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Exploring the essence and extent of ‘mutual trust and co-operation’



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KEY POINTS

- Recent court decisions have equated the NEC clause 10 ‘mutual trust and co-operation’ duty to good faith, but good faith is a much broader concept.
- Part of the English courts’ approach to good faith has been to rely on common law and equitable principles to achieve good faith outcomes.
- Other decisions confirm that clause 10 does not impose a fiduciary duty.
- ‘Mutual trust’ and ‘co-operation’ are established principles in English law, requiring NEC parties to have confidence in each other’s credibility and actively collaborate to achieve completion.

The ‘mutual trust and co-operation’ obligation under clause 10 of both NEC3 and NEC4 contracts lies at the core of the NEC contract suite. Initially introduced in the 1995 NEC second edition after the Latham Report (1994), the so-called ‘clause 10 duty’ has survived two major reviews yet its scope remains undefined. This article aims to explore the potential meanings and scope of the clause 10 duty.

Implied good faith

Significant judicial and academic interest has emerged regarding a deeper understanding of the NEC clause 10 duty to ‘act in a spirit of mutual trust and co-operation’. The prevailing belief is that this duty implies the principle of good faith. Court cases like *Costain Limited v. Tarmac Holdings Limited* [2017] EWHC 319 and *Van Oord UK Ltd v. Dragados UK Ltd* [2021] CSHH 50 equated the clause 10 duty with good faith, emphasising its reflection of the general principle of good faith in contracts.

In *Van Oord UK Ltd* the court stated that, ‘clause 10.1 is not merely an avowal of aspiration. Instead, it reflects and reinforces the general principle of good faith in contract’. However, these conclusions were not supported by detailed analysis (see Mante, 2022). Certainly there are indications that the concepts of ‘mutual trust and co-operation’ encompass elements of good faith.

Good faith, at its essence, revolves around honesty, transparency, and fair dealing—qualities that the Latham Report referenced. In the case of *Yam Seng Pte Limited v. International Trade Corporation Limited* [2013] EWHC 111 (QB) and the Canadian Supreme Court case of *Bhasin v. Hrynew 2014* SCC 71, the judges agreed that honesty forms the fundamental value of good faith. Additionally, both courts acknowledged that various other notions and obligations fall within the scope of good faith, such as the duty to disclose, duty to cooperate (referred to as fidelity to the parties’ bargain), duty to refrain from arbitrary exercise of discretionary powers under the contract, and duty not to unreasonably withhold consent.

While the concept of good faith is broad enough to encompass the duty of ‘mutual trust and co-operation’, it remains uncertain whether the scope of the clause 10 duty aligns completely with that of good faith. English law traditionally does not recognise a general duty of good faith performance in all contracts, except for certain long-term relational contracts.

Instead, equitable principles, contract interpretation and implied terms are utilised to achieve what continental European users of good faith would expect. The court’s approach in the

Scottish case of *Van Oord UK Ltd* aligned with this perspective, as it relied on distinct common law principles rather than generic good-faith principles to justify the parties’ failure to comply with the clause 10 duty.

No fiduciary obligation

But, as we know, the NEC drafters chose not to use the term ‘good faith’ and instead employed ‘mutual trust’ and ‘co-operation.’ However, limited research has been conducted to explore the legal and conceptual foundations of these terms in the context of English law. The suggestion that ‘mutual trust’ imposes fiduciary obligations similar to those of a trustee is unsustainable, as it assumes a fiduciary relationship in purely commercial dealings (see Millett, 1998).

Court decisions such as *Gold Group Properties Ltd v. BDW Trading Ltd* [2010] EWHC 1632 and *Automasters Australia PTY Limited v. Bruness PTY Limited* [2002] WASC 286 indicate that the obligation under NEC clause 10.1 and similar provisions do not establish a fiduciary relationship.

Confidence and collaboration

Examining similar concepts in employment and planning law reveals that ‘mutual trust’ and ‘co-operation’ hold well-defined meanings in English law.

In employment law, ‘mutual trust and confidence’ refers to the general obligation of employers and employees to maintain trust and confidence in their relationship, prohibiting conduct that undermines

this trust without reasonable cause (see *Malik v. Bank of Credit and Commerce International SA (In Liquidation)* [1998] A.C. 20). Similarly, the concept of ‘mutual trust’ in NEC ECC contracts aligns with the employment law concept, as both impose general obligations, cover various circumstances, and aim to preserve relationships and ensure compliance with contractual obligations.

The duty to cooperate is another well-established concept in English law, which can be either statutory or expressly agreed upon by contract parties. Lord Blackburn in *Mackay v. Dick* (1881) 6 App Cas 251 stated that when both parties agree that something must be done collectively, each is obligated to do everything necessary for its completion. In NEC contracts, the duty to cooperate is explicitly written, but it could also be implied if not explicitly stated, as cooperation is vital for the contract’s effectiveness.

Conclusion

Together, the NEC concepts of ‘mutual trust’ and ‘co-operation’ imply that parties should approach the contract with a mindset that recognises the contract’s ethos and the fact that its effectiveness is contingent upon certain behaviours (see Mante, 2018). This includes having confidence in each other’s credibility and actively engaging in collaborative efforts throughout the contractual process.

While the concepts exhibit good faith characteristics, they may have a more limited scope than the broader notion of good faith. Future examination by UK courts of the terms ‘mutual trust’ and ‘co-operation’ as used by the contracting parties could contribute to clarifying the scope of the clause 10 duty.

References

- Latham M (1994). *Constructing the Team*, HMSO, constructingexcellence.org.uk/constructing-the-team-the-latham-report-2
- Mante J (2018). Mutual trust and co-operation under NEC 3&4: a fresh perspective. *Construction Law Journal* 34(4): 231–252
- Mante J (2022). Good faith, mutual trust and cooperation: recent judicial insights. *Construction Law Journal*, 38(2): 75–92
- Millett P (1998). Equity’s place in the law of commerce. *Law Quarterly Review* 114: 214–227.

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