



Enforcing Good Faith vs Fostering Collaboration

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19 April 2024

A purpose-led professional services
business with law at the core

Duty of good faith

- Common law: no general implied duty
- NEC3 10.1: The Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in this contract **and** in a spirit of mutual trust and co-operation.
- NEC4
 - 10.1 The Parties, the *Project Manager* and the *Supervisor* shall **act as stated in this contract.**
 - 10.2 The Parties, the *Project Manager* and the *Supervisor* **act in a spirit of mutual trust and co-operation.**
- NEC4 emphasize 2 distinct duties.
 - good faith is *in addition to* duty to act as stated in contract
 - wider ambit – not limited to express terms

Good faith : When would such a duty arise?

- Resolve dispute by friendly discussion
 - Act with the utmost good faith
 - Act in absolute faith
 - Act in a spirit of mutual trust and co-operation
- } **Duty of good faith**
- Van Oord v. Dragados [2021]: “*clause 10.1 is not merely an avowal of aspiration. Instead, it reflects and reinforces the general principle of good faith in contract.*”
 - Costain v. Tarmac [2017], parallel is drawn between “mutual trust and cooperation” and obligations of “good faith”

Good faith in other forms of contract

- **PPC 2000:**
 - “Partnering Team members shall work together and individually in the spirit of trust, fairness and mutual cooperation”.
 - “In all matters ... members shall act reasonably and without delay”.
 - “members shall work together and individually ... to achieve transparent and cooperative exchange of information ... and to organise and integrate ... as a collaborative team”.
- **JCT** (optional): “The Parties shall work with each other and with other project team members in a co-operative and collaborative manner, in good faith and in a spirit of trust and respect”
- **BCC** (Be Collaborative Contract): The **Overriding Principle**...is their intention to work...in a co-operative manner in good faith and in a spirit of mutual trust and respect...The Overriding Principle is intended to sit above all the other contractual obligations...”

Meaning of good faith

- Interfoto [1989]: "...‘playing fair’, ‘coming clean’, ‘putting one’s cards face upwards on the table.’” It is in essence a principle of **fair and open dealing**”
- Mid Essex [2013]: parties must not act in a way that “would be regarded as **commercially unacceptable** by reasonable and **honest people**”
- Yam Seng v International Trade Corporation [2013]: “What good faith requires is sensitive to context. That includes core value of **honesty**”
 1. Basic. Not to deceive (i.e. make statement known to be untrue)
 2. Further? Remain silent about information which has subsequently become false?
 3. Deliberately avoid giving answer, or giving evasive answer
- Van Oord: NEC duty to act in mutual trust and cooperation. Further propositions:
 - A party cannot take advantage of his **own breach** against the other party
 - Clear language required to place a party completely at the **mercy** of other

Enforcing good faith: (1) affects other clauses

- To what extent 10.1 excludes parties from relying on other contract terms?
 - NEC no order of precedence (c.f. **Overriding Principle** in **BCC**)
- *Mears Limited v Shoreline Housing Partnership [2015]*
 - Payment made on composite rates not found in contract
 - Employer now wants to go back to contract mechanism

*“....not satisfied that obligation to act in a spirit of mutual trust and cooperation...would prevent either party from **relying on any express terms** of the contract freely entered into by each party.”*

- **Good faith does not trump other express terms of contract.**
 - Too wide?
 - Good faith failed, yet (alternative ground) promissory estoppel succeeded. This doctrine exists even without express good faith obligation.

Enforcing good faith: (1) affects other clauses

- *Costain v Tarmac Holdings [2017] EWHC 319 (TCC)*
 - cl. 93 (NEC3) adjudication, time-bar
 - Costain : Tarmac had *duty* to speak out about intention to rely on time bar instead of staying silent (duty to warn?). Argument failed.
 - “**parties are not expected to ‘nursemaid’ their opponents** ... otherwise the client might well ask which side his lawyer is on.”
- ***Good faith does not prevail over a ‘hard’ term of contract (like a time bar).*** [n.b. “hard” not terminology used in judgement].
- You do not have the obligation to point out to your counterparty - the nature, scope, and potential effect of clause 93 ! (the time bar)
- You cannot however do or say anything which lulled your counterparty into falsely believing – time bar was not operative or you wont rely on time bar.

Enforcing good faith: (1) affects other clauses

Van Oord v Dragados [2021]

- **63.10:** “If effect of a compensation event is to reduce total Defined Cost and event is a change to Subcontract Works Information, **Prices are reduced**”
- “10.1 and 63.10 are **counterparts**. Unless Dragados fulfils its duty to act “in a spirit of mutual trust and co-operation”, it cannot seek a reduction in Prices.”

Strong endorsement of Good Faith.

- “A party cannot enforce a contractual stipulation in its favour, if it is the **counterpart** of another obligation which it has breached...” (**mutuality**)
- **10.1 affects how 63.10 interpreted. Q: Which clauses are counterparts??**
- Limits - Parties not required to put aside **self-interest**.

(2) Constrain on the exercise of (unfettered) right

- Decision making functions (discretion) of PM – probably **Counterparts** to 10. 1.
 - E.g: right to reject a Programme (31.2); rejection of CE quotation (62.3)
 - *Braganza* duty (an implied obligation not to exercise a contractual discretion in good faith, and not arbitrarily or capriciously)

What if absolute unfettered contractual rights??

- *TSG Building Services v South Anglia Housing [2013]*
 - Cl 1.1: “...members shall work together and individually in the spirit of trust, fairness and mutual co-operation**within the scope of their agreed roles, expertise and responsibilities** ...”
 - Cl 13.3: “each party “may terminate ... at any time during the term”.

Q: Can Employer terminate (for convenience)?

- “1.1 does not require S. Anglia to act reasonably in terminating under 13.3.....it was clear that there was such an **unqualified right** available to either party...” (i.e. unfettered discretion)
- **BUT:** NEC has a **broader** application of the duty to act in good faith. Duty extends to everything (Open whether NEC require termination to be subject to good faith)

(3) Duty to warn

Negative duty not to mislead (not act in bad faith)

Positive duty to warn ? (to collaborate in good faith)

Costain Limited v Tarmac Holdings Limited [2017] EWHC 319 (TCC)

- You do not have the obligation to point out to your counterparty - the nature, scope, and potential effect of clause 93 ! (the time bar)
- You cannot do or say anything which lulls counterparty into falsely believing – time bar is not operative or you wont rely on time bar.
- But Judge continued: ***“I am also prepared to accept this obligation would go further than the negative obligationit would extend to a positive obligation on the part of the defendant to correct a false assumption obviously being made by the claimant* (either that clause 93 was not going to be operated or that the time bar provision was not going to be relied on).**
- *But beyond that, on any view of clause 10.1, there can have been no further obligation, because otherwise the provision would have required the defendant to **put aside its own self-interest...**”* (para 124)

(3) Early Warning

- **Contractual enforcement** of good faith
- DevB's Practice Notes for NEC: *"The parties should embrace the spirit of mutual trust and co-operation in dealing with early warnings. ...the Contractor and the Service Manager should deal with the early warning in a collaborative manner"*
- **Clause 15.1:** *The Contractor and the Project Manager give an early warning by notifying the other **as soon as either becomes aware of any matter** which could increase the total of the Prices / delay Completion / delay meeting a Key Date or impair the performance of the works in use...*
- **Clause 61.5:** *if the Project Manager decides that the Contractor did not give an early warning of the event which an **experienced contractor could have given**, the Project Manager states this in the instruction to the Contractor to submit quotation.*
- **Clause 63.7:** *if the Project Manager has stated in the instruction to submit quotations that the Contractor did not give an early warning of the event which an experienced contractor could have given, the compensation event is assessed **as if the Contractor had given the early warning.***
- What about PM's failure to give early warning?

(4) Giving Rise to a cause of action

- Appears that all cases use good faith obligation as a **shield**:
 - Van Oord: defence to a claim for reduction in prices
 - Mears: defence to a claim for overpayment
 - Costain v Tarmac: defence to time-bar
- Can it be used as a **sword**?
 - Yes in other contexts.
- What could be the **damages** for breaching NEC 10? Breach under NEC is a compensation event.

Talking Points (1)

1. NEC 10.2 is **context sensitive**.
2. NEC 10.2 prevails over **Counterparts** (related) clauses
3. But NEC 10.2 does not prevail over “**hard**” contractual rights
 - a) time bar (*Costain v Tarmac*)
 - b) termination for convenience (*TSG Building v South Anglia*)
 - c) payment terms? (*Mears v Shoreline Housing*)
4. What if language contemplates absolute, **unfettered discretion**?
5. Limits: not required to put aside **Self-interest** (*Costain v Tarmac*) – *tension with duty to warn*

Talking Points (2)

6. Generally **negative duty**

- a) Duty “not to act in bad faith” rather than positive duty “to act in good faith”
- b) Examples of bad faith include:
 - action that frustrates the purpose of the agreement
 - knowingly lulling the other party into a false belief
 - asking for information under a pretence
 - knowingly providing false information on which the other party will rely
 - negotiating behind the other party's back
 - knowingly sustaining a groundless dispute

7. **Positive duty**

- **Early warning:** express (mandatory) contractual provision
- **Duty to warn:** if I have knowledge of **obvious** false assumption, I need to warn you? Am I not being asked to nursemaid my counterparty or else putting aside my self-interest?