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DISPUTE RESOLUTION ALERT

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DEAL OR NO DEAL?

In commercial contracts, it is common to find the requirement that parties deal with each other in good faith. These clauses seem like a particularly good idea when the parties are still feeling positive about their business together, but, as with all relationships – it's all fine and well until things start to go downhill.

THE "BASTARD CONJUNCTION" – "AND/OR"

" ... 'and/or,' that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning..."

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DEAL OR NO DEAL?

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The court aligned itself with Australian case law which requires that any dead-lock breaking mechanism must provide certainty for the agreement to be enforceable.

It's important to distinguish between a contractual obligation to negotiate in good faith and an unenforceable agreement to agree. The Supreme Court of Appeal recently considered an obligation in a lease to negotiate in good faith. A shopping centre owner terminated a lease on one month's notice to the retailer tenant. The tenant said that the contract could not be terminated until the good faith negotiations had taken place and, absent those negotiations, the existing lease agreement should be allowed to continue. The tenant also said that for the same reasons, the notice of termination and ensuing application for eviction were premature.

The court noted that generally an agreement that the parties will negotiate to conclude another agreement is not enforceable because of the absolute discretion given to parties to agree or disagree. The position is different where there is a deadlock-breaking mechanism and the parties must participate in a dispute resolution process that is specifically agreed between them. The court aligned itself with Australian case law which requires that any dead-lock breaking mechanism must provide certainty for the agreement to be enforceable. If the parties can achieve this certainty, their choice must be respected and realised.

In this case, there was no deadlock-breaking mechanism in the lease. The court then rejected the retailer's contention that any deadlock would be resolved by sticking to the current rental and if it turned out to be unacceptable to either of the parties, that party could end the contract. Since payment of current rental and the option to terminate were not aimed at the resolution of the impasse between the parties, this was not a true deadlock-breaking mechanism. The retailer then tried to argue that the common law should be developed to recognise the validity of an agreement to negotiate in circumstances where there is no deadlock-breaking mechanism. But how could a court develop the common law to enforce a duty to negotiate in good faith? The contract did not make it clear how the court should determine what period of negotiation was fair and what criterion should be used to determine whether the negotiation was in bad faith as alleged. The parties had already been at loggerheads for a period of approximately two years.

In the end, the court held that it would be against public policy for a court to coerce a landlord to conclude an agreement with a tenant it didn't want. The decision is certainly to be applauded for its pragmatism and parties will need to consider carefully the wording of such clauses, if they are to be included at all.

Megan Badenhorst and Tim Fletcher

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THE "BASTARD CONJUNCTION" – "AND/OR"

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" ... 'and/or,' that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning..."

During the past eighty years or so the conjunction "and/or" has regularly been used in pleadings, agreements, notices and other legal documents, both in South Africa and elsewhere.

Even though it has over the years, in several jurisdictions, been the subject of judicial disapproval, it has become increasingly common in legal writing.

As long ago as 1932, in *Cochrane v Florida East Coast Ry Co* 145 So 217 (1932) Terrell J said (at 218):

> It is one of those inexcusable barbarisms which was sired by indolence and dammed by indifference... .

In the Supreme Court of Wisconsin, Fowler J, in *Employers' Mutual Liability Insurance Co of Wisconsin et al v Tollefsen et al* Wis 263 N.W. 376 at 377 (1935), referred to "and/or" as "that thing". This is what the judge said:

> It is manifest that we are confronted with the task of first construing 'and/or,' that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of some one too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning with view to furthering the interest of their clients. We have even observed the 'thing' in statutes, in the opinions of courts, and in statements in briefs of counsel, some learned and some not.

In *American General Insurance Co v Webster et al* 118 SW 2d 1082 (1938 Tex App) Combs J said that "the abominable invention, 'and/or" is as devoid of meaning as it is incapable of classification by the rules of grammar and syntax".

In the Chancery Division in 1942, in *Re Lewis, Goronwy v Richards* [1942] 2 All ER 364 at 365 the court had to construct a will, leaving a bequest to "Margaret Ann and/or John Richards". With reference to "and/or", Farwell J said:

> It is an unfortunate expression which I have not met before and which, I hope, I may never meet again.

In *Raine v Drasin*, 621 SW 2d 895 (Ky 1981) Lukowsky J, in a dissenting opinion in the Supreme Court of Kentucky, referred to "and/or" as "the much condemned conjunctive-disjunctive crutch of sloppy thinkers".

Combs J said that "the abominable invention, 'and/or" is as devoid of meaning as it is incapable of classification by the rules of grammar and syntax.

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THE "BASTARD CONJUNCTION" – "AND/OR"

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Despite certain contexts in which "and/or" should be avoided, the construct should not be discarded simply because individuals occasionally misuse the term.

In 1944, in the House of Lords, Viscount Simon LC in *Bonitto v Fuerst Bros and Co Ltd* [1944] 1 All ER 91 at 92, when dealing with the pleadings before the court, expressed himself as follows:

> Para 18 stated the alternative claim in a variety of separated phrases, separated from one another by the repeated use of the bastard conjunction 'and/or' which has, I fear, become the Commercial Court's contribution to Basic English.

In Australia Williams J described an expression in which "and/or" was used as "an elliptical and embarrassing expression which endangers accuracy for the sake of brevity" (*Fadden v Deputy Federal Commissioner of F Taxation*, (1943) 68 C. L. R. 76). In *Millen v Grove* [1945] VLR 259 at 260 Duffy J said that the draftsman (of a notice to a tenant to quit) "invited trouble by the common and deplorable affection for the form 'and/or'".

Also in South Africa the expression "and/or" and its Afrikaans equivalent, "en/of", have been subjected to judicial scrutiny.

Ex Parte McDuling 1944 OPD 187 concerned the construction, in a will, of the phrase "death before age of 25 years and/or without lawful descendants". Van den Heever J is reported (at 189) to have said the following:

> Hierdie vertolking rym ook met die oorweging dat die lompe uitdrukking 'en/of' nie Afrikaans is nie; blykbaar het die opsteller van ons oorkonde hier *ex majore cautela* maar gedagteloos daardie Engelse ongerymdheid 'and/or' nageaap.
>
> Dit is 'n greep om helder begrippe te ontwyk, nie om hulle uit te druk nie; mens kan net sowel sê: 'trousers is and/or are'.

In *Saffer Clothing Industries (Pty) Ltd v Worcester Textiles* (Pty) Ltd 1965 (2) SA 424 (C) the court struck out a phrase including such words from a declaration amplified by further particulars.

Some legal writers are of the view that "and/or" is not ambiguous at all. It has a definite meaning: when used properly the construct means "A or B or both". It derives its criticism mainly from the inability of

THE "BASTARD CONJUNCTION" – "AND/OR"

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The phrase "and/or" has become embedded in legal writing. It is unlikely that it will be discarded.

people to use it correctly. Despite certain contexts in which "and/or" should be avoided, the construct should not be discarded simply because individuals occasionally misuse the term. See Ira P Robbins: *'And/or' and the Proper Use of Legal Language* Maryland Law Review, Forthcoming American University WCL Research Paper No 2017-10 (Date Written: March 6, 2017).

There are several South African judgments where our courts interpreted and gave meaning to the words "and/or". These courts, in broad terms, applied the ordinary rules of interpretation, went out from the premise that the phrase has to be construed so as not to treat either the "and" or the "or" as *pro non scripto* and that it should be read disjunctively as well as conjunctively. Such judgments include *Rex v Standard Tea and Coffee Co (Pty) Ltd and another* 1951 (4) SA 412 (A) 415 - 416; *Berman v Teiman* 1975 (1) SA 756 (W) 757 - 758; *Du Toit en 'n ander v Barclays Nasionale Bank Bpk* 1985 (1) SA 563 (A) 570 - 571; and *Brink v Premier, Free State and another* 2009 (4) SA 420 (SCA) 424 - 425. See also *Thomas v BMW South Africa (Pty) Ltd* 1996 (2) SA 106 (C) 117 - 118.

The use of a single "and/or" in a paragraph or sentence will not necessarily give rise to ambiguity. The potential for uncertainty will, however, be compounded where the drafter uses a string of "and/or"s. The addition of each further "and/or" exponentially increases the possible permutations or meanings. In R v Adams and others 1959 (1) SA 646 (SCC) 657 - 658 the defence complained about the extravagant use of the conjunction "and/or". It was suggested that if all the "and/or"s are added together, there will, under three paragraphs of part of the main charge, be no less than 498,015 combinations.

Despite judicial disapproval over a long period of time, the phrase "and/or" has become embedded in legal writing. It is unlikely that it will be discarded. It is here to stay.

Marius Potgieter

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