

ETHICS IN CONSTRUCTION LAW— TWO YEARS ON

Professor John Uff CBE QC

Barrister and Arbitrator,
Keating Chambers, London

Emeritus Professor,
Engineering Law, King's
College, London

By the time this paper is read, well over two years will have gone by since the lecture on Ethics in Construction Law in which I proposed that ethics ought to be recognised and given a formalised role in the field of construction law. The objective of this paper is to review what has happened in that time, and also to ask what may be a more challenging question: is anything really happening or have we merely found another debating topic?

THE MICHAEL BROWN LECTURE, JUNE 2003

First to summarise the observations and proposals made in the 2003 lecture, it was pointed out that ethics, whilst still struggling to find a settled definition had undoubtedly impacted already on many areas of professional life including medicine, financial services, legal services and engineering. Ethical 'principles' necessarily interact with legal rights and duties and can be seen as extending the definition of acceptable professional conduct. Construction law poses interesting challenges in that it involves a hybrid mixture of professional disciplines each with their own existing professional and ethical codes. The point was made that ethics applicable to a multi-disciplinary activity should not amount to less than the sum of its individual parts. Yet there are examples of professional activities within the umbrella of construction law which seem to recognise no duties other than those applied by the law, notably in the presenting of expert evidence and in the conduct of adjudication generally. After suggesting a number of specific topics on which ethical duties might be identified, it was suggested that the Society of Construction Law was well placed to take on the task of drafting a code of ethical conduct for

construction law professionals and to consider what other roles it might be prepared to take on.

THE SCL ETHICS GROUP

In response, the Society of Construction Law decided in 2003 to establish an Ethics Group, which has set up four sub-groups dealing with (1) research, (2) issues, (3) definitions and (4) options. A special Ethics Group web page has been established to include current news and information, links and useful documents. The research group has examined a range of organisations, significantly including the UK arm of Transparency International, which operates an anti-corruption initiative in the construction and engineering industry. There is more to say about the work of TI later in this paper. The group has also investigated ethics initiatives in other professions and in other countries, including Japan. The issues group obtained substantial amounts of data on ethical issues from SCL members. They commented that 'no one sought to argue that there was not a problem—although its extent and nature may not be fully appreciated'. The options group examined the pros and cons of different courses of action and the different steps open to the Society.

JUDGE THORNTON'S DECEMBER 2003 PAPER

The ethics debate was continued and extended by HH Judge Anthony Thornton QC who delivered a paper to the Society in London in April 2004, subsequently published under the title 'Ethics and Construction Law: Where to start'. Judge Thornton proposed that the drawing up of a code of ethics should involve the separate questions:

- What should be the objectives of the code?

• What fundamental questions should the code address?

• Should there be a recognised construction law profession or qualification?

As regards the objectives of the Code, there was a need for a succinct analysis of the UK construction and engineering industries which would highlight how it differs from similar industries elsewhere and which would identify the reasons for perceived inefficiencies and cost overruns. This had led to a lack of trust and confidence between those involved in the construction process. A set of ethical principles should govern all or most of the relationships that make up a construction project, and should cover particularly the conduct required of a practising professional. Guidance could be obtained from the reports of the Nolan Committee on Standards in Public Life which identify principles of acceptable behaviour. The relevant principles as regard the construction industry should relate to the topics of:

- fair reward;
- integrity;
- objectivity;
- accountability;
- fairness;
- honesty; and
- reliability.

Judge Thornton emphasised that every participant in the construction process was in some degree to be regarded as a professional and subject to professional standards of behaviour which should transcend a particular relationship or contractual scheme. Judge Thornton provided a detailed analysis of the seven suggested principles of ethical conduct, which will be relevant to the drawing up an ethical code.

ETHICS GROUP RECOMMENDATIONS JULY 2004

The SCL Ethics Group published a report in July 2004, which appears on the Society's website. The conclusions of the report are that:

- there is a need for action;
- SCL should publish guidance on ethical issues in the construction industry; but
- regulation and the imposition of sanctions was not something the Society should be considering for the time being.

There were strongly diverging views as to the imposition of sanctions, some members considering that advice would be ineffective without sanctions but others concerned as to whether the society could take on a regulating role. This would involve a significant change to the constitution of the Society and was a matter to be considered as part of longer term action of the Society. In addition to publishing a statement on Ethical Issues, the Group proposed that debates be held in London and elsewhere and that discussion workshops be set up with a conference to be promoted, from which papers would be published by the Society.

As regards the status of the SCL ethical code, when drafted, Judge Thornton proposed that relevant parts could be incorporated into rules of conduct of the professional bodies, into Standard methods of measurement and into Standard forms of contract. In this way the Society could promote the general acceptance of the code within the construction and engineering industries in the same way, for example, as the Fair Wages Resolution, which had been intended to promote good employment practice. The drafters of the Code of Ethics would have to consider a range

of other factors, including the impact of EU law, UK statutory provisions effecting construction, and confidentiality issues to ensure that the Code does not breach any such requirements.

OTHER INITIATIVES

It is not to be doubted that ethics is increasingly recognised both as a complement to strict legal obligations and as an essential part of professional conduct. This is reflected in the development of new initiatives in many fields including engineering and science. The Royal Academy of Engineering is pursuing its own programme to develop ethical codes acceptable across the engineering profession. Ethics in both science and engineering was the subject of debate and press comment at the 2004 British Association Festival of Science at Exeter University and at the 2005 Festival in Dublin. In 2004 the Department of Science produced, through an ad hoc steering committee a draft ethical framework for scientists, inspired by the hypocratic oath of medical practitioners. The document shows what is achievable in terms of brevity and that long periods of debate are not always necessary. The draft is as follows:

Draft Universal Ethical Code for Scientists

Rigour, Honesty and Integrity

- Act with skill and care in all scientific work. Maintain up to date skills and assist their development in others.
- Take steps to prevent corrupt practises and professional misconduct. Declare conflicts of interest.
- Be alert to the ways in which research derives from and affects the work of other people, an respect the rights and reputations of others.

Respect for Life, Law and the Public Good

- Ensure that your work is lawful and justified.
- Minimise and justify any adverse effect your work may have on people, animals and the natural environment.

Responsible Communication:
Listening and Informing

- Seek to discuss the issues that science raises for society. Listen to the aspirations and concerns of others.
- Do not knowingly mislead, or allow others to be misled, about scientific matters. Present and review scientific evidence, theory and interpretation honestly and accurately.

This document has been given wide circulation by the Department of Science and has received general acceptance by government scientists and scientific bodies. In addition, being first on the scene, it has become the template for other codes and has formed the basis of the Royal Academy of Engineering's Statement of Ethical Principles. This document was formally launched at a public meeting at the British Library in October 2005. The Statement of Ethical Principles has received wide endorsement from the UK engineering institutions and is being further refined in the light of comments received. It is intended that the Statement will underpin the existing Codes of conduct of the individual institutions. It will also form the basis of ethical teaching programmes being set up for all UK schools of engineering.

TRANSPARENCY INTERNATIONAL

I can now return to Transparency International (TI). This is an international organisation formed in 1993 which operates with a

separate UK arm. The objectives of the international organisation are to raise awareness generally and to support efforts to reduce corruption and thereby to reduce poverty among vulnerable peoples who are directly affected by the waste of resources that corruption represents. The aims of TI (UK) were stated in its annual report of 1994 to be:

... to raise consciousness of overseas and local corruption issues within the UK and support the international campaign of TI.

TI (UK) published an introductory report in September 2003 on anti-corruption initiatives in the construction and engineering industry. Neill Stansbury, Project Director-Construction and Engineering for TI (UK), published a supplementary report in November 2003 giving examples of corrupt practices, explaining the effects on the economics of what might otherwise be viable projects and showing the damaging and often disastrous affects which corruption can have. The report notes that corruption, as well as constituting criminality, amounts to unprofessional behaviour and breach of professional codes of conduct. It must similarly constitute a breach of any code of ethics. TI (UK) also provided a discussion paper to the SCL Ethics Group supporting the drafting of a wide-ranging ethical code.

THE TI ANTI-CORRUPTION CODE

Neill and his wife Catherine Stansbury have recently published a major paper entitled, 'Unethical Behaviour and Criminal Acts', which includes a discussion draft of an anti-corruption code for individuals in the construction and engineering industry. The paper was presented at a meeting of SCL on 14 March 2005 in London. The Code describes over 100 examples of common-place

occurrences in the construction industry of which most people will be aware and for which the general reaction has been to turn a blind eye. The Code describes the criminal offences which are being committed. The examples include practices ranging from 'fixing' of tenders or prices to the submission of inflated claims or concealment of defects. The list includes a range of malpractice by contractors, sub-contractors and suppliers and professionals of all hues, including excessive billing by lawyers. The document invites the comment, but it largely achieves its objective by bringing home to construction and engineering practitioners the serious consequences of hitherto accepted practices. Even if all those reading this paper are entirely innocent of such practices, most will know of real examples of similar occurrence and of individuals who have at some time indulged in these practices.

The TI (UK) reports collectively make the point that, like corruption itself, ethics is no longer just a talking point. Ethics may properly be regarded as the first line of defence against corruption: if our profession can recognise and adhere to an ethical code of conduct, we are less likely to find ourselves straying up against the borderline of criminality.

THE PROCEEDS OF CRIME ACT

Neill and Catherine Stansbury's paper helpfully summarises the criminal law relating to bribery, deception and fraud. On top of those seemingly esoteric offences we have all, since the spring of 2004, been faced with the very real prospect of having to grapple with the effects of the Proceeds of Crime Act 2002 (POCA) and its accompanying Money Laundering Regulations 2003. These provisions have been in effect

since March 2004 and, unlike bribery, deception and fraud, cannot be circumvented simply by regulating one's own professional conduct. POCA and the Money Laundering Regulations require practitioners at all levels to take positive steps to prevent the acquisition or use of criminal funds. Breach of either the POCA or the Regulations is punishable by imprisonment. As most practitioners are well aware, the precise effects of the Act and Regulations remain unclear but the potential penalties dictate that any erring must be on the side of safety.

Although the legislation is new, it has a long history in progressive attempts to legislate against the use of criminal funds or property. The change brought about by the latest measures is to require all persons who may become concerned in the acquisition, retention or use of criminal funds to take action in order to avoid committing an offence. At one level this might be regarded as a serious intrusion into privacy or professional practice; but at another level it indicates the gravity of corrupt practices and the determination of the criminal authorities to tackle the problem. While the legislation might appear aimed primarily at serious criminality, no one should be in any doubt that many familiar practices in the construction and engineering industries, as highlighted by the TI publications, constitute criminality in just the same way as do the primary offences which generate criminal funds. We are all aware of the huge magnitude of the black economy and we should be in no doubt that the construction and engineering industries contribute materially to it.

This is not the occasion for a review of POCA but the breadth of its application will be clearly seen

from section 328 of the Act which is as follows:

328(1) A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.

The commission of an offence may be avoided by making an authorised disclosure under section 338. This involves notifying the National Criminal Intelligence Service (NCIS) and obtaining consent before proceeding with the suspect transaction. The effect of an authorised disclosure is to release the person concerned from any restriction on the disclosure of information, thereby circumventing commercial and professional confidentiality. The question how far lawyers and other professionals are obliged to notify NCIS in order to make authorised disclosure is currently of great concern to many professions including lawyers, arbitrators, adjudicators and others involved in financial transactions arising out of construction and engineering projects.

There can be little doubt as to the breadth of the phrases 'becomes concerned' and 'knows or suspects' in section 328. Practitioners, including lawyers, have thus far proceeded with great caution. Some relief was provided by the recent decision of the Court of Appeal in *Bowman v Fels* [2005] EWCA Civ 226, (Judgment 8 March 2005) where it was held that section 328 was not intended to cover or affect the ordinary conduct of litigation by legal professionals; and if the section was applicable it did not override legal professional privilege. Thus, lawyers engaged in court actions have a measure of protection; but the position

in regard to other professionals and different processes remains uncertain. The legislation also creates a new 'regulated' sector of businesses to which special regulations apply. These include, as well as lawyers, banks and building societies who, as we have all now experienced, are required to follow exacting measures to establish identity. Being required to comply with these new measures before opening or operating a bank account should again bring home to all of us the fact that potential criminality is no longer to be left to the criminal authorities, but now concerns us all.

IS ANYTHING HAPPENING?

Let me therefore return to the question posed at the outset: is anything really happening or have we merely found another debating topic? I hope that the recent experiences with POCA and its Regulations and the analysis presented by TI (UK) will have left no one in doubt that ethics is now for real. Something is happening. The potential breaching of the criminal law should itself provide ample persuasion and impetus to anyone doubting the need for a strong and relevant ethical code in the field of construction law. To most practitioners any financial sanction would be secondary to the destruction of a professional career that would surely follow a criminal conviction, whether under POCA or the more traditional offences listed in the TI (UK) report.

So is there not a case for regarding the drafting and promulgation of an ethical code for construction law practitioners as a matter of some urgency which cannot await further leisurely conferences and committees?

DRAFT CODE OF ETHICAL CONDUCT FOR CONSTRUCTION

Lest the impression has been created that no positive action has been taken, it should be noted that an SCL Ethics Group sub-committee is presently tackling the problems of preparing a draft for submission to the Society. The sub-committee is considering several drafts. One of the matters under review is whether the Code to be produced can adequately be contained on a single sheet of A4. In order to demonstrate one of the possible solutions a draft prepared by the author is set out below:

Application

1. This Code is to be complied with by all professionals working in the construction industry, whatever their original qualification or affiliation.
2. The Code applies to persons as individuals, whether they work as an independent professional or as a partner, associate, director or employee of a firm or company.
3. Persons who work on behalf of a firm or company have additional responsibility to ensure that this code is complied with by the firm or company to the extent of their authority.

Legal and Other Duties

4. The Code is in addition to any other professional code that may apply.
5. The Code is part of and additional to contractual and other duties taken on under civil law
6. The Code applies independently of any requirement imposed by or breach of criminal law.

Ethical Principles and Duties

7. Act with honesty and avoid conduct likely to result, directly

or indirectly, in the deception of others.

8. Do not seek to obtain a benefit which arises directly or indirectly from the unfair treatment of other people.

9. Avoid acts which are likely to result in another party being deprived of a fair reward for their work.

10. Maintain up to date skills and provide services only within your area of competence.

11. Have regard for the interests of the public, particularly people who will make use of or obtain an interest the project in the future.

12. Identify any potential conflicts of interest and disclose the conflict to any person who would be adversely affected by it.

13. Provide information and warning of matters within your knowledge which are of potential detriment to others who may be adversely affected by them. Warning must be given in sufficient time to allow the taking of effective action to avoid detriment.

The Construction Process

14. Advice, whether given directly to a client or otherwise, must be given with professional integrity and without regard to self interest.

15. In the procurement of construction work, seek to avoid the placing of unreasonable risk on any party and promote the adoption of realistic objectives.

16. In the tendering process, adopt procedures which are fair to all parties and seek to prevent the taking of unfair advantage.

17. In the implementation of projects, create or support incentives to promote the successful achievement of all project objectives and the achievement of fair reward for all participants.

18. Support claims that are properly sustainable and reasonably assessed.

19. Seek to adopt proportionate and expeditious means for the resolution of disputes which cannot be resolved amicably.

THE ECONOMICS OF ETHICAL CONDUCT

Finally, lest anyone should get the impression that ethics is about protecting professionals from their own worst inclinations, let us remember the positive side to the growing campaign for ethical standards. Unethical conduct leads to waste, inefficiency and depression of the market, whether for construction work itself or for construction support services that construction lawyers and other professionals offer. Even more serious, corruption undermines and ultimately destroys the economic viability of projects, as graphically described in the TI (UK) 2003 report. While those examples principally concerned third world economies, we should be in no doubt that the same applies to projects in the UK and elsewhere in the developed world. All of us, therefore, have a strong incentive to support the establishment and maintenance of proper ethical standards and the drawing up of a strong ethical code that will put us in the best position to avoid and to root out those aspects of corruption that threaten our industry and all who practice in it.

Professor John Uff's paper was previously presented at a meeting of the Society of Construction Law in Southampton on 7th October 2004. It was updated in April 2005 and revised in February 2006. Reprinted with permission.
