

Financial Times

Lawyers witnesseth dreadful legalese

By Megan Murphy

Published: March 24 2009

It was known as the battle of the million-dollar comma. Two Canadian companies—Rogers Communications, a cable provider, and Bell Aliant, a telephone company—became locked in a bitter dispute over whether Aliant could cancel a contract governing the use of more than 90,000 utility poles scattered across the country's easternmost provinces.

The high-stakes battle turned on the construction of a single sentence, and whether it allowed Bell Aliant to scrap the agreement at any time with just a single year's notice, or only after an initial five-year term had elapsed.

The offending passage? "This agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party."

A succession of grammar experts was called on to determine whether the position of the second comma modified the subordinate clause or the whole sentence. The dispute was decided in favour of Rogers after a Canadian court reviewed the French version of the contract – but only after nearly two years of costly litigation.

Aliant and Rogers are far from the only companies to learn the lessons of sloppy contract drafting the hard way. According to Ken Adams, a self-described "contracts geek", almost any standard business agreement will be riddled with punctuation ambiguities, meaningless boilerplate language and botched verb usage.

The "dirty little secret" of the Anglo-American drafting style that dominates global transactions, he says, is that nobody drafts contracts from scratch.

Since giving up his private law practice to set up his own drafting consultancy, Mr Adams has become a one-man crusade against legalese, that much-loathed and archaic jargon exemplified by such expressions as "in consideration of the premises and mutual promises herein contained" and "witnesseth".

With corporate legal departments now facing swingeing budget cuts, one of the simplest ways to improve efficiency is to overhaul the way they draft, negotiate and sign deals, Mr Adams argues.

As any lawyer knows, most contracts are based on some sort of master template, or the agreements used in a previous – hopefully similar – transaction. Those documents are then "marked up" to reflect the proposal being tabled, from a small business loan to a large takeover bid. Changes are generally marked first by hand, then by computer through seemingly endless rounds of "black-lined" documents exchanged between the parties.

This method, while aimed at reducing risk in the high-pressure world of corporate deal-making, means that most contract drafting quickly becomes an exercise in what Mr Adams dismisses as "uncritical

regurgitation". When a template is then used hundreds or even thousands of times a year, the cumulative effect of seemingly minor drafting glitches can become a costly drag on business efficiency.

Perhaps worse, it is just the sort of repetitive work that demoralises junior staff and takes people away from higher-level work. Confusing, cryptic and barely intelligible agreements cost companies time and money and, in the worst-case scenario, can deprive them of their rights.

The solution? Mr Adams recommends an active approach to contract drafting and calling in outside counsel or a specialist to rewrite templates in full.

He claims that skilful redrafting using standard English generally cuts about 25 per cent of the words without losing any of the substance and leaving what remains "vastly clearer".

Some of his other key recommendations are developing an internal style guide for drafting and using information technology to automate the process.

Many larger companies and law firms have already invested in some type of document assembly software in an effort to streamline contract management. Among the more popular products is DealBuilder, developed by London-based Business Integrity. The web-based service allows users to produce the first draft of a an agreement more quickly by answering a series of questions about the proposed transaction. A draft document is then automatically generated from those responses, which can then be further negotiated and refined.

The banking group at Linklaters, a global law firm, for example, says it has been able to cut the number of "master" precedents used in its syndicated lending deals from between 50-60 to just one using DealBuilder. Jeremy Stokeld, a partner, says that while the same issues still tend to be picked apart and argued by the banks involved in a deal, the service shaves hours off the initial drafting time, reducing the final costs to the client.

Mr Adams, while a proponent of automated document assembly services, says that businesses still need to be wary of rogue contract templates. "It's the garbage in, garbage out syndrome companies really need to watch out for."

Oh, and Mr Adams's take on the million-dollar comma? He would have scrapped the entire passage, in favour of the following: "The initial term of this agreement ends at midnight at the beginning of the fifth anniversary of the date of this agreement. The term of this agreement (consisting of the initial term and any extensions in accordance with this section 12) will automatically be extended by consecutive five-year terms unless no later than one year before the beginning of any such extension either party notifies the other in writing that it does not wish to extend this agreement."