

Have you gotta have faith? The effect of good faith and mutual co-operation provisions in construction contracts

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An obligation on parties to a contract to act in 'good faith' or in 'the spirit of mutual trust and co-operation' is often inserted into contracts and in particular the NEC family of contracts. What does this mean exactly and is the clause enforceable? Should public bodies consider it during negotiations?

In this article we will explore the concept of good faith in the context of construction contracts for public bodies, and what the recent decision in *Van Oord Ltd v Dragados Ltd* does for this area of law.

What is good faith?

The principle has a meaning of honesty at its core (Lord Justice Auld, paragraph 41, *Street v Derbyshire Unemployed Workers' Centre* [2004] EWCA Civ 964). Acting in good faith in a contractual context has been concisely explained as:

1. *adhering to the spirit of the contract;*
2. *to observe reasonable commercial standards of fair dealing;*
3. *to be faithful to the agreed common purpose; and*
4. *to act consistently with the justified expectations of [the parties].*

(Mr Justice Vos, paragraph 246, *CPC Group Ltd v Qatari Diar Real Estate Investment Company* [2010] EWHC 1535 (Ch))

Should express 'good faith' provisions be included in a contract

Express obligations are becoming increasingly common in construction contracts, and a clause obliging the parties to act in the spirit of mutual trust and co-operation is included in the industry standard NEC form contracts. The question is, do such provisions serve a purpose and are they even enforceable? This has been a point of contention and was further explored in the recent Scottish Court of Session (Inner House) case of *Van Oord UK Ltd v Dragados UK Ltd* [2021] ScotCS CSIH_50. It should be highlighted that whilst this is a Scottish case it is not binding on English and Welsh courts, but will likely still be persuasive.

Van Oord UK Ltd v Dragados UK Ltd

In this case, the claimant, Van Oord UK Ltd, was a sub-contractor employed by the main contractor, Dragados, to carry out various soft dredging works under a bespoke contract based upon an NEC3 Engineering and Construction Subcontract.

Clause 10.1 of the subcontract provided that the parties to acted "*in a spirit of mutual trust and co-operation*".

During the project, Dragados breached the provisions of the subcontract by engaging alternative sub-contractors to carry out specific elements of the dredging works contracted to Van Oord. Dragados sought to rely upon clause 63.10 which permitted the contractor to a compensation event to reduce the sums payable to Van Oord where agreed works were be subsequently omitted.

However, Van Oord relied upon clause 63.2 which provided that the compensation event provisions could not apply to a breach of contract. It was clear that Dragados' instructions to alternative sub-contractors in respect of Van Oord's agreed scope of works was in breach of the contract.

It was held that Dragados was unable to exercise the '*compensation event*' provisions as its omission of works to Van Oord's scope was carried out in breach of the contract provisions to act in the spirit of mutual trust and co-operation.

By engaging the alternative sub-contractors in the manner that the defendant had, it clearly had not complied with clause 10.1 of the subcontract. The commercial judge from the first instance decision indicated that no significance was to be placed on clause 10.1 when considering if Dragados could exercise clause 63.10. Lord Woolman rejected this assertion stating that the obligation to act in such a manner was "not merely an avowal of aspiration" but instead "*reflects and reinforces the general principle of good faith in contract*" (Lord Woolman, paragraph 19, Van Oord UK Ltd v Dragados UK Ltd [2021] ScotCS CSIH 50).

In coming to his decision, Lord Woolman believed that the good faith provision "*aligned with three specific propositions*" as follows:

1. a party should not be able to take advantage of their own breach against the other party;
2. a sub-contract is not obliged to obey an instruction issued in breach of contract; and
3. if it is intended for a party to be placed at the mercy of another, the language [of the drafting] should be clear.

(Lord Woolman, paragraph 20, [2021] CSIH 50)

Clause 10.1 and 63.10 were to be read in conjunction. Crucially, "*unless Dragados fulfils its duty to act "in a spirit of mutual trust and co-operation", it cannot seek a reduction in the Prices.*" (Lord Woolman, paragraph 23, [2021] CSIH 50).

A take away from Van Oord

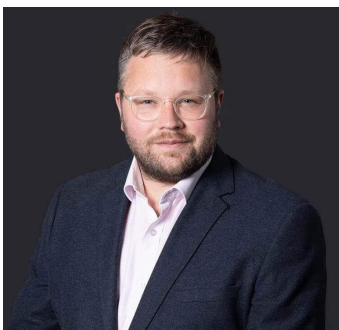
Express good faith provisions were upheld in respect of the specific 'compensation event' provision in Van Oord. We consider that the inclusion of such a provision is only likely to benefit public sector bodies and offer some protection against counterparties acting in bad faith.

However, it is important to appreciate that this concept was and is dependent upon the facts of each case placed in front of the courts. In practice, a blanket application of good faith cannot be applied to every provision of a contract (Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest), [2013] EWCA Civ 200) as particular provisions will require the ability for a party to act in its own commercial interest (such as an ability for a public body to curb its costs during a project where possible).

Therefore, if utilising an NEC contract in a construction project, over-reliance on the precedent good faith wording could prove to be a detriment. As pointed out by Lord Woolman above, if the intention was for a party to be placed at the mercy of another, then the parties need to be clear about this. To that end, if there is an intention for good faith / duty to act on mutual trust and co-operation should be limited in any way, or applicable to specific provisions in your contracts where you may be concerned of the other party's behaviour, then bespoke drafting should be considered when negotiating your construction contracts.

Please contact us with any questions or concerns regarding such provisions in your suite of contracts for any construction project.

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