

New contract is no legal fairytale

By John Sturrock QC

"GRANDAD?"

"Yes Gloagie"

"Can you tell me a story?"

"Yes lad - what about?"

"The time when lawyers used to draft long contracts?"

"Oh Gloagie, that's a bit scary..."

"Go on, Grandad."

"OK then... well, there was a time at the turn of the century when some business people asked an interesting question: 'Are commercial contracts really necessary?' They were concerned parts of their businesses were grinding to a standstill because of the time it took to finalise contracts.

"Some projects were finished and the written contract was still being negotiated. They felt they were being blinded by the pages and pages of contracts. They didn't understand them. They said they couldn't spot the real issues and assess the risks facing their businesses. If things went wrong, they couldn't work out what to do. The more detailed the contracts, the more uncertain and ambiguous they seemed to be.

"They had to go back to the lawyers, who drafted them and this seemed to increase cost, take up a lot of management time and sometimes sour business relationships and goodwill. Often, no-one could say what the contracts meant. They said they felt trapped and paralysed, Gloagie."

"Gosh Grandad, that is scary. What happened?"

"Well, one lawyer, called Steve Weatherley (he was the senior lawyer for a big company), came up with an idea that many contracts could be short, perhaps a letter of a page or two, without all the clauses that lawyers had come to think were essential. The letter would set out the key terms of a deal and say the general law would govern other issues."

"Oh, that was brave."

"Yes it was... he called it Pathclearer."

"Did it work Grandad?"

"Well, yes it did. It couldn't always be used of course, so care was needed, but it let people get on with business."

"What happened to all the lawyers who used to draft long contracts, Grandad?"

"Well Gloagie, some were unhappy of course. They said that the detail was important, that businesses were putting themselves at risk if they took the simple

path. But Mr Weatherley pointed out that, in olden times, businesses had managed to do deals themselves without involving lawyers in negotiating and drafting most commercial contracts.

"He said that there was something called 'commercial affinity' which existed in successful continuing commercial relationships. People worked hard to keep the relationship going because it was economically sensible to do so and they found ways to deal with problems - and they could walk away if it did not work. That was better than having what he called a legal straitjacket. He said that, if businesses were not getting along, there was little point in relying on a detailed document to force one of them to do something they did not want to do.

"The clever lawyers saw an opportunity. There were some contracts which required detail. But they worked on the principle that they should keep contracts simple unless there was a good reason for detail. And they found new and exciting ways to be professional advisers..."

"Did they all live happily ever after, Grandad?"

"No, Gloagie, not all... some... well, that's another story..."

"Grandad..."

"Yes?"

"Why did mum and dad call me Gloagie?"

"Well, there was once a great legal man who wrote a book about the law on contracts..."

- More can be found about Pathclearer in Practical Law Company's Law Department Quarterly for Oct-Dec 2005: www.practicallaw.com