

CONTRACT LAW

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AN OMNIBUS TERM

Contract

Agreement

Memorandum of understanding

Deed

Lease

Licence



THE COMMA

Eats shoots and leaves

Versus

Eats, shoots and leaves



Lynne Truss, Eats, Shoots & Leaves (2003)

BUT IN A CONTRACT, A COMMA CAN BE EXPENSIVE!

“The \$1 million (Canadian) comma case”

Facts

Telco Aliant Telecom wished to terminate its contract with cable communications company Rogers Communications

The contract had been on foot for < 5 years

The clause

Subject to the termination provisions of [the Agreement], [the 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.





“The \$1 million comma case” continued

Issue

Did the second (red) comma mean that the words “unless and until terminated by one year prior notice in writing” applied to the first 5 year term or only subsequent 5 year terms?

Held

It did apply to the first 5 year term so Aliant won.

On appeal

There was a French version of the contract in which the same clause was capable of bearing only one interpretation, which favoured Rogers, so original decision overturned.

[Telecom Decision C.R.T.C. 2007-75, [2007] Reference: 8662-R28-200612326 (Aug. 20, 2007)]
[<https://crtc.gc.ca/eng/archive/2007/dt2007-75.htm>]

THE FINE PRINT

“Herod clause”

<https://www.theguardian.com/technology/2014/sep/29/londoners-wi-fi-security-herod-clause>



Experiment by Europol – who will read the fine print when offered free public wi-fi?

The wi-fi would only be provided if “the recipient agreed to assign their first born child to [the provider] for the duration of eternity”. Six people signed up.

IS IT A CONTRACT AT ALL?

Facts

Mrs X – a wealthy non-English speaking Chinese woman

Mr L – an inexperienced Chinese/Australian accountant

Mr RH – business advisor

Mr JH – legal advisor

Mrs X owned and controlled two companies A and B

Company A purchased the land on which a hotel stood.

Company B purchased the hotel business.

Mr L established company C which entered into an agreement with company A (first mistake), being a “lease” of the hotel business (second mistake).

WHAT THE JUDGE SAID

The evidence suggests that [the two advisors] were both incompetent in relation to this transaction.

The outcome of the collective naiveté, inexperience and incompetence of [the two advisors] was to produce several contractual documents that reveal considerable confusion and neglect.

Some of the terms...were gobbledygook.

BUT

If possible, the parties' agreement should be given effect.

The agreement is ineffective and unenforceable.

[However] The restitution claim is less controversial...

NB: Restitution is a quasi-contractual concept.

CONTRACT WITH THE DEVIL



An attorney was sitting in his office late one night, when the Devil appeared before him.

The Devil told the lawyer, "I have a proposition for you. You can win every case you try, for the rest of your life. Your clients will adore you, your colleagues will stand in awe of you, and you will make embarrassing sums of money. All I want in exchange is your soul, your wife's soul, your children's souls, the souls of your parents, grandparents, and parents-in-law, and the souls of all of your friends and law partners."

The lawyer thought about this for a moment, then asked, "So, what's the catch?"

JUST ONE MORE LAWYER JOKE

"You're a high-priced lawyer! If I give you \$500, will you answer two questions for me?" "Absolutely! What's the second question?"



KEY CONTRACTUAL ISSUES CONTINUED

Are the goods or services adequately described?

Are attachments actually attached?

How wide are the grounds for termination?

Is each party insured?

- Sight certificates of currency

INDEMNITIES

Example:

The Contractor indemnifies the Principal against any actions, claims, liability or loss in respect of the performance of the services.

Scenario

The Contractor is providing cleaning services to the Principal. The Contractor forgets to place the Danger Wet Floor sign. Someone slips on the floor and sustains a permanent impairment.

However, the person should not have been there; the Principal has poor security.

Person sues Principal for negligence and damages. The Principal notifies the Contractor that the Principal's costs and any damages awarded against the Principal are payable by the Contractor under the indemnity. This is despite the Principal having been negligent itself.

CONTRACTOR'S INSURER'S RESPONSE

Principal gives Contractor a bill for \$100,000 eventually.

Contractor makes a claim on its insurance.

Insurer points out to Contractor that the insurance policy excludes “contractual liability”.

Sometimes the exclusion has a rider, that contractual liability is excluded to the extent that the Insured would not have otherwise been liable.

This means that the Insurer will cover the Insured to the extent the Insured was at fault. Being at fault means that the Insured could have been found liable for part of the harm anyway, by being sued by the person harmed.

What to do?

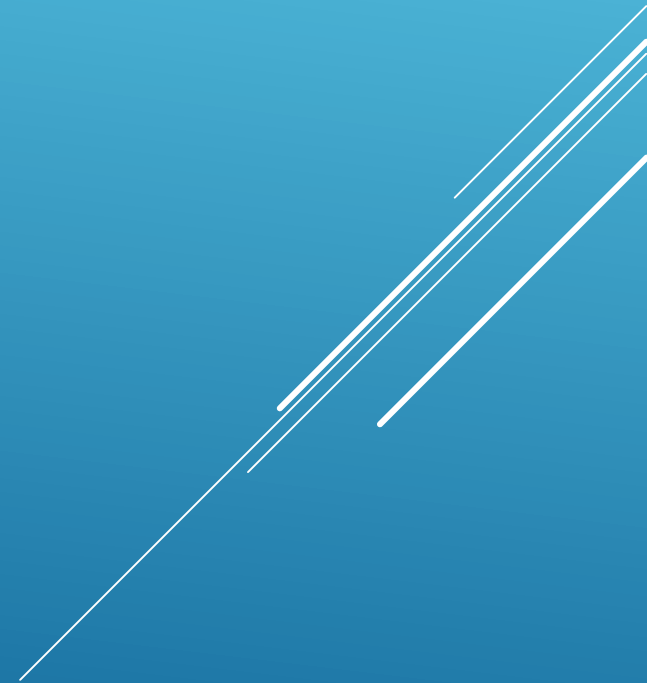
QUALIFY THE INDEMNITY

Limit the liability under the indemnity to those matters for which the Contractor is responsible, in the sense of contributed to or caused.

Indemnity clauses can trigger other exclusions in insurance policies:

- Compromise and settlement exclusion
- Subrogation clauses

The insurer's rights of subrogation are the rights the insurer has to step into the insured's shoes and sue or claim against others who have some responsibility for the loss or damage.



QUESTIONS?

