

Modernising Construction Contracts Drafting – A Plea for Good Sense

Ali, N.A.N.A.
University of Auckland
(email: naseem6864@yahoo.com)
Wilkinson, S.
University of Auckland
(email: s.wilkinson@auckland.ac.nz)

Abstract

Construction contracts users may be grouped into primary and secondary users. Primary users are those who would use the contract on a day-to-day basis including: (i) parties to the contract such as the client, contractor, and subcontractor, and (ii) the party administering the contract. Secondary users are occasional users such as lawyers, mediators, adjudicators, arbitrators, and judges who may be involved when disagreements arise. Construction contracts must be drafted in a style that suits both user groups. Unlike secondary users, primary users are unlikely to be legally trained. Modern legal drafters call for documents to be written in plain language. They assert that it is possible to write legal documents in plain language without losing legal intent. We critically examine the drafting style of construction contracts from several commonwealth jurisdictions and compare them against plain language drafting styles. We also compare „before and after“ examples to establish the potential benefits of plain legal drafting. Many published standard forms of construction contracts are still written in complex traditional style. Typically there is redundant legalese, long and convoluted sentences, and multiple cross-references. And many do not comply with modern practices such as gender-neutral drafting. We find plain legal drafting is practically achievable in construction contracts - without compromising legal intent but we would caution against overdoing it to prevent legal issues on interpretation. Some jurisdictions publish plain language guidelines and adopt them in statutory drafting. But we found no equivalent being used by construction contracts drafting bodies. We conclude with a plea for good sense in drafting construction contracts. We recommend a model set of plain language drafting guidelines for construction contracts be developed and adopted. This may be used when amending existing contracts and when drafting new contracts. Drafting contracts based on such guidelines can result in greater clarity to primary and secondary users, more efficient contract administration, and reduce unwarranted disputes. Drafters' thought-process would be clearer, enabling them to allocate risk more clearly. Drafting bodies can continue to maintain their freedom on conceptual approaches in allocating risk between contracting parties.

Keywords: construction contracts, construction industry, contracts drafting, modern legal drafting, plain language drafting guidelines

1. Introduction

1.1 Construction contracts

Construction contracts form the basis of contractual relations among parties to construction projects. They include (i) main or head contracts between clients and contractors, and (ii) subcontracts between contractors and subcontractors or between subcontractors and sub-subcontractors. These contracts, particularly the main or head contracts are commonly based on published standard terms of construction contracts.

1.2 Primary and secondary users of construction contracts

Many of the standard terms of contracts provide for the contract to be administered by a third party. In this paper we refer to the third party generically as contract administrator.

The parties to the contract and the contract administrator form the core people that would use the contract on a day-to-day basis. We call them the primary users. It is important that the parties to the contract fully understand the contract including their rights and obligations under them. Equally importantly, the contract administrator must understand and administer the contract based on the express provisions of the contract and what may be implied in law. An important example of an implied term imposed on a contract administrator - whether or not expressly stated in the contract - is the obligation (when exercising certain decision-making functions like certification of payment) to administer the contract in a fair and independent manner.¹

Whilst the contract administrator would usually have some construction related background and is expected to have sufficient knowledge of construction contracts and aspects of construction law, the contract administrator is not expected to be (and is usually not) legally qualified.

If disagreements arise under the contract and they evolve into a formal dispute, others like lawyers, claims consultants, party representatives, mediators, adjudicators, arbitrators, or judges may be involved. We call them secondary users. Secondary users are occasional users who are only involved when there are disputes to be resolved. They are usually interested in the legal interpretation of the contract.

¹ *Canterbury Pipe Lines Ltd v Christchurch Drainage Board* [1979] 2 NZLR (CA)

1.3 Construction contracts and drafting style

Construction contracts must be drafted to serve *both* primary and secondary users' needs. They must be clear enough for the contract administrator and parties to the contract to understand their duties in administering the contract and their rights and obligations under the contract. And they must be capable of clear contractual interpretation if a dispute arises.

The drafting styles to cater for the needs of these two groups of users' need not be different. Some contracts are drafted in traditional legalese, and have explanatory notes or guides in plain language. The assumption here may be that it is not possible to effectively express legal concepts in plain language. Butt (2005) dispels this as a myth, and goes further in suggesting that plain legal language even saves money. He says there is now over 20 years of research on the topic of plain language in law. He encourages the construction industry to consider using plain language and reassures:

The evidence is overwhelming. Plain legal language brings substantial benefits. It would bring those benefits to the construction industry. Carefully used, plain language is legally safe; it saves time and money; lawyers and non-lawyers alike have a better chance of understanding it; and most judges prefer it. (Butt 2005, p.9)

Thus plain language should be seriously considered when drafting construction contracts.

2. Modern plain legal drafting

2.1 What is plain language?

Before analysing and considering the use of plain language, we must first ask what plain language is. Much has been written about plain language and plain legal language. See for example Eagleson (1990), Garner (2001), Asprey (2003), Cutts (2004), Painter (2005), Kimble (2006), Butt and Castle (2006), and Adler (2007). In essence plain language means writing that is „clear and effective for its intended audience“ (Butt and Castle 2006, p.113) and writing that is straightforward, and „avoids obscurity, inflated vocabulary and convoluted sentence structure“ and „using only as many words as are necessary“, (Eagleson 2010). All these make it easier for the audience to understand what the writer intended.

Garner suggests the fundamental principle is that „anything translatable into simpler words in the same language is bad style.“ He defends this strict principle, by saying „that may sound like a facile oversimplification that fails when put into practice – but it isn't and it doesn't.“ (Garner 2001, p.662).

2.2 Modern legislative drafting guidelines

In support of modern plain legal language there are now legislative drafting guidelines which advocate plain legal drafting. See for example the New Zealand's Parliamentary Counsel Offices' (PCO) drafting guideline (Parliamentary Counsel Office 2009) and Australia's Office of Parliamentary Counsel Plain English Manual (Office of Parliamentary Counsel 2003). Rule 3.12 of the New Zealand PCO drafting guideline (Parliamentary Counsel Office 2009, p.5) instructs, among others:

- Use the simplest word that conveys the meaning
- Eliminate unnecessary words
- Do not use archaic language
- Always use gender-neutral language

Australia's Office of Parliamentary Counsel's Plain English Manual states their aim of plain English drafting in Chapter 1, Paragraph 10: „to simplify all official writing by removing unnecessary obscurity and complexity“ (Office of Parliamentary Counsel 2003, p.5). Their commitment to plain English takes a wide approach in Paragraph 11: „The Office policy is to draft in plain English, but to do more than that. It is to develop a whole art of making laws easy to understand“ (Office of Parliamentary Counsel 2003, p.5).

These statutory drafting guidelines are comprehensive. We did not find any comparable plain language drafting guidelines published by any of the construction contracts drafting bodies.

2.3 Common traits of modern plain language

In addition to plain language parliamentary drafting office guidelines, many modern legal writers advocate various plain language guidelines. For example, Painter (2005) lists 40 „rules“ in his book *The Legal Writer: 40 Rules for the Art of Legal Writing*. There are many common traits suggested by plain language experts. We list below a small selection of some of them.

2.3.1 Average sentence length

Plain language experts suggest sentence length should be around 20 words per sentence. For example, Painter (2005, p.66) suggests an average of 18 or fewer. This is the suggested *average*. Sentences could have more than 20 words – if it communicates clearly. Raj et al analysed and concluded that the average length of sentence in the FIDIC White Book has increased from 32 in the 1990 edition to 34 in the 2006 edition. They then acknowledge that „most style guides recommend much shorter sentences because it is widely accepted that shorter sentences are easier to understand.“ (2009, p.218). Even instructions to authors of quality journals such as the *Construction Management and Economics* suggest simple, short sentences make better communication (Construction Management and

Economics, 2010): „Simple language, short sentences and a good use of headings all help to communicate information more effectively.“

The easiest way of reducing the average words per sentence is to break up long sentences into shorter ones using the period or full stop. Listing and the use of numbering also help break up sentences to present them more effectively. Long sentences make reading difficult. Berry (2009, p.38) explains:

One of the major reasons why readers of legislative documents have difficulty in understanding them is that long and complex sentence structures overtax the cognitive capacity of the short-term memory.

2.3.2 Legalism

All modern legal drafters suggest legalism such as *whereas*, *hereinbefore*, *hereinafter*, *desirous*, *said*, and the *said* are unnecessary. Some suggest redundant doublets be omitted, for example, Butt and Castle (2006, p.27) suggest *void alone* will do instead of *null and void* – except possibly if used in *bijural* countries such as Canada.

Other phrases to be avoided include „*subject always*“, „*provided always*“ and „*and/or*“. These phrases are not straightforward and require readers to undertake some analysis before the clause could be understood.

Genuine „*terms of art*“ may of course be maintained, but these are generally only few. One study of a real-estate sales agreement by Benson Barr, George Hathaway, Nancy Omichinski and Diana Pratt, „*Legalese and the Myth of Case Precedent*“ (1985) 64 Michigan Bar Journal 1136-1137, quoted in Kimble (2006, p.11) found that only about 3% of the words had significant legal meaning based on precedent. In construction contracts this is estimated to be much less than 3% (Ameer Ali, 2008b, p.16). He suggests a few possible terms of art in a construction contract: „*reasonable skill and care*, *fitness for purpose*, *collateral warranty*, *regularly and diligently*, *time is of the essence*, *practical completion*, *liquidated damages*, *bills of quantities*, *provisional sums*, *loss and expense*, and *termination of the contractor’s employment*.“

2.3.3 Plainer words preferred over more complex words

Plainer words are preferred over more complex words. For example: *use* is preferred over *utilise*, *terminating* or *ending* a contract is preferred over *determining* a contract.

2.3.4 Consistent use of words

Words should be used consistently, and preference should be given to words with a unique meaning over words with multiple meanings. The first part may be best expressed as: „*Never change your language unless you wish to change your meaning, and always change your language if you wish to change your meaning*“ (Aitken and Butt 2006, p.19), crediting Jeremy Bentham as originating this

drafter's golden rule. For example, the word determination has multiple meanings, so termination or ending is preferable when used in the context of bringing a contract to an end.

Shall is commonly used throughout traditionally drafted construction contracts. But shall is rarely used in a consistent manner. Depending on context, shall has multiple meanings beyond meaning the imperative must. Modern legal writing experts have identified many more meanings of shall. For example, in addition to must and may, Butt and Castle (2006, pp.131-132) identify shall to mean giving a direction, stating circumstances, negating a right or duty, expressing an intention, stating a condition precedent, or stating a condition subsequent. In writing about avoiding shall, Garner (2001, p.939) suggests a word that has multiple meanings, even in midsentence, „runs afoul of several basic principles of good drafting“. Professor Kimble (Kimble 2006, p.159) is more direct and concludes, „give shall the boot“. Their advice, paraphrased in my words: shun shall.

2.3.5 Redundant parenthetical numerals

Omit redundant duplication through parenthetical numerals like fourteen (14). With the advent of printed and typed text, this practice serves no purpose. Worse still the words and numbers could be in conflict - leading to unnecessary legal arguments.

2.3.6 Multiple cross-referencing

Cross-referencing may be inevitable in long and complex contracts but multiple cross-referencing should be limited. This might sometimes mean inferring interpretation from reading the contract as a whole or repeating contractual provisions. Whilst plain language often results in shorter documents than those written in traditional legal language, clarity should take priority over brevity. An appropriate balance would serve the parties best.

2.3.7 Active and passive sentences

Active sentences get the message across more directly and efficiently using fewer words. „The contractor must submit a programme“ is written in active style and is more direct and uses six words. „A programme must be submitted by the contractor“ is written in passive style and has eight words (33% more than the active style). When writing on reducing complexity of legislative drafting, Berry (2009, p.68) discusses the use of active and passive sentence structures then concludes:

In sum, the research suggests that legislative counsel should, as a general rule, draft legislative documents in the active voice. Writing experts and research studies both support the general value of active sentences for understanding.

2.3.8 Gender-neutral drafting

In addition to the actual style of words, proponents of modern plain language suggest documents should be written in line with modern approaches and structured for ease of reading and comprehension. Among these would be gender-neutral drafting. The least preferable way to achieve

this is to use he or she, his or her, him or her, or she or he, her or him, or her or him. Using the plural, rewording in the passive, and repeating the noun enable gender-neutral drafting without the cumbersome he or she.

2.3.9 Lists and numbering

Using listing and numbering helps break paragraphs into more readable shorter sentences.

2.3.10 Headings, sub-headings, font type, font size, and use of white spaces

The use of headings, sub-headings, appropriate font type and size and white space around paragraphs can all make an impact on readability.

3. Applying modern plain legal drafting style to published standard construction contracts

In this section, we have taken examples from published standard terms of construction contracts found in several commonwealth jurisdictions, and discuss the application of plain language to construction contracts. We do this by comparing examples of traditional drafting with re-drafts and through examples from contracts that are in plain language.

3.1 Joint Contracts Tribunal (JCT) contracts

The most recent suite of the JCT contracts published in the UK has had much publicity. Showcasing projects between GBP 40 million and GBP 80,000.00, it has been referred to as being versatile (JCT 2010a, p 1). Neil Gower, chief executive of JCT claims „JCT has been setting the standard in construction contracts for almost 80 years“ and that they continue to „strive to ensure“ the contracts are „up-to-date“ (JCT 2010b).

The JCT Standard Building Contract (JCT 2007a) has been said to be the “ „industry standard“ against which all others are measured” (Murdoch and Hughes, 2008, p 106). A survey of contracts used in 2007 (RICS, 2007, p 13) showed the JCT contracts were used on 79.3% of the number of projects from the respondents to a survey. This was followed by the New Engineering Contract (7.7%) and GC/Works contracts (6.1%).

Historically many other jurisdictions such as Hong Kong and Malaysia had used the earlier JCT documents as a base, but which have now conceptually evolved in their own ways. The traditional drafting style has however generally remained.

The JCT revisions over the years have focused on addressing the way risks are allocated between the parties and how up-to-date technical provisions are incorporated in the contracts. In addition, there has been *some* refinement on the drafting style. For example, the word „determination“ which has

multiple meanings has now been replaced with „termination“ and the phrase „extension of time“ has now been rephrased „adjustment of time“ as the duration for completion could be reduced. Much of the drafting style is however still traditional and not in plain English. Consider, for example, the following.

3.1.1 JCT Standard Building Contract

Clause 4.14 from the JCT Standard Building Contract (Joint Contracts Tribunal 2007a, p.53) reads:

Without affecting any other rights and remedies of the Contractor, if the Employer, subject to any notice issued pursuant to clause 4.13.4, fails to pay the Contractor (including any VAT properly chargeable in respect of such payment) by the final date for payment as required by these Conditions and such failure continues for 7 days after the Contractor has given to the Employer, with a copy to the Architect/Contract Administrator, written notice of his intention to suspend the performance of his obligations under this Contract and the ground or grounds on which it is intended to suspend the performance, then the Contractor may suspend such performance until payment in full occurs.

This is a 112-word sentence with a Flesch Reading Ease score of 0. Whilst it can be understood after several reads, by re-drafting and re-arranging the clause and using listing or numbering, readability improves. Consider this re-draft:

- 4.14.1 Subject to any notice issued by the Employer under clause 4.13.4, if the Employer fails to pay the Contractor (including any VAT chargeable), by the final date for payment under these Conditions, then the Contractor may suspend performing his obligations under this Contract until full payment is made, if:
 - 4.14.1.1 the Contractor has given to the Employer written notice of his intention to suspend performing his obligations under this Contract, with a copy to the Architect/Contract Administrator;
 - 4.14.1.2 the Contractor has stated the appropriate grounds in the notice; and
 - 4.14.1.3 such failure continues for 7 days after the Contractor's written notice.
- 4.14.2 The Contractor's other rights and remedies are not affected.

The total number of words has decreased only slightly but clarity has improved – at least on the sentence structure and the Flesch Reading Ease score (now 7.2). If this were accepted as having the same meaning as the original, then the re-draft serves the intended primary audience better.

These improvements were achieved by applying only *some* of the modern legal drafting guidelines. A complete review would see the clause drafted in gender-neutral style without any reference to „his“ and the longish Architect/Contract Administrator shortened to just one or two words omitting the

virgule or slash (/) but maintaining legal intent through appropriate definitions in the definitions section or the articles of agreement. This can be done assuming there are no extrinsic reasons such as „political“ or diplomatic reasons for maintaining the term „Architect/Contract Administrator“ throughout the entire contract. The cumulative effect of using these modern drafting styles when re-drafting across the entire contract can be significant.

3.1.2 JCT Design and Build Contract

There are other similar examples that could be given from within the JCT suite. The survey of contracts in use in 2007 (RICS, 2007, p.19) suggests Design and Build contracts take up a significant portion of market share as a procurement route, and the JCT Design and Build contract accounts for 19% of all contracts used and „the proportion by number is the highest figure ever recorded“. Given its relative popularity, we have taken our next example from the JCT Design and Build contract.

We chose clause 2.17.1 on design work liability for two reasons: (i) this is a major distinguishing feature from the traditional contracts, and (ii) the 134-word sentence typifies similar design liability drafting style in other standard terms of construction contracts within the UK and far beyond such as the those found in Malaysia. The similarity of these clauses reflects the „boilerplate“ or cut-and paste approach that is common in construction contracts drafting. It also shows modern drafting style guidelines are rarely used when drafting construction contracts.

Clause 2.17.1 (Joint Contracts Tribunal 2007b, p.32) reads:

Insofar as his design of the Works is comprised in the Contractor's Proposals and in what the Contractor is to complete in accordance with the Employer's Requirements and these Conditions (including any further design required to be carried by the Contractor as a result of a Change), the Contractor shall in respect of any inadequacy in such design have the like liability to the Employer, whether under statute or otherwise, as would an architect or, as the case may be, other appropriate professional designer holding himself out as competent to take on work for such design who, acting independently under a separate contract with the Employer, has supplied such design for or in connection with works to be carried out and completed by a building contractor who is not the supplier of the design.

This has 134 words in a single sentence, and has a Flesch Reading Ease score of 0. The equivalent design obligation clause found in clause 10(2) Alternative A of the GC/Works/1 Single Stage Design & Build contract (Property Advisers to the Civil Estate 1998, p.19) and that found in clause D1(b) under option module D of the CIDB contract (Construction Industry Development Board Malaysia 2000, p.107) are similar in style.

The essence of clause 2.17.1 (and the equivalent in the GC/Works/1 and CIDB contracts) is:

The Contractor owes a reasonable skill and care obligation for design, as would a professional appointed independently. [17 words]

That has been the intended meaning for decades – since the *Bolam*² days, but the JCT clause stop short of making plain what the current standard of care for design is. The NZIA Standard Conditions of Contract (New Zealand Institute of Architects 2009, p.16) stipulates a similar design obligation in 14 words (and a Flesch reading Ease score of 41.5) in the first part of clause 8.6.5:

The Contractor must carry out all Contractor design with reasonable care, skill and diligence.

It may be that the JCT contract drafters wanted to ensure the clause is flexible enough to cater for changes in the standard for design obligation of professionals. Even if this flexibility were to be preserved, the essence of the 134-word sentence can be captured in 23 words:

The Contractor has the same liability to the Employer for design, as would any other appropriate professional designer appointed separately by the Employer.

Judges have long criticized the JCT contracts with strong words like “*Afarrago of obscurities*”³ and that they contained among the most “*obscurely and ineptly drafted clauses in the United Kingdom*”⁴. It appears, whilst the JCT has partly responded to some of these judicial criticism, there is a notable advice that remains unheeded. Putting aside the accusation that it was “*deviously drafted with what in parts can only be a calculated lack of forthright clarity*” Sachs LJ suggested in the Bickerton case:

*The time has come for the whole to be completely redrafted so that laymen – contractors and building owners alike – can understand what are their own duties and obligations and what are those of the architect.*⁵

We would however caution against overdoing to prevent loss of legal intent. For example: “the Contractor must be careful when designing” does not carry the same legal meaning.

Perhaps what needs to be done is to maintain the negotiated concepts and the technical refinements found in the current JCT contracts that have been introduced over the years, but to re-draft the contract in plain English, heeding modern legal drafting styles - some of which are highlighted in this

² *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, CA

³ *English Industrial Estates Corporation v George Wimpey & Co Ltd* [1973] 1 Lloyd’s Rep 118, CA at 123

⁴ *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* [1970] 1 BLR 111, CA at 114

⁵ *Bickerton & Son Ltd v North West Metropolitan Regional Hospital Board* [1969] 1 All ER 977, CA at 979

paper. But that won't be easy. The creator of the Flesch Reading Ease himself, Rudolf Flesch, warns (Flesch 1979, p.2):

Legalese is worse than smoking cigarettes. To kick the habit is extremely hard. So don't kid yourself. If you want to write plain English, you'll have to learn how. You'll have to study it as if it were Spanish or French. It'll take much work and lots of practice until you've mastered the skill.

3.2 GC/Works/1 contracts

Apart from the dominance of the JCT suite of contracts, the survey of contracts used in 2007 (RICS, 2007, p 13) shows the GC/Works contracts accounted for 6.1% of the total number of contracts. The publisher of the GC/Works contracts - the Stationery Office for the Property Advisers for the Civil Estate (PACE) did not refer to any plain language drafting guidelines used, but do make a claim on having adopted plain English for the suite of contracts. The PACE Information Note 26/99 (Property Advisers to the Civil Estate, 1999, p.2) claims:

The contracts are written in plain English and are accompanied by a comprehensive commentary. This ensures that users are able to easily interpret and understand the general conditions without the need to seek additional expensive legal advice.

Consider the following two clauses in the light of the claim that the contracts are written in plain English. Clause 8A(1) on professional indemnity insurance for design reads in a single 156-word sentence (Property Advisers to the Civil Estate 1998, p.18):

The Contractor shall maintain professional indemnity insurance covering (inter alia) all liability hereunder in respect of defects or insufficiency in design, upon customary and usual terms and conditions prevailing from the time being in the insurance market, and with reputable insurers lawfully carrying on such insurance business in the United Kingdom (in an amount not less than that required by the Abstract of Particulars) for any one occurrence or series of occurrences arising out of any one event, for a period beginning now and ending 12 years (or such other period as is required by the Abstract of Particulars) after certification under Condition 39 (Certifying completion) of the completion of the Works or the last Section thereof in respect of which completion is certified, or the determination of the Contract for any reason whatsoever, including (without limitation) breach by the Employer, whichever is the earlier, provided always that such insurance is available at commercially reasonable rates.

And clause 51 headed recovery of sums (Property Advisers to the Civil Estate 1998, p.47) is a 159-word sentence:

Without prejudice and in addition to any other rights and remedies of the Employer, whenever under or in respect of the Contract, or under or in respect of any other contract between the Contractor or any other member of the Contractor's Group and the Employer or any other

member of the Employer's Group, any sum of money shall be recoverable from or payable by the Contractor or any other member of the Contractor's Group by or to the Employer or any other member of the Employer's Group, it may be deducted by the Employer from any sum or sums then due or which at any time thereafter may become due to the Contractor or any other member of the Contractor's Group under or in respect of the Contract, or under or in respect of any other contract between the Contractor or any other member of the Contractor's Group and the Employer or any other member of the Employer's Group.

Both score 0 on the Flesch Reading Ease scale. And contrary to its claim of having adopted plain English, neither clause can be said to comply with modern plain English drafting style suggested in this paper. Both clauses are not easily understood on first reading.

Such traditional drafting style is not unique to the United Kingdom. They are also found in other commonwealth countries that adopted the original British construction procurement systems. Here are some examples from Singapore.

3.3 Singaporean contracts

3.3.1 Singapore building contract

The first part of clause 1(2) of the Articles and Conditions of Building Contract (Singapore Institute of Architects 2008) provides a basic provision relating to the difference between an Architect's direction and instruction. It does so in one sentence. The gist of this clause can be re-drafted more clearly and more efficiently using shorter sentences and using sub-numbering. Consider the following comparison:

	Original	Re-draft
Clause	1(2) In this Contract or when used by the Architect the term "direction" shall mean an order of the Architect (as opposed to suggestions, recommendations or agreements with proposals made by the Contractor), compliance with which will not under the terms of the Contract entitle the Contractor to additional payment or compensation or to an increase in the Contract Sum, but which may in some cases result under the terms of the Contract in a reduction of the Contract Sum, whereas the term "instruction" shall mean an order of the Architect, compliance with which, while it may in some cases involve	1.2.1 Direction means an Architect's order for which the Contractor will not be entitled to additional payment or an increase in the Contract Sum. 1.2.2 Instruction means an Architect's order, which in principle will entitle the Contractor in appropriate cases to additional payment or an increase in the Contract Sum.

	a reduction of the Contract Sum, will in principle entitle the Contractor in an appropriate case under the terms of the Contract to additional payment or compensation or to an increase in the Contract Sum.	1.2.3 Both directions and instructions may in some cases result in a reduction in the Contract Sum.
Total words	135	67
Average words per sentence	135	22.3
Flesch Reading Ease score	0	27.5

The total number of words in the re-draft is half of the original. The average number of words per sentence is now 22.3 - close to the recommended average of around 20. The Flesch Reading Ease score, which is one of the most commonly found readability formula, improves from 0 to 27.5.

We suggest the re-draft serves the users of the contract better. The numerical analyses additionally support our view. If a modern plain legal drafting guideline had been used, the original would have been re-drafted with greater clarity, shorter average words per sentence, and most likely fewer words. And all this is achievable without losing the original legal meaning.

The traditional drafting style is also common in other construction contracts in Singapore and in legislative drafting in Singapore. Ameer Ali and Wilkinson (2009) suggest that among nine jurisdictions that have introduced legislation affecting payment and adjudication in the construction industry, Singapore ranks among those with the most traditional style. They also conclude that retaining the traditional legislative drafting style is not „justified to a user who suffers the consequences of complex drafting style.“ (p.22)

3.3.2 Singapore Contractors Association Limited (SCAL) domestic sub-contract

Here is clause 6 on performance bond from the SCAL *Conditions of Sub-Contract for Domestic Sub-Contracts* (Singapore Contractors Association Ltd, 2005).

The Obligor agrees that its liability hereunder shall not be discharged, affected or impaired in any way by reason of any modification, amendment or variation in or to any of the conditions or provisions of the Sub-Contract or the works or reason of any arrangement made between the Sub-Contractor and the Contractor or by reason of any breach or breaches of the Sub-Contract, whether by the Sub-Contractor or by the Contractor, and whether the same is or are made or

occurs with or without the Obligor's knowledge or consent. The Obligor further agrees that no invalidity in the Sub-Contract nor its avoidance, suspension or termination shall discharge, affect or impair its liability hereunder and that no waiver, compromise, indulgence or forbearance, whether as to time, payment or any other matter afforded to the Sub-Contractor under the Sub-Contract, shall discharge, affect or impair the Obligor's liability hereunder.

Wydick (2005, p.3) writes about such style commonly found in legal writing:

We lawyers do not write plain English. We use eight words to say what could be said in two. We use arcane phrases to express commonplace ideas. Seeking to be precise, we become redundant. Seeking to be cautious, we become verbose.

Such legalism is common in this contract. It must be borne in mind that the primary users of this contract are the contractor and subcontractor – most of whom would not be legally trained and some of who might not have English as their first language.

Legalism can be avoided to ensure greater clarity to users of construction contracts and to prevent unwarranted inconsistency leading to legal arguments. A plea needs to be made – *a plea for good sense* in drafting construction contracts.

Apart from difficulty in understanding contract provisions, an added risk of long and convoluted sentences in legal drafting combined with multiple cross-referencing is the increase in the chances of errors, uncertain or inconsistent use of words. See the following examples from this contract.

3.3.2.1 Inconsistent terminology – termination of contract and termination of the contractor's employment

Clause 45 refers to *terminating the Sub-Contract*. Clauses 46 and 47 refer to terminating the *employment* of the Sub-Contractor. In cross-referring to clauses 46 and 47 clause 48 refers to *termination of the contract* instead of termination of the *employment* of the Sub-Contractor whereas Clause 49, when cross-referring to clauses 46 and 47 refers to terminating the *employment* of the Sub-Contractor.

Many construction lawyers distinguish *terminating the contract* from *terminating the employment of the subcontractor*. The JCT contracts consistently distinguish them. Even the authors of the SCAL contract themselves differentiate them in clause 51. And even if they are the same, or have the same effect, different words and phrases should not be used interchangeably. It goes against a basic rule of legal drafting - different words are taken to refer to different things, and the same words to the same things.

To further worsen the inconsistency, clause 51 introduces yet another variant. After referring to the *termination of the Main Contract* and the *termination of the employment of the Contractor*, it then refers to *determination of the Sub-Contract*. That word „*determination*“ has historically long been used in the JCT contracts and their many derivatives around the world. The word *determination* has

multiple meanings. It is best avoided. As part of improved drafting, the JCT suite of contracts has now replaced the word determination with termination. But many other jurisdictions have yet to follow suit.

3.3.2.2 The uncertain and inconsistent meanings of shall

Clause 53 from the SCAL contract (Singapore Contractors Association Ltd, 2005) reads:

If a dispute arises between the parties under or out of or in connection with this Sub-Contract or under or out of or in connection with the Sub-Contract Works, the parties **shall** endeavour to resolve the dispute through negotiations. If negotiations fail, the parties **shall** refer the dispute for mediation at the Singapore Mediation Centre in accordance with the Mediation Rules for the time being in force. For the avoidance of doubt, prior reference of the dispute to mediation under this clause **shall** not be a condition precedent for its reference to arbitration by either party nor **shall** it affect either party's rights to refer the dispute to arbitration under Clause 54 below. [Emphasis added for clarity]

Shall is used four times, but they are not used consistently to mean the imperative must. The words „the parties *shall* endeavour to resolve the dispute through negotiations“ might mean that negotiations are mandatory, but reading the whole clause it could be argued otherwise.

„If negotiations fail, the parties *shall* refer the dispute for mediation ...“. On first reading, shall here appears to mean „must“. However, the subsequent provision stating that mediation is not a condition precedent to arbitration could construe this shall to arguably mean may.

The word „shall“ has multiple meanings. Plain language experts suggest avoiding using shall as it is rarely used in one consistent meaning. Modern legislation in many jurisdictions have stopped using shall now. For example, legislation on payment and adjudication affecting construction contracts in New Zealand, Queensland, New South Wales, Victoria, South Australia, Western Australia, and Northern Territory do not use shall at all. Instead, must is used to indicate the imperative.

More recently in the United Kingdom recommendations were made for legislative drafters to stop using shall. The *Drafting Techniques Group Paper 19 (final): March 2008* recommends in paragraphs 51 and 52:

51 The Group considers that “must” in this context means the same as “shall” but is clearer, more modern and more consistent with Plain English drafting. There is no real argument that “must” is weaker (or stronger) than “shall”, or that it should be used for directory as opposed to mandatory obligations. Its use to impose duties is increasing, and there is no real danger that, if this became more widespread, the courts would think a different meaning was intended. This development would align practice in this Office more closely with practice elsewhere in the UK and in other jurisdictions.

52 *The Group recommends that there should be a presumption in favour of alternatives to “shall” to impose obligations.*

With this and other developments, even more developed countries are embracing legislative drafting in plain language. Other jurisdictions, particularly developing countries within the commonwealth jurisdictions, would benefit from following these developments.

3.4 Modern plain language construction contracts

Construction contracts have generally been late in adopting plain language drafting style. Many construction contracts found in the UK, Hong Kong, Malaysia, Singapore, and to a lesser extent Australia and New Zealand are drafted wholly or partly in traditional style.

There are a few minority exceptions. Among those attempting to use plain English drafting, catering for much smaller projects, are the JCT 05 HO or home owner/occupier, with or without consultant (Joint Contracts Tribunal 2005) and the NZS 3902:2004 New Zealand Standard Housing, Alterations and Small Buildings Contract (Standards New Zealand 2004).

Three other contracts are notable in their attempt to adopt plain English drafting. They are the Engineering and Construction Contract ECC commonly known as NEC3 suite of contracts (Institution of Civil Engineers 2005), the NZIA (New Zealand Institute of Architects 2009), and the Model Terms of Construction Contract for Subcontract Works (Construction Industry Development Board Malaysia 2007).

3.4.1 NEC3

The NEC suite of contracts has grown in popularity. A survey of contracts used in 2007 (RICS, 2007, p 12) shows the NEC contracts were used on 7.7% of the number of projects. Based on value of construction work, the NEC contracts account for 14%. The report states in its introduction (RICS, 2007, p.2) that the „NEC contracts are seeing an increase in usage“.

The NEC contracts declare and adopt a plain English drafting style. The early criticisms of them were partly because of initial teething problems during their infancy, and possibly because the present tense drafting style adopted was difficult to adjust to.

For example, clause 32.2 (Institution of Civil Engineers 2009, p.9) reads: „The *Supplier* submits a revised programme to the *Supply Manager* for acceptance ...“. The traditional drafting style might have read: „The *Supplier* shall submit a revised programme to the *Supply Manager* for acceptance ...“, and an alternative equally acceptable plain English version might read: „The *Supplier* must submit a revised programme to the *Supply Manager* for acceptance ...“

Although in law they might all mean the same, current users of construction contracts might understand the last version best.

In addition, as the NEC3 attempts to promote good project management practice and provide multiple options to keep the high degree of flexibility to cover many procurement options, the contract might have been complex to understand in the early days due to unfamiliarity. One other observation is, although the NEC3 is mainly drafted by repeating the nouns, it does slip into referring to „he“ and thus breaching gender-neutral style.

3.4.2 NZS and NZIA contracts

Among the most commonly used standard form of construction contracts in New Zealand are the New Zealand Standard Conditions of Contract for Civil Engineering and Building Work (NZS3910:2003) (Standards New Zealand 2003) and the two primary contracts published by the New Zealand Institute of Architects – the National Building Contract (New Zealand Institute of Architects 2003) and the NZIA Standard Conditions of Contract (New Zealand Institute of Architects 2009). In drafting style, all three are well structured with relatively short sentences and sub-numbering that break up clauses into short sentences.

They are generally drafted in gender-neutral style with the NZS 3910 adopting the more cumbersome „he or she“, „him or her“, and „his or her“ but not „she or he“, „her or him“ or „her or his“. Presumably an oversight left out a „or her“ in clause 14.1.2 (b) (Standards New Zealand 2003, p.63), likewise clause 14.1.2 (b) in the NZS 3915 contract (Standards New Zealand 2005, p.57).

The NZIA contracts adopt plainer language. For example, they clearly and plainly refers to „ending the contract“ rather than „terminating the contract“ or (worse still) „determining the contract.“ As stated earlier using the word „determination“ goes against good rules of modern legal drafting, since „determine“ has multiple meanings.

Whilst the NZS 3910 maintains 756 shalls (used in different senses including the imperative must) in addition to 53 other musts, the NZIA contracts are more consistent and clearer using mainly must for the imperative. It however slips into „shall“ and other minor redundant doublets in parts of the contract. Among the schedules used with the contracts those relating to fluctuations, insurance, and warranty provisions have a few shalls (19 in total) alongside 79 musts. Most but not all the shalls are used in the imperative sense. The main conditions of contract have 8 shalls along with 334 musts – and again, most but not all are used in the imperative sense.

The performance bond format falls into steep traditional style in the NZIA NBC contract (Standards New Zealand 2003). Presumably the revised edition due soon will remove the outstanding legalese.

NZIA SCC:2009 is drafted in gender-neutral language without the cumbersome he or she except on one occasion under 14.12 (New Zealand Institute of Architects 2009, p.29). This is presumably unintended.

The small amount of traditional style such as the few instances of shall might well be an oversight whilst the traditional „null and void“ might be used because of the assumption that void alone might not be an adequate equivalent.

3.4.3 The CICC model terms of construction contract for subcontract work

The CICC Model Terms of Construction Contracts for Subcontract Work (Construction Industry Development Board 2007) adopts plain language throughout, has no multiple cross-referencing, and is drafted in gender-neutral style without the cumbersome he or she.

Ameer Ali (2008a, pp.20-21) states the CICC Model Terms has an average of 19 words per sentence. One notable feature is the unique structure of the contract which clusters the entire contract under 7 broad main clauses: (1) general obligations, (2) administration and changes to the work, (3) time obligations, (4) payment, (5) quality, safety, health, and environmental obligations, (6) legal rights and termination, and (7) disagreement and resolution of disagreement. This logical structure is intuitive to those familiar with the 3 tenets of project management – time, cost, and quality, and makes the contract relatively easy to navigate despite it being a relatively new contract. These broad main clauses and the sub-numbered clauses are set out in the contents pages of the contract (Construction Industry Development Board 2007, pp.2-3).

The contract is not drafted in the present tense like the NEC, but it is plain and clear. For example, Part A – 1 reads: „The date of this contract is stated in C.1“ (Construction Industry Development Board 2007, p.4). Instead of the traditional „party A on one part and party B on the other“ the first part of A.2 (Construction Industry Development Board 2007, p.4) reads simply: „The parties to this contract are Contractor and Subcontractor.“

Another provision, A.12 (Construction Industry Development Board 2007, p.5), states the governing law: „The law stated in C.11 governs this contract.“ This combines the benefits of both brevity and flexibility to state the governing law. C.11 then also provides a default provision. The brevity is a contrast to many other contracts published in Malaysia. The public works department government contract clause 72 (Government of Malaysia 2007, p.44) reads: „This Contract shall be governed by and construed in accordance with the laws of Malaysia and the Parties irrevocably submit to the exclusive jurisdiction of the courts of Malaysia.“ Clause 49.1 of the CIDB 2000 contract (Construction Industry Development Board Malaysia, 2000, p.92) reads: „The law governing the Contract shall be the law of Malaysia, and the parties hereby submit to the jurisdiction of the Malaysian Courts for the purpose of any action or proceedings arising out of the Contract.“ The most commonly used private sector has a shorter provision but it can be made plainer by omitting the shall and rephrased in direct style. Clause 38.1 (Pertubuhan Akitik Malaysia 2006, p.43) reads: „The law governing the Contract shall be the Laws of Malaysia.“

Where the clause provides for more elaborate provisions, the CICC Model Terms also uses sub-numbering to break up the clauses for greater clarity. For example clause 2.2.2 (Construction Industry Development Board 2007, p.8) reads:

All Contract Administrator’s instructions, decisions, and certificates must be:

- i) in writing;

- ii) dated; and
- iii) clearly identified as the Contract Administrator's instruction, decision, and certificate respectively.

3.4.4 Construction contracts in Australia

Among the most commonly used construction contract in Australia is the AS 4000-1997. The layout of the contract is relatively clear but the drafting style is still partly in traditional English. The use of 298 „shalls“ is the most notable traditional style. And not surprisingly „shall“ in the AS 4000-1997 is not used consistently throughout in one sense to mean only one thing such as the imperative must.

Given the overall good structure of the contract, the contract will read much better if it were to adopt plain language drafting guidelines such as those used by Australian legislative drafters. The Australian Office of Parliamentary Counsel's legislative drafting manual instructs in Chapter 4, Rule 83: Say “must” or “must not” when imposing an obligation, not “shall” or “shall not” (Office of Parliamentary Counsel Australia 2003, p.19).

4. Conclusions

Many industries in more developed countries like Australia, New Zealand, USA, and Canada have progressively adopted plain English. Many commonwealth jurisdictions adopt plain language in legislative drafting. But the construction industry has been relatively slow to embrace plain language drafting. The majority of construction contracts in Commonwealth jurisdictions are drafted in traditional language. Some are steeped in redundant legalese.

There is enough evidence to show that it is possible to draft construction contracts in plain language – without losing legal intent. The evidence can be seen in re-drafts and in the few construction contracts that have adopted plain language. Plain language contracts would be better understood by both primary and secondary users and can lead to greater efficiency when administering construction contracts.

There are many traits that are common in plain language. The development or adoption of a plain language drafting guideline for construction contracts that has these relevant and common traits can benefit the construction industry. We recommend that a set of plain language drafting guideline be developed for universal use for all construction contracts. Drafting bodies can continue to preserve their concepts and risk allocation strategies, but can communicate their contracts more effectively and efficiently by adopting plain language.

If legalese persists after this, Kimble (2006, p.12) offers an explanation of why it might happen:

Legalese persists for the same reasons as always – habit, inertia, formbooks, fear of change, and notions of prestige. These reasons are more emotional than intellectual. ... And besides,

since legalese has nothing of substance to recommend it, its dubious prestige value depends on ignorance. We cannot fool people forever. Our main goal should be to communicate, not to impress.

We hope research on plain legal drafting is expanded and its findings disseminated widely to prevent ignorance. To those who insist on persisting with legalese when drafting construction contracts after this, we have a plea - *a plea for good sense*.

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