

The meaning of deleted terms; and IVAs in the Court of Appeal

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THE NARANDAS-GIRDHAR DECISION.

1. It is not uncommon for the final version of a contract to show clauses that have been replaced, deleted or struck out during the parties' negotiations. Can you have regard to them in order to interpret the contract? The Court of Appeal held in Narandas-Girdhar & Anor v Bradstock [2016] EWCA Civ 88 that you can, to a limited degree.
2. The case also considered "*material irregularity*" challenges to an Individual Voluntary Arrangement ("IVA") under s262 Insolvency Act 1986 ("IA 1986"), where a creditor's vote had been cast without authority.

3PB'S ANALYSIS.

3. This case answers questions in three areas:
 - 3.1. construction of a document by reference to deleted sections;
 - 3.2. retrospective ratification of an otherwise unauthorised act; and
 - 3.3. the meaning of "*material irregularity*" under s262, IA 1986.
4. **The facts.** P and his wife (W) found themselves in financial difficulty and put proposals to their creditors for IVAs. Paragraph 4.3 of P's proposal made his IVA conditional on W's IVA also being approved. P later presented modifications of his proposal, in which paragraph 4.3 was replaced, removing reference to that conditionality ("*the Modification*"). At a meeting of creditors the modified proposal for P's IVA was approved.
5. HMRC had given its proxy to the chairman of the meeting but did not give power to approve the Modification. The chairman cast HMRC's vote in favour, without which the Modification and IVA would not have had been approved. W's IVA was rejected. Thereafter, HMRC never complained about the manner in which its vote had been cast, and subsequently agreed two modifications of the IVA and for the presentation a bankruptcy petition in 2005.
6. In 2010 P issued proceedings for a declaration to set aside the IVA. The application was dismissed. He appealed,

arguing that: (i) on its proper meaning, the Modified proposal had still been conditional on W's IVA being simultaneously approved; (ii) the IVA had never been approved because HMRC's vote had been unauthorised.

7. **Construction of the modified IVA proposal.** In order to determine whether, after the Modification, P's IVA was still conditional on W's IVA being approved, could the court have regard to the original text that the Modification replaced? Briggs L.J., giving the single judgment, approved (at [19]) Mopani Copper Mines plc v. Millennium Underwriting Ltd [2008] EWHC 1331 (Comm).
 - 7.1. Before regard may be had to deleted/replaced clauses, the meaning of the **remaining text must be ambiguous** (if it is not, then its plain meaning should be applied). If so, a second question arises.
 - 7.2. The deletion of a term which provides for "X" might suggest that the parties were agreed on "not X". If in this way the **deletion shows agreement as to what was not agreed**, it is permissible to have regard to that as an aid to interpretation. Thus, on the facts, the Modification removed reference in P's IVA to it being conditional on W's IVA; its deletion demonstrated consensus that P's IVA was not dependant on W's.¹
 - 7.3. Resort to deleted text must however be **used with care**, because the proper inference to be drawn from the deletion may be unclear.
8. **Ratification.** On the question whether HMRC had ratified the unauthorised casting of its vote, the Court approved Yona International Ltd v. La Reunion Francaise SA d'Assurances [1996] 2 Lloyd's Rep 84 (QB): there can be a ratification of an act by conduct (as opposed to purely passive inaction). HMRC had ratified the error.
9. **Material Irregularity s262(1)(b).** Re Plummer [2004] BPIR 767 took a narrow view. Registrar Baister said a failure of approval before or during a meeting went beyond

¹ Strictly, the case did not concern a contract. However, as noted at [34], an IVA which has been approved by creditors operates by analogy with a contract between the debtor and all his creditors: Lloyds Bank plc v Ellicott [2002] EWCA Civ 1333, [2003] BPIR 632, at [51].

material irregularity and could not be subsequently ratified.

10. Smith-Evans v. Smailes [2014] 1 WLR 1548 took the purposive approach following Davis v. Price [2014] 1 WLR 2129, HHJ Purle QC declining to set aside an IVA where the chairman cast proxy votes outside his authority.
11. Briggs L.J. approved Smith-Evans v. Smailes. The Re Plummer approach: did violence to IA 1986, s.262(8); deprived the court of its flexibility in s.262(4); and may lead to sterile considerations of the nature of an irregularity. As the Court pointed out, however, s.262 is not a catchall. There must be material irregularity at a valid s.257 meeting.²

IMPACT OF THE DECISION

12. By holding that a court may use deleted sections of a contract (but cautiously) to construe an ambiguous replacement section, Girdhar probably represents an extension of the law. At very least it clarifies that the principle is not limited (as some had thought it might be³) to deletions in printed form contracts.

² Fletcher v Vooght [2000] BPIR 435; Vlieland Boddy v Dexter Ltd [2003] EWHC 2562 (Ch) (not properly summoned) and IRC v Bland v Sargent [2003] EWHC 1068 (Ch) (proposal made no provision for payment) were correctly decided.

³ See *Chitty on Contracts* (32nd ed., 2015) at para. 13-071.

13. Nonetheless, the Court of Appeal's caution is a welcome limit on the admissibility of such evidence. There is a fine line between evidence of negotiations (which is inadmissible) and visible deletions or modifications. Deleted text will in many cases remain an unsafe guide to the meaning of a contract because "*the parties may have had all sorts of reasons for deleting the provision*".⁴
14. Re Plummer was wrongly decided and "*material irregularity*" as a basis for setting aside an Individual Voluntary Arrangement should be construed broadly.

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This article intends to state the law at the date indicated above. Although every effort is made to ensure accuracy, this article is not a substitute for legal advice.

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⁴ See Lewison, *The Interpretation of Contracts* (6th ed., 2015), at para. 3.04, citing Lloyd J. in The Golden Leader [1980] 2 Lloyds Rep 573.