

HEAD TO HEAD

Adams v Anderson on contract drafting

**Kenneth A. Adams**

Practised corporate law in New York and Geneva with major US law firms. Author of influential book *A Manual of Style for Contract Drafting* (American Bar Association, 3rd edition, 2013)

» Among the more prominent voices in contract drafting are Kenneth Adams and Mark Anderson. They went head to head to debate contrasting approaches in the UK and US.

KENNETH A ADAMS: Mark, I think of us as coming from different parts of the contracts world and finding common ground. My focus is how to say stuff in contracts, but to get anything done you also have to figure out what you want to say. Your focus is the what-to-say stuff, but to handle that effectively you have to figure out the best way to say it. Perhaps we're Jack Sprat and his wife, and between the two of us we lick the contracts platter clean – although come to think of it that doesn't sound very appetizing. In any event, I have you pegged as Jack's wife in that scenario.

MARK ANDERSON: Yuk, what a gross image. I think I'm more like June to your Terry, where I am the practical and sensible one (but generally supportive of your endeavours, sorry efforts) while you dream of a better world of contracts.

You're always complaining about something, and I sense you're itching to do so now. So start complaining.

KA: Well, I will permit myself to observe that a large majority of business contracts are wretched in terms of both what they say and how they say it. That's because any given transaction will closely resemble other transactions that have gone before, so the urge is to copy contracts used in those other transactions and make only whatever adjustments are required to reflect the new transaction.

That should be a source of efficiency, but instead it has given us dysfunction – what I call 'passive drafting'. You don't follow a set of

**Mark Anderson**

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guidelines. Instead, you simply copy and rationalise any inconsistencies as being a matter of 'style'. You don't train anyone in clear drafting – who needs to be trained if you can copy! You make excuses for the dysfunction

dysfunctional language. I recognise the old argument about using traditional language because it has supposedly been tested in the courts, but I don't think I've heard that argument used seriously by an English lawyer in the last couple of decades. Attitudes have moved on, at least on this side of the Pond.

KA: I do believe I'll let you keep digging that hole deeper. What do you see as the differences between US and English drafting?

MA: Where to start? The most obvious difference is length. US agreements tend to use more words than English ones to say the same thing. There seem to be more formulaic phrases, such as 'indemnify, hold harmless and defend'. Particularly with east coast contracts, the layout seems very old-fashioned and not

my seminars and see in online discussion, I'm aware that the world over, people groan at the prospect at having to read a US-drafted contract.

But that's offset by a uniquely English problem. You say 'academic', I say 'over-sophisticated', with the US by contrast perhaps having a greater share of under-sophisticated drafters. (Hey, I just made that up!) The UK Supreme Court talks about being guided by the natural meaning of contract language, but you have English judges reaching conclusions that fly in the face of semantics. I have in mind the way English judges have attributed different meanings to 'best endeavours' and its variants and have seen remedies implications in whether statements of fact are introduced by 'represents' or 'warrants' or both. At the risk of channeling 'Disgusted of Tunbridge Wells', I think these decisions are fatuous. And English law firms are all too willing to issue unduly deferential newsletters endorsing these decisions. Let's call it the gamification of contract interpretation. Actually, please forget I said that!

MA: As we have discussed in the past, many of these phrases seem to be common currency in US business negotiations and to have crept into English contracts over time. Having said that, the phrase 'best endeavours' has a long history in English case law going back to the early 1800s, but only in the last couple of decades have English courts actively sought to distinguish between different levels of 'endeavours'.

The English courts try to give effect to what the parties say they have agreed. They probably assume that the parties and their lawyers are intelligent, rational beings, who mean something different when they say 'represent' rather than 'warrant' or 'reasonable endeavours' rather than 'best endeavours'. Whereas US judges may ignore a stream of words as so much 'noise' and come up with less academic interpretations. When drafting contracts, I try to sidestep the sterile 'best' versus 'reasonable' debate by including a definition of 'diligent efforts' or similar.

As for the newsletters of English law firms, I think the vast majority have no greater ambition than to report on developments in the law, as handed down by the courts, and demonstrate to their clients their technical knowledge of the law. I agree that there should be more critical analysis. But many lawyers,



by claiming that traditional language is precise, whereas it's anything but. And you claim that we're stuck with the traditional contract language because it's been 'tested'; the courts have told us what it means, so we'd be inviting a world of risk into our lives by tinkering with it. I'd like to hear what you have to say about the notion of 'tested' contract language.

MA: What's with all this 'you'? Leave me out of it! I'm all for training (and do quite a bit myself), and I'm against

user-friendly. US drafters seem less interested than English lawyers in having what is sometimes called an 'academic' debate about the meaning of wording. But generalising is dangerous. I see badly constructed agreements on both sides of the Atlantic.

KA: Although there are no grounds for complacency, I agree that English drafting is less afflicted by, for example, the verbosity and ludicrous archaisms that you still see in many US contracts. From what I hear at

particularly those who practise M&A, seem to regard the deal as a process, in which contract language is regarded as 'standard' and not given much intellectual scrutiny.

Essentially, I agree with your analysis, while taking a more benign view of the English courts' approach to interpretation.

KA: The world over, the principal driving force of the deal-making process is expediency, and it comes at a cost. But enough harmony! Is there anything we disagree about?

MA: Perhaps the main difference between us is that you're not interested in how a court would interpret wording. You prefer to make the meaning clear for the general reader so that, if a dispute arises, it cannot arise from a lack of clarity in the wording (even if a party argues that it does). Whether an imperfect court, guided by imperfect precedents, interprets the wording correctly is not a relevant factor for you.

Whereas, much as I want to draft the perfect document, sometimes messy 'real life' intervenes. As a practising lawyer, I have to keep an eye out for the vagaries of court decisions. To get the deal done, and in the heat of negotiations, I might take a course that seems best in context, but offends one or more of the principles that you have established in your book. In summary, expediency might trump other considerations.

KA: Ah, expediency again! I acknowledge that you can't always be choosy about what goes into making the sausage. Since you haven't suggested that being unclear in the hopes of winning any fight that results is preferable to being clear, I won't set the dogs on you.

MA: I know that you're increasingly being commissioned to rewrite the template agreements of major corporations. Expediency might be less relevant here. But even when drafting template agreements, in my view one needs to keep an eye out for how they will be used. If one's client is not in a strong bargaining position, giving them templates that are too 'edgy'

and outside the mainstream might be counterproductive in the context of getting them widely accepted.

KA: You're right, but if I'm doing a company's templates, it's because the company knows it has enough clout to use them rather than the others guy's paper. You might be surprised, man of the world though you are, at how readily my clients accept usages that would have many law firm lawyers choking on their Horlicks. And one of the saving graces of contract drafting is that contract usages aren't subject to a popular vote. The only people you have to convince are whoever's on your side of the table and on the other side of the table.

MA: Horlicks – interesting choice of word. OK, it's time to think about winding this up. How do you feel about the future?

KA: Relatively upbeat. I think about how the appearance of the first dictionaries caused English spelling to become standardised over the course of the 17th century. Because the building blocks of

contract language are finally being studied closely, I expect that a similar process will lead to contract language becoming clearer and more modern. And automated contract creation will allow the process to be commoditised to a degree. But as usual, progress will be slow. And it's far from clear that the market will be rational enough to allow publishers, or trade groups, to promulgate authoritative automated templates that gain broad acceptance, so we can get away from having countless organisations endlessly reinventing a wobbly wheel.

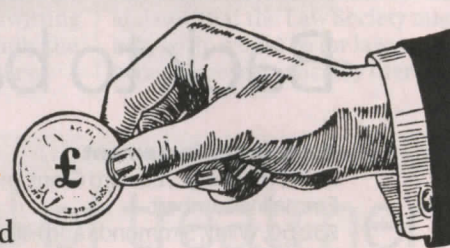
MA: Your comment brings to mind Noah Webster upsetting the standardisation (or do I mean standardization with a zed/zee?) of spelling, but I won't pursue that thought! If we – or rather you – can get a few large corporations using modern language in their contracts, others are likely to follow. Automation could be very useful in some areas, but I suspect there are just too many variables in a typical IP deal to make this a realistic goal in the short term.

KA: That's just like you, to end on a depressing note.



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