

Legal Briefing

Ted Lowery considers a case involving a cross border 'battle of forms'

Caledonia Water Alliance v Electrosteel Castings (UK) Ltd [2025] CSIH 21

In the Second Division, Inner House, Court of Session

Before Lord Justice Clerk, Lord Malcolm and Lord Armstrong

Judgment delivered 9 July 2025

The facts

During early 2015 Caledonia entered into an alliance agreement with Scottish Water under which Caledonia could be engaged as a contractor for Scottish Water projects on terms, including a requirement to obtain plant, materials and services from suppliers with whom Scottish Water had entered into framework agreements. During June 2015 Scottish Water advised Caledonia that Electrosteel would be its preferred supplier for ductile iron pipes and fittings. Thereafter Caledonia set up a customer account with Electrosteel that referenced the latter's supplier guide procedure for placing orders and the framework agreement with Scottish Water. Clause 30 in the framework agreement provided for Scots law and stipulated that the Scottish courts would have exclusive jurisdiction to deal with any disputes.

Pursuant to the alliance agreement, during 2018 Scottish Water contracted with Caledonia to design and install water pipes for a project known as the South Edinburgh Resilience Scheme. Over the next four years Caledonia issued 60 separate orders to Electrosteel for the supply of ductile iron pipe for use in the Scheme. The orders issued by Caledonia and the order confirmations issued in response by Electrosteel attached their respective standard terms which each provided for English law to apply and that the English courts would have jurisdiction.

Following completion of the Scheme, problems with water contamination were blamed upon defects in Electrosteel's pipes. During 2023 Caledonia commenced proceedings in Scotland against

Electrosteel claiming an indemnity of some £35 million in respect of liabilities associated with the defective pipework. Electrosteel contested jurisdiction on grounds that where their order confirmations were the last documents exchanged prior to supply of the pipes, these specified English law and the English courts.

The Outer House rejected Electrosteel's arguments finding that the parties' respective standard terms should be ignored in favour of the Scottish Water framework agreement provisions: the evidence indicated a common understanding that the orders were subject to the framework agreement (including where prices were generated in accordance with the framework rates), Electrosteel's supplier guide procedure was followed and neither party acted in a manner consistent with their own standard terms.

Electrosteel reclaimed (i.e. appealed) to the Inner House on grounds that the Outer House judge had failed to focus on the contents of the documents exchanged at the time the orders were placed – in particular the standard terms providing for English law and the jurisdiction of the English courts – and that there was insufficient evidence to justify a finding as to any common understanding in favour of the framework agreement provisions.

The issue

Were the orders issued by Caledonia to Electrosteel subject to the law and the jurisdiction of courts of Scotland or of England?

The decision

The court found that the evidence, both oral and documentary, pointed clearly to Caledonia and Electrosteel having a shared understanding of the purpose of the Scottish Water framework agreement, i.e. to ensure that products used in the Scheme were supplied at the rates, standards and specifications agreed by Scottish Water. Amongst other things, the supplier guide prepared by Electrosteel stated that under the framework agreement it was not allowed to deviate from Scottish Water's specifications or standard contractual terms (which was acknowledged to be a common arrangement in the water industry) and both parties had conducted their affairs in accordance with the framework agreement mechanisms.

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The court rejected Electrosteel's submission that there was insufficient evidence to demonstrate that the framework agreement terms were to apply: in the overall circumstances it was clear that whilst both Caledonia and Electrosteel had not thought to disable the automatic processes that generated *pro forma* standard terms with their respective orders and order confirmations, neither had intended that their standard terms should have any contractual effect.

Hence on an objective analysis of the evidence, 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 would form part of the orders. Accordingly, it had been open to the Outer House to reject the 'last shot' offer and acceptance approach advocated by Electrosteel.

Commentary

With a 'battle of forms' the general rule is to rely upon offer and acceptance principles and the 'last shot' doctrine may apply. However, if the parties appear to have explicitly agreed that the most recently exchanged terms and conditions should be ignored, this general rule may be superseded. The focus should always what the parties must be taken, objectively, to have intended at the time the contract was formed.

Here the evidence pointed to a consensus that Scottish Water's framework agreement provisions – including provision for Scots law and the Scottish courts' jurisdiction – would apply to the orders Caledonia placed with Electrosteel, to the exclusion of both parties' standard terms: that the latter were generated automatically was telling.

Thanks are due to Ms Olivia Dent of Balfour + Manson for proofreading this report to ensure consistency with Scots law and procedure.

Ted Lowery
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