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How can the use of "mutual trust and cooperation" in the NEC 3 suite of contracts help collaboration?

Abstract: The NEC 3 standard form of construction contract aims to promote collaboration. It hinges on the use of a particular phrase "mutual trust and understanding" which is largely undefined. Linking that to notions of good faith in contract, this paper explores how that meaning might be ascertained.

"Collaboration" has been a hot topic in the construction industry since, at least, the publication of the Latham Report in 1994[1]. It is of growing importance in other fields ranging from the way in which law teachers teach[2] to the maximisation of recovery of oil and gas from the North Sea.[3]

From a lawyer's point of view, one of the key issues around collaboration remains unresolved: what does "collaboration" actually mean[4] and can that meaning be captured in a contract's terms? Much of the discussion on collaboration focuses on techniques and practices which align parties' commercial approaches such as partnering and pain/gain share arrangements. Despite this, in the construction

[1] Sir Michael Latham *Constructing the Team: Joint Review of Procurement and Contractual Arrangements in the UK Construction Industry* HMSO 1994

[2] Association of Law Teachers: 2016 Annual Conference *Promoting Collaboration* https://www.northumbria.ac.uk/about-us/academic-departments/northumbria-law-school/law-research/promoting-collaboration-2016/ accessed 13 July 2016

[3] UKCS Maximising Recovery Review: Final Report (February 2014)

[4] It is noteworthy that, in conducting a survey of how collaboration was developing in the offshore oil and gas industry, Deloittes left the meaning of "collaboration" as something for those taking part in the survey to decide – Geoff Gibbons *Collaboration: What do we think it means?* Energy Voice 8 March 2016 https://www.energyvoice.com/opinion/103246/103246/ accessed 17 November 2016.

industry, parties' underlying interests will still often push their fundamental objectives in opposite directions: the person paying for the work will want to spend as little as possible and the person being paid for the work will want to make as much money as they can. In UK construction, as indicated by the Latham report, this traditionally led to adversarial and inefficient contract practices

This paper examines one mechanism in which "collaboration" might be contracted for in circumstances where there is no change to the traditional commercial structure and incentives of the parties but where, despite this, there is an attempt to work in a more collaborative way.

That discussion will focus on the use of an obligation that parties "work together in a spirit of mutual trust and cooperation." That phrase is recognised as facilitating collaboration by UK construction clients and contractors.[5]

It will be looked at in the particular context of its place within the the New Engineering Contract (NEC) suite of contracts – in particular, their third edition ("NEC 3"). That suite is relevant to the current discussion because it is has the encouragement of collaborative working at its heart – and its attempt to do so was endorsed by Latham.[6]

The focus of this paper is therefore on the particular clause of the NEC 3 contract, 10.1 which provides that the parties work together in a spirit of mutual trust and cooperation – and how that might be interpreted. That can then be taken as an example for the use of this sort of provision in other contracts. For example, para. 1 of Schedule 8 of the JCT 2011 Standard Form of Building Contract provides that parties

[5] 67% of clients and contractors who had adopted collaboration techniques said that the form which the collaboration took was *"A contract that included the ethos of mutual trust and cooperation"* p.14 NBS National Construction Contracts and Law Survey 2015

[6] Latham n. 1 at Chapter 5

"*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. To that end each shall support collaborative behaviour and address behaviour which is not collaborative*". For present purposes, it is notable that while the JCT 2011 suite, as a whole, does not have the same explicit "collaborative" ethos as the NEC 3 – that particular provision is headed "collaborative working".

So, focussing on the NEC 3, in order to progress that discussion, it is important to first of all discuss how that clause fits into the overall approach of the NEC 3 suite.

Collaboration and the NEC 3 suite

The success of the NEC 3 approach can be seen in its growing popularity for use in major UK construction projects[7] and increasingly internationally.[8] It should be noted that the NEC is not the most popular form in the UK – despite its growing reputation, but it is another mark of the growing desire for a 'collaborative' approach, that the new suite of the most popular form of building contract in the UK – the Joint Contracts Tribunal - has made it clear that it is looking to include "collaborative" provisions within the new 2016 suite of contracts which is in the process of being introduced at the time of writing.[9]

The aim of the NEC 3 suite of contracts to promote collaboration is clear for example, in the preface to the Engineering and Construction Contract, it says:

> ""*Previously, standard form contracts were written mainly as legal documents best left in the desk drawer until costly and delaying problems had occurred*

[7] See case studies on the NEC website <https://www.neccontract.com/Case-Studies> for details
[8] See e.g. Robert Horne *NEC and the Global Market: World Domination* Building Magazine 4 November 2011
[9] http://corporate.jctltd.co.uk/jct-2016-edition-new-features-announced/ accessed 13 July 2016

and there were lengthy arguments about who was to blame. The language of NEC Contracts is clear and simple, and the procedures set out are all designed to stimulate good management. ***Foresighted collaboration between all the contributors to the project is the aim***" [10][Emphasis added][11]

The NEC 3 supports the relational role of the contract through its goal of "stimulating good management" and is supported by the idea that this is not a document to be left in a drawer (but, by implication one to be read and used).

In terms of contract theory, that flows within the theoretical ideas of the "relational contract."[12] That is, contracts where the relationship between the parties lasts for a longer period and that the underlying circumstances about which they are contracting can be subject to change. That is in contrast with the more traditional paradigm of the single one-off transaction. The nature of construction contracts aligns closely with that definition and so the focus will be on contracts in that sector.

Detailed discussion of these sort of issues is beyond the scope of the present paper- beyond providing the broader context for the discussion on "mutual trust and cooperation". The relational aspect of the NEC 3 suite, this has been discussed at length and in detail by McInnis.[13] The key idea is that "*The key thing is that the commercial relationship is the key – and the legal relationship informs that by setting expectations."*[14]

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[10] Dr Martin Barnes, Preface Engineering and Construction Contract, NEC 3 April 2013
[11] Humphrey Lloyd *Some thoughts on NEC 3* 2008 ICLR 468 at p. 470
[12] The work of MacNeil is particularly influential in this regard and the brief summary in Stone and Devenney *the Modern Law of Contract* (11th Ed, 2015 Routledge) at Chapter 1.6 pp13 – 15 is a useful summary.
[13] Arthur McInnis *The New Engineering Contract: Relational Contracting, Good Faith and Cooperation – Part 1* [2003] ICLR 128 (Part 1) and [2003] ICLR 289 (Part 2).
[14] In this context, there is an interesting discussion of the interaction of contract law theory and construction law in Matthew Bell, *Contract Theorists: What did they ever for us in construction law?* May 2016, D189 available on www.scl.org.uk/papers. The present author hopes to explore the ideas set out here, in the context of the NEC in future work.

At the same time, if there is not an effective contractual arrangement standing behind the commercial relationship, matters can be difficult to resolve if the commercial relationship breaks down. One of the arguments against relational contracting is that the need for flexibility can mean a lack of commercial clarity.[15] That has been argued not to be necessarily the case – or at least not as important a factor as it might be thought to be initially.[16]

In "legal" terms, there are two principal ways in which the NEC3 contract (like others which promote collaboration) can be seen to promote collaboration.

Firstly, the contract operates as a "project management manual rather than a set of rights and obligations"[17] which tries to balance the rigidity of a framework with some flexibility in application in the relational process. The extent to which it might succeed at that is beyond the scope of this paper, but is relevant to the overall context in which the second feature will be discussed.

That second feature is the express provision in the contract that the parties are to carry out their obligations in a spirit of 'mutual trust and cooperation.' This attempts to capture the need for trust – which is recognised as vital in a collaborative relationship.[18]

The meaning of this provision is, however, unclear – and that could cause problems. In order to help the parties build their relationship, it is necessary to try and develop an understanding of the requirements of that sort of clause.

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[15] It is a truism that businesses prefer certainty to uncertainty

[16] David Campbell *Good Faith and the Ubiquity of the Relational Contract* 2014 MLR 475 at pp 488 - 490

[17] Tweet by @theNBS, 7 October 2014 from #whichcontract conference.

[18] See e.g. *The role of trust in business collaboration* Economist Intelligence Unit, 2008 www.wroldwide.biz/legacy/downloads/role_of_trust.pdf accessed 11 November 2016; Prusak "*The one thing which makes collaboration work*" Harvard Business Review, 5 July 2011.

Mutual trust and cooperation.

While there needs to be a framework for collaboration, there also needs to be flexibility.

In this context, then – what does the obligation to work together in a spirit of "mutual trust and cooperation" mean that the parties have to do?

Despite the attempts to capture the parties obligations in a 'plain English' style in the NEC 3 contract, it remains the fact that some ideas are expressed using terms that are, at best, ambiguous. The use of imprecise wording is, obviously, a common feature of legal drafting: the "*use of such clauses legitimises ad hoc but reasoned choices in a borderline case*."[19] That is a well-known and familiar process. Some terms (in particular "reasonable") are commonly used for this reason. However, there is a danger when newer imprecise (or "open textured") wording is used: the novelty and lack of clear understanding of the term mean that it may not have enough of the "*precisely appropriate degree of imprecision"*[20] necessary to provide parties with certainty as to what is required from them.

As has been highlighted before, some vagueness might be acceptable in terms of bolstering a commercial relationship but if that relationship breaks down, the parties would be advised to have an enforceable and clear contract to fall back upon.[21]

Working out how to remove some of the open textured language is therefore important. That is done, firstly, by reference to the wider common law discussions on these issues and then by discussing it in the context of the theoretical position.

The position of "good faith" in the UK jurisdictions

[19] Farrar "Law Reform and the Law Commission" (1974) Sweet and Maxwell) pp.44 – 45. Highlighted by Justin Leslie.
[20] Ibid.
[21] Echoing Campbell n. 16 and Mason n. 43 below.

"Mutual trust and cooperation" can be treated as meaning something similar to behaving in "good faith" in English law.[22] The general idea in both attempts to capture an open textured idea around standards of conduct and behaviour. Notwithstanding the different words used, the general thrust of the ideas is close enough to allow discussion to treat them as broadly equivalent for present purposes.

Despite recent developments in the discussion of "good faith" in case law that phrase remains something which does not have a particularly clear meaning in either English or Scottish law. Recent case law in England on similar clauses and "good faith" means that it is worth reflecting on where that leaves the positon at present and then on how that means the phrase, in the NEC or in any "collaborative" contract, might be used.

The position of good faith has been discussed at length elsewhere and the tendency to treat "good faith" as a synonym for another value laden word such as "honesty" or "fairness". [23] That does not necessarily aid parties understanding of what is required of them. Thus, while "good faith" is not unknown in the UK common law[24], but it is problematic. The problem is that the usage of the term in the NEC contract appears to be trying to give force to a concept which, while not unknown in the UK – does not have an established definition or meaning.

This is not to suggest there is particular need for concern, *per se*, in the admission of good faith into UK law at some point. The eventual outcomes which arise in jurisdictions with, and without, accepted notions of good faith are often broadly

[22] See e.g. discussion by Shy Jackson *"Good faith revisited" (2014) Const LJ 379 at p.379* and referring, in particular to the clause in the case of Compass Group UK and Ireland Limited (t/a Medirest) v Mid Essex Hospital Services NHS trust 2013 EWCA Civ 200.

[23] *Chitty on Contracts* (32nd Edition) – section 55(C) "A principle of good faith or of contractual fairness" paras. 1.039 to 1.056 sets out the English position and the Scottish position is well discussed in Hector MacQueen "Good faith in the Scots law of contract: an undisclosed principle?" in ADM Forte *Good Faith in contract and property law* (Hart Publishing, Oxford (1999)) (pages 5 – 37)

[24] Used advisedly to cover the various UK jurisdictions

similar.[25] However the concern can perhaps be put down instead to "*the fear of the potential of good faith as a tool to police the contract and impose a regulatory outcome*"[26] rather than actually assisting the management of the contract. There is a moral quality to the idea of good faith (as will be discussed below) and lack of understanding of what the phrase entails heightens the fear that conduct may be judged against uncertain principles; rather than the terms of the contract.

Outside of the construction law context, and in Scotland, memories of the decision in *Smith v Bank of Scotland plc*[27] are fresh enough to mean that any attempts to widen the present, narrow, usage of good faith beyond specific contracts (such as insurance) are treated with reluctance.

In the case of *Smith*, a spouse signed a joint guarantee of a loan made to the other spouse by the Bank. That loan was secured over the matrimonial home. When the loan was defaulted upon, the Bank called up the security. The "innocent" spouse resisted this. In England, equitable principles would have acted to protect the innocent spouse's position – but there were no such rules in Scots law. However, perhaps feeling that this led to an unfair result for the innocent spouse, the court said that the Banks' duty of good faith meant that it had to ensure that the innocent spouse was fully informed of the risks involved in signing up to securities. [28]

This result was met with significant academic criticism. [29] The extent of the use of good faith was not clear. A number of fundamental issues about this new usage needed to

[25] Dr Severine Saintier discusses the different approaches between civil and common law in *The Elusive notion of good faith in the performance of a contract, why still a bête noire for the civil and the common law in (2016) JBL (forthcoming);*
[26] Ibid at p. 11 and 12 (of the article, published references TBC)
[27] 1997 SC (HL) 111, [1997] UKHL 26.
[28] 1997 SC(HL) 111 at 121D
[29] The literature is well summarised and discussed in Sandra Eden *Cautionary tales – the continued development of Smith v Bank of Scotland* 2003 Edin LR 1107 at pp 114 - 118

be resolved: was it to apply to all spouses? What about analogous relationships (cohabitees? Partnerships?) What about relationships with some similar features to a married couple but not all? Was it just to apply to banks or all businesses? What steps did the bank have to take to discharge its duty of good faith? How much was it going to cost them?

The eventual result is that the position is now relatively restricted to similar positions to the one in *Smith* – and that the burdens of ensuring the relevant information and advice have been managed into the banking system. However, it took a number of years and a number of judicial decisions for this position to be clarified, creating a period of uncertainty while the parameters of the new requirements become more clearly established. During that period, there was scope to delay resolution of disputes through the deployment of novel but previously untested arguments.

This demonstrates the risks involved in letting a novel idea "loose" into a legal system without providing clarity over how it will operate.

A similar process can currently be seen to be underway in England following the decision in *Yam Seng Pte Ltd v International Trade Corp Ltd*.[30]

In *Yam* Seng, the court was willing to recognise that an implied provision of good faith might have effect in English law (and citing *Smith* in support of that proposition, among others) – where the contract was "relational". [31] In that case, the good faith obligation was said to mean that parties were to be honest in their dealings in such a contract and a false statement therefore gave rise to a breach of the implied term of good faith.

[30] 2013 EWHC 111(QB); 2013 All ER (Comm) 1321, [2013] EWHC 111 (QB)
[31] Ibid at para. 142

This decision is interesting in the context of the NEC 3 which seems to consider itself as "relational" in some ways – although the "good faith" obligation in the NEC 3 is expressly provided for, rather than implied.

The circumstances in which the good faith obligation could be implied were relatively narrowly defined in *Yam Seng*– and looked at situations where parties would have a relationship over time, among other things.[32] That assessment could, of course, apply to a range of potential commercial relationships (including construction projects) and so, as there was with the *Smith* decision, there have been further actions in court, and decisions aimed at clarifying and developing position set out in *Yam Seng*.

These subsequent decisions have tended to try and avoid defining good faith – and, take a restrictive interpretation where the phrase has been used in a contract.

The most important recent case is C*ompass Group UK and Ireland Limited (t/a Medirest) Mid Essex Hospital Services NHS Trust.*[33] That decision related to the decision making process for the award of incentives under a contract for services in a hospital and has been subject to considerable commentary already.[34] The scope of good faith type obligations has been restricted by that decision since the key contractual provisions were to be interpreted without needing to refer to the "good faith" type obligation. As a result, the meaning of good faith obligations provided for in contracts remains unclear.

[32] Ibid.

[33] 2013 EWCA Civ 200

[34] See in particular the discussions of this case in context in Jackson *Good Faith revisited* 2014 Const LJ 379 and Jan van Dunne *On a clear day, you can see the continent - the shrouded acceptance of good faith as a general rule of contract law on the British Isl*es 2015 Const LJ 3

The case of *Portsmouth City Council v Ensign Highway Ltd*[35] which had a similar factual basis to *Medirest* and had the benefit of considering and glossing that judgement. The position thereby seems to be

1. Good faith is not usually implied into English law contracts – but can be made express.[36]
2. There is no "freestanding" duty of good faith in English law – where there is a contract provision attempting to import good faith, then this is to be read along side other provisions.[37]
3. Those other provisions will be deemed to exclude the good faith duty where they are clear in what is required[38] or where another value is given to inform the nature of the obligation.

In terms of where this leaves the NEC contract – or any collaborative contract with a "good faith" type obligation where it can be said to exist is unclear. The courts seem to be avoiding dealing with the matter head on, as yet.

This means that there is still the risk of using good faith – as Saintier terms it – as a method of "policing the contract"[39] and attempting to impose a particular interpretation rather than giving effect to the parties' arrangements. Since *Yam Seng,* and speaking extra-judicially, Legatt LJ has pointed out that in the UK, the understanding of the "good faith" is drawn from the parties' contract – rather than a broader understanding of the position (which then sounds in issues of policy and in pre-contractual

[35] 2015 EWHC 1969 (TCC)
[36] Ibid at para. 81
[37] Ibid at para. 96 (quoting from *Mid Essex* with approval).
[38] Ibid at para. 83 and 93
[39] See reference at n. 26

discussions).[40] As Legatt also points out (chiming with the points discussed about the role of the commercial contract, above) that commercial parties operate their agreements with a degree of flexibility and cooperation – in the normal course of things.[41] It is against this that he feels contractual intentions would be supported by having regard to values of good faith.[42]

The key issue, therefore, is to try and ascertain what the contractual position of good faith might mean in the context of a collaborative construction contract, which makes express provision for it.

The preliminary point to make is that much of the discussion tends to suggest that "good faith" means something like "honesty" or "fair dealing" or the opposite of "bad faith"[43] (Legatt J takes this view in his lecture[44] and also looks at the use of good faith as it applies to parties' use of their discretion[45]). However, this runs the risk of replacing one open textured phrase with others – and not capturing the essential meaning of the phrase.

In particular, if the meaning of good faith in the context of a collaborative contract such as the NEC 3 is to import an idea of transparency or honesty – then it might lead to a question as to why there was a need to include complex and detailed provisions for

[40] Leggatt J *Contractual duties of good faith* Lecture to the Commercial Bar Association, 18 October 2016 https://www.judiciary.gov.uk/wp-content/uploads/2016/10/mr-justice-leggatt-lecture-contractual-duties-of-faith.pdf accessed 18 November 2016 at pp 2 and 3.
[41] Ibid at pp. 7 - 10
[42] Ibid at p.18
[43] See e.g. Steyn *Contract law: fulfilling the reasonable expectations of honest men* (1997) LQR 433 and Tan *Keeping faith with good faith? The evolving trajectory post- Yam Seng and Bhasin* (2016) JBL 420
[44] Leggatt J n. 40 at p. 9
[45] Ibid pp.12 - 15

the exchange of information within the contract itself.[46] In terms of the case law, that would serve to limit the usefulness of the provision.

Furthermore, this sort of definition and explanation works best where the "good faith" type of obligation is implied. Specific wording was chosen in the NEC 3. If the parties wanted "honesty" – then they could have provided for that.

Drawing on the existing case law, there might appear to be two particular options as to how to explore the interpretation of this clause. These are set out below but, as will be shown; neither is a particularly definitive answer to the question of interpretation. A further option will then be explored.

1. Acting as a rhetorical reminder[47]

Mason surveyed the operation of good faith in English law before the recent case law developments discussed above.[48] In that survey, he generally identified the impact "good faith" had as being one of emphasizing or allowing access to existing remedies under contract law. That tends towards a view that the difficulties in defining good faith in English law arise in part from the fact that it is inherent in the approach to enforcement of obligations already, since English law is based on ideas of good faith.[49]

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[46] For example the "Compensation Events" provisions in clause 6

[47] Or "mood music" as termed by Mike Barlow, see David Mosey *Love and Understanding* Building, Tuesday 15 November 2016 www.building.co.uk/nec-contracts-love-and-understanding accessed 15 November 2016. Its interesting to reflect on the prominence of the "mutual trust.." clause within the NEC 3: where it is very much at the forefront of the contractual documents compared with the JCT SBC equivalent which is buried in the eighth schedule of the standard form. Legally, there may be no difference, if the provisions are incorporated into the contract but there is a significant presentational difference.

[48] Brian Mason *Good faith clauses in construction contracts: fine sentiments in search of substance* [2011] ICLR 5,

[49] Ibid at. pp 16 - 25

In this situation "*such* [good faith] *provisions will express the parties aspirations which they may wish to regularly reaffirm throughout the course of their projects*"[50]

Jackson echoes this when he says: *"The cases suggest that such clauses will be relevant in limited factual circumstances but the real benefit of such clauses will be in reinforcing the message that collaborative conduct is required when carrying out contractual obligations*" [51]

At its heart, this analysis suggests that the wording in the contract is to act as a way of reminding the parties of their overall approach to the contract and therefore as a tool to persuade them of their need to behave "properly"; rather than having 'purer' contractual force in terms of its enforceability.

That "reminder" effect can have real value in discussions between the parties to the contract – and in setting expectations for the commercial relationship which is, it must be remembered, at the heart of the collaborative and relational contract.[52] However, as will be clear – and as Mason goes on to say[53] - while it is of use in the legal context where clarity of language and obligations exist in part to reinforce the commercial relationships; it does rather beg the question of why such a phrase would be included in the contract if the parties had not intended for it to have some legal obligatory force.

[50] Ibid at. p.26
[51] Jackson n.34 at p. 389
[52] As discussed by McInnis n. 13
[53] Mason n. 48 at p. 26 continues "*At worst [good faith obligations] will obfuscate a contract's interpretation such that the parties' agreed risk allocation may not be enforced*"

There would be other ways to try and achieve this "rhetorical" effect– through the use of protocols or other extra-contractual means. Alternatively, parties could have spelled out the level of force which the term was to have as part of the provision itself. Without these, it might be assumed that if the parties have used these words in their contract for a reason – especially in the context of a standard form where the wording is the product of careful consideration by panels of experts. This therefore suggests that the provision ought to have further meaning – and some sort of contractual force.

2. "Due Process"

The recent trend in the case law is for the contract to be interpreted in order to maintain "faithfulness to the agreed common purpose"[54]– with a view to allowing parties to make claims based on language which might previously have been considered too vague. This is seen clearly in the case of *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd*[55], where an obligation to have "friendly discussions" was held to be enforceable. The criteria for this were that the obligation was:

> "*The agreement was not incomplete; no term was missing. Nor is it uncertain; an obligation to seek to resolve a dispute by friendly discussions in good faith has an identifiable standard, namely, fair honest and genuine discussions aimed at resolving a dispute. Difficulty of proving a breach in some cases should not be confused with a suggestion that a clause lacks*

[54] To adapt the title from Henry Hoskins *Contractual obligations to negotiate in good faith: faithfulness to the agreed common purpose* (2014) LQR 131
[55] [2015] 1WLR 1145; [2014] EWHC 2104 (Comm)

certainty…commercial men expect the court to enforce obligations which they have undertaken"[56].

Similar decisions have held that there is an obligation to take steps to procure a collateral warranty (see *Liberty Mercian v Cuddy*[57]) and in Scotland to use "reasonable endeavour" to procure performance of obligations.[58]

This suggests firstly that the courts would try and give effect to the parties' contractual intention – if they could.

It also suggests, secondly, that the courts may try and treat the interpretation of the "mutual trust and cooperation" provision in terms of the extent to which it is clear and something by which attempts to carry out these obligations can be measured.

This approach would seem to solve the problem of how such provisions are to be interpreted. However, without further explanation these good faith/mutual trust terms are likely to be considered to be too "open textured" to allow a proper assessment of whether their requirements have been complied with. The *Emirates Trading* and *Liberty Mercian* cases mentioned above turned on the fact that there were clear intended potential outcome against which progress could be assessed. So – if "friendly discussions" are the intention – the existence or not of discussions can be identified. If a collateral warranty is to be provided, the steps which might be taken to reach that

[56] Ibid at para. 64

[57] Liberty Mercian Limited v Cuddy Civil Engineering Limited and others [2014] EWHC 3584 (TCC)

[58] R&D Construction Limited v Hallam Land Management Limited 2010 CSIH 96 and Kier Construction Limited v WM Partnership LLP [2016] CSOH 17

can be identified. It is less clear what might constitute "cooperation" – at least to the extent of what is "enough" cooperation to meet the contractual requirement. If that is true for "cooperation" it must be even more the case for "trust" and for "good faith" more generally.

Again, too, the position must be that if there was a desire to provide for a process – then it was open to the parties to set out clearly what that process is.

Since these issues remain unclear, it is therefore important to try and set out the framework for assessing what these mean. In doing so, it is worth considering some of the principles which lie behind discussions of good faith. These might then be able to draw out some lessons for inclusion in collaborative contracts.

Framework for assessment

In carrying out this task, it is worth considering the categorisations of "good faith" or the source of "good faith" by Wightman which are helpful in constructing that framework.[59]

Wightman categorises good faith to be either "core"[60], "contextual"[61] or "normative."[62] All of these of these might come into play in the present example of the collaborative construction contract.

[59] John Wightman *Good faith and pluralism in the Law of Contract* in Brownsword, Hird and Howells (eds) *Good faith in Contract: Concept and Context*
[60] Ibid. p. 42
[61] Ibid at pp 42 44.
[62] Ibid at. pp 44 – 46.

"Core" good faith

Wightman does not provide significant discussion on this aspect of good faith but suggests it is the "minimum standards of honesty in the formation of contract". [63] These seem to be those values which are inherent in the English (and Scottish) legal systems.[64] Wightman identifies this type of good faith as a means of distinguishing it from the two categories which follow rather than as a topic for separate discussion. For present purposes, that must be assumed that the express inclusion of a good faith type obligation in a contract is aimed at doing more than reflecting the inherent values of the system.

"Contextual" good faith

Outline

Wightman identifies contextual good faith as being something which is assessed in the specific context of the contract in question. Like the outline put forward by Steyn[65] – it reflects the parties' expectations as to how each of them will carry out their obligations under the contract: "*it is concerned with making parties live up to the actual standards of the contracting community of which they are members*"[66]

[63] Ibid. at p. 42
[64] See discussion at n. 23 and also Brownsword *Positive, Negative, Neutral: the Reception of good faith in English Contract* Law in Brownsword, Hird and Howells (eds) *Good faith in Contract: Concept and Context*
[65] Steyn *Contract Law: fulfilling the reasonable expectations of honest men* (1997) LQR 433
[66] Wightman n. 59 at p. 42

This “community” is relatively specific and recognises that “*in some contexts more restraint will be expected than in others, and so contextual good faith does not invariably require that parties act in a cooperative way: it will depend on the practices and understandings in their commercial sector*”.

Wightman identifies three criteria for the development of a particular contracting community

1. A regular engagement in contracting in that area so that the “*social relations necessary for the informal understandings to be shaped disseminated and become internalised cannot exist*”[67]
2. The bargaining position of the parties must be broadly aligned – otherwise the context for the relations will be weighted in one direction, rather than the other and “will not limit the pursuit of self interest by *both* sides”[68] [emphasis added]
3. The contract should be relational –in order that members have experience not just of operating the contracts but “handling problems when things go wrong”.[69]

Wightman considers that this form of good faith would work best for commercial contracts. [70] That would seem logical.

Analysis

[67] Ibid at p.43
[68] Ibid at. p.44
[69] Ibid. p.44
[70] Ibid p.48 - 52

There are a number of points which can be made here in relation to what Wightman says and the application of good faith in a collaborative construction contract such as the NEC 3. Most strikingly, this appears to be most in line with the reasoning of Leggatt LJ in *Yam Seng.* At para. 144 for example, Legatt J says *"Although its requirements are sensitive to context, the test of good faith is objective in the sense that it depends not on either party's perception of whether particular conduct is improper but on whether in the particular context the conduct would be regarded as commercially unacceptable by reasonable and honest people*" [71]

Firstly, the three categories where Wightman "contextual good faith" might apply would broadly seem to exist in the typical construction contract. Most parties in a construction contract have some experience of what they are contracting for. While the parties bargaining positions can be significantly different, the use of a standard form of contract can be seen as balancing their interests to some extent. The contract is also recognisably 'relational' – as has been discussed above.

There is therefore an argument that the key to an assessment of the meaning of 'good faith' or the similar provision in a collaborative construction contract might be to import an external value for evaluation such as "good industry practice" or "commercial sense" or some other equivalent recognised term.

This would be interesting as it would also align 'good faith' and the more general rules for the interpretation of contracts as set out in the case law – which echoes these ideas. While the focus in the case law has been on the idea of "commercial common

[71] *Yam Seng* n. 30 at para. 144

sense", the underlying idea of looking at the context of the contract would not be far away.

Leggatt J makes this link in *Yam Seng*[72] and Tan has placed the development of good faith in this "contextualist" position[73] the idea of interpreting ambiguous wording within commercial contracts with "commercial common sense" can clearly be seen in the decision of the UK Supreme Court in *Rainy Sky v Kookmin*[74]. This would support the idea of contextual good faith as the appropriate framework for interpretation of these sorts of provision but there are a number of problems which prevent that being appropriate.

Firstly, the UK Supreme Court have recently stepped back from the *Rainy Sky* judgment and the more "contextualist" approach, to some extent in the decisions of *Arnold v Britton*[75] and *Marks and Spencer v BNP Paribas*[76]. In doing so, they have re-emphasised the need to look at the terms of the contract a more "formalist" approach[77]. That stepping back suggests the courts may be less keen to "read in" good faith ideas from the context of the commercial arrangements – and therefore undermines the basis for *Yam Seng*, to some extent.

[72] See n. 25 at para. 139
[73] Zhong Zing Tan *Keeping faith with good faith? The evolving trajectory post-Yam Seng and Bhasin* (2016) JBL420 at 427
[74] 2011 UKSC 50 per Lord Clarke at e.g. para. 21. This decision is expressly name checked in *Yam Seng* at para. 139
[75] [2015] UKSC 63
[76] [2015] UKSC 72
[77] See e.g. Tan n.73 at p.426

However, the point about the use of a “commercial common sense” interpretation as an aid to dealing with unclear contract terms could still be important in the case of the interpretation of “good faith” wording, which is intrinsically unclear, in this context.

Secondly, even allowing for a contextual interpretation, there must be doubts about whether this would provide an answer to this issue.

This is because, if the parties were intending for their contract to be interpreted in line with “commercial common sense” or “good industry practice” or a similar contextual meaning, they could have said so in their contract. Alternatively if the contextual rule reflects the common law, then there must be doubt as to whether they need to make such a specific provision: rather than leaving it up to an application of the common law canons of interpretation. Adding a particular clause of difficult to determine meaning to the contract does not do too much to assist the positon.

So, it might therefore be said that the parties were looking to do something more by adopting a specific term than provide for a canon of interpretation.

Furthermore, while at first glance the three criteria identified by Wightman apply here, there must be questions about the extent of that application to the NEC 3 suite and construction contracts more generally.

In particular, if the aim of the provision is (at least partly) to promote collaboration, there are questions about whether an appropriately “collaborative” context for the interpretation of “good faith” applies in the UK construction industry. Full understanding

of the provision might require a culture of collaboration against which parties conduct can be measured. Moreover, even if it does exist in UK construction, it is even more questionable whether it would be understood outside of that sector. Wightman identifies that one criteria for the contextual approach is that the parties have access to some sort of external mechanisms for understanding how problems are resolved. It is not clear if this can be said to exist in terms of the current extent of collaborative working in the UK. .

Finally, while Wightman considers that the commercial sector is the appropriate paradigm for a contextual good faith contract – he says that personal contracts might be appropriate for the other category of "good faith".[78] Since there are elements of the collaborative working relationship which surely resemble a personal relationship more than a traditional commercial transaction; it is worth sketching out the alternative which Wightman details, namely "normative" good faith.

Normative good faith

Outline

In contrast to contextual good faith, Wightman sees normative good faith as a "*canon of contractual justice imposed on the parties*."[79] Among the examples cited are the framework of requirements in the Unfair Terms in Consumer Contracts Regulations. [80]The restrictions imposed on commercial companies in these regulations is not

[78] Wightman n.59. Discussed pp 48 - 57
[79] Ibid. at p.45
[80] 1994/3159 (which were replaced by Unfair Terms in Consumer Contracts Regulations 1999/2083 and which are now subsumed within the Consumer Rights Act 2015)

something which has developed from their commercial practice but the judgement of "unfairness" is, instead made in the terms of the regulations themselves. It comes from outside of the parties own understanding.

Wightman points out that there is, naturally, a cross over between the two classifications of good faith – and that contextual good faith has the benefit of being something which can be drawn from the parties' intentions. [81]

By contrast, normative good faith has an external source. This can be a set of rules or ethics – or "institutional rules" for a particular aggregation of people.[82]

Analysis

This type of good faith is by nature harder to assess but probably more closely reflects the natural, lay, understanding of "good faith" where people assess the meaning of the term by reference to a particular code of ethics or morals or internal sense of "good".

The difficulty with that approach is that it can lead to disputes where one person's subjective understanding of the requirement of good faith does not meet another's standards. In this situation, the perceived failure to act in good faith can actually act to corrode the relationship more quickly as it may have created the perception that a higher standard was being operated to. It is the negative side of the "rhetorical reminder" effect of the "good faith clause". One party might expect that in a traditional

[81] Wightman n.59 at p.46
[82] Ibid. at p. 53

contract, parties would act in their own narrow and adversarial interests – but where there is an obligation of "good faith" or similar in the contract it gives rise to a higher expectation.[83]

This bolsters the need for clarity on what good faith means. It is in this sort of situation, it is suggested, that there is most risk of good faith being used to "police" the parties.[84]

If a "personal," subjective, understanding of good faith is not enough, however, the question arises as to where the meaning is to come from. It maybe that certain institutions (religious, social or otherwise) can provide that meaning. In personal contracts, where there is not the same opportunity to create a "contracting community" which can develop its own understandings and rules, these "institutions" can provide this understanding, either by helping govern inter-personal relationships between members of the institution or as acting as a framework to protect individuals engaging with the particular activities (such as consumer protection laws). [85]

The idea of institutional rules is weaker in the commercial sphere when there are fewer parties operating in a particular 'space' (since activities are tied to particular projects or transactions) and there is not the same opportunity for understandings to develop on how to operate within the rules of the institution, over the longer term. Institutional rules are often enforced informally by other members of the institution – but that tends to mean an acceptance of the authority (at least in limited circumstances) of one of the institution. That acceptance is less likely to arise where parties have competing

[83] Ibid. at p. 52 – 56 for discussion of calculability which feeds into this idea.
[84] See n. 26
[85] Ibid. see p.52 - 57

commercial objectives. At the same time, the relational aspects of construction contracts and the relative novelty of “collaborative” working do suggest that there might be a need for an institutional framework to be imposed. That leaves the questions of where those institutional codes come from and how they come to be accepted and then interpreted by the parties.

Where does this leave us?

The following conclusions can be drawn from the discussion above.

1. There is a tension in the case law between increasingly open attempts to rely upon good faith and similar categories of obligation and the hesitancy of the courts to deal with precisely what it means.

2. While good faith type obligations have importance in terms of managing the parties expectations in a commercial/rhetorical sense – those expectations ought to be something which can be given effect to.

3. Current case law suggests that the courts ought to be willing to give effect to these expectations but they find it difficult to engage with the particular provisions which act to impose good faith across a contract.

4. This means we do not have a clear understanding of what “good faith” or “mutual trust and cooperation” means in a collaborative construction contract.

5. Considering the discussion of good faith in the more theoretical context provided by Wightman suggests that there is a need to identify a source of the values upon which the interpretation of good faith can be evaluated.

6. If an external set of values and rules is to be applied, there are difficulties in working out where this might come from. Collaborative construction contracts do not fit clearly into either paradigm offered by Wightman.

7. The source of the framework or context to interpret “good faith” in collaborative contract still needs to be worked out – especially where it applies to a sector which is still working to improve collaborative working.

One answer which would work specifically for the NEC 3 contract is that its theme and aims are clear enough to create a “context” on their own – for example by using the words of the preface set out above to guide behaviour, and along the lines of the “rhetorical reminder” which sets parties a goal as to their conduct. The NEC creates a clear drive to “collaboration” and so the answer to the issue of interpretation is to deal with the most collaborative approach.

At the same time, that tends to rely on similarly vague aspirations and so there is still value in attempting to bring further clarity to the wording in the NEC 3 can also serve to assist collaboration – and may also have lessons for other collaborative contracts which do not have such a clearly defined scheme for working together.

Identifying the context

The present writer's favourite example of collaboration is the British and Irish Lions Rugby team and, in particular the example of their successful tour to South Africa in 1997, where the Lions defeated the then-reigning World Champions, South Africa. One of the keys to the success of that tour was put down to the early steps which the tour management team took to allow the players to define for themselves what the code of conduct for the tour would be. The players identified some rules of conduct for themselves.[86]

In the context of the current discussion, this code of conduct could be seen to be along similar lines to the institutional rules which might underpin good faith or – more broadly and when considered with the other activities on the team building trip as accelerating the process of creating a context under which the "contextual good faith" could be understood.

There are further benefits in terms of expectations and relationship building which go beyond issues of legal enforceability. Agreeing these documents ought to be something that engages those who will be doing the work, for example, rather than being something which is done in an overly formal way. It was seen as an important part of the Lions' success.

Such drafting and creation of codes of practice is, of course, common in commercial settings – and applies in construction projects too. The JCT, for example, has a

[86] Neil Merrick "The Lion's Share" *People Management* 12 June 1997

standard form of partnering charter that provides some detail of how parties in a partnering contract are to interact.

In terms of the legal standing of these documents, a Partnering Charter was looked at in the case of *Birse Construction Limited v St David Ltd*. [87]. This charter contained a number of obligations – including one to operate with "mutual trust and understanding". In this case, the charter stood outside the parties' principal contract and so was used by the judge as a means to understand and measure the parties' behaviour. The precise way in which this was to operate is not the subject of detailed consideration in the report but it is clear that the judge considers that the Charter allowed for some flexibility or leeway in terms of the formalities of contractual formation. He also said

> "*One would note expect, where the parties had made mutual commitments such as those in the Charter, either to be concerned about compliance with contractual procedures if otherwise there had been true compliance with the letter or spirit of the Charter. Even though the terms of the Charter would not alter or effect the terms of the contract (where they had not been incorporated or referred to in the contract or are not binding in law in their own right) an arbitrator or Court would undoubtedly take such adherence to the Charter into account in exercising the wide discretion to open up, review and revise etc. which is given under the JCT Conditions"*[88]

[87][1999] BLR 194 Thanks to RGU dissertation student, Duncan McBoyle, for flagging up this case
[88] Ibid at.p.203

This is helpful in terms of demonstrating that the Charter would be part of the contextual, factual matrix which could be used in giving effect to the contract. Questions remain where the partnering charter (as in the *St David's* case) uses relatively vague and open textured words – of the kind discussed above. That requires an assessment of the spirit of the arrangement rather than providing a more concrete vehicle for assessing the parties understanding of its intentions. The steps identified in the *Emirates Trading* case above – where there needs to be sufficient certainty of the obligations in question to allow them to be enforced – may not therefore be met.

Measurable milestones

Accordingly, referring back to the idea expressed above about either creating a context or understanding of the values of a project or providing a set of institutional rules which might help understand and give effect to their understanding, this process – of agreeing a code of conduct or project charter would seem like an appropriate mechanism for developing this position.

As part of that, parties acknowledge that there are obligations on them to cooperate and act with trust and good faith but are then obliged try and work out what that means in practice. This discussion would help set expectations – and could also create a framework to ascertain whether the "good faith" obligations have been complied with.

The danger is that negotiating further documents just adds confusion rather than clarity. Construction projects are already often awash with paper work – and

construction contracts often have an array of protocols and other documents. As Tony Bingham has pithily put it:

> *"Not only are there too many forms…it is a truism that the industry does not understand these "legal" documents. True too that our industry sees no point in trying to understand these legal documents; true too that if you spent time trying to fathom the true intention of the contractual bumf, you would have no time to build the building"*[89]

Clearly the aim of this exercise should be to ensure that the parties do understand the documents – and that include the meaning of terms such as "mutual trust and understanding". But the warning of things getting lost among the array of contractual documents ought to be heeded.

In order to add value therefore, the parties need to engage in the process and keep an eye on tangible results. One suggestion is that, for example, rather than capturing aspirations, the discussion focuses on identifying in more detail the sort of things and factors which should be taken into account.

For example, parties might agree to deal with new risks along the lines of the Abrahamson principles for risk allocation such as:

1. Identifying the party with the most control over the causes of the risk?

[89] Tony Bingham *Standard Form Contracts: What the Papers Say* Building Magazine, 2 November 2012

2. Identifying whether the risk can be transferred from one party to another – for example by using insurance?
3. Identifying which party benefits most from the risk being controlled
4. Identifying whether one party can manage the risk more efficiently?
5. Identifying where the initial losses fall if the risk materialises?[90]

The greater specificity of the discussions on this sort of feature not only help provide the agenda for any meeting which might be had to discuss a topic but also provide the sort of criteria against which progress can be assessed and evaluated. The extent to which parties engage on discussion of this level of detail is much easier to gauge rather than more abstract questions around whether the level of engagement was broadly "enough" or of the right standard.

This would help allow the courts to assess compliance – along the lines of the authority in *Emirates Trading*.

It also provides scope for the courts to assess whether action has been taken against the agreed standards of the parties. The courts have shown a willingness to look at these sort of documents –and so care should be taken to make them as appropriately clear as possible.

Conclusion

In terms of the lessons for collaborative contracting then, the approach of the NEC is instructive. The use of "mutual trust and cooperation" is linked to the collaborative approach – but the way in which this provision is to be interpreted remains unclear.

[90] Paraphrased from Max Abrahamson *Risk Management* 1984 ICLR 241. Another model is put forward by Nael Bunni *Four Criteria for Risk Allocation in Construction Contracts* 2009 ICLR 4

That means that it is difficult for the parties to have a framework to assess whether their actions are appropriate or not.

The interpretation of this clause remains somewhat unclear at this stage, where the meaning of “good faith” in English (and Scottish) case law is unsettled. Steps have been outlined above which might help to add clarity to that. As well as possibly helping settle the legal position, they will be useful in terms of the management and relationship building on the contract.

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