had been confined to a wheelchair as a result of events spiralling out of personal injury in the workplace. Moreover, the loss would be borne by the employer's insurer.

Finally, it is worth noting that the insurers had taken what Sedley L.J. regarded as "the sensible view that, with a stoical claimant who was evidently determined to rehabilitate himself as far as he could, their best course lay in assisting him to do so and in not settling too soon" (at [6]). With hindsight the insurers may take a different view; if they had agreed damages before the second injury then they would only have had to pay out a notional sum to cover the possibility of further injury; that sum would have been significantly lower than that for which they are now liable. Insurers will no doubt be wary of this possibility in future cases where initial liability is accepted.

KIRSTY HUGHES

BATTLE OF THE FORMS: RESTATING THE ORTHODOX

Butler Machine Tool Company v. *Ex-cell-O Corporation* [1979] 1 W.L.R. 401 adopts a "last shot" approach to "battle of forms" cases. An offer to buy containing the purchaser's terms, which is followed by an acknowledgement containing the seller's terms, which is followed by delivery, generally results in a contract on the seller's terms, the seller's terms being a counter-offer.

The question in *Tekdata Interconnection Ltd* v. *Amphenol* [2009] EWCA Civ 1209, [2010] 1 Lloyd's Rep. 357 was whether in the "battle of forms" there can be circumstances in which a traditional offer and acceptance analysis can be displaced by reference to the conduct of the parties over a long-term relationship.

The parties to the case were part of a chain of suppliers and had been doing business for many years. Tekdata acquired components from Amphenol. Tekdata's purchase orders stated that the purchase was to be on Tekdata's own terms. Amphenol acknowledged the orders by sending an acknowledgment to Tekdata which stated that Amphenol's terms were to apply. A dispute arose and both parties alleged that the contract was on their own terms.

The traditional view is that if no further documentation passed between the parties and if Tekdata took delivery of the components, the contract would be on the terms of Amphenol's acknowledgement. However, in *Butler*, whilst siding with the majority, Lord Denning M.R. gave an alternative analysis. He saw the traditional analysis of offer, counter-offer, rejection and acceptance as out of date, and declared that even though there may be differences between the forms

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the better way is to glean from the documents passing between the parties or from their conduct whether they have reached agreement on all material points. Relying upon this the Judge at first instance held that Tekdata's terms were to apply, holding that the parties never intended that Amphenol's terms should apply.

The Court of Appeal reversed this decision. Longmore L.J. giving the leading judgment accepted that *Butler* was not a precedent for abandoning the traditional analysis, noting that the traditional offer and acceptance analysis was applied by the other members of the Court, and even in the end by Lord Denning. Further, Lord Denning's similar words in the earlier case of *Gibson* v. *Manchester City Council* [1978] 1 W.L.R. 520, 523 were disapproved of on appeal to the House of Lords [1979] 1 W.L.R. 294.

Longmore L.J. reasserted the traditional offer and acceptance analysis; however, he noted limits to it. It is not applied where "the documents passing between the parties and their conduct show that their common intention was that some other terms were intended to prevail" (at [11]). This intention will be difficult to show in a battle of forms case, unless there is a clear course of dealing between the parties.

The factors that pointed towards such a common intention in the case were deemed insufficient to displace the result given by the traditional offer and acceptance analysis, and demonstrate that such a common intention will rarely be found. Unknown to Tekdata, Amphenol had a (then expired) agreement with a party up the contractual chain who also required Tekdata to obtain components from Amphenol. However, that party did not require Tekdata to contract with Amphenol on any particular terms. The terms of that agreement and Tekdata's own terms were not the same, and its importance was limited since the parties had an opportunity to agree a single set of terms, but did not do so. Further, whilst Amphenol signed a certificate of conformance as required by Tekdata's terms, it was noted that parties to contracts often do things which they are not obliged to do. Post-dispute correspondence was considered of limited use. Further, the importance of delivery times and quality control was dismissed as a common position in commercial relationships.

Dyson L.J. agreed with Longmore L.J. Whilst accepting that the last shot doctrine may depend on chance and is potentially arbitrary, he stated that the rules which govern the formation of contracts are long established, and that the traditional offer and acceptance analysis is to be generally applied in battle of forms cases. He justified this on the ground that it provides a degree of certainty which is desirable and necessary in order to promote effective commercial relationships. Whilst the general rule applies in a simple battle of forms case, in other

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cases there may be an exception based on an assessment of what the parties must objectively be taken to have intended.

For Dyson L.J. this was not a case within the exception. Tekdata were unable to show that Amphenol's acknowledgment was an unqualified acceptance of Tekdata's offer. The words on the acknowledgment referring to Amphenol's terms had contractual effect and could not be ignored since the parties had not expressly agreed that they were to be ignored, nor was such an agreement necessarily inferable from the circumstances of the case.

Pill L.J., whilst agreeing that the focus is on what the parties must be taken, objectively, to have intended at the time when the contract was made, added a gloss that there could be a case in which a court would be entitled to conclude that *one* of the parties had not intended that terms and conditions attached to its acknowledgement would apply.

Although the Court of Appeal restated the traditional analysis to battle of forms cases, it noted that in rare situations it is possible to arrive at the conclusion that the purchaser's terms are to apply. This would happen when it is clear that neither party ever intended the seller's terms to apply and always intended the purchaser's terms would apply. In order to promote commercial certainty and to reduce the scope for litigation this exception should be narrowly confined.

Whilst a traditional offer and acceptance analysis is not always without its difficulties, for example where there are multilateral contracts (H. Beale (ed.) *Chitty on Contracts*, 30th ed., (London 2009), paras. 2-110- 2-111) the Court of Appeal was correct to refuse to accept Lord Denning's outright rejection of the traditional analysis, as it rests on insufficient precedential foundation, and is questionable after *Gibson*. His approach also provides insufficient guidance in determining if, or indeed on what terms, an agreement has been reached. The traditional analysis achieves commercial certainty and is well known to businessmen.

PHILLIP MORGAN

UNLAWFUL TAX: TANTALIZING GLIMPSES OF RESTITUTION

Two recent decisions of the Court of Appeal involved claims for restitution of tax which it was alleged had been levied in breach of EU law. The claim in *Test Claimants in the Franked Investment Group Litigation* v. *Commissioners of the Inland Revenue* [2010] EWCA Civ 103 ("*FII*") was referred to the Court of Justice of the European Union to

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