



Technical

5 Cases That Affect Your Business - Part One

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This is the first article concerning the five cases that affect your business dealing with 'Agreement and Contract Formation - Battle of the Forms' and 'Extension of Time'.

1. We are sure that it will be universally accepted by construction companies that a good working knowledge of construction law and how it practically affects your day to day business is a useful and some would say an essential part of the toolkit that you need in contracting particularly in the current market. With that in mind as part of this year's seminar we will be looking at some cases from which we think we can all learn lessons to help improve the bottom line in a direct way in dealing with time and money claims or in a perhaps less obvious way by ensuring that you understand the agreement you have made and that you do not get embroiled in unnecessary and costly disputes. The commercial reality is that Employers, main contractors and subcontractors can all run their businesses more effectively by keeping up-to-date and reminding themselves of some of the underlying principles that affect us all.
2. In this article and Part 2 which will be available shortly we will outline some of the aspects of construction law that we will be looking at in more detail at the seminar on the 22 November 2012. Of course, it is always important to look at how contracts come about and on whose terms the contract is ultimately concluded, often referred to as the

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- 'battle of the forms'*. In this article we will briefly review the position with the *'battle of the forms'* but will look at this in more detail at our seminar.
3. When the contract has been let we are used to there being arguments about time and money claims. We will look at a recent case concerning contractor's obligations to progress the works and will be reviewing in more detail a 2012 case which many would say has been the most important case on time and money claims for many years.
 4. We then look at the end of a contract where an account may be resolved by a settlement agreement. A recent case has highlighted that the words of the settlement agreement may well not reflect the deal you thought you had made. We will also be looking at the often uncertain nature of the various methods of dispute resolution - both sides will have inevitably taken what they consider to be the best advice but one will be found to be wrong.

Agreement and Contract Formation - Battle of the Forms

5. Ever since 1840 in the case of *Hyde -v- Wrench* the problems concerning the *'battle of the forms'* have been known. What usually happens is that one party specifies that any offer should be made based on the terms contained in an invitation to tender but when the tenderer returned its offer it is based on its own terms. There then follows an exchange of various types of communication, some oral, some written and there is the usual multiple exchange of emails. It is very rarely easy to establish whose terms and conditions ultimately apply.
6. There have been a number of cases over the years which have for the most part confirmed that the traditional analysis of offer and acceptance still applies to the *'battle of the forms'*. *TekData Interconnections Limited -v- Amphenol Limited [2009] EWCA*.
7. This approach was also taken in the case of *Trebor Bassett/Cadbury -v- ADT Fire & Security PLC [2011] TCC* and *[2012] EWCA*. In that case there was a dispute about ADT's terms which purported to limit its liability to £13,718.60 against a claim of around £110m (one hundred and ten million pounds). This claim followed a catastrophic fire which destroyed Cadbury's confectionery factory in Pontefract in 2005. The dispute concerned the effectiveness of the fire protection systems installed by ADT.
8. ADT's quotation for the works was based on its terms and conditions but when Cadbury issued its purchase order this was based on its terms and conditions which were very different to ADT's terms. Ultimately the work was done pursuant to the last document in the chain which was

Cadbury's purchase order and in those circumstances the conventional analysis applied, that is Cadbury's terms and conditions prevailed. Another interesting point in this case is that Cadbury's purchase order did not incorporate its terms and conditions but referred to them. The judge in this case held the usual position that notice within a contractual document identifying and relying on standing trading terms is sufficient to permit incorporation of those terms.

9. In our seminar we will review a construction case where practical guidance was given by the courts on '*battle of the forms*' situations.

Extension of Time

10. There have been many cases which have touched on extensions of time in the construction industry with one of the earliest being the 1838 case of *Holme -v- Guppy*. This case involved a carpentry contractor at a brewery. The work finished late (nothing new here) and the contractor sought relief from the deduction of liquidated damages on the basis that the Employer had prevented it from finishing on time. It was held in this case that if a party is prevented from completing the contract within the time limit he is not liable in law for the default. This principle was upheld in the Court of Appeal in 1970 in the well known case of *Peak Construction (Liverpool) Limited -v- McKinney Foundations Limited*. These and similar cases deal with the difficulties when a contractor does not finish by the completion date but the position where a subcontractor does not progress the works regularly is often a more difficult situation to analyse.
11. This issue came up in the case of *Pigott Foundations Limited -v- Shepherd Construction Limited [1993]*. In this case Pigott argued that it was not under any obligation to do more than complete the subcontract work within the time allowed and that it did not have to carry out the work in accordance with any particular rate of progress. The judge held that in the absence of any contract term the subcontractor could plan and perform its work as he pleased. The judge referred to the 1902 case of *Wells -v- Army & Navy Co-operative Society* in support of his decision.
12. There was some alarm with this decision and this position has been reviewed by the courts recently. This issue has important practical application in the construction industry and we will review the current position on the 22 November.

[Click here for 5 Cases That Affect Your Business - Part Two](#)

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