

Terms and Conditions don't apply

It follows from the basic principles of contract law that you cannot incorporate your standard terms of business into a contract after it has been concluded. An example of the operation of these principles was recently provided in the Scottish case of Baillie Estates Limited v Du Pont (UK) Limited.

Baillie had purchased a printing machine from Du Pont. Baillie was unsatisfied with the machine and raised proceedings in the Scottish Courts in which it sought to assert a right to reject the machine under the Sale of Goods Act 1979. Du Pont argued that it was not subject to the jurisdiction of the Scottish Courts because its standard terms and conditions of sale stated that the Courts of England had exclusive jurisdiction over any disputes.

After examining the evidence, Lord Hodge concluded that Du Pont's Terms of Business did not apply to the contract as they had been sent after the contract was concluded. The timeline was as follows:-

- On 17th November 2006 Du Pont's representative sent a detailed proposal to Baillie by e-mail.
- Later that day, Baillie's representative replied by e-mail with the message: *'Go ahead'*.
- Du Pont's representative replied by e-mail on 19th November and stated *"It's on the way"*.
- On 20th November, Du Pont's representative sent through its standard terms of business.

Lord Hodge held that the parties had entered into a binding contract for the supply of the printing machine the day before Du Pont intimated their standard terms and conditions and that accordingly they were not incorporated into the contract.

While the legal principles applied here may be straightforward, the underlying business reality is that many companies fail to incorporate their terms of business properly into their contracts by leaving it too late. As Lord Hodge observed *"it is not uncommon for a party to fail to incorporate its standard terms when it concludes an agreement."*

Your terms of business offer no protection if they are not part of the contract, so the message is simple:- make sure that they are provided to your customers as early as possible in the sale process.

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