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Mutual Trust and Co-operation under NEC 3&4: A Fresh Perspective

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Abstract

Using insights from planning and employment law, this piece looks beyond the conventional connotation of good faith and critically examines the meaning, scope and consequence of the duty to act in a spirit of mutual trust and co-operation under Clause 10 of NEC3 and NEC4.

Key terms: Construction contracts, Co-operation, Good faith, Mutual trust, NEC Conditions, Scope

Introduction

The duty to act in a spirit of mutual trust and co-operation is established by clause 10.1 of the NEC3 ECC form and sub-clause 10.2 of the recently launched NEC4 Conditions.² It requires all key players involved in a project – the Parties, Project Manager and the Supervisor – to act in a ‘particular way’ when carrying out their obligations under the contract. Indeed, the impact of the duty transcends the main NEC Conditions³ to any linked contract. The Project Manager under both NEC3 and NEC4 ECC is mandated to reject subcontract documents ‘if they do not include a statement that the parties to the subcontract act in a spirit of mutual trust and co-operation’.⁴ Under NEC4 ECC, an assignment of benefits under a contract by the Client⁵ will fail if the party or parties receiving benefits under the assignment do not ‘intend to act in a spirit of mutual trust and co-operation’.⁶ The first edition of the NEC Conditions had no such duty. The duty was part of the recommendations of the Latham Report.⁷ At paragraph 5.20 of the Report, it was suggested as follows:

A statement should be written into Core Clause 1 that the employer and the contractor affirm that they both intend to

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² The NEC4 suite of Contracts was launched on 22 June 2017. The launch of NEC4 did not do away with NEC3. As is often the case with most construction forms, it will be sometime before the NEC4 Conditions will gain traction among users; many will continue to use NEC3 a while longer.

³ NEC Conditions is used throughout this work to refer to both the NEC 3 and NEC4 Conditions of contract.

⁴ See NEC3&4 ECC, cl. 26.3

⁵ The employer under the NEC4 is called the Client.

⁶ See NEC4, cl. 28

⁷ See Guidance Notes for the NEC3 Engineering and Construction Contract, p.31; M. Latham, *Constructing the Team, Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry* (London, HMSO, 1994), p.39

establish a fair and reasonable agreement with each other to undertake the project in a spirit of mutual trust and co-operation, and to trade fairly with each other and with their subcontractors and suppliers. Core Clause 16.3 should be strengthened to make it clear that “win-win” solutions to problems will be devised in a spirit of partnership. Identical wording should be included in the appropriate Core Clauses in the subcontract document.⁸

A closer reading of the Latham Report suggests that this recommendation was a direct response to the prevailing culture of adversarialism and a clarion call for trust, transparency, co-operation and partnership in construction contracts.

The duty to act in a spirit of mutual trust and co-operation made its way into the second edition of the NEC Conditions but without any further explanation of its meaning or scope. The NEC Conditions have since undergone two major reviews. In each case, the reviewers have thought it prudent not to define the scope of the duty. Growing judicial and academic activity points to a yearning for a better understanding of the concepts embodied in the duty to act in a spirit of mutual trust and co-operation under the NEC3 ECC and NEC4 ECC.⁹ The discussions have tended to classify the duty as connoting good faith. Very little work has been done to investigate the legal and conceptual antecedents of ‘mutual trust’ and ‘co-operation’ as English law concepts at the heart of this duty. Using relevant case law, literature and the text of the NEC Conditions, this study takes up this challenge of critically examining similar concepts in other areas of law for insights into the meaning of the duty to act in a spirit of mutual trust and co-operation under the NEC Conditions. The study finds that valuable lessons could be learnt from judicial and academic exposition on related concepts from planning and employment law. On this basis, the study proffers a fresh viewpoint on the meaning and implications of the duty to act in a spirit of mutual trust and co-operation which is not necessarily tied to the nebulous concept of good faith.

The paper is divided into four sections. The first part examines current understanding of the duty to act in a spirit of mutual trust and co-operation and good faith. The second section discusses the different components of the ‘mutual trust and co-operation’ obligation

⁸ Ibid. p.39 (para 5.20).

⁹ See D. Mosey, “Good Faith in English Construction Law- What does it mean and does it matter?” (2015) ICLR 392; Jur B. Fuchs and S. Jackson, “Good Faith: An Anglo-German Comparison” (2015) ICLR 404; D. Christie, “How can the use of ‘mutual trust and co-operation’ in the NEC 3 suite of contracts help collaboration?” (2017) ICLR 34(2), 93-112; B. Mason, “Good faith clauses in construction contracts: fine sentiments in search of substance” [2011] ICLR 5; D. Thomas QC, *Keating on NEC3* (London, Sweet and Maxwell, 2012) 11

from the perspective of other branches of law. The third part discusses breach of the duty to act in a spirit of mutual trust and co-operation, judicial attitudes towards the duty and ensuing remedies. The final section pulls together the lessons from the study.

Mutual trust and Co-operation

Clause 10.1 of the NEC3 ECC provides that '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'. The NEC4 emphasises the two-fold nature of the obligations under clause 10.1 of NEC3 by separating these obligations into distinct sub-clauses. Clause 10.1 of NEC4 ECC provides as follows: 'The Parties,¹⁰ the Project Manager and the Supervisor shall act as stated in this contract'. This is followed by Clause 10.2 which states that, 'the Parties, the Project Manager and the Supervisor act in a spirit of mutual trust and co-operation'. The language of clause 10.1 in both NEC3 and NEC4 suggest a connection between this clause and all other terms of the NEC Conditions; parties and the two key administrators of the forms - the Project Manager and the Supervisor - are to comply with all terms of the contract. As the only term in the NEC Conditions couched in mandatory terms, it encapsulates all other terms, unless the language states otherwise.¹¹

Added to the obligation to comply with terms of the contract is the duty to act 'in a spirit of mutual trust and co-operation'.¹² The widely held view on this duty is that it connotes good faith.¹³ Why do many commentators see a link between this duty and good faith? A brief exploration of good faith will explain the connection.

Good faith

Much has been written about good faith,¹⁴ but there is still no consensus in sight on its precise meaning or confines. This stems from the nebulous nature of the concept. This vagueness is both its

¹⁰ Referring to the Client (formerly the Employer) and the Contractor – see NEC4 Engineering and Construction Contract (NEC4 ECC), cl. 11.2(13). Under the appropriate Conditions, this will include the Sub-contractor.

¹¹ E.g. where actions are permitted but not mandatory.

¹² Also referred to in this work as clause 10 duty.

¹³ See D. Mosey, "Good Faith in English Construction Law- What does it mean and does it matter?" (2015) ICLR 392; Jur B. Fuchs and S. Jackson, "Good Faith: An Anglo-German Comparison" (2015) ICLR 404; D. Christie, "How can the use of 'mutual trust and co-operation' in the NEC 3 suite of contracts help collaboration?" (2017) ICLR 34(2), 93-112; B. Mason, "Good faith clauses in construction contracts: fine sentiments in search of substance" [2011] ICLR 5; D. Thomas QC, *Keating on NEC3* (London, Sweet and Maxwell, 2012) 11

¹⁴ Oxford University Obligations Group, "Some Reflections on Good Faith in Contract Law" (February 2012), p.1.; J. Tarr, "A growing good faith in contracts", (2015) J.B.L 410

strength¹⁵ and weakness.¹⁶ This piece does not pretend to review all the protean literature on the concept; it only aims to highlight the key aspects of the concept sufficient to anchor the discussion on the duty of mutual trust and co-operation under the NEC Conditions. Essentially good faith means different things to different people in different contexts. At its core, good faith is about honesty, transparency and fair dealing, the concepts the Latham Report alluded to.¹⁷ Justice Leggatt in *Yam Seng Pte Limited v International Trade Corporation Limited*¹⁸ and Cromwell J in the Canadian Supreme Court case of *Bhasin v Hrynew*¹⁹ agree that the core value of good faith is honesty. Beyond the different formulations of the honesty value, both courts also admitted that many more notions and duties come within the scope of the concept of good faith.

In *Yam Seng*, these notions were said to include duty to disclose, duty to co-operate (which is an outgrowth of the idea of 'fidelity to the parties' bargain), duty not to arbitrarily exercise discretionary powers under contract and duty not to unreasonably withhold consent.²⁰ In *Astor Management AG & Anr v Atalaya Mining Plc & Others*²¹, Justice Leggatt summed up what the duty of good faith entails as follows:

A duty to act in good faith, where it exists, is a modest requirement. It does no more than reflect the expectation that a contracting party will act honestly towards the other party and will not conduct itself in a way which is calculated to frustrate the purpose of the contract or which would be regarded as commercially unacceptable by reasonable and honest people.²²

In *Bhasin*, the Court acknowledged categories of good faith as including duty to cooperate, duty not to exercise discretionary powers under contract arbitrarily and duty not to evade contractual duties.²³ Terms such as fair dealing, transparency, decency, common ethical sense and community standards have been traditionally construed as

¹⁵ See S. Saintier, "The elusive notion of good faith in the performance of a contract, why still a *bete noire* for the civil and the common law?" (2017) J.B.L. 441,453 which argues that the fluidity of good faith enhances its adaptability.

¹⁶ A. Mugasha, "Good faith Obligations in Commercial Contracts" - (1999) 27 Int'l Bus. Law. 355 at 356 which argues that this vagueness is the weakness of good faith as it challenges the ideals of legal certainty and predictability, the hallmarks of the English legal system.

¹⁷ M. Latham, *Constructing the Team*, Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry (London, HMSO,1994), 39 at [5.20]

¹⁸ *Yam Seng Pte Limited v International Trade Corporation Limited* [2013] EWHC 111 (QB); [2013] 1 All E.R. (Comm) 1321

¹⁹ 2014 SCC 71 at [65]

²⁰ *Yam Seng* [2013] 1 All E.R. (Comm) 1321 at [139,145].)

²¹ [2017] EWHC 425 (Comm)

²² *Ibid*, para 98. See also *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB).

²³ See *Bhasin* 2014 SCC 71; [2014] 3 S.C.R. 495 at [47] agreeing with J.D. McCamus, *The Law of Contracts*, 2nd edn (Toronto: Irwin Law, 2012), pp.840–856.

elements of good faith.²⁴ Saintier²⁵ observes that in French law, good faith finds expression in the ideas of loyalty, cooperation and coherence - it is a 'comportmental' (behavioural) norm.²⁶ In a lecture delivered at Cambridge University in the early 1990s, the renowned Australian judge, Sir Anthony Mason, observed that the concept of good faith has three elements to it: an obligation to cooperate to achieve contractual objects; compliance with honest standards of conduct; and compliance with standards of contract which are reasonable having regard to the interests of the parties.²⁷ In the context of construction law, Morsey²⁸ has argued that this may require parties to deal with each other honestly in the disclosure of information, act fairly and reasonably in the exercise of discretion and or take account of interests of others.

Given the difficulty, or even the near impracticality of any endeavour to identify all ideas/duties encapsulated by good faith as a concept, some authors, including McKendrick,²⁹ have argued that the concept should be viewed as an organising framework for specific duties or notions. This suggestion accords with the decision in *Bhasin* which viewed good faith essentially as an organising principle.³⁰ Good faith has been considered as an evolving spectrum of obligations; it is an avenue through which new rules find expression.³¹

The influence of the concept of good faith on contract law extends to pre-contract negotiations,³² contract formation,³³ performance³⁴ and enforcement.³⁵ Three different approaches have been used to incorporate good faith into contracts generally. Firstly, parties introduce good faith as an express clause into their contracts.

²⁴ A. Mugasha, "Good faith Obligations in Commercial Contracts" - (1999) 27 Int'l Bus. Law. 355 at 356

²⁵ S. Saintier, "The elusive notion of good faith in the performance of a contract, why still a *bete noire* for the civil and the common law?" (2017) J.B.L. 441

²⁶ Ibid at 444

²⁷ A. Mason, "Contract and Its Relationship with Equitable Standards and the Doctrine of Good Faith" The Cambridge Lectures 1993, 8 July 1993, at 5-6. See also the decision in *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268 at [90]. Per Hodgson JA

²⁸ D. Mosey, "Good Faith in English Construction Law- What does it mean and does it matter?" (2015) ICLR 392

²⁹ McKendrick, "Good Faith in the Performance of a Contract in English Law" in *Comparative Contract Law* (2015), p.204.

³⁰ 2014 SCC 71 at [65]

³¹ S. Saintier, "The elusive notion of good faith in the performance of a contract, why still a *bete noire* for the civil and the common law?" (2017) J.B.L. 441 at 445

³² *Cable and Wireless Plc v IBM UK Ltd* [2002] EWHC 2059 (Comm); see R. Merkin, *Arbitration Law* (Informa Law Library, loose-leaf), Ch.6, para.6.

³³ Insurance law has long recognised the role of good faith in contract formation. See the Marine Insurance Act 1906, s. 17; Julie-Anne Tarr, "A growing good faith in contracts", (2015) J.B.L. 411

³⁴ S. Saintier, "The elusive notion of good faith in the performance of a contract, why still a *bete noire* for the civil and the common law?" (2017) J.B.L. 441

³⁵ see Marine Insurance Act 1906 (UK) s.17, as amended by s.14(3) of the Insurance Act, 2015 – utmost good faith left in the law as an interpretive device – see Law Comm. Report (July 2014), Cm.8898, paras 30.22 to 30.23 and the Explanatory Notes on the Insurance Act, 2015, paras 113-116 – not exactly clear what this mean but appears to be a response to the *Yam Seng* decision and also align with the decision in *Bhasin* – see Z. X. Tan, "Keeping faith with good faith? The evolving trajectory post-*Yam Seng* and *Bhasin*" (2016) J.B.L.420, 438; See also C. Y. Ahmet, "Reasonable and good faith: new uses for legal standards" (2017) IBLJ 549, 554: the Romano-Germanic legal system see good faith as a contract interpretation tool – Ahmet cites examples of the German, Swiss and Turkish systems. The German system sees good faith as a complementary interpretation tool – s.157 of BGB.

Secondly, the concept is finding its way into aspects of English contract law through statutory provisions.³⁶ Finally, good faith may be implied into a contract by the courts.³⁷ In Canada and Australia,³⁸ good faith has been recognised as a common law duty. In *Bhasin*, the Supreme Court of Canada observed that the duty to be honest 'should not be thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance'.³⁹

An idea which runs through nearly all discussions on good faith surveyed is context. Good faith appears to take on different hues depending on the context (or jurisdiction) in which it is deployed. Most civil law and some common law jurisdictions have embraced the concept broadly as an overriding principle, but there is an ongoing disagreement on the place of good faith in English law.⁴⁰ Traditionally, English law does not recognise a general duty of good faith performance in all contracts.⁴¹ Nearly thirty years after Bingham L.J. affirmed the position of English law on this matter in the case of *Interfoto Picture Library Ltd. v Stiletto Visual Programmes Ltd*,⁴² the situation largely remains the same⁴³ although incremental progress towards recognition of good faith in certain areas of contract have been made.⁴⁴ For instance, where parties choose to expressly incorporate good faith into their contracts or the concept is implied by statute, the courts often enforce such clauses.⁴⁵ Much of the controversy regarding the role of good faith in English law has arisen in instances where there have been attempts to imply the concept into contracts generally.⁴⁶ In these instances, the English courts remain resolute in their opposition to good faith as an overriding concept.⁴⁷ McKendrick⁴⁸ provides three reasons for this opposition.

³⁶ See Consumer Rights Act, 2015, s.62 (4) and (6). The focus of this piece is on performance and enforcement.

³⁷ *Yam Seng per Leggatt J; Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch). Note that English law is yet to embrace the idea of general implication of good faith into all contracts.

³⁸ See the decision in *Khoury v Government Insurance Office (NSW)* (1984) 165 C.L.R. 622 : the courts in New South Wales have held that a duty to disclose is not an implied term but a common law duty imposed on the relationship between the insurer and the insured – See J. Tarr, "A growing good faith in contracts", (2015) J.B.L. 410

³⁹ [2014] 3 S.C.R. 495 at [74]

⁴⁰ *Interfoto Picture Library Ltd. v Stiletto Visual Programmes Ltd* [1989] Q.B. 433;

⁴¹ *Ibid*. Exception to this rule is in the area of long term relational contracts – See *Globe Motors Inc. v TRW LucasVarity Electric Steering Ltd* [2016] EWCA Civ 396, [67]-[69] (obiter per Beatson LJ); *National Private Air Transport Services Company (National Air Services)Ltd v Creditrade LLP and Anor* [2016] EWHC 3342 (Ch), [275]-[276] (per Asplin J) and *Portsmouth City Council v Ensign Highways Ltd*. [2015] EWHC 1969, [81] per Stuart J (TCC)

⁴² *Ibid*, [439D-G]

⁴³ This point has been reiterated in the recent case of *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (Trading As Medirest)* [2013] EWCA Civ 200 at [105]

⁴⁴ *Yam Seng per Leggatt; Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch)

⁴⁵ See *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (Trading As Medirest)* [2013] EWCA Civ 200 at [105]; *Yam Seng* at [121-130]

⁴⁶ Even in this situations, there is an emerging understanding that such actions are warranted where the parties are in a relational contract – *Yam Seng; Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch)

⁴⁷ *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789; [2016] 2 CLC, 272 at 290-291 [45A-E]; *Ilkerler Otomotiv Sanayai ve Ticaret Anonim Sirketi and another v Perkins Engines Co Ltd* – the court rebuffed an attempt to imply good faith into a contract.

⁴⁸ E. McKendrick, *Contract Law* (9th Ed) pp.221–2.

The first is the position expressed by Bingham L.J, that is, English law has its own approach to dealing with matters good faith seeks to address. The second reason is the inherent individualism in English law; individuals are expected to freely negotiate and or perform agreed obligations without or with minimum external influence. The final reason is the uncertainty that an overriding concept of good faith is likely to introduce into English law; this will be in direct conflict with the cherished English law principle of certainty.

The preferred English law alternative approach to a general principle of good faith was canvassed in the *Interfoto case*,⁴⁹ and recently added to in the *MSC Mediterranean Shipping case*:⁵⁰

“piecemeal solutions in response to demonstrated problems of unfairness”, although it is well-recognised that broad concepts of fair dealing may be reflected in the court’s response to questions of construction and the implication of terms’.⁵¹

The above statement by Moore-Bick LJ points to two approaches English courts use when addressing good faith related issues. The first is the use of diverse legal and equitable concepts to address unfairness whenever it is encountered. The second is more generic and discretionary in nature, that is, contract interpretation and implication of terms.⁵² Regarding the former, Bingham L.J in *Interfoto* provided the following examples: equity’s intervention to strike out unconscionable bargains,⁵³ statutory imposition of exemption clauses⁵⁴ and the common law’s position that certain contracts require utmost good faith and its approach to penalty clauses.⁵⁵ Sir Rupert Jackson,⁵⁶ in a recent lecture⁵⁷ questioned the necessity and value of express good faith clauses in contracts. He reiterated the argument that English law has developed concepts overtime which cater for different aspects of good faith. Further, he cited as an instance the role of the tort of deceit in addressing situations where

⁴⁹ [1989] Q.B. 433

⁵⁰ [2016] 2 CLC, 272 at 290-291 [45A-E]

⁵¹ Ibid [45B-C]

⁵² A discussion of the extent to which the process of construction/interpretation of contracts has been used to address unfairness and good faith concerns is out with the scope of this piece.

⁵³ See also what A. Mugasha, “Good faith Obligations in Commercial Contracts” - (1999) 27 Int’l Bus. Law. 355 at 356 refers to as conscience-based good faith and the list of equitable devices which have been used to address them: bona fide purchaser defence against third parties, honesty-based defences in defamation such as fair comment qualified privilege; duty not to contradict oneself – e.g. promissory estoppel which prevents a party from going back on his words, prohibition against conflict of interest in relationships of trust and confidence – e.g. fiduciary relationships; duty not to abuse position of dominance – e.g. duress, undue influence; economic duress, rule against unconscionable bargain etc. See also A. D. Miller and R. Perry, “Good Faith Performance”, 98 Iowa L. Rev. 689 at 700 (2013) - the authors refer to for instance estoppel, fraud, unconscionability, mistake as examples.

⁵⁴ E.g. The Sale of Goods Act 1979 (as amended), ss12-15

⁵⁵ *Interfoto* [1989] Q.B. 433, 439 [F-G] per Bingham L.J.

⁵⁶ A renowned justice of the English Court of Appeal

⁵⁷ R. Jackson, “Does Good Faith has any role in Construction Contracts?” Pinsent Mason Lecture in Hong Kong on 22nd November 2017 accessed on 5th December 2017 at <https://www.judiciary.gov.uk/wp-content/uploads/2017/11/speech-lj-jackson-masons-lecture-hong-kong.pdf>

one party makes a false statement intending the other party to rely on it. Consequently, 'an amorphous duty of "good faith" adds nothing to the duties imposed by the contract or by the law of tort', he argued.⁵⁸ Comparing English and French approaches to good faith, Saintier⁵⁹ observed that there is a tendency to contextualise good faith application and to resort to disparate concepts familiar to a given legal system to give effect to the true meaning of good faith. This is certainly true of the English system.

With the foregoing discussion on the English approaches to good faith in mind, one needs to bear in mind that the NEC Conditions are of English origin. Whether one agrees with the view that the duty to act in a spirit of mutual trust and co-operation connotes good faith or with Lord Justice Jackson's view that any express reference to good faith in a contract is of limited value, it is imperative to examine the terms/concepts used in clause 10.1 of NEC3 and clause 10.2 of NEC4 for their distinct import. This is more so as NEC3 and NEC4 Conditions do not use the term 'good faith' at all. It is also important to ask whether similar concepts such as those embodied by the duty to act in a spirit of mutual trust and co-operation have been used elsewhere in the law. Could it be that by simply interpreting this duty as a good faith provision, we miss the real significance of the concepts - 'mutual trust' and 'co-operation' - which are both well-known in English law? These concepts are examined next.

Mutual Trust

'Mutual trust' has been interpreted as imposing on parties a duty similar to that of a trustee of property.⁶⁰ This view is problematic as it presumes that parties to the NEC Conditions enter into some kind of fiduciary relationship of trust and confidence. In *Bristol and West Building Society v Mothew*,⁶¹ the Court of Appeal defined a fiduciary as 'someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence'.⁶² The Court continued, 'the principal is entitled to the single-minded loyalty of his fiduciary'. The Court had this to say about the nature of the obligation of a fiduciary:

⁵⁸ R. Jackson, "Does Good Faith have any role in Construction Contracts?" Pinsent Mason Lecture in Hong Kong on 22nd November 2017 accessed on 5th December 2017 at <https://www.judiciary.gov.uk/wp-content/uploads/2017/11/speech-lj-jackson-masons-lecture-hong-kong.pdf> at [4.3]

⁵⁹ S. Saintier, "The elusive notion of good faith in the performance of a contract, why still a *bête noire* for the civil and the common law?" (2017) J.B.L. 441

⁶⁰ See T. Davis and P.N. Thurlow, "Good faith obligations in NEC contracts" (2016) *Management, Procurement and Law*, Vol 169, Issue MP4, 145.

⁶¹ [1998] Ch. 1 at 18 [A-B]

⁶² *ibid*

A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations.⁶³

The relationship between a Client and a Contractor under the NEC Conditions does not fit this description. The parties do not act for each other as a trustee will do for a beneficiary. There is no prohibition under the NEC Conditions requiring parties not to place themselves in a position where their duties and interest may conflict. Indeed, the parties act for their own benefits. A party's interest is not subordinated to that of the other party. Lord Millett, in an extra-judicial writing has suggested that it is inappropriate to impose fiduciary obligations on parties to purely commercial relationship 'who deal with each other at arm's length and can be expected to look after their own interest'.⁶⁴ There is sufficient evidence to suggest that most courts do not view the obligation under clause 10.1 of NEC3 and similar provisions elsewhere as establishing a fiduciary relationship.⁶⁵ Tan⁶⁶ summed up rather aptly the relationship between good faith and fiduciary relationship in the following words:

'The notion of good faith can be captured by situating it within a spectrum of norms of behaviour, above the pure and unconstrained pursuit of self-interest, but below the converse notion which involves subjugating one's interests entirely to another's (such as a fiduciary duty of loyalty). It has sometimes been characterised as a compromise between these two polarities, and described as requiring "loyalty to the promise" or "faithfulness to the agreed common purpose", namely requiring that the other party's interests be taken into account, but only to the extent that this is already reflected in the nature of the intended bargain.'⁶⁷

Davis,⁶⁸ a proponent of the legal trustee argument, has also contended that mutual trust in the context of clause 10 should imply a prohibition on each party 'from detracting from the contractual and accrued rights of the other party'. This view certainly mirrors aspects

⁶³ *ibid*

⁶⁴ P. J. Millett, "Equity's Place in the Law of Commerce" (1998) 114 L.Q.R. 214 at 217-218.

⁶⁵ See the decision in *Gold Group Properties Ltd v BDW Trading Ltd, Costain Limited v Tarmac Holdings Limited* [2017] EWHC 319 at [118- 121] (TCC) and *Automasters Australia PTY Limited v Bruness PTY Limited* [2002] WASC 286

⁶⁶ See Z. X. Tan, "Keeping faith with good faith? The evolving trajectory post-Yam Seng and Bhasin" (2016) J.B.L.420.

⁶⁷ *Ibid* at 439-440

⁶⁸ T. Davis, "Clause 10.1: trust is not good faith" (2017) The NEC Users' Group Newsletter, Issue No.87, 7

of the very concept Davis had previously dismissed (that is, good faith).

Much can be learned from how similar concepts in other areas of law have been viewed and interpreted. In employment law, there is a general agreement on the existence of an implied term of 'mutual trust and confidence'. Lord Steyn observed in *Malik v Bank of Credit and Commerce International SA (In Liquidation)*⁶⁹ that the advent of the implied obligation of mutual trust and confidence is 'sound development'⁷⁰ and is 'established'.⁷¹ In the context of employment law, the concept connotes a 'general obligation not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages.'⁷² It imposes an obligation on the Employer to 'not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee'.⁷³

In *Malik*,⁷⁴ the highest court in the United Kingdom acknowledged that the mutual trust and confidence duty covers 'the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited'. The statement by the Supreme Court implies that the concept has 'many different aspects' and applies to 'differing circumstances'.⁷⁵ It is an obligation imposed by law.⁷⁶ It does not give rise to a fiduciary relationship.⁷⁷ In *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd*,⁷⁸ the court described the mutual trust and confidence obligation as 'the implied obligation of good faith'. The duty has also been described as 'an employer's obligation of fair dealing',⁷⁹ underscoring the connections between this concept and good faith. In *Johnson v Unisys Ltd*,⁸⁰ the court rejected an argument which suggested that the obligation is restricted to the employer only; it applies equally to the employee.⁸¹

⁶⁹ [1998] A.C. 20 at 46

⁷⁰ Ibid [46E]

⁷¹ Ibid [46G]

⁷² Ibid [35A] per Lord Nicholls

⁷³ *Malik v Bank of Credit and Commerce International SA (In Liquidation)* [1998] A.C. 20 at [45F]

⁷⁴ Ibid [46D]

⁷⁵ D. Thomas QC, *Keating on NEC3* (London, Sweet and Maxwell, 2012) 10

⁷⁶ *Johnson v Unisys Ltd* [2001] UKHL 13 at 24

⁷⁷ Ibid

⁷⁸ [1991] 1 WLR 589 at 597G.

⁷⁹ *Johnson v Unisys Ltd* [2001] UKHL 13 at 24

⁸⁰ Ibid

⁸¹ Ibid., at para 26

Judicial and academic examination of the concept of 'mutual trust and confidence' in employment law provide seven significant leads to understanding the concept of 'mutual trust' under NEC3 and NEC4. First, both the employment law concept (mutual trust and confidence) and the NEC concept (mutual trust) have some connection with the long-standing duty to co-operate. This is a significant indication that the concepts have a shared meaning, scope and antecedents. It has been noted that the implied term of mutual trust and confidence originated from the 'general duty of co-operation between contracting parties'.⁸² In the NEC Conditions, the idea 'mutual trust' is interestingly paired with the concept of 'co-operation'.

Secondly, mutual trust and confidence is a general obligation applicable to protean situations. The same point can be made for the concept of mutual trust under NEC3 and NEC4. The language of the NEC clause 10 duty leaves no one in doubt that it is meant to be a general obligation. The duty may apply to many clauses under the NEC Conditions of Contract.

Thirdly, the employment law duty of 'mutual trust and confidence' is mainly about conduct of the parties, especially the employer. There is a general expectation that parties' behaviour will accord with the manner the 'contract implicitly envisages'.⁸³ It is submitted that 'mutual trust' under NEC3 and NEC4 carries similar connotation. The NEC's ethos and procedures clearly promote certain 'manner of conduct' crucial to the successful implementation of the contract – parties are expected not to act in a manner that undermines this expectation. Further, the obligation of mutual trust and confidence in employment law does not create a fiduciary relationship.⁸⁴ This is equally true for the obligation to act in a spirit of mutual trust under the NEC Conditions.

Fifthly, both concepts promote the idea of preservation of relationship required to keep the contracts viable. The duty to act in a spirit of mutual trust and co-operation under NEC3 and NEC4 is about parties working together (collaborating) to achieve project goals. The duty emphasises the relational nature of the contract and the importance of maintaining the right kind of relationship; the success or failure of the contract largely depends on this. Sixthly, the concept of 'mutual trust and confidence' is also about compliance with relevant contract

⁸² *Malik v Bank of Credit and Commerce International SA (In Liquidation)* [1998] A.C. 20 at [45H] per Lord Steyn referring to B. Hepple and P. O'Higgins, *Employment Law*, 4th ed. (Sweet & Maxwell, 1981), pp. 134-135, at [291-292].

⁸³ *Malik v Bank of Credit and Commerce International SA (In Liquidation)* [1998] A.C. 20 at [35A] per Lord Nicholls

⁸⁴ *Johnson v Unisys Ltd* [2001] UKHL 13 at 24

terms. As an implied term, it operates to give efficacy to the express terms of the contract. 'It must be read consistently with the express words of the contract'.⁸⁵ The mutual trust concept under NEC is part of an express term in the NEC Condition and is also tied to the parties' obligation to comply with the terms of the contract.⁸⁶

The seventh illuminating lesson from judicial discussion of the employment law concept of 'mutual trust and confidence' is that it is about achieving balance between interests of the parties. One party's behaviour in pursuit of its interest can negatively affect the other;⁸⁷ the implied duty of mutual trust and confidence frowns on any conduct which undermines the interest of another party. This appears to be the import of 'mutual trust' under NEC3 and NEC4 as well.

From the foregoing, it is noticeable that the concept 'mutual trust' in the NEC Conditions shares significant common features with the employment law concept of 'mutual trust and confidence' in three key areas:

1. Nature - they are both general obligations;
2. Scope - they apply to protean situations and conducts; and
3. Purpose - they focus on preservation of relationships, compliance with contractual obligations and balance of party interests.

Though the context in which the concepts in employment law and construction law apply may differ, it is argued that the basic operating principles are the same. To act in a spirit of mutual trust under the NEC Conditions therefore requires parties to the NEC3 and NEC4 Conditions to do the following:

- (1) Acknowledge the relational nature of the contract they are committing to;
- (2) Accept that a certain manner of conduct is implicitly envisaged as vital to the efficacy of the contract;
- (3) Act in a manner that preserves and promotes the ethos, objectives and terms of the NEC Conditions.
- (4) Act in a manner that preserves relationship required to keep the contract viable.
- (5) Act in a manner that does not undermine the interest of other parties.

⁸⁵ *ibid*

⁸⁶ See NEC4 ECC, cl. 10.1 & 2

⁸⁷ This is the case in *Malik v Bank of Credit and Commerce International SA (In Liquidation)* [1998] A.C. 20

Judges, arbitrators and adjudicators interpreting clause 10.1 of NEC3 and Clause 10.2 of NEC4 can benefit greatly from these existing judicial insights into the concept of mutual trust and confidence.

Co-operation

Duty to cooperate is not a new concept.⁸⁸ It is well known in English law. It may be statutory,⁸⁹ express⁹⁰ or implied.⁹¹ It is encountered in areas of the law such as planning,⁹² insolvency⁹³ and landlord and tenancy.⁹⁴ It has been noted that parties to a civil proceedings have a duty to co-operate to achieve the overriding objective of the English Civil Procedure Rule, 1998 (CPR).⁹⁵ In its statutory or express form, the duty operates like any other provision or clause in a statute or written contract. As an implied term, the duty to co-operate may be incorporated into a contract within the narrow confines of the criteria for implying terms into agreements as set out in the Privy Council case of *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*⁹⁶ and affirmed and further explained by the UK Supreme Court in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*.⁹⁷ A duty to co-operate will be implied into a contract only if it is obvious the parties intended it to be part of the contract,⁹⁸ or failure to do so will mean the contract will lack business efficacy.⁹⁹ If what has been agreed to be done can only be accomplished if a party or parties do what is necessary to be done on their part, the court is likely to imply a duty to co-operate into the relevant contract to give it business efficacy.¹⁰⁰ In *Mackay v. Dick*,¹⁰¹ Lord Blackburn captured this principle in the following terms:

...where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually

⁸⁸ See *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 at 118 (obiter per Viscount Simon) HL; *Allridge (Builders) Ltd. v Grand Actual Ltd* (1997) 55 Con LR 91; see also N. Baatz, 'Problem management/ Dispute resolution in partnering contracts' (2008) Proceedings of the Institution of Civil Engineers Management, Procurement and Law 161, Issue MP3, 115

⁸⁹ See Planning and Compulsory Purchase Act 2004 (as amended), s.33A

⁹⁰ See e.g. NEC4 ECC, cl.10.2

⁹¹ *Globe Motors Inc. & Ors v TRW Lucas Varity Electric Steering Ltd & Anor.* [2016] EWCA Civ 396 at [67] per Beatson LJ

⁹² *R. (on the application of St Albans City and District Council) v Secretary of State for Communities and Local Government* [2017] EWHC 1751 (Admin)

⁹³ *Harris v Official Receiver* [2016] EWHC 3433 [14] (Ch), *Pearse v Lord* [2015] EWHC 3046 (Ch) and *Oraki and another v Bramston and another* [2015] EWHC 2046 at [144] (Ch)

⁹⁴ *Wild Duck Ltd v Smith* [2017] EWHC 1252 (Ch)

⁹⁵ *Ecila Henderson v Dorset Healthcare University Foundation NHS Trust* [2016] EWHC 3032 at [63] (QB) per Mr Justice Warby

⁹⁶ 180 C.L.R. 266

⁹⁷ [2015] UKSC 72. See also *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 at 227 per MacKinnon LJ; *The Moorcock* (1889) 14 PD 64, 68 per Bowen LJ and *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, 605 per Scrutton LJ.

⁹⁸ See *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 at 227 per MacKinnon LJ

⁹⁹ See *The Moorcock* (1889) 14 PD 64, 68 per Bowen LJ; *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, 605 per Scrutton LJ; *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* 180 C.L.R. 266; and *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72.

¹⁰⁰ *Ibid.* See also *Swallowfalls Ltd v Monaco Yachting and Technologies SAM* [2014] EWCA Civ 186

¹⁰¹ (1881) 6 App Cas 251

be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing...¹⁰²

Indeed, it may be argued that the NEC Conditions fall into the category of written contracts Lord Blackburn referred to in *Mackay v. Dick*.¹⁰³ The NEC Conditions, by their very nature and procedures, require co-operation to be effectual. It is likely that even without express terms such as one captured by clause 10.2 of NEC4 ECC, the courts may be inclined to imply a duty to co-operate into different aspects of the NEC Conditions on the basis of *Mackay*.¹⁰⁴

That said, the reality is that the requirement to act in a spirit of co-operation is an express contractual term under NEC3 and NEC4. Parties, the Project Manager and the Supervisor are expressly enjoined to co-operate in the management of procedures such as early warning, payment, programme and compensation events.¹⁰⁵ For instance, under clause 15(3) of the NEC4 ECC, individuals who attend early warning meetings are under obligation to 'co-operate' in making and considering proposals for the avoidance or reduction of an early warning matter and all other decisions to be considered at the meeting.¹⁰⁶ Under clause 25.1 of NEC3 ECC and NEC4 ECC, the contractor is obligated to 'co-operate' with others in providing and obtaining information required in connection with the Works and the Working Areas. The obligation to co-operate is not limited to situations where the form expressly requires parties to co-operate but appears to extend to relevant terms under both NEC3 and NEC4 where co-operation may be required for a procedure to be effective. This is the import of the phrase 'acting in a spirit of...' which precedes the concepts 'mutual trust' and 'co-operation'.

What then does the duty to co-operate or act in a spirit of co-operation entail? In the Australian case of *Butt v M'Donald*,¹⁰⁷ Griffith CJ sitting in the Supreme Court of Queensland observed that the duty to co-operate requires that a party 'do all such things as are necessary on his part to enable the other party to have the benefit of the contract.'¹⁰⁸ This does not necessarily imply that the party in question will have to forego its interest in order to ensure that the

¹⁰² *Mackay v. Dick* (1881) 6 App Cas 251 at 263, HL per Lord Blackburn

¹⁰³ (1881) 6 App Cas 251

¹⁰⁴ *ibid*

¹⁰⁵ NEC, *NEC4 User Guide: Managing an Engineering and Construction Contract* (2017) Vol.4, Chapter 2, p.3

¹⁰⁶ See NEC3 ECC, cl. 16(3) of NEC3

¹⁰⁷ (1896) 7 QJ 68. See also J. M. Paterson, "Good Faith Duties in Contract Performance" (2014) Oxford University Commonwealth Law Journal, 14:2, 283-309, DOI:10.1080/14729342.2015.1047655

¹⁰⁸ *Ibid* at 70-71

other party's interest is satisfied. It means parties must think 'win-win'; they should act to preserve their mutual interests.

Examples of application of duty to co-operate in different areas of English law, particularly planning law, provide some guidance on what the duty to co-operate entails in practice. In *R (on the application of Central Bedfordshire Council) v Secretary of State for Communities and Local Government*,¹⁰⁹ Paterson J observed in relation to section 33A of the Planning and Compulsory Purchase Act 2004¹¹⁰ that the duty to co-operate entails 'an active and ongoing process of co-operation'.¹¹¹ In developing this idea further, Sir Ross Cranston in *R. (on the application of St Albans City and District Council) v Secretary of State for Communities and Local Government*,¹¹² another case involving local authority planning, observed that the duty to co-operate is not a duty to agree; 'whether or not there is an agreement is not determinative of the duty to co-operate'.¹¹³ It is also not a duty to balance instances of co-operation against instances where there is lack thereof.¹¹⁴ There must be **an active, ongoing collaborative engagement even in the face of an impasse**.¹¹⁵ The contractual duty to act in a spirit of co-operation under the NEC Conditions should thus be seen in this light. The duty to cooperate under the NEC Conditions entails doing all that is necessary to ensure that contractual goals are achieved by maintaining active, ongoing and productive collaborative engagement even in the face of disagreements. Parties must co-operate during risk meetings.¹¹⁶ In the assessment of compensation events, parties are expected to act honestly and transparently, not exploit each other.¹¹⁷ This duty extends to all situations under the NEC forms where party engagement with each other is required to make the process workable.

The phrase 'in a spirit of' connotes looking beyond what the 'letter'¹¹⁸ may state about 'mutual trust' and 'co-operation', to the very essence of the concepts used. The duty to act in a spirit of mutual trust and co-operation under the NEC Conditions thus implies that parties will come to the contract with a frame of mind which acknowledges the ethos of the contract and the fact that it will only work as intended if

¹⁰⁹ [2015] EWHC 2167 (Admin)

¹¹⁰ On duty to co-operate by local authorities in planning matters

¹¹¹ *R (on the application of Central Bedfordshire Council) v Secretary of State for Communities and Local Government* [2015] EWHC 2167 at [50] (Admin)

¹¹² [2017] EWHC 1751 (Admin)

¹¹³ *Ibid.*, para 47

¹¹⁴ *R. (on the application of St Albans City and District Council) v Secretary of State for Communities and Local Government* [2017] EWHC 1751 at [47,51-53] (Admin)

¹¹⁵ *Ibid.* Emphasis added.

¹¹⁶ NEC3 ECC, cl.16 (3); NEC4 ECC, cl.15 (3).

¹¹⁷ NEC, *NEC4 User Guide: Managing an Engineering and Construction Contract* (2017) Vol.4, Chapter 2, p.3

¹¹⁸ In our context, the NEC Conditions

the parties act in a certain manner: having confidence in each other's credibility and on that basis, engaging each other actively, consistently and collaboratively on every facet of the contractual process. There is an aspect of the duty to act in a spirit of mutual trust and co-operation which is aspirational, but that should not, and indeed, has not stopped the courts from identifying acts which blatantly undermine co-operation and party interests, and are calculated and or likely to destroy or seriously damage the relationship of confidence and trust between the Client and the contractor. Such acts have been regarded as constituting a breach of this duty.¹¹⁹

Mutual Trust and Co-operation: Breach and Remedy

Do the NEC Conditions make provision for determination of breach of the clause 10 duty and likely consequences? Have the English courts had an opportunity to deal with these questions and how did they approach them? What has been the approach of the English courts to determining breach of express good faith clauses generally in the English context and what lessons could be learned from this approach in terms of gauging the overall trajectory of the discourse on contractual good faith in the United Kingdom?

Contractual Perspective

Potential or actual breach of NEC4 Clause 10.2 or the equivalent provision in NEC3 does not automatically result in a court action. The NEC Conditions provide a contractual mechanism to address an anticipated or actual breach. First of all, parties must resort to the early warning mechanism under clause 15 of NEC4 ECC as soon as they become aware of any potential breach of this duty.¹²⁰ Clause 15(1) mandates the Project Manager or the Contractor to give an early warning by notifying the other party 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'. Any matter likely to increase the contractor's cost must also be 'notified' and recorded in the Early Warning Register. The parties must then use an early warning meeting to attempt to resolve potential eventualities and or differences. Parties attending the early warning meeting are under obligation to co-operate in making and considering proposals, looking for solutions and making specific decisions to address the issues raised.¹²¹ Where the issue raised at the early warning meeting

¹¹⁹ See the decision in *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Limited* [2017] NIQB 43

¹²⁰ The language of this clause is sufficiently broad to accommodate a notification relating to alleged breach of cl 10 duty.

¹²¹ NEC4, Clause 15.3

relates to potential or anticipated breach of the mutual trust and or co-operation duty, the parties are still required to 'co-operate' to find solutions to such situation. Where there is lack of mutual trust, it is difficult (but not impossible) to envisage how the parties may 'co-operate' to find solution to the anticipated difficulty. It will be interesting to see how this plays out in reality.

Where parties fail to resolve anticipated concern with compliance with NEC4 ECC clause 10.2 at the early warning stage, this may result in actual non-compliance or breach. It is clear from the study of the NEC Conditions that the drafters expected breach of this duty to be treated like any other breach under the Conditions of contract. There are two discernible contractual consequences of a breach of NEC4 ECC clause 10.2 duty. First of all, such a breach will be subject to clause 60.18 of the NEC4 Conditions which provides that 'a breach of contract by the Client which is not one of the other compensation events in the contract' qualifies as a compensation event if it has a time and cost impact.¹²² Secondly, failure to act in a spirit of mutual trust and co-operation can result in acts and omissions (breach of terms other than clause 10) which constitute compensation events and are thus already subject to the compensation event procedure.¹²³ Examples of such scenarios are covered by clause 60.1(2),¹²⁴ (3),¹²⁵ (5)¹²⁶ and (16)¹²⁷ of the NEC4 Conditions.

Regardless of the nature of the breach of NEC4 ECC clause 10.2 duty, it is subject to the same process of assessment as any other compensation event. Clause 62.1 of NEC4 ECC makes it possible for the Project Manager and the Contractor to discuss ways of addressing notified compensation events. The procedure for assessing compensation events as set out under clause 63 of NEC4 ECC applies. For instance, where a party fails to act in a spirit of mutual trust and co-operation and as a result access to site is delayed for two months, which in turn affects the Completion Date, clause 63 allows the delay to the completion date to be assessed 'as the length of time that, due to the compensation event, planned Completion is later than planned Completion as shown on the Accepted Programme current at the dividing date'.

¹²² It should be noted that it is not every alleged breach of contract (cl 10 duty) which may qualify as a compensation event. It must be established that the alleged breach of clause 10 has an impact on Defined cost, Completion or a Key date (cl.61.4).

¹²³ Other than breaches under Clause 60.18

¹²⁴ The *Client* does not allow access to and use of each part of the Site by the later of its *access date* and the date for access shown on the Accepted Programme.

¹²⁵ The *Client* does not provide something which it is to provide by the date shown in the Accepted Programme.

¹²⁶ The *Client* or Others do not work within the times shown on the Accepted Programme, do not work within the conditions stated in the Scope or carry out work on the Site that is not stated in the Scope.

¹²⁷ The *Client* does not provide materials, facilities and samples for tests and inspections as stated in the Scope

The NEC4 ECC places a limit on the remedy the innocent party will be entitled to when there is a breach. Clause 63.6 provides that 'the rights of the Client and the Contractor to changes to the Prices, the Completion Date and the Key Dates are their only rights in respect of a compensation event'. In effect, the innocent party is entitled to price adjustment and extension of time but not damages. The NEC User Guide,¹²⁸ notes in relation to clause 63.6 that,

If any of the compensation events occurs, the **Parties' sole remedy is to use the compensation event procedure**. Therefore, if the Client breaches the contract the Contractor must use this route (see clause 60.1(18)), rather than pursuing damages. This prevents either party from trying to circumvent the time limits and processes in the contract.¹²⁹

From the foregoing, there is a contractual process for parties to follow to either pre-empt breach of NEC4 clause 10(2) or address actual breach when it occurs. There is a standard for what will constitute a significant breach of the duty to act in a spirit of mutual trust and co-operation; the alleged breach must have an impact on Defined cost, Completion or a Key date.¹³⁰ If a party fails to act in a spirit of mutual trust and co-operation and the failure does not result in time and or cost impact on the contract, such a breach will attract no remedy under the NEC Conditions. So when parties engage with each other either at the early warning stage or the compensation event stage, unless the parties disagree on which party is responsible for the alleged breach of clause 10.2 of NEC4 ECC,¹³¹ one of the key questions will be whether the alleged breach has had cost and time impact on the contract. If the answer is in the affirmative the aggrieved party will be entitled to price adjustment and or extension of time only; damages and all other remedies are excluded. Unlike the situation under the English Insurance Act, 2015¹³² where no remedy is provided for breach of the wide duty of utmost good faith under the Act, the NEC Conditions make a better provision in this regard.

Judicial attitude towards NEC Clause 10 concepts

Compliance with the early warning and compensation event procedures do not always result in mutually acceptable outcomes. Consequently, parties sometimes resort to the dispute resolution clauses in the NEC Conditions. The first point of call for dispute

¹²⁸ NEC, *NEC User Guide – Managing an Engineering and Construction Contract* (2017) Vol.4, 64

¹²⁹ Emphasis added

¹³⁰ See NEC4 ECC, cl.61.4

¹³¹ In which case this may become the subject-matter to be determined through the dispute resolution process.

¹³² This amended the Marine Insurance Act 1906.

resolution under the NEC3 Conditions is adjudication. Parties dissatisfied with the adjudication outcome have a choice to resort to a Tribunal which may be a court or an arbitral tribunal. Under the NEC4 ECC, both Options W1 and W2 require parties to refer disputes to party representatives mandated to use any alternative dispute resolution of choice to help address a dispute before resorting to adjudication. Parties dissatisfied with the outcome of an adjudication hearing can then proceed to an agreed tribunal. Parties who choose NEC4 ECC Option W3 are required to submit disputes to a Dispute Avoidance Board first and then to the court or arbitration.

So how have the English courts dealt with questions of breach and consequences of the clause 10 duty? Some NEC-related disputes end up in court but these are few and far between,¹³³ and even fewer cases have dealt with NEC3 ECC Clause 10 and or NEC 4 ECC Clause 10.2.¹³⁴ In *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Limited*,¹³⁵ the court was called upon to determine whether a compensation event was to be assessed based on actual cost or forecasted cost. It relied primarily on Clauses 63-65 of the NEC3 Professional Services Contract¹³⁶ and concluded that the assessment should be founded on the actual cost. In coming to this conclusion, Deeny J. considered the principle of contractual interpretation which requires the contract to be interpreted as a whole and acknowledged the need to consider what he referred to as 'other factors'. These, in the view of the judge, included the extent to which the defendant's conduct aligned with the philosophy of the NEC Conditions including the duty to act in a spirit of mutual trust and co-operation. He observed as follows:

First of all, it is a cardinal principle of contractual interpretation that one should look at the agreement overall. This particular contract begins with the agreement that the employer and the consultant shall act "in a spirit of mutual trust and co-operation"(10.1). It seems to me that a refusal by the consultant to hand over his actual time sheets and records for work he did during the contract is entirely antipathetic to a spirit of mutual trust and co-operation.

The respected judge concluded that the conduct of the defendant (in withholding the actual cost from the employer and the Tribunal) did not comply with the duty to act in a spirit of mutual trust and co-operation but crucially failed to provide the rationale for this conclusion. It appears that, to the judge in this case, the clause 10

¹³³ *Atkins Limited v The Secretary of State for Transport* [2013] EWHC 139 (TCC) [9] per Akenhead J: 'Very few cases involving material disputes as to the interpretation of the NEC3 Conditions have made their way through to reported court decisions.'

¹³⁴ These include the following: *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Ltd* [2017] NIQB 43; *Mears Ltd v Shoreline Housing Partnership Ltd* [2015] EWHC 1396 (TCC) [72]; and *Costain v Tarmac* [2017] EWHC 319 (TCC)

¹³⁵ [2017] NIQB 43.

¹³⁶ On assessment of compensation events.

duty is about the standard of conduct expected from the parties. In his view, the conduct of the defendant did not meet this standard. Useful as it may be, this decision does not help our understanding of the import of the duty to act in a spirit of mutual trust and co-operation. It also offers no insight at all into what the consequence of a breach of the duty should be. At best, the respected judge's comment on the clause 10 duty constituted an ancillary point which was meant to augment his interpretation of clauses 60-65 of the NEC3 Professional Services Contract (June 2005).

In *Costain Limited v Tarmac Holdings Limited*,¹³⁷ the parties had entered into a sub-contract which incorporated two different sets of agreements; a NEC3 Short Supply Contract and an amended NEC3 Framework Contract. The Framework contract related to seeking and providing quotations whilst the Supply Short Contract related specifically to supply of concrete for a safety barrier between junctions 28-31 on the M1 motorway in England. The concrete supplied was found to be defective. The dispute resolution clause in the Short Supply Contract had a restricted schedule on adjudication, time bar provisions and a second stage arbitration whilst the Framework Contract allowed adjudication at any time and litigation thereafter. The claimant having had its claim for the defective goods dismissed on a time bar ground by an adjudicator, made a claim before the High Court. It was this action that the Defendant sought to stay and refer to arbitration.

Among the issues agreed was the question of relevance of the clause 10 duty, that is, the obligation to act in a spirit of mutual trust and co-operation. The claimant had sought to argue that the defendants had acted contrary to prior representations made to them and thus acted contrary to the clause 10 duty. The claimants had also essentially argued that the defendant was under obligation per the clause 10 duty to draw its attention to the nature, scope and potential effect of the dispute clause in the Supply short contract. The court presided over by Justice Coulson dismissed both arguments by the claimant on the ground that the duty to act in a spirit of mutual trust and co-operation does not place such obligations on the defendant.

The arguments of the respected judge in support of the court's decision merits some further analysis. Firstly, the court relied on 'Keating on NEC3'¹³⁸ which equates the duty to act in a spirit of mutual trust and co-operation to the much broader concept of good faith. On this point, two observations are made here. The clause 10

¹³⁷ [2017] EWHC 319 (TCC)

¹³⁸ D. Thomas QC, *Keating on NEC3* (London, Sweet and Maxwell, 2012)

duty under NEC3 and NEC4 do not use the term 'good faith'. The drafters used specific terms – 'mutual trust' and 'co-operation'. It is submitted that bearing in mind the broad spectrum of the concept of good faith, it is unlikely that the concepts used in clause 10 of the NEC Conditions were intended to be 'substitutes' for good faith in its broadest sense. At best, the duty may cover some disparate sub-principles of good faith such as 'duty to co-operate' and 'duty not to improperly exploit'.

Secondly, some uneasiness was noticeable from the decision of the court¹³⁹ regarding embracing every good faith concept as a component of the duty to act in a spirit of mutual trust and co-operation under the NEC Conditions. For instance, the court was reluctant to accept that 'mutual trust and co-operation' entails an obligation to act fairly. Having concluded that there was no breach of the clause 10 duty, the court did not discuss the consequence or remedy for such a breach. It is worth noting that the exercise of determining the meaning and possible breach of the clause 10 duty was through contract interpretation.

In *TSG Building Services Ltd v South Anglia Housing*,¹⁴⁰ the parties' gas servicing (and related works) agreement had a provision similar in many respects to the wording in Clause 10.1 of the NEC3 ECC.¹⁴¹ The contract gave the parties unconditional right to terminate at any time. The defendant terminated early the contract with a four year duration. The adjudicator decided that the contractor was entitled to some payments as a result of the early termination. One of the questions for the court was whether the duty to act in a spirit of mutual trust and co-operation imposed any 'constraints, condition or qualification' on the rights of the parties to terminate for convenience. As with the judges in *Northern Ireland Housing Executives* and *Costain*, the Court treated the legal issue as 'a matter of construction' and resorted to precedents on the construction of commercial contracts.¹⁴² Pursuant to the interpretation exercise, the Court held that the scope of the said Clause 1.1 (akin to the clause 10 duty under NEC 3 and 4) did not cover the expressly agreed term on termination

¹³⁹ Ibid. para [123-124]

¹⁴⁰ [2013] EWHC 1151 (TCC)

¹⁴¹ Clause 1.1: '1.1 The Partnering Team members shall work together and individually in a spirit of trust, fairness and mutual co-operation for the benefit of the Term Programme, within the scope of their agreed roles, expertise and responsibilities as stated in the Partnering Documents, and all their respective obligations under the Partnering Contract shall be construed within the scope of such roles, expertise and responsibilities, and in all matters governed by the Partnering Contract they shall act reasonably and without delay.'

¹⁴² [2013] EWHC 1151 (TCC), [32]. At paragraph 36 of the judgment, the respected judge noted as follows: 'This type of case encourages a textual but also a contextual interpretation of commercial contracts. So it is that one needs to consider not just what the words in Clause 1.1 mean verbally but also what from looking at the contract overall they are intended to apply to. It is legitimate to consider whether they are intended to apply to the termination provisions at all'.

for convenience.¹⁴³ The judge in this case also gave no indication as to possible remedy for breach of the duty to act in a spirit of mutual trust and co-operation.

In *Mears Ltd v Shoreline Housing Partnership Ltd*,¹⁴⁴ a contractor who had been employed to repair and maintain properties owned by a landlord sought to recover £300,000 which the landlord had deducted from payments due to it. Akenhead J. rejected arguments by Mears Ltd that Shoreline, in a spirit of the values of the NEC contract, ought not to have taken advantage of them by failing to warn them that they (Shoreline) will adhere to the strict terms of the contract. The judge did not find any improper conduct on the part of the landlord and thus found that the clause 10 duty has not been breached.¹⁴⁵ Once again, the court did not provide detailed analysis of the conduct of the landlord other than stating that, 'I am not satisfied on the balance of probabilities that there was any such (what could be described as Machiavellian) conduct on the part of Shoreline'.¹⁴⁶ Such enterprise would have been fruitless as the court was of the view that the obligation to act in a spirit of mutual trust and co-operation should not prevent either party from relying on the freely agreed terms of the contract.

The cases which have dealt with the duty to act in a spirit of mutual trust and co-operation discussed above share some common features. Firstly, they did not attempt an explanation of the two main concepts in the duty namely, mutual trust and co-operation. In *Costain*, the judge attempted an explanation of the clause 10 duty but only went as far as equating it with good faith. Secondly, in nearly all cases, the judges concluded that clause 10 has not been breached without detailed analysis of the impugned conducts. Thirdly, in all the cases involving NEC3 ECC clause 10, the judges gave no indication of the consequences of breach and the likely remedy. In *Northern Ireland Housing Executive*, the judge discussed the duty to act in a spirit of mutual trust and co-operation as part of his approach to contract interpretation, found that the duty had been breached but failed to discuss the consequence of the breach. Finally, the common approach to the determination of breach (or otherwise) of the duty to act in a spirit of mutual trust and co-operation by the courts was by contract interpretation.

¹⁴³ Similarly, in the recent case of *Monk v Largo* [2016] EWHC 1837 (Comm), the court held that an absolute right to terminate is not constrained by an obligation of good faith.

¹⁴⁴ [2015] EWHC 1396 (TCC) [para 72]

¹⁴⁵ *ibid* [72]

¹⁴⁶ *ibid*

Attitudes of English Court's to express Good faith clauses

Earlier works by Saintier and Tan have examined this issue in some detail.¹⁴⁷ Two developments are observable from the relevant literature and cases on how the English courts have approached the interpretation of contracts with express good faith clauses. Firstly, the courts generally interpret express good faith clauses narrowly. Secondly, they generally view good faith (where it has come up for consideration) as a standard/ social norm which must be complied with. Each point is examined briefly.

On the first observation, Tan¹⁴⁸ found that the courts will usually limit the application of express good faith clauses to specific provisions and are in most cases unwilling to allow such clauses to operate as overriding principles.¹⁴⁹ The English courts have held that, subject to an express agreement to the contrary, clauses in the nature of the mutual trust and co-operation obligation under NEC3 and NEC4 do not supersede other expressly agreed contractual rights of parties. In *Gold Group Properties Ltd v BDW Trading Ltd*,¹⁵⁰ a party to a development agreement with a revenue-sharing provision and a good faith clause sued for damages for repudiatory breach. The defendant had failed to commence construction of dwelling houses on the due date as per the agreement and had unsuccessfully attempted to persuade the claimant to renegotiate the terms of the agreement to reflect the economic downturn and its effect on property prices in 2008. In opposing the action for damages, the defendant argued that the claimant had breached the good faith clause as a result of its refusal to renegotiate the terms of the agreement. It was held that the good faith clause did not require parties to give up freely negotiated rights and benefits under the contract.

In the Court of Appeal case of *Mid Essex NHS Trust v Compass Group UK and Ireland Ltd*¹⁵¹, the question of the extent to which the general duty of good faith can constrain/restrict other express provisions of the contract came up for consideration. Addressing this issue, the Court of Appeal (per Beatson LJ) observed as follows:

¹⁴⁷ See S. Saintier, "The elusive notion of good faith in the performance of a contract, why still a *bête noire* for the civil and the common law?" (2017) J.B.L. 441 at 453 and Z. X. Tan, "Keeping faith with good faith? The evolving trajectory post-Yam Seng and Bhasin" (2016) J.B.L.420 at 429-433

¹⁴⁸ Z. X. Tan, "Keeping faith with good faith? The evolving trajectory post-Yam Seng and Bhasin" (2016) J.B.L.420 at 428-429

¹⁴⁹ See *Mid Essex NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200, the court held that the provision on co-operation applied to the provision on transmission of information but not the discretion to award service failure points – See Z. X. Tan, "Keeping faith with good faith? The evolving trajectory post-Yam Seng and Bhasin" (2016) J.B.L.420 at 432.

¹⁵⁰ [2010] EWHC 1632 (TCC)

¹⁵¹ [2013] EWCA Civ 200

In a situation where a contract makes...specific provision, in my judgment, care must be taken not to construe a general and potentially open-ended obligation such as an obligation to “co-operate” or “to act in good faith” as covering the same ground as other, more specific, provisions, lest it cut across those more specific provisions and any limitations in them.”¹⁵²

The court eventually decided that whilst the duty to co-operate applies to terms on transmission of information, it did not extend to the entire contract including the terms dealing with the exercise of discretion in the award of points for service failure. The idea of a general open-ended contractual provision superseding a more specific provision was also rejected by Mr. Justice Akenhead in *TSG Building Services Ltd v South Anglia Housing*.¹⁵³ Here, whilst the Court agreed that the good faith obligation will apply to the performance of roles under the contract, it was not persuaded that it extended to the issue of termination for convenience.¹⁵⁴

The decisions in *Gold Group Properties Ltd, Mid Essex NHS Trust* and *TSG Building Services Ltd* on the interaction between good faith clauses and other express terms generally accords with the language of clause 10.1 of NEC3 and 10.2 of NEC4. Clause 10.1 of NEC3 states in part, that one of the primary obligations of the parties is to act as stated in the contract. That obligation is not to be superseded by the requirement of the second limb of the clause which states that parties shall act in a spirit of mutual trust and co-operation. NEC4 makes this position even clearer. The NEC4 User Guide¹⁵⁵ states expressly regarding Clause 10.2 on the obligation of mutual trust and co-operation, that the sub-clause does not change the obligation of the parties and the two key administrators under the NEC4 contract.

On the second observation, Saintier¹⁵⁶ notes in relation to assessment of breach of good faith in the English and French context that judges tend to view good faith as a ‘standard, a social contractual norm’ when determining a breach. This was the case in *Yam Seng*, where Leggatt J discussing this subject observed as follows:

In addition to honesty, there are other standards of commercial dealing which are so generally accepted that the contracting parties would reasonably be understood to take them as read

¹⁵² *ibid*, para 154

¹⁵³ [2013] EWHC 1151 (TCC)

¹⁵⁴ Similarly, in the recent case of *Monk v Largo* [2016] EWHC 1837 (Comm), the court held that an absolute right to terminate is not constrained by an obligation of good faith.

¹⁵⁵ NEC, *NEC4 User Guide: Managing an Engineering and Construction Contract* (2017) Vol.4, Chapter 2, p.3

¹⁵⁶ S. Saintier, “The elusive notion of good faith in the performance of a contract, why still a *bête noire* for the civil and the common law?” (2017) J.B.L. 441 at 453

without explicitly stating them in their contractual document. A key aspect of good faith, as I see it, is the observance of such standards. Put the other way round, not all bad faith conduct would necessarily be described as dishonest. Other epithets which might be used to describe such conduct include 'improper', 'commercially unacceptable' or 'unconscionable'.¹⁵⁷

This view reflects one of the popular theoretical positions on how breach of good faith is assessed in the United States.¹⁵⁸ The proponent, Burton,¹⁵⁹ argues that good faith is always preceded by the exercise of discretion and where the exercise of such contractual discretion is used to reclaim forgone opportunities there is a breach of good faith.¹⁶⁰ Breach, according to Burton, is 'determined by an objective standard, focusing on the expectations of reasonable persons in the position of the dependent parties'.¹⁶¹ As Tan¹⁶² points out, reference to objective standards or norms presupposes that they are undisputed and generally agreed. However, this is not the case.¹⁶³

Express good faith clauses, like any other clause in a contract, are subject to the same principles of contractual interpretation. In the United Kingdom, the question of good faith is part of the broader debate about the place of textualism and contextualism in contractual interpretation.¹⁶⁴ Ultimately, the prevailing approach is that captured in the opinion of Lord Hodge JSC in the recent decision of the Supreme Court in *Wood v Capita Insurance Services Ltd*,¹⁶⁵ that is:

The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract

¹⁵⁷ *Yam Seng* [138]. It appears these comments from Leggatt J were inspired by the decision of the New South Wales Court of Appeal in *Renard Constructions (ME) Pty v Minister for Public Works* (1992) 26 NSWLR 234, where Priestley JA observed that: '... people generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations.'

¹⁵⁸ S. J. Burton, "Breach of Contract and the Common Law Duty To Perform in Good Faith", 94 Harv. L. REV. 369, 369-71 (1980). The other theoretical approach to determining breach is the 'excluder' principle popularised by R. S. Summers, " 'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code", 54 VA. L. REV. 195, 262. This author argues that instead of a narrow definition of good faith, judges should rather focus on forms of bad faith which have been ruled out in previous cases and work his way to the current situation either by direct application or analogy to prior determinations.

¹⁵⁹ S. J. Burton, "Breach of Contract and the Common Law Duty To Perform in Good Faith", 94 Harv. L. REV. 369, 369-71 (1980).

¹⁶⁰ A. D. Miller and R. Perry, "Good Faith Performance", 98 Iowa L. Rev. 689 at 706 (2013)

¹⁶¹ S. J. Burton, "Breach of Contract and the Common Law Duty To Perform in Good Faith", 94 HARV. L. REV. 369, 369-71 at 390-391 (1980); A.D. Miller and R. Perry, "Good Faith Performance", 98 Iowa L. Rev. 689 at 707 (2013)

¹⁶² Z. X. Tan, "Keeping faith with good faith? The evolving trajectory post-*Yam Seng* and *Bhasin*" (2016) J.B.L.420 at 428-429

¹⁶³ See also A. D. Miller and R. Perry, "Good Faith Performance", 98 Iowa L. Rev. 689 at 706 (2013)

¹⁶⁴ See decisions in *Arnold v Britton* [2015] UKSC 36 and *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50.

¹⁶⁵ [2017] UKSC 24

as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.¹⁶⁶

Following recent precedents, the courts are likely to interpret the confines of the duty to act in a spirit of mutual trust and co-operation narrowly, bearing mind the language chosen by the parties and the contractual context of the duty.

Conclusion

The mutual trust and co-operation obligation under both NEC3 and NEC4 are at the heart of the cultural change agenda of the NEC Conditions. These obligations are critical to the smooth operation of the contract forms, particularly the aspects dealing with project management measures. The duty has been widely viewed as connoting good faith. Certainly, there is evidence of good faith overtones in the clause 10 duty. However, the question still remains as to whether the concepts used in couching the duty are merely substitutes for good faith. English practice supports using disparate concepts (instead of 'good faith') to achieve what continental users of good faith would intend it to achieve. Bearing in mind that the NEC forms have distinctly English origins, what then do the concepts 'mutual trust' and 'co-operation' entail? Similar concepts in employment and planning law have distinct and developed meanings in English law. The concepts in the context of the NEC Conditions may have a more confined implication than the broader good faith concept.

Three key observations are discernible from the examination of cases which have specifically dealt with or commented on the NEC3 ECC Clause 10 or NEC4 ECC Clause 10.2 duty. Firstly, the courts have yet to engage in a detailed analysis of the clause 10 duty. The English courts have made no attempt to examine the meaning of the words used by the contractual parties namely, 'mutual trust' and 'co-operation', even though there is sufficient legal precedents on each concept to aid such exercise. Secondly, the English courts have also not provided detailed analysis on behaviours or conducts which may or may not constitute a breach of the duty to act in a spirit of mutual trust and co-operation. Thirdly, the courts have given no indications regarding consequence of breach of the clause 10 duty and possible remedies. A review of the English courts' attitude to express good faith clauses has shown that they prefer to interpret such clauses

¹⁶⁶ Ibid [10]

narrowly, not as overarching principles. Such clauses are subject to the same rules of contract interpretation as any other contract term.

On the issue of the interpretation of the duty to act in a spirit of mutual trust and co-operation, it is fair to say that the courts' position on the subject is still developing. Given the English approach to addressing good faith related issues, it is plausible to expect that soon the courts may move away from simply substituting good faith for the duty to act in a spirit of mutual trust and co-operation and begin to pay attention to the words/concepts in the clause itself. Before then, users of NEC3 and NEC4 concerned with how breach of this duty is determined and the likely remedy can rely on the plain provisions of the forms. The NEC Conditions provide clear procedure on how anticipated or actual breach of the clause 10 duty should be handled. The Conditions also provide clear guidance on remedies for breach of the duty; these are limited to price adjustment and extension of time under the contract. Damages are expressly ruled out as a contractual remedy.