

Insights

BATTLE OF THE FORMS: A RECENT EXAMPLE

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SUMMARY

In this Insight, first published in the March 2025 edition of the NEC Newsletter, Shy Jackson considers the topic of the “battle of the forms” in the context of a recent Scottish case, Caledonia Water Alliance v Electrosteel Castings, where the parties each provided their own standard terms and conditions, but it was held that the applicable terms were governed by the Framework Agreement.

KEY POINTS

- ‘Battle of the forms’ means dispute about which party’s terms and conditions apply to their contract. The winner is often the party firing the ‘last shot’, but not always.
- In a recent Scottish case, the parties each provided their own standard terms and conditions for NEC3 FC work packages, leading to a dispute over which terms applied, in the context of a Framework Agreement which provided the applicable terms.
- To avoid unnecessary disputes, NEC4 FC work orders should ideally be let under other NEC4 contracts and include the same contract data, rather than simply attaching terms and conditions as a matter of course.

The term ‘battle of the forms’ is used to describe a dispute about which party’s terms and conditions apply to their contract. It is often said that the winner is the party firing the last shot, but that is not always the case.

In *Magnetic Shields v Vacuum And Atmosphere Services* [2024] EWHC 2260 (TCC), a quotation was provided with minimal reference to contract conditions. The client’s purchase order made reference in each page to terms and conditions available on its website or on request. The purchase order was responded to by three emails sent over 10 minutes and the judge said it was the second email that resulted in an offer being accepted. This meant the ‘last shot’, the third email, was irrelevant as by then a contract had come into existence.

In *Caledonia Water Alliance v Electrosteel Castings* [2024] CSOH 87, the contract between the parties related to an overarching NEC3 Framework Contract (FC) for supplies. In that case, both parties referred to their own terms and conditions but the FC prevailed.

CONTRACTS AND DISPUTE OVER JURISDICTION

In 2015 Caledonia Water Alliance (CWA), a joint venture, entered into an alliance agreement with Scottish Water. CWA was obliged under the alliance to obtain plant, material and services from suppliers with which Scottish Water had a contract under an overarching NEC3 FC. This was to enable Scottish Water, or anyone acting on its behalf, to order the supply of items on agreed terms.

In 2016, Electrosteel Castings (UK) Limited signed the NEC3 FC with Scottish Water. CWA, which was replacing a substantial amount of pipework as part of the South Edinburgh Resilience Scheme, placed over 60 orders with Electrosteel between June 2018 to May 2022 for the supply of pipework.

CWA argued that the supply contracts were based on the Scottish Water's NEC FC and were therefore subject to Scottish Water's terms and conditions. These provided that the contract was governed by Scottish law and subject to the Scottish courts. Electrosteel argued it had entered into contract with Morrison Water Services, one of the CWA joint venture members, based on its own terms and conditions, which provided for English law.

COURT'S DECISION

The court began by looking at the main documents exchanged, but then considered evidence from witnesses, who explained the background to the dealings between the parties and how matters developed. The parties agreed that the correct approach was to carry out an objective consideration of what has been communicated by words and action. Both parties suggested that there should be limits on what the court could look at in terms of what was reasonably available to the parties, but the court's view was that it should not take a narrow approach to that question.

Looking at the evidence, Lord Richardson found it was clear from the outset to the parties that their relationship would be governed by Scottish Water's terms and conditions in the NEC3 FC. This was based on what the witnesses said, on the fact that both parties knew and had access to these terms and that the terms were referred to in the supplier guide prepared by Electrosteel.

The judge however then had to address what the contractual documents exchanged by the parties stated. The purchase orders issued by Morrison were template documents that attached Morrison's standard terms and condition. This was followed by Electrosteel's order confirmations, which were similar standard documents that stated the transactions were subject to Electrosteel's attached standard terms and conditions. In both cases, the parties had systems that automatically included the terms and conditions in documents issued.

The issue for the judge was therefore whether the express words used by both parties to refer to their own terms and conditions could be ignored if it could be inferred from the evidence that the parties agreed to ignore such wording. The judge noted Lord Justice Dyson's view in *Tekdata v Amphenol* [2009] EWCA Civ 1209 that ignoring the express wording required a high hurdle to be surmounted. In this case, judge held that the evidence was strong enough to show the parties intended their own terms and conditions to be ignored. This meant Scots law applied, as set out in the NEC3 FC.

CONCLUSIONS

The decision highlights the uncertainty and unnecessary disputes that can arise where contracts are entered into on the basis of an exchange of a number of documents, instead of a single contract which determines the applicable terms and conditions.

Here both parties referred to their own terms and conditions. They also accepted in court that the correct approach was an objective interpretation and that the 'last shot' usually determined the outcome. In this case however, it was the use of the NEC3 FC that determined the terms of the contract between the parties.

Like the NEC3 FC, the NEC4 FC provides that work orders (work packages in NEC3 FC) follow an instruction and the intention is that an appropriate NEC4 form is then used and the contract data identifies what will apply to the work orders.

In this case, it seemed clear that both parties recognised the effect of the NEC3 FC and acted on that basis. This emphasises the need to ensure that the contractual documents exchanged, in this case the purchase order and order confirmation, should acknowledge the contractual terms that both parties expected. In this case, the automated systems that were intended to add certainty did not reflect what had in fact been agreed.

Using standard template documents which refer to a party's own terms and conditions when this is not the case will add to the uncertainty. As noted above, it is always important to recognise the contractual framework and record correctly what terms apply.

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