



UNETHICAL BEHAVIOUR AND CRIMINAL ACTS

*A paper presented by Neill Stansbury to a
meeting of the Society of Construction Law
in London on 14th March 2005*

including a discussion draft of the

ANTI-CORRUPTION CODE FOR INDIVIDUALS IN THE CONSTRUCTION AND ENGINEERING INDUSTRY

**by Neill Stansbury and Catherine Stansbury of
TRANSPARENCY INTERNATIONAL (UK)**

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

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FOREWORD

In 2003, the Society of Construction Law set up a group to consider the question of ethics in the construction industry, prompted by a call by Professor John Uff (made in a lecture at King's College in July 2003¹) for the Society to prepare a multi-disciplinary ethical code covering the activities of all professionals involved in construction law activities.

The group concluded that:

- there is a need for action;
- the Society, consistent with its objective 'to promote the study and understanding of construction law ...', should publish guidance on ethical issues in the construction industry to promote discussion and debate and increase awareness and understanding; and
- regulation and the imposition of sanctions of the kind suggested by Professor John Uff was not something that the Society should be considering for the time being.

The group made the following recommendations:

- the Society prepare and issue a statement on ethical issues, or code of [good] practice, setting out core principles of ethical conduct and giving guidance on the application of these principles in each area of construction law. The objective of the statement is to:
 - (a) increase awareness,
 - (b) inform and guide (that is, influence) construction law professionals, and
 - (c) provide a standard against which others may review compliance;
- the Society establish a working group to implement the recommendations and keep their effects under review;
- an SCL ethics 'champion' be appointed from Council to lead this work and act as a focus for other organisations;
- the Society should not, at present, engage in regulation or the imposition of sanctions.

¹ *Duties at the legal fringe: Ethics in construction law*, The Centre of Construction Law & Management Michael Brown Foundation fourth public lecture delivered at the Great Hall, King's College London on 19th June 2003, published by the Society of Construction Law in July 2003 and available from www.scl.org.uk.

The Council of the Society accepted these recommendations, and work is now underway on their implementation. The working group, of which Neill Stansbury is a member, is chaired by myself.

One of the steps in implementing the recommendations was to stimulate debate on ethical issues by arranging further talks to the Society, in London and around the country, on ethical issues. This paper is a part of that programme, with the objective of increasing awareness, and informing and guiding professionals on this important aspect of unethical behaviour. It is published as a discussion document, allowing further debate on the issues raised. The outcome of this debate will be valuable to the Society of Construction Law in developing their statement of ethical principles.

The work by Neill Stansbury and Catherine Stansbury in identifying breaches of the criminal code has a strong link with the Society's initiative on ethical issues. Unethical acts can be either criminal or non-criminal, depending on the laws in force at any time. The issues featured in this paper identify acts that are clearly breaches of ethical principles.

The Society looks forward to taking part in the debate on the issues raised in the Code.

Peter Higgins
Chairman
SCL Ethics Group.

UNETHICAL BEHAVIOUR AND CRIMINAL ACTS

Neill Stansbury

Introduction

Many people do not realise that actions which they regard as ‘part of the game’ are actually criminal offences. Corruption not only includes bribery, but also fraudulent practices such as tender collusion, claims fraud, and deliberate supply of sub-standard products or incorrect quantities. An offence may be committed by someone even where they are unaware that they are committing a crime, and even where they stand to make no personal gain.

Corruption can no longer be regarded as a necessary part of business life. The damage to developing countries caused by corruption is now obvious, with under-development, poverty and starvation the inevitable consequences. The World Bank estimates the cost of corruption at US\$1.5 trillion per annum. This sum could dramatically reduce world poverty if it was not misappropriated.

While many regard corruption as an international phenomenon, the UK is not immune. Corruption on UK projects leads to waste, defective products, inefficiency, and unnecessary litigation.

The consequences for an individual or company being involved, whether directly or indirectly, in bribery, deception or fraud are potentially extremely serious, and can include criminal prosecution, fines, imprisonment, loss of professional status, disqualification from office, loss of employment, civil claims for compensation and damage to reputation. The amendment to the UK bribery laws in 2002 ensures that UK nationals and companies can be prosecuted in the UK for offences committed entirely overseas. It is essential, therefore, that individuals in the construction and engineering industry acquire a better understanding of the criminal law in this area, and become aware of the types of actions which could constitute a breach of the law.

Transparency International (TI) is a non-governmental anti-corruption organisation founded in 1993, and has chapters in over 90 countries. It works in a non-confrontational way with government, business and civil society with a view to eliminating corruption worldwide.

TI has produced, as a discussion document, the *Anti-corruption Code for Individuals in the Construction and Engineering Industry* a copy of which can be found on the pages that follow. The Code was written by Catherine Stansbury and myself, both solicitors with over 20 years experience in the international construction and engineering industry.

The purpose of the Code is:

- to define the rules with which an individual should comply so as to reduce the risk of breaching the criminal law relating to bribery, deception and fraud;
- to give examples of actions which could breach that law;
- to provide information on the applicable law.

It is hoped that publication of this discussion draft will prompt debate on the issues raised, as well as inform those in the construction industry about an area of law with which they are unlikely to be familiar.

Neill Stansbury is a solicitor with over 20 years experience in the international construction and engineering industry; he is Project Director – Construction and Engineering for Transparency International (UK), and is leading an initiative which aims to eliminate corruption on domestic and international construction projects.

The views expressed by the author in this introduction or by the two authors in the Anti-corruption Code which follows are theirs 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 Anti-corruption Code or any information in either document may be put, whether arising through negligence or otherwise.

DISCUSSION DRAFT

TRANSPARENCY INTERNATIONAL (UK)



**ANTI-CORRUPTION CODE
FOR INDIVIDUALS IN THE CONSTRUCTION
AND ENGINEERING INDUSTRY**

(ENGLAND AND WALES)

by
**Neill Stansbury
Catherine Stansbury**

March 2005

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Neill Stansbury and Catherine Stansbury 2005

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SECTION I

THE PURPOSE OF THE ANTI-CORRUPTION CODE

In this Code, the term ‘corruption’ is used to refer to the activities constituting the criminal offences relating to bribery, deception and fraud.

Corruption is relatively widespread in the construction and engineering industry. It may take place in both developed and developing countries. It may occur at any phase of a public or private sector project, and may be committed by any one of the many corporate or individual participants in a project. The offence may be committed by any of these persons even where they are unaware that they are committing a crime, and even where they stand to make no personal gain from the crime.

Bribery may range from large payments made to secure contracts to relatively small ‘facilitation’ payments made to government officials. Deception and fraud may include price fixing, manipulation of pre-qualification or tender requirements, concealment of defects, wrongful levying of liquidated damages, wrongful withholding of payment, claims fraud, and fabrication or falsification of evidence to support claims.

Some of these offences are committed knowingly and deliberately for personal or corporate gain. Some offences are committed reluctantly in the belief that it is necessary to undertake these practices in order to remain competitive, or in order to retaliate against the corrupt practices of others. Some offences are committed in the erroneous belief that these practices are normal business acts and do not constitute criminal offences.

Whatever the commercial or other justification for such activities, they nevertheless constitute criminal offences for which a variety of persons may be liable including the individual employee who committed the act, his employer, and company officers. In some cases, an individual employee may be found personally liable for an offence committed purely in the interests of his company, while the company and complicit senior officers avoid liability through lack of evidence or on a technicality.

The consequences for an individual or company being involved, whether directly or indirectly, in bribery, deception or fraud are potentially extremely serious. For the individual, the consequences could include criminal prosecution, fines and imprisonment for up to 14 years; loss of professional status; disqualification from office; loss of employment; civil claims for compensation; and damage to reputation. For the company, the consequences could include criminal prosecution and fines;

debarment from tendering; termination for illegality of the contract in respect of which a bribe was paid; civil claims for compensation; and damage to reputation.

It is essential, therefore, that individuals in the construction and engineering industry acquire a better understanding of the criminal law in this area, and become aware of the types of actions which could constitute a breach of this law.

The purpose of the Code is therefore:

- to define the rules with which an individual should comply so as to reduce the risk of breaching the criminal law relating to bribery, deception and fraud (Section II);
- to give examples of actions which could breach that law (Section III);
- to provide information on the applicable law (Section IV).

The intention is that publication of the Code will reduce the prevalence of activities of this nature in the construction and engineering industry, both by making people less willing to undertake these practices, and by making it easier to identify offences. The Code could be adopted by companies and by professional associations as part of, or as an annex to, their ethical codes which govern their employees and members.

Comments on this document, and suggestions for its improvement, are welcomed. These should be sent to neill.stansbury@transparency.org.uk.

SECTION II

ANTI-CORRUPTION RULES

These Rules are modelled on the criminal law of England and Wales relevant to bribery, deception and fraud. Depending on the circumstances, breach of these Rules could result in criminal liability. Rules 1 to 3 are expressed in general terms. Rules 4 to 17 are based on specific criminal offences.

In order fully to understand these Rules, it is essential to read Sections III and IV of this Code. Section III gives examples of offences relating to bribery, deception and fraud committed in the construction and engineering industry. Section IV summarises the criminal law relating to these offences. References to the relevant parts of Sections III and IV are given at the end of each Rule.

General rules

Rule 1

These Rules shall apply to the individual whether the individual is practising in England and Wales, or in another country.

See Section IV: Law §11 and §23, p33 and p36.

Rule 2

An individual shall at all times act honestly and without deception.

See Section IV: Law §3-§5, p32.

Rule 3

An individual shall not deliberately, knowingly, with wilful blindness, or recklessly, participate in any activity which involves dishonesty or deception.

See Section IV: Law §3-§6, p32.

Specific rules

Rule 4 Bribery

An individual shall not:

- (a) offer, agree to give, or give, a bribe;
- (b) request, agree to accept, or accept, a bribe.

See Section III: Examples 3-7, 17, 21, 22, 26, 28, §32, 33, 41, pp14-29.

Section IV: Law §7-§21, pp33-36.

Rule 5 Conspiracy to defraud

An individual shall not agree with one or more persons by dishonesty:

- (a) to deprive a person of something which is his or to which he would be or might be entitled;
- (b) to injure some proprietary right of a person.

See Section III: Examples 1-7, 13, 17, 21-23, 26, 28, 29, 39-42, 47, pp13-31.

Section IV: Law §24-§28, pp36-37.

Rule 6 Obtaining by deception

An individual shall not, whether for himself or for another person, by any deception, dishonestly:

- (a) obtain money or other property belonging to another, with the intention of permanently depriving the other of it;
- (b) obtain a money transfer;
- (c) obtain a pecuniary advantage;
- (d) obtain services.

See Section III: Examples 1-4, 6-25, 27, 28, 34-41, 45, 46, pp13—31.

Section IV: Law §29-§51 pp37-39.

Rule 7 Evasion of liability by deception

An individual shall not, by any deception, dishonestly:

- (a) secure the remission of the whole or part of any existing liability to make a payment, whether his own liability or another's;
- (b) induce a creditor to wait for payment or to forgo payment, with the intention of permanently defaulting on the whole or part of the payment;
- (c) obtain any exemption from or abatement of liability to make a payment.

See Section III: Examples 22, 23, 29, 36-44, pp21-30.

Section IV: Law §52-§56, p40.

Rule 8 False accounting

An individual shall not dishonestly, with a view to gain for himself or another, or with intent to cause loss to another:

- (a) destroy, deface, conceal or falsify any account, record or document made or required for an accounting purpose; or
- (b) in furnishing information for any purpose, produce or make use of any account, record or document made or required for an accounting purpose, which to his knowledge is or may be misleading, false or deceptive in a material particular.

See Section III: Examples 1, 2, 4, 6-9, 13, 15-24, 27-29, 34-41, 45, 46, pp13-31.

Section IV: Law §57-§65, pp40-41.

Rule 9 Forgery and use of false documents

An individual shall not:

- (a) make a false document, with the intention that it be used to induce somebody to accept it as genuine and thereby to act to his own or another person's prejudice;
- (b) use a false document, knowing or believing it to be false, with the intention of inducing somebody to accept it as genuine and thereby to act to his own or another person's prejudice.

See Section III: Examples 38, p27.

Section IV: Law §66-§72, p42.

Rule 10 Perjury and false statements

An individual shall not:

- (a) when he has been sworn as a witness in a judicial proceeding, make a statement material in that proceeding, which he knows to be false or does not believe to be true;
- (b) knowingly and wilfully make a statement false in a material particular, where the statement is made:
 - (i) in a statutory declaration; or
 - (ii) in an abstract, account, balance sheet, book, certificate, declaration, entry, estimate, inventory, notice, report, return, or other document, which he is authorised or required to make, attest or verify, by any Act of Parliament.

See Section III: Examples 39-42, pp28-29.

Section IV: Law §73-§79, pp42-43.

Rule 11 Blackmail

An individual shall not, with a view to gain for himself or another, or with intent to cause loss to another, make any unwarranted demand with menaces.

See Section III: Examples 29-33, 42, 43, pp24-30.

Section IV: Law §80-§86, pp43-44.

Rule 12 Breach of the Competition Act

An individual shall not participate in any agreement between undertakings, decision by association of undertakings, or concerted practice, which may affect trade within the UK, and which has as its object or effect the prevention, restriction or distortion of competition within the UK.

See Section III: Examples 2, p13.
Section IV: Law §87-§90, p44.

Rule 13 Breach of the Enterprise Act

An individual shall not dishonestly agree with one or more persons, in relation to at least two undertakings:

- (a) in relation to the supply or production of products or services in the UK, to fix prices, limit or prevent supply or production, or divide supply or customers between the parties;
- (b) to bid-rigging arrangements in the UK.

See Section III: Examples 2, p13.
Section IV: Law §91-§95, p45.

Rule 14 Conspiracy

An individual shall not agree with one or more persons to commit any of the offences listed in Rule 4 and Rules 6 to 13 above.

See Section IV: Law §96-§97, p45.

Rule 15 Attempt

An individual shall not attempt to commit any of the offences listed in Rule 4 and Rules 6 to 13 above.

See Section III: Examples 3, 8, 15, 20, 22-23, 34, 36-41, 46, p14-
Section IV: Law §98-§100, p46.

Rule 16 Aiding and abetting

An individual shall not aid, abet, counsel or procure the commission of any of the offences listed in Rules 4 to 13 above.

See Section III: Examples 47, p31.
Section IV: Law §101-§104, p46.

Rule 17 Liability of company officers for offences by company

An individual who is a director, manager, secretary or other similar officer of a company, or who is purporting to act in any such capacity, shall not consent to or connive in the commission by the company of which he is an officer of any of the offences listed in Rules 4 to 16.

See Section IV: Law §105-§109, pp46-47.

SECTION III

EXAMPLES OF BRIBERY, DECEPTION AND FRAUD

INTRODUCTION

This section of the Code provides examples of activities in the construction and engineering industry which may constitute criminal offences relating to bribery, fraud and deception. The legal definition of these offences and the penalties for these offences are given in Section IV (pages 32-48). By reading the examples first, before the legal definitions, the individual will appreciate the immediate relevance of the criminal law to everyday practices in the construction and engineering industry.

The examples in this section frequently use the client/architect/contractor structure. However, they would apply on a similar basis to a contractor/sub-contractor structure. These examples are indicative only and are not a complete list of all possible types of criminal behaviour in the construction and engineering industry in relation to bribery, deception and fraud. They are simplistic and are designed to be informative of the type of acts which *could* constitute criminal offences.

As with all criminal offences, the commission of the offence will depend on the precise circumstances, including the degree of involvement of the individual in the particular situation and his intentions. Reliance should not be placed on these examples in determining the criminality of a particular action. Separate legal advice should always be obtained.

The list of offences in each example is also only indicative, and does not necessarily include all the offences which may have been committed. On some occasions, a party may be liable for 'aiding, abetting, counselling or procuring' the commission of an offence, rather than be liable for the offence itself. If the offence is unsuccessful, the party may be liable for attempt.

In many examples, there may be both corporate and individual liability. A company can incur criminal liability through the actions of its employees. Therefore, in many cases, both the company and the employee will be guilty of the same offence.

For instance, Example 1 describes the fraudulent negotiation of a loser's fee. The relevant companies would be liable as well as the individuals involved in the offence. These individuals may include the following employees of each contractor involved in the negotiations: senior officers who negotiate the fee, employees who document the fee, and employees who process payment of the fee. Example 36 describes the submission of a false claim and lists the claimant company as the offender. All those

parties who were knowingly or recklessly involved in this submission on behalf of the claimant may also be guilty of the offences listed. These could include the relevant director and employees of the claimant, as well as any independent consultants (eg quantity surveyor, programmer and lawyer) who put together the claim.

Consequently, a company should be aware that it may incur liability through the actions of its employees. Similarly, employees and independent consultants should be aware that they may incur personal criminal liability when acting on behalf of their employer or client. It is not practical, in the examples below, to list all individuals who may be criminally liable in each offence. Consequently, the global phrase 'individuals involved' has been used instead.

Even where the particular facts of the examples below would not inevitably lead to criminal liability, it is submitted that they would be sufficient to support a finding that the person concerned had not acted with integrity for the purposes of the person's professional or employment code of conduct.

EXAMPLES

Pre-qualification and tender

Example 1 Loser's fee

It is a condition (express or implied) of a tender that each unsuccessful tendering contractor will bear its own tender costs. Prior to tender submission, the competing contractors secretly agree that they will each include in their tender price an agreed additional sum of money representing the total estimated tender costs of all the competing contractors. Whichever contractor is awarded the contract will then divide this sum of money between all the unsuccessful contractors who will thereby recover their tender costs. This is known as a 'loser's fee'. This arrangement is not disclosed to the client. The client believes that the losing contractors are bearing their own tender costs. The client is therefore unknowingly paying more than it would have done had the unsuccessful contractors borne their own tender costs.

<i>Possible offenders and offences</i>	
Contractors Individuals involved	False accounting Obtaining property by deception Obtaining a money transfer by deception Conspiracy to defraud

Example 2 Price fixing

A group of contractors who routinely compete in the same market secretly agree to share the market between them. They will each apparently compete on all major tenders, but will in advance secretly agree which of them should win each tender. The contractor who is chosen by the other contractors to win a tender will then notify the others prior to tender submission as to its tender price. The other contractors will then tender at a higher price so as to ensure that the pre-selected contractor wins the tender. The winning contractor would therefore be able to achieve a higher price than if there had been genuine competition for the project. If sufficient projects are awarded, each contractor would have an opportunity to be awarded a project at a higher price. This arrangement is kept confidential from the clients on respective projects who believe that the tenders are taking place in genuine open competition, and that they are achieving the best available price. The clients therefore pay more for their projects than they would have done had there been genuine competition.

<i>Possible offenders and offences</i>	
Contractors Individuals involved	False accounting Obtaining property by deception Obtaining a money transfer by deception Conspiracy to defraud Offence under the Enterprise Act 2002 Offence under the Competition Act 1998

Example 3 Manipulation of pre-qualification

A client appoints an engineer to manage a pre-qualification for a project so as to obtain a short-list of five suitable contractors who can then bid for the contract. A contractor who wishes to be short-listed pays a cash bribe to the engineer to ensure that key competitors of the contractor are eliminated from the short-list on artificial grounds. The engineer produces a short-list which does not contain several key competitors. The engineer falsely informs the client that it has selected the best five competitors. The client relies on the engineer's advice. The contractor who bribed the engineer fails to win the project. The winning contractor submits a very competitive price, and completes the project to a high standard. The client therefore suffers no loss as a result of the manipulation of the short-list.

<i>Possible offenders and offences</i>	
Contractor	Bribery
Engineer	Attempt to obtain property by deception
Individuals involved	Attempt to obtain a money transfer by deception
	Conspiracy to defraud

Example 4 Bribery to obtain main contract award

A contractor who is tendering for a project is approached by an agent who claims that he will be able to assist the contractor to be awarded the project. They agree that, if the contractor is awarded the project, the contractor will pay the agent a commission of 5% of the contract price. The agent is appointed under a formal agency agreement which states that the agent will carry out specified services. However, the fee being paid to the agent is grossly in excess of the market value of the legitimate services which the agent is committed to provide. The agent intends to pay part of the commission to a representative of the client to ensure that the contractor is awarded the contract. Although the contractor does not actually know that the agent will use the commission for that purpose, the contractor thinks it likely that this will be the case due to the significant disparity between the value of the legitimate services to be carried out by the agent and the amount of the fee. The contractor is awarded the contract. The contractor pays the agent the commission. The agent pays the representative of the client a bribe out of the agent's commission. The cost of the commission (and therefore of the bribe) is included in the contract price. The client therefore pays more than it would have done had there not been a bribe. The client is unaware that one of its representatives has been bribed.

<i>Possible offenders and offences</i>	
Contractor	Bribery
Agent	False accounting
Individuals involved	Obtaining property by deception
	Obtaining a money transfer by deception
	Conspiracy to defraud

Example 5 Bribery during sub-contract procurement

A procurement manager of a contractor is managing a competitive tender between sub-contractors. One of the sub-contractors offers a free holiday to the procurement manager if the procurement manager awards the contract to the sub-contractor. The procurement manager does so. The relevant sub-contractor is in fact the cheapest and best of the sub-contract tenderers and does not include the cost of the bribe in the sub-contract price. Consequently, the contractor suffers no loss as a result of the bribe.

<i>Possible offenders and offences</i>	
Procurement manager Sub-contractor Individuals involved	Bribery Conspiracy to defraud

Example 6 Corruptly negotiated contract

A senior government official who is in charge of the construction of new infrastructure projects wishes to enrich himself. He therefore decides to initiate a project which could conceal a major bribe for himself. In order to maximise the bribe potential, he ensures that the design will result in a project which is unnecessarily large and complex. He then informs a major contractor that he will ensure that the contractor is awarded the project on a non-competitive basis if the contractor includes in the contract price a payment for him personally of an amount equal to 30% of the contract price. The contractor agrees. The contract is awarded and the contractor pays the official.

<i>Possible offenders and offences</i>	
Official Contractor Individuals involved	Bribery False accounting Obtaining property by deception Obtaining a money transfer by deception Conspiracy to defraud

Example 7 Manipulation of design

A client appoints an architect to design a project. One of the competing contractors who is tendering for the project bribes the architect to provide a design with which only that contractor can fully comply. The bribe is the promise by the contractor of significant future work for the architect. The architect provides an appropriate design. The contractor submits a price that is higher than it would have been had there been a genuine competitive tender, and higher than several of the other tenders. The architect recommends to the client that the relevant design was in the client's best interests and that the compliant contractor should be appointed, even though its tender is not the cheapest, as only it fully complies with the tender design. In fact, to the knowledge of the architect, one of the cheaper tenderers bidding to an alternative

design would have adequately suited the client's needs. The client follows the architect's advice and awards the contract to the compliant contractor.

<i>Possible offenders and offences</i>	
Contractor Architect Individuals involved	Bribery False accounting Obtaining property by deception Obtaining a money transfer by deception Conspiracy to defraud

Example 8 Specification of overly sophisticated design

A client and a contractor are negotiating a design and build contract. There is no competitive tender and the client is, to the knowledge of the contractor, relying on the contractor to put forward a reasonable proposal. In its written proposal to the client, the contractor deliberately specifies an overly sophisticated design. The contractor is aware that an alternative cheaper design would be adequate for the client's purposes but does not inform the client of this possibility. The contractor's intention is that the client will accept the sophisticated design as it will result in a higher overhead recovery and profit for the contractor. The client appoints an independent engineer to check the design who notifies the client that the design is unnecessarily sophisticated. The client does not place the contract.

<i>Possible offenders and offences</i>	
Contractor Individuals involved	False accounting Attempt to obtain property by deception Attempt to obtain a money transfer by deception

Example 9 Inflation of resources and time requirements

A client and a contractor are negotiating a contract. There is no competitive tender and the client is, to the knowledge of the contractor, relying on the contractor to put forward a reasonable proposal. In its written proposal to the client, the contractor deliberately exaggerates the manpower, equipment and time required to complete the project. These exaggerated elements are not a contingency against possible risk. They are deliberate overstatements of the time and resources required in order to support a higher price. The client accepts the contractor's proposal. The works are carried out and the client pays the excessive contract price.

<i>Possible offenders and offences</i>	
Contractor Individuals involved	False accounting Obtaining property by deception Obtaining a money transfer by deception

Example 10 Obtaining a quotation only for the purpose of price comparison

A client intends to place a contract with a contractor which it frequently uses. It wishes to ensure that the price obtained from the contractor is a market price. It therefore requests quotations from two other contractors. It leads these contractors to believe that they have a chance of winning the project. However, the client always intends to award the contract to its favoured contractor. The price of one of the other bidding contractors is the lowest. The client discloses this lowest price to its favoured contractor and requires it to match the price. The favoured contractor does so and is awarded the contract. The other contractors therefore waste their tender costs.

<i>Possible offenders and offences</i>	
Client Individuals involved	Obtaining services by deception

Example 11 Concealment of financial status

A client places a contract with a contractor. At the time of placing the contract, the client is in serious financial difficulty. It believes that it is quite likely that it will go into receivership prior to completion of the contract and will therefore be unable to pay the contractor in full for work done. The client does not disclose its financial status to the contractor at the time of placing the contract. The client is aware that if it does disclose its financial difficulties, the contractor is unlikely to commence work.

<i>Possible offenders and offences</i>	
Client Individuals involved	Obtaining services by deception

Example 12 Intention to withhold payment

A client places a contract with a contractor. At the time of placing the contract, the client intends, in order to increase the profitability of the project for the client, to refuse to pay the contractor the retention of 10% upon completion of the project and to concoct artificial counterclaims to set-off against the retention.

<i>Possible offenders and offences</i>	
Client Individuals involved	Obtaining services by deception

Example 13 Submission of false quotation

A procurement manager of a contractor is required to organise the hire of cranes for one of the contractor's projects. Crane hire companies are at that time giving discounts of approximately 25% off their published hire prices for long-term hires. The procurement manager and two friends set up a company ('Craneco') which is registered in the names of the two friends. Half the shares in Craneco are secretly held as nominee for the procurement manager. Craneco obtains a quote including discount from a crane hire company. The procurement manager obtains the published rates sheets (excluding discounts) from two other crane companies. Craneco supplies a written quote to the contractor to supply the cranes at a rate slightly lower than the published rates of the two other crane companies, but at a higher rate than the rate quoted to Craneco. The procurement manager uses the two rates sheets and the quote from Craneco as three competitive quotes, and awards the contract for the supply of cranes to Craneco. These documents are placed on the procurement file, creating the false impression that there has been genuine competitive pricing, and that the hire contract has been awarded to the cheapest supplier. Craneco makes a profit. The procurement manager does not disclose to the contractor his interest in Craneco. The contractor pays more for the hire than it would have done if the contract had been awarded, including discount, to one of the other crane hire companies.

<i>Possible offenders and offences</i>	
Procurement manager Friends	False accounting Obtaining property by deception Obtaining a money transfer by deception Conspiracy to defraud

Example 14 Falsely obtaining export credit insurance

A contractor tenders for a project using a buyer credit. Under this arrangement, a commercial bank offers the client a loan for part of the project cost. The bank will directly pay the contractor for the work as it progresses. The client will then pay back the loan and interest to the bank over an agreed period of time. The bank is insured against default by the client in repaying the loan by means of an export credit guarantee. The contractor pays the export credit guarantee organisation a premium in return for it offering the guarantee. Under the application for the export credit guarantee, the contractor is required to warrant to the export credit guarantee organisation that it will not pay a bribe in relation to the project award. The contractor pays a bribe to a representative of the client in order to win the contract. (This example looks only at the offence committed in relation to obtaining the export credit guarantee.)

<i>Possible offenders and offences</i>	
Contractor Individuals involved	Obtaining a pecuniary advantage by deception

Project execution

Example 15 False invoicing: supply of inferior materials

A concrete supplier is obliged to supply concrete to a particular specification. The concrete supplier deliberately supplies concrete of a cheaper and inferior specification, but invoices the contractor for the required specification. When the concrete cores are tested, the contractor discovers that the mix is inferior. It refuses to pay the concrete supplier.

<i>Possible offenders and offences</i>	
Concrete supplier Individuals involved	False accounting Attempt to obtain property by deception Attempt to obtain a money transfer by deception

Example 16 False invoicing: supply of less equipment

A scaffolding sub-contractor contracts to provide a specified quantity of scaffolding to a project for a fixed price and for a fixed duration. Before the contract period for supply has expired, the scaffolding sub-contractor, without the knowledge of the contractor, removes part of the scaffolding. The scaffolding sub-contractor does not inform the contractor that some scaffolding has been removed nor does it make any deduction for the scaffolding removed. It invoices the contractor for the full fixed price. The contractor pays in full.

<i>Possible offenders and offences</i>	
Sub-contractor Individuals involved	False accounting Obtaining property by deception Obtaining a money transfer by deception

Example 17 False work certificates

An earth-moving sub-contractor signs a contract with the contractor to remove unsuitable material from site and to replace it with suitable material. The earth-moving sub-contractor will be paid by the load. The contractor appoints a quantity surveyor to count on site the number of loads removed and replaced by the earth-moving sub-contractor. Each load will have a written load certificate which will be signed by the earth-moving sub-contractor and counter-signed by the quantity surveyor. The manager of the earth-moving sub-contractor agrees with the quantity surveyor that the quantity surveyor will falsely certify more loads than the earth-moving sub-contractor actually undertakes. In return, the earthmoving sub-contractor will pay the quantity surveyor 30% of the payment received by the earth-moving sub-contractor for each false load. The quantity surveyor certifies 20 false removals and 20 false replacements. The earth-moving sub-contractor submits both its genuine and its false certificates to the contractor for payment. The contractor pays in full,

resulting in an illicit profit to the earth-moving sub-contractor. The earthmoving sub-contractor pays the quantity surveyor his share.

<i>Possible offenders and offences</i>	
Sub-contractor Quantity surveyor Individuals involved	Bribery False accounting Obtaining property by deception Obtaining a money transfer by deception Conspiracy to defraud

Example 18 Excessive repair work

A domestic plumbing contractor is called to a customer's house to repair a toilet. After inspecting the toilet, the plumber ascertains that the repair could be completed by the supply of a replacement washer. The plumbing contractor, with the intention of securing a higher price, falsely informs the customer that several new parts are necessary. The customer agrees. The plumbing contractor replaces the parts and invoices the customer for the work carried out. The invoice is higher than it would have been had only the washer been replaced. The customer pays the invoiced amount.

<i>Possible offenders and offences</i>	
Contractor Individuals involved	False accounting Obtaining property by deception Obtaining a money transfer by deception

Example 19 Overstating man-day requirements

A sub-contractor is appointed by a contractor on a day-works basis to undertake work which the sub-contractor knows will take approximately 100 man-days to complete. The sub-contractor informs the contractor that the work will require 150 man-days. The sub-contractor deliberately over-states the man-day requirement in order to achieve a higher price from the contractor. The contractor accepts the sub-contractor's estimate of 150 days. The sub-contractor completes the work using 100 man-days. The sub-contractor invoices the contractor for 150 man-days of work and attaches time-sheets for the work. 100 man-days of time-sheets are correct. 50 man-days of time-sheets are falsified so as to support the amount invoiced. The contractor pays the invoiced amount.

<i>Possible offenders and offences</i>	
Sub-contractor Individuals involved	False accounting Obtaining property by deception Obtaining a money transfer by deception

Example 20 Inflated claim for variation (1)

A contractor is instructed by the architect to carry out a variation to the works. The contract entitles the contractor to an extension of time and additional payment in this circumstance. The contractor submits a written claim in respect of the variation to the architect which deliberately exaggerates the manpower, materials, equipment and time required to carry out the variation. The architect reduces the contractor's claim by disallowing the exaggerated element. The contractor is as a result awarded an extension of time and additional payment which is correctly calculated.

<i>Possible offenders and offences</i>	
Contractor Individuals involved	False accounting Attempt to obtain property by deception Attempt to obtain a money transfer by deception

Example 21 Inflated claim for variation (2)

The facts are as in Example 20 except that, when the architect indicates to the contractor that he is inclined to reduce the contractor's claim, the contractor offers the architect a bribe if he will approve the full claim. The architect does so. The contractor is as a result awarded an extension of time and additional payment of the full amount claimed by the contractor. The client accepts the architect's approval of the claim and pays the contractor.

<i>Possible offenders and offences</i>	
Contractor Architect Individuals involved	Bribery False accounting Obtaining property by deception Obtaining a money transfer by deception Conspiracy to defraud

Example 22 False variation claim

A contractor carries out work which is not in compliance with the contract specification. Under the contract, the architect is responsible for issuing variations. The contractor offers the architect a bribe if he confirms in writing that the work was carried out pursuant to a variation issued by the architect, and is therefore acceptable. The architect does so. The client discovers the proposed deception, and refuses to pay the contractor for the defective work.

<i>Possible offenders and offences</i>	
Contractor Architect Individuals involved	Bribery, False accounting Attempt to evade liability by deception Attempt to obtain property by deception Attempt to obtain a money transfer by deception Conspiracy to defraud

Example 23 Issue of false delay certificate

A contract entitles the contractor to an extension of time and payment of loss and expense in the event of specified delays caused by the client. The contract also provides that the contractor should pay liquidated damages to the client in the event of specified delays caused by the contractor. Under the contract, the engineer determines questions of delay and loss and expense. The works are delayed by the client. The contractor applies to the engineer for an extension of time and ascertainment of loss and expense. The client and engineer are aware that the contractor is entitled to both. The client agrees with the engineer that the engineer should refuse the contractor’s claim and should instead issue a certificate requiring the contractor to pay the client liquidated damages for delay. The engineer does so. The contractor refuses to pay the liquidated damages, and the matter goes to arbitration. The arbitrator awards the contractor an extension of time and additional payment.

<i>Possible offenders and offences</i>	
Client Engineer Individuals involved	False accounting Attempt to evade liability by deception Attempt to obtain property by deception Attempt to obtain a money transfer by deception Conspiracy to defraud

Example 24 False extension of time application

A contractor has been delayed in completing the project. Two reasons could account for the delay. The first is the delayed delivery of materials by one of the contractor’s suppliers for which delay the contractor is responsible under the contract and for which he would be liable to pay liquidated damages to the client. The second is a change to the specification for which delay the client is responsible under the contract and for which the contractor would be entitled to receive an extension of time and additional cost. The contractor is aware that the whole or part of the actual cause of the delay is the supplier delay. However, the contractor submits a written claim to the architect which alleges that the whole delay was attributable to the change in specification. The architect accepts the contractor’s claim, and awards the contractor an extension of time and additional payment. The client pays the additional payment.

<i>Possible offenders and offences</i>	
Contractor Individuals involved	False accounting Obtaining property by deception Obtaining a money transfer by deception

Example 25 False assurance that payment will be made

During a project, a client runs into financial difficulties and realises that it will be unable to complete payment to the contractor. The client nevertheless induces the contractor to finish the works by falsely assuring the contractor that it will be paid.

<i>Possible offenders and offences</i>	
Client Individuals involved	Obtaining services by deception

Example 26 *Delayed issue of payment certificates*

The client offers the architect a future appointment on another project if the architect delays the issue of payment certificates which are due to the contractor. The architect agrees.

<i>Possible offenders and offences</i>	
Client Architect Individuals involved	Bribery Conspiracy to defraud

Example 27 *Concealing defects (1)*

A contractor accidentally omits some structural steel from the foundation works. The contractor discovers the omission after the foundations have been completed. Neither the architect nor the client realises the omission. The contractor decides not to disclose the omission to the architect or client. The contractor invoices the client in full for the foundation works (including the omitted structural steel). The client pays the contractor in full.

<i>Possible offenders and offences</i>	
Contractor Individuals involved	False accounting Obtaining property by deception Obtaining a money transfer by deception

Example 28 *Concealing defects (2)*

A roofing sub-contractor installs a waterproof roof membrane. The membrane is accidentally perforated during installation which means that it could leak. The membrane needs to be approved by the contractor’s supervisor before it is covered over. The membrane should be rejected and replaced owing to the perforations. The sub-contractor offers to make a payment to the supervisor if he certifies that the sub-contractor’s defective membrane is water-tight. The supervisor accepts. The payment is made by the sub-contractor to the supervisor and the supervisor issues the certificate. The sub-contractor submits the certificate to the contractor, and obtains full payment for the defective membrane. Neither the sub-contractor nor supervisor discloses to the contractor that the membrane is defective.

<i>Possible offenders and offences</i>	
Sub-contractor Supervisor Individuals involved	Bribery False accounting Obtaining property by deception Obtaining a money transfer by deception Conspiracy to defraud

Example 29 Set-off of false rectification costs

A contractor has completed the works and applies for final payment. Under the contract, the architect is required to specify outstanding defects. The client persuades the architect to include, in the schedule of defects, additional purported defects which in fact are not outstanding. The client then sets off the alleged cost of rectification of these defects against the balance due to the contractor. The contractor disputes the deduction. The client informs the contractor that, if the contractor does not accept the reduced sum, then he will have to litigate or arbitrate to get the remainder from the client. The contractor cannot afford litigation, so he accepts the reduced amount.

<i>Possible offenders and offences</i>	
Client Architect Individuals involved	False accounting Evasion of liability by deception Conspiracy to defraud
Client Individuals involved	Blackmail

Example 30 Refusal to issue final certificate

A contractor has properly completed the works and is entitled to receive a final certificate. The engineer refuses to issue the final certificate to the contractor unless the contractor pays him 5% of the final certificate value. The contractor refuses to pay.

<i>Possible offenders and offences</i>	
Engineer Individuals involved	Blackmail

Example 31 Requirement to accept lower payment than is due

A client owes a contractor payment of the contract price. The contractor has completed the contract works to the correct specification and within the allotted time. There is no dispute between the client and the contractor. The client informs the contractor that it will pay the contractor 80% of the contract sum immediately in full and final settlement. The client further states that, if the contractor does not accept

this proposal and wants to recover the full amount, the contractor will have to sue the client for payment and the client will make the litigation as long and as costly as possible. The client is a large company which could bear the cost of protracted litigation. The client knows that the contractor would be unable to do so. The contractor agrees to accept the reduced payment.

<i>Possible offenders and offences</i>	
Client Individuals involved	Blackmail

Example 32 Extortion by client’s representative

A contractor is due the final payment on a project. The client’s representative informs the contractor that he will not authorise the release of the final payment unless the contractor makes an extra payment to the client’s representative personally. The contractor makes the payment. The client’s representative authorises the release of the final payment.

<i>Possible offenders and offences</i>	
Client’s representative	Blackmail
Client’s representative Contractor Individuals involved	Bribery

Example 33 Facilitation payment

A customs official demands a payment from a contractor in return for the customs official speeding up the issue of an import permit to which the contractor is entitled. The contractor makes the payment.

<i>Possible offenders and offences</i>	
Customs official	Blackmail
Customs Official Contractor Individuals involved	Bribery

Example 34 Overstating of profits

In the project accounts, a project manager deliberately overstates the profitability of the project he is overseeing in order to enhance his performance bonus. The project manager’s employer realises the overstatement, and refuses to pay the performance bonus.

<i>Possible offenders and offences</i>	
Project manager	False accounting Attempt to obtain property by deception

Example 35 *False job application*

In order to obtain employment, an applicant for the post of contract manager states in his job application that he has worked as a contract manager. He has not held such a position. He is appointed to the post.

<i>Possible offenders and offences</i>	
Applicant	False accounting Obtaining a pecuniary advantage by deception

Dispute resolution

Example 36 *Submission of incorrect or misleading contract claims, pleadings or particulars*

In a contract claim, or during dispute resolution proceedings (such as mediation, adjudication, arbitration or litigation), the claimant submits claims, pleadings or particulars which he knows to be false, or does not believe to be true, or of which he is reckless as to their accuracy. These include:

- A claim for an extension of time (in circumstances where the contract permits an extension of time based on actual delay) where the extension claimed is greater than the actual delay caused, or where the stated cause of delay is not the true cause of delay;
- A loss and expense claim where the extension of time claim on which the loss and expense claim is based is incorrect or the amount of loss and expense claimed is overstated;
- A claim for payment for the supply of work, equipment or materials where the work, equipment or materials are defective, or are not in accordance with the specification, or are not supplied.
- A claim containing false or misleading statements as to the parties' understanding at the time the contract was made;
- A claim containing false or misleading statements regarding representations made concerning scope of work, quality, timing, or limitations of liability.

<i>Possible offenders and offences</i>	
Claimant Individuals involved	False accounting Attempt to obtain property by deception Attempt to obtain a money transfer by deception Attempt to evade liability by deception

Example 37 Concealment of documents

In a contract claim, or dispute resolution proceedings, a claimant deliberately does not disclose to his opponent, or to the dispute resolution tribunal, documents which are, or may be, damaging to the claimant’s case. Such documents include:

- Timesheets which would undermine the claimant’s case that labour and equipment were working on a particular item of work;
- Work records which would show that the claimant’s claim document overstates or incorrectly describes equipment or material;
- Work records which would show, contrary to the claimant’s case, that the works were not completed by a particular date, or were defective, or were not in accordance with the specification;
- Programmes which would establish that the delay claimed by the claimant was in fact due to a different reason from that claimed, or was not as long as that claimed;
- Cost records which would show that claimed costs have been incorrectly stated;
- Photographs which would show an activity occurring at a different time or in different circumstances to that alleged by the claimant;
- Correspondence and other records which would undermine the claimant’s case.

<i>Possible offenders and offences</i>	
Claimant Individuals involved	False accounting Attempt to obtain property by deception Attempt to obtain a money transfer by deception Attempt to evade liability by deception

Example 38 Submission of false supporting documents

In a contract claim, or dispute resolution proceedings, a claimant submits the following supporting documents as genuine and accurate when he knows that they are false, or does not believe them to be true, or is reckless as to their accuracy:

- Timesheets which are not genuine and which have been created to show falsely that labour and equipment was used for a particular item of work when in fact it was not;
- Work records which are not genuine and which have been created to overstate or incorrectly describe equipment and materials supplied;
- Programmes which purport correctly to state dates and events, but which do not and which have been deliberately amended to attribute delay falsely to a stated cause;

- Cost records which incorrectly state the cost of items, or include items or work which were not provided;
- Photographs which have been created to show falsely that an activity occurred at a certain time or location, when in fact it did not.

<i>Possible offenders and offences</i>	
Claimant Individuals involved	False accounting Attempt to obtain property by deception Attempt to obtain a money transfer by deception Attempt to evade liability by deception Forgery Using a false instrument

Example 39 Supply of false witness evidence

In dispute resolution proceedings, a witness as to fact gives evidence on behalf of the claimant (whether by way of affidavit, witness statement or orally) that he knows to be false, or does not believe to be true. Such evidence by the witness includes the following:

- Confirming that supporting documents (such as those referred to in Example 38) are genuine and accurate, when he knows that they are false, or is not sure whether or not they are accurate;
- Stating that an event occurred, when he knows that it did not occur, or is not sure that it occurred;
- Stating that the opponent's action was the sole cause of delay to the works, when he knows that there were other causes of delay, or is not sure that it was the sole cause of delay;
- Stating that the claimant's loss was a certain figure, when he knows that the figure has been inflated above the true figure, or is not sure that the claimed figure is correct;
- Stating that a fact had been orally agreed between representatives of the claimant and the opponent, when he knows that this fact had not been agreed, or is not sure whether or not it had been agreed;
- Giving an incomplete account of events, knowing that, or being reckless as to whether, the incomplete account may be misleading.

<i>Possible offenders and offences</i>	
Claimant Witness Individuals involved	Perjury False accounting (where the evidence is written) Attempt to obtain property by deception Attempt to obtain a money transfer by deception Attempt to evade liability by deception Conspiracy to defraud

Example 40 Supply of false expert evidence

In dispute resolution proceedings, a claimant appoints an expert to provide an opinion on an aspect of the claimant's case. The expert's initial report, prepared confidentially for the claimant, is unsupportive of the claimant's case. The claimant makes it clear to the expert that his appointment will continue only if the expert amends his report to make it favourable to the claimant's case. The expert does so. He believes the amended view to be arguable, but presents it in the report as his most favoured view, and as the correct view, when this is not his belief. The report is then submitted as expert evidence in the proceedings and the expert witness gives oral evidence in accordance with it. Both the expert and the claimant are aware that the expert does not believe his evidence to be true. The success of the claim and counterclaim in the proceedings depends on the outcome of the expert evidence.

<i>Possible offenders and offences</i>	
Claimant Expert Individuals involved	Perjury False accounting (where the evidence is written) Attempt to obtain property by deception Attempt to obtain a money transfer by deception Attempt to evade liability by deception Conspiracy to defraud

Example 41 Bribery of witness

A claimant offers a witness a percentage of any future award by the arbitrator in the claimant's favour if the witness gives false evidence in support of the claimant in the arbitration. The witness accepts, and provides a false witness statement and false oral evidence both of which support the claim and undermine the counterclaim.

<i>Possible offenders and offences</i>	
Claimant Witness Individuals involved	Bribery Perjury False accounting (where the evidence is written) Attempt to obtain property by deception Attempt to obtain a money transfer by deception Attempt to evade liability by deception Conspiracy to defraud

Example 42 Blackmail of witness

The respondent in an arbitration owes money to the claimant. The respondent tells a witness that he will be dismissed as an employee of the respondent unless he gives false evidence in support of the respondent in the arbitration. The employee gives the false evidence and as a result the respondent wins the arbitration, and does not need to pay the claimant.

<i>Possible offenders and offences</i>	
Respondent Individuals involved	Blackmail
Witness Respondent Individuals involved	Perjury Evasion of liability by deception Conspiracy to defraud

Example 43 False information as to financial status

Under a settlement agreement, a client agrees to pay a contractor a certain amount. The client is late in paying and meets with the contractor to discuss payment. At the meeting, the client falsely informs the contractor that the client is in financial difficulty. The client offers the contractor a lower amount than the contractor is due and states that, if the contractor does not accept the lower amount, the client would have to be put into liquidation and the contractor may in that event get even less than the amount offered, or nothing at all. The contractor accepts the reduced payment.

<i>Possible offenders and offences</i>	
Client Individuals involved	Blackmail Evasion of liability by deception

Example 44 False statement as to settlement sum

A main contractor has reached a confidential settlement with the client. The settlement amount includes an amount for payment in full to all sub-contractors on the project. The main contractor then meets with the sub-contractors, and falsely states that he received a smaller amount from the client under the settlement agreement than he actually received. The sub-contractors believe the main contractor and, as a result of what they believe to be an underpayment under the settlement between the main contractor and the client, they agree to accept a reduced payment of sums due under their sub-contracts.

<i>Possible offenders and offences</i>	
Main Contractor Individuals involved	Evasion of liability by deception

Example 45 Over-manning by law firm

A contractor appoints a law firm to act in an arbitration on its behalf. The partner in the law firm who is head of construction sees the arbitration as a major opportunity to make money and allocates four lawyers to the arbitration when he knows that two lawyers would be sufficient. The partner advises the client, in writing, that this number of lawyers is necessary owing to the complexity of the case and the volume of the work. The contractor accepts this advice. The partner quotes the contractor an

hourly rate for each of the lawyers. Monthly bills are submitted by the law firm to the contractor and these are paid by the contractor.

<i>Possible offenders and offences</i>	
Partner	False accounting Obtaining property by deception Obtaining a money transfer by deception

Example 46 Excessive billing by lawyer

A lawyer working on an arbitration for a client bills more hours to the client than the lawyer actually spent working on the case. The client objects to the bill, and the lawyer reduces the bill to the amount of time actually spent on the case. The client pays the reduced (and accurate) bill.

<i>Possible offenders and offences</i>	
Lawyer	False accounting Attempt to obtain property by deception Attempt to obtain a money transfer by deception

Example 47 Complicity by lawyer

In relation to Example 39, the lawyer involved in drafting the witness statement is aware that the witness does not believe his evidence. However, despite this knowledge, the lawyer continues to draft the witness statement on the basis that it is true, and allows the witness statement to be put forward in support of the claimant's case.

<i>Possible offenders and offences</i>	
Lawyer	Aiding and abetting the primary offences Conspiracy to defraud

SECTION IV

SUMMARY OF THE LAW RELATING TO BRIBERY, DECEPTION AND FRAUD

INTRODUCTION

1. The following legal analysis relates to the law concerning bribery, deception and fraud in England and Wales. This analysis is a summary and is not comprehensive or complete.
2. Both companies and individuals may be liable for the offences described in this Section. The expression 'person' used below refers to both companies and individuals.

DEFINITIONS

3. **'Dishonesty'** and **'dishonestly'** are normally judged by the following test:
 - (a) Was what was done dishonest according to the ordinary standards of reasonable and honest people? If no, the defendant is not guilty. If yes:
 - (b) Did the defendant realise that reasonable and honest people would regard what he did as dishonest? If yes, he is guilty. If no, he is not.
4. **'Deception'** can be:
 - (a) by words or by conduct;
 - (b) as to fact or law;
 - (c) as to the present intentions of the person using the deception, or of any other person.
5. **'Deception'** can be deliberate or reckless.
 - (a) A deception is **deliberate** if a person knows his statement or conduct is false and will or may be accepted as true.
 - (b) A deception is **reckless** if a person is aware that his statement or conduct may be false and may be accepted as true, or if he is aware that it is ambiguous and may be understood by another in the false sense. If a person making a statement believes it to be true, he is not reckless, however unreasonable his belief may be. However, the more unreasonable the belief, the less likely the court is to accept that the person genuinely held the belief.
6. A person is **'wilfully blind'** if he deliberately closes his eyes to all the circumstances.

SUMMARY OF CRIMINAL OFFENCES

BRIBERY

7. Bribery is both a common law and a statutory offence.
8. Under the common law definition, bribery is the receiving or offering of an undue reward, by or to any person, in order to influence his behaviour, and to incline him to act contrary to the known rules of honesty and integrity.
9. Statutory bribery is covered by the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, the Prevention of Corruption Act 1916, and the Anti-terrorism, Crime and Security Act 2001. These statutes are drafted in a complex manner. In summary, they provide that it is a crime if:
 - (a) a person corruptly solicits or receives, for himself, or for any other person, any gift, loan, fee, reward or advantage as an inducement to, or reward for, any public servant doing or forbearing to do anything in relation to the business of the public body;
 - (b) a person corruptly gives or offers any gift, loan, fee, reward, or advantage to any person, whether for the benefit of that person or of another person, as an inducement to or reward for any public servant doing or forbearing to do anything in relation to the business of the public body;
 - (c) any agent corruptly accepts, or agrees or attempts to accept, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing, or forbearing to do, any act in relation to his principal's business; or
 - (d) any person corruptly gives or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, any act in relation to his principal's affairs or business.
10. For the purposes of the statutory offences:
 - (a) 'Agent' includes an employee, and any person acting for another, and 'principal' includes an 'employer'.
 - (b) 'Public body' includes a public body situated outside the UK.
 - (c) 'Corruptly' means that the person making the offer should do so deliberately and with the intention that the person to whom it was addressed should enter into a corrupt bargain. The intention can be inferred from the circumstances (for example if there is no other rational explanation for the offer).
 - (d) 'Intention' can include wilful blindness (where a person deliberately closes his eyes to the circumstances).
11. The courts of England and Wales will normally accept jurisdiction in relation to a bribery offence if the offence has been committed by:
 - (a) an individual of any nationality where the offence is committed wholly or partly within the UK;
 - (b) an individual who is a national of the UK where the offence is committed wholly outside the UK;
 - (c) a corporation registered in any country where the offence is committed wholly or partly within the UK;

- (d) a corporation registered in the UK where the offence is committed wholly outside the UK.
12. In relation to a company, the liability for a particular bribe could extend beyond the companies directly involved in the giving and receiving of the bribe, to include those companies who were either knowingly involved in the transaction or were wilfully blind as to the true nature of the transaction. For example, a company could be liable for bribes paid on its behalf, or for its direct or indirect benefit, by subsidiary or associated companies, agents, joint venture or consortium partners, sub-contractors and suppliers.
13. In relation to an individual, the liability for a particular bribe could extend beyond the persons directly involved in the giving and receiving of the bribe, to include those individuals who were either knowingly involved in the transaction or were wilfully blind as to the true nature of the transaction. For example, where a company is involved in a bribe transaction, liability could extend to the following individuals:
- (a) the officer or employee (for example, the sales director) who directly negotiated the payment of the bribe with the recipient;
 - (b) the directors or senior managers of the company who authorised the payment of the bribe, or who authorised the general policy of payment of bribes, whether tacitly or expressly;
 - (c) the financial director who instructed payment of the bribe;
 - (d) the accounting employee who implemented payment of the bribe;
 - (e) the in-house lawyer or the external lawyer who drafted the agency or other agreement which was used as a cover for the bribe mechanism.
14. A person may be liable for bribery even where:
- (a) the person does not pay or receive the bribe personally, and instead the bribe is paid or received through or by another person, such as an agent, subsidiary company, joint venture partner, friend, spouse or other third party;
 - (b) the person believes that his actions are in the interests of his employer;
 - (c) the person is acting under instructions from a person who is senior to him in the management hierarchy;
 - (d) the person makes no personal gain from the bribe;
 - (e) the bribe was not money but was instead the provision of a non-cash advantage, for example, a future contract, a holiday, jewellery or other gifts;
 - (f) the person who has been offered or who has received the bribe does not act in the way intended when the bribe was agreed;
 - (g) the bribe is never paid.
15. One of the most common mechanisms for paying a bribe is to do so through an agent or other intermediary. The appointment of the agent may appear on the face of it to be a genuine appointment for legitimate services to be provided under a formal agency agreement. However, the agreement and appointment may be a sham which conceals the payment of a bribe. If the agent is involved in a bribe transaction, the person who appointed the agent could be liable for bribery if he knew that a bribe was to be paid by the agent, or that it probably

would be paid. Even if the agent had never expressly told the person that it was to pay a bribe, and even if the person had not expressly authorised the payment of a bribe, a court may infer that the person must have known that a bribe would probably be paid. This inference may arise where the circumstances of the agent's appointment would be likely to put the person on notice. Examples of situations where the person may have been put on notice are where the agency commission is significantly disproportionate to the legitimate scope of services which the agent is to undertake, or where the agent has no capability of undertaking these services, or where the agency commission is to be paid in foreign currency into an off-shore bank account. It will not be sufficient for the person to rely on a formal agency agreement as a defence. The court is likely to look at the circumstances surrounding the agreement, not at its form.

16. 'Facilitation payment' is the term often used to cover relatively minor payments made to junior government officials to expedite services to which the payer is entitled (eg the obtaining of import or work permits, or installation of telephone lines). The amounts which have to be paid are often quite small, yet the consequences of not paying can be large. However, even though facilitation payments are usually small, their payment and receipt is normally a crime both in the UK, and in the country in which the payment is made.
17. The UK is a signatory to several international anti-corruption conventions which require the UK to take active steps against corruption. These include:
 - (a) The United Nations Convention against Corruption;
 - (b) The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
 - (c) The Council of Europe Criminal Law Convention on Corruption,
 - (d) The Council of Europe Civil Law Convention on Corruption;
 - (e) The EU Convention on the Protection of the European Communities' Financial Interests (PIF-Convention), and its first and second Protocols;
 - (f) The EU Convention on the Fight against Corruption involving Officials of the European Communities or Officials of the EU Member States.
18. These conventions vary in scope and effect. However, they all share common components in that they require signatories to take necessary steps to prohibit and to prosecute bribery, and to co-operate with each other in exchange of information, extradition and enforcement.
19. The two conventions which are likely to have the most significant impact are the following:
 - (a) The **OECD Convention**. This requires signatories to criminalise the bribery of foreign public officials, wherever committed, and to put into effect various preventative and enforcement measures. It also requires international co-operation, mutual legal assistance and extradition. All OECD countries, and some non-OECD countries, have ratified this Convention and most have enacted the necessary laws.
 - (b) The **United Nations Convention against Corruption**. This requires or advises signatories to take significant steps to strengthen the global anti-corruption process. Some of the key areas covered are:

- (i) the development, implementation or maintenance of effective, co-ordinated anti-corruption policies;
 - (ii) the establishment of transparent, competitive and objective procurement systems and public finance procedures;
 - (iii) the criminalisation of bribery, trading in influence, embezzlement, abuse of power, illicit enrichment, money laundering, and false accounting (applicable to both public and private sector);
 - (iv) the establishment of independent and adequately resourced entities to fight corruption;
 - (v) international co-operation and extradition.
20. The maximum penalty for bribery is seven years' imprisonment
21. Examples of actions which could constitute the offence of bribery are:
- (a) payment by a contractor to a representative of the client in return for the contractor being awarded a contract;
 - (b) payment by a sub-contractor to the contractor's quantity surveyor in return for the quantity surveyor approving the sub-contractor's timesheets;
 - (c) payment by a client to the architect in return for the architect falsely certifying that the client is entitled to liquidated damages from the contractor.
- For more detailed examples of this offence, see Section III: Examples 3-7, 17, 21, 22, 26, 28, 32, 33 and 41, pp14-29.

DECEPTION AND FRAUD

22. The law of England and Wales has numerous offences which fall within the category of deception and fraud. The offences most likely to have relevance to the construction and engineering industry are examined in outline below.
23. The courts of England and Wales will normally accept jurisdiction for any of the deception and fraud offences referred to in this Section if a relevant event occurs in England or Wales. A 'relevant event' is 'any act or omission or other event (including any result of one or more acts or omissions) proof of which is required for conviction of the offence' (Section 2 Criminal Justice Act 1993). Therefore, even if virtually all aspects of the offence occur overseas, a person can be prosecuted in England and Wales if any one element of the offence occurs in England or Wales. This could be a relatively minor event, for example, a participant arranging the offence by telephone in England or Wales, or a board decision taken in England and Wales to authorise a bribe or a fraudulent claim. The courts may also accept jurisdiction where the result of the offence takes effect in England or Wales.

Conspiracy to defraud (Common law)

24. The offence of conspiracy to defraud may be committed where a person agrees with one or more persons by dishonesty:

- (a) to deprive a person of something which is his or to which he would be or might be entitled; or
 - (b) to injure some proprietary right of a person.
25. Conspiracy to defraud is a common law offence. It would include, for example, an agreement between two or more persons to commit one of the deception offences in paragraphs 29 to 56 below.
26. 'Dishonesty' has the meaning stated in paragraph 3.
27. The maximum penalty for this offence is ten years' imprisonment.
28. Examples of actions which could constitute the offence of conspiracy to defraud are:
- (a) a price-fixing agreement between contractors;
 - (b) an agreement between client and architect that the architect will wrongfully refuse to issue an extension of time to the contractor, thereby denying the contractor the opportunity to obtain additional payment from the client.
- For more detailed examples of this offence, see Section III: Examples 1-7, 13, 17, 21-23, 26, 28, 29, 39-42, 47, pp13-31.

Obtaining property by deception

(Section 15 of the Theft Act 1968)

29. The offence of obtaining property by deception is committed where a person, by any deception, dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it.
30. 'Deception' and 'dishonestly' have the meanings stated in paragraphs 3 to 5.
31. 'Property' includes money and all other property.
32. 'Obtains property' includes:
- (a) obtaining ownership, possession or control of the property;
 - (b) obtaining property for another person, or enabling another person to obtain or to retain the property.
33. It does not matter that the person who was deceived did not suffer any loss arising from the deception.
34. The person who carries out the deception must intend permanently to deprive the victim of the property. The offence cannot be committed if he intends only to borrow the property temporarily.
35. The maximum penalty for this offence is ten years' imprisonment.
36. Examples of actions which could constitute the offence of obtaining property by deception are:

- (a) the concealing of illicit sums (such as bribes or losers' fees) in tender prices;
- (b) the formation of cartels to fix prices;
- (c) misrepresenting the availability of skilled personnel;
- (d) falsely purporting to provide a fair price;
- (e) falsely purporting to provide a competitive price;
- (f) misrepresenting matters relevant to pricing, such as:
 - (i) the necessity for the work in respect of which the pricing is given;
 - (ii) the suitability of the proposed design or scheme;
 - (iii) the time required for carrying out the work;
 - (iv) the quality and quantity of materials required for the works;
 - (v) the expertise of personnel required;
 - (vi) the number of personnel required;
 - (vii) the skill of labour to be used;
 - (viii) the number of man-days required;
- (g) supply of inferior materials or services;
- (g) false invoicing;
- (h) concealing defects;
- (i) submission of false contract claims;
- (j) submission of false oral or written evidence in support of claims;
- (k) concealment of evidence relevant to a claim.

For more detailed examples of this offence, see Section III: Examples 1-4, 6-9, 13, 15-24, 27, 28, 34, 36-41, 45, 46, pp13-31.

Obtaining a money transfer by deception

(Section 15A of the Theft Act 1968)

- 37. The offence of obtaining a money transfer by deception is committed where a person, by any deception, dishonestly obtains a money transfer for himself or another.
- 38. A money transfer occurs when:
 - (a) a debit is made to one account,
 - (b) a credit is made to another, and
 - (c) the credit results from the debit, or the debit results from the credit.
- 39. 'Deception' and 'dishonestly' have the meanings stated in paragraphs 3 to 5.
- 40. The maximum penalty for this offence is ten years' imprisonment.
- 41. Example of actions which could constitute the offence of obtaining a money transfer by deception are those listed in paragraph 36 above where, as a result of the deception, there is no cash payment but there is instead a debit and credit to the relevant bank accounts. For more detailed examples of this offence, see Section III: Examples 1-4, 6-9, 13, 15-24, 27, 28, 34, 36-41, 45, 46, pp13-31.

Obtaining a pecuniary advantage by deception

(Section 16 of the Theft Act 1968)

42. The offence of obtaining a pecuniary advantage by deception is committed where a person, by any deception, dishonestly obtains any pecuniary advantage for himself or another.
43. A pecuniary advantage is obtained when a person:
 - (a) is allowed to borrow by way of overdraft, or to take out any policy of insurance or annuity contract, or obtains an improvement of the terms on which he is allowed to do so; or
 - (b) is given the opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting.
44. 'Deception' and 'dishonestly' have the meanings stated in paragraphs 3 to 5 above.
45. The maximum penalty for this offence is five years' imprisonment.
46. Examples of actions which could constitute the offence of obtaining a pecuniary advantage by deception are:
 - (a) providing false information in an application for insurance or an export credit guarantee;
 - (b) providing false information in a job application.For more detailed examples of this offence, see Section III: Examples 14 and 35, p18 and p26.

Obtaining services by deception

(Section 1 of the Theft Act 1978)

47. The offence of obtaining services by deception may be committed where a person by any deception dishonestly obtains services from another.
48. It is an obtaining of services where:
 - (a) the other is induced to confer a benefit by doing some act, or causing or permitting some act to be done, on the understanding that the benefit has been or will be paid for;
 - (b) the other is induced to make a loan, or to cause or permit a loan to be made, on the understanding that any payment (whether by way of interest or otherwise) will be or has been made in respect of the loan.
49. 'Deception' and 'dishonestly' have the meanings stated in paragraphs 3 to 5 above.
50. The maximum penalty for this offence is five years' imprisonment.
51. Examples of actions which could constitute the offence of obtaining services by deception are:

- (a) a client obtaining quotations from contractors only for the purpose of price comparison;
- (b) a client making false representations to induce a contractor to accept a contract or to complete the works.

For more detailed examples of this offence, see Section III: Examples 10-12 and 25, p17 and p22.

Evasion of liability by deception

(Section 2 of the Theft Act 1978)

- 52. The offence of evasion of liability by deception may be committed where a person, by any deception:
 - (a) dishonestly secures the remission of the whole or part of any existing liability to make a payment, whether his own liability or another's; or,
 - (b) with intent to make permanent default in whole or in part on any existing liability to make a payment, or with intent to let another do so, dishonestly induces a creditor to wait for payment or to forgo payment; or,
 - (c) dishonestly obtains any exemption from or abatement of liability to make a payment.
- 53. The offences under paragraph 52 (a) and (b) above only apply to an existing debt which is legally enforceable. The offence under paragraph 52 (c) above may apply both to an existing liability and to a prospective liability which is legally enforceable.
- 54. 'Deception' and 'dishonestly' have the meanings stated in paragraphs 3 to 5 above.
- 55. The maximum penalty for this offence is five years' imprisonment.
- 56. Examples of actions which could constitute the offence of evading liability by deception are:
 - (a) set-off by the client of false rectification costs against sums due to the contractor;
 - (b) false denial that works constituted a variation;
 - (c) false denial of responsibility for delay;
 - (d) submission of false defences or counterclaims;
 - (e) providing false information as to financial status so as to induce a creditor to accept a lesser amount than due.

For more detailed examples of this offence, see Section III: Examples 22, 23, 29, 36-44, pp21-30.

False accounting

(Section 17 of the Theft Act 1968)

- 57. The offence of false accounting may be committed where a person dishonestly, with a view to gain for himself or another, or with intent to cause loss to another:

- (a) destroys, defaces, conceals or falsifies any account, record or document made or required for any accounting purpose; or
 - (b) in furnishing information for any purpose, produces or makes use of any account, record or document made or required for any accounting purpose, which to his knowledge is or may be misleading, false or deceptive in a material particular.
58. A person who makes or concurs in making, in an account or other document, an entry which is or may be misleading, false or deceptive in a material particular, or who omits or concurs in omitting a material particular from an account or other document, is to be treated as falsifying the account or document.
59. The offence may be committed as soon as the act described above is carried out. There is no need for a deception to have taken place, or for anyone to have acted on the false document, or for any payment to have been received.
60. The document does not need to be in the nature of an account, and the falsification does not need to relate to figures.
61. A 'gain' includes a gain by keeping what one has, as well as a gain by getting what one has not. A 'loss' includes a loss by not getting what one might get, as well as a loss by parting with what one has.
62. The offence does not only cover the falsification of documents. It also includes the concealment or destruction of documents which may be required for an accounting purpose. Therefore, the failure to produce documents relevant to a claim (such as in the process of discovery in arbitration or litigation) may constitute the offence of false accounting.
63. 'Dishonestly' has the meaning stated in paragraph 3 above.
64. The maximum penalty for this offence is seven years' imprisonment.
65. In the context of the construction and engineering industry, any document which could have a material bearing on the calculation of the sums owed to a party is likely to constitute a document produced or required for an accounting purpose. The following are a few examples of the types of documents that may be considered as being produced or required for an accounting purpose and which could, therefore, come within the ambit of the offence:
- (a) work records,
 - (b) equipment hire records,
 - (c) material supply records,
 - (d) invoices,
 - (e) architect's or engineer's certificates,
 - (f) contract claims,
 - (g) pleadings in arbitration or litigation,
 - (h) witness statements,
 - (i) experts' reports.
- For more detailed examples of this offence, see Section III: Examples 1, 2, 4, 6-9, 13, 15-24, 27-29, 34-41, 45 and 46, pp13-31.

Forgery

(Section 1 Forgery and Counterfeiting Act 1981)

66. The offence of forgery may be committed by a person who makes a false instrument with the intention that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or another person's prejudice.
67. 'Instrument' includes any formal or informal document, or any disc, tape, or other device on which information is recorded.
68. The maximum penalty for this offence is ten years' imprisonment.
69. An example of an action which could constitute the offence of forgery is where a person creates false timesheets in order to support a claim for additional costs, whether or not he actually uses the timesheets. For more detailed examples, see Section III: Example 38, 27.

Using a false instrument

(Section 3 Forgery and Counterfeiting Act 1981)

70. The offence of using a false instrument may be committed by a person who uses a false instrument, knowing or believing it to be false, with the intention of inducing somebody to accept it as genuine and thereby to act to his own or another person's prejudice.
71. The maximum penalty for this offence is ten years' imprisonment.
72. An example of an action which could constitute the offence of using a false instrument is where a person knowingly uses false timesheets in order to support a claim for additional costs, whether or not he actually created the timesheets. For more detailed examples, see Section III: Example 38, p27.

Perjury

(Section 1 of the Perjury Act 1911)

73. The offence of perjury may be committed where a person who has been sworn as a witness in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true.
74. 'Judicial proceeding' includes a proceeding before any court, tribunal, or person having by law power to hear, receive and examine evidence on oath.
75. The maximum penalty for this offence is seven years' imprisonment.
76. Examples of actions which could constitute the offence of perjury are:
 - (a) a witness stating in a court hearing that he saw an event take place when he knows that he did not;

- (b) an expert witness stating in an arbitration hearing that he believes that a defect was due to a specified cause, when he does not believe that to be the case.

For more detailed examples, see Section III: Examples 39-42, pp28-29.

False statements

(Section 5 of the Perjury Act 1911)

- 77. A person can be liable for making a false statement where he knowingly and wilfully makes (otherwise than on oath) a statement false in a material particular, and the statement is made:
 - (a) in a statutory declaration; or
 - (b) in an abstract, account, balance sheet, book, certificate, declaration, entry, estimate, inventory, notice, report, return, or other document which he is authorised or required to make, attest or verify, by any Act of Parliament.
- 78. The maximum penalty for this offence is two years' imprisonment.
- 79. Examples of actions which could constitute the offence of making a false statement are:
 - (a) a person declaring in a statutory declaration that a fact is true when he knows that it is not;
 - (b) a director knowingly falsifying the accounts of a company so as to overstate the company's value.

Blackmail

(Section 21(1) of the Theft Act 1968)

- 80. The offence of blackmail may be committed where a person, with a view to gain for himself or another, or with intent to cause loss to another, makes any unwarranted demand with menaces.
- 81. The word 'menace' is not limited to threats of violence, but includes threats of any action detrimental to or unpleasant to the person addressed. It can also include a warning that in certain events such action is intended. It will be a 'menace' if, in the circumstance known to the person issuing the threat, the threat might:
 - (a) influence the mind of an ordinary person of normal stability and courage, whether or not it in fact influences the person addressed; or
 - (b) influence the mind of the person addressed, though it would not influence an ordinary person.
- 82. A 'demand with menaces' is 'unwarranted' unless the person making it does so in the belief:
 - (a) that he has reasonable grounds for making the demand; and
 - (b) that the use of the menaces is a proper means of reinforcing the demand.

83. To demand with menaces that a person hand over property (including money), abandon a claim to property, or release a person from some legal liability of an economic nature, may constitute blackmail. It is not blackmail for a person to threaten another person that he will commence court or arbitration proceedings unless payment is made, provided that the person making the threat believes that he has reasonable grounds for claiming the payment.
84. 'Gain' and 'loss' are as defined in paragraph 61.
85. The maximum penalty for this offence is fourteen years' imprisonment.
86. Examples of actions which could constitute the offence of blackmail are:
 - (a) refusal by an architect, engineer or other certifier to issue approvals, orders, or certificates which are properly due unless he receives additional payment;
 - (b) a demand by a client that if the contractor does not accept less than the proper amounts due then no payment at all would be made and protracted litigation would be necessary to extract any payment.
 For more detailed examples, see Section III: Examples 29-33, 42 and 43, pp24-30.

Competition Act

(Section 2 of the Competition Act 1998)

87. Agreements between undertakings, decisions by associations of undertakings, or concerted practices which:
 - (a) may affect trade within the UK, and
 - (b) have as their object or effect the prevention, restriction or distortion of competition within the UK
 are prohibited unless they are exempt under the Act.
88. The prohibition applies in particular to agreements, decisions or practices which:
 - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - (b) limit or control production, markets, technical development or investment;
 - (c) share markets or sources of supply;
 - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
89. Any such agreement or decision which is prohibited by the Competition Act is void. For examples of actions which could breach the Competition Act, see paragraph 94 below.
90. Fines may be imposed for breach of these provisions.

Enterprise Act

(Section 188 of the Enterprise Act 2002)

91. An individual is guilty of an offence if he dishonestly agrees with one or more persons, in relation to at least two undertakings:
 - (a) directly or indirectly to fix a price for the supply by the parties in the UK of a product or service;
 - (b) to limit or prevent supply by the parties in the UK of a product or service;
 - (c) to limit or prevent production by the parties in the UK of a product;
 - (d) to divide between the parties the supply in the UK of a product or service;
 - (e) to divide between the parties customers for the supply in the UK of a product or service;
 - (f) to bid-rigging arrangements in the UK.
92. ‘Bid-rigging arrangements’ are those where the parties to the arrangement, without disclosing the circumstances to the client, agree that one but not the other shall bid, or that they shall both bid only in accordance with the terms of the arrangement.
93. The maximum penalty for this offence is five years’ imprisonment. Such activities may also constitute the offence of conspiracy to defraud for which the maximum penalty is ten years’ imprisonment.
94. Examples of actions which could constitute a breach of both the Competition Act and the Enterprise Act are where:
 - (a) several bidders secretly agree to share the market between them by pre-selecting which of them will win each project;
 - (b) several concrete suppliers agree to charge a minimum price for the supply of concrete.For a more detailed example, see Section III: Example 2, p13.
95. The Competition Act and the Enterprise Act are included in this section on deception and fraud, because the acts prohibited by them (set out in paragraphs 87 to 94 above) are likely to involve deception or fraud on the client. However, the major parts of the Competition Act and the Enterprise Act are outside the scope of this Code, and are not dealt with.

RELATED OFFENCES

Conspiracy

(Section 1 of Criminal Law Act 1977)

96. An agreement between two or more persons to commit any of the offences referred to in paragraphs 7 to 21, and 29 to 95 above may constitute the criminal offence of conspiracy.
97. The maximum penalty is the same as for the principal offence.

Attempt

(Section 1 of the Criminal Attempts Act 1981)

98. The offence of attempt may be committed where a person, with intent to commit any of the offences referred to in paragraphs 7 to 21 and 29 to 95 above does an act which is more than merely preparatory to the commission of the offence.
99. Therefore, if a person tries, but fails to commit one of those offences, he can be liable for attempt.
100. The maximum penalty is the same as for the principal offence.

Aiding and abetting

(Section 8 Accessories and Abettors Act 1861 (as amended by Section 65 of the Criminal Law Act 1977))

101. The offence of aiding and abetting may be committed where a person aids, abets, counsels or procures the commission of any of the above offences.
102. A person can be convicted of aiding and abetting if he was aware of all the essential matters which make the act a crime. He does not need to have known that the act amounted in law to a crime. He can be judged to have been aware if he deliberately closed his eyes to the circumstances. It is not enough that the aider and abettor does acts which in fact aid the commission of the crime; it must be proved that he intended that the actions constituting the crime should be committed, or was indifferent as to whether or not they would be committed.
103. The aider and abettor will be tried and punished on the same basis as if he were the principal offender.
104. The maximum penalty is the same as for the principal offence.

Liability of company officers for offences by company

(Section 18 of the Theft Act 1968, Section 5 of the Theft Act 1978)

105. Where an offence is committed by a company and is proved to have been committed with the consent or connivance of any director, manager, secretary or other similar officer of the company, or any person who was purporting to act in any such capacity, he as well as the company shall be guilty of that offence.
106. 'Consent' would cover the situation where the person by word or conduct consented to the offence with knowledge.
107. 'Connivance' consists of:
 - (a) knowing that the offence in question is being or will be committed, or at least realising that this is the case; and
 - (b) intentionally failing to take steps that he might take to prevent the offence.

108. It therefore requires active participation or encouragement, or deliberate passivity. The director, manager, secretary or other similar officer of the company may alternatively be liable either as a principal offender, or for aiding and abetting the company in committing the offence (see paragraphs 101 to 104 above).
109. The maximum penalty is the same as for the principal offence.

Proceeds of Crime Act 2002

110. The Proceeds of Crime Act 2002 ('POCA') and associated Money Laundering Regulations ('MLR') are not considered in this Anti-Corruption Code. POCA is concerned primarily with crimes (in particular money laundering) related to dealing with the property which results from criminal activity. This Anti-Corruption Code deals with the underlying crimes which could give rise to the criminal property. However, individuals should be aware that if a criminal offence is committed, including any offence covered by this Code, any dealing with the proceeds of such criminal offence may fall within POCA and MLR, and may result in duties to report the transaction and consequent criminal penalties as provided by POCA and MLR.

LIABILITY AND DEFENCES

111. Both companies and individuals may be liable for criminal offences.
112. In order to be liable for the relevant offence, all the constituent elements of the offence must be established beyond reasonable doubt by the prosecution.
113. **Duress:** In the event that all necessary elements of any of the above offences are established, the only defence which is likely to have any bearing in certain very limited circumstances is duress. Duress is the threat of immediate death or serious personal violence which compels the person to commit the crime in question. The threat must be operative and effective at the time of the act or omission which constitutes the criminal offence. The test is objective. What would the reasonable person have done when faced with that situation?
114. The following do not constitute defences to the above offences:
- (a) That the person was not aware that the activity constituted a crime.
 - (b) That the person did not or would not make any personal gain from the activity.
 - (c) That the conduct constituting the offence was widely practised and considered to be normal business practice.
 - (d) That the conduct constituting the offence was necessary for a party to remain competitive.
 - (e) That the person was following the instructions of a superior in the organisation.

- (f) That there were threats of adverse physical or financial consequences made to the person to make him commit the offence (unless they were sufficient to constitute duress as stated in paragraph 113 above).
- (g) That the offence did not succeed (as the person could be liable for an attempt to commit the offence).

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