NEC Mutual trust and cooperation

The Parties shall act as stated in this contract and in a spirit of mutual trust and cooperation.

With the prevalence of the NEC form of contract especially with many of the large infrastructure projects, I often will start off a seminar to a group with this statement and ask immediately how each of the attendees view these words. The reactions are usually all of the same and with an air of indifference. Secondly, I will ask whether or not in correspondence or otherwise if they have felt that this clause standing at the forefront of the NEC suites has ever been used against them. Again, it is well responded to in a way that I am very familiar with at seminars.

The theory is excellent, that parties should enter into an agreement and shall act in a spirit of mutual trust and cooperation. The word shall in law is mandatory and in fact one would struggle to find the word shall anywhere else within the contract. Contracts especially in construction will generally be formed from circumstances that contain competing interests at the final discharge at the end of the contract.

However, while the NEC suites and its drafting has been at pains to introduce the concept of cooperation and in effect the mantra of good faith, what does this clause mean, what obligations does it place on parties over and above other standard forms and why is it a term that appears to cause such indifference or reaction when the question is posed as to its operation. I have heard on many occasions especially from contractors that if they set out various compensation events, if they put forward an application they will be accused of not acting in a spirit of mutual trust and cooperation, meanwhile, they will repeatedly submit programs for acceptance that are not accepted or will be prevaricated upon with a derisory reasoning as to why it is not capable of being accepted. It is these pressures that are prevalent and repeating within the industry and are very real matters as to the conduct of the parties.

Following from a recent seminar where I raised the question and was provided with the wholly predictable response, it is useful to set out what in fact this term means, when it is to be applied and certainly when it is not.

Ordinarily, contracts in England and Wales would not express a term of a requirement to act in good faith but certainly parties are expected not to act in bad faith and such conduct would see sanctions imposed. A very useful case is Costain v Tarmac where the question was raised and the distinct issue between the parties as to the operation of this clause formed part of the judgement. An argument was raised as to whether an arbitration clause was inoperative on the basis that the other party had a duty to raise it prior to a limitation period being exhausted and reliance on this.
In his Judgement, Coulson J (as he then was), said:

“...the parties are not expected to “nursemaid” their opponents, at least where they are well used to commercial litigation, otherwise the client may well ask which side the lawyer is on...”

Numerous times in the Judgement, it was mentioned that Tarmac had done nothing wrong, underhand or unfair and so there was no sharp practice.

Predominantly, the interpretation of the clause was assisted by Keating on NEC where it says that a good faith obligation is one:

“...to have regard to the legitimate interests of both parties in the enjoyment of the fruits of the contract as delineated by its terms.”

And;

“...honest, fair and reasonable, and not to attempt to improperly exploit the other...”

“...the defendant could not do or say anything which lulled the claimant into falsely believing that the time bar in clause 93 was either non-operative or would not be relied on in this case. For this purpose, I am also prepared to accept that this obligation would go further than the negative obligation not to do or say anything that might mislead; it would extend to a positive obligation on the part of the defendant to correct a false assumption obviously being made by the claimant, either that clause 93 was not going to be operated or that the time bar provision was not going to be relied on. But beyond that, on any view of clause 10.1, there can have been no further obligation, because otherwise the provision would have required the defendant to put aside its own self-interest...

In the present case, I find that the defendant did and said nothing about clause 93 which was or could have been misleading... There was therefore no reason for the defendant to believe that the claimant was making any false assumption at all...

Accordingly I reject the suggestion that, on the facts of this case, the obligation in clause 10.1 can somehow turn an otherwise unsuccessful assertion of estoppel (either by representation or by convention) into a successful one.”

In turn, this then leads to the initial question raised and is most prevalent in terms of operation on construction contracts which is in what circumstances can a party raise such an argument on what is on the face of it an apparently highly subjective clause. From the case law available, it would be apparent that by acting strictly in accordance with the terms of the contract and that whether waivers are represented and whether or not reliance on such statements can be established, then the parties ought not to act in a manner that would constitute a sharp practice. This would be an interesting argument for example where parties were somewhat flexible in respect of the operation for example of time bars as a course of conduct and where following any representation, a party would return to its original position without notice and to the detriment of the other party who had previously relied upon such express statements.

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