

Insights

NEC AND JCT: GOOD FAITH COMPARED

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SUMMARY

An article by Shy Jackson, first published in PLC, which considers "good faith" clauses and compares NEC's mutual trust and co-operation provision with JCT 2024's collaborative working provisions.

This article contains some links which are only accessible by PLC subscribers.

JCT 2024 brings to the forefront, in the form of the new Article 3, a provision that was previously part of the supplemental provisions and requires collaborative working. It requires the parties to work with each other and other project team members in a co-operative and collaborative manner, in good faith and in a spirit of trust and respect. In addition, it requires the parties to support collaborative behaviour and to address behaviour which is not collaborative.

This is direct response to the Construction Playbook, as well as the equivalent private sector Trust and Productivity report. It also reflects a global trend towards collaborative contracting, with FIDIC looking to produce a collaborative version of its contracts and NEC4 being adopted by the government in Hong Kong and being used in countries such as Peru, South Africa and most recently in Singapore. For more information, see [BCLP Insight, *Collaboration in practice under Singapore PSSCOC Option Module E and NEC4*](#).

JCT has commented that the courts have been more open to recognising good faith in recent years. That is certainly the case, but such recent judgments highlight that its application is very fact sensitive. The equivalent NEC provision (clause 10.1 in NEC3 and clause 10.2 in NEC4) is typically expressed in shorter terms, simply requiring parties to act "in a spirit of mutual trust and co-operation". That obligation has been considered by the courts so it is worth looking at how it is different from the JCT wording and whether that will make a difference as to how it is applied in practice.

For more information, see [Toolkit, *NEC contracts toolkit: Opinion and debate on the NEC contracts*](#).

COMPLYING WITH THE CONTRACT

Until NEC4, the obligation to co-operate in a spirit of mutual trust and cooperation was part of the first clause in the contract (clause 10.1) and was preceded by the obligation to comply with the terms of the contract. In NEC4, the obligations were separated, to highlight the fact that the obligation to comply with the contract terms is the primary obligation. In *Costain v Tarmac [2017] EWHC 319 (TCC)*, a decision on the NEC3 form, the court stated that a good faith obligation does not require a party to "...put aside its own self-interest". In the earlier case of *Gold Group Properties v BDW Trading [2010] EWHC 1632 (TCC)*, which dealt with express good faith obligations, it was held that good faith:

"...does not require either party to give up freely negotiated financial advantage clearly embedded in the contract."

Similarly, Article 3 of JCT 2024 follows Article 1, which sets out an obligation to design and construct the works in accordance with the contract. This reinforces the general principle, namely that the requirement to collaborate does not detract from the obligation to comply with the contractual terms.

THE USE OF THE TERM "GOOD FAITH"

NEC chose not to use the term "good faith", as it was the subject of legal jurisprudence and commentary. Indeed, in *Walford v Miles [1992] 2 AC 128*, the court described it as "inherently repugnant to the adversarial position of the parties when involved in negotiations". Nonetheless, the courts have made it clear that the NEC wording would be treated as a good faith obligation and in the more recent decision of *Van Oord UK Ltd v Dragados UK Ltd [2021] CSIH 50*, concerning the NEC sub-contract, the court commented that:

"Clause 10.1 is not merely an avowal of aspiration. Instead, it reflects and reinforces the general principle of good faith in contract."

Therefore, despite NEC not using the term good faith, the courts have regarded the NEC wording as having the same effect and the decisions on NEC contracts will be relevant to issues that involve the new Article 3 of the JCT 2024 suite of contracts.

JCT however does not simply replace the NEC term of "spirit of mutual trust and co-operation" wording with the term "good faith". It also states that parties are to work with each other in a co-operative and collaborative manner and in a spirit of trust and respect. The issue will therefore be whether these additional requirements give rise to additional obligations or do they simply operate so as to reinforce a more general good faith obligation. While it is possible to see arguments to the effect that the additional wording would not have been added if it simply meant good faith, in practice the additional terms may well be seen as examples of conduct that falls within the good faith obligation. By way of an example, the wording in the Framework Alliance Contract (FAC-1)

does not use the term good faith but states an obligation to "...work together and individually in the spirit of trust, fairness and collaboration...".

THE PARTIES SUBJECT TO THE OBLIGATION

The JCT provision applies to the parties, that is, the employer and contractor while the NEC drafting provides that the Project Manager and Supervisor are also subject to the same obligation. Bearing in mind the prominent role of the Project Manager under NEC contracts, it is not surprising that it is to be subject to the same obligation (as is the Supervisor) and this is consistent with its role as the employer's agent. As noted below, the absence of reference to the employer's agent or contract administrator should not make a difference and it would be odd for an employer to suggest that while it is subject to an obligation to collaborate, this does not apply to the contract administrator.

THE OBLIGATION TO SUPPORT COLLABORATIVE BEHAVIOURS AND ADDRESS NON-COLLABORATIVE BEHAVIOUR

This is an additional obligation that JCT includes and that does not appear in NEC. The issue will be the extent of that obligation. In particular, does it require the parties to address non-collaborative behaviour by their employees only or, will the obligation be interpreted widely to mean that they must ensure that the third parties they appoint to play a role in a project should also be subject to the good faith obligations and that non-collaborative behaviours should be addressed?

A wider interpretation is in line with the broader aims of this change and it would be odd for a party to accept that such an obligation is limited and does not apply, for example, to the employer's agent or a designer. This could however give rise to uncertainty and it will remain to be seen whether, for example, professional appointments in JCT projects will include an additional obligation to reflect the requirements of Article 3. Similarly, it remains to be seen what steps a party will be expected to take to address non-collaborative behaviours. This will no doubt depend on the context and could range from providing training on collaborative contracting to removal from the project in extreme cases. Overall, JCT users who are not used to good faith-based arguments will now need to consider how that obligation may apply in practice, in the way that is already common for NEC users. The NEC and similar case law will be relevant in that respect despite the different drafting and provides useful guidance.

By way of example, in *Willmott Dixon v Newlon* [2013] EWHC 798 (TCC), a decision concerning the PPC 2000 project partnering standard form that includes a requirement to "... achieve transparent and cooperative exchange of information in all matters relating to the Project and to organise and integrate their activities as a collaborative team", the court held that this obligation extended to performing the problem solving and dispute avoidance or resolution provisions, including adjudication .

APPLYING "GOOD FAITH" OBLIGATIONS IN PRACTICE

It is however important to recognise that good faith is very fact sensitive and courts may prefer to apply it to reinforce existing obligations rather than as a stand-alone obligation. In two decisions in the same dispute, *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Ltd* [2014] NICA 27 and *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Ltd* [2017] NIQB 43, clause 10.1 was relied upon when determining the employer's obligation to instruct change but also when commenting on whether a party could refuse to provide cost records. Some judges may however rely on existing principles such as estoppel where possible, instead of good faith, as was the case in *Mears Ltd v Shoreline Housing Partnership Ltd* [2015] EWHC 1396 (TCC), where parties agreed to operate a payment process that did not comply with the contract and one party then sought to revert to the contractual process. In *Van Oord UK Ltd v Dragados UK Ltd* [2021] CSIH 50, it was held that clause 10.1 operated to prevent a main contractor from reducing the rates payable under an NEC3 sub-contract when omissions were instructed in breach of contract.

In that respect, the courts' willingness to accept concepts such as relational contracting should also be recognised. In *Essex County Council v UBB Waste (Essex) Ltd (Rev 1)* [2020] EWHC 1581 (TCC), it was held that "[a] 25-year PFI contract is a paradigm example of a relational contract in which the law implies a duty of good faith" which is consistent with express inclusion of such clauses and indeed the drive for collaborative contracting.

It was also held in that case that:

- Whether a party has not acted in good faith is an objective test.
- Dishonest conduct will be a breach of good faith, although dishonesty is not required.
- The test is whether the conduct would be regarded as "commercially unacceptable" by reasonable and honest people, which will depend on the contractual and factual context. A similar test was proposed a year earlier in *Bates v Post Office Ltd (No.3)* [2019] EWHC 606 (QB), in the context of relational contracting, stating that it imposes an obligation to:

"...refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people."

For more information, see:

- Insight: [*Good faith, NEC clauses 10.1 \(and 10.2\) and aspirations.*](#)
- Legal updates:
 - [*Retrospective assessment of NEC3 compensation event \(Northern Ireland High Court\).*](#)
 - [*Estoppel where parties operated non-contractual pricing mechanism \(TCC\).*](#)
 - [*NEC contract imposes an enforceable obligation to act in good faith \(Inner House, Court of Session\).*](#)

- *Employer entitled to terminate and claim damages on failed PFI waste treatment project (TCC).*
- *Implied duty of good faith in "relational" contract (High Court).*

FINAL THOUGHTS

It will no doubt take some time for JCT users to consider the practical impact of Article 3 and, as was the case with NEC, arguments based on non-compliance will be raised in cases where there is no other express provision or in support of arguments based on existing provisions. In time, this may well result in decisions that consider this obligation in the context of the JCT contracts.

JCT users however should consider the purpose of this obligation and see it as a positive development that is aimed at encouraging parties to work together for the benefit of the project in order to improve delivery. More importantly, it is necessary to acknowledge that solely signing up to an obligation to collaborate will not ensure collaborative behaviours. Experience with NEC tells us that having a collaborative contract is a useful starting point, but all parties must make the effort to embed the necessary mindset and behaviours to achieve the benefits of genuine collaboration.

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- Commercial Construction & Engineering

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