

BATTLE OF THE FORMS & THE LAST SHOT PRINCIPLE

Whose terms regulate the parties' contract is a familiar bone of contention between parties where there have been offers and counter-offers passing between the parties in the guise of quotes, order acknowledgements, delivery notes all relying upon printed terms on the reverse side of the same or reference to terms to be provided on request.

Generally such a dispute is decided on the last shot principle providing the terms have been reasonably brought to the attention of the offeree.

This issue presented itself in the recent case of ***Transformers & Rectifiers Ltd v Needs Ltd [2015]*** where Justice Edwards-Stuart held that "*neither party's terms and conditions were incorporated into the two relevant purchase orders.*" The consequences being that the contracts are governed by amongst other things the Sale of Goods Act 1979.

In reaching his decision Justice Edwards-Stuart reviewed previous case law and distilled the same into 7 key principles:

1. Where A makes an offer on its conditions and B accepts that offer on its conditions and, without more, performance follows, the correct analysis, assuming that each party's conditions have been reasonably drawn to the attention of the other, is that there is a contract on B's conditions.
2. Where there is reliance on a previous course of dealing it does not have to be extensive. Three or four occasions over a relatively short period may suffice see ***Balmoral*** at [356] and ***Capes (Hatherden)***.
3. The course of dealing by the party contending that its terms and conditions are incorporated has to be consistent and unequivocal see ***Sterling Hydraulics***.
4. Where trade or industry standards terms exist for the type of transaction in question, it will usually be easier for a party contending for those conditions to persuade the court that they should be incorporated, provided that reasonable notice of application of the terms has been given see ***Circle Freight***
5. A party's standard terms and conditions will not be incorporated unless that party has given the other party reasonable notice for those terms and conditions see ***Circle Freight***
6. It is not always necessary for a party's terms and conditions to be included or referred to in the documents forming the contract; it may be sufficient if they are clearly contained in or referred to in invoices sent subsequently see ***Balmoral*** at [352]. [356]

7. By contrast, an invoice following a concluded contract effected by a clear offer on standard terms which are accepted, even if only by delivery, will or may be too late see **Balmoral** [356]

When a contractor or supplier sends its quote or order acknowledgement or delivery note it must ensure that its terms and conditions are clearly identified placing the recipient of said terms on reasonable notice, especially if they are printed on the reverse of the document.

Further if the terms are on the reverse of the document and you are emailing the document ensure that both sides of the document are sent. Alternatively you may wish to attach a separate document containing your terms and conditions.