

NEC People Conference 2026


NEC4 in Practice: A Legal Perspective

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INTRODUCTION

- Acting in the “spirit of mutual trust and co-operation” – a legal perspective;
- Reasonable skill and care v fitness for purpose:
 - Why is it important?
 - What does NEC4 say?
 - Beware of the Scope
- Option X7 - what applies if it is not selected?
- Contract Data – what is the position where entries are left blank?

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SPIRIT OF MUTUAL TRUST AND CO-OPERATION

- Clause 10.1
 - “The Parties, the *Project Manager* and the *Supervisor* shall act as stated in this contract.”
- Clause 10.2
 - “The Parties, the *Project Manager* and the *Supervisor* act as in a spirit of mutual trust and co-operation.”
- Spirit of mutual trust and co-operation in addition to contractual terms to “fill in the gaps”.
- An obligation not to improperly exploit the other party, & not a duty to act ‘fairly’: *Costain Ltd v Tarmac Holdings Ltd* [2017]

VAN OORD UK LTD V DRAGADOS UK [2021] CSOH 87: BACKGROUND

Dragados engaged Van Oord as a subcontractor to carry out dredging works as part of a project creating a new harbour in Aberdeen.

- Dragados issued a number of instructions to omit scope (1/3 of the original scope) in breach of contract.

Dragados sought to reduce the rate for the remaining subcontract works; Van Oord objected and Dragados terminated the subcontract.

- Court concluded that 10.1 and 63.10 are counterparts, and 63.10 only applied to a lawful change to the Works Information
- “*NEC should not be a charter for contract breaking*”

VAN OORD UK LTD V DRAGADOS UK [2021] CSOH 87: BACKGROUND

Outer House of the Scottish Court of Session determined that:

- The transfer of Van Oord's subcontract work constituted a breach of contract.
- Notwithstanding the fact that the instructions amounted to a breach of contract, clause 63.10 was applicable to such instructions, and Dragados was entitled to reduce the bill rate accordingly for the remaining works.
- The reduction may merely be reflecting losses which would have been incurred by Van Oord in any event

VAN OORD UK LTD V DRAGADOS UK [2021] CSOH 87: DECISION

The court considered three principles of contractual interpretation:

- A contracting party shall not be entitled to take advantage of his own breach as against the other party;
- A subcontractor is not obliged to obey an instruction issued in breach of contract; and
- Clear language is required to place a contracting party at the mercy of the other

VAN OORD UK LTD V DRAGADOS UK [2021] CSOH 87: DECISION

Held that:

- clauses 10.1 and 63.10 are counterparts, and that unless Dragados fulfils its duty to act in a spirit of mutual trust and cooperation, it cannot seek a reduction in the Prices
- Clause 63.10 only applies to a lawful change, not instructions issued in breach of contract
- Dragados' instructions constituted a breach of contract, and therefore it cannot seek to rely on clause 63.10 to reduce the Prices

Inner House highlighted the importance of considering clause 10.1, noting that it was not “*merely an avowal of aspiration*” but that it “*reflects and reinforces the general principle of good faith in contracts*” “*NEC should not be charter for contract breaking*”

GOOD FAITH RECENT CASES

- *Mark Faulkner & Ors v Vollin Holdings Limited & Ors* [2022] EWCA Civ 1371 – “core” requirement is that a party behaves honestly;
- *Matiere SAS v ABM Precast Solutions Ltd* [2025] EWHC 1434 (TCC) – party found to have breached a duty of good faith but that breach was not the cause of the innocent party’s loss

SPIRIT OF MUTUAL TRUST AND CO-OPERATION IN PRACTICE

- Parties must still comply with the contract;
- Obligation to act in a spirit of mutual trust and co-operation has substance;
- Can play a role in how other contractual provisions are interpreted;
- May encompass elements of ‘good faith’, a fundamental value of which is honesty.

REASONABLE SKILL AND CARE V FITNESS FOR PURPOSE: WHAT ARE THEY?

- Design liability
- “reasonable skill and care”:
 - a designer must show they acted in accordance with the usual practice and professional standards at the time the design was carried out;
 - Not necessary to demonstrate the highest skill.
- “fitness for purpose”:
 - Absolute obligation to achieve a specified result;
 - Does not require proof of negligence;
 - May be implied, e.g. the Contractor will comply with the Scope.

REASONABLE SKILL AND CARE V FITNESS FOR PURPOSE: WHY DOES IT MATTER?

- Fitness for purpose is a higher standard;
- Professional Indemnity Insurance:
 - Most policies will cover only professional negligence;
 - Uninsured risk;
 - May seriously limit *Contractor's* potential for financial recovery.
- Unless expressly stated otherwise, a design and build contractor must ensure that the works are completed so they are “reasonably fit for their intended purposes”.
(*Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd [1980] 14 BLR 1*)

REASONABLE SKILL AND CARE V FITNESS FOR PURPOSE: WHAT DOES NEC4 SAY?

- PSC – 20.2 “The *Consultant's* obligation is to use the skill and care normally used by professionals providing services similar to the *service*”.
- 20.3 “The *Consultant* is not liable for a Defect unless it failed to carry out the service using the skill and care normally used by professionals providing services similar to the *service*.”
- ECC X15 – “The *Contractor* is not liable for a Defect which arose from its design unless it failed to carry out that design using skill and care normally used by professionals designing works similar to the *works*.”
- Burden of proof on the *Client*.

REASONABLE SKILL AND CARE V FITNESS FOR PURPOSE: NEC4 DEFAULT POSITION

- 20.1 “The *Contractor* Provides the Works in accordance with the Scope.”
- 21.1 “The *Contractor* designs the parts of the *works* which the Scope states that the *Contractor* is to design”.
- The *works* must comply with any purpose specified in the Scope.
- Depends on the precise wording in the Scope.
- Reasonably fit for the purpose for which it was made known to the *Contractor*?

REASONABLE SKILL & CARE V FITNESS FOR PURPOSE: READ THE CONTRACT AS A WHOLE

MT Hojgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Limited and another [2017] UKSC 59:

- *Contractor* responsible for design defects even though it had complied with reasonable skill and care and relevant industry codes;
- Design life requirement in the technical documents;
- Reasonable skill and care clause will not override an express fitness for purpose obligation

SECONDARY OPTIONS: DELAY DAMAGES

- ‘Liquidated Damages’ - damages which are pre-agreed (= “liquidated”) at a sum.
- X7 not selected?
 - If unliquidated they are ‘general damages’
 - Remedy for breach of contract, therefore calculated on the same principles
 - Must be substantiated / proven by *Client*
 - Losses that which naturally flow from the breach
 - Check X18 –
 - Delay Damages Cap applies only if X7 applies
 - But subject to other caps and exclusions (i.e., for indirect or consequential loss)
 - Any other Z-clauses relating to liability caps?
- X7 selected but Contract Data left blank?

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SECONDARY OPTIONS: HUMAN ERROR

- Appear similar, very different commercial outcome:

X7: Delay damages

If Option X7 is used without Option X5 Delay damages for Completion of the whole of the works are per day

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FILLING IN THE BLANKS: COMPLETION DATE

The completion date for the whole of the works is

- Obligation is to complete within a 'reasonable time'
 - Term implied by statute: *Supply of Goods and Services Act 1982* section 14
 - What is reasonable? 'So long as delay is attributable to causes beyond [its] control, and [it] acted neither negligently nor unreasonably' *Hick v Raymond & Reid [1893] AC 22*
- No fixed *completion date* = liquidated damages regime falls away
- General (unliquidated) damages may still be claimable if nonetheless, the Contractor fails to complete within a reasonable time

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FILLING IN THE BLANKS: MISSING DATA

Option C and E:

- 11.2(31) The Price for Work Done to Date is the total Defined Cost which the *Project Manager* forecasts will have been paid by the *Contractor* before the next assessment date plus the Fee.
- 11.2(10) The Fee is the amount calculated by applying the *fee percentage* to the amount of Defined Cost.

Option A:

- 63.1 The changes to the Prices are assessed as the effect of the compensation event upon ... the resulting Fee.

All the *Contractor's* costs which are not in the Defined Cost are included in the Fee. Deemed the case, whether intended or not!

So what happens if...

The *fee percentage* is % ?

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FILLING IN THE BLANKS: MISSING DATA

Will....

- The Courts will look to the negotiations and apply the last-exchanged *fee percentage*?
- The Courts will calculate a reasonable *fee percentage* (based on *Contractor's* overheads, market rates, etc)?

Or

- The *Contractor* is out of luck – it gets its Defined Cost only and misses out on its Fee?

COURT APPROACH TO AMBIGUITY

- 'Black letter' interpretation:
 - Meaning conveyed to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time of the contract;
 - *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896
 - Freedom to allocate risk; Courts should avoid re-writing agreements to reflect their own views of 'commercial common sense'
 - *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827; *Arnold v Britton* [2015] UKSC 36
- Implied terms:
 - 'Business efficacy' – necessity – no term will be implied if the contract is effective without it
 - 'officious bystander' – so obvious it 'goes without saying'
 - *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* [1977] UKPC 13; *Attorney General of Belize and others v Belize Telecom Ltd* [2009] UKPC 10; *Marks & Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72;
- Rectification:
 - Not the rectification of the contract itself, but a rectification of the documents which record that contract
 - Need evidence of common intention of the parties
 - *FSHC Group Holdings Ltd v Barclays Bank plc* [2018] EWHC 1558 (Ch)
 - Equitable remedy - court discretion and 'clean hands' required

KEY TAKEAWAYS

- Mutual trust and co-operation is a provision with substance
- 'Reasonable skill and care' does not limit 'fitness for purpose'
- Contract conditions and scope documents will be read together as a whole
- Ensure consistency between Contract Data and Secondary Options to avoid unintended commercial outcomes
- Courts will only intervene in limited circumstances