"SPLENDID, BUT WHAT DOES IT ACTUALLY MEAN?"[1]

GOOD FAITH AND RELATIONAL CONTRACTS IN THE UK CONSTRUCTION INDUSTRY

DAVID S CHRISTIE*

ABSTRACT. *There is an increasing recognition of the role of good faith – in some form – in UK construction contracts. One of the most popular standard forms, the New Engineering Contract (NEC), puts an express "good faith" like obligation at its heart. Standard forms are particularly useful in exploring the meaning and operation of legal obligations, since they are drafted to achieve a balance between the various competing interests of the parties to the contract. To some extent they represent a consensus view of the rights and obligations within the "mini legal system" of a construction project. This paper will explore the use and meaning of good*

[1] With apologies to Lord Justice Jackson this is a conflation of two rhetorical questions he poses on the nature and definition of good faith in construction contracts. Lord Justice Jackson, "Does good faith have any role in construction contracts" (Pinsent Masons Lecture in Hong Kong, November 2017) <https://www.judiciary.uk/wp-content/uploads/2017/11/speech-lj-jackson-masons-lecture-hong-kong.pdf> accessed 6 June 2019.

*Academic Strategic Lead, Robert Gordon University, Aberdeen. Thanks to my colleagues, Dr Hamish Ross and Dr Joseph Mante for their very helpful comments and input both on the specifics of this paper and the general ideas. I am also grateful to the anonymous reviewers for their helpful and constructive suggestions.

faith obligations in construction contracts in case law as well as the broader commercial and more philosophical context.

KEYWORDS*: Good faith in contract, UK construction contracts, relational contracts, NEC3.*

I. INTRODUCTION

The Lathan Report, the most important modern report on the culture of the UK construction industry had, as its aim, the creation of an atmosphere in the industry where, in the words of Lewis Carroll's Dodo, "Everybody has won and all must have prizes".[2]

This approach required "better performance", "teamwork", and a "healthier atmosphere" for working.[3] While the idea of "good faith" was not mentioned, the attitude contained in those sorts of outcomes would seem to underpin it. Linked to that was the focus on relationships between the parties involved.

In a recent lecture on the topic of good faith in construction by Lord Justice Jackson, he remarked that "no self-respecting academic in this area [i.e. good faith and contracts generally] can resist the temptation" to write about relational contracts.[4] That trend will continue here since clearly the ideals set out above have the parties' relationship at their heart. The

---

[2] As quoted in Sir Michael Latham, *Constructing the Team: Joint Review of Procurement and Contractual Arrangements in the UK Construction Industry* (HMSO 1994).

[3] Ibid.

[4] Jackson Lecture (n 1) [4.5].

most recent case law has not, however, been as relationship-focussed.

A number of recommendations were put forward in the Latham Report and have found their way into UK construction law and practice.[5] This is reflected in the fact that working "collaboratively" is a key idea in modern construction practice.[6] The recent collapse of the second largest UK contractor, Carillion,[7] has exposed, in many ways, the failings in the business models and approaches to this practice in the UK; but that heightens the need to develop collaboration in some form, rather than lessen it. Many of the discussions on this issue focus on how to commercially arrange projects in such a way as to align parties' interests. For example, the NEC 4 version of the alliancing contract which does this will be discussed briefly below. Beyond that, there is now an International Standard for Collaboration[8] which provides for various processes and procedures. The construction industry has been familiar with "partnering" contracts for some time, too. All of these look beyond the legal framework to some extent to appeal to parties' commercial interests. Alternatively, they set out detailed processes to follow[9] This is good, but the impact is largely

---

[5] These are mainly found in the Housing Grants, Construction and Regeneration Act 1996.

[6] Also in other sectors, increasingly such as the UK Offshore Oil and Gas industry. Sir Ian Wood, UKCS Maximising Recovery Review: Final Report (HMSO February 2014).

[7] Daniel Thomas, "Where did it go wrong for Carillion?" BBC News (15 January 2018) <https://www.bbc.co.uk/news/business-42666275> accessed 10 May 2019.

[8] ISO 4001: 2017 Collaborative business relationship management systems—Requirements and framework.

[9] The NEC suite also does this to some extent. See David Christie "Capturing Collaboration in Construction Contracts" in M Heidemann and J Lee (eds), *The Future of Commercial Contracts in Scholarship and Law Reform* (Springer 2018).

restricted to those projects which justify the extra project management, administrative and procurement expense. More broadly, the various levels of thought and ideas (whether social, cultural, or economic) engaged within the structures of these contracts limits the scope to assess the role of the specifically legal obligations within those frameworks in promoting collaboration. So, the focus here will be on innovative construction contracts that attempt to capture this idea and how that moves the focus towards relationships – underpinned by good faith – in their language and structure. The way in which this will require the wider culture around construction projects to change will also be discussed. One part of the move to make contracts more collaborative is found in a contractual provision which is broadly understood as creating an obligation on the parties to perform the contract in good faith.[10] The way in which this operates identifies a tension which goes beyond the ideal of better working together and moves towards developing different understandings of the framework of contract law.

This is because good faith obligations and their treatment in construction law simultaneously lies at the heart of, and exposes a tension, in the law. On this analysis, it lies on the balance point between the need for cooperation[11] and the need for certainty.[12] Previous examination of this issue has

---

[10] This is not to say that the wider solution does not require focus on the other levels of thought and ideas, but that the focus here is on the legal aspect.

[11] G Leggatt, "Contractual Duties of Good Faith" (Lecture to the Commercial Bar Association, 18 October 2016) <www.judiciary.uk/wp-content/uploads/2016/10/mr-justice-leggatt-lecture-contractual-duties-of-faith.pdf> accessed 25 April 2019.

[12] Matthew Bell, "Contract theorists: What did they ever do for us in construction law?" (Society of Construction Law Papers, No. D189, May 2016) <https://www.scl.org.uk/papers/contract-theorists-what-did-they-ever-do-us-construction-law> accessed 6 June 2019.

identified the difficulties in filling that gap.[13] Since good faith is a more general, open textured word – which focuses on aspects of parties' conduct and (although this is difficult to capture) attitude – this helps to create a route to transparency and a more collaborative approach to a contract, rather than simply enumerating specific and particular requirements. A workable solution is for the parties to acknowledge this tension ahead of the contract being executed and to work together to understand their relationship and approaches better.[14] That has the benefit of harnessing and building the collaborative spirit, but only by sidestepping the question of how the good faith obligation operates, rather than dealing with it head-on.

However, this developing picture has been impacted by a more restrictive interpretation placed on construction law good faith in recent case law and extrajudicial commentary, which risks weakening a drive to that sort of pragmatic solution. Moreover, this restrictive treatment demonstrates the difficulty with interpreting express good faith type obligations in the UK construction law context. That may well impact on the success of moves to get the parties working more collaboratively.

These recent developments will be discussed and further consideration given to what the next steps for the use of good faith obligations in construction contracts might be. Firstly, in identifying any objections and secondly, in suggesting how to move the discussion forward. Good faith in this context refers to the use of the terminology in the performance of contracts (rather than in other stages of the contract's existence) an area

---

[13] David Christie, "How Can the Obligation to Cooperate in a Spirit of Mutual Trust and Cooperation in NEC 3 Help Collaboration" 2017 ICLR 93.

[14] Ibid 111-113.

where Scots law may historically have been at the forefront[15] but Canada has recently taken something of a lead.[16]

For the purposes of this paper, Scots and English construction law will be treated as similar. Aside from issues around remedies, the underlying law of obligations is generally sufficiently alike to be mutually informative. The main industry players operate on both sides of Hadrian's Wall and the key regulations and legislation are UK wide in their effect.[17]

II. GOOD FAITH IN UK CONSTRUCTION: WHERE WE ARE

There have been a few cases which have discussed good faith in the UK construction industry in the last few years.

The first of these is the judgment of Leggatt J in *Yam Seng*,[18] which sparked a general appetite to make arguments based on good faith. The case has been widely discussed. One point arising from it is the linking of good faith with so-called "relational" contracts. There has been discussion of relational contracts in academic literature since the introduction of the concept by McNeill in the 1960s and onwards.[19] Over that

---

15 The case of *Mackay v Dick* is commonly cited as the source of the obligation to cooperate. (1881) 6 App Cas 251. See also Sir Vivian Ramsay and Stephen Furst QC (eds), *Keating on Construction Contracts* (10th edn, Sweet and Maxwell 2017).

16 *Bhasin v Hrynew*, 2014 SCC 71, [2014] 3 SCR 494. The discussion in David Percy, "The Emergence of Good Faith as a Principle of Contract Performance" in Simone Degeling, James Edelman, and James Goudkamp (eds), *Contract in Commercial Law* (Thomson Reuters 2016) is particularly helpful.

17 For example, the Housing Grants, Construction and Regeneration Act 1996 (as amended) or the Construction Design and Management Regulations 2015 to name but two. The general overlap in terms of commercial law and the influence of the House of Lords Judicial Committee and latterly the UK Supreme Court are clearly important.

18 *Yam Seng Pte Ltd v International Trade Corporation Ltd* 2013 EWHC 111(QB).

19 See eg I R MacNeill *The New Social Contract* (Yale 1980); Ian R MacNeill, "Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neo-

period, there has been a development of the understanding of what it means but the heart of the idea is that a contract ought to be understood and interpreted best in the context of its place within a relationship between two parties. One of the impacts of the decision in *Yam Seng* was to bring a more blackletter definition to the contract:

> Such "relational" contracts, as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long-term distributorship agreements.[20]

This case sits within a growing development of the idea of good faith and its meaning beginning with issues of intention and honesty[21] and extending more widely. As Jackson LJ notes, many academics have felt the urge to explore the topic. Notably, Campbell has made clear links with good faith terms with the idea of the relational contract[22] and Saintier has attempted to explain the concept as used in French (Civil) Law as a means of

---

Classical and Relational Contract Law" (1997) 72 Northwestern L Rev 854; I R MacNeill, "Relational Contract Theory: Challenges and Queries" (2000) 94 Northwestern L Rev 877. Cf Randy Barnett "Conflicting Visions: A Critique of Ian MacNeill's Relational Theory of Contract" (1992) Virginia L Rev 78. A recent discussion, with further references, may be found in David Campbell, "Good Faith and the Ubiquity of the Relational Contract" (2014) MLR 460.

[20] *Yam Seng* (n 18) [142]. See also Campbell (n 19).

[21] J Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) LQR 433; Z Tan "Keeping Faith with Good Faith? The Evolving Trajectory Post *Yam Seng* and *Bhasin*" (2016) JBL 420.

[22] Campbell (n 19).

demystifying it.[23] In the construction law context, the present author has undertaken some analysis of the context of good faith, more broadly, and Mante has attempted to interpret the particular words.[24] Others have also explored the concept in this commercial context. The growing international importance of the topic can be seen in the wider selection of papers in this Journal.

After the case law developments, the second development in the growth of good faith in construction is that the suite of standard form contracts known initially as the New Engineering Contract and now as the "NEC" has been coming to particular prominence in the UK[25] following its use for the delivery of such significant projects as the London 2012 Olympics and London Crossrail, as well as increasing popularity more generally. The NEC suite of contracts, which has been around in various editions for 20 years, has a specific goal of being collaborative,[26] and an earlier version of the contract was endorsed by Latham as helping towards that sort of goal.[27] There are various ways in which this is done,[28] but for present purposes, the key is the provision set out at the start of the contract that the parties will comply with their obligations and "work together in a spirit of mutual trust and

---

[23] S Saintier, "The Elusive Notion of Good Faith in the Performance of a Contract, Why Still a Bête Noir for Civil and the Common Law" (2017) JBL 441.

[24] J Mante, "Mutual Trust and Cooperation under NEC 3 & 4: A Fresh Perspective" (2018) Const LJ 231.

[25] The usage had been growing year or year but seems to have dropped back, or at least plateaued. *NBS National Construction Contracts and Law Report 2018.*

[26] Martin Barnes, "Preface" in *Procurement and Contract Strategies* (NEC April 2013) vii.

[27] Latham Report (n 2) 39.

[28] Christie, "Capturing Collaboration" (n 9).

cooperation."[29] This obligation has been understood as bringing in obligations similar to good faith.[30]

This phrase "mutual trust and cooperation" was found in the earlier versions of the contract and in the NEC 2, and has broadly survived into the fourth edition, NEC 4, which was issued in summer 2017. The latest version has split the provision into two sub clauses, the first requiring parties to comply with the contract, and the second, mandating cooperation in a spirt of mutual trust. It has been suggested that the split serves to emphasise the first provision, namely compliance with the contract. That may be so; but another reading is to demonstrate that, by physically placing the obligations side by side on the page, the provisions are given more equal standing. Mante, in particular, has looked at the interpretation of the particular words.[31]

The new version of the NEC contract has also included a specific form based on "alliancing", a more advanced form of collaboration which aligns parties' commercial and wider interests, not just their legal ones. It creates a platform for engagement and risk sharing across the construction project team, not just the more traditional pairing in a construction project with a project manager as referee. In the alliancing contract, each project has its own set of project governance routines.[32] Such a platform ought to be given a chance to

---

[29] Clause 10.1 of the Engineering and Construction Contract which is part of the New Engineering Contract 3rd Edition suite (Thomas Telford Ltd, April 2013).

[30] See eg S Jackson, "Good Faith Revisited" (2014) Const LJ 379, 379, and referring, in particular to the clause in the case of *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200, and the lecture given by Lord Justice Jackson (n 1).

[31] See eg Mante (n 21).

[32] See discussion by, among others, Khalid Ramzan, "NEC4 Alliance Contract opens door to increased collaboration" (Out-Law.com 26 June 2018)

succeed but the contractual framework is complex and is likely to require significant investments in effort and funds to operate smoothly. Moreover, the apportionment of risk and profit sharing means that the parties' interests are aligned through different processes and cultural and psychological drivers. The present exercise is focussed on the extent to which parties retain their own underlying commercial interests and aims at examining more straightforward contractual arrangements. That then requires examination of particular parts of the contract.

In the construction context, the case law has avoided giving an expansive definition to these good faith type obligations and generally seem to have endeavoured to avoid dealing with the substance of the term[33] although there are examples where good faith,[34] or similar ideas,[35] have influenced the interpretation of the provisions. If not directly opposed to it, this does seem to run against the broader trend within case law on the interpretation of contracts and which has lately focussed on the actual words of the contractual document.[36]

<https://www.out-law.com/en/articles/2018/june/nec4-alliance-contract-increased-collaboration> accessed 30 May 2019.

[33] See Christie, "Cooperation" (n 13) 99 – 100.

[34] See *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Limited* [2017] NIQB 43.

[35] *Birse Construction Ltd v St David Ltd* [1999] EWHC253 (TCC) used a "partnering charter". See also "Christie" (n 13) 110-111.

[36] *Arnold v Britton* [*2015*] UKSC 36. See also Lord Sumption, "A Question of Taste: The Supreme Court and the Interpretation of Contracts" (Harris Society Annual Lecture, Keble College, Oxford, 8 May 2017) <https://www.supremecourt.uk/docs/speech-170508.pdf> accessed 30 May 2019. But cf Lord Hoffman, "Language and Lawyers" (2018) 134 LQR 553. Its an interesting question of the extent to which the contract is bringing in external reference points, expressly and how that fits.

This avoidance of engaging with the scope and extent of good faith is frustrating in many ways since the wording is expressly written into the contract and has survived the updating of the contract through several editions. The courts appear to be trying to grapple with the concept but without doing enough to take on the novelty and innovation of the wording in place. The courts ought to do more to give effect to the wording.[37]

A. Understanding and Developing the Context for Good Faith

A lot of construction law discussion and analysis is practice-focussed and blackletter without a great deal of doctrinal inquiry.[38] As noted above, while there has been some discussion of good faith in that context, the nature of the study and practice of construction law has made it difficult to transfer the more theoretical work across. This can make it harder to deal with new and more abstract concepts. Without more philosophical thinking to underpin how the concept of good faith is to be interpreted in the construction context, disputes over the interpretation of obligations based on weak arguments, rather than collaboration, will become the norm,. While the idea of good faith seems aimed at providing flexibility, there is

---

[37] Although not in favour of specifically introducing good faith, J Steyn, "Contract Law: fulfilling the reasonable expectations of honest men" (1997) LQR 433. See also *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd* [2014] EWHC 2104 (Comm).

[38] The leading textbooks are both produced by barristers' sets, namely Keating Chambers and Atkin Chambers, with some honourable exceptions. See Bell (n 12), 4; Nicolas Baatz, "Factual and Legal Causation – A Thorny Subject" (Society of Construction Law Paper No. 202) <https://www.scl.org.uk/papers/%E2%80%98factual%E2%80%99-%E2%80%98legal%E2%80%99-causation-construction-infrastructure-law-thorny-subject> accessed 30 May 2019.

insufficient clarity over its meaning for it to be used effectively. The diversity in the case law on good faith is testament to that. The balance between clarity and flexibility is not struck here, yet.

It is worth considering the wider trend of academic writing to consider how to achieve that balance. For example, it is helpful to look at the work of Wightman as a guide. On his analysis, the usual meaning of good faith needs to be derived from an external source or set of values. There are two principal sources for this meaning: whether it is "normative", involving some general value system, which is hard to identify in the modern world,[39] or "contextual", which is to say, having reference to a more specific industry related meaning.[40] This reference to context can be seen in the case law, as for example in *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)*,[41] although a more substantive meaning of good faith was not really developed. Taking account of that basis in the context, there are several possible ways in which the obligation of good faith could be developed.

Firstly, one possible result of this analysis is to treat good faith as a guide to contractual interpretation, essentially encouraging the courts to take account of commercial common sense, an external value, or something else which draws on the practice in that industry.

The difficulty with this is that if the parties were seeking such a result then it might be expected that they make that

---

[39] John Wightman, "Good Faith and Pluralism in the Law of Contract" in R Brownsword, N J Hird and G G Howells (eds), *Good Faith in Contract: Concept and Context* (Ashgate 1999) 42-44, discussed in Christie, "Cooperation" (n 13) 103 -107.

[40] Ibid 44-46; Christie "Cooperation" (n 13) 107-109.

[41] (n 30) [109]: "It is clear from the authorities that the content of a duty of good faith is heavily conditioned by its context".

purpose clear, as for example, the parties agreeing that this contract ought to be interpreted in the context of its "surrounding circumstances".[42] The extent to which this might be successful is therefore unknown, but at least the argument would be based on explicit guidance given by the parties to the courts as to their intentions. There is further difficulty in that the emphasis on the use of the wider context of the contract over a more formalist/literal interpretation has shifted considerably over the last decade in the UK, so it is difficult to now assess what, exactly, was being agreed upon.[43] Having said that, and notwithstanding the change of the structure of the clause noted above, the wording has survived in the NEC suite of contracts despite the swing of the pendulum from contextual to formalist emphases in interpretation without being changed which suggests that the panel of experts who draft the contract (to look at the context of the drafting) did not consider that they needed to change the wording to reflect that swing. Moreover, it would seem anomalous that the clause which seems, if anything, to be focussed on dispute avoidance and the parties' relationships to each other became seen as a call to action for a dispute resolver, whether a judge or arbitrator. Finally, and importantly, there are questions over the nature of the context against which the express good faith obligation is to be assessed: if the aim is

---

[42] See eg *Luminar Lava Ignite v Mama Group PLC* [2010] CSIH 01. This is the Scottish equivalent to "factual matrix" arguments. *Prenn v Simmonds* [1971] 1 WLR 1381; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101. *Luminar* is referenced here to provide an opportunity to note the author's favourite case which looked at the interpretation of non-compete clauses between two nightclubs in Edinburgh, leading to a more in-depth discussion of various forms of musical style than had previously been heard in open court.

[43] The more formalist approach endorsed in *Arnold v Britton* (n 36) would militate against this more expansive interpretation.

collaborative working, it is doubtful that the standards against which to judge behaviour are sufficiently certain to create an appropriate benchmark for assessment. While it may be said that when read as a whole, the NEC suite of contracts have a clear set of aims and philosophy which might allow for a more contextual interpretation.[44] This context was not a factor in recent decisions.[45]

Secondly, in the absence of a clear meaning of good faith, it may simply be that the obligation is to act as a "rhetorical reminder"[46] or "mood music"[47] to try and create a cultural influence on the project, that is, to remind parties to check their emotions in interpreting other each other's actions by reference to a value based on their relationship. [48] The argument against this is that if the parties sought a cultural lever there are other mechanisms to use than to add an ambiguous term to their contract.[49]

That said, in *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Limited*[50], the court was asked to consider whether the meaning of the word "forecast" in terms of costs claimable under Clause 60 of one of the NEC 3 contracts ought to mean that, if the actual figures were available, the actual

---

[44] Expanded versions of these arguments may be found in Christie, "Cooperation" (n 13).

[45] Although it has perhaps been influential in other cases, such as *Norther Ireland Housing Executive v Healthy Buildings* [2017] NIQB 43.

[46] Christie "Cooperation" (n 13) 101.

[47] Ibid. The term was coined by Mike Barlow. D Mosey and R Horne, "NEC contracts: Love and Understanding" *Building* (15 November 2016) <www.building.co.uk/nec-contracts-love-and-understanding> accessed 25 May 2019.

[48] Ibid.

[49] Christie "Cooperation" (n 13) 102.

[50] (n 45).

figures would be used. The court in that case considered that an interpretation that they would not be, would be "antipathetic"[51] to the idea of mutual trust in the contract, although the decision was reached without more direct reference to that mutual trust provision. That contains both of the ideas noted above, since the "mood music" suggests "playing fair" and the overall aim of the NEC contract focusses on ideas of proactivity and engagement which make it clear that "forecast" ought to reflect the best information available. The issues which arise are not resolved by this decision, which it is submitted did not particularly engage good faith; and, importantly in terms of what follows, there was no real discussion of the good faith phrasing on the decision reached.

As a result, it is difficult to see a wholly satisfactory definition of the term used in the NEC and the most pragmatic solution was to throw the situation back on the parties to work out for themselves what they intended – but at the outset of a project rather than when relationships break down.[52] That would help the goal of collaborative working but would not advance much towards understanding the parameters of the good faith obligations in construction contracts and help develop an understanding which might be used more widely.

Driving all these interpretations is, it seems, a desire to get the parties to be flexible and collaborate or cooperate in some way. Indeed that specific desire is in the clause. The difficulty is in terms of identifying the parameters of that collaboration, which is highlighted in the most recent interventions by recognised specialist construction law judges in England.

---

51 *Norther Ireland Housing Executive* (n 45) [43].

52 Christie, "Cooperation" (n 13) 111-112.

B. Recent Developments in the Understanding of Good Faith in Construction Law

There have been two recent discussions on good faith by leading construction specialist judges, Sir Rupert Jackson, on the cusp of retirement from the English Court of Appeal, and Sir Peter Coulson, about to step up to the Appeal Court. These discussions – in the lecture noted above,[53] and in the case of *Costain v Tarmac*[54], (discussed below), can be seen in the context of the growing work on good faith, such as that noted above, both in the UK and internationally, such as in the *Bhasin* decision in Canada. Indeed, Lord Justice Jackson's lecture seems to be an attempt to put construction law in that wider context.

These two interventions suggest that there is a hardening of the judicial view against giving much content to the performance obligation of good faith. The tension, and the concern to which this gives rise, is that it runs against the thrust of an idea which the parties have agreed to include in their contract. The general tenor of recent case law from the UK Supreme Court on the interpretation of contracts is to look at the words the parties have used.[55] There is a tension between this generally formal approach, which focusses on the words of the contract, and the attempts to read those words narrowly. Of course, that does leave the challenge of how to interpret those words and so the views of the senior judges are important. It is,

---

53 See (n 1).

54 [2017] EWHC 319 (TCC).

55 D Pannick, "Up for interpretation: when judges disagree about which word is law" *The Times* (London, 26 October 2018) <https://www.thetimes.co.uk/article/up-for-interpretation-when-judges-disagree-about-which-word-is-law-nf355x093> accessed 25 May 2019.

however, notable that Sir George Leggatt, the principal proponent of good faith within the senior English judiciary[56] has joined Sir Peter Coulson in the Court of Appeal. It may be that an appropriate case can be found to test their respective views.

At the heart of the discussion of good faith in the construction context is found in *Costain v Tarmac*,[57] probably the most definitive discussion of the "mutual trust" clause in the NEC3 thus far. This case arose following the supply of defective concrete for motorway barriers. The contract for this work contained a few incorporated documents, including two dispute resolution procedures. The bulk of the judgement is given over to the job of interpreting these procedures to ascertain if an arbitration agreement was operative on the facts of the case. A further point arose when it was suggested that the defendants in the case ought to have been clearer with the claimants about the interpretation of the dispute resolution procedures. The argument in that respect was that failure to do so breached the obligation of mutual trust and cooperation. On that point, the judge said:

> I am . . . prepared to accept that this obligation would go further than the negative obligation . . . would extend to a positive obligation on the part of the defendant to correct a false assumption obviously being made by the claimant . . . . But beyond that, on any view of clause 10.1, there can have been no further obligation because otherwise the provision

---

[56] See *Yam Seng* (n 18); Legatt (n 11); Sir George Leggatt, "Negotiation in Good Faith: Adapting to Changing Circumstances in Contracts and English Contract Law" (Jill Poole Memorial Lecture, Aston University, 19 October 2018).

[57] See (n 54).

> would have required the defendant to put aside his own self-interest.[58]

The focus on allowing parties to maintain their own self-interest is particularly noteworthy here and is in line with the general arguments of legal policy used against developing good faith in English law: that "parties are free to pursue their own self-interest not only in negotiating but also in performing contracts provided they do not act in breach of a term of the contract".[59]

It is suggested that this argument also informs the narrow interpretation placed on good faith in cases such as *Medirest*[60] as a means of trying to avoid impinging on what the parties have agreed.[61] While the narrow approach seems appropriate in this instance, the decision has the unfortunate effect of limiting the scope for good faith to be understood. The reasons for why this is a missed opportunity will be explained below.

The discussion in *Costain* is given further emphasis by the gloss put upon it as part of Jackson LJ's discussion in his recent lecture.[62] Coulson and Jackson are the most senior construction law practitioners to have opined on this subject, their views have particular weight. In his lecture, Jackson LJ surveyed the overall position on good faith in construction and

---

58 Ibid [124].

59 E McKendrick, *Contract Law* (9th edn, Palgrave 2011) 221-222, cited in *Yam Seng* (n 18) [123].

60 See (n 30).

61 Ibid. Also in terms of relational contracts more broadly, avoiding the over "stretching of consent", see MacNeill, "Adjustment of Long-Term Economic Relations" (n 19).

62 Jackson Lecture (n 1).

more broadly across jurisdictions. That survey covers *Costain* among the other key cases.

Lord Justice Jackson is careful not to give a particularly clear answer on the result or analysis in *Costain* as he is mindful that it might come before him on appeal, (which does not seem to have occurred); but he does say that "what is significant about that case is the judges' valiant struggle to ascribe to clause 10.1 a meaning which was additional to the existing obligations".[63] This restrictive view of the clause is in keeping with his judgement in *Medirest* and the general tenor of the law to date; but, for reasons explained below, ought not to be the definitive view on good faith. Yet, aside from the discussion of *Costain*, Jackson LJ's lecture canvasses the broader horizon of good faith in construction including *Bhasin*[64] and the position in China.[65] Having set out the issues initially, Jackson LJ asks, "What does good faith in the common law context actually mean?"[66] (followed shortly afterwards with a "Splendid, but does any of that hold water?)"[67] His answer to these questions is less sure. He does not seem to find any additional meaning beyond the other contractual obligations.[68] On the use of an express term of good faith he says:

> A "good faith" obligation in a construction contract may encourage an arbitrator or judge called upon to construe the contract to be "bold": in other words to be slightly more willing to give effect to the obvious purpose underlying the

63 Ibid [6.7].

64 (n 16).

65 Jackson Lecture (n 1) pt 5, [5.1]-[54].

66 Ibid [4].

67 Ibid [4.3].

68 Ibid [4.5].

> contract. . . . It is doubtful that an obligation of good faith adds to the obligation of a certifier beyond what is already spelt out in the general law.[69]

Jackson LJ also notes that this slightly grudging "boldness" would even then still be constrained by the terms of *Arnold v Britton*.[70] The result is a fairly cautious boldness.

Consequently, good faith is further hampered by the more restrictive interpretation of contracts now encouraged by the *Arnold* decision.[71] A more contextual interpretation might allow a wider frame of reference in examining parties' conduct.

The discussion of good faith here, then, concludes with both Justices Jackson and Coulson giving the impression of seeking meaning for good faith but without really going far in that search. This approach denies parties an interpretation of their contract which fits with what they have actually agreed as evidenced by the words they have agreed upon. That may be because in the cases which have arisen so far, there has not been a use to be found for the good faith language. However, the current approach is unsatisfactory for three broad reasons. Firstly, much, but not all, of the discussion which tends to cut against good faith focusses on implied obligations. Here, there is an express obligation and more ought to be done to try and give that meaning. Secondly, it gives the impression that the senior judiciary will give weight to the obligations of good faith, (they seem to be engaged in a "valiant struggle" to do so[72]), but does not provide much by way of guidance about when and

---

69 Ibid [6.10].

70 (n 36).

71 Which decision was issued following completion of the work on the previous article on this subject

72 See (n 60) [6.7].

how they might do so. This creates uncertainty as it leaves parties with the avenue of a good faith argument open. Thirdly, by not recognising more by way of an obligation of good faith, the judiciary are following the self-interested cultural approach which policy thinkers from Latham onwards have sought to move beyond.

In terms of making progress however Jackson LJ was given some opportunity to expand on how this approach might operate in practice when giving the judgment in the Court of Appeal in the case of *Amey Birmingham Highways Ltd v Birmingham City Council*.[73] That judgment focussed on the obligations arising under a relational contract rather than a good faith obligation, but these are closely linked [74]and, in any event, the approach of boldness can be seen where Jackson LJ said the following:

> Any relational contract of this character is likely to be of massive length, containing many infelicities and oddities. Both parties should adopt a reasonable approach in accordance with what is obviously the long-term purpose of the contract. They should not be latching onto the infelicities and oddities, in order to disrupt the project and maximise their own gain.
>
> In the present case the PFI contract worked perfectly satisfactorily for the first three and a half years. Things only went wrong in 2014 when ABHL thought up an ingenious new interpretation of the contract, which would have the

[73] [2018] EWCA 264.

[74] See *Yam Seng* (n 20), in which the relational contract was the starting point in the implication of a good faith obligation.

> effect of reducing their workload, alternatively increasing their profit if BCC issued change notices.[75]

The similarities between "boldness", as used in the lecture, and "not latching onto infelicities", as used in the case, are clear: both contain the same sort of idea of being focussed on the main issues and avoiding technicalities, which is generally something like a purposive rather than literal approach, although the fact that neither point is expressed using these terms of art, suggests a more rough and ready approach is to be adopted. Moreover, there is a clear link in the literature and case law between the use of good faith ideas and those of the relational contract, whether it is in *Yam Seng*, discussions such as Campbell's,[76] or in Jackson's lecture itself.[77] Finally, in the lecture, Jackson LJ cited the same article on relational contracts as he referred to in his lecture;[78] namely that by Professor Collins, and said:

> I question whether there is any need to super-add an obligation of good faith. The general law implies a duty to co-operate.[79] It is difficult to see what additional conduct an obligation of good faith will import, beyond those obligations arising under the express or implied terms.[80]

Jackson thus sees a distinction between relational contracts and good faith. However, this fails to give weight to the fact that the good faith obligation is also an express term of

---

75 (n 18) [93]-[94].

76 See Campbell (n 19).

77 Jackson Lecture (n 1).

78 Ibid [4.5].

79 Referring to *MacKay v Dick* (n 15).

80 Jackson Lecture (n 1) [4.5].

the contract. When Jackson LJ says that there is a struggle to add additional meaning to existing obligations, he does not seem to account for the fact that the "mutual trust and cooperation" provision is expressed as an existing obligation in the contract and that this is being denuded of content. As noted above, this runs against the general trend in contractual interpretation, at least to some extent. In terms of the position on cooperation, the provision goes beyond that with the mutual trust language. The express agreement of a more substantive term, it is suggested, indicates that the parties are seeking to go beyond the limits of the underlying idea of cooperation from the common law, or are at least seeking for it be used differently.

Taking this observation with the others, set out above, a number of observations can be made about it and which underpin the analysis of the next steps.

The *Amey* obiter helps clarify the bold approach and it does reflect an approach of robustly reminding the parties that they have contracted in terms to be positive in their relationship with each other. That accords with the approach to enforcing, for example, statutory adjudication decisions under the Housing Grants, Construction and Regeneration Act 1996, where the courts have been clear that they will be robust in allowing enforcement and not look for technical reasons to overturn a decision.[81] However, the interaction of this with

---

[81] See eg Jackson J (as was) in *Carillion v Devonport Dockyard* [2005] EWHC 778 (TCC) [80] (approved Court of Appeal [2005] EWCA Civ 1358):

> Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice.

general contractual interpretation is not clear, nor is the issue of boldness clearly defined. It is possible that it will be identifiable when it arises, but that does not necessarily help the parties to manage their behaviour. That leaves matters with a restrictive and minimalist interpretation of good faith. It only creates uncertainty, without the particular benefit of flexibility. As noted in the discussion of good faith above, it would be odd that a mutual obligation between the parties amounts, in effect, to an instruction for the judge or arbitrator who is deciding any dispute.

At the same time, this broader, generous approach highlights the inconsistency with the rationale based on self-interest which is expressed by Coulson. In *Amey*, the interpretation of the terms arrived at did not require a good faith obligation to assist it. Indeed, Coulson's logic is itself internally inconsistent: he was willing to acknowledge that parties should correct a false assumption, but without addressing the point that this would require the putting aside of their own self-interest, which he also says is not required by clause 10.1. The "interest of the project" mentioned in *Amey* clearly has some role to play.

The basis for this seems to be a narrow a view of self-interest and lack of emphasis on the relational aspect of the contract. As Jackson remarks in *Amey*, one possible interpretation of this clause is that it requires parties to modulate their self-interest, recognising that there is scope for parties to have a mutual self-interest in the delivery of the project and, crucially, taking account of the relational nature of the construction contract. The similarity in outcome from a use of good faith and the existence of a relational contract links the two concepts; but as Jackson points out in his lecture, they are not necessarily reliant on each other. The answer to this, of course, might be that there is good reason not to take an

expansive approach to good faith in the construction context. The reasons given above demonstrate that a more expansive definition is desirable since they would give effect to the express words of the contract, and at the same time could contribute to a change in culture by moving beyond a narrow view of self-interest.

II. WHY RESTRICT GOOD FAITH?

It is important to try and identify the rationale for why the interpretation of good faith ought to be restricted.

There is the argument for certainty and not bringing in confusion by the introduction of terms with no fixed meaning. This has some force, and while the broader point about the need to ensure that contracts are flexible to meet the needs of those who agreed upon them, while avoiding stretching beyond the initial consent,[82] certainty is an important value. The risks of this can be seen from Jackson LJ's reasoning on why such obligations should not be implied, when he concludes:

> There is generally no reason to imply such a nebulous provision of little utility. There is also a wider policy consideration. A large number of individuals who had nothing to do with drawing up the contract, have to operate in accordance with its provisions. . .They all need to know what the contract requires and what the contract permits. To that end, they do not speculate about ethics or metaphysics. Nor do they ring up their lawyers at every turn. They look at the black letter provisions of the contract. That is what the court should do as well.[83]

---

[82] See MacNeill, "Adjustment of Long-Term Economic Relations" (n 19) 901. Cf Barnett (n 19).

[83] Jackson Lecture (n 1) [6.11]

This situates one point of the resistance to good faith in UK construction law, namely the aspect of the balancing between flexibility and certainty the need for clarity and understandability. This need is perhaps more pronounced in the construction law context than in other commercial spheres because of the relative disconnect between what the commercial/legal teams agree for the terms of the contract and what those delivering the works understand to be the situation. This has been identified by the construction law commentator, Tony Bingham, as one of the sources for the prevalent disputes in construction: "Do you see how all these points [i.e. causes of disputes] overlap? The contractual rules are unfathomable to the lads doing the actual building work"[84]

There is the danger that if the discussion on the nature and scope of obligations becomes too esoteric, it becomes irrelevant to the general project management process, the fundamental obligation underpinning delivery. As noted above, one solution is the suggestion of getting the teams together to help them work through and develop their understanding.[85] However, against this argument, construction contracts contain plenty of technical provisions and so the key ought to be that the contract makes sense in operation whatever the provisions say.

That said, the need to keep things simple is important to bear in mind. One of the strongest points made by the NEC suite is that it uses plain English, which promotes this.[86] That

---

[84] Tony Bingham, "Still Beating the Drum" *Building* (21 April 2017) <https://www.building.co.uk/communities/still-beating-the-drum/5087282.article> accessed 25 May 2019.

[85] Christie, "Cooperation" (n 13) 110-113.

[86] See discussion of language by Peter Rosher, "NEC3 contracts: partnering benefits, drawbacks and adaptation under French law" 2015 IBLJ 311, 316-317.

does not mean that we ought not to engage with complicated ideas to try and identify the way forward. It does mean that the need for the operation of the construction contract to "make sense" is an important factor to be considered.

To get to this resolution, however, it is necessary to understand how the more restrictive analysis of good faith seems to underplay (1) the relational nature of the contract, specifically the NEC, and linked to that (2) the nature of self interest in construction projects and more broadly. The restrictive view does not necessarily reflect the desire of parties to deliver successfully and, moreover, to the extent that it might, the arguments around changing culture suggest that this attitude ought to be developed. Overcoming these hurdles is important in developing the collaborative spirit, as well as resolving the issue of what the words in an important standard form say.

A. Relational Context

The linking of good faith and the relational contract is clear from the literature and the case law. The terms are not, however, synonymous. The *Yam Seng* approach was that relational contracts might give rise to implied good faith. The question might be asked about whether express good faith provisions give rise to relational contracts, and what the impact of that might be.

As Jackson notes in *Amey*, and as is clear from the literature, there is considerable debate on the meaning of relational contracts.[87] There is an understanding in the case law

[87] See sources cited in (n 19).

about what sort of features are required.[88] That may come from the discussion by Leggatt noted above, or from comments in *Unicorn Tower v HSBC Plc*, [89] where Lady Wolffe gave the example of a relational contract as one "where the nature and duration of the contract pointed to a need for active co-operation between the parties".[90] The link between cooperation and relationality is clear from the case law. It would fit the model of trying to build a more collaborative approach to delivery of construction projects. However, the cases on the subject tend not to include construction contracts as particular examples within the definition, suggesting that the link is not immediately apparent, although that might also reflect the nature of the disputes and the broad terms of reference. To some extent, that might be understandable. If, (and this analysis is disputed), there is a continuum of contracts between simple, one-off transactions, such as the purchase of basic groceries, and relational contracts, such as ongoing commercial agency arrangements,[91] then construction contracts can be seen to have features drawn from both ends of the spectrum. Moreover, even within construction contracts there are differences of approach. On the one hand, the relatively simply constructed contract forms promulgated by the Joint Contracts Tribunal (JCT) and which remain the most popular within the UK, take a relatively restricted and narrow approach to the parties'

---

88 For a brief and interesting summary of the current situation, see Angharad Parry, "Contract and Good Faith: An idea gaining ground?" (*Lexology*, 20 March 2017) <https://www.lexology.com/library/detail.aspx?g=f306fb14-fe65-4a41-a32b-d6fa1dcdd52e> accessed 30 May 2019.

89 2018 CSOH 30.

90 Ibid [43], echoing the English court of Appeal in *TRW v Globe Motors* [2016] EWCA Civ 396 [65].

91 See eg the work of MacNeill (n 19).

relationship. By contrast, the NEC suite, which is the focus of this discussion, seems to put more stock in relational issues such as communication and information,[92] with a key focus on collaboration. Still, at the more relational end of the spectrum, are those contracts which are expressly relationship and which are founded on "partnering" and "alliancing". These focus on aligning the parties' interests and detailed provisions for relationship managing.

It is true that the relationship between the parties to the construction contract lasts for a period and has to deal with changing circumstances and needs for flexibility. Indeed, the specific need for striking the balance between security and flexibility is recognised in, for example, the Draft Common Frame of Reference which gives construction services contracts as a specific example of a contract where security comes from flexibility, rather than from having a more certain set of obligations, which would usually be the case.[93] At the same time, the parties' relationship itself is not always particularly long, perhaps a question of months which reflects the fact that the rules are not fixed in stone. Against this, the case law implies that relational contracts are relationships that span a longer period, reaching often into years, which suggests a different character of arrangements from the more medium term construction contract.

The outcome or output of a construction contract is usually a fixed thing which might be philosophically tied to a sale of goods contract, a one-off transaction, rather than being

---

92 Arthur McInnis, "The New Engineering Contract: relational contracting, good faith and cooperation" [2003] ICLR 128, 130.

93 E Clive and C van Mol, Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, Outline Edition (Sellier 2009): Principle 22 at p 47.

open-ended provision of a service such as exists in many of the cases.[94] Finally, the very level of detail which is spelt out in many construction contracts could mean that the relationship is deemed codified to the exclusion of other values. That seems to reflect the restrictive interpretation, but excludes the scope for further development or a broader, more flexible, approach. Finally, the fact that parties can choose a higher or lower level of integration in the delivery of a project suggests that not all construction contracts ought to be treated as being as relational as each other. It could be said that construction contracts may not be relational contracts – at least as a general or universal rule. The question is open, but as possible new interpretations emerge, there is a risk of uncertainty. Further investigation beyond the case law is therefore required.

Calling back to the academic work, Jackson LJ in both his lecture and the *Amey* judgement has singled out the work of Hugh Collins.[95] In his view, relational contracts (1) lead to an implication of duties including of mutual trust and confidence,[96] and which seems to be used in the same category as obligations as "good faith",[97] (2) a "long-term business relationship [which] relies for its success on the acceptance of the parties of indeterminate obligations of cooperation",[98] and (3) that a more contextual interpretation may arise from a

---

[94] Acknowledging, of course, that construction contracts require the provision of a service, but that this is usually with the end in mind of a tangible and physical result.

[95] Hugh Collins, "Is a Relational Contract a Legal Concept?" in S Degeling, J Edelman and J Goudkamp (eds), Contracts in Commercial Law (Thomson Reuters 2016).

[96] Ibid 43.

[97] Ibid 57.

[98] Ibid 56.

relational contract.[99] It is clear this echoes many of the features of the NEC forms, whether express or implied within that.

In terms of the content of the obligations which flows from this, Collins says:

> The precise content of the duties inserted by implied terms into relational contracts will evidently depend on the context and purpose of the transaction, the express undertakings made by the parties and the acknowledged implicit expectations of the parties. But two elements of these implicit obligations stand out: expectations of cooperation and loyalty in order to give business efficacy to this kind of transaction, and the avoidance of actions likely to destroy mutual trust and confidence between the parties.[100]

If the focus is on the NEC suite, then that set of contracts, in structure, emphasises collaboration, and overarching good faith obligations would seem to fit that idea.[101] In that context, it is striking how clearly those ideas link with the terms and concepts set out by Collins, both in terms of the cooperative ethos and the link in terms of "mutual trust" language. In addition, in the case of the NEC suite, the structure of the contract as a whole can feed the idea of relationality.[102] As has been suggested elsewhere, the clarity of the philosophy of the NEC suite makes it easier to identify the context against which actions can be assessed. As a result, since the NEC is so prescriptive in terms of its action requirements on parties to it, and also because it is written in plain English, it is easy to link

---

99 Ibid 56.

100 Ibid 43.

101 Christie, "Capturing Collaboration" (n 9); McInnis (n 92).

102 Ibid.

these abstract ideas into the reality of carrying out the work envisaged by the contract.

However, there remain two questions, namely (1) what the transferability of these notions is to a different set of terms in a different construction contract, and (2) how good faith might impact in those other forms of contract. These questions are linked. As noted above, there may be doubt about whether a construction contract is relational. That would pose difficulties in understanding the application of good faith or wider relational duties in construction contracts, even if the ideas around implied good faith in *Yam Seng* were accepted. Given the variety of projects and services covered, it is unlikely that this question could be definitively answered.

It would seem sensible, given the links in language and ideas, and especially given the choice of words in the NEC suite, that this might be seen as the parties agreeing that this contract was to be treated as relational, with all that that implied. An express good faith obligation set up to weave through the whole contract could amount to a contracting-in of relational ideas. At the very least, it acts as evidence in favour of that. One response to this might be that if parties wanted a relational contract then they could have chosen those words; but, in contrast to ideas of interpretation within "commercial good sense", it is submitted that the idea of a relational contract per se is not one which is well understood outside of contract law theory. Instead, the parties have chosen to use terms which, in that contract law theory, are closely and inextricably linked with the idea of the relational contract such that it may be considered sufficiently synonymous as to be a choice to include those values.

That, however, does not advance the overall discussion about what that actually means the parties have to do. It does mean that it must be accepted that there ought to be some

content to the right. Jackson LJ's view about being a call to the judge has force, but the terms of the contract are not, in the first instance, about communicating with the judge. The focus is on the parties' relationship. That provides the answer: there is a relationship rather than necessarily two parties operating self-interestedly.

B. Overcoming Self-Interest

As noted above, the law has developed, or is developing, the idea that contracts ought to be more flexible and that parties are seeking to collaborate, unless there is a complex framework which encourages the parties to align their interests commercially. This hardening against good faith seen in *Costain* may restrict that development and is focussed on too restrictive an idea of self-interest.

Moreover, this harder approach, in the context of the NEC suite, does not take account of the view that the contract is aiming at flexibility and collaboration. Fundamentally, the limit on expanding the scope of good faith seems to arise when there is an issue which suggests parties must go beyond their own self-interest in order to cooperate in mutual trust. That ignores the idea of collaboration which must, if it is to have any meaning at all, include an idea of working together;[103] but, it also takes too narrow a view of parties' self-interest. That there must be some limit on the need to reach out, and that that limit may be difficult to define ought not to prevent any attempt to work out the definition. The idea of the relational contract acknowledges that parties are not just interested in themselves. As argued by Campbell, the fundamental nature of good faith

---

[103] That being the etymology of the work from the Latin "cum laborare", or to "work with". *Oxford Latin Dictionary* (2nd edn, 2012).

is that it draws on other people as a reference. Drawing on the idea of good faith from *Yam Seng*, he says:

> As the reception to *Yam Seng* shows, the current situation is one in which the existing rules relating to good faith which are to be found in the positive law of contract cannot be welded into a coherent doctrine because it is thought that legitimate contractual self-interest is solipsistic. It is not, rather it is other regarding, as those existing rules indicate and as an explicit concept of good faith would make clear. The development of a concept of good faith would not be an altruistic imposition on the contractual law of agreement and the negotiations of contracting parties. It would be a clarification of the actual nature of the self-interest of the contracting parties which the law of contract must facilitate.[104]

If good faith is "other regarding", then the obligation within the NEC suite which looks at mutual trust and cooperation must be even more so. It is meaningless without attention to another party.

C. Working Out What the Meaning Is

One way to understand how this change of perspective from self- to other-regarding might arise is by looking at the view of good faith from another constituent part of the UK, Scotland.

The Scottish Law Commission, the public body charged with reviewing the law in Scotland, has recently concluded a significant review of contract law, using the Draft Common

---

[104] David Campbell *Adam Smith and the social foundation of agreement: Walford v Miles as a relational contract"* (2017) 21 Edin LR 376, 404.

Frame of Reference as a sounding board for Scottish concepts.[105] Interestingly, the discussion of good faith in this document came in terms of its use in remedies for breach, rather than in other areas of contract law. The SLC stated:

> In Scots law terms, the duty [of good faith] operates rather like a personal bar:[106] more as a shield than a sword. The emphasis otherwise would seem to be on mutual cooperation and disclosure with due regard for the other party's interests.[107]

The discussion paper on this topic focuses on the way in which good faith is woven into the Scots law approach in various areas. Given that "in good faith" currently is understood in Scotland as an intrinsic rather than express duty in the Scottish common law, the Scottish Law Commission considered it was not the appropriate time to try and develop the doctrine further.[108]

Taking this forward, it may be that the adversarial nature of the construction industry and dispute resolution in the UK has hidden something important about the use of good faith. Undefined, good faith is likely to assume a subjective meaning. . . . along the lines of "something someone else has done that I don't like". This leads to it being used as a line to attack the position taken by one of the other parties. That may be looking at the issue from the wrong side of the equation.

---

105 See details and outputs at the page on the Scottish Law Commission's website for the project on Scottish Contract Law in the light of the Draft Common Frame of Reference: <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/contract-law-light-draft-common-frame-reference-dcf/> accessed 6 June 2019.

106 The English law equivalent term is "estoppel".

107 Scottish Law Commission, *Discussion Paper on Remedies for Breach of Contract* (Scot Law Com No 163, 2017) para 11.16.

108 Ibid para 11.22, and Question 75.

As highlighted by the SLC, the use of good faith as a shield, rather than a sword, indicates that the true value of good faith may be in looking at how parties react to a breach, rather than as a basis for a claim by itself. On that assessment, it can be a defence to justify behaviour, rather than a source of outrage. It is naturally something which sits outside the traditional adversarial approach, which takes traditional contract terms as a mode of attacking the conduct of others. Instead, good faith as a shield makes parties reflect on, and justify, their own conduct. Although that seems to invert the idea of other-regarding, the reflective stance it would require would naturally demand consideration of the wider context. The aim of the SLC discussion paper was to consider ways in which remedies for breach of contract could promote the performance of the contract, rather than relying on damages.[109] That would seem to be one aim of collaboration.

D. Adding this Together

In terms of how this impacts the understanding and operation of the construction contract, which is not perhaps as relational as some others, Collins sketches the boundary between indeterminacy and flexibility so as to get to additional obligations which are implicitly recognised.[110] The idea of interpreting the contract in three dimensions comes into play,[111] including the idea psychological contract, which is that the parties' behaviour to each other and understanding of what

---

[109] The Discussion Paper stated that its focus was "on performing the contract as agreed, and as much as possible keeping the parties working together for solutions to disputes, rather than ending up in court or terminating their contract altogether". Ibid para 1.39.

[110] Collins (n 94) 56.

[111] Ibid 58.

they are required to do is governed by assumptions and tacit understandings as much as by a document in writing: breaches of those understandings can, therefore, cause more difficulty than breaches of the underlying agreement.[112] This three-dimensional approach is more than using the wider context to interpret the blackletter provisions. On the contrary, what is relevant here is the point that the parties' overall understanding of the position is likely to be wider than the words on the page, but that those dealing with the words on the page ought to take account of this wider understanding.

III. SO…WHAT DOES THIS MEAN?

Returning to the reality of a construction site, while this all seems relatively esoteric language, it recognises the simpler ideas and points to a way of understanding the contract in its wider context as understood by the parties' relationship to have elements of mutual reinforcement. At the end of the day, the construction contract is aimed at the delivery of a project and both parties have an interest in its completion even if their economic drivers are different. In *Amey*, Jackson LJ contrasted "latching onto infelicities…to maximise their own gain" with "the interests of the project".[113] Without getting too metaphysical, that can only mean the shared interests of the parties in successful delivery.

Crucially in these construction contracts, the obligations towards relationality potentially supported by good faith are not to be implied, but are expressly agreed by the parties in their contracts. The characterisation by Coulson J in *Costain v Tarmac*

---

[112] See discussion of the link with the NEC 3 structure in Christie, "Capturing Collaboration" (n 9).

[113] See (n 72).

that the parties would not act against their self-interest fails to deal head-on with the fact that if they have agreed to cooperate with mutual trust they are agreeing to a wider interpretation or sense of their self-interest. They may be taken as having agreed that this might be diluted. In a construction contract, there are parameters for what success will look like in a way that focusses on the external project, rather than the achievement or goals of the individual parties. The bold approach is therefore part of the requirement; but the parties need to take further steps, and the courts ought to encourage this.

The key issue is that the third dimension, in terms of the standard of conduct to which parties ought to be held, remains unclear.

In terms of working out how to develop the doctrine, the first step would be to recognise that the good faith wording has meaning, and to use it to develop the psychological and three-dimensional requirements which it entails. The parties need to embrace this. Building a positive culture is, therefore, important, and indeed fits the idea of the mood music and rhetorical reminder noted previously. The NEC, or other similarly detailed contracts, seems to already operate that way and the courts ought to recognise that parties have committed to taking steps to do this by holding them to higher standards of conduct to prevent them acting in a way which hinders the effective delivery of the project. If that requires, for example, greater transparency in discussing appropriate dispute resolution provisions, such as might have occurred in *Costain v Tarmac*, or in providing more detail and explanation of the award of points in a PFI contract, as might have happened in *Medirest*, then that should have been noted by the judges even if it did not change the analysis. After all, there is a reasonable chance that greater transparency might have helped defuse the situation. There is a commitment required in using the NEC,

and one step would be to work on the extent to which some of that contract's flexibility can be achieved without the full integration of that contact's overall approach. That approach could also be assisted by parties embracing the ambiguity of good faith and acknowledging that it is more than a bare legal obligation, by enumerating what they think it means and the various requirements it would bring along for a particular contract.[114]

That this may require a significant change of culture in the UK industry is not a flaw, or bug, in the system but the central point. Asking not what the contracting party or the employer is doing for itself, but what it is doing for the successful delivery of the project,[115] is a significant shift. Moreover, this requires more than simply a difference of stance but an acknowledgement that information must be shared and discussed, and that issues must be dealt with.

This sounds perhaps over dramatic, but it comes in the context of wider calls in the industry for a change of attitude and practice. Such a move therefore would not occur in isolation – and would benefit from the wider understanding and development of standards to which parties could be held.

Professor Rudi Klein, as a response to the Carillion collapse, recently called for greater regulation of conduct in construction. Such a regulator would seem intrusive, but one area of benefit in the current discussion would be in helping to

---

[114] There is an interesting discussion of this idea in Richard Harvey, "Good Faith, Contracts and Procurement: Analogous Means to Achieving Legal Certainty?" (Society of Construction Law Paper D211, May 2018) <https://www.scl.org.uk/papers/good-faith-contracts-procurement-analogous-means-achieving-legal-certainty> accessed 6 June 2019.

[115] With apologies to John F Kennedy.

develop standards for collaboration and good faith. [116] That would help develop the standards which could be enforced. They may draw on things such as the Society for Construction Law set of construction ethics.[117] At present, the difficulty for these sorts of documents is that they replace an open textured idea like "good faith" with similarly open textured ideas such as "honesty" or "fair reward". However, taken together, there is scope to develop greater understanding of the commonly acceptable terms. The restrictive interpretation of good faith currently espoused would run against these developing trends, whereas a more constructive focus on the wider purpose of the project could help to build these trends into the legal contractual framework of construction projects more quickly. whether that was by acting as an aid to assessing parties' conduct or as a route to the incorporation of particular blackletter procedures and practices.

In the result, there is a risk that the harder line taken in *Costain v Tarmac* could send the good faith obligation in construction contracts to an end like that of the Dodo. Instead, a deeper understanding of the relational nature of that contract, and the requirement to give a broader interpretation to parties' interests and the words used in the contract, could help move the industry closer to the Dodo's demand that "all must win prizes".

---

[116] Rudi Klein, "Let's get the dogs out" *Building* (11 April 2018) <https://www.building.co.uk/communities/lets-get-the-dogs-out/5093029.article> accessed 6 June 2019.

[117] Available at <https://www.scl.org.uk/resources/ethics>.