



Project Management

The Liability and Standards Expected of a Project Manager

by Nicholas Gould

Introduction

The services offered by Project Managers (PMs) vary considerably, as do the qualifications and experience of the people putting themselves forward for this role. There is no defined group of services for them to undertake and only a limited number of standard form contracts for their performance.

The qualifications and experience of people practising as PM may stem from the professional side of the construction industry, as in Architects, Quantity Surveyors or Engineers, or may emanate from the contracting side, such as in the management teams of major main contractors.

The package of services offered may include providing, through others, all the design and consultancy services required for the project, with or without co-ordinating or chasing up the administration and supervision of any relevant construction main or sub-contract(s). In other cases, a PM may simply exist as an additional tier of advice and administration between the Architect/Engineer on one hand and the Employer on the other, in other words act as the Employer's agent in all contractual matters, sometimes including the engagement and briefing of the Architect, the Quantity Surveyor and other consultants.

The role and services of a Project Manager

The Chartered Institute of Builders has produced a Code of Practice for Project Management for Construction and Development. The definition of project management in the 2002 third edition is worth comparing to the 2010 fourth edition. The third edition stated:

"Project management is the professional discipline which separates the management function of a project from the design and execution functions".

The fourth edition states that project management is:

"...an established discipline which executively manages the full development process, from the client's idea to funding, co-ordination and acquirement of planning and statutory controls, approvals, sustainability, design delivery, through to the selection of procurement of the project team, construction, commissioning, handover review, to facilities management co-ordination".

The project management role has, therefore, really evolved into a more complex and wide ranging professional role.

According to the Code of Practice for Project Management for Construction and Development, published by Blackwell Publishing (3rd Edition):-

"The Project Manager, both acting on behalf of, and representing, the client, has the duty of providing a cost-effective and independent service, selecting, correlating, integrating and

managing different disciplines and expertise, to satisfy the objectives and provisions of the project brief from inception to completion. The service provided must be to the client's satisfaction, safeguard his interests at all times, and, where possible, give consideration to the needs of the eventual user of the facility."

"The key role of the Project Manager is to motivate, manage, co-ordinate and maintain the morale of the whole project team. This leadership function is essentially about managing people and its importance cannot be overstated. A familiarity with all the other tools and techniques of project management will not compensate for shortcomings in this vital area. In dealing with the project team, the project manager has an obligation to recognise and respect the professional codes of the other disciplines and, in particular, the responsibilities of all disciplines to society, the environment and each other..."

It is essential that, in ensuring an effective and cost-conscious service, the project should be under the direction and control of a competent practitioner with a proven project management track record usually developed from a construction industry – related professional discipline. This person is designated the Project Manager and is to be appointed by the Client with full responsibility for the project. Having delegated powers at inception, the Project Manager will exercise, in the closest association with the project team, an executive role throughout the project..."

The duties of a Project Manager will vary depending on the Client's expertise and requirements, the nature of the project, the timing of the appointment and similar factors. If the Client is inexperienced in construction the Project Manager may be required to develop his or her own brief. Whatever the Project Manager's specific duties in relation to the various stages of a project are, there is the continuous duty of exercising control of project time, cost and performance. Such control is achieved through forward thinking and the provision of good information as the basis for decisions for both the Project Manager and the Client."

The RICS schedule of project management services can be used with the RICS standard form of consultant's appointment and the RICS short form of consultants appointment. This is basically a schedule of services with a series of tick boxes. The Code of Practice includes a matrix correlating suggested project management duties and the client's requirements, and goes on to say as follows:-

"The skills a Project Manager will use during the course of a project will include:-

- Communication:- using all means, the foremost skill.
- Organising:- using systems and good management techniques.
- Planning:- via accurate forecasting and scheduling.
- Co-ordination:- by liaising, harmonising and understanding.
- Controlling:- via monitoring and response techniques.
- Leadership:- by example.
- Delegation:- through trust.
- Negotiation:- by reason.
- Motivation:- through appropriate incentives.
- Initiative:- by performance.
- Judgment:- through experience and intellect"

The specific activities to be undertaken by the PM should of course be set out in his/her appointment in each case. They may include reviewing, and in some cases developing, the detailed project brief with the Employer and any existing members of the project team to ensure that the Employer's objectives will be met, and establishing, in consultation with the Employer and the other consultants, a project management structure and the participants' roles and responsibilities, including communication routes.

In GC/Works/5, the duties of the PM are set out in Annex 1; if the PM is also the Lead Consultant, then the duties in Annex 8 will apply as well.

The PM's role will inevitably focus in particular on monitoring the performance of the main contractor and the progress of the works, as well as monitoring the performance of the other consultants. The PM will need to anticipate and resolve potential problems before they develop, wherever possible, and, generally speaking, the "hard skills" required will include planning, scheduling, organisational ability, report writing, information assembly, cost control, innovation, decision making and prioritisation.

The PM will need to know how to manage change, ideally maintaining a register of changes and variations, cross-referenced to the Contractor's requests for instructions, and possible contract claims. This register should include budget costs and final costs for reporting to the Employer on a regular basis. The PM will also need to ensure that accurately detailed daily diaries are kept by key personnel and that events are carefully recorded.

A fundamental aspect of the PM's role is the regular reporting of the current status of the project to the Employer. The PM needs to ensure an adequate reporting structure is in place with the Consultants and the Contractor; reporting is required for a number of reasons, including:-

- To keep the Employer informed of the project status.
- To confirm that the necessary management controls are being operated by the project team.
- To provide a focused discipline and structure for the team.
- As a communication mechanism for keeping the whole team up to date, and
- To provide an auditable trail of actions and decisions."

Progress reporting should record the status of the project at a particular date against what the position should have been; it should cover all aspects of the project, identify problems and decisions taken or required, and predict the outcome of the project.

Annex 8 of GC/Works/5, setting out the duties of the Lead Consultant, provides, in paragraph 3, that

"The Lead Consultant's primary duty will be to lead the team of other Consultants appointed by the Employer for the Project and to ensure satisfactory co-ordination of their designs, recommendations and reports and, where required in the following duties and at other times necessary to ensure the satisfactory outcome of the Project, communicate these matters to the Project Manager."

Such design "co-ordination" will include the consideration of all relevant issues, such as health and safety obligations, environmental requirements, loading considerations, space and special accommodation requirements, standards and schedule of finishes, site investigation information/data, availability of necessary surveys and reports, planning

consents and statutory approvals and details of internal and external constraints. The PM will be acting as the interface between the design consultant and the Employer.

As with all construction professionals, the primary obligations owed will be found in the express and implied terms of the PM's appointment. As there is, as yet, no formal legal recognition of a distinct profession of PM, it is likely that when ascertaining the relevant duty of skill and care, the court will look at the profession from which the PM comes. In other words, if the PM is an Architect, the standard will be the standard of skill and care to be expected of a reasonably competent architect holding himself out as carrying on project management work, etc.

Legal liability

A number of general observations regarding the role of PMs were made in the case of *Royal Brompton Hospital NHS Trust-v- Hammond* (2003) 88 Con LR 1 in 2003, when the Judge said that:-

- (a) Project management is still an emergent professional discipline, in which professional practices as such have not yet developed or become clearly discernable. The standard of care required of a PM is therefore likely to depend upon his particular terms of engagement and of the demands of the particular project;
- (b) Nevertheless it was clear that a central part of the role of PM was to be "co-ordinator and guardian of the client's interest".
- (c) Moreover, the terms of engagement of other consultants will be material in defining the scope of the PM's duties, since duplication of the function is not expected. For example, on the facts of that case, although the Architect was the contract administrator formally appointed under the contract, that function had been transferred de facto to the PM;
- (d) The PM is the Employer's primary representative and should be regarded by other consultants as, in effect, an Employer (albeit a highly informed Employer) and should be kept fully advised by them. The expertise and knowledge of the PM will affect only the extent to which advice needs to be spelled out; the essential elements of the advice must always be clearly given although it may be thought to be pointing out the obvious;

Construction professionals acting as Contract Administrator or PM must have both a knowledge of the fundamental principles of construction law and an ability to apply those principles in the administration of building contracts and the management of construction projects. In many cases what is required is not so much knowledge of the general law but rather a good understanding of the operation of the standard forms of building contract. Given the above, care should be taken to ensure that an expert witness in a claim against a PM has appropriate qualifications. In the case of *Pride Valley Foods Limited -v- Hall & Partners (Contract Management) Limited* (2001) 76 Con LR 1 in 2001, the Judge said:-

"There is an initial difficulty in accepting expert opinion evidence in relation to the duties of Project Managers. There is neither a chartered or professional institution of Project Managers nor a recognisable profession of Project Managers. Insofar as it may be appropriate to accept expert evidence, the nature of the evidence that might be acceptable will depend on what the Project Manager has agreed to do."

As the PM's role is concerned largely with supervision and co-ordination, most professional negligence actions against PMs involve an allegation that the PM failed to control particular aspects of the costs, failed to ensure that other construction professionals had access to correct information, or failed to prevent another construction professional from making an important error. However, applying the theoretical to the practical is not always easy.

In the case of *Chesham Properties Limited –v- Bucknall Austin Project Management Services* [1996] BLR 2, the claimant sued both the Architect and the PM in respect of what it alleged were excessive extensions of time together with loss and expense awarded to the Contractor. The Court found that where it would have been apparent to a reasonably competent PM that the Architect, Engineer and/or Quantity Surveyor were not performing their respective duties, he had an obligation to inform the Employer. The case illustrates the potential width of the duties owed by PMs managing the professional input of a variety of multi-disciplined contributors, particularly given that the conventional professional team had been engaged for some period of time before the PM came on board. The Judge was of the view that:-

“The Project Manager was plainly under a duty, on the true construction of the contract in such terms and made in such context, to report to the plaintiff on deficiencies in performance on the part of its co-defendants.”

However, where the claimant made the same complaint, in the case of *Royal Brompton Hospital NHS Trust –v- Hammond* (No.7) 76 Con LR 18, the Judge found that it was not part of the PM's duty to second-guess the decisions of the Architect.

Whilst a claim against the Architect succeeded in respect of their negligence in granting a 5 week extension of time, the claim against the PM was held to be based upon fundamental misconceptions as to the nature of the PM's obligations under its retainer. The PM's role in relation to the consideration by the Architect of applications for extensions of time was essentially found to be to ensure that the Architect dealt with such applications within a reasonable time.

There are relatively few reported cases concerning PMs alone; most claims are likely to be ancillary to claims against other professionals. For example, in both the above cases, the claims against the PMs were ancillary to the claims against the Architect for negligent over-certification. When considering how much of the loss should be borne by the PM, the court should have regard to the extent to which poor management was really the cause of the problem.

Further practical examples of claims involving PMs include the cases of *Pozzolanica Lytag Limited –v- Bryan Hobson Associates*, and *Palermo Nominees Pty Limited and Micro Bros Pty Limited –v- Broad Construction Service Pty Limited* (Supreme Court of Western Australia, Parker J, CIV 2439 of 1996, 17 April 1998).

In Palermo, the PM was held to have fallen short of their contractual duties and undertakings by failing to recommend the appointment of an external consultant to report on internal acoustics in respect of a project involving the design and construction of a nightclub.

The case of *Pozzolanica Lytag Limited v Bryan Hobson Associates* [1999] 89 BLR 267 considered whether a project manager owed a duty of care to the client to ensure that the professional indemnity insurance of the consultants was adequate. The case concerned the construction of a concrete dome, which due to a design defect collapsed causing

considerable financial loss to the employer. The main contractor was primarily liable under the JCT Design and Build Form of Contract, but did not maintain adequate insurances required by the contract.

The TCC Judge held that the defendant engineer was liable to the employer for not ensuring that the contractor had adequate professional indemnity insurance, and for not ensuring that professional indemnity insurance was in place. The defendant engineer pleaded contributory negligence on the part of the employer for not himself checking the insurance. This plea was rejected by the Judge.

The Judge held that the fact that the PM lacked the expertise necessary to assess the adequacy of the insurance arrangements which the Contractor did have in place did not relieve them of their responsibility. They could not simply act as “post-box”.

The “good working rule” in *Pozzolanic Lytag*

The key question in *Pozzolanic Lytag* was set out on page 3 of the judgment:

“The case raises questions as to the scope of the duty owed by projects managers to their clients to ensure that suitable insurance arrangements are put in place by contractors.”

In *Pozzolanic Lytag* reference was made to the Code of Practice for Project Management for Construction and Development. Although there was a misapplication of the 1996 edition the author listed duties and responsibilities undertaken during the management of a construction contract. The list included:

- “(l) Compile all contract documents ... establish the client’s requirements on such matters as ... insurance requirements ...
- (o) ... Ensure the contractor has complied with insurance and bonding requirements”.

Mr Justice Dyson accepted that this was “a good working rule” as to the scope of the duties to be undertaken by a project manager in relation to insurance. There were two caveats:

- 1 There should not be a “slavish” application of the list; and
- 2 The list is subject to any “special requirements” made between the client and the project manager.

Mr Justice Dyson came to the conclusion that the project manager in that case owed a duty to the employer to take reasonable care to “ensure” that there was in place insurance that would cover the contractor’s liabilities in respect to the building contract. No insurance was in place. The real or effective cause of the loss was the project manager’s failure to ensure that the contractor had taken out the relevant insurance.

What does a PM need to do in order to “advise”?

In *Pozzolanic Lytag* Mr Justice Dyson stated on page 8:

“If a project manager does not have the expertise to advise his client as to the adequacy of the insurance arrangements proposed by the contractor, he has a choice. He may obtain expert advice from an insurance broker or lawyer. Questions may arise as to who has to

pay for this. Alternatively, he may inform the client that expert advice is required, and seek to persuade the client to obtain it. What he cannot do is simply act as a "post box" and send the evidence of the proposed arrangements to the client without comment."

Mr Justice Dyson took the view that a project manager was to act in a proactive manner in respect of the insurances. Does this obligation relate only to the contractor's insurances, or does it extend to insurances that the Employer may need to obtain? Mr Justice Dyson was of the view that a project manager must inform the client and "seek to persuade the client to obtain" appropriate insurances. It is not adequate to simply act as a "post box" by sending evidence of the proposed arrangements to the client without comment.

The use of the word "persuade" suggests that a project manager should do more than just advise, but should make very clear to the client the importance of dealing properly with insurance. Also he is suggesting that even where the contractor is to take out the insurance, the client, meaning the employer, could be advised by the project manager to take out the insurance.

The case of *Six Continents Retail Limited v Carford Catering Limited* [2003] EWCA Civ 1790 concerned the construction of a restaurant which was damaged by fire during construction. Six Continents were the project managers and they engaged Carford to design and install the kitchen equipment. Once the restaurant had reopened, there was a problem with the spit-roaster. Carford had failed to follow the spit-roaster's manufacturing installation guidelines. The project manager had a duty in his appointment to check the condition and nature of the spit-roaster.

At first instance, the project managers were not liable. However, the Court of Appeal decided that the project manager was responsible. The project managers had escaped liability because they sent their client a letter from the spit-roast manufacturer that set out the recommendations for installation, but these were ignored by the restaurant. The Court of Appeal decided that simply forwarding a letter was not adequate. The project manager needed to be more proactive and should have assessed the fire risk and warned the client in much clearer terms.

Conclusion

These cases confirm a growing trend towards establishing some degree of legal accountability in the performance of project managers, albeit that the precise parameters of the duties owed are still evolving.

In conclusion, the liability of project managers is onerous. They are not simply to act as a post-box, but they must fill their proactive and all-embracing planning, management and co-ordination role for the project. They need to think clearly ahead, advise the client accordingly about the costs risks and time implications of the project, not just at the start but on an ongoing basis.