

## THE HUMAN FACTOR IN CONSTRUCTION LAW

By John Burgess Esq

A report of the lecture given at the Society of Construction Law meeting at the National Liberal Club on 8th February 2000

A well attended meeting of the members of the Society of Construction Law heard their Chairman, Mr John Burgess, deliver his address on the largely untouched topic of "The Human Factor in Construction Law".

Mr Paul Darling QC, member of the SCL Council and Chairman of the evening's proceedings, introduced Mr Burgess and his lecture. Mr Burgess made it immediately clear that there was to be audience participation and what followed was without doubt one of the more inter-active and lively events in recent memory of the Society.

### The "Human Factor "

Mr Burgess explained that the Human Factor is made up of the real needs and interests of members of the construction industry. The Human Factor is important because it is what really motivates individuals involved in a project and how they act; it is the "stuff of your daily life". However, in Mr Burgess' analysis the Industry presently does not fully understand the Human Factor and this tends to lead to a misallocation of risk and to disputes remaining unresolved ultimately leading to litigation. A proper understanding of ourselves and of other parties, their needs and interests, would result in the smoother running of construction projects and a decreased reliance on combative forms of dispute resolution.

### Construction and the law

Mr Burgess began the substantive part of his address with an overview of the construction industry and construction law illustrating meanwhile the scale and importance of the Human Factor in both.

The industry itself is probably one of the most extraordinarily complex of any industry. The physical nature of work, any project's intended longevity, its intended purpose, the requirement of enormous investment from various parties and the accompanying complex financial arrangements are but a part of this diverse business. The scope for change in plans and for things to go wrong is great. It is extraordinary in some respects that buildings ever get built at all!

Construction Law comprises the underlying rules by which the industry operates. Complex in themselves for the most part they form the backcloth upon which day-to-day operations of a construction project take place. It is only really when something goes wrong that the law comes to the forefront. Fault is found and compensation or other remedy is forthcoming. But it is an imperfect solution to the problems that arise and seldom are working relationships the same following an exertion of legal rights. Mr Burgess exhorted the crowd to consider an alternative approach to the organisation of construction operations and the use of the law taking into account and respecting the Human Factor, the needs and interests of each individual, personal and public.

### The "Human Factor " as a present reality

As promised Mr Burgess invited the audience to contribute their views and on the subject of the motivations of individuals and parties involved in a project. A lively discussion ensued on the particular subject of the different motivations of an Employer and its composite parts when something goes wrong in a construction project. Obviously and consciously any Board of Directors makes a decision whether to take legal proceedings by striking a balance between the fact of present losses and setting it against the risk of losing the proceedings necessary to recoup those losses and the costs that will be incurred in taking that risk. However, suggestions from the audience gave a frightening insight into what underlying considerations are actually influencing the decision-making process. Of primary importance, there is the project director who has been ultimately responsible: depending on the level of the losses, his personal pride and public association with the project he may wish to pursue the path of least resistance, settle a compromise and salvage what he is able. If, however,

the stakes are higher, and his job is likely to be on the line in any event an ignominious settlement might be less palatable than a battle fought and lost. The latter might at least be blamed on witnesses not coming up to proof. In contrast, the Financial Director may take a simple balance sheet approach to making a decision based principally on how much is left in the annual budget for litigation. A substantial shareholding Director may take a different view to a full-time employed director. Personal animus might play a part. All these personal considerations have little to do with the public criteria which it is expected are applied. Mr Burgess described this example as typical of the processes of decision-making in the Industry and that such private motivations are largely unrecognised and largely not catered for by their professional advisors.

#### The Law and contracts

The Human Factor is not well served by England's formalised contractual approach to construction operations. In this respect Mr Burgess criticised the JCT and ICE Standard Forms of Building Contract. Oftentimes, when a problem has arisen both parties might want to find a commercial solution, but a rigid contractual framework gets in the way. This difficulty is beginning to be recognised in the Industry, as was reflected in the comment of one member of the assembled Society, Mr John McGuinness, who amusingly described how if a consultant wants to be insulting to the client's representative he accuses him of being contractual. However, despite this burgeoning recognition little has changed and an altogether new approach is needed to reflect normal day-to-day procedures on a building site and the Human Factor within it. An educative comparison was suggested contrasting the cultures of Japan and of England. In Japan agreements are seldom written and even if written down the stated terms are largely ignored since parties know their obligations and if something goes wrong a solution is amicably found between them. This is done without the intervention of the law and to the benefit of all.

#### Conclusions

Taking these threads together Mr Burgess recommended that members of the industry pause to think through a proper strategy before embarking on a construction project and consider what each of the parties really want. Through this understanding they can frame agreements and operate in a far more constructive way and achieve a completed project without having to resort to dispute resolution mechanisms at all.

There followed further discussion with the audience, then Mr Darling warmly thanked Mr Burgess for his thought-provoking introduction to this infrequently discussed topic.

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