

NEC3 Mutual trust and Cooperation

By Peter Sheridan

A recent case, *Mears Limited v Shoreline Housing Partnership Limited* (2015), gave some consideration to the NEC3 standard wording on trust and co-operation. The provision at clause 10.1 was: “The Employer, the Contractor and the Service Manager shall act as stated in this contract and in a spirit of mutual trust and cooperation.”

This is the only provision in NEC3 which uses the word “shall”, the conventional word to indicate an obligation. Elsewhere the present tense is used, but because clause 10.1 says “shall act as stated in this contract”, the “shall” applies to the instances where the present tense is used elsewhere in the contract to indicate how the parties act. The “shall” clearly applies to acting in a spirit of mutual trust and cooperation, so that is a contractual obligation.

The *Mears* case is largely about estoppel by convention. The parties contracted for interim payment based on cost, but because they perceived particular problems in certain areas they agreed a solution which entailed that payment for certain work would be based on some composite codes. These codes were based not on cost, but value. There was a shared assumption and a convention between the parties that these codes would be used and they conducted themselves on that basis, despite the contract wording always indicating payment based on cost.

It was held that Shoreline could not then deny the convention and seek to revert to the letter of the written contract (as it sought to do) as it would be unjust to Mears on the facts of the case to permit that. The case could also have been decided on the basis of estoppel by representation. There was an entire agreement provision in the contract, but this did not exclude or limit reliance on an estoppel.

There was a fair amount of reference in the tender and what was later to be the Contract documentation about partnership and co-operation. At a launch workshop collaborative working and partnering were highlighted and of course there was the express provision on trust and cooperation quoted above. In addition to its case on estoppel, Mears also relied on a separate cause of action arising out of the trust and partnering language used in the NEC3 conditions.

Mears contended that the contract should “be interpreted and applied on the basis of the shared value and norm of behaviour of partnership” and by way of implied term that “any party would not take advantage against the other of the departure by the other from the strict requirements of the contract where the first mentioned party was or ought to have been aware of the departure without warning to the other party and affording an opportunity and a reasonable time to the other party to change”.

It was doubtful on the facts that Shoreline planned in a Machiavellian way to encourage Mears to sign the contract, knowing that Shoreline would seek to enforce the strict terms and not to make payment

on the basis of the codes, so Mears' alternative case might have foundered on the facts if sound in principle. But in any case, Akenhead J was not satisfied that there would be any such implied term or that the obligation to act in a spirit of mutual trust and co-operation or even in a partnering way would prevent either party from relying on any express term of the contract freely entered into by each party. The judge therefore decided the case on the basis of estoppel and not on the alternative basis suggested by Mears.

As the writer has previously suggested, it is unlikely that the courts would find that the obligation to act in a spirit of mutual trust and co-operation overrides other express provisions. For example, it is unlikely that it would be taken to be a breach of the obligation to act in a spirit of mutual trust and co-operation for the employer to take the point that a claim for a compensation event failed, because the requisite notice was not given (notice being a condition precedent).

While there is a clear obligation to act in a spirit of mutual trust and cooperation, what this means is less clear. It may be that good faith type obligations of honesty and fair dealing are brought in by this wording, although the words "good faith" are not used.

Peter Sheridan

psheridan@sheridangold.co.uk