

Taking care of the detail

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Shy Jackson discusses some practical issues to address when putting contracts together

It goes without saying that it is important to put together a contract that is clear, comprehensive and consistent. Although this helps to reduce uncertainty and therefore the risk of dispute, it is not unusual to come across contracts that have been put together in a hurry, without sufficient thought. A few recent decisions serve as a reminder of the importance of getting the contract right.

Square brackets

In [Imperial Chemical Industries Limited v Merit Merrell Technology Limited \[2015\] EWHC 2915 \(TCC\)](#), the final version of the contract contained various terms left in square brackets. This was an issue for the dispute resolution clause, where the reference to the Technology and Construction Solicitors' Association adjudication rules was left in square brackets, as was the choice of the RICS as the adjudicator-nominating body.

The judge saw no reason why the square brackets should be ignored, especially as, in several places, ordinary brackets were used. He therefore found that the insertion of text in square brackets must have been deliberate. In his view, their use meant that the reference to RICS was intended to suggest it would be this organisation unless another nominating body had been specifically identified elsewhere in the contract documents. Another body was named and so it was not possible to argue that the nomination should have been performed by the RICS.

The effect of leaving in the deleted words

Some standard form contracts rely on the parties completing the agreement by crossing out certain words or options. Other forms can be used electronically, which makes it more difficult to identify what may have been deleted. In [Narandas-Girdhar and another v Bradstock \[2016\] EWCA Civ 88](#), the issue was whether the court could have regard to deleted words when interpreting the contract.

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The Court of Appeal confirmed that in the event of an ambiguity, deleted words can be taken into account if the fact of deletion shows what the parties agreed and what they did not agree. It was noted that care is required as to what inferences, if any, can be drawn from the fact of the deletion, but this principle may help identify what was agreed when it is still

possible to ascertain what words have been deleted. While it may be helpful in cases of ambiguity, it does mean a party may try to rely on deleted words to support its interpretation of the contract.

Incorporating documents into the contract

Tender and pre-contract correspondence is often incorporated into the contract to ensure that all agreed matters are included. Such documents, however, are not usually reviewed with the same care as contractual terms, and can lead to uncertainty. This was the case in [Martifer UK Ltd v Lend Lease Construction \(EMEA\) Ltd \[2015\] ScotCS CSOH 81](#) , where an information release schedule and a programme were incorporated into the contract.

The court accepted that the information release schedule showed the earliest dates that the main contractor could expect to receive detailed information from the designers, and that the programme provided the parties with information about the key sequencing of works. The contractual effect of such documents was, however, a question of interpretation, and it was held that such documents had a limited effect as they had to be read in the context of the main contract and the commencement notice and completion dates. As observed by the court, if a programme was held to be binding in its entirety, a failure to comply in every respect would result in a breach, which could not have been the parties' intent.

Conclusion

Care needs to be taken when putting a contract together to ensure that there is certainty as to the scope of the contractual obligations and the parties' intentions. When drafts are being prepared for execution, it is important to check they are in their final forms and any drafting notes have been removed. While incorporating pre-contract correspondence may seem an easy way to record what was agreed, it may result in more uncertainty with regard to any inconsistent provisions.

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Further information

- Related competencies include: [Contract practice](#)
- This feature was taken from the RICS *Construction journal* (September/October 2016)