Many employers and contractors, as signatories to NEC contracts, and adjudicators misconstrue the importance and the effect of core clause 10.1, being of the misconception that this core clause, in so far as it relates to ‘a spirit of mutual trust’ is merely an expression of good intent, without any binding effect. This paper analyses the meaning of the words ‘a spirit of mutual trust’ and discusses the scope of the obligation, which core clause 10.1 imposes on the parties to the NEC contract. It identifies the clause as a manifestation by the parties of an intention to create a legal relationship of trust with regard to the contractual rights and assets of one another; it equates the resultant fiduciary duties of the parties to those of a trustee of a trust, which are more onerous than a bare duty to act in good faith.

1. Introduction
There is no general duty of good faith in English law, but this does not affect the NEC (NEC Engineering and Construction Contract [previously the New Engineering Contract]), because the duty of good faith is accepted by the parties in core clause 10.1 as governing their dealings concerning the project.

2. The NEC
Core clause 10.1 provides: ‘The Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in this contract and in a spirit of mutual trust and co-operation.’

Core clause 10.1, which is at the heart of the NEC, imposes two obligations on the employer, the contractor, the project manager and the supervisor (‘the parties’): to act as stated in the contract and to act with each other in a spirit of trust and co-operation. These two obligations are the only substantive obligations contained in the NEC, but they are global in extent, as they cover all the actions which the NEC requires the parties to perform and all the dealings between the parties.

3. Interpretation of core clause 10.1
What meaning must be given to the word ‘trust’ in core clause 10.1? The rule of interpretation of contracts is to ascertain, not what the parties’ intentions were, but what the language used in the contract means. One of the meanings of ‘trust’ is a reference to an emotion: you trust somebody if you believe that they are honest, and sincere, and that they will not intentionally do anything that will harm you in any way. This is the meaning of the word ‘trust’ from a social science perspective. It is a feeling or an emotion which is either present or absent in a party, but which cannot be generated at will or upon demand. As the word ‘trust’ in this sense is not capable of being the subject of a legal obligation, it is not in this sense that the word ‘trust’ is referred to in the NEC; a party cannot be obliged contractually to feel something.

Core clause 10.1 is structured as a legal obligation. The reference to the word ‘trust’ in core clause 10.1 is a reference to the legal concept of a trust, which is composed of the legal duties of a trustee in respect of property held by the trustee for the benefit of a third party. A trust is a fiduciary relationship with respect to property, subjecting the trustee holding ownership of the property to duties to deal with the property for the benefit of another person. This relationship arises as a result of the manifestation of an intention to create it. It is this intention, that is recorded in core clause 10.1, and which identifies the relationship created between the parties as being one of trust.

As the parties do not actually hold property in trust for the benefit of any of the other parties, core clause 10.1 obliges each party to act ‘in a spirit of … trust’ (own emphasis). The reference to ‘a spirit of … trust’ as opposed to ‘the strict letter of the law of trust’ means that the parties must comply with the principles underlying the law of trust, as if these trust law principles did govern their actions. Each party must conduct himself in relation to the assets and rights of the other parties, in the same manner...
that a trustee would be obliged to act, if the trustee held those assets and rights in trust for the benefit of a third party. In other words, each party is a quasi trustee in relation to the other parties’ assets or rights under the NEC and is bound by all the duties and the limitations applicable to a trustee in his dealings with property held by him in trust. By accepting the obligation to act in a spirit of trust, with regard to the other parties’ rights and assets, each party acquires a status of a quasi trustee, and with it, the obligations of a trustee.

4. Interpretation of NEC unaffected by parties’ actions

The manner in which the parties perform the contract is irrelevant when interpreting the written contract. If the parties operated a provision of the contract in a particular, but actually incorrect, manner, this fact will be irrelevant in determining how the provision was intended to work. The actions of the parties, or of their employees or agents, which are outside the parameters of the contract, cannot be construed as an agreement to vary the terms of the written contract, or as detracting from a party’s accrued rights. This is confirmed in core clause 12.3 which records: ‘No change to this contract, unless provided for by the conditions of contract, has effect unless it has been agreed, confirmed in writing and signed by the Parties.’

5. Duties of a quasi trustee

A party, in dealing with any other party in a spirit of trust, must act in good faith and may not place himself in a position where his personal interest may conflict with his duty of good faith. This rests upon a broad doctrine that a man who stands in a position of trust towards another, cannot, in matters affected by that position, advance his own interest (e.g. by making a profit or by withholding relevant information) at the other’s expense, thus avoiding the danger of being swayed by his own interest, rather than by his duty towards those who he is obliged to protect.

The overarching obligation of a trustee is to discharge his duties acting in a bona fide manner and observing the utmost diligence. This obliges the project manager inter alia to acknowledge timeously the existence of the contractor’s accrued rights arising from the contract, and to assess timeously the changes to the prices, the completion date, and key dates to which the contractor is entitled. These actions are specifically recorded in the core clauses of the NEC, but if they were not, the project manager’s obligation to act in a spirit of trust would have obliged the project manager to have acted in this manner. This obligation of bona fides does not override or affect the parties’ agreed obligations and rights recorded in the specific core clauses of the NEC, but it does prevent the project manager from detracting in any manner from the accrued rights of the contractor, or from withholding relevant project information from the contractor.

Each party’s duties go beyond the duty of acting in a bona fide manner with the other parties, and beyond the obligation of refraining from doing anything which might prejudice the rights or assets of the other parties unless authorised. The parties’ fiduciary duties are the same as those required of a trustee.

The parties, in carrying out their specific functions under the NEC in compliance with the principles underlying the trust law, must comply with the fiduciary duties imposed on trustees: inter alia, they must discharge their duties honestly, observing the utmost diligence; they must take good care of the assets and rights of the other parties to the extent that they are able to do; they must not detract from the rights and assets of the other parties; they must not make a profit, at the expense of the other party, out of such other party’s rights and assets, unless authorised to do so; and they must make full disclosure of all relevant information they have concerning the project and the rights and assets of the other parties.

A defaulting party who failed to act as stated in the contract (e.g. failed to give early warning of an event in terms of core clause 16.1), or who breached core clause 10.1, cannot claim, that any subsequent failure by the non-defaulting party, which arises from or in connection with the defaulting party’s failure, gives rise to the non-defaulting party being prejudiced or penalised in any manner. The principle is that a party, as a quasi trustee, cannot benefit from his own breach of contract.

6. Good project management

The NEC acknowledges that bilateral engineering and construction contracts are cooperative ventures, where the parties have reached agreement involving performance by each other in order to benefit all parties and to fulfil the goal of the venture. Honouring such contract is not a matter of each party pursuing his own self-interest without regard to the other parties’ interests. The NEC protects the agreed common purpose of the contract and obliges the parties not to act in a manner inimical to the goals of the project and to the contractual rights of the other parties. This is in keeping with the principles of good project management set by the NEC.