SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2025] CSIH 21
CA88/23

Lord Justice Clerk
Lord Malcolm
Lord Armstrong

OPINION OF THE COURT

delivered by LORD MALCOLM

in the reclaiming motion by

CALEDONIA WATER ALLIANCE

Pursuer and Respondent

against

ELECTROSTEEL CASTINGS (UK) LIMITED

Defender and Reclaimer

Pursuer and Respondent: Ellis KC, McAndrew; Pinsent Masons LLP
Defender and Reclaimer: G Walker KC, Broome; DAC Beachcroft Scotland LLP

9 July 2025

Introduction and background

[1] Caledonia Water Alliance (Caledonia) has raised an action against Electrosteel Castings (UK) Ltd (Electrosteel) seeking payment of £35 million by way of damages for Electrosteel's alleged breaches of contract. Electrosteel pleads that the parties agreed that the contracts concerned are subject to the exclusive jurisdiction of the English courts, thus the action should be dismissed without any investigation into its merits. A commercial judge held a proof on this issue at which both parties led evidence from witnesses. He

repelled the challenge to the court's jurisdiction, which meant that there would be further procedure in this action. Electrosteel has reclaimed (appealed) that decision to this court.

[2] In his decision, see [2024] CSOH 87, the judge set out the background circumstances. They can be summarised as follows. Caledonia is a joint venture comprising Morrison Water Services Ltd and Aecom Ltd. In 2015 it entered into an agreement with Scottish Water (the alliance agreement). It allowed Caledonia to be engaged as a contractor in Scottish Water projects, and in terms of which it would be obliged to obtain plant, materials and services from suppliers with whom Scottish Water had entered into a framework agreement. Electrosteel was one such supplier. The purpose of the framework agreement was to allow companies such as Caledonia to make orders with approved suppliers such as Electrosteel on terms which had been agreed by Scottish Water.

[3] Under the alliance agreement, Caledonia was contracted to design and install water pipes for a major pipeline project named the South Edinburgh Resilience Scheme. Over four years it entered into 60 separate contracts with Electrosteel for the supply of substantial quantities of ductile iron pipe for use in the project. The pipeline has been completed, but it is claimed that deficiencies in Electrosteel's product has led to contamination of the drinking water carried. Caledonia states that because of this it is in breach of its contract with Scottish Water. The current action is based on the proposition that since Electrosteel is in breach of its contracts with Caledonia, it should indemnify Caledonia in respect of its liabilities for using defective pipework in the project.

[4] On the jurisdiction issue, and notwithstanding that it attached its own standard terms to the 60 purchase orders (which provide for English law and courts), Caledonia contends that the contracts were subject to the standard terms and conditions set out in appendix B to the framework agreement between Scottish Water and Electrosteel. Clause 30

of that agreement provides for Scots law to apply and any disputes to be subject to the exclusive jurisdiction of the Scottish courts. Electrosteel argues that its standard terms and conditions of sale apply. They were referred to in the order confirmation documents, the last documents exchanged prior to supply of the product, and which specify the exclusive jurisdiction of the English courts with English law governing the contracts.

[5] It might be asked - why is Electrosteel so exercised as to which court decides the dispute? In this regard the court was informed that there are a number of terms in Electrosteel's standard form which, so far as its interests are concerned, are preferable to those in the framework agreement. (Examples given included the quality and specification of the pipework and exclusions of liability.) Thus it is important to both parties to know whether the framework terms apply to their contracts. Resolution of the jurisdiction issue will answer that question.

The commercial judge's decision

[6] The judge took the view that all the witnesses did their best to recall events accurately. The parties were agreed that the issue should be determined by an objective consideration of that communicated between them by words and action; in other words, by what reasonable and honest business people in the position of the parties and having their shared knowledge of the surrounding circumstances would have understood by those communications. Reference was made to *RTS Flexible Systems Ltd* v *Molkerei Alois Muller GmbH & Co* [2010] 1 WLR 753 and *Baillie Estates Ltd* v *Du Pont (UK) Ltd* [2009] CSOH 95. On a traditional offer and acceptance approach, Electrosteel's standard terms would govern; however this would not apply if the parties had agreed that the standard terms they had exchanged should be ignored, see *Tekdata Interconnections Ltd* v *Amphenol Ltd* [2009] EWCA

Civ 1209; *Specialist Insulation Ltd* v *Pro-duct (Fife) Ltd* 2012 SCLR 641; and *TRW Ltd* v *Panasonic Industry Europe GMBH* [2021] EWCA Civ 1558.

[7] It was Scottish Water's framework arrangements and Electrosteel being on the framework supplier list which brought the parties together. In June 2015 Scottish Water's alliance partners, including Caledonia, received an email stating that Electrosteel was the preferred supplier for ductile iron pipes and fittings. Reference was made to a supplier guide or manual which had been prepared by Electrosteel. Thereafter, at the instigation of Electrosteel, Caledonia completed a form which referred to Scottish Water and to the framework. It set up a customer account with Electrosteel with the reference CALE102S1C. In 2016 the parties' representatives attended Scottish Water framework/contract meetings.

[8] The judge held that it was clear that supplies would be made in the context of Scottish Water's framework arrangements. For example, Electrosteel's quotations were addressed to "Caledonia Water Alliance (Scottish Water)" and gave the customer reference "South Edinburgh". The prices were generated in accordance with the framework rates. Furthermore, both parties knew that their relationship was to be regulated by Scottish Water's standard terms. This conclusion was based first on the evidence of witnesses for both parties that, certainly at the outset, this was the intention. Secondly, both parties at least knew of Scottish Water's standard terms and had access to them. Thirdly the judge relied on the terms of the supplier guide prepared by Electrosteel which made it clear that Scottish Water's framework envisaged the use of Scottish Water's standard contractual terms and that Electrosteel did not intend to deviate from them. The judge found that both parties shared this understanding.

[9] Nonetheless, in respect of all 60 transactions each party intimated documentation which referred to its own standard terms and conditions. Both Caledonia's purchase orders

and Electrosteel's order confirmations were *pro forma* documents. The question was - does the evidence demonstrate that the parties had agreed that these references should be ignored in favour of the framework agreement's standard terms? The judge concluded that this could and should be inferred from all the circumstances of the case, and this for four reasons.

[10] The first reason was the common understanding that the parties' relationship was under and in terms of Scottish Water's framework. It was clear from the documentation that Caledonia and Electrosteel were both aware that the orders related to the aforesaid Scottish Water project. The evidence was that the prices were generated in accordance with the framework rates. The judge asked: why did nobody ever question the competing references to each party's terms and conditions? The answer was that they were sent automatically against a background that it was standard practice generally for customers and suppliers to try to impose their own preferred terms. However the evidence from both sides' witnesses was that within the water industry, framework arrangements were designed to ensure consistency in terms and rates.

[11] The judge held that the parties simply ignored the references to each other's standard terms because of their shared understanding that their relationship was governed by the framework, in much the same way as they paid no attention to Electrosteel's pricing quotes. The framework agreement required Electrosteel to use the framework terms when entering into contracts with alliance contractors working on Scottish Water projects. When asked to reconcile the conflict between the apparent attempt by Electrosteel to impose its own terms notwithstanding its framework agreement obligations to Scottish Water, the company's managing director struggled to answer; not because of prevarication, but because it had

never occurred to him that Electrosteel's conditions would be applied to the orders from Caledonia.

[12] The judge's second reason for concluding that the parties intended to apply the framework terms was that they followed the supplier guide's prescribed procedure of a purchase order, with a unique reference number, which triggered an order acknowledgement within 48 hours, with the specified details as to quantity, price, etc. This demonstrated a desire to follow the framework arrangements. Thirdly, neither party acted consistently with their own standard terms and conditions, for example as to the formalities required thereby. Finally, Electrosteel's invoices all bore the CALE102S1C account number issued by it to Caledonia. And Electrosteel gave Scottish Water rebates based on the volume of pipework ordered, all as per the framework agreement.

A summary of Electrosteel's submissions in support of the appeal

[13] Both parties' standard conditions gave the English courts exclusive jurisdiction. Thus unless the framework agreement terms apply, the action must be dismissed. This is a "battle of the forms" case to which the traditional offer and acceptance analysis should be used unless it is established that the parties intended that documents other than those passing between them should prevail. This turns on an objective assessment of what the parties must be taken to have intended. If a party expressly refers to its standard terms as being applicable to the contract, this presents a high hurdle to anyone submitting that the circumstances demonstrated an intention that these words should be ignored.

[14] The judge said (paragraph 141) that both parties entered into agreements with Scottish Water which required each of them to contract with the other on Scottish Water's

terms. However the alliance agreement contained no such provision, and Electrosteel reached no other agreement to such effect.

[15] There was no sufficient evidential foundation for the judge's finding that there was a common understanding, itself a nebulous concept, that the parties' relationship was regulated by Scottish Water's terms. The general principles of contractual interpretation are well-established. The meaning of a provision is not dependent on the subjective understanding of one party. A contract must be construed objectively. The only basis for the judge's finding of a common understanding came from the evidence of two witnesses for Caledonia, namely Mr McLean and Mr Walker. Their evidence as to their subjective impressions or expectations says nothing as to whether Electrosteel agreed to be bound by Scottish Water's terms. There was no evidence that Electrosteel was aware of any such view held by Caledonia. What was needed was evidence of facts of which both parties were aware, see *Luminar Lava Ignite Ltd* v *Mama Group plc* 2010 SC 310 at paragraph 45. Any subjective impressions of Caledonia personnel cast no light on facts known to both parties which might be relevant to an exercise of contractual construction. There was no finding that Electrosteel knew the terms of the alliance agreement. In any event it did not require Caledonia to contract on Scottish Water's terms.

[16] It was on the basis of an application of the foregoing evidence to the exercise of contractual construction that the judge reached the said common understanding conclusion. The other factors relied on by the judge could not have supported that view. The evidence was not strong enough to clear the "high hurdle" spoken of in *Tekdata* at paragraph 27. No one spoke of a pre-existing course of dealing. There would have to be a finding that there was an agreement to contract on Scottish Water's terms. The judge should not have asked whether there was an agreement that the parties' standard terms were intended to

"oust" Scottish Water's terms. Those terms were not susceptible to any such incorporation; and in any event the judge's approach inverted the onus to clear the high hurdle.

[17] The judge erred by starting from the wrong place. It follows that the issue is at large for this court. His analysis should have begun with the only documents of a contractual nature which passed between the parties, culminating in Electrosteel's order confirmations. The procedures were automated, but that did not mean that the references to the parties' standard terms and conditions were unintended. Caledonia were not contractually obliged to use the framework provisions. Any such subjective understanding was erroneous, and was never communicated to Electrosteel. The judge misdirected himself by starting with a supposed common understanding and then looking to see whether anything ousted it. The correct approach would have been to focus on the plain wording of the documents exchanged when the contracts were being made. That would make commercial sense. Subjective impressions and understandings were irrelevant. The judge concentrated on what he thought should have happened rather than what did occur. There was nothing communicated between the parties which a reasonable person would regard as subverting the references to the parties' standard terms and conditions in the contract documents.

[18] Since the documents passing between the parties and their conduct do not demonstrate a common intention that Scottish Water's terms prevailed, the traditional offer and acceptance analysis must be adopted. That can only lead to one or other of the parties' standard terms, and in either case the Scottish courts are deprived of jurisdiction.

A summary of Caledonia's submissions

[19] When concluding each order, both parties issued *pro forma* correspondence which *automatically* referenced their own terms and conditions (emphasis in the submissions).

However, an objective analysis of the whole background and the order documentation demonstrates that neither party wanted to impose its bespoke terms and conditions on the other. Rather they each intended that the Scottish Water framework conditions would apply to supplies made under the framework arrangements. It provides for the Scottish courts to have jurisdiction over the present dispute. The "last shot" doctrine, which here would give primary importance to Electrosteel's order confirmation documentation, can be displaced by an objective assessment of what, in the light of the whole circumstances, the parties must be taken to have intended, see *Tekdata* at paragraph 25; *Specialist Insulation* at paragraph 18; and *TRW* at paragraphs 31-33.

[20] The judge correctly carried out such an exercise and reached a conclusion which, on the evidence, was open to him. The height of the hurdle spoken of by Dyson LJ in *Tekdata* depends on all the circumstances of the case. The test remains the balance of probabilities. An unusual case might require particularly cogent evidence. However here the judge has applied the water industry norm. In *Tekdata* the question was whether a qualified acceptance should be treated as unqualified. The judges' comments should be seen in the context of the particular circumstances under consideration in that case.

[21] Electrosteel's witness accepted that it was obliged to incorporate the framework conditions into its contracts with Caledonia (paragraph 44 of the judge's opinion) and Caledonia were aware of the terms of the framework agreement (paragraphs 113-116). Against the background to the orders, it would have been anomalous for either party to try to subvert the framework arrangements agreed by Scottish Water. The judge correctly concluded that his key findings in fact showed that the parties' common intention was to adhere to them. Neither party acted consistently with its own terms and conditions, for example as to the rates to be paid, and rebated. This demonstrated an intention to abide by

the framework terms. It would be odd to separate out "terms" and "conditions". If the submission for Caledonia had to clear a "high hurdle", it did so.

[22] The authorities say nothing about a particular starting point for the judge's analysis. There is no logic in requiring it to begin with the exchanged documents when the key question is whether the references in them to each party's standard terms and conditions were intended to have contractual effect. There was no error in how the judge approached the matter before him.

[23] The judge carefully explained the basis for his finding of a common understanding that the framework terms would apply. It was not dependent on the subjective view of two Caledonia witnesses. The judge's conclusions were supported by a substantial body of evidence, which included purely factual material. It was entirely appropriate to ask whether the parties departed from that understanding, including whether it was ousted by their conduct. The unchallenged findings in fact point strongly in one direction. The judge's decision did no damage to commercial common sense. On the contrary it fits with the background and the purpose of the framework arrangements, and also Electrosteel's contractual obligations to Scottish Water. It can be assumed that good relations with Scottish Water would be important to Electrosteel's business interests.

Discussion

[24] The judge gave an account of the evidence he heard and made various findings in fact, none of which have been challenged. In agreement with the judge, in our view the evidence, both oral and documentary, pointed clearly to the parties having a shared understanding of the purpose of the framework arrangements, namely to ensure that products used in the project were supplied at the rates, standards and specifications agreed

by Scottish Water, all as contractually required of Electrosteel as a framework supplier. The supplier guide prepared by Electrosteel stated that under the framework agreement it was not allowed to deviate from Scottish Water's standard specifications and standard contractual terms. All of this was normal for the water industry.

[25] Mr Wheeler, Electrosteel's head of sales, said that its standard terms were attached to the quotations and order acknowledgements "automatically" as a function of its procurement system. He accepted that because Caledonia was working on the South Edinburgh pipeline project for Scottish Water, the framework would apply. Mr Baillie, Electrosteel's managing director, accepted that it was not likely that it would try to impose its own terms and conditions into a supply contract when that ran contrary to Scottish Water's express intention. He also accepted that Electrosteel's *pro forma* documents contained wording which was inapplicable to framework supplies.

[26] When regard is had to all the evidence and to the judge's reasoning it is apparent that there is no merit in the submission that the only basis for the finding of a common understanding that the framework terms would apply was the subjective impression of two Caledonia witnesses. Mr Baillie did explain the general purpose of attaching standard terms to contract documents, namely to trump those referred to in customers' orders; but when faced with the question of whether in respect of the 60 contracts with Caledonia under the framework arrangements the intention was to breach Electrosteel's contract with Scottish Water, he demurred. In the whole circumstances it seems clear that neither party thought to disable the automatic *pro forma* processes for these orders, but equally neither actually intended their standard terms and conditions to have contractual effect.

[27] For Electrosteel it was stressed that the alliance agreement did not oblige Caledonia to contract with suppliers on framework terms. The proposition is contested, but in any

event, in the overall context of the tripartite relationship, with both Caledonia and Electrosteel understanding that their contracts should match the requirements of the ultimate customer, namely Scottish Water, its relevance for present purposes is obscure.

[28] The judges' observations in *Tekdata* are of assistance in this appeal's somewhat analogous circumstances. The following can be derived from the judgment of Dyson LJ. The general rule is to apply an offer and acceptance approach to determination of the contract. However, if by necessary inference the parties agreed that the terms and conditions in question were to be ignored, the general rule will not be applied. The focus must always be on what the parties must be taken, objectively, to have intended at the time of the contract.

[29] While the trial judge's decision in *Tekdata* was overturned on the view that the necessary inference had not been made out, the case is important for its confirmation that what is sometimes called "the last shot doctrine" is not sacrosanct. Dyson LJ spoke of the need for a necessary inference being a "high hurdle", and this on the view that anything else would lead to unsatisfactory uncertainty, see paragraphs 26-27. Longmore LJ expressed himself as follows: the traditional offer and acceptance analysis must be adopted "unless the documents passing between the parties and their conduct show that their common intention was that some other terms were intended to prevail", see paragraph 11. Later he spoke of it always being difficult to set aside the traditional analysis in a battle of the forms case, "unless it can be said there was a clear course of dealing between the parties", paragraph 21. (*Tekdata* was a course of dealing case and it seems unlikely that the judge intended to restrict the possibility of displacement to such circumstances.) Pill LJ simply focussed on a search for evidence from which it could be fairly inferred that it was never the defendant's intention that its terms and conditions should apply.

[30] Scots law has made prolific use of the offer and acceptance approach when ascertaining whether parties have made an enforceable bargain, and if so on what terms. There is a proper concern that an over emphasis on subjective matters will frustrate the need for commercial confidence in business arrangements. However, if the evidence rebuts what would otherwise be inferred from giving primacy to a document exchanged immediately before performance, to ignore that rebuttal could lead to the imposition of a bargain which neither party intended. That said, plainly the evidence would require to be sufficiently cogent to overcome that which would normally apply.

[31] The judge held that the parties must be taken to have intended that their 60 separate contracts were governed by the terms and conditions set down in the framework agreement between Scottish Water and Electrosteel. Both parties conducted their affairs in accordance with the framework arrangements. In his view they each decided, or must be taken as having decided, that neither of their standard contract provisions took effect. The key question is whether this decision was not available to him because of the aforesaid exchanges of documents which each referenced different standard terms and conditions, and which both gave exclusive jurisdiction over this dispute to the English courts.

[32] Electrosteel submits that it was not open to him, and this because of the objective offer and acceptance approach to contract formation; thus the terms of Electrosteel's order confirmations were accepted when the product was supplied and not rejected by Caledonia. The judge has held that the parties agreed to be bound by Scottish Water's standard terms as appended to the framework agreement. Yes they exchanged references to their own terms and conditions, which regarding jurisdiction and other matters contradicted that document, but neither actually intended them to apply. An important element is that the *pro forma* contract documentation was automatically, that is in the judge's view unthinkingly,

processed in the same way as other orders not part of the Scottish Water framework arrangements. Absent the whole background to these orders, and given the objective approach, that may not have mattered. However, in the particular circumstances of the present case we see no flaw in the judge's view that the "last shot" offer and acceptance route to resolve matters should not be used.

[33] As a generality, if party X acts in a way which would be understood by a reasonable person as intended to convey a particular agreement, and it is so understood by the other party Y, then that is their bargain even if this is inconsistent with X's actual thoughts and intentions. In the classic case of *Muirhead & Turnbull* v *Dickson* 1905 7F 686, Lord President Dunedin said that commercial contracts are not arranged by what people think: "Commercial contracts are made according to what people say", page 694. Much emphasis was placed by counsel for Electrosteel on this well understood principle, often described as the objective approach. However this, and other similar judicial and academic statements, presuppose that Y did not know X's true state of mind; see the discussion in *Chitty on Contracts*, 35th edition, paragraphs 4-004/5. In any event, the reasonable person is placed in the position of the parties, and does not wear blinkers. Before reaching a view on whether there is a binding contract, and if so on what terms, they will look at all the relevant facts and circumstances, including all that has gone before and how the parties have acted.

[34] That the approach adopted in *Tekdata* is consistent with Scots law on the formation of contract is demonstrated by the decision in *Continental Tyre and Rubber Co Ltd* v *Trunk Trailer Co Ltd* 1985 SC 163. It was held that documents accompanying supplies of tyres signed by a foreman of the purchasers and which made reference to the sellers' standard terms were not intended to have contractual effect. Reliance had been placed on a prior course of dealing. Lord President Emslie referred to a passage in the speech of Lord Reid in *McCutcheon* v

David McBrayne Ltd 1964 SC (HL) 28 at page 35: "In this case, I do not think either party was reasonably bound or entitled to conclude from the attitude of the other as known to him that these conditions were intended by the other party to be part of the contract." Lord Emslie said that this clearly identified the court's task: "In short, did the parties by word, writing, deed, and silence, so conduct themselves as to justify the inference that it was their mutual intention that the pursuers' conditions of sale should be part of the particular contract which is in dispute." (page 170).

[35] In the present case there is no reference to a prior course of dealing; however, the passages quoted from *McCutcheon* and *Continental Tyre* are of general application, and they are in line with the approach adopted in *Tekdata* and by the commercial judge here in the court below when addressing the whole circumstances as known to each party. In any event, as with a course of dealing, the particular background to the immediate circumstances of the individual contracts between Caledonia and Electrosteel, all as carefully explained by the judge, is germane to any inquiry into their intentions and expectations at the time. While a straightforward application of the "last shot" rule may be more than sufficient in a straightforward "battle of the forms" dispute, in a more complicated case such as the present, it would involve passing over evidence and circumstances of clear relevance to the court's task.

[36] The judge concluded that the parties' actual intentions and expectations coincided. However, he was also able to justify the outcome by what an objective analysis of the full circumstances demonstrated as to the parties' contracts. It showed that a reasonable person with the knowledge of and in the position of the parties would understand that neither was proceeding on the basis that its own standard terms and conditions were part of their bargains.

[37] In summary, the court has identified no error in the judge's approach and reasoning. There was more than sufficient evidence to justify the conclusion that the parties did not intend either of their standard terms and conditions to apply. It is plain that each would have understood that the other was adopting the framework arrangements. The obvious explanation for the references to their own terms in the contract documentation is that no one thought to interfere with the automatic procurement procedures applied by the parties. We have reservations as to the reference in *Tekdata* to a high hurdle, but even if it is adopted, on the facts of this case it was cleared.

Disposal

[38] The result is that we affirm that the Scottish courts have jurisdiction over the parties' dispute. The reclaiming motion is refused and we adhere to the interlocutor of the commercial judge. The case will now be remitted for further procedure in the court below.