The Admissibility of Deleted Words

- Tom Davie, Senior Associate,
Allen Allen & Hemsley, Solicitors.

It is not uncommon for the documents that form construction industry contracts to be comprised of amended standard forms. Frequently, they include amendments and deletions. Alternatively, they may have been prepared from precedents from which deletions have been made.

This article addresses the question of whether deleted words are admissible in the construction of a contract.

The diversity of authority on the topic illustrates the tension between two basic principles of contract law. These are, first, that the courts, in enforcing a contract, are trying to uphold the agreement reached by the parties. Secondly, the principle that once a contract is reduced to writing the contract should be construed in accordance with the plain meaning of the written words and extrinsic evidence, for example, as to negotiations leading up to the agreement are excluded.

The competing concerns were articulated by the House of Lords in the case of *Inglis v Buttery* [1878] 3 App Cas 552. The question for consideration was whether a ship-builder was bound to supply without extra charge new plates to enable a vessel to be classified 100 A1 at Lloyds. The words "but if any new plating is required the same is to be paid for extra" had been deleted and the deletion initialled.

The House of Lords held that they were not entitled to consider the deleted words in interpreting the contract. Lord Hatherley observed that the deleted words were contained in the offer document submitted by Messrs Inglis, but Messrs Buttery & Co did not agree to that offer, and the words were struck out. He observed that it was immaterial whether or not the document was rewritten without the deletions, or whether the deletions made left the original wording visible. The parties had reached an agreement and that was the only thing the court would construe as representing that agreement. He held that the deleted words were inadmissible in evidence.

Lord O'Hagan agreed that the deleted words were inadmissable. He pointed out that if the words were to be allowed then, had they been obliterated altogether, it would have been necessary to admit secondary evidence of them. This could not be done as it would be contrary to reason and principle. This was because it would be permitting evidence of negotiations - but the contract must be construed by itself.

Lord Blackburn developed this argument. He quoted Lord Gifford in the court below, to the effect that the court must look to the contract alone and should not admit evidence of negotiations. To do so would be inimical to the entering into of a formal contract the very purpose of which is to put an end to and supersede negotiations and record the agreement finally entered into by the parties.

Consistently with that, Lord Blackburn said that while taking the words of the agreement, it is permissible to look at "surrounding circumstances" to see what was the intention. By "intention" was not meant the intention of the parties as a fact, but the intention expressed in the words of the contract, used as they were with regard to the particular circumstances and facts.

The distinction between going behind the words of a contract to find out the intention of the parties (which is not permissible) and having regard to surrounding circumstances to construe the words of a contract (which is permissible) is not an easy one.

A contrasting approach was taken in the English Court of Appeal in the case of *Caffin v Aldridge* [1895] 2 QB 648 (where the Court of Appeal did not appear to have been referred to *Inglis v Buttery*). In that case the plaintiff contended that the true construction of a charterparty was that the plaintiff was hiring the full carrying capacity of the ship. In the charterparty itself the words "full and complete cargo", which were originally in the printed form, had been deleted. Lord Esher MR said (at page 650):

> "In order to see what [the charterparty] meant, one must look at the rest of the document. We find that the words "full and complete", which were originally in the printed form, had been struck out."

Lopes LJ added (at page 650):

> "The words "full and complete" were erased; and that could only, I think, have been done for the purpose of showing that such was not the intention."

In the case of *City and Westminster Properties v Mudd* [1958] 2 All ER 733 Harman J, while doubting the legitimacy of the approach taken by the Court of Appeal, nevertheless distinguished *Caffin v Aldridge* from *Inglis v Buttery* on the basis that such a method of construction must be confined to commercial cases where the words

struck out appear on the face of the signed draft. In the case under consideration express words appeared in a draft and did not appear in the lease executed. The words deleted in the draft did not, in the opinion of Harman J, constitute surrounding circumstances which could be called in aid to construe the language used.

Harman J's distinction is charitable to the decision in *Caffin v Aldridge*. In the Privy Council case of *M A Sassoon & Sons v International Banking Corporation* [1927] AC 711, Viscount Sumner said (at page 721):

> "There is a good deal of authority, now old, about the effect of deleting words in a printed form of mercantile contract, which it is not necessary to cite; but they take it to be settled, in such a case as this, that the effect is the same as if the deleted words had never formed part of the print at all."

M A Sassoon was a commercial case, dealing, as the headnote records, with "Bill of Exchange - Bankers - Confirmed Credit - D/A Draft - Surrender of Shipping Documents..."

The facts of this case, together with the judgment of Viscount Sumner, appear to undermine the basis of Harman J's distinction.

The judgment of Diplock J in *Louis Dreyfus et Cie v Parnaso Cie Naviera SA* [1959] 1 All ER 502 considers the admissibility of evidence of words deleted from standard forms: in this case the Gencon charter.

Diplock J expressed the view that it was unreal to suppose that when there is a standard form familiar to commercial men, and when the contracting parties strike out a provision dealing with a specific matter, they intend any provision other than the exclusion of the provision struck out. This comment would seem to go to weight, rather than admissibility, of evidence. But, after consideration of the authorities, he added that although he was required to look first at the clause in its actual form, where the clause was found to be ambiguous, he was entitled to have regard to the deleted words to see if assistance could be derived from them to resolve any ambiguity.

In *Wells v Minister of Housing and Local Government* [1967] 1 WLR 1000 CA it was argued that the legible deletion of the words "no action should be taken hereunder until the approval of the Town Planning Authority and Licensing Authority have been obtained", constituted a "determination" by a local council. Lord Denning MR rejected this argument (at page 1008):

> "The general rule is that you do not look at the words that have been deleted. They are struck out and are to be treated as if they were not in the document at all: see *Inglis v Buttery* per Lord Hatherley LC and *M A Sassoon & Sons v International Banking Corporation* per Lord Sumner. There may be exceptions to the general rule, but none of them would enable us to elevate this decision into a positive determination that no planning permission was necessary."

Russell LJ was slightly less confident in his remarks (at page 1016):

> "Whether the deletion of words may be used in aid of construction of other parts of a document may be doubtful: deleted words are intended not to exist, even though not illegibly erased: as to this see the cases referred to by Harman J in *City and Westminster Properties v Mudd*. But I am quite confident that deleted words cannot stand up by themselves as positive statements to the contrary."

Two comments can be made on this decision. Firstly the principle is extended in this case to deal with, not merely contracts, but documents submitted in the course of planning applications. Secondly, insofar as Russell LJ's tentative statement is attributable to the reference to *Caffin v Aldridge* in *City of Westminster Properties v Mudd*, this tentativeness may be unjustified, given the status of *Caffin v Aldridge* discussed above.

The position with regard to deleted words was made more doubtful by the decision of the House of Lords in *Timber Shipping Co SA v London & Overseas Freighters Ltd* [1972] AC 1, where Lord Reid said (at page 15 and 16):

> "There is a controversy as to whether one can look at deleted words in an agreement. If the words were first inserted by the draftsman of the agreement and then deleted before signature then I have no doubt that they must not be considered in construing the agreement. They are in the same position as any other preliminary suggestion put forward and rejected before the final agreement was made. But it appears to me that the striking out of words from a printed form is quite a different matter. The process of adapting a printed form to make it express the parties' intentions requires two things to be done. Those parts which are not to be part of the agreement are struck out and words are inserted to complete the rest of the form so as to express the agreement. There is no inference that in striking out words the parties had second thoughts: the words struck out were never put there by the parties or any of them or by their draftsman. I must not express a concluded opinion because for some reason this question was not argued by counsel of either side. But fortunately in this case the result is the same on any view, whichever view I take of the real meaning of the duration provision. So I shall assume in the appellants' favour that I can take the deletion into account..."

There are a number of remarks to be made about this dictum.

First, the statement is clearly and expressly obiter. As Lord Reid observes the question was not argued by counsel for either side and the report indicates that the appellants' counsel did "not rely strongly any more than did the Court of Appeal on the deletion...".

Second, Lord Reid accepts that deleted words would be inadmissable where they were submitted by the draftsman of the agreement and then deleted.

Third, Lord Reid's words were confined to circumstances where a printed form was being adapted to express the parties' intentions. Presumably then, deletions could not be taken into account where one party forwarded a printed document intending it to be the agreement between the parties and that printed document was amended and returned by the other party. In such circumstances the deletions become a record of negotiations. It may be entirely fortuitous whether or not deletions appear in the final draft.

Fourth, if the applicability of Lord Reid's comments depend upon whether or not the printed form was intended by one party or another at one time to represent the final agreement, the question of whether the deleted words could be admitted in evidence would have to be resolved by determining that initial question. This would require the admission of evidence.

Consider the following example:

A forwards to B a standard-form building contract, with deletions. B objects to the deletions. A remains adamant. B relents.

It is submitted that to admit evidence in such circumstances of whether or not the deleted words are part of negotiations or not would be in effect to admit evidence of negotiations between the parties even though, without evidence, the document would appear to be an adapted printed form. It is true that a distinction can be drawn between the evidence of the facts of a negotiation and evidence of the content of the negotiation itself. But in reality the evidence required to determine whether a printed document formed the basis of negotiations, and what those negotiations were, would be the same. The mischief that the rule against the admission of deleted words was designed to avoid would not have been avoided.

The English case which provides the strongest authority for those who would argue in favour of the admission of deleted words is Mottram Co*nsultants Ltd v Bernard Sunley & Sons* [1975] 2 Lloyds Rep 197, a decision of the House of Lords. In the course of his judgment Lord Cross of Chelsea (with whom Lords Wilberforce and Hodson agreed) said (at page 209):

> "When the parties use a printed form and delete parts of it one can, in my opinion, pay regard to what has been deleted as part of the surrounding circumstances in light of which one must construe what they have chosen to leave in. The fact that they deleted [clause] (iii) shows that these parties directed their minds (inter alia) to the question of deductions under the principle of Mondel *v Steel* and decided that no such deductions should be allowed."

No reference to authority is made in support of the opinion expounded by Lord Cross, but the vocabulary he employs clearly reflects previous decisions. Insofar as he qualifies his opinion by reference to the use of a printed form, it is assumed that he has in mind the words of Lord Reid in the *Timber Products* case, discussed above. The reference to a printed form presumably therefore means a form which has been adapted for use rather than one which has been used as the basis for negotiations.

The reference to "part of the surrounding circumstances" appears to have been derived from the words of Lord Blackburn in I*nglis v Buttery*. But Lord Blackburn was quite clear that looking at the "surrounding circumstances" did not include taking into consideration evidence of negotiation leading up to the contract entered into. It is also important to have regard to the distinction drawn by Lord Blackburn between intention as a fact, and the intention expressed in words, used as they were with regard to particular circumstances and facts.

Lord Cross uses the fact of the deletion as evidence of what the parties had directed their minds to. He did not consider whether the deletions formed part of the negotiations. It is submitted with respect that the approach taken by Lord Cross runs contrary to the principles expounded by Lord Blackburn. Surrounding circumstances are admissible as evidence of what words in a contract mean, and not what the parties think they mean.

The cases were considered by Bingham J (as he then was) in the *"C Joyce"* [1986] 2 Lloyd's Rep 285 at 291. Although he found the dicta of Lords Reid and Cross to be highly persuasive, "the authorities relied on by the owner [which included In*glis v Buttery* and *Sassoon's* case] are of such persuasive weight that I do not feel entitled to disregard them". Bingham J reached this conclusion in the context of a submission that the court was entitled to look at the standard bill of lading clause deleted from a charterparty form as showing the intention of the parties. It is unclear whether this was a "printed form" of the nature envisaged by Lord Reid.

In Australia there was early support for the principles enunciated by Lord Blackburn in In*glis v Buttery*. *Gordon v MacGregor* [1909] CLR 316 concerned the parol evidence rule and not the effect of deleted words. Nevertheless, Isaacs J cited with approval the words of Lord Blackburn. Isaacs J also referred to Lord Blackburn's judgment in *Inglis v Buttery* in *The King v New Queensland Copper Co Ltd* [1917] 23 CLR 495 at 500.

Isaacs J makes particular reference to Lord Blackburn's judgment as supporting the proposition that evidence of prior negotiations is not to be admitted. But Lord Blackburn's judgment was posited on the fact that the admission of deleted words would be admitting evidence of prior negotiations. It was Lord Reid's innovation to suggest that in relation to printed forms deleted words might not constitute such evidence.

In the case of Bu*ilding and Engineering Constructions (Aust) Limited v Property Securities No 1 Pty Ltd* [1960] VR 673 at 681 Pape J considered the authorities and concluded that he should accept the law as laid down by Viscount Sumner in the Privy Council in *Sassoon's* case, although it was made clear that nothing turned on the point in that case, which involved a printed form.

By contrast, in T *J Watkins Ltd v Cairns Meat Export Co Pty Ltd* [1963] Qd R 21, the Queensland Full Court referred to a deleted clause for the purpose of interpreting a provision in the contract relating to the payment of

retention moneys. The contract was a printed form. The decision is impaired by the fact that it appears from the report that their Honours did not have made available to them a wide range of authorities on the point.

The question arose again in R*e S C Molineaux & Co Pty Ltd and Board of Trustees of Sydney Talmudical College* [1965] 83 WN (Pt 1) NSW 458. The proceedings were a special case stated for the decision of the court pursuant to section 19 of the *Arbitration Act* 1952-1957. Asprey J was required to consider, amongst other questions, whether interest on any sum found due to the builder in respect of the period up to the date of the award might be included in the award.

Asprey J observed that at common law the question for determination in the construction of a contract is one of construction of the instrument the parties have executed. After quoting various dicta to the same effect he went on to observe that it was plain from the application of this principle of construction that it is not open for one to speculate as to what the parties probably or might have intended if they had thought more about the matter or were properly advised. The problem is to ascertain the meaning of the contract from the actual words used in the contract which the parties have executed in the circumstances of the case.

Having said this the Judge went on to consider the deletion of the words "ten per cent per annum" after the clause (clause 25(i)) stipulating the interest payable in the event of late payment upon certificates. He went on to say (at page 465):

> "The condition with which I am immediately concerned, namely condition 25(i), itself has no operation but to confer a right in the builder to receive interest in the circumstances set out in the clause. By leaving condition 25(i) standing in the contract while at the same time striking out the percentage rate per annum stated in the appendix, it appears to me that the intention of the parties was to agree that the builder shall be entitled in given circumstances to interest on the sum to which he has become entitled from the date of the certificate until date of payment, leaving the question of interest at large."

Thus the Judge infers the intention of the parties from the fact of the deletion. This approach contrasts with Asprey J's stated approach. The decision may be explained on the basis that where a clause in a contract refers to another part of the contract which has been deleted, the remaining clause must be construed "standing alone". This decision is not, it is submitted, strong authority for the proposition that deleted words can be admitted in the construction of a contract.

A more thorough consideration of whether deleted words may be used as an aid to interpretation is to be found in the case of Mobil *Oil Australia v Kosta* (1969) 14 FLR 343, a decision of Blackburn J in the Supreme Court of the Northern Territory.

Although aware of the decision of the Full Court of the Supreme Court of Queensland in T *J Watkins Ltd v Cairns Meat Export Co Pty Ltd,* Blackburn J declined to follow it. He noted that by far the most authoritive dicta were to the contrary, including the statements of Lord Hatherley in *Inglis v Buttery* and the Privy Council in *Sassoon's* case.

Blackburn J also observed that in his view, in principle, it seemed irrational to admit deleted words because the materials available for the construction of written documents may be either extrinsic (ie parol evidence) or intrinsic (ie the contract itself). Moreover if it be the law that words struck out may be looked at, the result may depend on the extent to which they remain legible.

The interpretation of a document where words are struck out of an agreement was considered in the South Australian Supreme Court by Jacobs J in H*arrod v Palyaris Construction Co Pty Ltd* (1973) 8 SASR 54, where the cases of *Building and Engineering Construction* and *Mobil Oil* were followed. Jacobs J said this (at page 58):

> "In examining a contract of the kind I have just described, [which was based on an amended printed form] it is not, in my view, permissible to have regard to the printed or written words or phrases which have been substituted in their place. In some cases, it may well have been helpful, in ascertaining the intention which underlies an altered form of words, to know how the clause stood before it was altered. The words struck out, however, are no part of the contract which the parties have made, and it may well be possible to suggest a number of reasons for any particular alteration. Wide-ranging speculation on such possible reasons is not likely to be a useful aid to interpretation."

The most recent and authoritive review on the question of the admissibility of deleted words is to be found in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 327.

Mason J first addressed the question of the admissibility of evidence of surrounding circumstances. He said that the true rule was that such evidence was admissible where the language of a contract was ambiguous, but generally not unless they were known to both parties, or notorious.

Evidence of prior negotiation is therefore admissible to the extent that it tends to establish objective background facts which were known to both parties and the subject matter of the contract. But evidence of prior negotiations is not admissible insofar as it is reflective of the actual intentions and actions of the parties. Such intentions are superseded by the contract itself and the object of the parol evidence rule is to exclude them.

His Honour continued (at pages 352 to 353):

> "There may perhaps be one situation in which evidence of the actual intention of the parties should be allowed to prevail over their presumed intention. If it transpires that the parties have refused to include in the contract a provision which would give effect to the presumed intention of persons in their position it may be proper to receive evidence of that refusal. After all, the court is interpreting the contract which the parties have made and in that

> exercise the court takes into account what reasonable men in that situation would have intended to convey by the words chosen. But is it right to carry that exercise to the point of placing on the words of a contract a meaning which the parties have united in rejecting? It is possible that evidence of mutual intention, if amounting to concurrence, is receivable so as to negative an influence sought to be drawn from surrounding circumstances (see Heimann)."

By reference to Heimann (*Heimann v Commonwealth of Australia* (1938) 55 WM (NSW) 335 it is presumed that Mason J is referring to the words of Jordan CJ, (at page 237) in the context of a discussion on the implication of terms into a contract:

> "Where a term is not expressed in a contract, but would be implied by law, its implication may be excluded by proof that both parties intended to exclude that term: McGrory v Alderdale Estate Co Ltd".

The reference to *McGrory v Alderdale Estate Co Ltd* [1918] AC 503 leads in turn to consideration of the words of Lord Finlay LC (at page 508) where he said:

> "The law is clear that, if there is a written agreement of sale which expressly provides that a good title is to be made, it is not open to the vendor to prove that at the time of the contract the purchaser knew of a defect in title for the purpose of leading to the inference that a good title was not to be shown in that particular. This would be to vary a written contract by parol evidence. But if the contract is open, the obligation which the law would import into it to make a good title in every respect may be rebutted by proving that the purchaser entered into the contract with knowledge of certain defects in the title."

The tentative exception, expressed by Mason J, to the rule against the admission in evidence of deleted words, is narrow. The admission will only be allowed where a presumption as to the meaning of words arises from surrounding circumstances, and that assumption is sought to be rebutted. It must also be established that the deletion of the words constituted a mutual intention, amounting to concurrence.

Where words are deleted, one party may argue that it agreed to the deletion of the words because the provision was already included in the contract and the words were thought therefore unnecessary. The other party may argue, to the contrary, that the deletion was agreed by the parties to entirely remove a provision from the contract. The point is that the deletion of words alone will not always be sufficient to show mutual intention amounting to concurrence. Evidence may be necessary to establish this.

Notwithstanding the narrow ambit of Mason J's permitted exception, his dictum was followed by Rogers CJ Comm D in *NZI Capital Corporation Pty Ltd v Child* (1991) 23 NSWLR 481 (and see (1992) ACLN #27, p51).

In that case Rogers CJ Comm D was confronted by a loan document which was not clear as to whether it was to be non-recourse to the borrowers. Although the pre-contract negotiations indicated that it was the intention of the parties that the loans were to be non-recourse, such evidence was, as the Judge recognised, inadmissible in construing the contract.

But the loan document had been prepared from a precedent which was substantially the same. The only significant difference was that in the loan document the words "PRINCIPAL PAYMENT: All advances will be repaid by THE BORROWER to (Indo Suez) on or before the (relevant date)" had been deleted.

Rogers CJ Comm D had already found that in the absence of terms to the contrary, it would be presumed as an implication at law that a loan agreement permits lenders to have recourse against the borrowers. Rogers CJ Comm D went on to say (at page 494):

> "There is no direct evidence that the deletions took place as a refusal to include a provision which would have given effect to the "presumed intention of the parties" that the loan be repaid. However to my mind the inference to be drawn is clear... even if [the lender] did not make the deletion... [it] acquiesced in it giving effect to the intention of the parties."

NZI v Child did not deal with words deleted from a printed form. It dealt with a document prepared by one of the parties, from a precedent, where the precedent was not proffered to the other side as a draft for consideration. The evidence of the deletion from the precedent was used where the words of the document under question were ambiguous, and to rebut the presumption that the loan would be repaid.

In the course of reviewing the authorities Rogers CJ Comm D commented that some of the diversity in authority was due to the fact that some of the older decisions failed to differentiate between deletions in the actual document drafted for the occasion and deletions from a document serving as a precedent. Certainly at least in the final category of case the argument was, (he considered), strong that the rule against admitting evidence of negotiations works heavily against giving weight to the deletion.

From this it would appear to follow that, at least in Rogers CJ Comm D's view, deletions from a standard form document, where the document had been passed from one party to another and had been the subject of amendment, should not be admissible. This leaves the situation where one party has prepared a document from a precedent, as was the case in *NZI v Child.*

The effect of the decision of Roger CJ Comm D in *NZI v Child* is, arguably, to confine the operation of the exception enunciated by Mason J to cases where a document has been prepared by one party from a precedent, where neither the precedent nor the deletion has played any part in the negotiation between the parties. ❑