

Van Oord v Dragados: the Inner House dredge up good faith from Aberdeen harbour.

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Van Oord v Dragados: The Inner House Dredge Up Good Faith from Aberdeen Harbour

A. INTRODUCTION

At £350m and the “largest marine infrastructure project in the UK”,¹ the work to extend Aberdeen Harbour is a significant but somewhat troubled project, due for completion in 2022. The original main contractor, Dragados, had (reportedly) had difficulties and left the project in Summer 2021.² That did not end their involvement, as litigation about the scope of subcontracted dredging works was subject to a decision of the Inner House in October 2021.³ The case examines the role of an express term of the building contract which requires the parties to act “in a spirit of mutual trust and cooperation” and the way in which that interacts with the idea of good faith.

B. THE FACTS

The factual basis for the case can be set out briefly.⁴ The extension works included digging out Nigg Bay next to the existing harbour basin.⁵ Dragados first subcontracted the dredging work to Van Oord in September 2018, and subsequently (without Van Oord knowing) subcontracted portions of the same dredging work to other subcontractors. This work amounted to around 30% of the total dredging. Van Oord’s contract was then terminated in March 2020.⁶

Van Oord claimed that the instruction to reduce the amount of dredging was a breach of contract. This was confirmed by the Outer House.⁷ A subsequent appeal to the Inner House considered the mechanism for evaluating the consequences of that breach. The Inner

¹ Aberdeen Harbour Trust, available at www.aberdeen-harbour.co.uk.

² BBC News, “Aberdeen Harbour project to be finished by October 2022”, 7 July 2021, available at <https://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-57749051>.

³ *Van Oord UK Ltd v Dragados UK Ltd* [2021] CSIH 50.

⁴ *Van Oord* (IH) paras 8-17.

⁵ Aberdeen Harbour Trust, “Project Background”, available at www.aberdeen-harbour.co.uk/south-harbour/project-background.

⁶ *Van Oord* (IH) paras 8-10.

⁷ *Van Oord UK Ltd v Dragados UK Ltd* [2020] CSOH 87.

House also put the case to proof on the question of whether Dragados had complied with the contractual “spirit of mutual trust and cooperation” clause.

C. LEGAL ISSUES AND CONTEXT

There are three legal questions in the case. The first two provide important context for the third.

The first issue relates to the law around changing a construction project to reduce the amount to be done. Construction contracts usually anticipate change to the agreed scope of works—reflecting the frequency of change in the delivery of construction projects.⁸ This is usually straightforward and leads to more work (and therefore more money) for the contractor. Reduction of work is different as it impacts the contractor’s profit margin (as here, where the ‘easy’ work was removed, leaving the less economic work for Van Oord). In some circumstances, it could even be a circuitous route to termination (if all remaining work was removed from the contract). There is scant authority on this issue.⁹

The second issue is that the case examines the core terms of the New Engineering Contract (NEC) Standard form of building contract. In this case, the contract was based on the third edition of the NEC, known as NEC 3, although the fourth edition is currently in use. The NEC has risen to prominence in the last 30 years. Its novel approach focuses on promoting collaboration through (i) using plain English,¹⁰ (ii) requiring parties to be proactive, and (iii) the promotion of communication, especially around changes.¹¹ It is widely considered to have been successful and is an increasingly popular choice.

The third—related—strand is that one of the cornerstone provisions within the NEC suite is clause 10.1 of the contract. That provision requires that the parties “act as stated in the contract in a spirit of mutual trust and cooperation”.

⁸ See e.g. *Obrascon Huarte Lain SA v HM Attorney General for Gibraltar* [2014] EWHC 1028 (TCC).

⁹ There is little beyond *Abbey Developments Ltd v PP Brickwork Ltd* [2003] EWHC 1987 (QB).

¹⁰ N Gould, “NEC3: construction contract of the future?” (2008) *Constr Law J* 286 at 288.

¹¹ D Christie, “Capturing Collaboration in Construction Contracts in their Commercial Context” in M Heidemann and J Lee (eds), *The Future of the Commercial Contract in Scholarship and Law Reform* (2019) 251.

The meaning of this has been broadly equated with good faith, although neither of the two previous cases which have considered the specific term in detail do so unequivocally.¹² In *Costain v Tarmac*, “mutual trust” was said to amount to more than an obligation “not to mislead” (in that case about the nature of the contractual dispute resolution mechanism) but did not require a party to “put aside self-interest”.¹³ In *Northern Ireland Housing Board v Healthy Buildings (Ireland) Limited*,¹⁴ a failure to provide notices was said to be against “mutual trust”, but there was no substantive discussion of it.

Outside of the particular terms, the leading construction judges in England and Wales have been somewhat sceptical of the role and definition of good faith and have equated it broadly with “cooperation”.¹⁵ That still leaves precise definition missing—especially if, as here, the cooperation is expressly part of the term and linked with “mutual trust”.

These remarks reflect the emerging English jurisprudence on the role of good faith, and the extent to which it is linked with a more flexible approach to understanding how contracts might operate when they meet the criteria of a “relational contract”.¹⁶ A construction contract might be or might not be “relational”—but there is scope to recognise the particular features of the NEC in that category.¹⁷ It has proven difficult, in England, to reach a settled definition of good faith—and the further development and link with relational contracts in Scotland has, so far, been largely to “wait and see”.¹⁸

¹² In *Mears v Shoreline Housing Partnership Limited* [2015] EWHC 1396 (TCC), Akenhead J said that the provision would not override an express term of the contract. That does not assist in interpreting express clause 10.1.

¹³ *Costain Ltd v Tarmac Holdings Limited* [2017] EWHC 319 (TCC) para 124 per Coulson J.

¹⁴ [2017] NIQB 43.

¹⁵ Coulson LJ, “Recent highlights and greatest hits”, *Society of Construction Law*, Paper 220 (2019) at 11; R Jackson, “Winners, losers and a coda on good faith”, *Society of Construction Law*, Paper D227 (2020), paras 2.1 – 2.3.

¹⁶ S Saintier et al, “Industry led standards, relational contracts and good faith: are the UK and Australia setting the pace in (construction) contract law?” (2022) *Liverpool LR* (forthcoming), especially n 8.

¹⁷ S Jackson, “Driving collaboration through ‘relational’ construction contracts” (2019) *Out-Law Analysis*, available at <https://www.pinsentmasons.com/out-law/analysis/driving-collaboration-through-relational-construction-contracts>; A McInnis, “The New Engineering Contract: relational contracting, good faith and cooperation” [2003] *International Construction Law Review* 128 (Part 1) and [2003] *ICLR* 289 (Part 2).

¹⁸ H L MacQueen and S O’Byrne, “The principle of good faith in contractual performance: a Scottish-Canadian comparison” (2019) *Edin LR* 301 contains a detailed overview of the current state of the discussion in Scots law.

D. THE DECISIONS

The overlap on the issues makes it appropriate to consider the Outer and Inner House decisions together.

(1) Omission of work

The judge at first instance, Lord Tyre, focussed on the question of instructions to omit work. He helpfully provided a gloss on the previous decision on this issue, *Abbey Developments Ltd v PP Brickwork Ltd*.¹⁹ In short, “[t]he test is whether, on a proper interpretation of the contract read as a whole, the clause ... is wide enough to permit the change that was made”.²⁰ In carrying out that test, Lord Tyre noted that “motive was irrelevant.”²¹ On that basis, he discounted clause 10.1.²² Given that clause 10.1 specifically talks about the spirit in which compliance occurs, this decision is somewhat surprising. This aspect of the case was not challenged on appeal.

(2) Interpretation of NEC 3

On the question of how to deal with the instruction for omission of works—given in breach—Lord Tyre interpreted the contractual “compensation events” mechanism as providing the remedy for the breach, since it governed all changes made.²³ The decision on this point feels somewhat counter-intuitive, since the usual remedy for breach of contract would not arise within the contract itself. However, Lord Tyre did cite practitioner textbook authority on the NEC in support of his interpretation. Clause 10.1 was not held to be relevant to this mechanism.

By contrast, the Inner House appear concerned that Lord Tyre’s approach might suggest that the compensation events mechanism was a “charter for contract breaking”.²⁴ They made clear it was not. In doing so, they interpreted the compensation event mechanism as implying that the instruction given must be “lawful” (so, the instruction must not be in breach of contract).

¹⁹ [2003] EWHC 1987 (QB).

²⁰ *Van Oord* (OH) para 21.

²¹ *Van Oord* (OH) para 25.

²² *Ibid.*

²³ *Van Oord* (OH) paras 39-48.

²⁴ *Van Oord* (OH) para 30.

(3) Clause 10.1: Mutual trust and cooperation

Since Lord Tyre largely discounted the clause 10.1 point, those of us academics who get “over-excited about good faith”²⁵ will be happy that the Inner House did engage with it, while perhaps being disappointed at the relatively brief discussion of the subject. There were however three key points in that discussion.

Firstly, Lord Woolman observed that clause 10.1’s reference to “mutual trust and cooperation” was more than an “avowal of aspiration”.²⁶ That does however leave the question of what the anticipated extent might be.

Secondly, in that endeavour, Lord Woolman outlined three points which “align” with mutual trust and cooperation. These are that parties (i) cannot benefit from their own breach, (ii) should use clear language to be at the “mercy of the other”, and (iii) that a contractor does not have to comply with an instruction given in breach of contract. However, all three propositions are settled within contract law. There is a question about what additional impact clause 10.1 has here.

Thirdly, Lord Woolman drew a specific link between clause 10.1 and the doctrine of mutuality. Clause 10.1 is said to be a counterpart of clause 63.10, which provides for changes of circumstance which lead to a reduction of the prices (that is, the sums agreed to be paid for work under the contract) . Therefore, Dragados’ failure to comply with clause 10.1 means that Van Oord were not bound by this aspect of the compensation events mechanism. This gives rise to the question of whether clause 10.1 was breached or not. That, however, was said to be a matter for proof and the matter was remitted accordingly. Disappointingly, there was no further guidance given.

E. COMMENTS

There is much to reflect on, even in the relatively short Inner House judgment. The key questions are as follows.

The first question is, what is the scope of the proof? While it is encouraging that the concept of good faith is open for discussion, the court has outsourced the issue of defining it

²⁵ Coulson LJ, “Recent highlights and greatest hits”.

²⁶ *Van Oord* (IH) para 19; cf D Mosey and R Horne, “NEC contracts: love and understanding” (10 June 2011), *Building Comment*, available at <https://www.building.co.uk/comment/nec-contracts-love-and-understanding-/5018931.article>.

to the parties' counsel and agents. As noted above, the question of what "more" clause 10.1 might require beyond an aspiration is not clear. That risks needless cost in preparing for the proof.

The second question is, how does this impact on the understanding of good faith in Scots law? The explicit link between good faith and the specific words of clause 10.1 risks interweaving the position in Scotland (where good faith is understood more narrowly²⁷) with the position in England (where its role alongside equity and other doctrines is developing²⁸). It is submitted that the focus should be on the specific words used, in their context. The survey by Mante on how those particular words might be understood is an important step on that process.²⁹ That would keep the notion anchored and avoid potential conceptual confusion while still benefitting the construction sector with its particular idiosyncrasies.

The third key question is, does this pose problems for mutuality retention? This risk of uncertainty is particularly pronounced in the explicit link with the rules of mutuality,³⁰ and thus, to the self-help remedy of retention. It is a counterpart of the pricing clause (63.10). Since retention takes place with minimal court supervision, clarity on when it applies is vital and the court has not gone further to define good faith or why these clauses are counterparts.³¹

Not only does that pose a problem of understanding of when there is a breach, but it creates a potential inconsistency in application of mutuality. In *McNeill v Aberdeen City Council*,³² an implied term of "mutual trust and confidence" was held not to be a counterpart of other obligations. While it was important, it was not one of the "substantive" obligations of the contract (such as payment).³³ It "affects the way that the parties act in performing their

²⁷ M Hogg, "The implication of terms-in-fact: good faith, contextualism, and interpretation" (2017) Geo Wash LR 1660 at 1662-1663; MacQueen and O'Byrne, "The principle of good faith".

²⁸ Ibid; *Bates v Post Office (No.3)* [2019] EWHC 606 (QB) paras 702-746.

²⁹ J Mante, "'Mutual trust and cooperation' in NEC 3 and NEC 4: A fresh perspective" (2018) Const LJ 231.

³⁰ *Van Oord* (IH) paras 21-23.

³¹ For a detailed overview on the Scots law of retention, see L Richardson, "The scope and limits of the right to retain contractual performance" (2018) JR 209.

³² [2013] CSIH 102.

³³ Ibid para 31.

substantive duties, but is conceptually distinct”.³⁴ In that case, it was not a counterpart to an obligation to perform.³⁵

Both *Van Oord* and *McNeill* concern contracts with a relational character. In English law, relational contracts give rise to implied good faith obligations.³⁶ Should that also be the case in Scotland, there would be a tension between *McNeill* (which held that implied “mutual trust” obligations are not counterparts of the rest of the contract) and *Van Oord* (which says an express “mutual trust” obligation is a counterpart to other clauses). The cases are no doubt distinguishable, but the incongruity remains.

F. CONCLUSION

The Inner House’s decision on “mutual trust and cooperation” provides a spur for further, careful, development of the ideas behind the NEC. The integral role of this term can be seen in the final observation that—stepping back—both judgments capture different approaches to collaboration and cooperation. In the Outer House, the interpretation of the contract keeps the parties’ relationship within its confines even where that seems counterintuitive. In the Inner House, there is a wider view, implying words and drawing on outside norms. The idea of “mutual trust and cooperation” has different weight in the judgments—and this might be seen to underpin the different approaches.

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³⁴ Ibid.

³⁵ Ibid para 31.

³⁶ *Bates v Post Office (No.3)*.