

# NEC CONTRACTS – LATEST CASE LAW

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## The NEC

The 2015 national Construction Contracts and Law Survey 2015 by NBS, part of the Royal Institute of British Architects (RIBA):

- Confirmed NEC3 contracts are now the most popular procurement route for clients – and continue to increase their overall market share at the expense of other standard contract forms
- Found the NEC3 contract suite is now most used by 42% of clients compared to 32% mostly using JCT contracts
- Reported the NEC to be most used by 30% of the construction industry, up from 22% in the last survey three years ago, while JCT contracts are most used by 39% of the industry, down from 48% in 2012

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## NEC – case law

- Courts attitude to the NEC

- Good Faith

- Defining 'The Works'

- Notices of Dissatisfaction

- Pay Less Notices

- Dispute Resolution

- Adjudication

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## Courts attitude to the NEC

Anglian Water Services Ltd v Laing O'Rourke Utilities Ltd [2010] EWHC 1529 (TCC),

Edwards-Stuart J said:

“No doubt this approach to drafting has its adherents within the industry, but speaking for myself and from the point of view of a lawyer it seems to me to represent a triumph of form over substance”.

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## Courts attitude to the NEC

### RWE Npower Renewables Ltd v J N Bentley Ltd [2013] EWHC 978 (TCC):

Courts will look at the whole contract and its documents to determine objectively what a reasonable person with all the background knowledge reasonably available to the parties at the time of the contract would have understood the parties to have meant. A more commercial construction should be adopted

"It needs to be borne in mind that much of the language of these conditions is in the present tense, although that factor does not seem to impact upon contractual interpretation in this case"

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## Courts attitude to the NEC

### Atkins Ltd v Secretary of State for Transport [2013] EWHC 139 (TCC):

The Contract contained a version of the NEC3 Conditions, albeit somewhat modified. Mr Justice Akenhead noted that whilst the NEC3 terms are seen by many as providing material support to assist the parties in avoiding disputes and ultimately in resolving any disputes that do arise, there are also:

"there are some siren or other voices which criticise these Conditions for some loose language, which is mostly in the present tense, which can give rise to confusion as to whether and to what extent actual obligations and liabilities actually arise"

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## Courts attitude to the NEC

Costain Ltd v Bechtel Ltd TCLR 6 and [2005] BLM Vol. 22 No.8 p.1 TCC:

- NEC2 Option C for the construction of HS1, the Channel Tunnel Rail Link
- Key question was whether the Project Manager had a duty to act impartially when assessing Actual Cost and Disallowed Cost
- The Court relied on Sutcliffe – v – Thackrah, a JCT case about architects
- Acceptance that the NEC is more specific and objective than other forms
- Acceptance that in some circumstances the PM acts for the Employer
- The requirement for impartiality arises from law not custom
- The question of impartiality was NOT decided by the court. The court acknowledged the importance of the question but said that the Employer should be involved in any such discussion

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## “Good faith”

**Bates v Post Office Ltd (no 3)**  
[2019] EWHC 606 (QB), the judge said that where good faith is implied into a contract it:

*“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”*

**In Astor Management AG & Anr v Atalaya Mining Plc & Others**  
[2017] EWHC 425 (Comm), the judge said:

*“A duty to act in good faith, where it exists, is a modest requirement. It does no more than a reflect **the expectation that a contracting party will act honestly towards the other party** and will not conduct itself in a way which is calculated to frustrate the purpose of the contract or which would be regarded as commercially unacceptable by reasonable and honest people”*

**In the case of Yam Seng Pte Ltd v International Trade Corporation Ltd** [2013] EWHC 111 (QB) it was suggested that good faith should have the following meaning:

*“**What good faith requires is sensitive to context. That includes the core value of honesty.** In any situation it is dishonest to deceive another person by making a statement of fact intending that other person to rely on it while knowing the statement to be untrue. Frequently, however, the requirements of honesty go further. For example, if A gives information to B knowing that B is likely to rely on the information and A believes the information to be true at the time it is given but afterwards discovers that the information was, or has since become, false, it may be dishonest for A to keep silent and not to disclose the true position to B”*

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## “Good faith”

### Van Oord UK Limited v Dragados UK Limited [2021] CSIH 50,

Considered that an instruction to omit works and give them to others will amount to breach of contract, how an instruction to omit works is assessed under the NEC, and the application of the NEC3 duty to act *“in a spirit of mutual trust and cooperation”*

The court stated as follows:

- *“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.”*

- The Court based its decision on the Scots law doctrine of mutuality whereby:

- *“A party cannot enforce a contractual stipulation in its favour, if it is the counterpart of another obligation which it has breached”.*

- The Court decided that a right to reduce the Prices under clause 63.10 was a counterpart of the clause 10.1 obligation to act *“in a spirit of mutual trust and co-operation”*. Hence, the consequence of Dragados breaching clause 10.1 would be that clause 63.10 could not be enforced.

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## “Good faith”

### Cases that considered clause 10.1 and 10.2:

#### Mears Ltd v Shoreline Housing Partnership Ltd, [2013] EWHC 1396 (TCC)

It was held that the obligation to act in a spirit of mutual trust and co-operation could not prevent a party from relying on any express terms of the contract

#### Costain Ltd v Tarmac Holdings Ltd [2017] EWHC 319 (TCC)

- The judge recognised a good faith obligation could exist but was:
  - “... uneasy about a more general obligation to act ‘fairly’; that is a difficult obligation to police because it is so subjective.”

#### Northern Ireland Housing Executive v Healthy Buildings (Ireland) Ltd [2014] NICA 27

It was held clause 61.1 should be interpreted in line with clause 10.1 and it was held that a refusal to provide records of actual cost went against the obligation in clause 10.1

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## Design life

### SSE Generation Ltd v Hochtief Solutions AG and another [2015] CSOH 92:

- A provision for joint names construction all risks (CAR) insurance does not displace the parties' liability under an NEC2 ECC
- The standard of liability under and NEC3 and NEC4 contract is that of fitness for purpose for the works carried out
- If there are design elements to the works, this standard remains, unless secondary options X15/X15.1 are included, in which a limitation of liability is adopted as "reasonable skill and care" for the contractor's design
- X15 and the standard of "reasonable skill and care" is only a shield insofar as it relates to design; everything else, must be measured against the fitness for purpose test. This also follows the Supreme Court decision of MT Højgaard a/s v E.ON Climate and Renewables [2017] UKSC 59, whose repercussions are still being felt throughout the industry

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## Design life

### Blackpool Borough Council v. Volkerfitzpatrick Ltd & Ors [2020] EWHC 1523 (TCC):

- The minimum design life obligation, the suitability obligation and the maintenance obligation all imposed strict contractual obligations upon the defendant, and not merely reasonable care obligations
- Highlights the importance of defining your contractual design life requirements and that without a clear definition to the contrary, some form of maintenance may be required (and in the case of sacrificial coatings, they may need to be replaced entirely)

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## Payment

### Universal Piling & Construction Ltd v VG Clements Ltd [2016] EWHC 3321 (TCC):



The subcontractor alleged that there was no contractual basis for which the contractor could issue an assessment and/or payment application under the terms of the subcontract. Therefore, there was nothing that could properly be referred to adjudication. Further, the issue in dispute was the same, or substantially similar, to what had been determined in an earlier adjudication



Upon review of the subcontractor's contractual argument, O'Farrell J held that the real issue was whether that proper valuation should be carried out by a tribunal or in adjudication as the Clause 50 of the subcontract did not make any payment applications and/or assessments conclusive as to the value of the works carried out



Under Clause 50, which incorporated the NEC short form contract NEC3 ECSC, when read with clause 10.1, the sub-contractor has the obligation to make payment applications, but such applications or their assessments are not conclusive as to the value of the work carried out

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## Defining 'The Works'

### Liberty Mercian Ltd v Cuddy Civil Engineering Ltd EWHC 2688 (TCC):



This involved the use of a NEC3 Option A for a development project at Bath House.

The following points arose:



- Clause 90.5 is clear that after termination the contractor does nothing more to "Provide the Works"
- The provision of bonds, parent company guarantees and warranties are not part of the works and are therefore are not needed to "Provide the Works"
- The provision of bonds, parent company guarantees and warranties, whether under X13 or under a Z clause, is a self-standing obligation not forming part of the obligation at 20.1

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## Pay less notice

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**Advance JV v Enisca Ltd [2022] EWHC 1152 (TCC):**

The dispute concerned the validity of a pay less notice and whether it applied to interim application for payment 24 (IA 24) or interim application for payment 25 (IA 25)

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## Pay less notice

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**Sleaford Building Services Ltd v Isoplus Piping Systems Ltd [2023] EWHC 969 (TCC):**

The Court, reminded us of the applicable principles in using parallel Part 7 and Part 8 applications in adjudication enforcement proceedings. The parties had entered into an amended NEC3 ECSC.

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## Notices of dissatisfaction

### Ravestein BV v Trant Engineering Ltd [2023] EWHC 11 (TCC):

The court refused the Claimant's application for permission to appeal an arbitrator's decision on jurisdiction under Section 69 of the Arbitration Act 1996. Trant was successful party in an adjudication brought against Ravestein in February 2021

In October 2021, Ravestein served a notice to refer the dispute to arbitration. Trant successfully argued before the arbitrator that he did not have jurisdiction to determine the dispute, since Ravestein had failed to comply with the Clause W2.4(2) by giving a valid Notice of Dissatisfaction

Ravestein sought leave to appeal the arbitrator's decision pursuant to Section 69 of the Arbitration Act 1996

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## Dispute resolution

### Greater Glasgow Health Board v Multiplex Construction Europe Ltd [2021] CSOH 115:

- Tiered dispute resolution clause

- The Court upheld the tiered dispute resolution clause in the first defender's NEC3 ECC contract, and sisted (stayed) court proceedings to allow adjudication

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## Dispute resolution

J Murphy & Sons Ltd v W Maher and Sons Ltd [2016] EWHC 1148 (TCC):

- The words "any dispute arising under or in connection with this subcontract" (in Option W2 of the NEC3 Conditions) are broad enough to cover a dispute arising under the alleged settlement agreement

- Even where parties to a construction contract had reached a full and final settlement in relation to the final account, these disputes could be referred to adjudication

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## Dispute resolution

WSP Cel Ltd v Dalkia Utilities Services Plc [2012] EWHC 2428 (TCC):

This case involved a NEC3 Professional Services Contract for the design and project management of a biomass energy plant  
The following points arose:

- In the language of the NEC "does not refer", in the context of a reference to the tribunal means "cannot refer" or "may not refer"
- The validity and value of claims in an account were either actions of the employer or the employer not having taken an action for the purpose of determining when adjudication was to be brought
- The philosophy of the NEC is to avoid disputes at the end of projects by having extensive project management machinery
- A reference to adjudication may be necessary at each stage of the compensation event process

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## Dispute resolution

Walter Llewellyn & Sons Ltd v Excel Brickwork Ltd [2010] EWHC 3415 (TCC)



NEC2 Option A subcontract  
The Court found:



- The standard NEC contract does not provide for arbitration, rather it provides for the tribunal. The parties then decide what form the tribunal will take
- Failing to choose a form of tribunal did not give rise to an ambiguity and even if it did it was not one to which 17.1 would apply

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## Adjudication

SGL Carbon Fibres Ltd v RBG Ltd [2012] ScotCS CSOH 19

- The Court held that the adjudicator did not breach the rules of natural justice, noting that the parties had chosen this particular adjudicator because of his knowledge of the NEC3 contracts, having written a textbook on the subject. Further, the adjudicator was not obliged to seek further submissions from the parties:
- "... it is not practicable for the Adjudicator to go back to the parties with each of his provisional conclusions which represented some intermediate position for which neither party was contending..."

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## Adjudication

Ecovision Systems Ltd v Vinci Construction UK Ltd (Rev 1) [2015] EWHC 587 (TCC):



The Sub-Contract contained 3 sets of terms under which, potentially, either party could request adjudication:



- Option W2 of the Sub-Contract
- Option W2 of the Main Contract as amended by clause Z16, incorporated into the Sub-Contract by Appendix 1 and Document A
- If neither of the first two was operable or applicable, the Scheme in Part I of the Schedule to the Scheme for Construction Contracts (England and Wales) Regulations 1998 (1998 S.I. No. 649) ("the Scheme")
- This case acts as a reminder that care should be taken to ensure that the dispute resolution procedure in a contract should be clear-cut and simple to follow. In larger projects where conflict might arise between various contracts as to which dispute resolution procedure applies, this can be particularly important

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## Adjudication

### Vinci Construction UK Ltd v Beumer Group Ltd

In Vinci Construction UK Ltd v Beumer Group UK Ltd [2017] EWHC 2196 (TCC), O'Farrell J granted declaratory relief in a Part 8 claim, finding that an adjudicator was wrong to decide that certain sectional completion and delay damages provisions in the parties' sub-contract (which was based on the NEC3 Engineering and Construction Subcontract (ECS), using Main Option A), as varied by a settlement agreement, were "uncertain, inoperable and unenforceable". On a property construction of the sub-contract, the court held that the relevant provisions were "operable and enforceable"

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## Adjudication

Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd [2017] EWHC 1763 (TCC)

- The Court found that the adjudicator had been correctly appointed and had followed the applicable adjudication procedure

- Termination under the contractual provisions of NEC3 ECC did not have the same effect as acceptance of a repudiatory breach

- Where the parties contracted on the basis that the project manager would be independent from the parties, replacing the project manager with an employee of the employer's parent company was invalid

- Fraser J held that an interim valuation under Clause 50 did not constitute the final valuation of the work. The Project Manager was entitled to recover any overpayment in the next interim payment. He held that the payment provisions of the NEC3 contract were not designed to work in such a way that an Employer had no accrued right to recover overpayments until the next interim payment date. ICI therefore had a right to recover any overpayments paid following interim applications, notwithstanding the fact that the contract had been terminated.

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# Any questions?

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