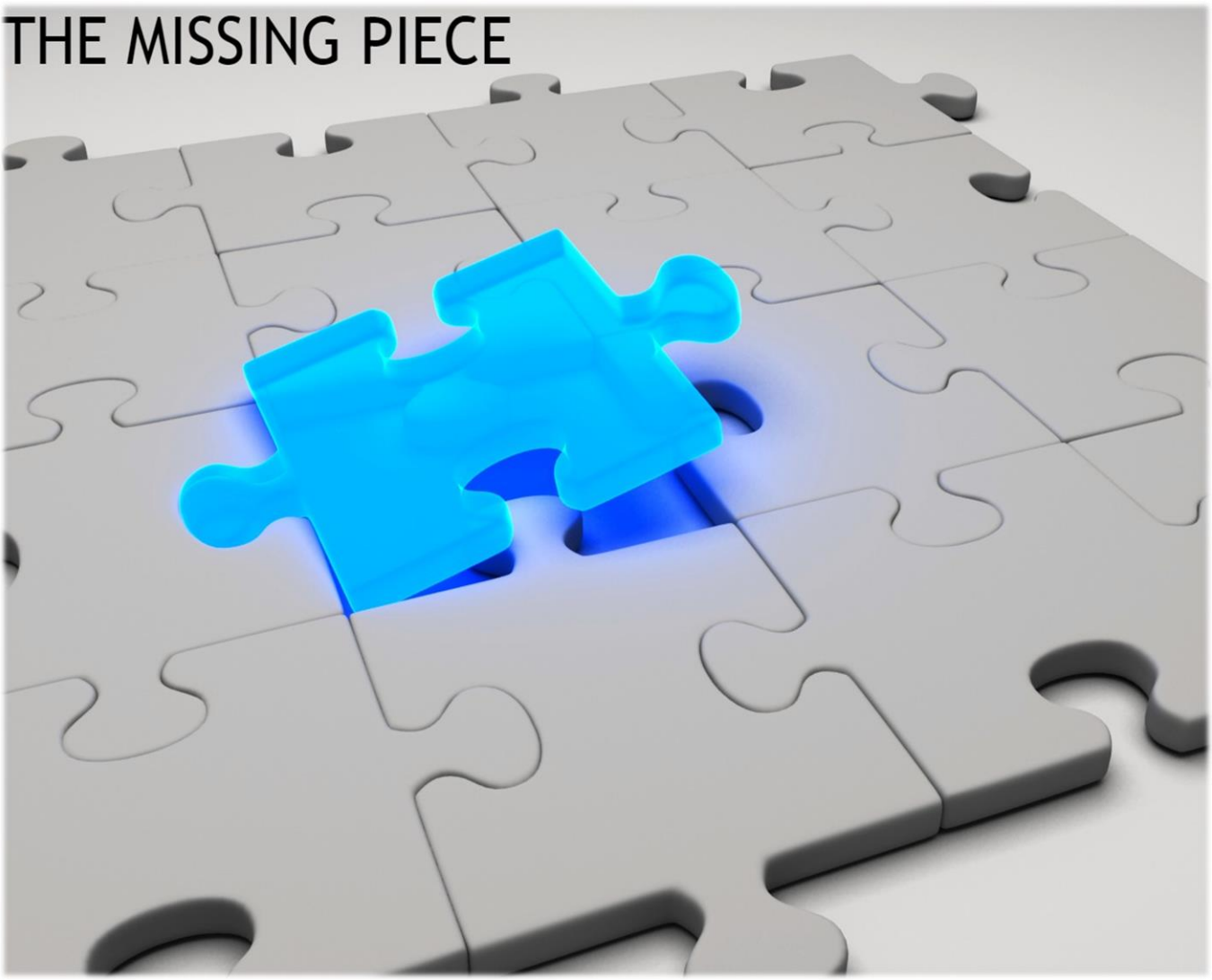

Welcome….

to the latest edition of *The Missing Piece*, the monthly legal bulletin from *In House Lawyer*.

In House Lawyer is my individual and exclusive legal service with strong ideals and a bespoke approach.

In this issue the focus is on contracts. I'll be looking at the phrases 'time of the essence' and 'best endeavours' which you may be using thinking of their everyday rather than legal meaning. I'll also explain how to ensure that when you are using standard terms and conditions, yours apply.

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TRYING TO WIN THE "BATTLE OF THE FORMS"

A situation which often occurs during the negotiation of agreements between businesses, each of which wants its own standard terms and conditions to be incorporated into the contract, is the so-called 'battle of the forms'.

Where one side offers to contract on its terms and the other side attempts to accept but tries to impose its own terms, there is no acceptance at all. Instead this is a counter-offer which can be accepted by an unequivocal acceptance by one side, or by performance. In practice, this often means that the last set of terms despatched before acceptance or performance (the last shot fired in the battle of the forms) will prevail.

Battle of the forms disputes are notoriously tricky, because ascertaining the terms of the contract the parties appear to have agreed is a matter of construction and fact.

At least three different devices have been used in an attempt to win the battle of the forms:

Prevail clauses which stipulate that where terms are issued by a party, that party's terms will prevail over any terms issued by the other. For example,

"Subject to any variation under condition [NUMBER] these Conditions form part of the Contract to the exclusion of all other terms and conditions (including any terms or conditions which the Buyer purports to apply under any purchase order, confirmation of order, specification or other document)."

This clause is unlikely to be effective, since the standard terms and therefore the clause itself will not form part of the contract because it will not have been accepted by the other party where that party is itself seeking to impose its own standard terms by means of a counter-offer.

However, parties continue to use clauses of this kind, as they may bluff the operational staff of the other party into assuming that there is nothing to be gained from seeking to impose their own terms. Sales teams should be aware of this potential problem so that when they receive purchase terms containing such a provision, they know that their terms can still prevail, and that they should therefore respond in the usual way with an acknowledgement of the order bearing their standard terms.

Direct negotiations by discussing the sale terms with the other side and, if possible, agreeing any variations in a side letter. The disadvantage is that this involves a negotiation of the standard terms, incurring time and expense, which the use of standard terms was originally intended to avoid. However, where the customer/supplier in question is seen as particularly important, and there is the possibility of significant repeat business, the extra time and expense involved in agreeing special terms, which could also be used for future transactions, might well be justified.

The shot-gun approach of ensuring that your terms are included in as many pre-contractual documents as possible, refraining from raising the standard terms as an issue with the customer, and attempting to fire the last shot in the battle of the forms by ensuring as far as possible that your terms appear on the last document passing between the parties before delivery. The advantage of this is that no time is wasted in negotiating amendments to the terms and if the battle of the forms is won, your terms will be incorporated without amendment.

The risk is that the other party might succeed in firing the last shot, in which event their terms would be incorporated without amendment. For example, a customer could refer to or include their terms and conditions on their purchase order or order confirmation.

Practical steps

- You should remind your sales teams that they should never accept an offer (whether by behaviour or otherwise) in the expectation or hope that some unacceptable items set out in the offer can be renegotiated later. After acceptance it will be too late.
- Even junior staff should know not to ignore the small print on the back of documents as this is often a way for a supplier to impose onerous terms via the back door, for example, transfer fees for agency staff or limited termination rights.
- You should have in place a general rule that staff should not work at a customer's site before an agreement being signed. Entering on site without a contract in place (including protective limits of liability in relation to such matters as property damage) could invalidate an insurance policy.
- Once you are confident that you wish to conclude a binding contract, make sure you accept the offer unequivocally. Do not confuse the acceptance message, for example, by dealing with some points and not others.

HOW HARD DO YOU HAVE TO TRY?

Endeavours clauses are commonly used by parties to a contract to qualify an obligation by only agreeing to "try" to achieve it. Despite the fact they are widely used, there is some uncertainty as to what efforts each different endeavours clause requires. However, case law does identify some key characteristics of the more commonly used endeavours clauses which may help in interpreting and applying such clauses.

Best endeavours has received the greatest amount of consideration by the courts and the starting point is that the phrase requires the party "*to take all those steps in their power which are capable of producing the desired results being steps which a prudent, determined and reasonable person, acting in his own interests and desiring to achieve that result, would take*".

While this is clearly onerous and could require a party to go beyond their commercial interests, it is not an absolute obligation; one particularly striking point is the reference to reasonableness. The following examples show how this principle applies in practice:

- A best endeavours obligation may require expenditure on behalf of the trying party. For example, Jet2 successfully obliged Blackpool airport to open outside of its normal operating hours despite the fact the airport incurred a loss in doing so. However, depending on the nature and terms of the contract in question, the trying party may have some small regard for its own commercial interests and certainly would not need to take action resulting in the certain ruin of the Company or the utter disregard for the interests of shareholders.

- Similarly, an obligation to use best endeavours may well impose an obligation to litigate or appeal against a decision, though this would not extend to action that was doomed to failure or would be unreasonable in all the circumstances.

Reasonable endeavours are a less tangible concept. One formulation involves the party balancing "*the weight of their contractual obligation*" to the other party against "*all relevant commercial considerations*" such as the trying party's relations with third parties, its reputation, and the cost of that course of action. In doing so, "*the chances of achieving the desired result would also be of prime importance*". These considerations are likely to be based on the circumstances and the trying party is not required to sacrifice its own commercial interests.

All reasonable endeavours is commonly adopted as a compromise between best and reasonable endeavours. However, it is difficult to decipher its meaning and an analysis of existing case law raises three interlinked questions: Does it mean the same as best endeavours? Is the trying party obliged to sacrifice its commercial interests? Is the assessment based on the trying party's particular circumstances? The answer seems to be that it depends on the context.

Other variations such as "commercially reasonable endeavours" and "reasonable commercial endeavours" are often used to try and soften a reasonable endeavours obligation. However, it is not clear that the courts would differentiate between the terms, given that a reasonable endeavours obligation already involves considering all relevant commercial factors. Similarly, the term "utmost endeavours" is sometimes seen as an advancement on a best endeavours clause, though again there is little precedent on its use in commercial contracts.

Practical steps

Clearly if you are the trying party then your best position is to 'endeavour' and the position to be avoided at all costs is 'best endeavours'. However, you are likely to need to find a compromise of 'reasonable endeavours' and in such case there is always a degree of uncertainty as to what the clause may actually require in any given case and ideally these uncertainties are best dealt with expressly in the contract.

A useful approach may be to set out the steps the trying party should take to achieving that particular obligation. The approach will vary from case to case, but parties should have regard to factors such as:

- Whether the trying party should bear any costs or incur any expenditure and, if so, how much;
- The period for which they should pursue that objective;
- Whether they must take legal action or appeal to achieve the objective;
- The extent to which a party is entitled to protect its own interests, is required to act in the interests of the other party, or base its actions on its own particular circumstances;
- Specific steps that they are or are not expected to carry out.

Finally, probably the most decisive factor in applying endeavours clauses is whether the party does in fact take steps to comply with the endeavours clause. In the majority of cases the debate is not over the nuances in the differing level of obligation imposed by such clauses, but whether any real endeavours were used at all. It would be prudent to record evidence of the steps taken to comply with the endeavours obligation and to inform the other party should any difficulties arise.

HOW IMPORTANT IS PUNCTUALITY?

In ordinary English, if anything is "of the essence", that means it is very important, or essential. In a contract term, however, "time is of the essence" has a further meaning. If time is of the essence for a contractual deadline, even a slight delay has drastic effects.

Rights. If time is of the essence for exercising a contractual right, then the right is generally lost if not exercised within the time set.

Obligations. If time is of the essence for performing a contractual duty, then the time limit is a condition of the contract, so that any breach means that any delay in performing the duty will be grounds for terminating the contract (in addition to any other available remedy).

The smallest delay can trigger a time of the essence provision, as shown by a case concerning a contract to buy a flat in Hong Kong, completing by 5 pm on 30 September. The contract expressly made time of the essence for this deadline, and also stated that any breach by the buyer of any contract term would lead to forfeiture of the deposit and allow the seller to end the contract. The buyer tendered the purchase price just ten minutes late. The seller declared the deposit forfeit and the contract ended. The court confirmed the seller's right to do so.

If the contract includes a termination clause, deal with termination on grounds of delay within that clause. There is no benefit in having a separate "time of the essence" clause, but there is a risk of inconsistency and confusion. For instance, you may see a payment clause that makes time of payment of the essence, while the termination clause provides that the contract may be terminated if a payment is more than 14 days late.

If you have the benefit of the phrase in your contracts and you deal with consumers then you should note that the regulators responsible for enforcing the Unfair Terms in Consumer Contracts Regulations 1999 have said "time of the essence" is not plain and intelligible, because consumers cannot understand it without legal advice. They have also identified unequal termination rights, and rights to terminate on grounds of trivial breaches, as potentially unfair terms. You should seek legal advice in relation such contracts to ensure they remain enforceable.

THAT'S ALL FOR THIS MONTH...

Next month I'll be continuing the contracts theme and explaining the key points of indemnities and limiting your liability. If you have any queries, comments or request for future bulletins then get in touch, I would be delighted to talk to you or meet at your convenience.

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