

Mutual Trust and Co-operation – Walk the Line

A recent court case has helped to shed some light on a subject which first reared it's head in the construction industry over twenty years ago – trust in contracts.

It was all Sir Michael Latham's fault. In his industry leading report *Constructing the Team* he called for construction contracts to include a duty for all parties "... to undertake the project in a spirit of mutual trust and co-operation, and to trade fairly with each other ...". NEC duly responded to this by including this in their New Engineering Contract when the second edition was published in 1995.

Since then little has changed. Well that's not entirely true, the industry has made huge leaps forward since then, however one perennial question has remained - what on earth does "act in a spirit of mutual of trust and co-operation" mean?

Now NEC contracts don't actually say this. Clause 10.1 says is that the parties "shall act as stated in this contract and in a spirit of mutual trust and co-operation. I've underlined the word "and" as it's fundamental to correct interpretation of the contract, you have to do both things.

Picture the scene, we're at a monthly progress meeting on a project and the thorny issue of compensation events comes up for discussion. The Project Manager goes through recent compensation events notified by the Contractor and states that he's rejecting some of them as he doesn't believe they are compensation events. The Contractor responds to this with a sharp "what happened to mutual trust and co-operation?" Should the PM change his mind? On another project the Contractor might be new to NEC and not really understand compensation events, should the PM help him out by identifying compensation events for him? Just how far does the PM have to go?

In *Costain Limited v Tarmac Holding Limited* we finally have something to help us understand where the line in the sand is drawn between the various parties to an NEC contract.

The judge in this case accepted a similarity between “mutual trust and co-operation” and a good faith obligation (a concept that exists in the legal systems of many other countries, but not in English law). He approved the following summary of good faith from another case:

“It is a form of contractual duty which requires the obliger to have regard to the interests of the obligee, while also being entitled to have regard to its own self-interest when acting. F&C Alternative Investments (Holdings) Limited v Barthelemy (Nos. 2 and 3) [2011].”

He also approved the following from Keating on NEC3:

“Whilst the parties can maintain their legitimate commercial interests, they must behave so that their words and deeds are honest, fair and reasonable, and not attempts to improperly exploit the other party.”

Interestingly though, he did say he was a little uneasy about Keatings’ suggestion that clause 10.1 imported a more general obligation to act fairly as he felt this would be too subjective, and difficult to apply in practice.

My thoughts on this are:

- It is acceptable to put your own commercial interests first. Usually for the Employer this will be to pay less, and for the Contractor this will be to recover more. This is a basic commercial reality that clause 10.1 does not despatch with.
- What is perceived to be fair does not come into it. The contract might create an unfair outcome for either party but that does not necessarily mean that mutual trust and co-operation has somehow been diminished, provided the parties have acted in accordance with the contract.
- If you feel the contract has created an unfair outcome for you, seek to understand why it happened? Is the other party wrong (in which case you should consider dispute resolution), or was it your interpretation of the contract that was wrong (in which case learn from it)?



- The key to success with NEC3 contracts lies in getting people's behaviours right and ensuring people follow the contractual processes and procedures.

So does the PM change his mind? No he doesn't, but maybe he spends a bit of time explaining his decision to the Contractor to help him to understand it.

Does the PM help the Contractor identify compensation events? Again, no he doesn't, but maybe he helps set up proformas for notifying and responding to them and suggests that the Contractor reads the Guidance Notes and / or does some training.

As Jonny Cash once sang "because of you, I walk the line". To use NEC3 contracts effectively you walk a delicate line to ensure you comply with the contract whilst acting collaboratively. Be careful not to stray too far from it.

Neil Earnshaw
Director
NE Consult
27th April 2017