

HOW EFFECTIVE IS NEC4 CL 10.2 – SOMTAC?

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Driver Project Services



Site-based commercial management, project management, planning and programming services, working closely with clients' teams, throughout the project lifecycle.

BSc (Hons) Quantity Surveying

MRICS

Worked for main contractor for five years as site QS

Completed law degree in 2002

Completed solicitor's exams in 2004

Worked in construction claims consultancy for 20+ years

- Clause 10.2 incl NEC3 to NEC4
- Examples
- History of good faith
- NEC cases referring to SOMTAC
- Summary

CLAUSE 10.2

NEC3

10.1 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.

NEC4

10

10.1 The Parties, the *Project Manager* and the *Supervisor* shall act as stated in this contract.

10.2 The Parties, the *Project Manager* and the *Supervisor* act in a spirit of mutual trust and co-operation.

Ask the audience – is this often amended?

Often misquoted – look at the word “shall”

NEC3 v NEC4

- Relegation?
- Emphasis on separate obligations?

EXAMPLES

Example 1

Contract amendments

- 61.3 period – notice to be received within 7d (not 8w)
- 61.3 notices only valid if sent by recorded delivery
- CD1 confirms delay damages of £10k per day

A Contractor suffers critical delays of 3w due to failure by Client to give access. Access dates were contained in the contract and also shown on the Accepted Programme. Contractor does issue an EW, but its CEN is late.

Will 10.2 save the Contractor or can the Client deduct DD's of £210k?

Example 2

SC properly administers the subcontract by issuing valid EWs and CENs

On a single day, the SC issues 8 separate notices

MC calls the SC into a meeting and says

“we can’t stand all this contractual nonsense, we have a great relationship, and you know we will pay you fairly. Stop these notices otherwise the relationship will change.”

SC stops issuing the notices, despite continuing to be delayed and disrupted on the job

End of the project, SC issues final application, MC deducts £300k for the SC late completion

How will cl 10.2 work in this situation?

HISTORY OF GOOD FAITH

English contract law

- Parties negotiate and are deemed to be capable of looking after their own best interests
- Parties have the ability to agree an express term
- Courts have used a piecemeal approach
- General “good faith” duty is too vague and uncertain (is there much difference with SOMTAC?)

A VERY BRIEF HISTORY

- 1994 – Latham report – recommended inclusion of SOMTAC
- Taken on board in NEC – NEC2/3/4
- Other contracts such as PPC2000 (ACA) have followed
- JCT since 2009 – optional clause
 - “*The Parties shall work with each other and with other project team members in a **co-operative and collaborative manner, in good faith and in a spirit of trust and respect ...**”.*
- JCT2024??

UK – common law system – has recognised good faith in

- Insurance contracts
- Mortgages
- Employment contracts
- JV's
- Long term contracts

EU law

- Consumer law includes “good faith” – Unfair Terms in Consumer Contracts Regs 1999

Merton v Leach (1986)

- The requirement of good faith has not been incorporated into English law
- E must not hinder and must take all steps reasonably necessary to enable the other party

Interfoto v Stiletto (1989)

- Good faith is typically a feature of civil law systems
- “playing fair”, “putting one’s cards face up on the table”, “coming clean”
- English law – no overriding principle, but has developed piecemeal solutions to unfairness problems

Bates v Post Office Ltd (no 3) (2019)

- *“does no more than require a party to refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people”.*

A longer-term contractual relationship – more likely to have a duty of good faith implied

Essex County Council v UBB Waste [2020] EWHC 1581

Court happy to accept a 25-year PFI contract was a "paradigm example of a **relational** contract in which the law implies a duty of good faith" without finding that any of the Council's actions in failing to agree contractual changes came close to the "sharp practice" indicative of a breach of a duty of good faith.

Mrs Justice Pepperall

- noted there was some irony in UBB's promotion of the implied term of good faith, as it is arguable that UBB did not act in good faith, due to concealments it had made throughout the project.
- concluded that dishonesty is not of itself a necessary ingredient of an allegation of breach. Rather, the question is whether the conduct would be regarded as 'commercially unacceptable' by reasonable and honest people.

NEC CASES

MEARS v SHORELINE HOUSING (2015)

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- Building repair and maintenance on social housing contract
- Intention to use NEC3 TSC Option C
- Mears started work 6m before the contract was signed
- Tender – cost plus % and pain / gain reconciled against SoR
- SoR mechanism was very complicated, so parties agreed a simplified set of composite rates (new system)
- Contract signed in Dec 2009 on the original system
- Period of 6m – 13,600 orders placed and paid on new system

MEARS v SHORELINE HOUSING (2015)

- SL realised that they were not achieving the savings anticipated, and said that Mears owed £300k
- Mears sought a declaration that SL could not recover the £300k
- Basis for the declaration
 - a) On the basis of estoppel
 - b) Breach of cl 10.1
- M won on estoppel argument, but lost on cl 10.1
- Cl 10.1 SOMTAC cannot trump express terms of the contract
- Mr Justice Akenhead said that he was *"not satisfied that there would be any such implied term or that the obligation to act in a spirit of mutual trust and cooperation or even in a "partnering way" would prevent either party from relying on any express terms of the contract freely entered into by each party"*.

NORTHERN IRELAND HOUSING EXEC V HEALTHY BUILDINGS (2017)

NI HOUSING EXEC v HEALTHY BUILDINGS (2017)

- NEC3 Professional Services Contract - Asbestos survey work
- Instruction given changing the scope of work
- Disagreement as to how work should be valued
 - NI – actual Time Charge
 - HB – forecast Time Charge

- Held – actual Time Charge

*“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**”.*

Faced with seeking to award compensation to the consultant here for any cost to it as a result of the instruction of 10 January 2013 why should I shut my eyes and grope in the dark when the material is available to show what work they actually did and how much it cost them?

COSTAIN v TARMAC (2017)

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- Did Tarmac have an express obligation to point out the time bar to Costain?
- No
- SOMTAC – parallels with “good faith”

COSTAIN V TARMAC (2017)

- "(1) What is good faith will depend on the circumstances of the case and the context of the **whole contract**.
- (2) Good faith obligations **do not require parties to put aside self-interests**; they do not make the parties fiduciary.
- (3) **Normal reasonable business behaviour is permitted** but the court will consider whether a party has acted reasonably or unconscionably or capriciously and may have to consider motive.
- (4) The duty is one '*to have regard to the **legitimate interests** of both the parties in the enjoyment of the fruits of the contract as delineated by its terms.*' "

- Coulson J decided that cl 10.1 meant
 1. Tarmac could not “lull” Costain into believing that the time bar was inoperative.
 2. A positive obligation on Tarmac to correct a false assumption put forward by Costain on the inapplicability of the time bar.
- Did cl 10.1 require Tarmac to bring to Costain’s attention the effect of an adjudication clause containing a time bar –
- HELD: - no

VAN OORD v DRAGADOS (2021)

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- Scottish case
- Regarding an instruction to omit work and give that work to others
- Is this a change which is valued under the contract or a breach of contract – and damages then result
- *“In our view clause 10.1 is not merely an avowal of aspiration. Instead it reflects and reinforces the general principle of good faith in contract”.*
- 63.10 allows the Prices to be reduced, but only if there is a change to the Works Information which is in accordance with the subcontract. It therefore only applies to a lawful change and excludes instructions which are in breach of contract

SUMMARY

- SOMTAC – great marketing tool for NEC
- Similar to “good faith”
- Still uncertainty about its meaning
- To refrain from conduct that would be regarded as commercially unacceptable by reasonable people
- Clear example of failure to act in a SOMTAC
 - Failure to hand over records (NI v HB)
- Can it override the express terms of the contract?
 - True in Costain v Tarmac – timebar to adjudication / arbitration (if fraudulent statement)
 - False
 - NI v HB – actual v forecast
 - Mears v SL – evaluation

- So if it is a woolly term ...
- And with little actual application / effect
- Does cl 10.2 really **add value through collaboration** to a contract?
- Should cl 10.2 be crossed out? Can it be deleted?
- Are the personalities of the project team far more important than cl 10.2?

ANY QUESTIONS ?



THANK YOU

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