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Pushing the boundaries: the impact of the changing nature of the professions in construction law

Abstract

The way in which the role of the professions is understood in society is changing. One of the traditional effects of being a profession was that the relevant group was regarded as having a virtual monopoly over the provision of services in the area in which it operated.

As the understanding of what a "profession" is has been put under pressure and changed, there is increasing scope for competition between the professions in the provision of particular services. There is increasing scope for "turf wars" between professions as the boundaries between them are tested through competition for work. This is particularly apparent in the construction industry where there are number of traditional professions operating in similar fields – and in conjunction with other roles which have many "profession-like" features. Much of this requires commercial and sociological consideration. These will be discussed briefly but the focus of this paper will be on the emerging legal issues in this area. This article looks at recent cases where the courts have looked at issues which arise when professions encroach upon each other's areas of operation.

Moreover, in Scotland, a new "profession" drawing on those with construction industry experience has been granted rights to essentially compete with the legal profession in presenting cases in court.

Following discussion of these developments, the lessons this might have for the future coexistence of the professions will be discussed.

Introduction

The construction and engineering sector is the home to a variety of professions.

Some of these professions are long established: architects[1]; engineers (of

[1] The Institute of British Architects, which is now RIBA – the principal professional body of British Architects was founded in 1834

various disciplines)[2]; quantity surveyors[3] and so on. Other disciplines' "professional" status is less clear cut: the planner, the claims consultant and the adjudicator. Practitioners in those fields fill roles which have at least some of the trappings of a "professional" without being necessarily recognised as "professions" in their own right. Indeed the particular practitioners of those roles might still be a member of one of the established "professions".

This proliferation of professionals reflects the fact that the nature and diversity of technically complex tasks involved in a construction project, whether it is in terms of manufacturing, engineering, design, project and contract management make it a natural arena for different groups with particular specialisms and experience to operate, side by side.[4]

More widely, the role and nature of the professions is changing both in terms of how society recognises them and in how they recognise themselves.

[2] Engineering obviously covers a variety of skills and disciplines – and dates back to the creation of Stonehenge, and before. The Institute of Civil Engineers was formed in 1818 see https://www.ice.org.uk/about-us/our-history [accessed 3 June 2016]

[3] The Royal Institute of Chartered Surveyors traces its origins back to 1792 (see http://www.rics.org/uk/about-rics/who-and-what/history/ [accessed 3 June 2016]

[4] The definition of "profession" is discussed below – as will be seen, "specialism" is a key component of that.

As the understanding of what a "profession" is, has been put under pressure and changed, there is increasing competition between the professions in the provision of particular services. Technology is accelerating this process by increasing the access to the specialist knowledge that used to be the preserve of the particular professions.

This is particularly apparent in the area of construction law which for present purposes can be seen to include issues of contractual negotiation and drafting, contract and project management and, in particular, the compilation and prosecution of construction claims.

These individual tasks are capable of being carried out by a number of people drawn from different professions and the rationale for choosing one practitioner over another is not always clear.

In this environment, there is increasing scope for what have been termed as "turf wars" between professions[5] as the boundaries between them are tested through competition for work. This is particularly apparent in the construction industry where there are number of traditional professions operating in similar

[5] See discussion below.

fields – and in conjunction with other roles which have many "profession-like" features.

Much of this requires commercial, technological and sociological consideration. The recent work of the Susskinds[6] is an excellent source for discussion of these. While that text will be referred to, the main focus of the present article will be the ways in which legal developments provide evidence of the turf wars and the ways in which the character of the professions, as recognised by the law, is changing.

Assessing the ways in which attempts have been made to challenge these advantages provides a route to examine the emerging "turf wars." As will be seen, there are overlaps with the construction professions and lessons for all professions. Facing an uncertain future; there is a need to understand the present.

In order to carry out this assessment, then, firstly, the current understanding of the nature and definition will be examined in the context of the pressures which might arrive in the future. These changes will then be discussed by reference to

[6] Richard and Daniel Susskind *The Future of the Professions: How technology will transform the work of human experts (2015, OUP) ("Susskinds")*

two developments which highlight the way in which the traditional boundaries between the professions, with specific reference to the legal profession's particular privileges, are being eroded.

What is a profession?

This question is one which has been subject to significant cross disciplinary work.[7] For current purposes, however, it is worth focussing on the approach taken by Lord Justice Jackson[8] in a recent lecture.[9]

The purpose of the lecture was to identify and describe the changing conception of what it means to be a "professional" and in discussing whether that conception has had any impact on the way the law treated particular issues (for example there is discussion of the degree of deference given to expert medical opinion in issues of the standard of care to apply in cases of negligence).

[7] The introductory lecture to the Robert Gordon University course on professional responsibility and ethics refers to definitions by G Strauss, "Professionalism and Occupational Associations" (1963) 2(3) Indus Rels 8 Millerson G, The Qualifying Associations. London: RKP, 1964 and Millerson G, The Qualifying Associations. London: RKP, 1964 among others.

[8] Well known to all of those with an interest in construction law as a result of his time in the Technology and Construction Court and in the Court of Appeal, when at the bar Rupert Jackson had a particular specialism in professional negligence and was a founding author of the leading textbook on the subject.

[9] Lord Justice Jackson "*The Professions: Power, Privilege and Legal Liability"* Peter Taylor Memorial Lecture to the Professional Negligence Bar Association, 21 April 2015 (available: https://www.judiciary.gov.uk/wp-content/uploads/2015/04/pnbalecture-_2_.pdf (accessed 21 December 2015))

The lecture therefore serves as a good 'entry point' for the construction professional, especially those with an interest in law, and others, into the questions of defining what it means, in the modern world, to be considered "a professional". The learned judge observed that since the 1960s, the sociological analysis of the professions (as a whole) has become one in which

> "*Professions are characterised as privileged groups with special knowledge, which they exploit to achieve enhanced income and status. Each profession seeks to expand its empire to control its own segment of the labour market. The professions rely upon their asserted ethical standards in order to justify self-regulation and to defend their territory".*[10]

This view aligns with other relevant literature[11] and captures the position neatly.

The key issue from this modern definition is that the professions retain their 'characterisation' as a 'privileged group' that is, one with the aim of controlling its own "segment of the market" because of (i) assumed "special knowledge"

[10] (see para. 3.24(ii) of the speech)

[11] see e.g. Russell G Pearce, "The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar" (1995) 70 New York University Law Review 1229 and Susskinds Chapter 1 "The Grand Bargain"

and (ii) the “assertion of ethical standards” towards some form of commercial endeavour.

These are discussed in detail – with a view to identifying the particular features of the construction context.

“Special Knowledge”

Jackson LJ identifies one of the outcomes of the overlap of spheres of professional influence as possible conflicts and the likelihood of ‘turf wars’. This can be seen through a brief discussion of the way in which specialisms manifest themselves in the construction industry and the pressures which social and, in particular technological changes are bringing, on this front.

In terms of how “specialist knowledge” plays out in an analysis of the construction sector, the following can be seen: in the construction context, the professions are those which have a high degree of control over certain tasks in the construction project (their “segment of the market”): architects over the design; the various types of engineer over their particular areas of expertise; quantity surveyors over costs; lawyers over legal advice and so on.

It will be apparent that this level of control does not amount to a monopoly – contractors can carry out some design work; architects may look at issues of engineering and all may provide a view on the meaning of terms of the contract. At the same time, the particular specialisms of one particular profession over another must be seen as important in differentiating that profession's services from another's.

In terms of a parties legal duties, this is relevant on a number of levels. An important example, arises from the fact that the standard of care for design varies at common law depending on whether it is "pure" design work or whether part of a design and build arrangement.[12] This serves to help segregate the functions of those involved (at least to some extent) by requiring assessment of expertise against some framework of objective standards. Discussion of the precise professional standards at play here are beyond the scope of the current paper.[13]

[12] See of course *IBA v EMI and BICC* [1980] 14 BLR 1 and discussion of design liability in Sarah Lupton *Design liability: problems with defining extent and level* 2016 ICR Rev 96.

[13] The specific issues are well summarised in Sarah Buckingham "*Understanding your design duty – "reasonable skill and care" vs. "fitness for purpose" – mutually incompatible or comfortably coexistent?*" http://www.fenwickelliott.com/research-insight/annual-review/2014/understanding-design-duty [accessed 23 June 2016)

The overlap in knowhow and access to the specialist information required to discharge "professional" functions will only be heightened as technology makes it easier to access knowledge and techniques. If anyone can access the knowledge; it stops being special. This point has been the subject of substantial consideration and development in the recent work of Richard and Daniel Susskind (among others) who have examined the way in which technological change – and other factors – are changing and will continue to rapidly change the nature of the professions.[14] It is worth outlining this.

The Susskinds' key idea is that technology will lower the barriers to accessing expert practical knowledge – impacting on the particular abilities of the professions to operate with exclusive power in particular areas. In relation to construction, the authors looked at the impact growing technology has in facilitating design through the increasing use of BIM and other electronic tools – as signposts of the general direction of travel.[15] In the future, to harness these changes (at least in part) will require an understanding of where human expertise can best be deployed to meet the needs of clients and wider society.

[14]Susskinds *Introduction* p. 1 - 9
[15] Susskinds p. 94ff.

For present purposes, there is no need to examine the particular and varied ways in which technology might change the professions – that is done clearly and in detail by the Susskinds.

However, the broad point that technology lowers the thresholds to specialist knowledge is a critical feature in understanding how the interactions and boundaries between professions are changing.

As it becomes easier to access and manage specialist knowledge – it becomes easier for professionals to operate in specialist fields within their profession. It is clear that in areas such as construction law where contract negotiation and drafting requires input from architects, commercial managers and lawyers, among others that there is likely to be overlaps in the knowledge which each have. This is also likely in the compilation of claims in construction dispute resolution where the need to have input from various specialists will mean that there is overlap between roles and knowledge. These interactions come to seem close to the “turf wars” identified by Jackson LJ.

Jackson LJ picks out the “next turf war” as being between lawyers and accountants. This is likely because there are areas – such as tax law and

construction law – where specialist knowledge can be acquired through different professional routes. The "Commercial Attorneys" discussed below are an example of this.

As specialist knowledge becomes more accessible, the other key feature – the professions "ethical standards" comes more to the fore.

"Assertion of Ethical Standards"

The other aspect considered by Jackson's definition is "ethics". A detailed discussion on the nature and application of ethics is not necessary for present purposes.[16]For present purposes, they are treated as rules of professional conduct and professional morality that govern the way in which a professional performs their duties. In terms of the definition and the discussion here, it is something which represents almost the particular quality which a professional adds to the service they provide and which runs beyond the specialist knowledge. It is to some extent intangible.

[16] A good introduction to the subject is William Frankena *Ethics* (1973) (2nd Ed).

The Susskinds address the issue of ethics on the developments they discuss in a number of ways. There is a general justification for the role of the professions on the basis that one benefit of professionals is that they somehow 'behave better' than other workers in the market place, the Susskinds demonstrate how either this is something of an illusion in the modern commercial market or that the general opening up of the previously specialised areas of knowledge will remove these barriers. [17]

There is an important sense in which professional obligations and regulation help to maintain particular sectors. In terms of justifying the privilege to conduct court litigation which lawyers might have over, say, construction claims consultants, there might be an argument that ethical barriers to certain conduct allow, for example, the justice system to operate more smoothly as practitioners are bound by duties to the court in terms of what they can and cannot do; as well as to their clients.

In addition, there is the argument that some roles "*have a moral character, an intrinsic virtue that distinguishes them from other things*".[18] On analysis, part of

[17] Susskinds p.231ff

[18] Susskinds n 2. At p 240 – 242 referring to Michael Sandel's ideas about the moral limits of markets

the quality of professional ethics is that they are a good thing in themselves – without having to necessarily be justified by their broader impact or benefits.

This character might be "*degraded if it comes into contact with market norms*". [19]

This view tends to assume that professionals will tend to operate at the more conscientious end of the spectrum of their professional duties - while still providing some principled basis for action.

In response, those seeking to erode the particular privileges of a profession (such as those seeking to argue against the construction lawyers ongoing privileges) might adopt some of the Susskinds argument on this point of supposed superior ethics and say that the importance of the professional's function to society is not acceptable when compared with the difficulties in accessing that professional expertise or the cost of doing so. In those situations: *"The combination of these two reasons – the importance of what they provide and the current inadequacy of the provision – overwhelms the case to protect the status quo."* [20]

[19] Ibid.
[20] Ibid p. 243 - 244

That is also assumes that professions general levels of service are of the standard which this lofty ideas suggest they ought to be; but which may not always be reflected in reality.

It may be that, in the future, technology can compel certain behaviour – or at least act as a restraint – but that speculation is beyond the scope of the current consideration. [21]

These developments largely lie in the future – but it is possible and relevant for those involved with construction law to see how the issues identified above are reflected in current developments in law and practice. This can be seen in the way in which construction professionals are attempting to break the lawyer's monopoly on appearing in court and the arguments being made against the ongoing specific protection which lawyers have for maintaining the confidentiality of their advice. The example of this latter challenge is the overlap in work between lawyers and accountants on tax law issues- but the reasoning would potentially apply in relevant cases around construction law, too.

Construction professionals crossing the boundaries?

[21] Drawing on the discussion in Susskinds p.281ff. They call for an urgent discussion on how ethical standards will be resolved as technology increasing removes human action from the principal processes.

Firstly, although the commercial impact has yet to be felt, it is interesting that a group of construction professionals have managed to breach the monopoly which the Scottish legal profession has had over appearing in the Scottish courts.

Of course, in construction dispute resolution, there are already overlaps between the construction professions and the legal one. All professions can advise in disputes - drawing on their particular expertise and there is no bar to any representative acting to present a case in a construction dispute before an adjudicator or arbitrator, or acting as an advocate or agent in mediation.

Against this, the legal profession retains a virtual monopoly over presentation of cases before the Scottish courts. In Scotland, there has been, for some time the statutory power to increase the scope of rights of audience before the courts[22] under ss.24 and ss25 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.[23] This was in response to the recommendations of a Royal Commission in respect of the provision of Legal Services in Scotland, which originally reported in 1980.

[22] That is, the right to represent a party before the Scottish courts

[23] Albeit this section was only brought into force in 2009, following some pressure from those interested (thanks to Torquil Murray for pointing this out to me).

The powers under s.24 have never been exercised but s. 25 of that Act provides for rights of audience to be given to other groups – and that power *has* been exercised.

In 2009, the then Lord President of the Court of Session (Scotland's senior judge) granted to members of the 'Association of Commercial Attorneys' (the "ACA") the right to appear in uncontroversial procedural matters in the Sheriff Court and conduct litigation.[24] While this seems like a minor concession – it does represent a shift in the prevailing position which has historically been that the legal profession have a monopoly.

It is therefore interesting to consider the case of the ACA in the context of the present discussion.

The ACA is drawn – or intends to be drawn – largely from those who work in the construction industry. As mentioned already, that industry, however, covers a variety of professions - 'old' (architects, surveyors, engineers and so on) and 'new' (planners, claims consultants, project managers).

[24] See the Association's website for more details - http://www.commercialattorneys.org.uk/ (accessed on 28 August 2015)

Against this background, the Association needs to cut across existing professional lines - and set out its own criteria.

To that extent, in order to justify its rights of audience, the Association has to provide an appropriate framework. That means either developing itself as a "profession" or, at least, developing its organisation in such a way as to allay any concerns about exercising the equivalent of a professional privilege. The Scottish Ministers and the Lord President of the Court of Session are required to consider the applications and approve them. The grounds to which they are to consider are principally (i) education and training (ii) continuing professional development (iii) codes of practice, disciplinary mechanisms and complaints procedures (iv) professional indemnity insurance (v) transitional arrangements[25]and (vi) any other relevant information. [26]

The ACA's criteria[27] can be seen in that context. It provides as follows:

> *"If you have an LL.M. in Construction Law[28], a construction-related professional qualification, and you complete the 4 day training course in*

[25] i.e. where members of an organisation might have the rights of audience while their work to gain full qualification was in progress

[26] Guide for professional or other bodies on making an application to enable their members to acquire: Rights to conduct litigation and Rights of Audience < http://www.gov.scot/Publications/2007/03/16093734/1> accessed 13 June 2016

[27] As summarised on its home page.

[28] For the sake of transparency, the author is the academic responsible for the masters programme in construction law and arbitration at Robert Gordon University

Sheriff Court Practice you will be eligible to apply for an interim practicing certificate which will allow you to represent your clients in the Sheriff Court. The oral advocacy part of Sheriff Court Ordinary Cause proceedings (above £5,000.00) will be carried out by an advocate or a court solicitor you will instruct on behalf of your client."[29]

So, there is a requirement for a "gateway" qualification – followed by specialist training. There is also reference to an overarching organisation which would then govern the ethical standards and conduct of Commercial Attorneys – in accordance with its Code of Practice[30]. It is noteworthy that the requirements to gain and maintain particular knowledge and to maintain standards of conduct are at the forefront of the investigation which the relevant authorities must undertake into any application for rights of audience, too.

This chimes with the criteria (specialist knowledge and ethical control), identified by Jackson LJ in his lecture.

[29] "About us" http://www.commercialattorneys.org.uk/ accessed 11 August 2015
[30] See included within its application dated March 2009 found here: http://www.gov.scot/resource/doc/254431/0085773.pdf accessed 22 June 2016

The ACA is still relatively small and its present impact seems to be limited. Six years after being given these rights, the ACA has five members.[31] To this extent, there is no direct conflict with the legal profession. It might be that the ACA is still building – a "profession" takes a while to grow; the existing ones have had several hundred years of development. Notwithstanding this, the efforts of the ACA have broken the monopoly of the legal profession over rights of appearance and are operating in an area which might prove to be at a boundary between the legal profession and those in other professions – namely construction claims and disputes.

As yet, the membership of the ACA remains small. It does demonstrate though that if a claim can be made where both the relevant specialist knowledge and some ethical protections are in place – then it can gain access to sectors which had previously been protected by professional monopoly privileges.

The weakening justification for professional boundaries in the law

One of the main privileges by which legal professionals are differentiated from other professionals is through their ability to keep confidential the advice which

[31] Confirmed to the author by Torquil Murray, ACA Secretary by email. The ACA website recorded 2 members at the time of writing. . Five members seems a creditable number to the author, given the relatively small size of the likely pool.

they give and the information which they are given in order to formulate that advice. This privilege is different from some of those other commonly held bonds of confidentiality – such as between a confessor and his priest: while the priest is bound by professional duties of confidentiality – the disclosure of this sort of information may be compelled by the court. This is justified by reference to ideas about ensuring people get robust advice and helping to ensure the smooth operation of the justice system.. However, it has the side effect of providing an incentive to seek advice from a lawyer rather than a non-lawyer, where they might otherwise have relatively equal abilities to provide substantively good advice.

As the nature and understanding of professional boundaries changes, that sort of privilege comes under threat.

In the construction context, the possibility of allowing claims consultant's advice to be privileged was raised in one of the preliminary decisions in the saga of Walter Lilly v MacKay.[32] The discussion in this case focussed on whether those giving the advice fell within the category of lawyers or not – and the subsidiary question of whether the client was entitled to treat them as lawyers will do for

[32] [2012] EWHC 649 (TCC). The principal judgement in this case is [2012] EWHC 1773 (TCC)

the purposes of gaining the benefit of the privilege.[33] The underlying issue of whether privilege could apply to non-lawyers giving advice was not addressed. At the time of the decision, the key authority which the court followed was the then recent Court of Appeal judgement in *R (on the application of Prudential v Special Commissioners for Income Tax* [2010] EWCA 1094) which had reaffirmed the existence of the legal advice privilege. The court of appeal judgement in this *Prudential* case was subsequently appealed to the UK Supreme Court and in that case, the Supreme Court did take the opportunity to look at the underlying position.[34]

In their decision, while the court upheld (and only by a majority) the protection, it did so on the grounds that the privilege was long established – rather than indicating any particular comfort with the merits of the rule. Indeed, studying the reasoning of the majority makes it clear that their view is that there is no particular logic or principle to the ongoing existence of the rule's continued limitation to lawyers only.

[33] Ibid. paras. 15 – 17.
[34] [2013] UKSC 1

Generally, Lord Sumption's dissent was seen by the majority in the UK Supreme Court as persuasive in principle but not capable of overturning the existing position.

In his judgement, Lord Sumption said that the privilege ought to focus on the advice being sought or given rather than the identity of the person giving the advice – "*[the privilege] does not depend on the adviser's status, provided that the advice is given in a professional context"*[35].

In terms of the person giving that advice, Lord Sumption records that the trial judge found that there are "*at least three professions whose practitioners have as part of their ordinary professional functions the giving of skills advice on tax*".[36] In other words, the relevant "specialist knowledge"[37] in terms of the subject matter of the advice does not belong to the legal profession alone; but it is not yet universally available.

The second rung, ethical protections, is also dealt with relatively briefly by his Lordship. One point in favour of the continuing protection for lawyers was that "*other professionals did not have the same stringent legal obligations of non-*

[35] See para. 114
[36] Ibid at para. 123
[37] to refer back to Jackson LJ's criteria

disclosure as lawyers"[38]. Lord Sumption's response is that once the advice becomes subject to the privilege, it also becomes subject to the legal obligations which attach to them: the surrounding ethical considerations, essentially, fade away. It is less clear, however, how the advice becomes subject to that privilege. As noted above, Lord Sumption makes it clear that the advice must still be given in a "professional context" – but he does not seem to discuss in detail what that is.[39] It is clear that the advice must be given by a professional of some description – and he notes that there are three groups capable of giving the advice in question. Logically, therefore, some level of specialist knowledge is relevant before the privilege comes into play. Once that is established, the advice becomes privileged, on Lord Sumption's analysis, and the obligations of confidentiality attach to it.

On this analysis, Lord Sumption is therefore not saying that there is no place for a professional privilege like this; rather he is saying that such a privilege should not attach merely to lawyers. What is not clear is what "profession" might be in a position to give such privileged advice.

[38] Ibid at Para. 124

[39] He does interpret Lord Brougham's reference to a "professional" context as being "not a social one" in para. 116, but that does not mean that is how it is always to be understood. This is one of the main weaknesses of his argument: if the privilege is to be extended beyond the legal professions but is to remain in some situation: where is the line to be drawn?

Presumably, this privilege would arise in circumstances where there is justification for it. That however would move the link between the definition of the professional privilege away from the qualities of the person with the privilege and towards something more context based. The uncertainty which arises from that shift and establishing what the relevant context might be is presumably what causes the other justices sufficient unease as to decide to uphold the existing rule.

Accordingly, with the arguments in favour of the privilege being attacked in this way, the majority justify the status quo on the grounds that (i) that the rule in support of legal advice privilege was understood to be limited to lawyers (albeit that this category had expanded to include foreign lawyers in recent years) (ii) that therefore any change to that rule would amount to innovation and (iii) that there was sufficient uncertainty surrounding the alternative rule which Lord Sumption set out to require that any innovation in this area was best left to the relevant legislature to develop.[40]

The principle of legal advice privilege attaching only to lawyers therefore has moved away from any particular principled justification – but continues to exist

[40] A short summary attempt to capture the more elegant and expansive reasoning by, in particular, Lord Neuberger in his conclusion [2013] UKSC 1 at paras. 47 - 75

on the basis that the alternative way to meet the same goals has yet to be properly developed. In the meantime, tax accountants and construction claims consultants in particular may be losing business because their advice cannot be given on a qualitatively similar basis to the same advice if it came from a lawyer – in terms of its protection from disclosure.

While on these issues, it should be said that litigation privilege[41] was not looked at in the *Prudential* case. It is worth noting that the underpinning for litigation privilege is slightly different: its scope is wider and there is already some focus on the purpose of the advice; rather than the identity of the person providing it. Litigation privilege is, ultimately, seen as part of the need to deliver justice (within the current frameworks of the various UK legal systems) – by helping parties to deliver their cases in the most compelling way. It is noteworthy that in the *Walter Lilly* decision referred to above, this question was reserved and the judge noted that "*there is little authority on this latter issue and consideration might have to be given to issues of policy if and when this argument arises on another case*"[42] In that sense, as long as lawyers have monopolies over the presentation of legal cases, that might provide a justification for some special privileges being allowed to them in that process.

[41] That is, advice given for the purposes of a litigation which has started or is in prospect.
[42] Walter Lilly (n.32)) at para. 20

What are the lessons that can be drawn from this?

Taking account of this discussion, there are two steps which the construction professions could consider as a response to the evolution and increasing overlap of the role of the professions.

1. There is a suggestion that "hyperspecialisation" could be the future for many industries – where particular tasks are broken down into their component parts.[43] It could be seen as part of the process with the construction professions that different individuals become very good at their particular niches. There must be concerns about the sustainability of this approach as technology advances and even if only in terms of the limits it places on access to other qualities which potential clients might favour.[44]

2. An alternative is to focus on the ethical protections afforded by working with a professional. Lord Neuberger has recently called for an increasing emphasis on the teaching of ethics[45] – new emphasis might be on way to

[43] See Thomas W. Malone, Robert Laubacher and Tammy Johns *The Age of Hyperspecialisation* July/August 2011 Harvard Business Review 57

[44] For example, Lord Sumption has spoken out "Specialisation cramps imagination and limits curiosity" (see Interview with Daniel Johnson "*Never a battle lost by the Hundred Years' Warden*" Sunday Times New Review 9 August 2015 at p. 5

[45] Lord Neuberger *Ethics and Advocacy in the twenty-first century* Lord Slynn Memorial Lecture 2016, 15 June 2016 at para. 49

> maintain the key differentiating factor which professions have as access to "specialist knowledge" diminishes. The difficulty is that ethical duties appeal to the institutions but do not always appeal to the clients and customers who engage professionals: ethics often means doing something that the client does not want.

The discussion above suggests that there is value in these broader ethical protections but that perhaps, to draw on what was said by Lord Sumption in the *Prudential* case, the time has come to attach the ethics to the task rather than the person. If the value of the professional is not their specialist knowledge – because that has become more accessible; but their ethics, then the qualification should be focussed on that latter point.

There is the wider issue that the role of ethics will change in these circumstances and so there is a need, as the Susskinds[46] and Lord Neuberger[47] call for consideration, discussion and debate of the justification for particular rules. Including some discussion of how professions, in the construction industry and beyond, might operate together would be a valuable part of this exercise.

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[46] Op Cit.
[47] Neuberger n. 69 at para 48.

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