JUDGMENT : **HIS HONOUR JUDGE WILCOX TCC.** 24th February 2005

2. The claimant, Great Eastern Hotel Ltd., (GEH) claims damages from John Laing Construction Ltd., and Laing Construction Plc, the Guarantee (Laing) for breaches of Construction Management Agreement between the parties dated 30th April 1998. GEH alleges that Laing so misconducted itself as Construction Manager of the Project to refurbish and extend the Great Eastern Hotel that completion of that Project was delayed by about 44 calendar weeks. As a result, GEH was unable to earn revenue over that period and by reason of the delays, GEH was required to pay large additional sums to its professional team and to the Trade Contractors who carried out the work. In this case GEH seeks to recover those losses amounting to over £17m by way of damages in respect of Laing's various breaches of contract.

3. By way of counterclaim and defence, Laing alleged that GEH made material misrepresentations such that it relied upon them and entered into the Construction Management Agreement (CMA) and seeks damages under the Misrepresentation Act of 1967 and claim that the misrepresentations 'give rise to an estoppel from bringing against the Defendants any cause of action based (in effect) upon any of the said representations be anything other than true and claim 'that if the claimant has suffered any reasonable loss and damage, further to any cause of action against the Defendants cause or contributed to by any of the representations being anything other than true, the Defendants would be entitled to recover the same quantum of damages back from the Claimant as damages for misrepresentation'.

4. **THE PROJECT**

The Great Eastern Hotel is situated in the City of London at the junction of Liverpool Street and Bishopsgate. The original Hotel was built at the height of the development of the Railway Network in the late 19th Century. It was one of the major railway hotels and abuts Liverpool Street Station on the North Side, the only hotel situated in the City of London. Over many years, extensions and additions were made to the Hotel so that it was divided into two blocks, the West Block and the East Block with the Tower and Cab Road underneath them. There was a gap between the two blocks on the North Side, which became known as the 'Infill Block'. As a result of this chequered history of construction and development, the building comprised a striking range of different construction forms. Because it had no proper maintenance or refurbishment for many years prior to 1996, it became somewhat dilapidated.

5. The scheme proposed by the consortium of Arcadian International Plc and Conran Holdings Ltd., acting through the Claimants Great Eastern Hotel Ltd., (GEH), was to completely refurbish and extend the existing buildings to produce a first-class hotel for the use primarily of business customers. The proposal involved demolishing the fourth and fifth floors and the associated Mansard Roofs but retaining the corner and central towers, demolishing the centre of the building down to sub-basement level and then re-building, to create a large central atrium and two and a half additional floors within a newly created mansard roof and a total of 266 guest bedrooms. This provided an additional 116 bedrooms to the existing stock. The ground floor was planned to accommodate five restaurants with associated bars with 750 total covers. The first floor in the Eastern half of the building was to contain the conference and banqueting facility around the new atrium with a total capacity of around 500 people at any one time. To serve the hotel were four kitchens and finishing kitchens with facilities on each floor to provide room service. Most of the back of house facilities were to be located at ground, basement and sub-basement levels, including the kitchens and food preparation areas, cold stores, offices, staff rooms, lavatories and staff dining rooms.

6. The main plant rooms were to be constructed at sub-basement or roof level and two plant rooms built on the Northeast and the Northwest mansar roofs. With the exception of the re-modelled ground floor, and the new fourth, fifth and sixth floors, the exterior of the hotel would present an appearance very much as if there had been a simple refurbishment of the original building. Internally the design was that of a contemporary and modern hotel to be served by over 500 staff. The range, quality and fit-out elements in all areas of the hotel were to be of a similar quality to those of other properties designed by the Conran Partnership and Design Practice (CD & P) and managed by Conran Restaurants such as Quaglinos, Mezzo and Bibendum

7. At the start of the project and before it had been fully designed, the GEH budget was £34.8m. That figure contained a contingency to reflect the fact that the design was not complete. The out-turn overall cost of the Project was some £61m.

8. After the purchase of the building, GEH set about putting together a professional team for the re-development. They decided to appoint a Construction Manager to manage the procurement of the construction process. The intention was that the redevelopment would be carried out by various specialist Trade Contractors undertaking specific Trade packages, managed and co-ordinated by the specialist Construction Manager under a Construction Management Contract. It was also intended that should it be appropriate GEH would consider the option of converting the Construction Management Agreement into a standard JCT 80 Private Edition Construction Contract suitably modified to reflect the requirements of a Guaranteed Maximum Price Contract (GMP) with the client having the option at a stage when the design had been substantially completed and Works packages procured to approximately 90% by value of the construction Costs Planned. If such conversion occurred then under the contract Laing would have been transferred from the role of Construction Manager to Main Contractor and the Trade Contractors transformed into Domestic Sub Contractors.

9. The option was never exercised. Laing were appointed Construction Manager and remained throughout.

10. This provision may explain why Laing staffed the Project with personnel whose backgrounds were in construction rather than in construction management.

11. GEH engaged a large professional team (the design team) to design and plan the Project. The principal professionals were Manser Associates, Architects (Manser), Davis Langdon & Everest (DLE), Costs Consultants, Alan Baxter & Associates (ABA), Structural Engineers, E.C. Harris, Project Management (ECH) Project Managers, Mace Ltd., Planning Supervisors, Upton McGoougan (UMG) Mechanical and Electrical Engineers, C.D. Partnership (CDP) Interior Designers and C.D.S. Associates (CDS) Kitchen Consultants.

12. The invitation to tender for appointment as a Construction Manager was sent to Laing on 29th April of 1997. That invitation included a lengthy enquiry document.

13. There were a number of meetings mid and post tender and Laing inspected the hotel on 8th May and met with members of the professional team on 9th and 13th May of 1997. Their tender was discussed with the professional team on 16th/25th June 1997 and this led to GEH indicating their willingness to accept Laing's tender.

14. Prior to this, a copy of the Indicative Design and Construction Programme was sent to Laings on 9th May 1997. It stated that:
"This programme does not represent fixed proposals, but is meant to indicate the Design Team's thinking".

15. On 9th May 1997 E.C. Harris also wrote to Laing making reference to the Indicative Programme in these terms:
"A copy of the Indicative Design and Construction Programme dated 7th May of 1997 prepared by E.C. Harris which shows the likely major works packages and their estimated design, procurement and construction durations, will be sent to you under separate cover. This programme which reflects the current thinking of the Design Team, is issued to you for discussion purposes only – any significant comments which you have on this programme should be raised at the mid-tender interview. As part of your response to CM Enquiry Document, you are, of course, required to submit your preliminary Master Programme. Please ensure that this programme includes all design, documentation and tendering activities as well as construction activities.
…
Finally as discussed at the mid tender interview, other architectural, interior design, structural, services and catering installation drawings are available at the offices of the relevant designers should you wish to have additional information about any particular aspect of the protect. Please liase directly with the designers to make the necessary arrangements".

16. On 15th May 1997 DLE reminded Laing of the designs explored by ABA
"*GREAT EASTERN HOTEL CONSTRUCTION MANAGER ENQUIRY*
Further to the mid-tender interview held at E.C. Harris' office on Tuesday 13th May, we enclose one copy of the following drawings for your additional information and consideration when preparing your response to the tender enquiry –
    - *Alan Baxter Associates drawing 1070/10/04 as referred to in the Health & Safety Plan prepared by Mace.*
    - *Alan Baxter Associates drawings 1070/10/05 and 06A showing two of the options through temporary roof designs, which had previously been considered by the Design Team.*

The design and construction of the temporary roof, whether internal or external, is seen to be critical to the success of this project. Please ensure that your proposal with this roof included within your submissions are comprehensive and detail the extent, materials, method of construction and support and how the roof interfaces with scaffolds, access routes through the building and craneage."

17. On 21st May 1997 Laing wrote to ECH saying:
"*During the course of our Tender Preparation we have developed with our Temporary Works and Buildability Team a number of additionak Temporary Roof options which, if allowed to be developed, could prove to be both efficient and cost effective".*
On 21st May 1997 they also submitted their Tender, a substantial and detailed document running to 170 pages which was unqualified and contained no reservations as to the timing of the appointment of the Construction for the project. There was no reservation as to the state of development of the design process or the procurement programme. As to the feasibility of working within the proposed programme Laing proposed an alternative shorter programme of 109 weeks instead of 113 weeks. In the Tender Laing proposed four options for the temporary roof, which had to be fitted over the building before the existing roofs could be demolished. The design and construction was properly characterised by E.C. Harris as critical to the success of the project. Laing's third option was a lightweight pitched roof construction with the rein forced polythene sheeting. This was the option ultimately followed.

18. On 29th June 1997 GEH issued a letter of intent to Laing. The relevant parts of that letter state:
"We are pleased to inform you that it is our intention to enter into a contract with you in the name of the Great Eastern Hotel Company Ltd., for the Construction Management of the above works in accordance with the C.N. Enquiry Document dated April 1997 and your tender dated 21st May 1997, subject to the following:
The above amendments and clarifications to your tender are to be construed in conjunction with your letters 6th, 9th and 13th June of 1997, copies of which are attached as Appendix D hereto to this letter and which prevail in the event of their being conflict with the foregoing, together with a copy of S.J. Birwen Operative Provisions relating to the Guaranteed Maximum Price Agreement (attached as Appendix B hereto).
The resulting revised combined Fee and Preliminaries total £3,431,442 as per the analysis attached as Appendix E hereto.
Please make all arrangements necessary to commence the Construction Management Services with immediate effect.
This letter is issued to you on the understanding that, within one calendar month of your acceptance of this letter of intent, you will agree and enter into a Construction Management Agreement (CMA) and the Forms of Warranty and Guarantee in accordance with the above.
We will shortly thereafter send you engrossed contract documents for execution in accordance with the foregoing terms. If you are agreeable to the Contract being entered into on this basis, please countersign and return this letter; the countersigned letter will then form a provisional but binding Contract as if a Contract has been formally executed in accordance with the foregoing terms subject to the following paragraph".

19. On 20th June 1997 Laing confirmed that it accepted the appointment as Construction Manager. The formal Construction Management Agreement document however was signed ten months later on 30th April 1998 and a manuscript addition was added by Laing –
"*…entering into the CMA on/with effect from 30th June 1997".*

20. Laing's preferred option to follow the shorter 109 weeks programme originally entailed commencement of work on 2nd June 1997 but by agreement this was put back to 23rd June and by Laing's request further delayed until 30th June 1997.

THE CONSTRUCTION MANAGEMENT AGREEMENT (CMA).

21. Construction Management is a relatively recent development in the construction industry reflecting the reluctance of major contractors to undertake all the risks inherent in the standard main contract. As a concept, it can be described as a method of procurement whereby the Construction Manager manages the construction of the Project without accepting the principle 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 Clients risks in relation to time and money are minimised. The advantage to the Client of this form of procurement is that the responsibility for the 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 on 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 CM simply receives his agreed fee for managing the construction of the job.

22. The Letter of Intent was issued to Laing on 19th June 1997, the CMA was not finally executed by the parties until 30th April 1998 and during this interval the parties negotiated the precise terms of the CMA and various amendments to the original draft, which had been accepted by Laing at tender stage, were made. The manuscript edition of Clause 23.4 is such an example.

23. It was accepted by the parties that this provision meant that the CMA had retrospective effect, which is seen to be significant for Laing's misrepresentation claim. As late as 27th April of 1998, the wording of the CMA was apparently still being discussed. During these discussions Laing intimated that they wished to pursue claims for additional monies in respect of additional services they say were provided by them over and above those which were allowed for in their Tender. Ultimately, all of these matters were dealt with in the Addendum Agreement dated 18th August 1997.

24. The key clauses of the CMA are as follows:-
"Clause 2.1
The client appoints a Construction Manager as Construction Manager and the Construction Manager hereby accepts such an appointment and agrees to carry out and complete the Services fully and faithfully and in the best interests of the client and in accordance with the terms and conditions of this Agreement, all information supplied by the Construction Manager to the client as part of his Tender and financial submissions in relation to the Project submitted on 21st May 1997 and the Letter of Instruction issued by the Client dated 19th June 1997 and accepted by the Construction Manager on 30th June 1997.

Clause 3.1
The Construction Manager shall proceed regularly and diligently with the services and once the Client that it has exercised and will continue to exercise in the performance of the services all the reasonable skill, care and diligence to be expected of a properly qualified and competent Construction Manager, experienced in carrying out services for a Project of a similar size, scope and complexity to the Project.

25. The services to be carried out by the CM are set out in Schedule 2 in two parts: Part I being pre-construction services and Part II construction services.

26. In relation to Trade Contractors (TC's) the CM's obligations are set out as follows:-
"*Clause 3.4*
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.

27. Clauses 2.3 to 2.22 of Schedule 2 and especially Clause 2.8 are to similar effect:
"*2.8. To provide such management, control, administration and planning with the work with the Trade Contractors so as to ensure full compliance by the Trade Contractors with all the requirements of their respective Trade Contracts. To inspect Trade Contractors ethos working and temporary works to ensure that the same are adequate and safe… "*

28. Mr Richard Fernyhough Q.C. on behalf of the claimants submits that these provisions impose absolute obligations on the CM to take all steps available to them to ensure compliance by the Trade Contractors with the terms of the Trade Contracts. Onerous as such obligations are, they flow he submits from the words 'procure compliance' in clause 3.4 and, 'to ensure compliance with the trade contractors. In Clause 2.8 of Schedule 2 he contends that the word 'procure' means to 'contrive, obtain or bring about' or more colloquially 'to see to it that something happens' and contends that the word 'ensure' in this context means to make certain that a particular outcome occurs and he relies upon John Mowlem & Co. the Eagle Star and others 1995 CILL.1047 in support of this construction. In that case the Court of Appeal approved the decision of HHJ Bowsher Q.C. at first instance who held that the obligation cast on a Management Contractor or to secure the "*commencement of that section and ensure the regular and diligent progress thereof and shall secure the completion of the same on or before the completion date …"* amounted to an absolute obligation to achieve regular and diligent progress and completion by the due date.

29. Mr Fernyhough submits that there is no reason why this CMA should not be construed in the same way and contrasts the absolute nature of the obligations in relation to Trade Contractors with the obligation to exercise all reasonable skill, care and diligence imposed upon the CM by Clause 3.1.

30. Mr Colin Reese Q.C. seeks to distinguish Mowlem on the basis that it relates to a Management Contract, which provides for the provision of a complete project whereas in the instant case of Construction Management, there is a contract for the provision of services. He contrasts the mechanism for the control of those who execute the works in management contracting with those available to the Contract Manager. In the former the Management Contractor employs the sub-contractors through sub-contracts and has privity with them, whereas in Contract Management the Trade Contracts are between the Employer and the Trade Contractors.

31. Mr Reese submits that the effect of the strict construction urged by Mr Fernihough would result in the acceptance of the same vicarious responsibility for a performance of the Trade Contractors as a traditional main contractor or management contractor would accept in respect of their sub contractors notwithstanding that the Trade Contractor contracted directly with GEH and not with Laing.

32. He further submits that the contractual scheme under the CMA has significant differences to the traditional main contract or management contract schemes. The CMA does not contain time adjustment provisions of the kind normally found in such contracts where the Contractor has himself undertaken to carry out the works and to complete the works by a stipulated date subject to appropriate adjustments if certain events occur. Further, all members of the professional team including Laing and all Trade Contractors contract individually with the employer, with no direct contractual ties inter se. Despite this GEH bears the risk of non performance/defective performance on the part of each were Mr Fernyhough's argument accepted.

33. The CMA had annexed to it a template prescribing the form and content of trade package contracts between the employer and the individual trade contractor. This is an integral part of the contractual scheme. The contract gives limited powers to the Contract Manager in relation to works comprising the Trade Packages. Before issuing variations or agreeing disruption costs or agreeing extensions of time, he has to have both the consent of the Employer and the approval of the Design Team Professionals.

34. Mr Reese submits that a prudent Construction Manager using reasonable skill and care and all due diligence, deploying as necessary his powers in relation to the trade contractors to the full may nonetheless, for reasons beyond his control, would be unable 'to procure that each trade contractor complies with all of its obligations under and all of the requirements of their respective trade contracts…" (3.1). By way of example should a Trade Contractor become insolvent and thus become unable to execute the works he contracted with the employer to perform. Mr Reece submits that contractual scheme does not impose upon the Contract Manager in such a situation the obligations of a guarantor or one who underwrites the whole risk in relation to the Trade Contractors and contends that the court should look to the primary obligations of the Construction Manager to be found in Clauses 2.1 and 3.1.

"*2.1 The Client appoints a Construction Manager and the Construction Manager hereby accepts such appointment and agrees to carry out and complete the Services fully and faithfully and in the best interests of the client and in accordance with the terms and conditions of this Agreement, all information supplied by the Construction Manager to the client as part of his tender and financial submissions in relation to the Project submitted on 21st May 1997 and the letter of introduction by the client dated 19thJune 1997 and accepted by the Construction Manager on 30th June 1997;*

3.1 The Construction Manager shall proceed regularly and diligently with the services and warrant to the client that it has exercise and will continue to exercise in the performance of the Services all the reasonable skill, care and diligence to be expected of a properly qualified and competent construction manager, experienced in carrying out the services for a project of a similar size, scope and complexity to the Project..

He submits that within the scope of the primary obligation, the succeeding causes particularise the duties of the Construction Manager thus:-

3.2 *Without Prejudice to the generality of Clause 3.1, the Construction Manager shall:*

a) comply with all reasonable instructions and directions given to the Construction Manager by the Client or Project Manager on any matter connected with the Project;

b) to operate fully with the Professional Team;

c) keep the client and professional team fully and properly informed on all aspects of the Project for which the Construction Manager is responsible and provide the Client and the Professional Team with such information, consents, comments, approvals or instructions required by or from the Construction Manager with regard to the

Project promptly and in good time so as not to delay the progress of the Project or to cause the Client to be impeached of any of its obligations under any of the Third Party Agreements;

d) use all reasonable endeavours to cause the Services to be performed and the development to be implemented and completed within the Construction Period and the Construction Costs Plan;

e) ensure that the Construction Manager has full knowledge of and (unless otherwise instructed) complies with all Applicable Requirements affecxting or which it is reasonably foreseeable are likely to affect the Development with the passage of time; and

f) in Shah the Construction Manager has full knowledge of the provisions of each Trade Contract and the terms of the appointment of each member of the Professional Team and of the Third Party Agreements, extractions of which the client may from time to time have supplied to the Construction Manager.

35. It may be said that Clauses (e) and (f) epitomise the loose use of the term 'ensure' by the draftsman – the Contract Manager shall 'ensure' that a contract manager, similarly in Clauses 3.4, 3.8, 5.1 and 7.2 as to the employment of the verb 'procure'.

36. I reject the construction clause 3.4 urged by Mr Fernyhough Q.C. The contract read as a whole imposes upon the Construction Manager, obligations of a professional man performing professional services, which are contained in Clause 3.1. I accept the submissions of Mr Reese Q.C. that to construe Clause 3.4 as imposing an absolute obligation is inconsistent with the clear scheme of the Construction Management Contract and its annexures and the primary obligation contained in Clause 3.1.

Laing's Representation Claim

37. In paragraphs 7 and 8 of the Amended Defence and Counterclaim, Laing raises a case of misrepresentation. It is said that the dates shown in the Indicative Design and Construction Programme (IDCP) issued by ECH on 7th May 1997 relating to the dates when certain early Trade Packages were to be let, were false in that there was no realistic prospect that such dates could be, had been or would be met.

38. At paragraph 8 it is alleged that GEH acting through its agents DLE and/or ECH knew or should have known that there was no realistic prospect that any such dates could be met. Then it is averred that GEH knew that Laing would rely on the representations in entering into the CEMA and that Laing did in fact so rely.

39. At paragraph 62 of the Amended Defence and Counterclaim Laing allege a further material misrepresentation, saying that GEH or its agent represented to Laing that there would be a total of 42 Trade Contractor Packages whereas in fact there turned out to be 68 different Trade and Contractor Packages.

40. The consequences of the misrepresentations alleged are set out in paragraph 63 of the Amended Defence and Counterlaim. First Laing claimed to have suffered loss and damage as a result of the misrepresentations and seek damages under the Misrepresentation Act 1967. No such damages are identified or quantified in the Pleading. Secondly, Laing say that the representations give rise to an estoppel by representation and/or convention

"……*whereby the Clamant is estopped from bringing into the Defendants any cause of action based (in effect) upon any of the said representations being other than true…."*

It is difficult to understand this allegation because GEH has not brought any cause of action against Laing based upon the truth of the alleged representations or otherwise and no such a case is pleaded.

41. Thirdly, Laing allege that if GEH has suffered any loss of damage caused or contributed to by any of the representations being anything other than true, then '*… the defendants (Laing) would be entitled to recover the same quantum of those damages back from the Claimant as damages for misrepresentation. Therefore the Claimant would have suffered no loss….".* Since no such case has been advanced against Laing, it is difficult to understand this aspect of the defendant's case either.

The Indicative Design and Construction Programme and the evidence relation to it.

42. Throughout the month of June 1997 Mr Chris York who became the Construction Manager on 30th June 1997, together with his team were working on the Project and had been so occupied throughout June. They were privy to a great deal of information relating to planning matters and to the date of Trade Packages. The Letter of Intent for the appointment of Laing was dated 19th June and it was agreed that the appointment as Contract Manager would be effective from 30th June 1997 and that the contractual arrangements would commence on that date. This date was reaffirmed by Laing in April 1998 when the formal CMA was signed and executed.

On 11th June 1997, Laing's staff discussed their start up strategy which included the need to acquire information as to the packages which were in the course of development. On 25th June at the project meeting attended by Mr York and six members of his staff, it is minuted that there were discussions as to the trade packages and at paragraph 8.16 it is recorded that Laing were to produce and distribute the procurement programme for consent the following week. Insofar as the Defendants base their defence upon the Indicative Design and Construction Programme, it is evident that it was clearly an indicative programme.

43. In the indicative programme the expressions the "*anticipated place or the dates*" and "*anticipated tender return dates*" and relative to schedule numbers 1000, 1010/1,020/1030/1,050,1,060, 1 1,071, and 1,110 make it clear to even the uninformed that the dates shown are forecasts as to the likely progress of the letting of trade packages in the future. Furthermore the anticipated dates shown on the Indicative Programme were forecasts inserted by reference to the date of the appointment of the Construction Manager originally anticipated to be 1st June 1997 and later agreed to be 30th June 1997. These forecasts, I am satisfied, were in fact fulfilled.

44. The Indicative Programme forecast a number of packages which would have orders placed prior to the appointment of the Construction Manager. These comprised structural investigation works when the order was placed prior to 12th May 1997 when Hayden and Hagen commenced work on site; geotechnical works when the order was placed prior to Wintech commencing work on site on 13th June 1997; termination of services and temporary electrics when the order was placed with Wingate Electrical before 27th June 1997; removal of retained items in respect of which the order was made to Building Works on 15th May 1997 and asbestos removal the order for which was placed on 9th June 1997.

45. There was a second category mentioned in the Indicative Programme namely packages where Tenders were obtained or were out to tender. In relation to the package Demolition and Temporary Roofs the tenders were in fact returned on 9th June 1997. The package 'diversion of external tenant/railtrack services' is mentioned in the Laing Draft Trade Package and details document of 3rd July 'full scope of works received by Laing tenders in 4th July 1997'. The inference is warranted in my judgment that the tender went out before the appointment of the CM on 30th June 1997.

46. The structural Steelwork in the Indicative Programme shows the tender return date as six weeks after the appointment of the CM. In fact it was returned four weeks after the appointment and was thus earlier than forecast.

47. The package entitled 'site protection works' was in fact included in the demolition package and was not separately proceeded with.

48. As to items 1320/1330/1335/1340 and 1360, it would be obvious to the prudent tenderer that these works had not yet commenced. They were in fact the subject of anticipated orders placed before the appointment of the CM. The other items in indicative Schedule I again were matters that the Laing team would have been aware of because they would have influenced their start date decision and the procurement programme they were to produce following the meeting of 25th June of 1997.

49. Laing distributed their procurement programme of 21st July 1997 as they said at the meeting of 25th June. This showed all the early packages with the exception of asbestos removal, commencing after the 30th June 1997. On 15th August 1997 Laing issued the second revision of the procurement programme and the Information Required Schedule and the Master Contract Programme (MP/1). All the early packages except asbestos removal was shown as commencing in August 1997.

50. By 21st June 1997 Laing I find knew the true state of affairs as to the early trade packages. They made no contemporary complaint about the state of the programme. They did not adjust their 109-week master programme to take account of any supposed letting of the early Trade Packages.

51. Had Laing considered that they had in fact entered into contractual arrangements on 30th June 1997 relying upon material misrepresentations made on behalf of GEH, they would have raised such matters in the discussions and negotiations preceding the execution of the CMA on 30th April of 1998 and it would have affected their decision whether or not to sign such an agreement. In my judgment the defendants recycled case as to misrepresentation has no merit.

52. There was no material misrepresentation in fact and the Defendants were privy to the true position as to the tendering and ordering of the trade packages.

53. The difficulty does not rest there. There were no witnesses called on behalf of Laing to give evidence that they relied upon the information in the Indicative Design Construction Programme or the misrepresentations alleged. In fact Mr Chris York in his oral evidence frankly admitted that he had not even seen the IDCP let alone relied upon it. In my judgment there is yet a further difficulty confronting the defendants. The claims based upon the alleged misrepresentations contained in the defendants amended defence and counterclaim were included in Laing's comprehensive claim document entitled "The Construction Managers Additional Entitlement associated with carrying out the services at GEH as at 31st October 1998 Rev.A.". The Addendum Agreement 8th August 1999 contains the following inter alia:-
"*NOW IT IS HEREBY AGREED as follows:-*
1.1 the client has paid to the Construction Manager the sum of £745,001 (Seven Hundred and Forty Five Thousand and One pounds) (comprising the sum of £515,001 in respect of the cost of direct works and £230,000 in respect of additional preliminaries) together with any VAT in full and final settlement of the claim made by the Construction Manager and any other claims which the Construction Manager might be entitled to make under the contract in respect of matters arising prior to 31st October of 1998.

54. Any financial claim possibly arising out of any alleged misrepresentations relied upon were thereby effectively and finally comprised.

The commencement of the project

55. It is common ground between the parties that it would have been desirable for GEH to have brought the Construction Manager into the project earlier so that there would have been greater involvement in the procurement process. That in the event was not possible because of the timetabling following the purchase of the site, the obtaining of planning consent, the recruitment of the professional team and the decision as to which procurement route was to be followed.

56. A considerable amount of work had been done by the design team before the appointment of the Construction Manger. The timing of the commencement of the Construction Manager's duties was the matter of agreement between the parties and was delayed to accommodate the wishes of Laing.

57. The imperatives of the need for careful planning of construction and procurement and the swift mobilisation of Trade Contractors would have been evident to Laing who accepted their obligation properly informed as to the letting of existing trade packages and design issues.

58. Mr York described the need 'to hit the ground running'. The task called for organisational skills and Construction Management professionalism of a high order.

59. It was evident, however, that Mr York and his team in those early stages had no Construction Management experience to fall back upon. This choice of traditional contracting personnel by Laing was no accident. In my judgment Laing's management in selecting the team to undertake the CM contract were mindful of the option to convert the CMA into a JCT 80 Private Edition contract modified to reflect the requirements of Guaranteed Maximum Price contract (GMP). Laing's misjudgment in selecting personnel was exemplified in the choice of Mr York as Contract Manager. He is a thoroughly decent man but unequipped by training or experience for the role into which he was propelled and then driven by inexperience and commercial pressures to protect Laing's position at the expense of his client. The position was not helped at the outset by inadequate professional support being provided by Laing in relation to vital planning matters. At the beginning of July Laing envisaged that the design of the temporary roof structure would be undertaken by them using the services of a Laing designer Mr Alan Webster. Mr Parry of Laing's wrote on 1st July referring to the need to deploy Mr Webster's services:
"*….We desperately need this to commence in conjunction with John…"*

Laings Mr Lye was unable to make Mr Webster available for the project. Mr York was reminded in cross-examination of a written comment he made to Laings on 27 July 1997.

"Q. Charlie, Warewick is here and as usual doing an excellent job. We are just about to start demolition, scaffolding erection and enabling works package, not in that order. I must have more engineers than one. If we cannot resource a job I will not hesitate to close it down for lack of engineers. Please discuss with Jim Treharne if necessary".

That was a fairly stark warning was it not?

A. *That is how I am and that is how you have to be.*

Upon being appointed, Laing set about producing its own detailed master programme for the project. MP1 was produced on 15th August 1997 and was followed up on 21st July 1997 with a Procurement Programme.

60. The re-development of the hotel involved the demolition and re-building of the upper floors of the hotel, together with the construction of the new 'infill block' linking various parts of the old hotel buildings together. Thus one of the first steps which had to be taken in the construction process was the procurement and erection of the temporary roof over a large portion of the existing hotel. Once that temporary roof was erected the demolition of the upper floors could be undertaken without water and weather damage below. The procurement and erection of the temporary roof was one of the first items on Laing's programme.

61. Unhappily both the procurement of the Temporary Roof Trade Package and erection of the roof itself went badly wrong.

62. The procurement took three weeks longer than the time programmed by Laing. In consequence the scaffold and Temporary roof contractors TRAD commenced on site on 11th September 1997, three weeks later than programmed. There was thus an immediate three-week delay caused to the Project.

63. The erection of the roof itself took 35 weeks rather than the 10 weeks programmed by Laing. It was completed on 1st May 1998 instead of late October of 1997 as planned. That was a delay in excess of six months. The reasons for these delays had been canvassed a great deal in the evidence.

64. The parties are agreed that one of the fundamental causes of delay was the fact that TRAD did not devote adequate resources to the design of a roof. The fact that TRAD did not have or were not prepared to devote adequate design resources was not sufficiently appreciated or dealt with until long after the temporary roof should have been completed.

65. The parties accept that the temporary roof was critical to the whole Project and agree that the delays to the procurement and erection of the temporary roof caused a substantial delay to the project. GEH say that the critical delay caused was 19 weeks and Laing's expert accepts that the critical delay was even more substantial, 26.9 weeks. In either case, the effect on the project was significant. It never recovered from this first fundamental setback, and the delays sadly became worse.

66. The Claimant's case is that this arose because of the Defendant's breaches. The Defendants accept that there was significant delay but deny that Laings were responsible. They furthermore point the finger at other parties and causes of delay which they characterise as concurrent delay which they contend connotes no blame so far as Laing is concerned. The principal witnesses in relation to the case on delay were the programming experts Mr Anthony Caletka who gave evidence for the defendants and Mr Gary France who gave evidence for the claimants. Mr Gary France was employed by Mace who as a firm had been professionally involved in early parts of the project. Mr France was properly subjected to rigorous cross-examination by Mr Reece as to his duties to the Court and the possibility of his independence as an expert witness being compromised. I am satisfied that he was a witness of intellectual vigour and independence who did his best to assist the court in an objective and dispassionate way. His research and analyses were impressive and comprehensive. They were based upon the contemporary primary documentation which included computer records and timed site photographs depicting the actual progress of the demolition preparation and construction on site and the inter-relation of these activities. This data was objectively evaluated and reflected in his expressed opinion.

67. Where there was delay characterised as concurrent delay by Mr Calekta which included delay both on and off the critical path, Mr France produced an analysis showing the actual impact of such delay upon the critical path as he had determined it. Mr Calekta accepted that he was unable to assess the impact of the so called concurrent delay save than in a general way using for this purpose the impacted as planned analysis method.

68. Both experts approached their analyses for the principal part of the project differently. Mr Calekta for the main part proceeding retrospectively from an as built programme to determine the critical path and respective periods of delay and causes. Mr France used an impacted as planned programme analysis by which the project is analysed on a monthly basis to measure the impact of events as the project proceeded.

69. The principal critical path determined by each expert was broadly similar. The total extent of delay periods found by each expert broadly coincided. Mr Calekta's assessment was several weeks longer than Mr France, but I am satisfied that by applying an adjustment for public holidays and not taken account of by Mr Calekta, there is no significant overall difference. It was 49½ weeks.

70. The vital differences relate to some differences as to the route of the critical path and the causes of delay advanced by each expert. Of particular significance is the Defendants' broad-brush case that none of the delays was caused by Laing's and that such delays that may be proved was the consequence of concurrent causes such as the default of the design team to produce timely design information and the performance of the Trade Contractors.

71. The experts in their joint statement that Court agreed as built dates for construction activities up to April of 1999. Thereafter, due to lack of information, Mr France was unable to confirm the dates relied upon by Mr Calekta in his as-built programme. They both agreed that MP/1 demonstrated Laing's programme intentions at the time it was drawn in August of 1997 and at the time the periods allocated to the activities were reasonable. Mr France made certain improvement and refinements to MP/1. Not all of these were agreed by Mr Calekta but none are particularly significant.

72. The experts accept in their joint statement that at the outset of the Project it was envisaged that there would be one single handover date for the entirety of the Works. In fact, the Works were handed over in three categories as follows: "back of house" on October 19th, 1999, "front of house " on 14th, 29th February 2000 and the remainder of the bedrooms on various dates concluding with Practical Completion. Practical Completion of the project was certified by Laing on 6th July 2000. The Certificate issued by Laing was countersigned by the Architect Manser showing the date of the 13th July 2000. That date is 346 days later than the original planned completion date of 2nd August 1999.

73. I am satisfied that the date of practical completion was in fact 13th July 2000.

74. The process of engagement and management of the performance of TRAD the scaffolding and temporary roof design and erector exemplifies how in the early and critical stages of the project, delay became fatal to the achievement of the date of the planned completion of the project.

75. The experts dealt with the delay issues with reference to identified periods of time. In reviewing the evidence I would do so relating to each of these periods.

First Period: 30th June 1997 – 7th September 1997.

76. The master programme designed by Laing was a fast-track programme and was shorter than that proposed by GEH. The demolition and roofing package was divided into two by Laing and no criticism attaches to this. Their procurement programme of 21st July 1997 contemplated that the slimmed down package of scaffolding and temporary roof would be placed on 14th July followed by a three-week mobilisation period leading to a start on site date of 4th August 1997.

77. The MP/1 however showed a start date of 18th August of 1997.

78. TRAD returned its formal tender to Laing on 18th July 1997 and there was a delay of nearly one month before a letter of intent was sent to TRAD on 13th August 1997. The tender period was protracted by one week and thereafter there were extensive post-tender clarifications and re-pricing as between Laing and TRAD between 18th July and 1st August 1997. There followed detailed contractual negotiations as to terms and conditions, which lasted until 12th August 1997.

79. The Letter of Intent was issued on 13th August 1997 but TRAD did not commence work until 8th September 1997, a delay of three weeks against MP/1.

80. Both of the experts accept that this was 21 days of critical delay. Mr Calekta expressed the view that this was the fault of GEH in failing to procure the combined temporary roof and demolition package in accordance with the Indicative programme. I reject that explanation. There is an obligation on GEH to do so. In the sense that Mr Caekta uses the expression "procure" to mean put out to tender and then place an order, that clearly on the proper construction of the indicative programme was not warranted. In any event, it was the decision of Laing to divide the packages and then proceed to re-tender as they were entitled to do.

81. In an early memorandum post-tender, Laing expressed the view that TRAD their chosen scaffold and temporary roof designer and constructor had demonstrated …
"*That (their) technical analysis is very poor and they do not seem to know how the temporary roof was going to be put up*".

82. At the time recommended to DLE and GEH the client, that TRAD be appointed Laing admitted that they were not yet able to comment on the technical aspects of the bid.

83. The 21 days critical delay was caused by Laing who failed to ensure that the package was let on time in accordance with their own process and planning. It is evident that Laing took no effective steps to ensure that TRAD came to site. Mr York, the Contract Manager accepted that delay in commencement by TRAD was critical and had a knock-on effect on the demolition and subsequent works. Nonetheless he felt that there was scope for Laing
"*…managing their way out of a problem like this.*

He felt that there was sufficient interface between the various trades to allow it.

Second Period – Scaffold and temporary roof erection, September 8th 1997 to 20th April 1999.

84. The planned period shown by Laing on MP/1 was a start on 18th August for a ten-week period ending on 24th October 1997. A package programme was issued by Laing on 24th July 1997 to the tenderers which showed a period of two weeks for the Liverpool Street/Gantry scaffold, three weeks for the façade scaffold, and five weeks for the temporary roof, giving s total of 10 weeks. It is evident from this that a continuous operation was envisaged for each of the elements of these temporary works.

85. The actual period on site for this package was 35 weeks from 11th September 1997 to 1st May 1998. This period included Christmas 1997 and Easter of 1998. This meant that the critical temporary roof finished six months late.

86. The actual erection work was split into four quadrants, in the West Block, (South West and North West) and in the East Block, (South East and North East). These works were carried out in four separate phases. The first phase the West Block South West Quadrant took 13 weeks to erect on site.

87. Laing showed the temporary roof on the critical path in their master construction programme MP1 but the October/November/December 1997 updates of this programme show the temporary roof as not being critical. In the months of January, February, March, April and May of 1998, Laing once again reported the temporary roof on the critical path. In fact the temporary roof was on the critical path during all of the foregoing months.

88. The responsibility for the design of the temporary roof was that of TRAD in conjunction with Laing. Laing's obligation was to produce the necessary design and working drawings. Alan Baxter Associates, GEH's engineers at the pre-tender stage produced drawings to show the possible options for the temporary roof design. Option 2 in particular showed in helpful detail the concept and the elements of the design ultimately and belatedly produced by TRAD, which also took account of the structural unknowns in the upper stories of the building. Scaffolding structures within rooms known as scaffolding horses, were used to give added support and cantilever connection to the outer scaffolding where the structural strength of the walls in the vicinity of window openings and the like was not yet fully ascertained. Laing chose not to provide TRAD at the tender stage with these drawings. No reason has been proffered for this failure by Laing.

89. Had ABA's concept drawings been made available to TRAD, their task of design would have been made much easier. Doubtless, had Laing also themselves provided some design input or resource to assist TRAD as was originally envisaged by Laing when they sought to secure Mr Alan Webster's services for the project, delay could have been minimised or avoided.

90. The performance of TRAD was unacceptably slow and inefficient for a fast-track project such as this. Both erection and design work could only have been completed within the ten-week period allowed if TRAD were designing and erecting the scaffold and temporary roof as a continuous operation. However, they chose to produce their drawings and carried out the erection sequentially quadrant by quadrant. The first phase took 13 weeks to carry out, the other quadrant was shorter but the last quadrant, the North East, took seven weeks to complete.

91. In paragraph 52 of the amended defence to Appendix 5, Laing admit that "the temporary roof package caused 160 days (23.9 weeks) critical delay to the Project". The main cause of TRAD's failures to produce drawings in time, I am satisfied was the lack of resource. TRAD it seems had only one qualified draftsman and he appears to be engaged on other projects at the same time.

92. Laing's case as the cause of this admitted delay, is based upon Mr Celetka's first expert report at page 188:
"*The erection of the Scaffold/Temporary roof was critical to this critical path from September 8th 1997 through April 30th 1998 a period of 167 calendar days in this window. The issues that contributed to this delay are not as easily distinguishable as they are in window 1. "*

93. At page 190 after detailing a great deal of delay without indicating whether such delay was on or off the critical path, it concludes that:
"*I have found it extremely difficult to assign specific durations to each of the above causes of delay to account for the full 167 days of critical delays experienced in this window.*
From my review of the contemporaneous documents and the evidence provided in the witness statements, however, I believe the delays in this window are primarily the result of the combined effects of:
a) TRAD's slow design progress;
b) TRAD's slow erection progress;
c) Additional scope issued to TRAD
d) Additional access required by other trade contractors
e) Lack of permits/licence (Corporation of London Railtrack)
f) Discovery of Asbestos
g) ABA's lack of a pre-agreed design for temporary roof prior to Laing's appointment and the submittal and review time for TRAD's drawings.

94. The first two reasons are self evident and not controversial. As to the suggestion of additional scope, there is no evidence of this save that Laing's neglected to provide TRAD with the details of ABA's four optional conceptual drawings may have led TRAD to extend more time than was desirable in formulating a finished design. There is no evidence that there was any delay caused by other trade contractors. It was of course Laing's management obligation to co-ordinate the work of the Trade Contractors. The obtaining of unloading permits and scaffold licences from the Corporation of London and consent from Railtrack were the responsibilities of Laing as Contract Managers. The discovery of asbestos in an old building is always problematic. Asbestos investigation and removal was an early pre-tender package put into operation early on and although some additional asbestos was discovered later, I am satisfied that asbestos discovery was not the cause of any critical delay during this stage of the project.

95. The final matter identified by Mr Caletka as to the source of critical delay outside the responsibility of Laing, namely the allegation that ABA did not produce a pre-agreed design for the temporary roof is wholly misconceived. It was not ABA's responsibility to design the temporary roof. They had in fact done a great deal of exploratory groundwork in presenting the four options to Laing to assist the tenderers. Laing neglected to use this material. I am further satisfied that the engineering reviews by ABA of TRAD's final designs did not cause or contribute to any critical delay. The late issue of the drawings by TRAD caused delay in the first place.

The Allegations of Breach in relation to the temporary roof

96. The cause of the initial period of delay by TRAD was their slow design and erection progress but for GEH to succeed they must prove that TRAD's failure was a causal consequence of Laing's breach of the CMA.

97. Relevant to this period on the pleaded allegations of paragraph 30C of GEH's case that as part of their procurement responsibilities Laing should have managed the procurement process so as to achieve a start date for a temporary roof as planned, namely 15th August 1997 and taken steps to ensure that the re-tendered period for the roof package was properly utilised so that a more comprehensive and commercially acceptable bid would have been obtained. This would have involved a reasonably competent Construction Manager in the time scale involved and with the pretender information available to him, making sure that all that was reasonably possible to be done was in fact done to enable the tenderers to understand the scheme and be aware of the constraints of the building and to ensure that the tenderers by the contents of their method

statements showed their mastery of the complexities of the scheme and by further satisfying the requirement that they had sufficient design and construction resources to deal with the project.

98. In relation to the procurement of the temporary roof design and construction and the steps to manage TRAD, the Construction Management experts disagree. Mr Wylie gave evidence on behalf of the claimants, Mr Anthony Celetka on behalf of the defendants.

99. Mr Wylie expressed the view that
"In order to meet the ten week erection period, TRAD would have needed to undertake its design in the order of three or four weeks designing all areas of the roof in this time frame. TRAD actually designed the temporary roof in quadrants, sequentially and this greatly extended the time taken to undertake that design. As a result of the time taken by TRAD to design the temporary roof, he original ten week programme of erection very quickly was put in jeopardy as by the date the temporary roof should have been fully erected (27th October 1997) TRAD were only part-way through the process of designing some of the West side roof. They had not started on either of the quadrants to the East side. Clearly Laing thought the erection of the roof would take ten weeks and I agree with this, but this was not possible given the pace that TRAD were undertaking with the design of the temporary roof. It should have been clear to Laing in September of 1997 that TRAD were not designing the temporary roof quickly enough. Had this been dealt with by Laing quickly, the temporary roof erection would have taken ten weeks, but the ten weeks Laing originally planned for had not resulted in such a huge delay to this critical path activity. The design period actually took 31 weeks resulting in the final North East Quadrant being delayed in commencing erection until 11th March 1998. As indicated.. the TRAD drawings for the South West quadrant dated 11th/12th August 1997 were passed via Laing to ABA on 4th September 1997, a wasted period of three critical weeks. At this stage it should have been clear or at least seriously questioned that TRAD were adopting a quadrant approach (as opposed to a single phase approach) which would have a serious impact on the following trade of demolition which was programmed to carry out its work in one single phase. This would not necessarily have been a problem provided that each quadrant design was proceeding concurrently, which it clearly was not.

Mr Wylie based his comments on what Laing should have done on normal industry practice and he noted that Laing had arrived at the same conclusion in its meeting with TRAD on 21st July 1998 when they accepted that when TRAD started on site the whole roof scheme could have been designed and agreed".

100. Laing's responsibility in accordance with the CMA extended to managing, administering, planning and co-ordinating the work with the Trade Contractors. Laing failed to manage this package to the extent that the period of erection overran by 25 weeks. Laing should have recognised that the sequential quadrant by quadrant approach and the time to reach a standard of design that gained ABA approval was extending the programme dramatically. A competent CM would have taken action to arrange that the quadrant design proceeded concurrently as opposed to sequentially, and should have appreciated this by 11th or 12th August of 1997 when only the TRAD drawings for the South West quadrant were submitted. I accept Mr Wylie's evidence that a competent CM would have insisted upon additional design resource being allocated to each quadrant, as a minimum separate design teams comprising a designer and checker, each liasing with the other at the quadrant interface and the whole process being the subject of weekly monitoring by the respective managing directors of Laing and TRAD. At a lower level daily meetings to review progress of the design co-ordination at the interface and on a progressive basis there would have been the monitoring of the progress of the erection.

101. Mr Celetka in his written report commented in relating to TRAD's engagement under the letter of intent
"*GEH were exposed to exactly the same risk with all of the Trade Contractors who also placed on the basis of LOI's. The risk of TC performance is with the Employer and following the employment under LOI, this risk is increased as Laing had little effective leverage over TRAD. Laing could not have envisaged TRAD's performance or commercial stance when making recommendation to appoint TRAD under LOIS. Laing are not responsible for the performance of TRAD which clearly contributed to critical delay".*

It is naive to conclude that the risk of an Employer is the same under every letter of intent. It depends on the terms of that letter advised by the Contract Manager and the safeguards that are included to minimise the risk to the Employer to whom he owes an obligation.

The fact that a Trade Contract is at the risk of the Employer rather than the CM is recognised by the standard form Terms of Contract under the CMA, which obliged the TC to accept the instructions of the CM. Thus in

the selection of the Trade Contractor, the scoping of his package and such control given to the CM within the trade contracts the CM is able to minimise the element of risk to the Employer. Should the CM see fit not to acquire the mechanism whereby he can protect his employer, it may make him the CM the more vulnerable to an allegation of breach of contract.

102. Mr Celekta's view was that TRAD took longer to design the roof and that this was in part influenced by the requirement of a phased and measured approach to avoid any uneven settlement due to the imposed load of the scaffold and temporary roof structure and because TRAD changed a key design resource at a material period of the design stage and that this would have protracted the design period.

103. One man in fact was replaced by another man after a gap of time.

104. Mr Celetka also postulated that the information allowing TRAD to determine imposed loads was not supplied in a timely way by ABA and this held up the design process. This is fanciful because there is no evidence that this was the case. Clause 2.8 in the schedule deals with the CM's obligation in relation to Trade Contractors:

"*To provide such management, control, administration and planning the work of Trade Contractors, so as to ensure full compliance by the Trade Contractors with all the requirements of their respective Trade Contracts. To inspect trade contractors methods of working and temporary works to ensured that the same was adequate and safe. To ensure that the clients directions in regard to the handling of materials and goods at the Development Site are complied with by the Trade Contractors. To ensure that Trade Contractors are supplied at all times with sufficient information about any risk to health and safety and any safety precautions to enable them to undertake their works faithfully.*

2.9 To co-ordinate the work of trade contractors and to co-ordinate the work of statutory undertakers (including gas, water, sewerage and electricity undertakings) with the local trade contractors. To make inspections. To make inspections visits as necessary to the premises of the Trade Contractors and their supplies, whether the same are located in the United Kingdom or overseas, and conduct regular meetings with Trade Contractors so as to monitor all aspects of progress both on and off site, relevant to the latest agreed programmes and to review all information requirements and provide monthly written reports thereon to the client (with copies to the architect and the costs consultant) to ensure he is fully aware of the completed records of performance by each of the trade contractors."

105. When cross-examined by Mr Fernyhough Q.C. on Day 28, Mr Celetka displayed a lack of knowledge as to why TRAD were working to a letter of intent, and not to an executed trade contract or letter with tightly agreed terms. He clearly had not investigated the position as to the terms of engagement of a crucial trade package whose performance was critical to the whole project. He first asserted that GEH were not in a position to execute a trade contract in August or September of 1997. That clearly was not the case. He asserted that what Laing did in that period was competent, whilst acknowledging that he did not in fact know exactly what they did do.

"*Q. Have you seen any evidence as to anything they did to take up with TRAD thereafter to try and agree terms of the letter of intent.*

A. No, I haven't.

…

Q. Do you say they were acting competently in doing nothing to try and get the terms of the contract agreed and signed?

A. I haven't reviewed that in detail, but I think it .. I don't think it would have been incompetent if the works were being directly stopped. So if TRAD were withholding services until a contract was agreed, I think that would be incompetence".

106. The critical distinction Mr Celekta asserted was that if TRAD continued to work, that meant that the Contract Manager could not be considered incompetent in that role.

"*Q. Of course we all know, do we not, that scaffolders can be difficult customers?*"

A. They are always in high demand. They always have to be procured first, and they rarely have finalised terms from the three or four interactions I have had with them.

Q. One of the reasons they are tricky customers is because they have a lot of cards, do they not, in their hands to play?

A. That's one way to put it, Yes.

Q. One of the cards they have in their hands is that once they are on site and their scaffolding is up, it is virtually impossible for a client to remove them and replace them, is it not?

A. There's a lot of issues with ownership, protection, security, Yes.

Q. Therefore does that well-known fact in the construction industry not lead me irresistibly to the same conclusion that it was extremely ill advised for Laing to allow a client to get into this position of strength by putting their scaffolding up on site without any form of agreement with them at all?

A. In hindsight, it gave TRAD a very good hand to play for. At the time I would not say it was ill advised because we didn't know how TRAD would behave.

Q. You have a contract to protect yourself against the other parties non-performance do you not?

A. It is one aspect of a contract. It is a payment mechanism as well.

Q. Are you suggesting that the client, if he is properly advised, should be told 'it is much better to take the risk of non performance by TRAD with no recourse because of no contract rather than take the hit now of an early delay, a certain delay which you, I am afraid, have to take but later on you have the certainty of performance because we will not let you go ahead until you enter into said contract?

A. Well, what I am saying is that TRAD had started because they had started the design process. The designers were submitting and receiving approvals and rejections of their drawings by the professional team.

Q. TRAD were not on site.

A. They were not on site at that time, no.

Q. They had not been paid anything.

A. They hadn't submitted any payment obligation at that point.

Q. You are not seriously suggesting are you that if Laing's had said 'we want nothing to do with you because you will not agree with our letter of intent, we are going to someone else'. You are not really suggesting are you that TRAD had any legal right to payment?

A. No, what I am saying is that if you sent them away and had to re-procure the package that would have been a much more significant delay than to continue with a specialist trade contractor who was already advancing your design for you.

Q. How long did it take Laing to get TRAD on site and start work please?

A. Well I know the date they started.

Q. They actually started procuring TRAD on 10th July did they not? That is the first date?

A. I think that is the first date they sent in something.

Q. TRAD started work on the 8th September.

A. I think they started after they had an approved drawing they could proceed.

Q. Two months?

A. Two months sounds right.

Q. Eight weeks?

A. Yes.

Q. How long was the delay in this case caused by this trade sub-contractor?

A. By my calculations, about 20 weeks.

…

Q. Are you saying therefore that you would be ill advised and unwise at the time to take an 8-week hit by re-procuring the scaffolding package at the beginning of the job much better to wait and go along with TRAD at the end and take a 20-week hit?

A. No, I was saying at that time they didn't know what the delay would be.

Q. Of course they did not.

A. And they had TRAD on board advancing the design, which prior to the involvement of TRAD the preliminary designs were for a temporary roof. So there was no detailed temporary roof solution until TRAD came up with one, so there were benefits of having TRAD on board. I can't speak as to why the amendments weren't addressed or why the contract was not executed.

Q. In fact your own chart shows that you estimate the delay to the project caused by TRAD was about 24 weeks was it not?

A. Yes, 20 weeks plus so I am trying to allocate the first three weeks.

Q. Sorry would you look at the chart please if you have got it handy. It is nothing to do with the first three weeks, your delay to the project when TRAD finished directing the temporary roof ids 26.9 weeks, is it not?

A. That's correct.

Q. Say 27, if you knock off the first three for late procurement of TRAD that leaves you 24 weeks

A. Yes.

107. Mr Celetka agreed that it would have been a good idea for Laing to suggest that TRAD bring in additional design resources and that they did not.
"*Q. You do agree do you not that this contract got off to a disastrous start as a result of the non performance by TRAD*
A. I would agree with that.
Q. Not only there but in the words of one of the witnesses TRAD had GEH over a barrel in the circumstances.
A. There was a point, yes, GEH wanted services from TRAD and there was only one way to get TRAD to perform.
Q. You say the construction managers who got the client into that position is not in any respect to blame?
A. I said they could have done better, but whenever a contract is let under a letter of intent, that is a risk to be taken. I think that is not an unusual risk. The problem is under this case it became an extremely bad situation."

108. Mr Celekta was content until the very end despite the objective evidence to maintain that Laings could not properly be criticised and that they did not fall below the standard of competent contract manager until he was cross examined and until he had heard the admissions of Mr York.

109. It is evident that Mr Celetka had uncritically accepted that Laing throughout acted as a competent construction manager until he was cross-examined. He did not reflect in his written opinion the reluctant admissions of Mr York going to Laing's neglect and failure to protect GEH by procuring a satisfactory contract or agreed terms of a LOI or the neglect to assist TRAD to enhance its design process or to act by imposing a regime of strict supervision and monitoring to ensure reasonable levels of design and erection performance.

110. Mr York has referred in his evidence to the letter from TRAD of 3rd September 1997 and accepted that it made very unpleasant reading for him.
"*…we have received your letter. However, we feel some clarification made be required as to the term of our appointment since we have not accepted the contractual content of your letter of intent of 13th August. For the avoidance of doubt, there is no agreed contract in place between our companies until (1) the matters addressed in TRAD scaffolding's letter of 15th August from Peter Phillips are resolved and included in the contract and (2) the full content of the amended addendum scaffolding sent to us on 14th August are similarly included in the contract. We remind you that you have an obligation to make regular fair and reasonable payments to us, despite the current situation of our proceeding on site under non agreed contract terms. Further we confirm that we shall commence our work on site so that your programme is protected…*"

111. Mr York accepted that there is a contractual impasse that did not get resolved. No contract was signed by TRAD until 1998 after completion of the works because TRAD appreciated that they could not do that which they said they could do, even before starting to work on site. They refused to agree the terms of a contract. There is no evidence that GEH were informed of the position in writing. When they did perform, they never achieved any programme put before them by Laing preferring to ignore such requirements because they appreciated the freedom from the constraints of a contract giving some protection to GEH.
Q. Far from Laing writing to TRAD saying we must have contractual meetings and sign a contract, we see \TRAD writing to Laing saying when are we going to have a contract?
A. Yes.
Q. Can you look at 67(letter). You see it is from TRAD's Mr Parry specifically as you say, what the letter says. You would have seen this letter would you not?
A. Oh yes, I have seen it.
Q. "We note that you consider that liability for delays rests with TRAD and not with the client" and so on and then "Of course you will know that no contract can be concluded until such time as both parties have arrived at a stage when it is said that full agreement had been reached. A principle upheld in Kitson Insulation –v- Balfour Beatty Buildings 1989 B.L.R. 4 page 272
Further you are aware that this project is currently proceeding on non agreed contract terms and for the avoidance of doubt we confirm to you that the contract would not be concluded while such significant matter as the delays you allege remain in contention. We insist that a meeting be convened forthwith to settle all contentious matters thereby allowing the contract to be signed since failure to agree will certainly hinder or halt the current diligent progress on site. This meeting must have all parties involved in attendance.
Q. It could not be clearer could it?
A. No.
Q. What did you do about it?

A I discussed it with the commercial manager Bob Parry and proceeded along those bases. It is not uncommon for us not to have a sub contract or trade package contract in place, not uncommon. So this was not a problem I had never seen before.

Q But had you ever seen the problem that you had before being held to ransom by a trade contractor who was going at his own pace?

A. Yes I had seen that before as well.

Q. Right, you know the dangers?

A. I did.

Q. What do you do to get the contract signed?

A. Well I made everybody aware of what was going on as one does. Everybody was informed. Everybody knew.

Q. But it was your job, was it not?

A What to resolve it? Yes it was my job to see that it was resolved, Yes.

Q. It was your job to make sure the correct documents were prepared for the contract to be signed?

A. Yes, but we couldn't get an agreement with them because we knew by then that they could not achieve the programme, so they had been difficult. Mr Cooper was being especially contractual and difficult.

Q. But you never sent the documents to them for agreement until the following April or May, did you?

A. You'll have to question that with Damien and Mr Parry – I can't comment on that.

Mr York accepted that he did not make any real effort to make any of his staff available in TRAD's offices to increase their production of drawings. Ruefully he recognised and accepted the position that Laing's contract managers had permitted GEH to be without the protection of the negotiated letter of consent with agreed terms or a contract to protect them.

112. I reject the expert evidence of Mr Celetka as to the performance of Laing as contract manager in relation to periods one and two. He has demonstrated himself to be lacking in thoroughness in his research and unreliable by reason of his uncritical acceptance of the favourable accounts put forward by Laing. I prefer the evidence of Mr Wylie who was an impressive and conscientious witness who showed that he approached his role as an expert in an independent way and was prepared to make concessions when his independent view of the evidence warranted it. In my judgment, in relation to this phase of the project, the defendants are clearly in breach of clauses 2.8, 2.9, 3.1 3.2 (D) and 3.4 of the CMA and in consequence by their acts and omissions are proved to have significantly caused the delay during these periods.

113. Mr Parry proffered his opinion as to the causes of delay to the project when he gave evidence. He condescended to very great detail. He made no mention in his written evidence of the performance of TRAD.

114. He characterised the most significant delaying problem as being design changes and the extensive general changes made to the scope of works for the TRAD contractors. The obvious and greatest source of delay, namely TRAD's performance is omitted from his account. In cross examination, he reluctantly accepted that Laing chose a period of ten weeks for the temporary roof design and construction based upon Option No.3 and permitted TRAD to start on the site knowing full well that no binding contract had been agreed. He acknowledged that he had not mentioned TRAD's default, nor that their design resources were inadequate well knowing that these were significant causes of delay. His reluctance to face up to TRAD's performance and Laing's part in it may be seen as part of an orchestrated response by Laing management to these claims.

The period June 1998.

115. The delay experts disagreed as to where the critical path ran during this period. It is evident that no critical delay occurred during this period. Mr Celetka considers that during this period the critical path ran through the requirement for the protection of the Railtrack services under the infill block. Mr France's evidence was that the critical path ran to the demolition of the North East Mansard, then to the demolition of the East cross wall above the Hamilton Hall function room and hence through the removal of the demolition chute in the infill block.

116. The infill block was a vital area of the site in the earlier stages of the demolition and construction phases of this project. It was accessed from Bishopgate via the cab road. The cab road provided the sole access for vehicles and equipment. The northern part of the infill area, a slab covering a basement and a sub-basement, was the location where the arisings from the demolition of the roof and Hamilton Hall could be collected and then removed. To this end at various times, there were chutes enabling the demolition arisings to be brought

to the vehicles for removal. There was also located there a tower crane which enabled steel and building material to be brought in and distributed as well as permitting large demolition elements to be removed from site. The Northern part of the infill site served by the cab road which comprised a concrete slab covering the two basement levels, had beneath it the Railtrack services.

117. It was necessary to demolish the basement slabs and to complete the demolition work in the large inner court, or light well of the original hotel structures, so that the atrium could be built and the additional bedroom accommodation provided. This, the infill block, was the core of the new build part of the hotel. Mr Celekta based his analysis on the account of Mr Les Wallis who succeeded Mr York as a project manager in June of 1998.

118. Mr Wallis' recollection was demonstrated by Mr Fernyhough Q.C. in an impressive and economical questioning to be wholly unreliable as to the events that govern the timing of the infill demolition and the course of the critical path. There was a body of contemporary documentation available that would have assisted Mr Wallis had he chosen to conscientiously recollect the precise course of events that he gave evidence about. It would have run counter to the view taken by his Employers as to these events had he taken account of these documents. Mr Celekta who was charged with the duty of independently researching and analysing these events singularly failed to take account of this documentation and the photographic evidence in his written report for the court and presented a view of the course of the critical path which was clearly wrong. Mr France had correctly analysed the critical path and had presented the data contradicting Mr Wallis' view in two reports served on Mr Celekta. Mr Celekta preferred to accept the assessment of Mr Wallis until Mr Wallis was forced to disavow it.

119. The Relocation and Protection of the existing Railtrack Services under the infill slab was initially non critical, but they were left so late that by the time that they were eventually undertaken, they were on the critical path of the project because they were delaying the critical demolition of the existing infill block area.

120. When demolition of the existing North East mansards was complete and the Hamilton Hall East cross wall was removed, the main demolition chute located in the area of the infill block was dismantled. When this occurred the existing infill block area was no longer required to be used as a logistics area and the infill block itself should then have been demolished.

121. This was not possible however, because during the five weeks following, the existing rail services were still to be relocated and protected and therefore demolition of the existing infill block was not feasible. I accept the evidence of Mr France that the relocation and protection of the existing Railtrack services could and should have been undertaken earlier and would not have prevented the demolition of the existing infill block in July of 1998. The necessity to undertake the relocation and protection to the existing Railtrack services was known about well before the appointment of Laing and was clearly shown on the project drawings.

122. Laing allowed for the relocation and protection of the existing Railtrack services within activity 20.00 'service diversions/relocations' on their original programme MP/1. The works were originally planned to be undertaken by Laing in August, September and October of 1997.

123. That Laing were aware of the requirements for them to organise the location and protection of the Railtrack services was confirmed by Laing by including this work in their trade package schedule produced in July of 1997.

124. During two meetings with the demolition contractor, Hunt, in December of 1997, it was signalled that 'protection of Railtrack services to upper and lower basement levels' was extremely urgent. The support and protection to existing Railtrack services was to be undertaken by Dove Brothers who produced drawings and a method statement showing how it would be accomplished on 19th January 1998.

125. Little was done by Laing or Dove during the months of February, March and April in relation to the protection of the services. Their revised master plan/1 in fact wrongfully showed the activity to be 100% complete.

126. In April of 1990 realising their error, Laing produced a programme which recognised the need to procure the protection of the existing services and programmes and postponed the removal of the infill block until June of 1998. On 19th June 1998 Dove complained of having waited over 6 weeks for Sulzer/T. Clarke to relocate the

existing services in the infill block, which was the necessary prelude to demolition work. By 7th July 1998, it was apparent that the critical delay in demolishing the infill block was the continuing failure of Laing to relocate and protect the Railtrack services. It was the effective impediment to the final infill demolition work. It was undertaken between the 3rd and 14th August of 1998. On the latter date Dove issued its 'permission to load' to the demolition contractor, Hunt, which allowed Hunt to carry out demolition of the infill block.

127. I am satisfied that had Laing ensured that method statements were finalised and protection works undertaken in February, March and April of 1998, then the protection of the infill block services could have been completed before the earliest date when the North slab of the infill block ceased to be used as a logistic staging post and was ready for demolition. This was in early July.

128. I accept Mr France's careful analysis and conclusion that the relocation of the Railtrack services could have remained non critical and that the five weeks critical delay that in fact occurred to the whole project as a result of Laing's neglect could have been avoided. The documentation ignored by both Mr Wallis and Mr Celekta included the Resident Engineers report 16th June 1998 from ABA file note of 6th October 1998 reporting on work accomplished and the photographs No.9 of the 1st July 1998, 52A of 21st October 1998, photographs 36 and 37 of 26th August 1998, all showing the state of demolition accomplished and the means of removing the arisings on those dates.

129. Mr Celetka ultimately, in cross-examination, as he had to, revised his opinion as to the criticality of the protection of the Railtrack services to the project. His failure to consider the contemporary documentary evidence photographs and his preference to accept uncritically Laing's untested accounts has led me to the conclusion that little weight can be attached to his evidence save where it coincides with that of Mr France. I sadly conclude that he has no concept of his duty to the court as an independent expert. Despite seeing the photographs and material contained in Mr France's two reports received and read by him in May, totalling undermining credit and accuracy of Mr Wallis' account upon which he relied, he chose not to revisit his earlier expressed views in accordance with his clear duty to the Court.

The period July to December 1998

130. I have considered the criticality of the protection of the Railtrack services above. The works of diversion could have been carried out at any time after January of 1998 when it would not have been on the critical path. The demolition commenced on 20th August of 1998, 35 working weeks later than planned upon MP/1.

131. Mr Celetka agreed in evidence that if proper planning and co-ordination of the infill block demolition had taken place at least 6 weeks of critical delay, exceeding the 5½ weeks lost, could have been saved.

132. There were further critical delays totalling 3½ weeks during this period which are not alleged to be the responsibility of Laing. There was half a week on account of the discovery of a small amount of asbestos and three further weeks because of the need to dig trial pits on the instructions of ABA the Engineers in order to ascertain the ground bearing capacity for the completion of the design of the foundations of the infill block.

133. During this period Laing's failure to protect the Railtrack services caused five weeks critical delay. The slow demolition of the infill block raft slab caused a further three weeks and the asbestos find and trial pits accounted for 3½ weeks, totalling 14 weeks critical delay.

134. Mr Celetka by the time of his supplemental report ascribed half the critical delay in this period, namely 7.3 weeks to the requirement to dig trial pits and the balance to Railtrack services protection, the demolition of the lift shaft in the infill block area and demolition of the Hamilton Hall cross walls east and west and the balance concurrently.

135. In his oral evidence he abandoned that view, based as it was on Mr Wallis' discredited evidence. It was not clear what Laing's position was as to the extent of critical delay in relation to this period. Be that as it may, on the evidence as to the proven occurrence and sequence of events and the analysis of Mr France which I accept as accurate and reliable, I am compelled to conclude that the critical delay during this period was 14 weeks.

Responsibility for delay

136. Both the planning experts in their first joint statement agreed that the period shown in the master programme (MP1) were appropriate if proper planning was applied. One week was allowed for the demolition of the infill block and one week for breaking out a concrete raft in the lower basement. In fact it took 11 weeks and

because of the previous delays to the roof and the protection of Railtrack services, the demolition of the infill block was on the critical path. Mr Wallis, the project manager, when asked about this agreed that the demolition of the infill block and slab, took 11 weeks but expressed the view that it did not take any longer than the situation required. He accepted that it was important and on the critical path.

"I don't recall going back to MP/1 to make that comparison. I believe the work took a reasonable amount of time"

Q. Are you saying seriously that you knew it was important, you knew it was on the critical path but you never bothered to find out how long you had programmed it for?

A. I think that is correct. I set about programming it into the future as best I could.

Q. That is very interesting you see. Your case, Mr Wallis, is that really you ignored MP1 entirely?

A. I think that's true, Yes.

Q. You did not have any confidence in MP1 at all, did you?

A. I made no use of it.

Mr Wallis was asked about steps that he took to speed up the demolition in the infill block.

Q. . .Can you remember any other steps you took?

A. We are talking purely at this 11 weeks demolition period?

Q. Yes, that is all.

A. No I can't because there was no opportunity to bringing heavier machinery onto site or more labour. It was using the existing labour in a congested site.

137. Mr Wallis was shown the trade contractors' programme issued in July, showing a sequence of demolition beginning 13th July and ending 18th August 2000. A period of 4½ weeks. He accepted that the re-programming necessarily involved a further 2½ weeks critical delay. The only steps to speed things up was to ask Hunt's the demolition contractors to work overtime.

"Q. I suggest to you Mr Wallis that was an inadequate response to a very serious situation causing critical delay on the job?

A. Well my recollection is that a decision was taken about the time I joined the project which I was aware of, that the ground slab of the infill block would be retained for the reasons we discussed earlier and that probably accounts for the delay to the whole process. I suspect this programme may well have been optimistic.

138. It was wholly unnecessary to retain the ground floor slab of the infill block for as long as it was, the protection of the Railtrack services was clearly overlooked. The basis of Mr Wallis' judgment was demonstrated to be wholly without substance.

139. The logic link in the electronic programme between the completion of the demolition of the northeast mansard roof and the demolition of the infill block was for some unexplained reason, deleted. It would have focussed attention on the economic and practical means of removing the demolition arising.

140. Laing did recognise the serious implications of maintaining the mansard demolition chute discharging to the ground floor the infill block at their meeting with TRAD in January of 1998. It was noted that delay to the temporary roof erection had delayed roof demolition whilst the atrium demolition had surged ahead and that an alternative means of disposal should be sought if the slow disposal of arisings by Laing using the crane was to be avoided.

141. The solution canvassed was delay to the demolition of the infill block to enable the arisings from the north east mansard roof to be disposed of using the infill block as a collection point, recognising however, that it would lead to the out of sequence demolition of the infill block, the additional handling of the north east roof arisings, disruption to the construction sequence of the basement slab, disruption of the drainage package and possible delay to the steel constructors contractors work in the infill block.

142. Mr Wylie the construction management expert expressed the opinion that a competent construction manager should have recognised the serious programming implications of maintaining the mansard demolition chute discharging to the ground floor of the infill block. A competent construction manager should not and would not have ignored the situation. He would have taken alternative measures to avoid leaving the infill block in place and thus causing critical delay.

143. Furthermore, it is evident that the deletion of the logic link without good reason was an action that would not have been initiated by a competent construction manager because it disguised the critical importance of demolishing the infill block area.

144. Had Laing acted as a competent construction manager, even given the failings referred to above at a late stage from January onwards, they should have used an additional tower to remove mansard demolition arisings to avoid or minimise the delay. The use of an additional tower crane was not a solution which was adopted for this purpose and a second tower crane was not put into place until July of 1999 for Dove to use following the agreement of the Strategy to Completion.

145. I accept Mr Wylie's analysis that Laing failed to procure the protection of the Railtrack services which was a necessary pre-requisite to the demolition of the infill block, a critical activity. The incompetence is the more so since the months of delay caused by the temporary roof provided ample opportunity and every motivation for a competent construction manager to ensure that every reasonable step was taken to prevent further delays.

146. I am mindful that when Railtrack had reminded Laing on two separate occasions in April of 1998 of the need for demolition method statements to be submitted and approved in advance of demolition works. It did not cause Laing any concern, neither did it cause it to amend its reporting to the client or reflect in its recovery programme.

147. The protection works were not started until July/August of 1998. They were not completed until mid-August 21998 because Laing simply left these works too late.

148. In my judgment there is no cogent reason why the commencement of these works were delayed other than the fact that Laing did not make the necessary arrangement early enough.

149. I accept Mr Wylie's evidence that:
"*What Laing should have done and what I am of the opinion a competent construction manager would have done bearing in mind that the demolition of the infill blocks originally programmed by Laing to be completed by early December 1997, was to have produced an outline construction manager's method statement for the protection of the services prior to obtaining demolition tenders and should have made sure that the detailed methods statement for the protection of the existing Railtrack services was submitted and approved by no later than October of 1997.*"

150. Mr Celetka wearing his expert's hat as a construction management expert in his supplementary report (after he had received Mr France's reports) commented on Laing's performance
"*5.47 The failure to protect or relocate Railtrack Services prior to Laing's appointment was a result of GEH's Professional Team. Laing performed entirely in accordance with the CMA and what could be expected of a competent Construction Manager in attempting to advance these works as soon as possible with the information provided to it by the Professional Team*".

151. He considered the strategy for good Construction Manager on Day 28 of his oral evidence accepting that demolition of the infill block was a pinch point in the project. He would not accept that it was a difficult piece of demolition although recognising it to be one of the trickiest on site needing the co-ordination of several Trade Contractors. He agreed that by removing the two constraints upon demolition, namely by demolishing the lift shaft and protecting the Railtrack services the final infill demolition could have been brought forward six weeks earlier thus reducing critical delay by that amount.

152. Mr Celetka was unable to identify any occasion when Laing were less than reasonably competent in relation to this period or indeed to any other.

153. I preferred the evidence of Mr Wylie on management issues because it was based upon sound research and extensive practical experience as a Construction Manager under similar contracts to that in this case.

154. I find that Laing had been proved to have breached their obligations under the construction management agreement and to be wholly responsible for the critical delay that took place during this period.

Period 6 – January to August 1999.

155. From the inception of the project, Laing reported progress against programme MP1 from January of 1999 however they reported progress against their new programme COMSUM3.

156. During this eight-month period the work being carried out on the critical path according to the claimant was the completion and subsequent correction to steelwork in the infill block and the northeast Plant room. Until the end of August 1999 the Mansard roofing of the infill block and the roofing to the northeast.

157. The delay experts both agree that during this period there is about 15 weeks critical delay. Mr France assesses it at 15 weeks exactly. Mr Celetka at 15.2 weeks.

158. The experts disagree as to where the critical path ran during three parts of this period. In February of 1999 Mr France says that the critical path was in the completing and correcting of the steelwork. Mr Celetka says that it ran through the floor slabs to the infill block. Mr Celetka maintained that in March and April it ran through the roofing, Mr France saying during this time that it continued through the steelwork to the infill block. Finally the experts disagree as to when the building was made watertight in August of 1999.

159. Mr Celetka in his report said that:
"The critical delay that occurred during this period amounts to 107 calendar days and was caused primarily by out of tolerance steelwork, additional corrective work instructed to correct it, the demolition and construction of roof level parapet walls, and adverse weather and the early removal of the temporary roof."

He did not break down the period and attribute particular periods of delay to each of those particular events. Mr France did so. In his analysis he attributed 5 weeks delay in the erection of the scaffold and steel to the infill block. The steelwork erection was late and hand balling of the steel caused further delay as did the positioning of the tower crane which fouled the proposed northeast plant room steelwork.

160. Because of the late start to the roofing of the infill block and the northeast plant room as a result of the remedial work to overcome the out of tolerance steel, there was a further one and a half weeks period of delay.

161. Finally there was a period of nine weeks delay because of the extended roofing period to the infill block which resulted variously from causes which included late brickwork block work, some missing roof steel, further steel alignment problems, damage to roofing, early removal of the temporary roof causing ponding and lack of weather protection and a drainage system. Furthermore, there were delays caused to other trades, to new plant bases and delays to the hoist area.

162. The experts agreed that the out of tolerance steel and steps necessary to correct the situation and the early removal of the temporary roof together with the impact of adverse weather were causes of delay.

163. Laing was responsible for setting the datum point for the setting out of various parts of the Works. This included the steelwork to the northeast plant room. It was then the responsibility of Rowen, the steelworks contractors to set out their steelwork according to these datum points. Laing also had the responsibility to check out the setting out carried out by the Trade Contractors. As a result of either Laing's inaccurate setting out of the datum points, or their failure to properly check the setting out of Rowen's steelwork, it was erected out of alignment by a margin of 100mm or four inches. This was four times the accepted tolerance for such steelwork erection.

164. Mr Wallis accepted in evidence that either the setting out grid had moved 100 millimetres as a result of the various trade contractors setting out, or that the steel contractors setting out was erroneous and Laing's checkers had not picked it up. In either respect, I am satisfied that this constitutes a clear failure of the duty of a competent construction manager to co-ordinate the trade contractors and to comply with clause 2.2. schedule 2. The more so since ABA on 15th March expressly drew the attention of Laing to the risk that the grid may have been moved as a result of earlier setting out by the trade contractors by a margin of 100mm.

165. The obligation under clause 202 is clear:
"To provide and maintain an initial site survey and establish all baseline datum's which may be required for the execution of any works, and co-ordinate and supervise any further setting out carried by the Trade Contractors and to ensure the adequacy of the same".

166. Mr Celekta gave evidence as to the standard of care to be expected of a competent construction manager. He orally expressed his opinion as to the failures of Laing to keep the building watertight on day 17. He did not accept that Laing were at fault.

Q. If therefore delay is caused to the project because they did not provide adequate temporary waterproofing measures so that rain got in and damaged the work, Laing would be responsible for that would they not?

A. Well no, that's where I disagree.

Q. Let me try and explain it to you very clearly, and I hope logically. You say earlier removal of the temporary roof combined with the adverse weather was a cause of delay to the project, correct?

A. Yes.

Q. It was Laing's decision whether or not they removed the temporary roof and if so in which areas, correct?

A. Correct, but I will let you continue.

Q. It was also Laing's requirement that where they did remove the temporary roof and the building was exposed, they had to provide ad hoc temporary waterproofing measures, correct?

A. Correct.

167. Later, when pressed he posited that they might be in breach of their obligations.

168. I am satisfied that the removal of the temporary roof was a critical activity and that in removing the roof too early Laing should have recognised that the permanent roof programme would be exposed to the risks and effects of inclement weather. The removal of sections of temporary roofing caused significant areas of the building to be exposed to considerable water ingress and risk of damage. Prater who were the roofing contractors were entitled to install their works in a dry environment and they had to undertake the work exposed to the weather, as did the dry liners and other trades. Laing should either not have allowed the temporary roof to be removed early or in the event of removal, should have ensured that another waterproofing measures were in place to secure a watertight environment albeit temporary.

169. Laing also failed to investigate the risks involved and balance them as against the potential advantages and then to have presented those findings to the client in order that the client could take part in the decision regarding the early removal of the roof.

That too would have been the obligation of a competent construction manager.

170. Between June of 1998 and September of 1999 there was an abundance of documentary evidence of complaint that the removal of the temporary roof was in fact causing water ingress below and consequential damage and delay. On 5th August 1999 At the end of a series of such leaks, Mr Manser, the project architect, was driven to write to Mr Aikenhead, a Laing director, pointing out the lack of weather protection. In evidence he said:

"…in our view the problems with water ingress was not critical in themselves, a highly illustrative of Laing's ability not only to manage information flow on this project, but also property to properly manage and monitor the works on the site. The need to ensure that water does not get into a building is a fundamental yet straightforward element of any project, particularly including the refurbishment of a listed building. Here it was an element which Laing repeatedly failed to deal with effectively. Together with others in the Manser team, I wrote a number of letters to Laing about this and yet problems continued throughout the project. ,Letters of course were only written after meetings on site or telephone conversations had failed to produce a satisfactory result.

To take one example out of many, I wrote to Les Wallis on 19th August 1998 about the removal of the temporary roof. One reason for my concern was that we simply did not know when and how it was planned to remove the roof. I have found this surprising. This was particularly important because the previous weekend following the removal of the central section of the roof, large areas of the building had been open to a torrential downpour on the Saturday night. Rightly, we were concerned that such a downpour might affect the integrity of the existing building and the areas of the building would require periods of drying out. This lack of forward thinking and planning was typical of Laing's approach on this project.

Notwithstanding my concerns, expressed in my earlier letter during the nights of 22/23rd September 1998, heavy and driving rain penetrated the temporary protective measures.

Damage to the internal fabric of the building was widespread. Although none of this resulted in major structural damage, it did contribute in many areas to delay and extra costs. The scope of the plaster restoration package had to be extended as a result of the deficiencies in the temporary roof, which allowed water into the building. Walls which were in good condition became soaked and plaster was rendered unstable. Therefore plasterwork had to be replaced.

171. Mr Wallis accepted that there was justifiable complaint, but nonetheless asserted that there were benefits in opening the roof and that on balance more benefit accrued than would have done so than if effective weather

cover had been maintained, because that would have impeded convenient access particularly to high level construction.

172. At paragraph 12.67 of his report, Mr Celetka conceded that if the outer tolerance steel was found to be due to any misalignment between the new Infill Block and the existing north east block due to a discrepancy in the setting out work carried out by Laing, then Laing might be considered to have contributed to the delay resulting from the outer tolerance steel work. Rudimentary research of the contemporary documentation would have demonstrated to him that this was in fact the position.

173. Laing's breaches in my judgment caused in this respect critical delay of 1½ weeks.

174. The necessity to hand ball the steel in part of the Infill Block came about because Laings introduced a metal deck to act as temporary crash deck, in order to allow two teams of steel erectors to work simultaneously in safety one above the other. It effectively prevented the use of cranage and ironically a mitigating measure caused further delay.

175. The continued positioning of the tower crane within the mechanical services duct of the Infill Block ultimately caused more delay. The structure supporting the roof to the northeast plant room on top of the Infill Block could not be completed until after the tower crane had been removed. Laing should have removed the tower crane at such time that its jib did not foul the erection of the final light roof steel. How they failed to do this and further delay was caused. I accept that they may have felt unable to remove the crane, because as a result of the existing overall delays to the Project that they had caused, it was perhaps still needed. That may well be the case, nonetheless the further delay caused by this claim was clearly caused by Laing's early default and the delays caused thereby.

The extended roofing period of the Infill Block

176. The earlier removal of the temporary roofing led to water penetration in inclement weather, Mr Wallis deposed that removal of the temporary roofing was necessary to speed up works. This was wholly understandable given the existing pattern of delay, provided some alternative effect of adequate weather protection was provided. It clearly was not, and in addition to the lack of adequate temporary water protection there was an absence of any drainage system for part of the period. Ponding occurred on the roof and the collected water escaped downwards. It had a serious effect on the progress of roof works, and lower down the building as was described in Mr Manser's evidence referred to above.

177. I accept Mr Wylie's evidence that there were clear failures by Laing to achieve the standard of a competent Construction Manager, by managing these items, and by co-ordinating the works to achieve reasonable progress and least damage.

178. It is further evident I accept that there was damage caused to the roof and delay by reason of uncoordinated access to the roof by various trade contractors and employees. There was no method of organised or orderly permitted access to the roof as should have been provided by a competent Construction Manager.

179. During this period Laing were, I find responsible for the delay as identified by Mr France's evidence. I reject Mr Celetka's evidence and analysis as to the delay during this period, and his evidence as to the standard of competence expected of a contract manager confronted with the events during this time, and in the context of that which had gone before.

COMSUM 3

180. When Mr Wallis took over the role of Construction Manager in June of 1998, against MP/1 the delay according to Mr France was 19 weeks and 26.9 weeks according to Mr Caletka. A Strategy to Completion had been tabled by Laing with two alternative programmes LON 363 MP/1/Revision C giving a completion date of the 2nd August 1999, and Revision D giving a completion date of the 13th September 1999 some six weeks later. There was an unstated cost difference. Mr Wallis's review of the project on taking office as C.M. concluded that the strategy to completion could not be implemented, and that Laing's financial position was in a serious state and far worse than had been hinted at by senior Laing personnel.

181. By December of 1998 Laing tabled Consum 3 the programme whereby they purported to recover delay to an overall net four weeks of delay.

The delay reported by Mr Wallis and Laing was 20 weeks, when in fact the programme was 33 weeks in delay. In December of 1998 the structure and envelope works informing the new bedrooms were 33 weeks, and Laing showed completion of these in Consum 3 by the end of August 1999, four weeks later than shown on MP1. Laing's programme therefore showed that they were attempting the impossible, namely recovery of 29 weeks or almost seven months during a period of nine months.

182. GEH were reluctant to spend further monies and in December Mr Gunewardena stated that the estimated cost of £1.95m was not acceptable. By February however a budget was agreed. Laing's recovery programme had already been put into effect. Consum 3 later than Laing hoped for. It did not fail however by reason of late authorisation.

183. I do not accept Mr Wallis' explanation that its failure was caused or contributed to by late design information, or the late instruction of Trade Contractors, or the inability to achieve labour resources because of the general pressure in the construction industry to complete millennium Projects.

184. I accept Mr France's careful evidence as to the impact of the flow of design information throughout the Project. It was based on thorough research and objective analysis. Whilst there was some delay in relation to the provision of design information, it was not critical delay. It was the delay endemic in a large and complex Project when it is anticipated that the design would evolve and some information was provided "just in time."

185. I reject Mr Celetka's evidence that the late design information either caused or contributed to the critical delay in the Project. His analysis was self confessedly incomplete. He did not have the time to approach the research of this aspect of the case in the complete and systematic way, furthermore, the impacted as planned analysis delay takes no account of the actual events which occurred on the Project and gives rise to an hypothetical answer when the timing of design release is compared against the original construction programme. Thus it would take no account of the fact that the design team would have been aware of significant construction delays to the original master programme, and would have been able to prioritise design and construction to fit this. Furthermore, Mr Celetka in his report compares the timing of the actual design releases against an original programme which was superseded by later versions of the procurement programme on which Laing showed later dates for the provision of the information required.

186. Mr France took account of the actual events in his researches and exhibited in his researches and conclusions the clear-sighted objectivity that informs the whole of his report.

In my judgment Consum 3 failed because it could not in fact have ever succeeded, and further more, it was a programme that was ineptly managed to the degree that still further critical delay occurred whilst it was followed.

187. At the end of August of 1999 instead of the progress position being only four weeks in delay as planned by Laing in fact it was 48 weeks in delay. The implementation of Consum 3 cost a further 15 weeks delay during the 35-week period.

Those delays derived from the delay in completing the Infill Block steel work, because it was erected with excessive tolerance and the delays to the roofing.

As a direct consequence I am satisfied that GEH paid out additional monies for acceleration and the provision of additional resources by trade contractors.

188. Because of the expressed intention by Laing in Consum 3 to reduce the misreported delay of 20 weeks down to a delay of 4 weeks for the bedrooms GEH was encouraged to pay acceleration costs to the TCs in order to get them to "buy in" to Consum 3. GEH occurred these additional costs in an attempt to comply with a programme that in my judgment was fundamentally flawed and unachievable.

189. Had Consum 3 been presented to GEH on the basis that the actual delay against MP1 was 34 weeks and not the misrepresented 20 weeks I have no doubt that the design team and GEH would not have accepted the programme.

The reporting obligation under the CMA

190. Clause 2.16 Schedule 2 of the CMA is one of a number of provisions dealing with the obligations of the Contract Manager to co-ordinate the activities of Trade Contractors and others, and provide co-ordinating

meetings, programmes and reports. The Contract Manager is at the centre of the information hub of the Project.

191. He is the only person on a Project with access to all of the information and the various programmes, he is the only available person who can make an accurate report to the Client at any one time, of both the current status of the Project and the likely effects both on timing and on costs. Clause 2.6 obliges the Contract Manager

"To advise the Client and the Architect of any action that may be necessary for the Client to take in connection with any of the Trade Contracts or the Trade Contractors. To report to the Client and the Architect all matters related to progress and quality of the Project. To consult with the Architect on a matter which may cause delay to a completion of a Project."

192. One of the prime reasons a Client may decide to incur the expense of appointing a Construction Manager is to manage any delays and variations that may arise on a Project in order to minimise the effect of any particular delay on the whole Project. As part of that process a competent Construction Manager requires knowledge of the exact status of the Project on a regular basis in order that he can ensure that the Client is kept fully apprised, and that he the construction manager, can deal with problems that have arisen, and therefore anticipate potential problems that may arise, and make provisions to deal with these work fronts.

193. In a Project such as this, the construction of the Great Eastern Hotel, a competent Construction Manager would know of the necessity that GEH must have accurate information of the likely completion date, and the costs, because this would effect his pre opening preparation and financing costs.

194. Similarly, a competent Construction Manager in the position of Laing would have known that any change to the likely completion date and thus to costs would be vitally important information required by GEH in order that it could adjust its operational dates. Where a completion date was subject to change the competent Construction Manager had a clear obligation to accurately report any change from the original Projected completion date, and the effect on costs on a weekly basis.

As a competent Construction Manager Laing would have been aware of the entitlement of GEH and its decision makers to have accurate information on programming matters in order to avoid additional costs.

Laing did report on a regular basis. They understandably chose to report against their own master programme MP1.

195. From November of 1997 Laing seriously unreported the delays on a monthly basis occurring to the Project, against the master programme. The most flagrant example according to GEH occurred in December of 1998 when the recovery programme Consum 3 was presented. Laing reported a 20 weeks delay as against 34 weeks assessed by the experts. During October of 1997 to February of 1998 inclusively a five-month period, Laing reported monthly delays to the Project of eight weeks only. Alterations were made to the updated copies of the master programme, which had the effect of showing that no further critical delays were occurring during that reporting period, when in fact because of TRAD's performance the delay to the temporary roof and the consequential effects were much greater.

196. No satisfactory explanation has been given on behalf of Laing as to why this institutionalised misreporting occurred. Laing the Construction Managers were served by a professional planning team that included Mr John Croot who gave evidence before me, and Mr Howard Parsonage the chief planner on the Project who did not. The intended use made of the construction planning system as it evolved throughout the Project seemingly to provide a transparent tool to accomplice a timely completion of the Project, contrasted with its use by Laing as a source of selective data to mask delay and management incompetence. The Project Managers and their team were clearly privy to the use made of the data extracted from the programmes, and presented to the Employer as construction bench marks accomplished, or as the basis for forecasting the path and timing of the construction yet to be achieved to complete the Project.

197. Where the electronic programme is shown to have had its logic changed to the end of producing data capable of masking incompetence, the likelihood is that such sophisticated technical manipulation was unlikely to have been part of the detailed knowledge of those other than the dedicated professional planners.

198. I am satisfied that the logic of the electronic programme was tampered with as I describe below. That programme was not made available to GEH's delay expert, until the 1st June 2003 after commencement of this

action, when the case had already been pleaded on the basis of the documentary programming and other contemporaneous material.

199. Neither the original pleaded case by GEH or its re-amended case alleges fraud, neither is it necessary in order for it to succeed, to demonstrate fraud.

200. The evidence relating to the Laing employees operation of the programming system and the presentation of advice based on this is instructive as to the credit of those who gave evidence before the court. It is also relevant to the issues of competence where the performance of those charged with the duties of Construction Manager as Laing employees, under Laing's agreement with GEH falls to be considered.

201. The Defendants plead that their reporting was within the acceptable range of reporting by a competent Construction Manager, and broadly the position as to delay was known to the professional team advising GEH and that the true position could be ascertained in the plethora of documentation comprising minutes of meetings, letters, reports and oral observations variously made to the professional team.

202. I accept that from time to time that professionals including the architects and the engineers voiced concerns about delay, and were aware that some delay was occurring, but I am satisfied that the Defendants failed to comply with their contractual obligation to report candidly and objectively as to the extent of the delay which was known to them, and to seek to assuage those concerns. Furthermore on the evidence before me I am driven to the conclusion that Mr York, Mr Croot and Mr Parry knew full well what they were doing when they permitted misleading delay information to be furnished to GEH and their advisors. They were all of them intelligent and experienced personnel who were well able to perceive the advantage to Laing of suppressing the true extent of the delay for as long as that remained possible, and giving themselves the opportunity to "manage the way out of the difficulty" or to safeguard the financial interests of Laing.

203. The Laing multi progress report number 22 dated 19th November 1977 has two pages comprising an overall statement and introduction to the report and explaining programming issues. At the outset it states "*No further programme loss during the period but early programme activities remain in delay*". This is not correct since three week critical delay had already occurred because of demolition roof to basement activity had not commenced. Laing then went on to give a list of reasons and current problems none of which I am satisfied related to the demolition that had actually caused the three week critical delay in that month. The report complains of administration difficulties, change forms, responses to information requests, builders work details, the need for better liaison and contractual administration, and an assertion that the M and E drawings for the M and E package for tender are urgently awaited. Whilst some of these complaints may relate to matters causing some delay, nonetheless they do not relate to critical delay and the effect is to divert attention from the true cause of critical delay on the Project, which is that the main demolition was not commenced on time and not managed so that time loss could be retrieved.

204. The format of reporting also serves to demonstrate the difficulties experienced by Laing's fellow professionals in discerning the true position as to delay from the monthly report and documentation provided by Laing as Contract Managers.

205. The first updated master programme with progress entered and the impact of progress shown was issued by Laing in their monthly report in October of 1997 3½ months after Project commenced. The programme showed an eight-week critical delay to Activity 80, the demolition and roof to sub-basement event. Laing accurately showed the true impact of this as an eight week critical delay to the forecast end date of the Project now shown as the 27th September 1999.

206. For each of the next four months on the Project November 1997 to February 1998 further critical delays occurred but Laing did not disclose the true impact of those further critical delays on the Project completion date for each of those months. Instead they continued to show the overall forecast completion date remaining the 27th September 1999 (which is eight weeks late) despite the further critical delays occurring to the Project. The 27th September 1999 forecast completion date by Laing is included in the Laing MP/1 updated programmes included with all the Laing monthly Project reports from November 1997 until 2 February 1998 inclusively.

207. The text of the Laing multi progress reports uses wording such as "progress continued to be maintained at eight weeks behind the master programme …" when as they knew significant cumulative delay was actually

occurring. Laing also updated the master programme issued in November 1997, which showed that the critical activity demolition roof to sub-basement (80) had been further delayed by three weeks and is now shown as 11 weeks in critical delay. The forecast Project completion date however, remained at only 8 weeks late 27th September 1999.

208. The updated master programme issued by Laing in December 1997 wrongly shows that the critical Activity 80, demolition roof to sub-basement, has been forecast to finish eight weeks late whereas it should be 11 weeks late, and the completion date Project is shown as remaining just eight weeks late, whereas it should show 11 weeks late. The January updated programme should have shown 13 weeks delay to Activity 80 and the corresponding delay to Project completion. It does not. It shows eight weeks delay only. Similarly in February when the delay to Activity 80 has gone up to 17 weeks, only eight weeks is shown and no knock on effect on the overall completion date is indicated.

209. The Laing updated master programme issued in March 1998 shows the critical Activity 80 demolition roof sub-basement as complete. It was not complete and should have shown that the remaining critical demolition works of the Infill Block would finish 17 weeks late with a corresponding adjustment to the overall Project completion date.

210. Mr France gave evidence of his receipt of the disk containing the electronic data in June 2003. The Hornet software used to create Laing's master programme was sent to the programme's authors who printed out the logic relationship between activities on each of the master programme updates produced by Laing.

211. The October programme accurately depicts the actual and intended progress. The November programme showed a reduction of three weeks taken off the duration of the critical path, I am satisfied that there may have been a proper basis for this having seen the documentary evidence for doing so.

212. On the original master programme, Laing showed that after completing the erection of the temporary roof it would take a further five weeks to complete the demolition of the existing mansard. This relationship is shown on the programme. In November 1997 Laing changed the logic relationship. Instead of showing that the Mansard demolition would take five weeks to complete after the temporary roof was finished Laing changed this to just two weeks. This in my judgment was unrealistic and has not been explained. This change should not have been made because the Mansard demolition was actually completed six weeks after the temporary roof was completed, and therefore Laing were not justified in reducing this to two weeks.

213. The printout of the electronic data sheet for the original MP/1 programme confirms the five week "finish to finish" relationship between the completion of the temporary roof and the completion of the demolition of the existing mansards. The reduction made by Laing from five to two weeks is shown on the data sheet for November 1997, which shows just two weeks between completing the temporary roof and the demolition of the mansard. This alteration made by Laing shows a reduction to the critical path by three weeks and thereby maintains the credibility of the forecast Project completion date a mere eight weeks late instead of 11 weeks.

214. The reasons for the alterations to the electronic data in the updated MP/1 are difficult to discern. There was no assistance from Mr Celetka or from Mr Croot or Mr Parry or Mr York as to why it was done. These are not changes that could have been made accidentally. There are no explanations given or apparent on the evidence. Had they not been made I am satisfied that it would have been easier for GEH and their advisors to see through the inaccurate reports being made by the Contract Manager.

215. In December 1997 Laing issued a further update to their master programme, which incorrectly showed Activity 80 demolition roof to sub-basement as finishing a mere eight weeks late in the middle of February, when in truth Laing should have showed it as completing 11 weeks late in early March at the earliest. The original programme showed Activity 80 planned to finish one week after Activity 90, a "finish to finish relationship" of one week, the original programme showed that the final week of Activity 80 was for the demolition of the Infill Block, which occurs after the demolition of the Mansard block enabling the demolition to be removed. That logic link was deleted. Had it not been deleted the critical Activity 80 would have been shown to have finished three weeks later than it was wrongly shown that it would and the result and effect on the overall Project would have been a further three weeks delay. Laing were thus enabled to report a delay of eight weeks instead of 11 weeks.

216. There is a further consequence of deleting the logic link between Activities 90 and 80. This had a further impact that was not declared by Laing on their December 1997 updated programme MP/1. Had the logic link not been deleted not only would Activity 80 had been shown three weeks later, but Activities 40 and 90 would have been identified as being critical. Activity 40 was the erection of the temporary roof. As a direct consequence of Laing's deletion of the link between Activities 90 and 80 they incorrectly showed the temporary roof as being non critical.

217. I am satisfied that there was no good operational reason why Laings as competent Construction Managers should have removed the logic link. The link was there to reflect the fact that the Infill Block could not be demolished until after completion of the demolition of the mansards and this could not have been accomplished unless another way of disposing of the demolition arising from the mansards was achieved, and this was not the case.

218. In January during the relevant three-week working period, two weeks in fact was lost. The monthly report for January by Laing makes no mention of critical delay resulting from the erection of the temporary roof, or demolition of the mansards, in common with many of the monthly reports it makes little or no mention of the most significant delay events.

219. The only report of time lost and thus delay reported is alleged to result from the failure to appoint a trade package, and the occurrence of bad weather. In the monthly report Laing state that they urgently needed to appoint the M and E contractor. But since the M and E contractor was not due to start on site until according to Laing's own updated master programme until the 24th May some four months later, the complaint seems premature, and clearly was not the source of the existing delay. Neither was the fact that they still had to appoint the sub-structure and super structure contractor, which was reported as "devastating progress on site that has stopped the Project progressing".

220. The Laing updated master programme issued with the January 1998 report showed that the five activities to be undertaken by the sub and superstructure contractor, the earliest of which was Activity 100 were not due to start until the 9th February 1998. Laing's alarmist assertion was plainly wrong, and detracted from the actual problem, which should have been expressly drawn to the attention of GEH and the professional team, namely, that it was the critical delay to temporary roof (Activity 40) and the demolition to the mansards that were critical and properly could be described as "devastating progress on site".

221. In the February updated master programme Activity 40 the temporary roof and Activity 90 was shown to have lost three weeks. The logic link between the two activities had been deleted and Laing instead of reporting the overall Project delay of 17 weeks reported only a eight weeks delay.

222. Laing also altered the logic link between Activity 230, contractual preparation for steel mansards, and Activity 240, steel work to mansards. Before February 1998 Laing's programme in fact showed a need for seven weeks between the completion of the preparation and the completion of the structural steel work to the mansards. That was reduced to four weeks in the February update. The actual difference shown in Mr Celetka's "as built programme" evidence is a period of 16 weeks.

223. By changing the "finished relationship" from seven to four weeks Laing were enabled to under report the true delay. Their report for February despite little progress having been made on the temporary roof and Mansard demolition they felt able to report that "*progress continued to be maintained at eight weeks behind the master programme despite changes, late information, lack of information, delay contractual appointments and some bad weather affecting temporary roof erection*". They went on to report that they believed that the programme would slip further as information short falls would cause a crisis when coupled with the lack of trade contractor appointments which could lead to a 12 week delay and thus put the opening at risk.

224. It is evident in my judgment that Laing consistently underplayed mention of the true causes of critical delay and assert other reasons for delay that would not reflect upon them. They consistently misreported the delays actually occurring and manipulating the data in the programme update to obscure the accurate position.

225. In the March updated programme Activity 80 demolition of roof to sub-basement was shown as complete. It was not in fact completed until many months later. The associated atrium central core demolition work was not completed until the 22nd May, two months later. It is evident that had Laing correctly shown the timing of the Infill Block demolition activity the overall Project completion date would have been put back to six weeks

and not the 11 weeks currently reported. Since the February update there had been further critical delay shown to Activity 100 the breaking out of the foundations and under pinning, which would have put the programme contract completion date back four weeks, it is in fact shown as three weeks. Activity 540 was arbitrarily reduced by one week for no genuine reason. Additionally the demolition of the sub-roof was shown as complete by the 6th March when it was not. It could not have been started until the end of March, when the three weeks work in removing the EEB Meter and enclosure was finished. The March report containing this under reporting was followed by a section of the report where Laing stated that
"Hamilton Hall and West Block finishing kitchen structural alterations are to be price. This is a critical area and the final design is awaited from ABA".

It was not on the critical path of their master programme, and there was no cogent reason for asserting that it was, other than to persuade those whom the report was tendered to accept it at face value.

226. In April 1998 Laing produced a programme works relating to interfaces with Rail Track which shows that the protection of the Rail Track services should be undertaken during the month of May 1998 and early June 1998 and that the demolition of the existing Infill Block would be undertaken in the first half of June 1998. A comparison of this with the master programme update for April shows that the Laing short-term programme has not been incorporated into the April updated programme. The April short term programme shows the demolition of the Infill Block for cost be undertaken in June. The April master programme update continues to show that the work was completed in March 1998.

227. The April updated master programme also shows that the Activity 160 raft slab construction would complete in early May 1998. The short term programme which showed the necessary preceding event, the infill demolition, not occurring until June 1998, meant that the raft slab activity was shown two weeks too early on the master programme update.

Mr Wylie the Construction Management expert giving evidence on behalf of the Claimants with commendable moderation in his report concluded:
"…There was no good reason why Laing could not have accurately reported both the extent and causes of delay on site. Laing were there on site and they had free access to all information. It was their job to investigate how the job was going, collate that information and present an accurate picture to the Clients. … If incorrect information was given by Laing simply because it did not understand the true delays being ……on site and/or made mistakes when altering its programme that was very remiss.
If, in fact Laing deliberately submitted incorrect information on the delays and causes for the delays then this is mismanagement of the most serious nature".

Mr Wylie's final conclusion is compelling commonsense, and in my judgement there is no doubt that Laing did deliberately submit incorrect information on the delays and causes of delays.

228. It translates into causal effect. Mr Wylie goes on to say and I accept that had Laing accurately reported delays and faced up to them there would have been little difficulty reorganising the Contract before Trade Contracts commenced, so that they were properly co-ordinated in accordance with the actual progress of the Project. He concludes and I accept that is one of the key skills which a Construction Manager is supposed to bring to a Project, and that their failure to properly report progress meant that they were unable to do this, and GEH and the professional team were not in a position to push Laing to do so. In consequence GEH was exposed to the inevitable claims for prolongation, delay and disruption as a direct consequence of Laing's breaches.

229. The under reporting of the problems with the temporary roof and the delays which they were causing disguised the critical importance of the temporary roof, and the fact that steps urgently needed to be taken to identify and deal with Trad's problems. It had the further consequence that the decision makers of GEH and the design teams were kept in ignorance of the true position, and thus the combined resources of GEH and the design team could not be brought to bear upon Laing and/or Trad in order to secure better performance from Trad and thereby safeguard GEH's position.

230. Mr Parry was clearly aware that MP/1 and its updates were highly unreliable documents: he must have known because he had professional planners, and the information they were in possession of was not consistent with the recovery programme. He sought metaphorically to wash his hands in relation to updates of the master programme 1 and the reporting based upon it, and the false picture it represented as to delay

and progress. I was not impressed by his evidence. He was not frank as to the extent of his knowledge of MP/1 and the extent of misreporting, neither was he open about the role he played in pursuing Laing's financial interest, and the professional conflict it presented to a professional adviser advising a Client. Mr Wallis' evidence in relation to the Infill Block as I indicated elsewhere, showed that he was not a reliable witness as to critical events relating to the Infill Block and that his management skills were sadly lacking.

231. The deletion of the logic link between the demolition of the Mansard and demolition of the Infill Block obscured from GEH and the design team that the Infill Block was as critical as it was. Had Laing's manipulation not taken place the criticality of the Infill Block from the delays it was causing would have become more readily apparent to everyone. In that event is it more likely than not that under inevitable pressure from the hotel and design team Laing would have taken steps to commence demolition of the Infill Block after protecting the Rail Track services at a much earlier stage. The misreporting of progress had further serious effects on the following Trade Contractors.

232. Because of the misreporting of progress, some of the following Trade Contractors commenced work on site before the works were ready for them, and this led to claims for extensive extensions of time together with prolongation and disruption costs. Had the true state of progress been declared, whilst it would have been necessary for Laing to have renegotiated with Trade Contractors in order to postpone their commencement on site, the cost consequences of such renegotiation would have been relatively minor, and it would have avoided the subsequent claims for extensions of time and loss and expense.

Trade Package Scoping

233. The Claimants' pleaded case is at paragraph 27 of the amended Particulars of Claim.

"27. In breach of clauses 2.1 (including the warranty as set out therein) and 3.1 of the CMA, paragraphs 1.5, 1.11 and 2.8 of the Services set out at schedule 2 to the CMA and the paragraphs 14.1 and 14.7 of its tender, JLC failed to fully and faithfully act in the best interests of GEH and failed to exercise a reasonable skill, care and diligence to be expected of a properly qualified Construction Manager in that it failed adequately to define the scope of the various trade packages and/or failed to ensure the packages which made up the trade's contracts were finalised prior to the Trade Contractors undertaking their contract works with the result the scope of the packages were not adequately defined and the packages were procured uncompetitively".

The Defendants in paragraphs 6(e) (iv) of the Amended Defence and Counterclaim described the extent of the scoping obligations as they understood them to be.

"iv. Laing were required to assemble and collate the Trade Contract documents following discussions with, and after input from, other members of the Professional Team, and to conduct any negotiations that might be appropriate to secure the TC. However, Laing were not responsible for identifying or preparing the scope of work for each Trade Contract or the technical documents in relation thereto and did not do so".

In addition to clauses 2.1, and 3.1 of the CMA set out earlier the following clauses are relevant to the ascertainment of the scoping obligations of Laing under the CMA.

"Schedule 2 – The Services

Clause 1.7

… To assist, in close consultation with the Architect, the Costs Consultant in his preparation of a sub-division of Project into various Trade Packages to be carried out by Trade Contractors … so that all the work comprising the Project is included in the Trade Package.

Clause 1.1

… To assist the Architect in co-ordinating the bid drawings and specifications having regard to the agreed Trade Package Sub-Division of the Construction Costs Plan. To monitor the contents of the Trade Packages to ensure that all work comprising the Project is included in the Trade Package.

Clause 1.18

… To prepare and distribute to the Client and the Professional Team, as appropriate, lists of suitable Contractors from whom bids may be invited for each Trade Package stated in the Construction Costs Plan … to recommend to the Client the most effective bidding procedures having regard to the time available and the quality and cost.

Clause 1.19

… To prepare for inclusion in the Bid documentation in due time terms and conditions, general and special sections … and to assist in the preparation of the Bid documentation relating to the relevant Trade Package being prepared by others. To discuss and agree the same with the Architect the Cost Consultants and Client. To assemble and collate the final draft of the Bid documentation for each Trade Package and circulate them to the Client. Architect and Cost Consultant and to members of the professional team as maybe appropriate for comment … To take due account of any comments received from the Client Architect and Cost Consultant and any other members of the professional team. To check in detail the ethicasy of the various documents. To dispatch the Bid documentation when finalised on the part of the Client the bidders and the lists approved by the Clients".

234. The Defendant's Construction Management expert Mr Celetka says that a Construction Manager does not have an obligation to define the scope, but rather to procure the scope defined by others. Both experts agreed in their joint statement that some of the services of the Project team members were overlapping with other team members, and with Laing's obligations but that there were no clashes. Mr Celetka was of the opinion that Laing's performances in regard to scoping were those that reasonably could be expected of a competent Construction Manager on a Project of similar size and complexity at the time.

235. From cross-examination it is clear that the differences between Mr Wylie and Mr Celetka as to scoping were essentially of emphasis rather than real substance.

236. The scope of the packages comprised in a particular Trade Contract Package is clearly the responsibility of the Construction Manager. Whilst others may have the initial responsibility to design and provide the contents, the ultimate obligation to make sure the Trade Package is workable and complete is that of the Construction Manager, who is there to safeguard the position of the Employer. Thus, as in this case, the Construction Manager may split an existing package and redefine its bounds as Laing did by severing the scaffolding and temporary roofing from the demolition part of the original package.

237. Mr Wylie has identified in relation to many of the Trade Contracts a large number of instances in which many of the Construction Managers instructions (CMIs) had to be issued after Trade Packages had been let in order to instruct work to be carried out as a variation, which the Claimant contends should have been included within the original Trade Package tender documentation.

Mr Celetka does not deal with the individual Construction Manager instructions.

238. Mr Ian Wishart the Defendants' quantum expert, an expert of great experience in his field, which includes procurement on large and complex projects has considered many of the CMIs. He is not an expert in the field of Construction Management, and did not purport to analyse the CMIs as would an expert in that field, and consider whether or not if an element was missing and had to be procured by variation or the like, it was because the Construction Manager failed to take all reasonable steps to see that the work was included. I did not for this reason find Mr Wishart's evidence as to these issues of great assistance. The only evidence that remains, and which stands uncontradicted is that of Mr Wylie the Claimants' Construction Management expert.

239. Mr Colin Reese QC on behalf of the Defendants accepts that to be the case, but contends that there is no evidence of fact produced by GEH in relation to the CMIs. He observes that Mr Wylie the Construction Management expert had no direct knowledge that the works were performed, neither had Mr Brewer the quantum expert called by the Claimants, or Mr Wishart the Defendants' quantity expert. He submits that:-
"The Civil Procedure Rules state in the overriding objective that the court should have regard to the matters at stake in considering the most appropriate way to achieve cost effective administration of justice. The Trade Contract Packages are not something that could be said to be of insignificant value such that GEH are justified in pursing significant sums on one hand, yet advancing no evidential basis for these claims and electing not to spend Court time at the trial to explore the issues."

I understand his submission to be that the Court is not entitled to place any reliance upon the content of the CMIs.

He is right that the starting point should be the Civil Procedure Rules objectives.

240. CPR 1.2 provides that the Court must seek to give effect to the overriding objectives when it a) exercises any power given to it by the rules or b) interprets any rules.

241. CPR 1.3 reminds the parties of their duty to help the Court to further the overriding objectives.

242. No CPR Part 32.19 Notice has been served in this case requiring formal proof of the many thousands of documents put in evidence following comprehensive disclosure by the parties including the CMIs which are the Defendants documents. They are clearly admissible as documents not needing any formal proof.

243. They comprise the instructions given to the Trade Contractors by the Defendants acting as Construction Manager under the CMA. The Defendants had a duty under the Agreement to record the CMIs in writing accurately and timeously. Copies of them were distributed by the Defendant to members of the professional team, and they have been in the possession of both parties as they originated. Various witnesses have made reference to the CMIs and the contents of the instructions including Mr Parry and Mr Monaghan and Mr Manser. The CMIs are clearly by documents falling within Section 4(1) of the Civil Evidence Act 1968 since they are records which an historian would regard as original or primary sources, which contain a contemporary record of information supplied by those with direct knowledge of the facts.

244. Mr Reese rightly observes that every fact and matter connected with the CMIs has not been canvassed before me. In a trial such as this, where as Mr Reece sagely observed its component parts alone would have given rise to a dozen or more substantial separate TCC trials, it would be surprising if such a course was pursued.

245. The trial was conducted according to a timetable agreed between the parties, and sanctioned by the Court. This was no arbitrarily guillotined trial imposed upon the parties. Thousands of documents and scores of witness statements have been the subject of reference or comment but not necessarily cross-examination. A trial which could have occupied six months was concluded in 35 working days. Inevitably, a great deal has to be read and considered, which cannot always be the subject of oral evidence. That it was accomplished in so short a time reflects the skill and self-discipline of the advocates presenting and testing the evidence, and the intensive case management throughout which incorporated the constructive contributions of both the advocates and solicitors all highly experienced in this field. Under the CPR and related Practice Directions the Court has extensive powers to case manage cases at all stages including the process of trial, and that armoury includes the powers under Part 32.

    The CMIs are deemed to have been formally proved as documents and are records that fall within Section 4(1) of the Civil Evidence Act 1968.

246. I am satisfied that they have been tendered within the Act and it is proper for me to receive them in evidence. I regard them in the context in which they were issued by the Defendants, and there after used to afford prima facie evidence that the work instructed was in fact carried out. It has not been suggested that the Defendants' CMIs are inaccurate, or that the work instructed was not in fact carried out.

247. The real issues in relation to this aspect of the case are not whether the additional works were in fact accomplished, but the value of the work done and whether any element of this is attributable to Laing's conduct as Construction Manager.

    In my judgment CMIs provide evidence as to the work therein described.

248. I found Mr Wylie to be a highly experienced Construction Management expert, with a great deal of practical experience as Construction Manager on important Projects over a period of many years. He has relevant experience also operating under similar contractual provisions as exist in the instant case.

    I found him to be a reliable and impressive witness.

249. The proven failures by Laing to fully "scope" the Trade Packages has led to GEH incurring additional losses representing some of the increased sums which had to be paid to the Trade Contractors to carry out such work by way of variation, rather than having them included in the original Trade Package. The expert evidence of Mr Wylie has established that carrying out works as variations is not as economical as carrying it out as part of the Trade Package since the element of competition is missing.

250. The Claimants have established in the following instances, firstly, that the Defendants failed to take reasonable steps to include all of the subject works in the relevant packages. Secondly, that a CMI had to be issued to enable those omitted works to be carried out, and thirdly, that the additional cost was necessarily incurred by reason of the need to instruct a variation, and fourthly, that the quantification takes account of the views of both Mr Brewer and Mr Wishart.

251. The additional work of course would have needed to be carried out and paid for in any event. What is recoverable is the element representing the enhanced cost caused by the failure to have the works carried out at the economical Trade Package rate. I accept this to be 15% of the cost of the instructed variation.

252. The practical starting point is the proven total cost attributed to the failure to adequately scope to the standard of a competent Construction Manager in the situation that confronted him in relation to this Contract.

253. The relevant CMIs are

26 1634
29 1724
59 1725
65 1726
92 1802
127 1808
130 1821
135 1880
148 1887
part of 168 1910
225 1913
228 1916
277 1917
374 1919
375 1920
399 1920
444 1931
581 2101
661 2119
665 2210
716 2453
732 2463
741 2474
864 2577
961 2682
1009 2792
1346 3448
1508 3533
1512 3676
1566 3813
4239

254. There are a number of Trade Contractors who were paid for CMI instructed works on account of work that should have been within the scope of the Trade Packages, they are as follows:-
Hunt the Demolition Contractor was paid £13,032.
Trad the Temporary Roofing and Scaffolding Contractor was paid £56,762.
Dove the Sub and Superstructure Contractor was paid £60,535.
Prater the Roofing Contractor was paid £10,213.
Joinery Plus responsible for refurbishment and replacement windows under Trade Package was paid £18,809.
Rawlson responsible for secondary steel work of staircases under a Trade Package was paid £17,335.
Baris Dry Lining and Suspended Ceiling Contractors were paid £25,402.
Keith Clarke Electrical Contractors were paid £13,897.
Swift the Carpentry and Bedroom Fit Out Trade Contractors were paid £101,712.
Jarvis Newman responsible for marble floorings through annex and fit out works were paid £51,073.

The total amount claimed by GEH is £501,677.

This represents 25% of the total amount of £2,006,708 paid out to Trade Contractors in respect of these items. I find that the appropriate mark up should instead be of 15%. The total of the works net of 25% mark up is £1,505,031.

The proper sum recoverable under this head is therefore £225,754 being 15% of £1,505,031.

CMIs and Specific Management Breaches

255. There are a number of specific management failures identified by Mr Wylie, the Claimant's Construction Management expert which are said to have caused losses to GEH.

The issues that arise are – was the additional work or service caused by the alleged breach, and secondly what is its proper value?

256. As to the first issue, there is the evidence of Mr Wylie, and as to the second, the evidence of Mr Ian Wishart the Defendants' quantum expert, and Mr Brewer the Claimants' quantum expert. In the careful review of documentation by Mr Wishart there are sometimes matters raised which warrant a closer examination of the issue of causation.

257. In relation to Trad, the temporary Scaffolding Contractor, I am satisfied that the work done and service performed, arose from the breaches identified by Mr Wylie whose evidence I accept, the work or services are identified in CMIs 234, 448, 1638 (part) 1663 (part) 555 and 2741. The total value of these I find to be £6,630. Some were paid to Rowan the Structural Steel Contractor who had abortive drawing office costs amounting to £6,275. These were properly valued in that sum and was caused by Laing's breaches.

258. In respect of Jarvis Newman the Fit Out and Floor Contractor £31,750 is claimed.

259. The £400 claim for adapting the scaffold in the main reception area is proved. It results from Laing's failure to co-ordinate the common use of scaffolding requirements. The value is made out.

260. The claim for £200 for abortive setting out time in the banqueting room is not made out. The documentation relates to the removal of asbestos.

261. I am satisfied that the claim for £1,150 relating to the bar ceiling out of tolerance by up to 19mm is proved. It results from Laing's proven failure to co-ordinate the works of the interfacing Trade Contractors.

262. The claim for the costs relating to cubicles in the club bar due to a ceiling height similarly is approved as to liability and quantum in the sum of £1,000.

263. By far the largest item is the Jarvis Newman claim under this head for £27,000 claimed as an allowance of possible variations pending proper valuation, agreement and CMI authorisation for a claim. Mr Wylie's evidence is that a competent Construction Manager would not have paid this sum, because the works were not properly analysed and therefore not identified and authorised. Laing did not operate the monthly interim statement of account system as required by the CMI, and Mr Wylie's view is that a competent Construction Manager should have done so.

In consequence it is argued that because they did not follow the agreement procedure, GEH have suffered "commercial exposure".

The sum became subsumed within the final account commercial settlement because Laing did not deal with it otherwise.

264. I am satisfied that Laing's are proved to have been in breach of the CMA by failing to operate the agreed interim statement of account system, and thus did not contemporaneously analyse the claim. Nonetheless whilst there may have been the risk of loss characterised as "commercial exposure" I am not satisfied that the proved failure in fact caused any particular loss or damage other than perhaps a nominal loss. I reject this claim.

The claim based upon CMI 4450 is made out both as to liability and quantum in the sum of £1,000.

CMI 4634 is a claim that is made out both as to liability and quantum in the sum of £1,000.

Joinery Plus the Window Contractors were instructed under CMI 1252 to seal window voids where ties had penetrated. The sum claimed is £1,720. I am not satisfied that the expenditure relates to any proven breach. It could have arisen from a failure to co-ordinate but is not proven to have been so caused. I dismiss this claim.

T. Clarke the Electrical Contractor was instructed under CMI 3089 to undertake work connected with the commissioning of fan coil units to bedrooms, and under CMI 3219 to provide the emergency lighting for the bar grille exits. As to the former no nexus is proved between this and any alleged breach by Laing of their duties as Construction Manager. As to the latter the work appears to be a permanent works insulation instructed by the Architect, and no causal link is proved to establish any liability.

In relation to Swift £94,602 is claimed. The first item comprises a claim for £59,180 in respect of items "skipped by Laing" this formed part of a reference to an adjudicator who made an award in August 2000.

Laing's were not parties to that adjudication. They did not instruct the legal representatives who represented GEH in the adjudication. Appendix 1 of the Adjudicator's decision states:
"Item 2 Description material skipped
Comment - SSL have had no responses as to their loss letters therefore pay the full amount on account."

265. The provisional finding by an Adjudicator making a summary award under the Housing Grants Construction and Rehabilitation Act 1996 does not bind the party not privy to the contract. It has no relevance to these proceedings. There is no evidence before me that Laing did skip any materials as alleged. Neither is there any cogent evidence linking Swifts alleged loss with any breach of duty by Laing. I reject this claim.

As to CMI 1119 the provision of temporary waterproofing valued at £5,614 I am satisfied that the claim is made out both as to liability and quantum.

266. CMI 4085 of the 4th November 1999 gives rise to a claim for the costs of additional labour resources paid by Swift in the sum of £7,740. Whilst there clearly was delay to the project at this time it is not clear whether this requirement relates to an acceleration measure, because of Laing's management breach or Swifts own default. In letters written by Laing to Swift on the 22nd December 1999 the 6th January 2000 and the 10th January 2000 there are repeated complaints that Swift's under staffed the work and failed to provide resource. Mr Wylie characterises Laing's conduct as under breach/ management. The Claimants have failed to prove any breach by Laing that led to this expenditure. I dismiss the claim.

267. CMI 5011 issued on the 24th February 2000 instructs the removal of Swift materials to prevent risk of damage and delays and procuring replacement materials until the second floor accommodation becomes available. Speculatively it might be a consequence of delay but there is no evidence of a nexus between this which on the face of it is a sensible instruction, with any breach by Laing. I dismiss this claim for £10,911.

268. CMI 5060 2nd March instructed a resurvey of the East block levels and the undertaking of remedial works due to the problems caused by preceding trade. The claim is quantified at £11,157, in my judgment the necessity for this work arose from Laing's failure to check and co-ordinate the works of Swift and the preceding Trade Contractor including Baris. I am satisfied both as to liability and quantum.

269. CMI 3468 was an instruction given to Sulzer to remove and replace ductwork in order that certain voids could be filled. They should have been filled earlier and the neglect was in consequence of Laing's failure to co-ordinate and manage to the standard of a competent Construction Manager. I am satisfied that the cost is reasonable and liability and quantum are made out.

270. CMI 5475 relates to system testing work undertaken during the Easter break following the opening of the hotel. The hotel was closed over Easter on the face of it, where testing and commissioning could be intrusive for guests

271. I do not find that this testing and its consequential expense arose as a result of any breach by Laing as opposed to sensible rescheduling to accommodate guests. I dismiss this claim.

272. Prater the roofing contractors were the recipients of several CMI's contended by the claimant to reflect breaches of Laing's contract management obligations.

CMI 1672 relating to roof protection works arose from Laing's breach. I am satisfied that the sum claimed out is made and liability proved in the sum of £1,500.

CMI 1673 of 22nd January 1999 required the removal of the section of window sub-frame connected to secondary steel to enable the installation of safety eyebolts on a day work basis. The eyebolt requirement was identified in September of 1998. The work was necessary from the outset. The failure to proceed with it earlier and therefore more economically in my judgment amounts to a failure to co-ordinate the trade contractors and led to an increasing cost, I judge this to be proven in the sum of £1,090.

CMI 1787 of 19th February 1999 instructed Prater to proceed with the metal leaking and saran works to the southeast block roof and the return to the area of the atrium ring beams on the northeast block elevations. The additional cost paid to Prater was because of the activities of the trade contractor Stonwest in connection with the parapet which impeded Prater's access. I am satisfied that this was a breach of Laing's obligation to competently co-ordinate and plan the activities of the trade contractors. The quantum in my judgment is reasonable and proved.

CMI 1872 of 17th March 1999 required temporary waterproofing to level 4 southeastern gutter to afford further and adequate weather protection. I am satisfied this was in consequence of Laing's failure to properly programme these works to the standard of a competent construction manager. Liability is made out and the cost is proved in the sum of £1,500.

CMI's 3029 /4785 and 5090 were directed to Baris who were responsible for dry lining and sealing.

CMI 3029 of 18th August 1999 directed the removal of two wing walls for Prater to enable access to a smoke duct where secondary steel was to be fitted for the smoke vent. I am satisfied that Laing as a competent construction manager should have programmed this to minimise disruption and was a breach of the construction manager's obligation to competently plan and co-ordinate the work of trade contractors, the sum claimed in my judgment is proved.

CMI 4785 of 26th January 2000 relates to cutting holes at a late stage in ceilings for light fittings. CMI 5090 of 7th March relates to the reinstatement of ceilings. There is nothing on the face of threes CMI's to indicate that the cost of the work was additional or in consequence of any neglect by Laing. Mr Wylie's brief reference does not make good these deficiencies. These claims are rejected.

273. Rawlson, the structural steelwork contractor was the recipient of CMI's 1793, 2035, 2323, 2324 and 4982 which the claimant alleges were works and services made necessary by reason of the defendant's construction management breaches.

CMI 1793 was issued on 25th February 1999 and was an instruction to carry out remedial works to alter the already fitted picture frame structures in the banqueting room. There is no evidence that would warrant the conclusion that this work resulted from a breach of Laing's obligation under the CMA.

CMI 2035 issued on 21st April 1999 instructed the re-drilling and re-fixing of plates in connection with the lift shafts. This was a change to completed works caused by Laing's failure to co-ordinate the works with other trade contractors. The sum claimed is made out.

CMI 2323 issued on 11th June 1999 instructed Rawlson to recut stainless steel trim plates and to lift the already fitted mesh framework over bracketing in the east and west wings of lifts 2-6 inclusive. This was necessitated by reason of Laing's failure to co-ordinate the work of the trade contractors and the claim is proved both as to liability and amount £1,586 plus £1,240 total £2,826.

CMI 2324 issued on 11th June 1999 instructed the removal of Fujitech header angles from the lift entrances and making good. This alteration was because of an interface clash in the works of Rawlson and Fujitech which would have been avoided had Laing properly co-ordinated and planned these works as a competent construction manager would have. This claim succeeds in the sum of £1,455.

CMI 4982 of 23rd February 1999 instructs the removal of mesh panels in the atrium area and re-fixing after flooring tiling had been completed. £3,720 was paid as day works. It is not clear why this sequence was followed. No reason was advanced in limited evidence before me. It is not said to arise from a lack of co-ordination or planning although speculatively may be explained in that way. The claim fails.

Contra Charges

274. At Paragraph 28 of the Amended Particulars of Claim, the claimant pleads its case that the Defendant failed to identify and inform the Architect and Costs Consultant as soon as practicable of any sums to be contra charged against any of the Trade Contractors and to conduct jointly with the Architect, such negotiations as may be appropriate in connection with the Trade Contractor.

275. The main provisions in respect of contra charging are to be found in the Agreement as follows:

Schedule II.
Clause 2.23
"*To report immediately to the Client, the Architect and the Costs Consultant on any claim or notice of a claim that payment made by any Trade Contractor for loss and/or expense or extension of time. To identify and inform the Architect and the Cost Consultant as soon as practicable of any sums to be contra charged against any of the Trade Contractors and to conduct jointly with the Architects such negotiations as may be appropriate in connection therewith the Trade Contractor.*

Clause 2.25
In collaboration with the Architect to expedite the production by the Trade Contractors and the verification of the Trade Contractors day works and the agreement of the value thereof.

Clause 2.26
To keep proper accounts of all monies expended to Trade Contractors to provide copies of such information and document sent to or received from Trade Contractors at the same time as they are sent or received and/or other information as may be necessary to enable the Architect and the Costs Consultant to check such account and to provide copies of such information and documents sent to or received from any of the Construction Managers , sub-contractors and suppliers at the same time as they sent or received and/or such other information as may be necessary to enable the client to check accounts.

Clause 2.27
To prepare interim and final accounts for each of the Trade Contracts and provide copies of them to the Client, the Architect, Cost Consultants. To report to the Client by means of regular account settlement register and to agree the register with the Architect and the Costs Consultant. To obtain thereafter each of the Trade Contractor's agreement to the relevant interim or final statement of account as the case may be and his signature thereon. To produce a final detailed cost statement of the Project broken down into works packages showing unit costs and the total cost of the Project.

276. It is evident that records were kept detailing matters properly the subject of contra charging, and that on occasions contra charges were raised and successfully recovered as identified and accepted contemporaneously with the acts or omissions giving rise to them.

277. It is also apparent because there is no contradictory evidence that the accounting requirements of clause 2.27 requiring interim statements of accounts to be prepared were not systematically followed. From mid-1998 onwards when acceleration measures were attempted, it is easy to understand the importance of a Contract Manager striving to maintain good relations with his Trade Contractors upon whom he relies for flexibility and maximum co-operation. A competent Construction Manager in such circumstances might well seek to rely on the recorded but not enforced contra charges in a formal final settlement or commercial reckoning rather than pursuing and enforcing them as they arise.

278. Mr Monaghan, one of Laing's quantity surveyors on site during the currency of this contract lent support to the perception that Laing at all times applies a "softly softly" approach. He also described how at other times, Laing pursued the practice of discouraging contra charging by emphasising to a limited number of trade contractors, the administrative costs that would have to be borne should they pursue such charges. On other occasions, according to Mr Monahan, trade contractors were encouraged to sort out contra charging issues amongst themselves without the involvement of Laing.

279. DLE, GH's costs consultants were responsible for settling the Final Accounts of the Trade Contractors. It was the obligation of Laing's under the accounting requirements to equip them with the requisite data to take account of legitimate contra charge claims and monies due to GEH.

280. There was evidence from Mr Wylie, the claimant's construction management expert in the following terms
"I would highlight Laing's failure to implement a proper contra charging system which exposed GEH with a series of costs that should have been borne by other parties. … I also refer to the tripartite agreement of 24th June of 2000 between ECH, DLE and Laing in my previous report and in the first joint statement prepared by Mr Celetka. It remains my opinion that GEH was exposed to costs arising from final account settlement costs as a result of Laing having failed to keep adequate records and documentation and thereby preventing a proper response to the Trade Contractor Claims. Such exposure included exposure to costs which should have been recovered from other offending parties had Laing promptly followed and implemented the contra charge process".

281. Reliance was placed by Mr Wylie upon the tripartite agreement referred to in the evidence of Mr Cursley.

282. Mr Wylie's firm opinion was that Laing's neglected to operate the contra charge system and thus fell below the standard of a competent construction manager in this respect.

283. Mr Wylie noted in the course of his supplementary report "*that the electronic base of documents plus drawings and documents arising out of discovery was considerable i.e. in the region of:*
4,100 documents

10,000 drawings
5,747 construction management instructions
1,176 architects instructions

284. On the basis of that, with the assistance of Mr Brewer, GEH's quantum expert, he has concluded that contra charges to a total extent of £931,748 should have been levied against one or other of twelve trade contractors at the end of the project.

285. The Claimant contends that the contra charge regime which existed in theory was often ignored in practice and that by the end of the project it was found by the design team that many of the potential contra charges had not been levied and because adequate records were missing, it was impossible to levy them at that stage. In consequence the hotel lost the opportunity of levying the contra charges where they properly belonged.

286. Thus the case is variously put 'lost opportunity' – 'exposed to costs arising from a final settlement of the account'.

287. Mr Cursley was a contributor to the tripartite agreement. He did not accept it in its entirety. The report in its executive's summary concluded that on the basis of information received, the contributories would recommend that GEH attempt to resolve the outstanding financial issues by way of commercial negotiations to achieve the most favourable settlement.

288. He did not accept that the recommendation rested on the premise that this was because of inadequate information available to GEH and that in consequence they had a weak case to press against the trade contractors and therefore to settle on the best terms available.

289. He set out his view contemporaneously with the report in a letter containing the following passage:
"*We concur with the view that most appropriate basis of settlement of accounts is on the commercial basis if an acceptable level of settlement is achievable… however in the event that a recommendable level of settlement is not achievable by negotiation then subject to a detailed review of the performance of the trade contractors as set out above alternative resolution by reference to third parties is an option. The use of alternative resolution to accounts is in no way prevented by the level of information or records available".*

In that letter and in his evidence, he parted company with the other contributors who expressed the view that lack of information was an impediment to a merits resolution of the issues rather than the broad commercial one.

290. The absence of readily available information may have influenced pragmatic costs advisers to pursue a commercial negotiation route. I am satisfied however that the records existed and that the sort of exercise attempted by Mr Brewer and Mr Wylie could have been pursued by those in fact responsible for the final account settlement and the recovery of contra charges. There is no direct evidence from E.C. Harris.

291. In my judgment, whilst there is proof of a breach of clause 2.27 in relation to the recovery of contra charges, I am satisfied that there was sufficient information available to pursue the contra charge claims in relation to the trade contractors. It may have been that some of the data was not in the form that was readily convenient. For a variety of reasons, some good others less so, not all the trade contractors were put the strict proof of their claims and subjected to close contemporary investigation.

292. `I am satisfied that much of the contra charge information was kept in files relating to the trade contractor and that the CMI system was used as a basis of a contra charge regime where contra charge matters which were identifiable were reviewed and where practical, a CMI for that purpose was issued. This CMI data was on the computer data base and was recoverable.

293. At the end of the day the commercial judgment ultimately made was that of GEH on the advice of ECH. That advice has not been the subject of scrutiny and testing. On a final analysis it could overall demonstrate loss or indeed bonus.

294. The claimant has failed to prove that the breach of clause 2.27 and the other failures to record contra charges conveniently has caused any loss.

295. As to the decisions made at various times not to rigorously follow the black letter requirement of the contra charge provisions, I am not persuaded that they were based upon an approach and reasoning that was outside that of a competent construction manager.

296. GEH is not shown to have been compromised in relation to contra charging by reason of Laing's default. The decision to pursue the matter to a commercial settlement was that of ECH.

297. I reject this claim.

CAUSATION

298. Mr Colin Reese QC submitted that even if there were major breaches of the CMA nonetheless the Claimants should fail because they were unable to demonstrate that such breaches caused particular loss and damage.

299. As to the delay case at paragraph 179 of the Defence to the Amended Appendix V Laing pleaded:-
"*The Defendants aver that, in respect of any activity to which the Court may find Laing responsible, any concurrent delay during that same period for which Laing were not responsible should be deducted from the "culpable" delay element to end at the proper amount to delay in respect of which Laing have caused loss, that is to say been an effective cause of loss in contractual terms.*
The Defendants will rely upon normal contractual principles of loss and causation in this respect, and also upon the Society of Construction Law Delay and Disruption Protocol of October 2002 in respect of calculation of delay where there is concurrent delay. The Defendants aver that there was delay for which Laing were not responsible caused by the timing of design as follows …."

300. Then follows the setting out of examples of the provision of late design information.

301. I am satisfied that there were no other causes of critical delay, other than those caused by Laing, save as to delayed asbestos discovery and the digging of the trial pits during the project.

302. There were periods of delay relative to activities which were not critical, which in time were concurrent with periods of critical delay.

303. Mr Celekta produced a critical path analysis that exhibited three critical paths which related to milestones in the project, namely the back of house handover between the 11th and 18th October 1999, the front of house handover 14th February 2000 and the date of practical completion the 13th July.

304. In order to alleviate the effect of the delay which had occurred by December 1998 the hotel agreed to accept partial possession in three phases. The first in October 1999 was partial possession of tranche AA comprising staff kitchen, canteens, hotel administration offices, West Block finishing kitchen, Terminus Restaurant, Aurora Restaurant, restaurant reception area, club bar, and associated M and E systems, and plant rooms.

305. The second phase in mid-February 2000 gave partial possession of the front of house areas including main reception, public toilets, staircases etc. Thereafter progressive handover of bedrooms occurred although some bedrooms then had to be handed back to Laing in order to carry out remedial work.

306. The last phase comprised the handover of the remainder of the Works principally bedrooms and bathrooms.

307. Mr Celekta carefully constructed three critical paths starting at the beginning of the project in July 1997 when the milestone dates did not exist. At best they are theoretical constructs identified retrospectively once the project was completed.

308. These are not paths which were identified by either party during the project itself.

309. His theory that the second critical path did not run through the Infill Block collided with reality on site, as was clearly evidenced in documentary and photographic evidence made available to him which he chose to ignore. Sadly in seeking to justify his erroneous analysis, he invented the concept of a waterproof working platform protecting the critical works below, but when confronted by contradictory photographs in cross examination he had to abandon his theory. By the following day, he was driven to deny that he had ever asserted his theory.

310. Mr Colin Reese QC submitted that "The retrospective delay analysis carried out on the overall construction programme MP/1 entirely ignores any and all existing concurrent causes of delay and/or other factors affecting other activities which might have caused delay to completion if, hypothetically, each of the identified critical activities had in fact been completed within the originally programmed programming".

311. Mr Reese is in error. Whilst the delay analysis carried out by Mr France concentrated on critical delay he did in fact separately and comprehensively consider all other activities which might have caused delay to completion if each of the identified critical activities had been completed within the originally programmed period, and concluded that none were in fact critical. Mr Celekta's so called concurrent causes to delay were not established. His evidence, the foundation of this submission was rejected.

312. Mr Reese went on to submit that:-
"If it is established that some breach or breaches of the CMA on Laing's part caused delay to an identified critical path, of itself that cannot establish the necessary causal link …."

313. He cited in support of his proposition Galoo Limited v. Bright Grahame Murray [1995] 1 All Eng 16 and the dicta of Glidewell LJ at page 25 paragraph L et seq and Quin v. Burch Brothers (Builders) Limited [1968] 2 All Eng 283 and the Australian case Alexander v. Cambridge Credit Corporation [1987] 9 NSWLR at p310. These were cases where courts considering the consequences of breach were careful to distinguish between the consequence of merely giving rise to the opportunity or occasion of loss as opposed to causing it.

314. On the question of causation, the law is conveniently set out in Chitty on Contracts (29th Edition) at volume 1 at paragraph
"The courts avoided laying down any formal test for causation; they have relied on commonsense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of the Claimant's loss. The answer to whether the breach was the cause of the loss, or merely the occasion for loss must in the end depend on the court's commonsense in interpreting the facts".

315. If a breach of contract is one of the causes both co-operating and of equal efficiency in causing loss to the Claimant the party responsible for breach is liable to the Claimant for that loss. The contract breaker is liable for as long as his breach was an "effective cause" of his loss. See **Heskell v. Continental Express Limited** [1995] 1 All Eng 1033 at page 1047A. The Court need not choose which cause was the more effective. The approach of Devlin J in **Heskell** was adopted by Steyn J (as he then was) in **Banque Keyser SA v. Skandia** [1991] QB page 668 at page 717 and accepted by the Court of Appeal see page 813A to 814C.

316. Each claim or group of claims must be examined on their own facts and in the context of the specific contractual provisions such as variations which may give rise to a consideration of the comparative potency of causal events and to apportionment. In the absence of such provision the appropriate test is that if GEH prove that Laing were in breach and the proven breach materially contributed to the loss then it can recover the whole loss, even if there is another effective contributory cause provided that there is no double recovery.

317. This approach connotes no injustice, because the Defendant who pays is protected, because it was open to him to seek contribution from any other contract breaker.

318. As to category one losses, the delay losses there were no other critical causes of delay. Such losses as may be proved are thus wholly the responsibility of Laing. They comprise the net revenue lost by virtue of the delay in opening the hotel available for business as a profitable revenue earning business on the completion date agreed.

319. The Claimants also seek to recover from Laing the acceleration costs expended during the project.

320. They were expended on the basis of advice given by Laing as Contract Managers who represented that if such expenditure was made the revised completion dates set out in the Strategy to Completion of the 30th June 1998 and the programme Consum 3 the 8th December 1998 the revised dates would be achieved. That advice was wrong because it was based on the deliberate misreporting of the actual state of delay, and it was evident to Laing's planners and senior personnel that the programme put forward was not capable of achieving the dates. There is internal documentary evidence to show that Mr Parry and his colleagues at the time of giving advice knew this to be the case.

321. The advice to spend more money on the project to achieve acceleration was bad advice clearly in breach of the CMA obligations and in part driven by Laing for self-interest.

322. Laing had a professional obligation under the CMA to protect their client, by giving objective advice based on all known facts. They were in breach of that obligation, and thereby encouraged their client to throw good money after bad. GEH were advised by Laing to authorise and pay for a series of Strategy to Complete

proposals which did not in fact work and the project was not significantly accelerated at all. Laing argue that the claim for acceleration costs must fail, because the payments made to bring about the accelerations measures were not wasted at all. There is no factual basis for that submission. However even if some acceleration could be demonstrated, it follows that the delays to completion would have been greater, and thus Laing's liability for costs consequent on such delays correspondingly larger in the absence of acceleration. Any acceleration measures even if partially successful, were clearly measures adopted in order to mitigate GEH's losses and as such the cost of such measures are recoverable from the contract breaker, see Lloyds and Scottish Finance Limited v. Modern Cars and Caravans [1966] 1 QB 764 at page 782.

323. The following allowable costs paid to the Trade Contractors are recoverable

Trad	50,224
Dove	36,040
Rowen	27,862
Swift	146,381
Baris	274,163
Sulzer	567,500
T. Clarke	676,665
Prater	37,084
Joinery Plus	18,583
Rawlson	23,810
Jarvis Newman	486,000
=	2,344,312

324. The sums paid to the contractors in respect of delay and disruption claims directly flow from the fact that the project was delayed from the start, and as a result of those delays virtually all of the Trade Contractors spent longer on the site than had been envisaged on the original programme MP/1.

325. The claims made by trade contractors were largely global, the trade contractors were not asked to produce a delay and disruption analysis or any significant further documentation. Because of the way in which the claims were settled, it is largely impossible to provide a precise breakdown of the sums paid to the Trade Contractors that were considered by Laing at the time to be appropriate.

326. Mr Mitchell who was principally responsible for recommending payments to the major Trade Contractors on account of their claims for delay and disruption, stated on day 22 in his evidence that he recommended payment to Trade Contractors on two bases. First if they could show that they had been delayed or disrupted by delays caused to the project as a whole, and secondly if there were delays resulting from late instructions, and lack of information. Where he found the case made out on either of these grounds he recommended payments without seeking to separately identify the payments falling under each head. He gave evidence and I accept that he was careful to exclude from his consideration losses resulting from the Trade Contractors own default or any other ground for which the Employer was not responsible.

327. The quantum experts Mr Brewer and Mr Wishart have been able to identify and agree the sums actually paid to Trade Contractors in respect of prolongation, delay and disruption claims, and have related them in respect of each Trade contractor to heads of claim under which the sums had been paid.

328. Mr Wishart on behalf of the Defendant, made complaint that there was an absence of contemporary analysis or retrospective analysis, and he adopted the same robust approach in giving his expert evidence as he would have adopted had he been the Project Quantity Surveyor valuing certificates for payments and ascertaining sums due, thus valuing the claim at nil. Such an approach inevitably would prompt better particularisation of

a claim. I am told that Mr Brewer and Mr Wishart have now agreed that there is sufficient material available, and that if they were directed to do so they could reach firm views as to the proportions of the global settlements made with Trade Contractors under this head which were the responsibility of Laing, and those not. It seems to me that such an apportionment would be on a more informed basis than if the Court at this stage attempted that exercise on the present evidence and I so direct.

329. I am satisfied that the Trade Contractor accounts are global claims, and if such a claim is to succeed, GEH must eliminate from the causes of the loss and expense element all matters which are not the responsibility of Laing. That requirement is mitigated in this case, because it is possible to identify a causal link between particular events for which Laing was responsible, and the individual items of loss.

330. Such analysis was approved in the Court of Session Inner House in **John Doyle Construction Limited v. Laing Management (Scotland) Limited** Times Law Reports 18th June 2004.

331. I am satisfied on the basis of Mr Mitchell's evidence that the dominant cause of Trade Contractor delay was in fact the delay to the project caused by Laing's proven breaches.

332. The amounts paid out to the Trade Contractors that the experts have expressed themselves able to apportion are:

Hunt	110,360
Dove	216,759
Rowen	55,118
Swift	796,494
Baris	346,145
Sulzer	713,758
T. Clarke	657,806
Prater	276,189
Joinery Plus	310,000
Jarvis Newman	287,000
Rawlson	480
=	3,770,109

333. **Loss of profit claim**

333. The hotel was finished late and as a result of the late completion GEH lost substantial profits. Practical completion was not certified until 13th July 2000, a delay of 49½ weeks. The loss of profit claim ends on the 1st June 2000, taking account of GEH's case that six weeks delay was not caused by Laing.

334. As to delay and causation GEH have wholly proved their case. The expert relied upon by the Claimant in relation to the loss of profit claim is Mr Nicholas van Marken a partner in DeLoitte and Touche whose expertise is in corporate finance in relation to hospitality and leisure industries. He is not formally qualified as an accountant, but has considerable technical backup in his firm. He has a very wide international experience in hotel planning development and operations. There were two reports from him and he gave oral evidence before me.

335. Mr Anthony Levitt was the expert called on behalf of the Defendants. He also gave two reports and oral evidence. Mr Levitt is an accountant employed by RGC Forensic Accountants. He has wide experience acting for hotel clients and is familiar with issues of costing, profitability and development.

336. The reports of both experts condescended into very great detail, and indicate the great deal of industry and research undertaken by both of them to produce their reports. There is a measure of agreement between them, and their assistance has reduced the number of outstanding issues left for resolution by the Court.

337. Both experts proceeded on the sensible basis of looking at the hotel's actual trading and profit figures for the period August 2000 to 1st June 2001, and then adjusting those figure in order to arrive at an opinion as to what the performance would have been in the "missed" period of the 2nd August 1999 to the 1st June 2000. (This has the obvious benefit in that the experts have been enabled to should they wish use figures for the same hotel and management in calculating loss profit).

338. The difference between Mr van Marken's view that the delay caused a loss in the order of £5.769m, and Mr Levitt's that it was between £2.5m and £3.827m, is based upon three remaining issues of difference between them. The issues about which they differ are the date upon which the hotel would have been open for business; the degree to which the hotel's revenue would have been increased or "ramped up" in the five month period after opening; and finally which room rates would have been charged by the hotel during the delay period.

339. It is agreed that the monthly profit the hotel was expected make was about £1m per month. I am satisfied on the evidence of Mr Nicholas Rettie the General Manager of the hotel that the Claimants would have opened the hotel as soon as practically possible after it was handed over. The contemporary documentation makes it clear that an immediate opening was always intended.

340. The hotel was in fact handed over in phased parts and these parts handed over immediately opened for business.

341. Mr Levitt was indecisive when expressing his final views as to when the hotel would have opened after handover, and expressed assessments between one and three months. He eventually agreed that one month would have been the measure of delay between handover and opening. Mr van Marken was consistent in his views throughout as to one month, and in my judgment was wholly realistic. Mr Rettie gave evidence as to the careful recruitment of key and other personnel, and the training and progress of commissioning to achieve an early trading start. I am satisfied that the opening would have been as soon as possible after handover, and that one month thereafter would have been achievable and accorded with good commercial sense in view of the large sums invested in the project.

342. That timescale accorded with the experience of Mr van Marken and he expressed the opinion that a month for opening a hotel of the scale of The Great Eastern Hotel with its food and beverage outlets would be enough without upsetting any of the customers. It was more than enough time to prepare.

343. The profits properly claimed, relate to the period the period the 13th August 1999 to the 1st June 2000, 39½ weeks.

Ramp up

344. The second key issue between the experts is the extent to which The Great Eastern Hotel would have immediately begun to generate custom and revenue, as opposed to building up such custom over a period of time. This is important because the figures used the basis of calculating lost profit are taken from the period August 2000 to the 1st June 2001 when the hotel had a chance to become established.

345. Mr Levitt's view was that the hotel would have taken a substantial period of four months to "ramp up" its revenue and that, as a result the trading figures for August 2000 to 1st June 2001 as a guide to losses have to be very significantly discounted. He based that view largely on the premise that such ramp up is inevitable for any business commencing from a standing start. Any increase is due to such reasons as the greater awareness of the product by customers and booking agents, repeat business from satisfied customers, and the effect of word of mouth recommendations.

346. Mr van Marken accepted that some ramp up would have occurred. To ascertain the extent of such ramp up he analysed the specific circumstances of The Great Eastern Hotel together with other similar Conran operated restaurants. He observed that it was a matter of record that as parts of the hotel opened they became very busy and immediately generated revenue substantially above Mr Levitt's figures. He concluded that the degree of ramp up was very small if non existent. He also noted that he observed the model was fairly typical of Conran operated businesses. He concluded that in relation to the Great Eastern Hotel the ramp up in 1999 to 2000 would have been small, and would have been specific to some areas of the business. The discount he has applied to the 2000 to 2001 figures is therefore significantly smaller than that applied by Mr Levitt.

347. The difference between the two experts as to the degree of discount reflecting ramp up is valued at £2-2.4m.

348. Mr Levitt maintained there would have been a ramp up in respect of room revenues for the first five months of occupancy and in respect of restaurant revenue for the first four months. Mr van Marken on the other hand maintained that there would have been no ramp up at all in respect of the rooms, and only small ramp up in respect of two of the restaurants.

349. Mr Levitt uses the period March to July 2000 inclusive. The room revenue for each month is compared with the room revenues for 2001 and then the revenues are compared in percentage terms. Thus the revenue in March 2000 is expressed as 26% of the March 2001 revenue. The August 2000 revenues are shown to exceed the August 2001 revenues.

350. Mr Levitt expresses the opinion that had the hotel opened on the 2nd August with all its rooms available, it would have suffered the same percentage of reduced revenue as it suffered in March 2000 when rooms started to be let. Because of the phased handover, in March 2000, there were only 81 rooms available to sell. This gradually increased to 108 rooms in April 2000, 133 in May 2000, 172 in June 2000, and 199 in July 2000. Mr Levitt's conclusion is based on the assumption that if in March 2000 there were 257 rooms to sell as there were in March 2001, only 81 would have been sold.

351. In fact the room occupancy for March 2001 was 85% and in succeeding months it varied between 73% and 85% despite the increased availability of rooms to sell.

352. Mr van Marken was of the opinion that had all the rooms been available to be sold in August 1999 the same percentage of rooms would have been sold as sold 12 months later in August 2000, namely, 73%.

353. It is demonstrated that the hotel managed to sell between 73% and 85% of all its available rooms when in fact it opened in March 2000. There is no basis to conclude that had all 257 rooms been available in August 1999, the same percentage of occupancy of 73% would not have been achieved as was achieved in August 2000. There is no evidence of ramp up in respect of room revenue, in fact the reverse is the case since the percentage figures for occupancy in March to June 2001 are lower than in March 2000 when the hotel opened. Far from there being a ramp up the occupancy percentage figures declined due to the current market factors.

354. Mr Levitt's conclusions as to ramp up in the first five months of the hotel's occupation are based upon a flawed approach since it does not compare like with like, 81 rooms comprising part of an incompletely opened hotel as opposed to 257 rooms with complete hotel facilities backing up the residential occupation.

355. The percentage occupancy comparison in my judgment is the more accurate measure. Applied it demonstrates no ramp up in fact. I accept Mr van Marken's evidence.

356. In relation to the question of ramp up of revenue from the seven bars and restaurants there is a smaller area of disagreement between the experts.

357. Mr van Marken considers that there would have been ramp up in respect of two restaurants only, namely the Fish Market and Miyabi.

358. In respect of the others, there was a gradual increase in revenue. His view was that this reflected the fact that the restaurants opened in November 1999 when there were no rooms available to be sold until March 2000. Thus there was no captive clientele for the restaurants. Mr Levitt did not take this point into account in his report. In his evidence he was not prepared to countenance that room users would even breakfast at the hotel and thereby contribute in some small part to restaurant revenue. That view in my judgment was unrealistic.

359. Mr van Marken's figure of £53,000 in my judgment over estimates the potential contribution of the hotel guests to the restaurant revenues.

360. The proper figure in my judgment in respect of restaurant ramp up is £160,000, that figure should be discounted from the assessed profits.

361. The third issue between the experts is the fundamental one as to what room rates would have been achieved by the hotel during the delay period. The issue arises because the figures used as the basis of calculating lost profit are taken from the period August 2000 to the 1st June 2001. By the end of this period the rates being charged by the hotel had stabilised and the period of any introductory rates had ceased. The question is as to

whether the rates actually charged would have been at 2000 to 2001 levels or whether lower rates would have been charged?

362. The experts have applied two completely different methodologies in order to ascertain how rates might have changed over the delay period.

363. Mr van Marken on behalf of the Claimants produced a "implied hotel performance" as a guide to rates over the relevant delay period.

364. Using the hotel's own data and that for the market he observed the relationship between the hotel's monthly trading performance and that of the market for the month of October 2000 to May 2001. He then applied that relationship to market performance for the year October 1999 to May 2000 producing "an implied hotel performance" during the delay period. His analysis compared this implied performance with the hotel's reported performance over October 2000 to May 2001, to consider whether any further adjustments to room revenue would be appropriate.

365. Both experts accepted that market conditions were broadly the same over the two periods under review. Mr van Marken legitimately considered it reasonable to assume that the hotel's relationship with the market would also be broadly similar. The impact of reported monthly market performance on potential hotel performance during the alleged delay period is taken account of in his analysis.

366. Hotels do not operate independent of the market, but are strongly influenced by market conditions. Figures for a period in one year even if it is a basis for assessing lost revenue in a former year, must reflect the market conditions in each year and take account of such features as inflation, if they are to be considered a reliable guide.

367. Mr van Marken's chosen route was to measure the hotel's performance in the period of comparison by using the Revenue Generated Index (RGI) which measures market share on the basis of Revenue per available room (Rev PAR) Mr Levitt and Mr van Marken as part of their researches commissioned market data from two well known firms of international accountants, and from these Mr van Marken has calculated a weighted average Rev PAR market figure month by month, and using the actual monthly figures of revenue generated by the hotel has calculated an individual hotel Rev PAR figure. If the hotel actually achieved a Rev PAR of £164 per room, and the market Rev PAR achieved £181 based on weighted average, the RGI figure is £164 over £181 namely 91%. Mr Levitt's approach to ascertaining what the rates would have been charged by the hotel during 1999 to 2000 is set out clearly in his report:-

"Based on the information that was disclosed by the Claimant for room rate increases, I calculated the increase in prices for rack rate (i.e. the full listed tariff) and the preferential travel consortia rate (i.e. a preferred corporate rate) between the years 2000 and 2001.

The rates varied between the types of room for each of these categories and so I have used a weighted average based on the relative number of rooms, to calculate an increase in rack rate between 2000 and 2001, of 6%, and an increase in preferential travel consortia rate, of 6.8% I then calculated the average of these increases being 6.4%."

368. By this percentage he justified a reduction in the estimated revenue generated by the rooms for each month of the claim period.

369. The achieved rates often substantially differ from those published, it does not follow that an increase in desired rates means an automatic increase in the overall rates achieved by the hotel.

370. I am satisfied that the actual achieved rates for 2000 to 2001 were in fact lower than the desired rack or consortia rates, and that the 6.4% adjustment is not justifiable.

371. Mr Levitt accepted in evidence that he had only considered two of the rates that were published namely, the rack and corporate rates and could not explain why a further 11 other rates on offer were not taken account of.

372. Mr van Marken's evidence took account of the hotel's complete performance in terms of the occupancy and room revenue generation actually achieved. It was not a theoretical exercise. He says in his report that Rev PAC is the most widely used performance measure in the hotel industry as it incorporates the impact of volume, occupancy, price and average room rate.

373. Mr Levitt did not take issue with this assertion.

374. The weighted market Rev PAR takes account of all matters built into pricing, and where appropriate, I am satisfied such factors as inflation are reflected. In my judgment the most accurate method of assessing the cost of room revenue was that followed by Mr van Marken whose evidence I accept as being reliable and carefully researched in preference to the more theoretical approach of Mr Levitt.

375. **Professional Fees/Miscellaneous costs**
Appendix 7 of the Re-Amended Particulars of Claim sets out GEH claim for additional fees paid to the professional team as a result of Laings breaches.

376. E.C.Harris were paid on a time charge fee basis with expenses. In consequence of the prolongation to the project additional charges based on time and expenses were paid to E.C.Harris for the period to 16 April 2000. I am satisfied that £193,872 became payable to E.C.Harris by reason of the culpable delay caused by Laing. The fees cover the period 2 August 1999 to 16 April 2000.

373. In respect of Davis Langdon Everest the GEH costs consultants £659,739 is claimed. The agreement relied upon is not a time based contract as is the E.C.Harris agreement. The lump sum originally agreed was before the precise extent of services was agreed. Mr Reese submits that £98,000 of this clearly refers to payment for increased works due to tender prolongation for which Laing cannot be blamed. That submission is clearly right, indeed GEH have not sought to criticise Laing in this respect. It is surprising therefore to see such a large element of this claim being supported in evidence by Mr Chester GEH's "point of contact with the Professional team" when he asserted that the entire payment was because of Laing's failings.

374. .Mr Chester was cast in a difficult role in relation to these claims. He was endeavouring to make good the absence of direct evidence from some members of the professional team notable for their absence.

375. I accept his evidence that payments totalling £659,739 were paid by GEH to DLE. The issue that I have to decide on the evidence is why they were paid. There is pleaded a number of items of correspondence in a negotiation between E.C.Harris and DLE. No one from either body has been produced to assist the Court as to their proper significance and content. It seems to me therefore that the Court should exercise a degree of caution in examining these claims. Given the extensive proved and culpable delay there is a strong inference that some of the additional fees paid were causally attributable to Laings' breaches. The claimants nonetheless have the obligation of demonstrating how much. The answer given by Mr Chester in cross examination on day 11 epitomises GEH difficulty in relying upon the negotiating correspondence between DLE and ECH, when Mr Chester was being asked about part of DLE's claim letter for additional fees 16 June 1998.
" As far as your evidence is concerned, I suggest to you that although DL & E do make some criticism of Laing, for example, p.110 they say the quality of Laing's resource and their contractual approach rather than a construction management approach draws in more of our resources. They certainly do not elevate it in this letter to being the predominant or only reason for the vast increase they are seeking in fees, do they? Answer. No, my Lord, the letter speaks for itself in that regard. That is correct."

376. Mr Rettie the Managing Director GEH gave evidence before me confirming the fact that additional payments made to the professional team and produced the invoices endorsed 'paid' in his hand and that of Mr Chester. Throughout I found him to be a reliable and careful witness as to the matters he gave evidence upon. I refer to my observations supra in paras 238 et seq.

377. No CPR p1 32.19 notices have been served in respect of these invoices, however the circumstances relating to these documents are different to those obtaining in relation to the CMIs.

378. Objection was taken to Mr Rettie's evidence as contained in his fifth statement. Mr Rettie was not in a position to give any first hand evidence as to the extent to which the recorded claims were justified wholly or in part. The fact of payment is established, the assertion of DLE's belief as to entitlement is recorded and the untested opinion of ECH supporting the payment may be inferred whether based on strict entitlement or considered a reasonable commercial settlement of a claim.

379. The weight of evidence is slight. The principal actors who presumably have direct knowledge of the causal justification for such payments were not called to give evidence of it. Mr Chester in fact states that ECH did have some knowledge when he admitted on DAY 11 that when deciding on the amount of fees for which Laing was responsible " I took advice from E.C.Harris as project managers".

380. I accept Mr Reese's submission that " it is entirely unsatisfactory for a witness such as Mr Chester to give second hand evidence of a hearsay nature of this type.." This is particularly so when questions as to the reasonableness of the sum paid as well as strict entitlement arise.

381. However there is evidence of some weight before me in relation to this claim. I am satisfied having considered all of the evidence as to scoping and other causes of delay that ? of the total claimed was wholly attributable to Laings culpable delay, and to that limited extent GEH's claim for the additional fees paid to DLE succeeds. £219,900.

382. In relation to the Architects Manser £137,500 was paid additionally. GEH say that this was by reason of the prolongation caused by Laing and that the sum was paid as a result of the proven delays to the project. Manser were entitled to a fixed fee under clause 6 of the Architects Appointment 30th April 1998.

383. 19th November 1998 Manser sought additional fees of £55,000 for prolongation to the project and compression of work. They sought an increase in the monthly fee from £14,000 to £25,000 for 5 months, namely an additional £55,000. The were paid £50,000. On 3rd November 1999 Manser claimed a further £92,000. On 3rd November 1999 an offer of a final adjustment of £68,000 through to the completion of the project was made by GEH and accepted by Manser on the basis that it would continue to the end of February 2000. It was subsequently recognised that from March onwards the continued and necessary involvement of Manser should be remunerated at the rate of £13,000 per month until mid June. From 14 June until 14 September a £10,000 fee was agreed and from 1 August until October an hourly rate was agreed. From 1st August 2000 to October 2001 Manser were paid an additional £33,091.

384. GEH case is that Mansers involvement which should have tapered off towards the intended end of the project did not in consequence of Laings breaches, and in addition there were the additional costs reflecting their additional presence on site.

385. Mr Reese submits in relation to Manser's fees:-

> 7.16 As a single example regarding MA, the uplift sought by MA in November 1998 was both for prolongation and "compression" of work; G14/233. In other words (and interpretation is perhaps required due to the strained language used) the fact that the project was taking longer was requiring further resources to deal with the fact that work was spread over a longer duration on the one hand, but also work was having to be done in shorter durations on the other. The fact that the Claimant chose to pay MA extra fees (and Jonathan Manser was personally known to Robert Breare, having been at University with him and introduced the project to him; Day 5/2/lines 35-50) does not mean that they can be reclaimed from the Defendants.

386. By that I understand Laings to be submitting that there was no contractual entitlement to additional payment during the currency of the original project dates. It is evident that Manser's appointment was a perfectly regular commercial arrangement and conducted at arms length. For services in relation to those payments after the original project completion date I am satisfied that they were both reasonable and the additional services were a result of Laings culpable delay.

387. The claim for 5 months delay period is made out in a sum not exceeding £137,500.

388. There is no proven basis for any additional fee entitlement or for making additional payments on any reasonable commercial basis. The enhanced fees post completion date adequately reflect the deployment of greater resource.

389. GEH paid the M&E consultants Upton McGoughan (UMG) an additional £88,545 over and above the lump sum agreed for the project of £750,000 under the Engineering Services Agreement.

390. They had claimed £410,000. The project Architect recognised a problem with this member of the professional team

> *"…….there was a problem…….primarily based on the fact that their the process of disintegration and that had an impact on their production……"*

391. It is evident that part of the strategy to keep UMG performing was the provision of a resident engineer and extra money. It has not been convincingly demonstrated that any of the monies paid to UMG can properly be characterised as prolongation costs, and in consequence of any culpable breaches by Laing.

392. UMG's stance was exemplified in a letter 24 April 1998 when £350,000 in extra fees was being claimed, not stated to be by reason of prolongation but because:-
"This effort has primarily been as a result of our having to prepare and issue Tender Design Drawings and Specifications for the M&E Services, in advance of agreed building layouts having been agreed and provided to us"

393. Extra money was paid to UMG by GEH but not of £220,000 as GEH implicitly accept that only £88,545 could possibly be attributable to additional services and only then on a dubious time rate basis.

394. Mr Chester is the witness supporting the claim for reimbursement of UMG payments. Through no fault of his he is not in a position to offer any credible first hand evidence as to UMG entitlement, or to the reasonableness of this payment in commercial terms.

395. It seems more likely than not, that UPM arrangement was, as Mr Reece submits predominantly a lump sum arrangement and not based on any time basis.

396. I reject this aspect of the claim for professional fees.

397. **Miscellaneous costs claimed as a result of delay**

398. These costs are pleaded in the Amended Particulars of Claim and cumulatively are substantial namely £171,400. They comprise the costs of relocating guests, providing alternative gymnasium facilities, additional costs of security stemming from phased handouts of parts of the hotel facilities and storage of furniture and equipment pending completion.

399. Mr Nicholas Rettie the managing director of GEH gave comprehensive evidence as to the need, costs and disbursements in relation to these individual claims. I am satisfied that his evidence was reliable and accurate and I find each of the claims proved both as to liability and quantum.

The form of the final money judgement appropriate is a matter that I will hear counsel on, in the light of their quantum experts final advice as to the matters referred to them by the Court.

Health and Safety Plan prepared by Mace

Mr Richard Fernyhough QC and Mr Sean Brannigan (instructed by Fenwick Elliott) for the Claimant

Mr Colin Reese QC and Mr Peter Fraser (instructed by Rosling King) for the Defendants