

# Deleted Terms in Construction Contracts: Friend or Foe?



*Brenna Conroy considers conflicting precedents in relation to deleted terms in construction contracts and the possible implications that they may have in practice.*

## **Introduction**

In construction contracts it is very common to see standard form provisions deleted and replaced with bespoke terms, either on the face of the document itself, or in the schedules to the document. Often not considered are the implications, if any, of terms which appear in the contract, but which have been struck out. Is the contract to be treated as never containing the deleted words, or can the deleted words be used either as an aid to construction or to negate the implication of words in the same form?

## **Two Schools of Thought**

Historically there has been conflicting authority on whether it is permissible to look at deletions in construing a contract and, if it is permissible, for what purpose. One school of thought is that deletions should not be taken account of at all; deletions are to be treated as if they had not formed part of the concluded contract (having been taken out of the agreement between the parties) and should not therefore be used to construe added words.<sup>1</sup> In contrast, there is also a line of authorities in support of the position that the deleted parts can be considered as part of the surrounding circumstances in construing what the parties have chosen to leave in and that the court is entitled to look at deleted words to see if any assistance can be derived from them in solving ambiguity in words retained.<sup>2</sup>

## **Mopani Copper Mines Plc v Millennium Underwriting Ltd**

In *Mopani Copper Mines Plc v Millennium Underwriting Ltd*,<sup>3</sup> Christopher Clarke J

considered the conflicting authorities on the question of whether it is permissible to have regard to deleted words in construing a contract. Whilst the judge did not consider it necessary to refer to or rely on the deleted words to find for the claimant on the preliminary issues determined, he suggested, *obiter*, that some general principles could be drawn from the cases.<sup>4</sup> Whilst the general rule is that deleted words cannot be used as an aid to construction, there were two exceptions, namely:

1. Deleted words in a printed form may resolve the ambiguity of neighbouring paragraphs; and
2. Deletion of words in a contractual document may be taken into account if the fact of the deletion shows what it is that the parties did not agree and there is ambiguity in the words that remain.

Clarke J also cited with approval the following passage from 'Keating on Construction Contracts' (8th Edition):

*"In this confusion the second school is generally to be preferred. Where parties have made a contract in a document that contains deletions, to look at the deletions does not offend the principle discussed above which prevents reference to preliminary negotiations. The deletion is physically contained in the concluded contract. It is submitted that the court should first construe the retained words. If they are unambiguous, reference to the deletions is unnecessary. If they are ambiguous reference to deletions from printed documents should be permitted to see whether objectively they throw light on the meaning of the retained words."<sup>5</sup>*

Nevertheless, the judge expressed that care must be taken as to what inferences, if any, could properly be drawn from the deleted words as the parties may have deleted the words because they thought they added nothing to, or were inconsistent with, what was already contained in the document, or because the words that were left were the only common denominator of agreement, or by mistake.

## **Narandas-Girdhar v Bradstock**

In *Narandas-Girdhar v Bradstock*,<sup>6</sup> the Court of Appeal had to consider whether deleted words in an IVA could be taken into account in resolving an ambiguity in the words that remained. In that case, a debtor had entered into an IVA, and the documentation as originally drafted stated that the IVA would be conditional upon the acceptance of his wife's simultaneous IVA proposal. As a result of a modification, this condition was deleted and subsequently his wife's IVA proposal was not approved.

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*"Deleted provisions are only relevant to construction where express terms are ambiguous."*

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<sup>1</sup> *Inglis v Buttery* (1878) 3 App. Cas. 552, HL; *Ambatielos v Jurgens* [1923] A.C. 175 at 185, HL; *M.A. Sassoan & Sons v International Banking Corp* [1927] A.C. 711 at 712, PC; see also, *City & Westminster Properties (1934) Ltd v Mudd* [1959] Ch. 129; *Prenn v Simmonds* [1971] 1 W.L.R. 1381, HL; *Compania Naviera Termar v Tradax Export* [1965] 1 Lloyd's Rep. 198 at 204; *Ben Shipping v An-Board Baine* [1986] 2 Lloyd's Rep. 285 at 291; *Wates Construction v Franthom Property* (1991) 53 B.L.R. 23, CA

<sup>2</sup> *Lord Cross*, stating the majority view in *Mottram Consultants Ltd v Bernard Sunley & Sons* [1975] 2 Lloyd's Rep. 197 at 209, HL

<sup>3</sup> [2008] EWHC 1331 (Comm)

<sup>4</sup> See paragraphs 120-122 of the judgment

<sup>5</sup> Paragraphs 121 of the judgment

<sup>6</sup> [2016] EWCA Civ 88; [2016] 1 W.L.R. 2366



After being made bankrupt due to the failure of the IVA, the debtor applied to set aside the IVA on the basis, *inter alia*, that on its true construction, his modified proposal had been conditional upon the acceptance of a simultaneous IVA proposal for his wife which, in the event, had been rejected by her creditors.

The Court of Appeal approved Clarke J's comments<sup>7</sup> and held that, in that particular case, the relevant principle was that if the fact of deletion shows what it is the parties agreed that they did not agree and there is ambiguity in the words that remain, then the deleted provision may be an aid to construction, albeit one that must be used with care.<sup>8</sup>

The Court of Appeal upheld the judge's decision at first instance and found that the wording of the debtor's modified proposal was ambiguous such that it was legitimate to have regard to what the modification had deleted from the original proposal, and that, construing the proposal in this way, it had not been made conditional on the acceptance of the debtor's wife's proposal.<sup>9</sup>

#### **Bou-Simon v BGC Brokers LP**

In the recent case of *Bou-Simon v BGC Brokers LP*,<sup>10</sup> the Court of Appeal had to determine whether the judge at first instance was right to imply a term into a loan agreement that the monies advanced to the appellant by the respondent had to be repaid where the appellant had failed to remain in the respondent's employment for four years. The appellant alleged that deletions contained in a previous draft of the loan agreement were relevant to the process of the implication of terms.

The appellant had been employed by the respondent as a broker and it had been intended that he would become a partner. The loan agreement provided that the appellant would "repay the Loan from the net partnership distributions" and that if the appellant ceased to be a partner any unpaid amounts would only be written off if he had served at least four years. A previous draft of the agreement had contained terms about repayment that had been deleted during the negotiations, and in particular wording which contemplated repayment from sources other than partnership distributions.

The appellant resigned within four years and the respondent claimed repayment of the loan amount. There was no express provision in the loan agreement to this effect and the respondent sought to rely on an implied term that "the Loan [£336,000] would become repayable in full where the Maker [the Appellant] failed to serve the full term of the Initial Period (the Implied Term)." The appellant alleged that the deletions contemplating repayment from sources other than partnership distributions were relevant to the process of the implication of terms.

At first instance, the judge determined that the loan agreement contained an implied term that the monies be repaid on the basis that a reasonable person would have regarded the contract as an agreement for the making of a repayable loan which would be forgiven only on completion of the full four years of the initial term of engagement, but which, if the initial period was not completed in the circumstances which actually occurred, was repayable in full.

The Court of Appeal allowed the appeal on the basis that the judge at first instance had

<sup>7</sup> See paragraph 19 of the judgment

<sup>8</sup> Paragraph 20 of the judgment

<sup>9</sup> See paragraphs 20 to 23 of the judgment

<sup>10</sup> [2018] EWCA Civ 1525; [2018] 7 WLUK 85

*“If the fact of deletion shows what it is the parties agreed that they did not agree and there is ambiguity in the words that remain, then the deleted provision may be an aid to construction.”*

succumbed to the temptation of implying a term in order to reflect the merits of the situation as they now appeared and it was not appropriate to apply hindsight and to seek to imply a term in a commercial contract merely because it appeared to be fair. The Court of Appeal went on to determine that the loan agreement did not lack commercial or practical coherence without the Implied Term and a limited recourse loan was not absurd or uncommercial. Equally, the agreement would have required considerable re-drafting to require repayment in the circumstances that arose. This was a good indication that the Implied Term was not necessary to give business efficacy and was not obvious.

*“The consideration of deleted words may negative the implication of a term in the form of deleted words.”*

Given that finding, the Court of Appeal considered that it was unnecessary to consider the deletions; however, for “clarity’s sake”, Asplin LJ and Singh LJ also chose to make a number of *obiter* comments on the deleted provisions in earlier drafts. Asplin LJ noted that deleted provisions are only relevant to construction where express terms are ambiguous and that there was a different process for the construction of contracts and the implication of terms.

In relation to the latter, “even if the deleted clauses had been on all fours with the

*Implied Term and there were evidence that they had been omitted by common design, it would only have been appropriate to have taken them into account in the implication process if they could be characterised as part of the relevant surrounding circumstances and not merely part of the course of negotiations”.*

Asplin LJ considered that deletions were unlikely to be relevant to the process of implication given it was necessary to consider the express terms of the contract in question from the viewpoint of the reasonable reader and not the parties themselves (unless the deletions were relevant to the process of interpretation in the first place) and a term should only be implied as a matter of strict necessity.

Singh LJ also noted the potential “wider importance” of the admissibility of deletions from previous drafts of a concluded contract. He commented that he saw force in the suggestion made in Lewison, ‘The Interpretation of Contracts’,<sup>11</sup> that “the consideration of deleted words may negative the implication of a term in the form of deleted words” even though the fact that the same words had been deleted could not be used as an aid to construe the express terms of the contract. He also stated that he did not necessarily accept that, in the context of implied terms, there is a threshold requirement that there must be an ambiguity in the contract before deleted words could be admissible, despite there being such a requirement when the court was engaged in the exercise of construction of a contract. However, ultimately he left this open to an appropriate future case.

#### **Conclusion and Practice Points**

Given that recent authorities have determined that deleted terms may, in limited circumstances, be relevant to the construction of a contract, and have suggested the relevance to the implication of terms, careful thought should be given to the potential consequences of striking through provisions in standard form construction contracts.

From a practical point of view, it may be preferable to delete the relevant words in their entirety; if deleted text remains visible in the contract, it may be taken into account if a dispute arises. Certainly, the authorities have been keen to express the dangers of drawing inferences (if any) from deleted words given that there are a number of reasons why words are deleted in any particular case.

If deleted provisions are retained in the contract itself, there are a number of points to remember:

- Deleted words will only be relevant to the construction of a contract if the remaining words are ambiguous.
- The deletion of words in a contractual document may be taken into account if the fact of the deletion shows what it is that the parties did not agree.
- Caution must be taken as to what inferences can be drawn from deleted words.

<sup>11</sup> (6th ed.) at p.96