Clarity in Contracts

The Million Dollar Comma or Paragraph

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We live in a world of contracts and contractual obligations. We sign contracts to buy a house, to lease business premises, to enter into a new job, to purchase or supply goods, or to lease a car. An agreement that might seem straightforward and easily understood may become very complex as purchaser and seller negotiate. This is especially true now that contract templates can be downloaded from the internet, documents can be easily altered, and communications take place at the speed of light. Paragraphs or changes that appear to be innocent can have dramatic impact later on.

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Some recent contract disputes demonstrate how important it is to pay close attention to the fine print—including the punctuation. The first is the case that made newspaper headlines: Rogers Cable Communications versus Aliant Telecom, where the placement of a comma could have cost Rogers dearly in providing Aliant an early exit from a contract. Only by examining the less ambiguous French version was Rogers able to overturn the decision on appeal.

In the second case, when a vendor decided to sell part of its business, the selling price was initially defined as being "net of taxes, rebates and discounts." The purchaser amended the agreement of purchase and sale to read "net of taxes, freight rebates and discounts," then further amended it to read "net of taxes, freight, rebates and discounts." See the difference a comma makes? The vendor didn't—and lost $1 million on the sale price in the final agreement.

The vendor tried to argue that the agreement should be altered because it had not intended to change the definition of the selling price in this way. But the Court held the definition was clear, the comma was there in black and white, and the agreement should be enforced. Another costly comma!

The third case shows how even boilerplate wording should be carefully scrutinized. In 1986, Brick Furniture Warehouse Ltd. (Brick Ltd.) entered into a long-term lease with JSM Corporation (JSM) to operate a retail store on land owned by JSM. The lease allowed Brick Ltd. to sublet; the subtenant could also sublet. Brick Ltd. was structured legally to have no assets, so that there would be no point in suing Brick Ltd.

In 1987, Brick Ltd. assigned the lease to Brick Windsor, an affiliated shell company also without assets. In turn, Brick Windsor sublet the premises to Brick Warehouse, an operating company. A short time later, Brick Warehouse assigned the lease to Brick Corp., an operating company with assets. JSM was not a party to the subleases, since they were between affiliated companies, but was notified of them, signing a standard "Consent and Acknowledgement" form. In a clause in this form, Brick Corp. promised to Brick Windsor that it would "observe, comply with and perform all terms, conditions and covenants in the sublease".

In 2000, some 18 months before the expiry of the lease, JSM was notified that the store was being closed and that no more rent would be paid. JSM sued all of the Brick entities involved for the unpaid rent, which amounted to nearly $800,000. Brick Corp., which had assets, defended on the basis that it had no direct contractual arrangement with JSM, but only with its sublandlord, Brick Windsor. At trial, the argument was successful, but was rejected on appeal. Because JSM had been a signatory along with Brick Corp. to the standard "Consent and Acknowledgement" form, Brick Corp. had made a promise, not only to Brick Windsor, but also to JSM. Brick Corp. was therefore liable for the unpaid rent.

While not every contract is worth millions, every agreement is important and can have substantial impact on your life and your finances. Having a lawyer review what you are signing gives you an objective viewpoint on what the contract really means, whether that paragraph really matters and to avoid misplacing that million dollar comma.

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