

Pritchard Englefield's corporate and commercial e-bulletin



In this edition (July 2010):

- Whose terms of business govern our contract?
- Enviroco and the meaning of “subsidiary”
- Legal News in Brief
- What's new at Pritchard Englefield?

For more information contact:

[David Glass](#)

[Bryan Bletso](#)

[Thilo Schneider](#)

WHOSE TERMS OF BUSINESS GOVERN OUR CONTRACT?

The continuing problem posed by the principle of “battle of the forms”

Businesses and their lawyers will be familiar with the problem of the “battle of the forms”. This arises when supplier and purchaser each have their own terms of business and each strives to ensure that contracts are governed by their terms. Matters have become ever more complicated with the increasing tendency for contractual negotiations to be conducted online.

The general principle is that the terms that govern a contract are those that are last to flow between the parties prior to exchange of contracts – the so-called “last shot” doctrine. A recent decision of the Court of Appeal in *Tekdata Interconnections Ltd v Amphenol Ltd* clarifies the law in this area and on the facts upheld the principle. One of the judges stated that the principle has the advantage of providing “a degree of certainty which is both desirable and necessary in order to promote effective commercial relationships”.

How can the principle be overridden?

In summary, with great difficulty; but the Court acknowledged that there can be cases where the traditional analysis would not prevail. One must look at all the surrounding circumstances in order to shed light on the intentions of the parties, consider the business dealings of the parties, generally, the past course of dealing between the parties, etc.

The following are some practical pointers for businesses to ensure that their own terms govern contracts:

- You should review the terms themselves to ensure that they are up to date. In particular, it is prudent to include a provision that your terms govern all contracts with customers (or sellers as the case may be) and can only be varied in writing and signed by both parties. This should be good evidence that the parties intended your terms to apply.
- You should make the other party aware of the full terms and conditions, even before you enter into a contract with them. This means that these terms and conditions should appear on your website, in all presentations and quotes, etc. that you give to set the scene that it will be your terms that will govern the contract.
- If you are the supplier, prior to their placing an order, all new customers should complete an account opening form in which you attach or refer to your own terms. Of course, if the form is online then you can ask your new customers to click to confirm that they accept your terms.
- In all paperwork sent in the lead-up to and subsequent to the contract, you should include or refer to

your terms. The terms should, therefore, appear or be referred to in order confirmations and delivery notices. You should be careful that this paperwork is delivered prior to the contract being entered into which could be prior to or on despatch of the goods or delivery of the services.

- You should be careful to ensure that you do not acknowledge the other party's documents such as order confirmations because you may then be bound by any terms that appear on or are referred to on such documents. For example, if you are a purchaser you should be wary about signing and returning a supplier's forms.
- Training should be given to all members of staff who are involved in the ordering and delivery process so that they are aware of the pitfalls.
- In some cases even where one party's terms are the "last shot", on the facts it could be that the other party's terms which apply because the (past) course of dealing between the parties.

ENVIROCO AND THE MEANING OF "SUBSIDIARY"

The Court of Appeal's decision in *Enviroco Limited -v- Farstad Supply A/S*, that a subsidiary will no longer be a subsidiary within the meaning of the Companies Act 1985 (the "Act") where a parent company charges its shares in that subsidiary as security for a loan and consequently registers those shares in the name of the lender, has potentially significant consequences on the drafting of agreements.

Facts

Enviroco Limited ("Enviroco") was a subsidiary of Asco Plc. Asco Plc charged its shares in Enviroco as security for a loan from the Bank of Scotland. As a condition of that loan, the shares were registered in the name of the bank. Asco Plc was allowed to continue exercising the voting rights attached to the shares so long as the rights were not to be used in any way that would prejudice the value of the security.

Enviroco was engaged by Farstad Supply A/S ("Farstad") to clean the tanks of an oil rig supply boat owned by Farstad and chartered to a company named Asco UK Limited ("Asco UK"), which was also a subsidiary of Asco Plc. While Enviroco was conducting the cleaning operation, oil was ignited killing one of Enviroco's employees and causing substantial damage to the boat. Farstad issued a claim against Enviroco for its damages arising from the fire.

As a term of the charter agreement between Farstad and Asco UK Limited, Farstad agreed to indemnify Asco UK Limited and its "Affiliates" against all losses resulting from loss or damage to the boat. "Affiliates" were defined in the charterparty as "*any Subsidiary of [Asco UK] or a company of which [Asco UK] is a Subsidiary or a company which is another Subsidiary of a company of which [Asco UK] is a Subsidiary. For the purposes of this definition "Subsidiary" shall have the meaning assigned to it in Section 736 of the Companies Act 1985*".

Enviroco sought to rely on this indemnity, claiming that it was an Affiliate of Asco UK by virtue of the fact that both companies were subsidiaries of Asco Plc. Whether this defence would be successful would however depend on whether Enviroco fell within the definition of subsidiary pursuant to section 736 of the Act.

Section 736 (1) of the Act (now restated in Section 1159 of the Companies Act 2006) provided that "*A company is a "subsidiary" of another company, its "holding company", if that other company -*

- holds the majority of the voting rights in it, or*
 - is a member of it and has the right to appoint or remove the majority of its board of directors, or*
 - is a member of it and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it,*
- or if it is a subsidiary of a company which is itself a subsidiary of that other company".*

Enviroco sought to rely on Section 736(1)(c) of the Act, whereas Farstad argued that Enviroco was no longer a subsidiary of Asco Plc as Asco Plc's shares were now registered in the name of the Bank of Scotland. Section 22 of the Act stipulated that a member of a company is every person who agrees to become a member of a company and whose name is entered on the Register of Members.

Enviroco submitted, however, that the provisions of section 736A(7) of the Act (which set out various

“rights attached to shares”, argued in this case to be held by Enviroco) must include the right to be registered as a member and that the condition of membership under section 736(1)(c) was consequently satisfied.

Decision

Reversing the decision of the High Court, the Court of Appeal considered that membership of the company could only be derived from the entry of a shareholder’s name in the Register of Members. Enviroco was not a subsidiary of Asco Plc within the meaning of section 736 of the Act because the shares were registered in the name of the bank. Enviroco could not therefore claim to be an Affiliate of Asco UK under the charterparty and was consequently unable to rely on the indemnity.

Patten LJ considered that the clause in the charterparty was clear in stating that the statutory definition of “subsidiary” should be applied. Another meaning of the term could not be derived by a different interpretation from the contract. Section 736A of the Act merely explained and supplemented section 736. The Court of Appeal considered that the rights in this section did not include the right to membership.

Comment

Patten LJ reasoned that the Court of Appeal did not have the power to revise statutory provisions merely because their operation might produce uncommercial results in some cases. In light of this decision, however, there may be other situations where a group company may unintentionally fall outside the definition of “subsidiary” for the purposes of the Companies Act and this will need to be borne in mind when drafting agreements.

Having said this, the Supreme Court has now granted Enviroco leave to appeal the Court of Appeal decision. The hearing is scheduled to take place on 20 and 21 October 2010 so watch this space!

LEGAL NEWS IN BRIEF

- **The Bribery Act 2010** received Royal Assent on 8th April 2010. The Act is intended to modernise and simplify existing legislation and places a heavy burden of compliance on UK companies to properly manage the risks of bribery within global trade. In particular the new offence of “failure to prevent” bribery may require revision of operating procedures to ensure that companies have “adequate procedures” to prevent corrupt practices both internally and by external agents.
- **The Overseas Companies Regulations 2009** (SI 2009/1801) came into force on 1 October 2009. The Regulations provide a single regime for overseas companies wanting to have an establishment in the UK. Aside from regulating disclosure of information and formation and execution of contracts, the Regulations impose accounting requirements on such companies. Annual accounts of the UK establishment must be filed at Companies House within 3 months of the due date of disclosure under the law of the country in which the company is incorporated. If the accounts are in a foreign language, when filed, they must be accompanied with a certified English translation. A Director or company secretary must sign the accounts to certify that it is a true translation. A filing fee of £30 is payable.
- Two company directors were recently disqualified under sections 6 and 7 of the **Company Directors Disqualification Act 1986**. These apply where a person has been a director of an insolvent company and the court is satisfied that the director’s conduct makes him unfit to be concerned in the management of a company. The court’s decision was based on breaches by the directors of FSA rules. The directors had shown themselves to be unfit to manage any business. The court held that, in the case of a FSMA authorised company, a director’s duty to that company to exercise reasonable care skill and diligence extends to taking all reasonable steps to ensure that the company complies with its regulatory obligations.

WHAT’S NEW AT PRITCHARD ENGLEFIELD?

Forthcoming event

We will hold a breakfast seminar at our offices on **5 October 2010 from 8.15am:**

Corporate governance and social responsibility

In the light of the introduction of a new UK Corporate Governance Code, David Glass (Senior Partner and Head of the Corporate and Commercial Department at Pritchard Englefield) will explore the changing

legal duties and social responsibilities of directors and what this may mean for you.

Victor Joffe QC, of Serle Court, London, will provide an overview of Shareholders' Remedies, including Unfair Prejudice Claims and Derivative Actions, and Frank Lewis will share his long experience as a non-executive director and give his views on good practice.

For more information, please visit our website ([www.pe-legal.com/media centre/news and events](http://www.pe-legal.com/media_centre/news_and_events)) or contact Ysaline Clero at yclero@pe-legal.com.

Calvert22 Foundation

Pritchard Englefield is proud to have supported Calvert22 Foundation, the UK's first not-for-profit foundation dedicated to promoting art from Russia and Central and Eastern Europe, in its application for charitable status.

Situated in Shoreditch, in the heart of London's vibrant art scene, close to the major Olympic sites, the gallery is housed in a converted warehouse and boasts expansive upper and lower gallery areas. The current exhibition of works by Olga Chernysheva will be open to the public from 1 July to 29 August 2010.

For more information about Calvert22 please visit its website: www.calvert22.org.

New Senior Partner at Pritchard Englefield

With effect from 1 April 2010 and after 38 years with the firm, **David King-Farlow**, Senior Partner and Head of the firm's Private Client Department, will become a Consultant. A Partner with Pritchard Englefield since 1973, David was the firm's Senior Partner for the last two years. As a Consultant, David will continue to handle all aspects of private client work concentrating on estate planning, probate, trusts and off-shore tax planning. He is also involved with charities and Court of Protection work.



David Glass takes over from David King-Farlow as Senior Partner. David Glass, a fluent French speaker, is responsible for the Corporate and Commercial Department and handles all aspects of corporate and commercial and finance work, including public company, M&A (with extensive cross-border experience), competition, banking, insolvency and other commercial work.

ABOUT US

Pritchard Englefield is a niche City firm of solicitors covering company commercial law, IP/IT, corporate/banking, disputes resolution, commercial property and construction, employment, probate and tax planning, family and personal injury. Further information can be found on our website at www.pe-legal.com.

If a colleague or friend in another business would benefit from receiving these email updates then please forward this bulletin on to them and ask them to contact PEnewsletters@pe-legal.com with **Subscribe to Corporate and Commercial Bulletin** as the subject line. If you no longer wish to receive these bulletins, then please email PEnewsletters@pe-legal.com with **Unsubscribe from Corporate and Commercial Bulletin** as the subject line.

We also prepare an employment and an information technology and e-commerce e-bulletins giving an overview of some of the more significant and interesting developments in this fast-moving area. If you wish to receive these bulletins, please email PEnewsletters@pe-legal.com with **Subscribe to employment e-bulletin** or **Subscribe to information technology and e-commerce e-bulletin** as the subject line.

The contents of this bulletin are intended to provide guidance only and should not be taken to constitute legal advice on specific problems. We cannot accept responsibility for this information or matters affected by subsequent changes in the law.
July 2010 © Pritchard Englefield