



DUTIES AT THE LEGAL FRINGE: ETHICS IN CONSTRUCTION LAW

*Centre of Construction Law & Management
The Michael Brown Foundation: fourth public lecture
delivered at The Great Hall, King's College London
on 19th June 2003*

Professor John Uff CBE QC

July 2003

DUTIES AT THE LEGAL FRINGE: ETHICS IN CONSTRUCTION LAW

Professor John Uff

The Michael Brown Foundation lectures are an irregular series which have so far had in common the examination of issues falling somewhat outside the current mainstream of construction law, yet which are likely to exercise influence on the development of the subject. Thus, the inaugural lecture delivered by Professor Hugh Beale in 1992 dealt with the multi-disciplinary (as opposed to inter-disciplinary) approach to construction law and provided a valuable insight into the way contracts operate in the real commercial world.¹ His lecture introduced a relatively novel concept then called 'relational contracting', subsequently to become better known as partnering. In the second lecture Professor John Perry developed the theme of research and development into forms of contract, and considered a number of questions arising from the New Engineering and Construction Contract, as well as the awaited Final Report of Sir Michael Latham's Study Group.² In the third lecture His Honour Judge Anthony Thornton QC tackled the impending problems of litigation reform at a time when both the Woolf proposals and the Housing Grants, Construction and Regeneration Bill were about to make their impact on the construction industry, and considered the means by which time and expense involved in dispute resolution could be reduced without undermining the principles of fairness and justice.³ Those lectures each make a compelling re-read in the light of subsequent events.

The first three lectures and the present one are also linked in being sponsored by the Michael Brown Foundation. This was set up with funds generously provided by Bill Brown in memory of his son, a civil engineer who graduated at King's College and would, but for his untimely death, have pursued an interest in construction and engineering law long before the subject became fashionable. The Michael Brown Foundation now funds many of the core activities of the Centre of Construction Law at King's College, and has allowed it to develop a degree of financial strength and independence almost unique in academia today.

Introduction

The topic with which I have chosen to continue this series of lectures is the impact of ethics on construction law, necessarily in terms of the effect on the actions of individuals who participate in construction projects. I shall examine the impact of ethics at three distinct stages: the initiating stage of drawing up

1 *Construction Law – A multidisciplinary approach*, Hugh Beale, 1992.

2 *Structuring Contracts for the Achievement of Effective Management*, John Perry, 1994.

3 *Litigation reform – an impossibility?* His Honour Judge Anthony Thornton QC, 1996.

contract documents, obtaining tenders and placing contracts; the construction or operational stage, during which the project is brought to completion; and the post-construction accounting stage, when claims and disputes may be formulated and resolved, sometimes with substantial additional expense. The dispute resolution stage must, as a result of the arrival of statutory adjudication rights, now be understood to commence at or shortly after the moment that the ink dries on the contract and to continue until settlement of the final account or the expiry of limitation. This factor gives a particular flavour to construction law and means that the ethics of dispute resolution may have an important influence on the whole field of construction law.

The direction and implementation of each stage of the construction process is overseen and managed, and certainly in the first and third stages largely carried out, by professionals. Depending on the nature of the work, they will be engineers, architects, surveyors or lawyers. Each of these disciplines operates under an existing ethical code and the same professionals must surely bring their own ethical code with them when they operate in the field of construction law. One of the questions to be addressed is what ethical code should apply to what Professor Beale has labelled 'multi-disciplinary' activities. Such activities are the essence of construction law and form an important part of the ethos under which the Centre at King's College was established. The same is true of the Society of Construction Law which attracts exactly the same cross-disciplinary mix of participants and followers. The subject matter of this inquiry might be restated, therefore, as whether a separate multi-disciplinary ethic needs to be recognised, and if so, what is its nature? It will be of particular interest to examine whether, as some might think, the net result does not equate to the sum of the individual components. In other words have we, in combining disciplines, lost sight of the possibility of a greater combined ethic in construction law?

While I shall concentrate in this paper on what may be termed professional ethics, the great bulk of construction activities, involving manufacture and supply of materials and components and the physical creation of buildings and works from them, is carried out by non-professionals. I do not in any way seek to exclude these individuals, firms and corporations from the ethical standards applicable to construction law. In some respects measures such as the rules applied by trade associations or quality assurance schemes may impose more onerous duties than in the case of professionals. This potentially wide and important field must, however, remain to be examined on another occasion.

Before continuing further, it may be pertinent to ask why it should be supposed that ethics should have *any* application to the field of construction law. There are a number of answers which can be given. First, most professions and other related activities recognise a need for regulation in areas not covered by legally enforceable duties, medicine being a prime example. Secondly, the professions most closely allied to construction law, namely engineering, surveying and law, each promulgate well developed ethical principles and systems for regulating professional conduct. Thirdly, the need for ethics in construction law is surely implicit in the nature of many of its

activities. Does not the very existence of the principle of partnering, in whichever of its forms, imply that the participants will act ethically in seeking to achieve the stated objectives? In more conventional contracts is there not an overriding ethic which should motivate all participants to seek to bring the project to a successful completion? And when disputes cannot be avoided, should there not be an assumption that they be pursued in an ethical manner?

In legal terms ethics is concerned with conduct which affects third parties, to whom no or no clear enforceable duty is owed. Ethics will often dictate a course of conduct not in the client's interest, such as requiring disclosure of adverse documents. It is instructive also to reflect on the activities which seem to have turned their back on ethics in favour of success at all costs. Sport in general still recognises ethical concepts through the notion of sportsmanship: batsmen occasionally 'walk' when they know they are out, without waiting for the umpire, who may be mistaken. Even sportsmanship, however, may need to be enforced, as in the case of Thierry Henri in the recent FA Cup Final, who was booked for exaggerating the effect of a tackle. More serious is the world of athletics, where individuals and sometimes whole national teams seem prepared to use any performance enhancing measures they can get away with, most recently reported as including illicit blood transfusions. In some fields it may be too late to resort to ethics.

Meaning of ethics

The term 'ethics' applied to any commercial or professional activity is not without controversy and I do not intend to add to this by offering a definition. In any event, it would be difficult today to pin down ethics to a particular definition in the current climate of change in matters of professional accountability and transparency. These topics were comprehensively reviewed by Baroness Onora O'Neill in her 2002 Reith lectures under the general title *A Question of Trust*.⁴ In the third lecture, she expressed the view that the new accountability was not merely changing but was seen 'as distorting the proper aims of professional practice and, indeed, as damaging professional pride and integrity'. She then noted that:

In the very years in which the accountability revolution has made striking advances, in which increased demands for control and performance, scrutiny and audit have been imposed, and in which the performance of professionals and institutions has been more and more controlled, we find in fact growing reports of mistrust.

It is surely a common objective for those professions not yet beset by excessive accountability to seek to maintain the trust of its clients through reaffirming and redefining, where necessary, its essential ethical basis.

For whatever reason, the last two decades has undoubtedly shown a flowering of interest in ethics, in Britain, the USA and in a number of Commonwealth countries. In Britain, medical ethics is now established as a mainstream subject; one of the earliest centres of research and teaching was located at

4 Accessible at <http://www.bbc.co.uk/radio4/reith2002/thelectures.html>.

King's College, London, formerly under the direction of its founder, Professor Sir Ian Kennedy. No one could now doubt the enormous impact of ethics on the practice of medicine and its increasing importance in the debate on the appropriate use of limited resources. Like construction law, medical practice has also seen an explosion of claims and disputes, and a huge increase in the size of the medical negligence (or to use the unattractive Americanism 'malpractice') sector. The huge increase in the financial significance of claims, in terms both of legal costs and of increasingly large awards, has led to more than one proposal for the introduction of a no-fault compensation system. The latest of these was in Sir Ian Kennedy's Bristol Royal Infirmary Inquiry, whose final report recommended (so far without result) the abolition of the clinical negligence system.⁵ In the field of construction, it is perhaps premature to contemplate the replacement of legal liability with a system of ethically based financial adjustment; but the parallels between the practices of medicine and construction remain relevant and helpful.

In other fields too there is increasing acceptance of an underlying ethic. The financial services industry has struggled over the years to formulate rules to prevent unconscionable actions, not amounting to criminal conduct, but which threaten to undermine the financial systems. Insider share dealing is one example. Another is the recent Enron scandal, which has shown exactly why auditors must have regard for the public interest: the failure of that empire involved not merely huge losses by those who are now seeking legal redress, but a general loss of confidence in the market system, causing losses substantially beyond any boundaries recognised by the law. What these experiences tell us is that ethical principles exist as a matter of fact and status and are not dependent on the maintenance of a relevant professional body and a written code of conduct. Manifestations of ethics in the form of rules is of significance, but it remains the case that many of the ethical controversies which hit the news media (such as Enron) show the rules to be wanting, with conduct of the most flagrant kind often involving no breach of any existing code of conduct.

This theme could be applied to most areas of professional activity. I make reference below to the legal profession and its codes of ethics. Lest it be thought that lawyers are being held up as paragons of virtue, it might be noted that one of the most recent unethical practices, originating in the USA and now entering the UK market, which involves no breach of current ethical rules, is the practice of one law firm engaged in legal proceedings bringing an action against another law firm engaged in the same proceedings. The action usually arises out of the conduct of those very proceedings, for example alleging improper procurement of documents. The motive might well be assumed (at the highest) to be distraction of the other law firm or (at the lowest) discrediting the other firm in the eyes of the tribunal and of its own client. The point is that ethical codes have yet to catch up with such practices and the legal profession is far from being above criticism.

5 Bristol Royal Infirmary Inquiry Final Report, July 2001, Recommendations 37, 119; accessible at http://www.bristol-inquiry.org.uk/final_report/.

Coming closer to the subject of this lecture, the concept of 'engineering ethics' has proved to be a fruitful area for new research and study. In some circles, the concept has become confused with moral ethics and with philosophy. Thus, many writers now enthusiastically label the debate about nuclear power or the armaments industry as falling within the broad field of engineering ethics. While not wishing to diminish the importance of these issues, they do not contribute to the present debate any more than would a consideration of the ethics of modern architecture. For the purpose of this paper I confine my considerations to ethical principles which are capable of being formulated as a professional code of conduct which, however imperfectly it may be expressed, may be expected to be enforced by a relevant professional body. I can illustrate the distinctions which I seek to draw by two examples. First, the question whether an engineer chooses to work in the nuclear power industry or in the armaments industry is not a matter of professional ethics in the above terms, but a moral question for his own decision, which should not be influenced by any professional body. Secondly, a professional engineer who writes or speaks about such issues may surely express his own moral opinion free from any professional constraint. But as an engineer, he must also have a professional ethical duty not to use his expertise to mislead, particularly having regard to the trust that may be placed on his opinion. The latter duty, I suggest, should clearly be within the scope of the control exercised by the relevant professional institution.

It follows from what I have said that codes of conduct can never be regarded as definitive of ethical standards. This is further demonstrated in the debate over the engineer's duty to warn of preventable disaster. The topic came into sudden and dramatic focus in the USA with the destruction of the Space Shuttle *Challenger* in 1986 during its launch, which had been preceded by warnings from engineers which were overridden by managers. The debate continues as to whether the warnings were sufficient and whether the engineers should have prevented the fatal launch. The debate has been regularly revived both in the USA and in Britain in the context of warnings given by individuals of unheeded dangers which did not lead to disaster, but which did lead to victimisation or dismissal.⁶ In Britain this has led more recently to the introduction of statutory protection for what the press has dubbed 'whistle blowers'.⁷ A number of initiatives have been launched by professional groups seeking to regulate and give guidance on warnings of preventable disaster.⁸ What this shows us, surely, is the operation of an as-yet unwritten code of ethical conduct, the existence of which is not a matter of doubt to those who feel impelled to put their reputation or careers on the line in the public interest. To apply this to the present inquiry, it is surely the case that construction law is not a subject waiting for the invention of an ethical

6 See the celebrated BART case: *Holger Hjortsvang v San Francisco Bay Area Rapid Transit*; also Walter Elden, *Curtailing Ethical Harassment*, on the IEEE website at <http://caffeine.ieee.org/INST/feb96/ethics.html>.

7 Public Interest Disclosure Act 1998, inserting new Part IVA in the Employment Rights Act 1996.

8 Fellowship (now Royal Academy) of Engineering Conference on Preventing Disasters, 1991, including draft *Guidelines for Warnings of Preventable Disasters*; and more recently the 13th Report of the Standing Committee on Structural Safety (SCOSS), May 2001.

code, but one in which there is an ethical code already out there, waiting to be identified.

Professionalism

Having focussed my discussion on professional ethics, it is appropriate to consider whether the notion of professionalism has any continuing relevance today. This question is particularly apposite in a relatively new field such as construction law, which has no professional institute of its own and very little historical baggage of the sort that locks many existing activities into their own straightjackets. Many have perceived the professions to be under attack as out-dated and as struggling to justify their continued existence. The subject forms one of the current areas of study of the Royal Society of Arts which, even given a predilection to support its own continued relevance, has generated a strong body of opinion in favour of the professions as part of modern society.⁹ Ethics forms a significant element in the case being put forward for the continued relevance of the professions.

In order to appreciate the relevance and purpose of the professions a definition may be helpful. There are many such definitions, some less than complimentary, but I select a recent one given by the UK Inter-Professional Group:

An occupation in which an individual uses an intellectual skill based on an established body of knowledge and practice to provide a specialised service in a defined area, exercising independent judgment in accordance with a code of ethics and in the public interest.

This and other definitions make clear that the objective of professional work must be much wider than the immediate financial or material interests of the client or, of course, the professional himself. The essence of professional ethical duties is that they are owed to persons who may be outside the range of those to whom legal duties may be owed. The reference to 'the public interest' is reflected in codes of conduct issued by many of the professional institutions in the construction field.¹⁰ Similarly, there could be no doubt as to the existence of a public interest element in the legal professions, which recognise and enforce by disciplinary action duties to uphold the proper administration of justice. The existence of the professions and the broader concept of professionalism have, I suggest, an important role to play in shaping the ethical duties which apply in construction law. It would be anomalous, to say the least, if the multi-disciplinary activities with which construction law is concerned were not subject to an ethical code recognising duties beyond those owed to the immediate client, and containing a significant element of public interest.

9 See http://www.rsa.org.uk/projects/project_closeup.asp?id+1034, with papers including Lord Phillips of Sudbury, *Can the Professions Survive?* and a linked bibliography on professional ethics.

10 See for example Code of Conduct of Institution of Mechanical Engineers, Rule 33.6, 'A member shall at all times so order his conduct as to safeguard the public interest, particularly in matters of Health & Safety and the Environment.' Similar rules appear in all other engineering institutional codes.

The impact and importance of professional ethics can also be demonstrated by the actions of clients when choosing those whom they wish to act for them. This is nowhere more graphically demonstrated than in the prominence which British professionals enjoy in the construction field (and in other technical fields as well) in the international dispute 'market'. This applies to experts, arbitrators and lawyers alike and is primarily due, I believe, to the preservation of recognised professional ethical standards in this country. British professionals still hold a dominant position throughout the world irrespective of the location of the dispute or the nationality of the disputants. One explanatory factor might be the predominance of the English language in commercial contracts and disputes. But this has not served to maintain the former British dominance of the international contracting market, and in any event a high proportion of foreign experts and lawyers are able to work very effectively in the English language. Statistics are available for the numbers of arbitrators selected of a nationality other than that of the selecting party, which plainly show that British arbitrators are more regularly selected by non-British parties than in the case of any of our commercial rivals.¹¹ Further particularity might offend against the principles of comity and I make the point only to demonstrate that British professionals are trusted for their integrity, as well as their skills and experience. Such international appointments represent a valuable source of invisible exports for this country, which the industry has every interest in preserving by reinforcing the ethical basis of the actions of construction professionals.

Ethics in the construction process

The initiating stage

Having set the scene, I now turn to consider the part which professional ethics plays or ought to play in the practice of construction law. For this purpose, I take the three-fold division of the construction process already mentioned, starting with the drawing up of contract documents, the tendering process and the making of the contract. Within these activities one might identify many individual issues, such as whether it can be ethically justifiable to allow contracts to be let on inadequate ground investigation data or in circumstances where a major variation to the works will be inevitable; or whether grossly under priced contracts should be let at all. Such instances will often involve potential liability in civil law if the party who suffers loss is able to establish a legal duty. However, the point to be made is that such conduct on the part of the professional will often lead to an irrecoverable loss to the public, for example where the result is delay to some public facility; and construction projects which are seen to result in substantial delay and additional cost surely damage the industry as a whole, as well as the public as the beneficiary. I suggest that construction law professionals placed in positions of control or influence do indeed owe ethical duties to act in the wider public interest, as well as in the narrow interest of their client or employer. In many cases, as we have seen, such a duty may be found in the individual professional codes; but

11 See ICC International Court of Arbitration *Annual Bulletins*, accessible on http://www.iccwbo.org/court/english/right_topics/stat_2002.asp.

there will be other cases in which the existing codes provide no clear guidance.

An activity which, I suggest, gives rise to ethical issues specifically referable to construction law, is the process of tendering, coupled with the negotiation of the final contract price. In some instances the process is governed by strict legally enforceable rules (as in the case of *Harmon CFEM Façades (UK) Ltd v Corporate Officer of the House of Commons*¹²) and in other cases a failure to act in accordance with a contractually binding duty may allow some legal redress. This was the case in *Blackpool & Fylde Aero Club v Blackpool BC*,¹³ where the particular circumstances of a tendering procedure were held to give rise to an implied contractual duty to consider tenders received, or at least to consider the plaintiff's tender if others were. However, in a large proportion of cases, particularly those involving subcontracts and supply contracts, the rule appears to be that anything goes. Professor Beale described a survey of contract practices which revealed that some smaller firms tend simply to fire off standard order and acknowledgement forms without any attempt to reconcile conflicting provisions, on the basis they have calculated that the cost of negotiating was not justified by the risk. Where large sums of money are involved in tendering for main contracts, equally bizarre but more calculated occurrences may be observed, crudely aimed at giving one tenderer a superior negotiating position when the final bargaining process arrives. And the unconscionable dealings of tendering contractors can be well matched by the practices of employers, who chose to ignore whatever tendering rules may exist.

Given that most of these actions are not susceptible to any form of legal control, I suggest that the professionals involved on all sides must at least owe an ethical duty to prevent cheating and other extreme unconscionable conduct, in the same way that they owe duties under the criminal law to avoid or prevent bribery or corruption. If parties need to use the services of construction law professionals, they should not be permitted to disregard their ethical standards. The task of identifying those standards and applying them is surely one for the construction law profession to undertake.

A general problem involving ethical issues at the initiation stage is the placing of risk through the terms of contracts and subcontracts. This applies with added force in the case of PFI projects, which now comprise a large proportion of public works expenditure. They involve special relationships at the upper levels of the contract structure, with the 'contractor' usually having financial interests in the outcome of the project. Such arrangements do not, however, remove the underlying difficulties of bringing the project to a successful completion and it will often be found that the relevant risks are simply transferred to the level of subcontractors and sub-consultants. It is at this level that some projects have run into difficulty, as a result of the primary parties having taken on contractual obligations which subsequently prove far more onerous than anticipated in terms of practical and economic fulfilment.

12 *Harmon CFEM Façades (UK) Ltd v Corporate Officer of the House of Commons* (1999) 67 Con LR 1, TCC.

13 *Blackpool & Fylde Aero Club v Blackpool BC* [1990] 1 WLR 1195, CA.

I suggest that this places an ethical burden on those responsible for arranging the contract structure to ensure that the legal draftsmen are properly informed as to the feasibility of the tasks which are being created for others. In any form of contract, construction professionals should not seek to hide behind lawyers when risks are being transferred, but should regard it as an ethical duty to ensure, so far as practicable, the feasibility of the obligations being created. Likewise, lawyers should owe a reciprocal ethical duty to avoid the creation of risk which cannot be practically and economically borne.

The construction stage

As regards the construction process itself, ethical considerations involved in giving warning of avoidable disaster have already been mentioned. Similar situations have given rise to a number of cases in which the courts have had to consider when a 'duty to warn' might arise, particularly in a situation where the party in a position to warn has no contractual duty to do so. The courts have found a duty in tort to exist in some circumstances but by no means universally.¹⁴ The point that needs to be made is that rulings of the court on the existence of legal duties cannot be taken as defining the extent of an ethical duty in such circumstances. It is clear law that a passer-by who is also a structural engineer owes no greater duty than an ordinary member of the public if he happens to notice that a structure is in a dangerous condition. It is to be hoped that his professional institution, were the matter to be put before them, would take a different view so that the spectre of doctors crossing the street on encountering cardiac arrest, in order to avoid a malpractice suit, will have no place in the construction industry. Such an ethical duty, falling primarily on engineers, will involve complex issues; but that surely means that the debate that will be needed is already overdue.

Much of the construction process is still operated and controlled by professionals who are often appointed to carry out an 'independent' certifying process where, despite being engaged by the client, the certifier's function involves 'holding the balance between his client and the contractor'.¹⁵ This function plainly depends for its viability on the appointed engineer, architect or surveyor acting in a professional and ethical manner when carrying out functions such as valuing work and determining extensions of time. The ethical tension created by such appointments is plain enough and it is a common complaint of contractors that certifiers fail to act in an ethical manner, being reluctant to 'concede' extensions of time or to sanction variation orders. In formulating the ethical duty owed by a certifier, as in the case of the duty to warn, regard must be had to the circumstances in which the courts have been prepared to recognise that a duty might exist in tort.¹⁶

14 Compare *Plant Construction PLC v Clive Adams Associates* [2000] BLR 137 (CA held contractor under a duty to warn) and *Aurum Investments Ltd v Avonforce Ltd* [2001] CILL 1729 (TCC held specialist contractor under no duty to warn).

15 *Sutcliffe v Thackrah* [1974] AC 727, HL.

16 *Pacific Associates v Baxter* [1990] 1 QB 993, CA; see also *Edgeworth Construction Limited v F Lea & Associates* (1993) 3 SCR 206 (Supreme Court of Canada). The latter case is also of relevance to the existence of ethical duties in relation to the preparation of contract documents.

The significance of the certifying process now needs to be seen, in the UK at least, in the light of statutory adjudication. This has, on one hand, deprived certification of some of its force, and on the other, empowered the contracting parties to take matters into their own hands. Disputes about certificates are largely replaced by the tactical use of adjudication, reportedly used on a serial basis on some contracts and surely representing an escalation in the much criticised concept of ‘adversarialism’. It may be the case, of course, that the possibility of quick adjudication tends to induce parties to be more open in their dealings so as to avoid such confrontation. But if this is so, hard evidence is still lacking. Equally unknown is whether the availability of 28-day dispute resolution has the effect of securing fair and timely payment where properly due. I posed the question above whether there exists an overriding ethic which should motivate participants to seek to bring a project to a successful completion. In relation to disputes arising during the course of construction projects, I suggest that all professionals involved, architects, engineers and surveyors as well as lawyers, should be under an ethical duty to seek to ensure that projects are run in a fair way, avoiding the waste of resources and unproductive expenditure that adversarialism represents. To the extent such duties are not supported by codes of conduct of each of the professions involved, they should be part of a multi-disciplinary ethic generated by the construction process itself and applying to all professionals who participate in it.

In the context of the suggested duty to act in a fair way, it is pertinent to recall one of the Latham recommendations which found a place in the original consultation document setting out possible legislation. This was the concept of the ‘fair construction contract’, aimed at promoting reasonable contractual provisions.¹⁷ The proposal evidently had little support and failed at the first hurdle. In retrospect, one might suggest that it was not the idea that was at fault, but the proposed method of implementation, through the somewhat crude device of legally binding provisions, which were universally branded as unworkable. Had the principle been expressed in terms of professional ethical duties, it would have been more in keeping with the ideas promoted here and might perhaps have secured the support of the professional institutions involved.

The post-construction stage

In the third project stage, construction industry professionals will be involved at all levels in the settling of the final account including the formulation and resolution of claims and counterclaims. It has already been noted that this process now potentially covers also the construction period, both in terms of adjudication and arbitration, should either of the parties so elect. The formulation of and response to claims and counterclaims gives rise to a series of ethical issues concerning the way in which facts are analysed and expertise utilised to support claims. Of particular relevance is the contribution of claims consultants who frequently also act as experts. There are a number of

¹⁷ Sir Michael Latham, *Constructing the Team*, Final Report, July 1994, HMSO, para. 5.18 and *Fair Construction Contracts*, a consultation paper issued by the Department of the Environment, May 1995.

publicised instances of such consultants being publicly criticised by judges for having put forward unsustainable claims, presumably motivated by the hope of inducing a favourable settlement. The persons in question may have sought to act in what they conceived to be the best interests of their client, but in doing so lost sight of what I suggest is a clear professional and ethical duty to put forward only such claims as are properly supported by credible evidence and reliable and not fanciful expertise. I use the term fanciful intentionally, as it seems to describe some of the more unintelligent uses to which critical path programming technology is put, where software is configured to produce an answer which bears no relation to reality, in order to support a wildly exaggerated claim. Barristers and solicitors are bound by codes of conduct which require claims to be based on credible evidence. The same rule ought to apply to a non-lawyer placed in a position of formulating claims to be placed before any tribunal.

The professional and ethical rules governing the conduct of lawyers are well documented. Judge Thornton in the third Michael Brown Foundation lecture referred to the duty of a barrister before any tribunal to draw attention to all relevant decisions, whether favourable or unfavourable to the case being advanced.¹⁸ There is an equally clear duty not to mislead the tribunal as well as duties on all English lawyers to ensure proper disclosure of documents when so required. These duties are enforceable through the Bar Council or the Law Society as matters of professional conduct or, in the case of breach of an order of the court, enforceable by the court itself, ultimately by imprisonment.¹⁹ A similar question arises to that discussed above in relation to the management of claims: what duties are owed by those who carry out work which has traditionally been the reserve of barristers and solicitors but who owe allegiance to a different profession or perhaps to none at all? Again, there should be no doubt that such individuals owe analogous duties to comply with the standards and rules applicable to their professional legal counterparts. Time could be spent discussing the precise nature of the duties applicable to non-lawyers. The real problem, however, is how to ensure that non-lawyers are properly aware of these duties and what sanction can exist to ensure compliance.

A second question raised by Judge Thornton in his lecture is whether rules and standards are compromised by the imposition of time limited or other truncated procedures. This applies particularly to statutory adjudication but also includes various forms of fast track arbitration. Experience suggests that the legal professions have adapted in an admirable and even remarkable fashion to the demands of such novel procedures, with no obvious reduction of ethical or professional standards in the conduct of cases. The same is not necessarily true in relation to the deliberate use of binding time limits to disadvantage an opposing party (sometimes referred to as ‘adjudication by ambush’). This factor applies to lawyers and non-lawyers alike and raises a clear ethical issue as to whether such tactics are acceptable when the quality of the adjudicator’s decision may be impaired.

18 See note 3.

19 See Civil Procedure Rules CPR 31.23 and Practice Direction PD32 para. 28.1.

To extend the theme of dispute resolution, an expert who invariably gives evidence in support of the party by whom he is commissioned raises issues which have been widely discussed over many years.²⁰ In court, the Civil Procedure Rules²¹ have introduced limited use of the single joint expert, as a way of avoiding rather than solving the problem. The ethical question that remains, in many cases, is how an expert appointed by one party can support the case of that party while purporting to act as an independent professional expert. The root of the problem, I suggest, is to identify the true nature of an ‘expert’ report prepared for one party. This will often contain a mixture of technical advocacy and a presentation of the facts in a manner supportive of the case being advanced by one party. This is the inevitable result of the expert being instructed by one party, probably attending a conference with that party and considering a selection of documents provided by that party. The conventional solution to the problem of ‘independent experts’, enthusiastically supported by the Academy of Experts and the Expert Witness Institute, is the so-called *Ikarian Reefer*²² rules expounded by Mr Justice Creswell, to the effect that experts owe a duty to the court. While this approach may have curbed some of the worst excess of the ‘hired gun’ culture, it does not, with respect, address the underlying problem nor has it had any impact on the phenomenon of experts routinely supporting the party by whom they are commissioned. I suggest that professional ethics should dictate that an ‘independent’ expert should not accept an account of the facts from one side, should not attend private meetings with one side nor accept a selection of documents from one side. If he does any of these things he should not hold himself out as independent.

Defining and enforcing ethical standards

So far I have made only passing reference to the institutions that, in theory, enforce ethical standards. They comprise the institutes and institutions which grant professional status to their members, and publish and enforce ethical codes. All of these bodies maintain systems by which complaints of professional misconduct are considered and adjudicated upon by an appointed panel, usually following self administered rules. At the present time most complaints are adjudicated in private and, if misconduct is upheld, only the decision is published. As will be seen, this is likely to change in the near future. A further characteristic of professional misconduct cases at the present time is that they are mostly concerned with complaints of relatively gross misconduct or incompetence. Cases involving serious ethical questions or concerning the public interest are rare. There may be a number of reasons for this. Where ethical issues concern the public interest, it seems unlikely that a member of the public could ever have sufficient standing to initiate a complaint and it is unlikely that an institution would itself bring such a complaint. Institutions are known to take action against members for

20 See Royal Society Conference, *Science and Technology in the Eye of the Law*, 21st March 2000.

21 See Civil Procedure Rules CPR 35.7.

22 *National Justice Compania Naviera SA v Prudential Assurance Company Ltd* [1993] 2 Lloyd’s Rep 68, QBD (Comm Ct).

allegedly bringing that institution into disrepute.²³ But such cases, if contested, can prove troublesome and costly.

Another factor likely to inhibit the bringing of complaints alleging breach of ethical duties is the privacy surrounding professional conduct issues as presently dealt with in the UK, making it difficult to ascertain whether any relevant precedent exists covering a particular case. In other countries more publicity is given. For example, in the Canadian State of Ontario, the Association of Professional Engineers publishes accounts of disciplinary proceedings in its Gazette, where a summary of the arguments and evidence is given, together with the decisions and reasons of the tribunal. In the UK the practices of dealing with issues of professional ethics in private and 'in-house' are currently undergoing major revision, largely as a result of the impact of the Human Rights Act 1998, particularly the entitlement (subject to qualification) to 'a fair and public hearing ... by an independent and impartial tribunal'.²⁴ The result has been a general acceptance of the need for greater accountability and transparency. This is conveniently demonstrated in the Architects Act 1997 (re-enacting and amending earlier legislation) by which registered architects are made subject to a new statutory Architects Registration Board and its Professional Conduct Committee.²⁵ The Board and the PCC are now required to have a majority of members who are not registered architects; and where a disciplinary order is made, the PCC is required to publish 'a description of the conduct, incompetence or offence concerned'.²⁶ The Act also provides for a right of appeal to the High Court from a disciplinary order.²⁷ These measures may be taken as the shape of things to come in all professional fields. It is notable that the Construction Industry Council has, to this end, established an Independent Appeals Tribunal, available to professional bodies within the construction industry. The composition of any Appeal Tribunal will (like the Architects Registration Board) contain a majority who are not members of the relevant institution. The CIC Appeals Procedure provides for the Tribunal to issue a reasoned judgment and to provide a copy to the institution for publication.

Thus, in any professional field there now exists the prospect that a source of published precedent will become available dealing with professional ethics which may, in time, provide guidance on the sorts of question raised in this paper. Furthermore, there is already an increased awareness of the importance of ethical issues, particularly in the field of engineering where the Royal Academy of Engineering has recently launched a new initiative with the intention of promoting debate on the public role of engineers.

In terms of enforcement there is a significant distinction in that some professions in the construction law field are subject to registration while others are not. The legal profession in any country requires individual practitioners

23 See Reports on Disciplinary Proceedings of the Chartered Institute of Arbitrators, (2003) 69 *Arbitration* 152.

24 European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6: Right to a Fair Hearing.

25 Architects Act 1997, Schedule 1, Part II.

26 Architects Act 1997, section 15(4).

27 Architects Act 1997, section 22(c).

to be 'admitted' or in some other way licensed, and the statutory registration of architects has already been noted. No such requirements exist in respect of most of the technical or scientific professions which contribute to the construction industry. Engineers in the UK are not registered nor, with a few exceptions, is their work regulated. Most UK professional engineers will be corporate members of one of the engineering institutions and be entitled under Royal Charter to use the title 'Chartered Engineer' or the European prefix 'Eur Ing'. However, persons not so qualified remain entitled to call themselves 'engineers', as many do. The same applies in the case of surveyors. It can be seen that, in comparison to lawyers and architects, the problem of enforcing professional and ethical standards in the case of engineers and surveyors may be greater without the ultimate sanction of withdrawing the right to practice.

Statutory registration of engineers in the USA and Canada appears to have given added force to the development and enforcement of professional ethics. In the UK, registration has been considered by the former Engineering Council and remains on the agenda of its successor, the Engineering and Technology Board. However, the current approach of some of the engineering institutions is to consider the alternative of establishing lists of 'qualified persons', to whom particular tasks should be reserved. If such proposals are implemented, this may offer an important opportunity to lay down requirements for professionals who attain listed status. This appears to offer a valuable opportunity for defining the standards to be adhered to when engineers operate in the field of construction law. The listing process will itself create an important sanction against non-compliance.

Moving forwards

Most of this paper has been devoted to establishing the existence of an ethical dimension in the conduct of those who provide professional services within the construction law industry, and to defining the scope and application of such a duty. By analogy with the related professions, the existence of ethical duties in construction law should not be contentious. There are, however, a number of steps to be undertaken before a workable system of ethics could be established, notably in identifying areas to which ethics should apply, in defining appropriate rules and in providing mechanisms for application and enforcement of these rules. Underlying these matters is the question of which bodies, other than the existing institutions, are capable of undertaking or overseeing the administration of construction law ethics.

How are the rules to be defined? I suggested at the outset that the proper approach, following Professor Beale's analysis, was to view construction law as multi-disciplinary, ie a profession in its own right, despite the fact that participants are drawn from different professions each having its own basic code of ethics.²⁸ The task is to define a multi-disciplinary ethical code to apply to those performing a particular function irrespective of their profession of origin. As to the area or functions to be covered, these should include the major activities in which professionals will be involved: the drawing up and awarding of contracts; the administration of contract performance; and the

28 See note 1.

formulation of and resolution of claims and disputes. Other and more specific functions may be included such as acting as an expert adviser, witness or dispute tribunal.

As regards the application of ethical rules, it seems clear that, in common with other professional conduct procedures, decisions as to the acceptability of particular conduct must be made on the basis of peer judgment, having regard to any available precedent. The rules to be defined would therefore operate, as is the case with existing professional codes, as broad principles to be applied with appropriate discretion to particular cases. It is fortunate that the impact of the Human Rights Act 1998 will be to secure greater transparency and publicity for decisions of professional and ethical tribunals – such that it can be anticipated that guidance in the form of precedents will, in time, become available through decided cases.

The maintenance of ethical standards must be dependent also on the existence of a workable sanction. In the case of lawyers and others working in professions which require registration or licensing, adequate sanctions already exist, ultimately in the form of striking off. To provide an effective sanction in respect of an ethical code for construction law professionals requires, I suggest some form of registration which is capable of being revoked or withheld by an appropriately empowered body. An example of such a procedure is that of the Chartered Institute of Arbitrators, which operates a scheme of registration for arbitrators. As discussed above, some engineering institutions are considering the creation of further registers of appropriately qualified engineers, one of which might be of engineers working in the field of construction law. However, a more appropriate body, capable of encompassing all the professions involved, is the Society of Construction Law.

Although not a qualifying body, SCL has all the attributes of a body which could offer professional registration to members who are judged to be appropriately qualified and experienced and who are prepared to comply with an ethical code of conduct. It would seem to follow that SCL should also take the lead in preparing a code of ethical conduct for construction law professionals, which may be followed and adopted to the extent appropriate by individual professional bodies who wish to maintain a list of their members qualified work in the field of construction law.

Having suggested that the drafting of a code of ethical conduct for construction law professionals should be undertaken by others, it is appropriate to outline the content of such a code. As a starting point, I suggest that ethical rules will be needed to provide for the following activities:

1. Drawing up of conditions of contract, including the appropriate placing of risk;
2. Obtaining and processing of tenders;
3. Negotiating and awarding of contracts;
4. Administration of contracts, including the initial settlement of contentious matters;
5. Formulation and processing of claims;
6. Acting as an advocate in formal proceedings; and
7. Acting as an expert (including expert witness) in formal proceedings.

Each of these topics need to be sub-divided and basic rules formulated, which should represent what is presently considered to be the minimum acceptable standard. No doubt the task would be illuminated by further research and debate.

Registration as a ‘construction law practitioner’ is not envisaged as compulsory and no one should be prevented from carrying on their practice. However, in some circumstances, it may be appropriate that a practitioner should be asked whether he or she is a registered construction law practitioner. For example, in the case already mentioned of a non-lawyer acting as advocate in arbitration or adjudication proceedings, it is not only relevant but essential for the tribunal to know whether such an advocate is bound by ethical standards, for example requiring him or her to bring to the notice of the tribunal all relevant authorities, whether favourable or unfavourable. The answer to this question may determine whether the arbitrator or adjudicator must take independent legal advice or whether he can be assured that all the relevant material has been placed before him. Equally, it would be relevant and pertinent to ask an expert witness the same question, so as to know whether he adhered to the defined ethical standards in formulating or advocating a claim.

Conclusion

In conclusion, I return to the question posed at the outset, and suggest that a separate multi-disciplinary ethic does need to be recognised in the field of construction law. Professional ethics have an increasingly important role to play in the proper running and well being of the construction process at all stages. Ethics is important to the public which uses and relies on the construction law industry, and ultimately to the professionals who are involved in the industry. An ethical approach may hold the key to a number of the problems which have beset the construction industry for many years and may lead to a fairer and ultimately more prosperous future.

Professor John Uff CBE, QC, PhD, FICE, FCI Arb, FREng, FKC
the founding Nash Professor of Engineering Law at the Centre of Construction Law & Management at King’s College London.

© John Uff and the Centre of Construction Law 2003.

The views expressed by the author in this paper are his alone, and do not necessarily represent the views of the Society of Construction Law or the editor, neither of whom can accept any liability in respect of any use to which this paper or the information in it may be put.

*'The object of the Society
is to promote the study and understanding of
construction law amongst all those involved
in the construction industry'*

MEMBERSHIP/ADMINISTRATION ENQUIRIES

Jackie Morris
67 Newbury Street
Wantage, Oxon OX12 8DJ
Tel: 01235 770606
Fax: 01235 770580
E-mail: admin@scl.org.uk

Website: www.scl.org.uk