

WHAT'S BEEN HAPPENING?

First, apologies for the delay in issuing this second CLARITY newsletter. Not that your organiser has been idle. Details of CLARITY have been sent to over 300 enquirers and, more importantly, around 180 of those have confirmed their membership. A current list of members is included with this newsletter. The answers to the questionnaires sent with the first newsletter have been analysed to show members' views on the early direction of CLARITY. The results are given below. There has been further publicity in the various legal journals, as well as a feature in BBC Television's "Out of Court" programme. Enquiries continue to come in. The membership and goodwill built up over the past few months will provide a sound base on which to build in 1984.

THE WAY FORWARD

The questionnaires sent out with the first CLARITY newsletter asked for members' views on how CLARITY should operate. About 150 forms have been returned. These are the conclusions:

Organisation

74% would prefer CLARITY to be run on a fairly informal basis, at least initially, with the organiser seeking assistance from other members when needed. But 23% of that majority also expressed the view that a more formal structure, constitution and executive committee may be required at a later stage, dependent on the growth of membership.

Precedents

73% considered that there should be an exchange of precedents through a central register, with a catalogue and charging system based on actual cost. But many expressed serious reservations about the mechanics of such a system, as well as the problems associated with copyright, negligence claims and the like. 73% were also in favour of some sort of vetting system and, of those, 52% thought that this should be carried out by individual volunteers demonstrating expertise in particular areas of work, while 31% preferred a committee system. A view frequently expressed was that precedents should be offered merely as examples of what might be done in clear drafting and that it is a lawyer's own responsibility to ensure that what he or she drafts is suitable for its purpose. This point was of course made in the last newsletter and members will remember that the object is "exchanging ideas and precedents, not to be followed slavishly but to give guidance in producing good written and spoken English".

Influencing Others

50% want to see CLARITY influencing the style of legal English by good example, together with publicity through the legal journals etc. But 29% would like to see a positive campaign to improve the image of the

profession, while 18% are in favour of some sort of combination of the two.

Help

There have been many offers of positive assistance, including specialist advice, the use of equipment and sheer enthusiasm. It's good to know that practical help is available, as well as good intentions. It is to be hoped that we can take advantage of many of the offers.

Other Comments

These were invited and, lawyers being lawyers, few resisted the temptation to use the space provided. A selection of the points made feature elsewhere in this newsletter.

Conclusions

So far, the exercise has been to identify a nucleus of lawyers and others who believe in the aims of CLARITY and are willing to do something to achieve them. It is apparent that most members see the movement as offering them some positive advantage from the exchange of ideas and precedents. Of course, they want to be sure that any assistance they receive is of good quality. The next phase then is likely to be the development of CLARITY as a "self help group". Certainly the will is there to provide as well as to receive assistance.

It is also apparent from the comments received that a great deal of thought must go into any organised exchange scheme. This really needs a high-calibre working party, if the various problems are to be resolved satisfactorily. There is no doubt that we have amongst us a number who would be well-qualified to serve on a small "think tank" of this type. Would those who are willing to serve please declare themselves? In the meantime, the newsletter can continue to be used for the publication of ideas, advice and shorter precedents.

It is hoped that members, by committing themselves to the principle of using good, clear English in legal work, will influence others by their good example. But there is clearly scope for this aim to develop into a more

positive campaign on the legal profession as a whole. How can this best be achieved? The use of stickers and posters has been suggested, perhaps to indicate that individual lawyers or practices support the aims of CLARITY. Would someone like to come up with an authoritative view on how that might be achieved without offending professional rules and ethics? And what do members feel about advertising the movement to other lawyers? Good ideas are needed, so get thinking — and writing!

WITHOUT WISHING TO SEEM CRITICAL

Dr. Stanley Robinson, University of Queensland.

In advancing the cause of the disciplined use of English ("legal" English does not exist) I hope the cause is not daunted by the introduction of a vetting system. For, one man's meat is another man's poison. No doubt Mr J.M. McKean considers the use of the "decimal" system an advance; I don't. For instance it is not possible to say whether 2.2.2 is a sub-paragraph of clause 2, or a paragraph of sub-clause 2 of clause 2, or an item of list tabulation in sub-clause 2 of clause 2. Insofar as neither has a subject or a main verb they must be paragraphs or sub-paragraphs. But then that conclusion is questioned by the fact that the "t" of "to" and the "w" of "when" are in the upper case. And one does not use the upper case in the middle of a sentence other than for a proper noun.

Clearly if one turns to 1.2, 1.2.1 and 1.2.2. are clearly paragraphs as the language in 1.2.1 and 1.2.2 is responsive to the introductory words, but the use of the upper case, of the first full stop, and of the colon is wrong and to boot the word indicating the cumulative or alternative is omitted.

Further I comment that 2.2.3 is marred by the use of "such" as a demonstrative adjective when it is not. The proper hierarchy is, "a" then "the" and finally (and sometimes for emphasis) "that". Thus having referred to "a book" and the writer wants to refer again to that noun, he then says "the book". Technically the use of the definite article must be consistently used with the same word. In 2.2.3 the use of the expression "such removal" is wrong as the word removal is not previously mentioned although the word "removed" is, and hence may be considered a technical infraction but even these are to be avoided. The use of the expression "such apparatus as" is a proper use of the expression "such as". However clarity would have been achieved by paragraphing so that it is clear that removal of apparatus is only required if the Board gives notice in writing to the tenant. The writer is puzzled by the use of the word "apparatus" having regard to the basic principle of "change your language, change your meaning". Is the word intended to refer only to improvements that are fixtures, improvements that are not fixtures (if that be possible), or goods, or some combination.

The lot of the draftsman is not a happy one.

WHERE THERE'S A WILL

A simple and effective blow for the cause of better legal English could be struck if every member of CLARITY resolved to use either of the very short attestation clauses given in the "Encyclopedia of Forms & Precedents". One was judicially approved in *Re Selby-Bigge* (1950) and the other was approved by the Principal Probate Registrar — so why any solicitor should continue to use twice as many words as necessary is beyond me.

The form I have used for about fifteen years is:

"SIGNED by _____ in our joint presence and attested by us in the presence of him (her) and of each other".

It could be even shorter: however, we need not be brief to the point of baldness, and it clearly impresses on the testator and witnesses that if they all see each other sign they cannot go wrong.

David Lyall, Cheltenham.

Editor's Note:

The long form of attestation clause commonly used in wills is:

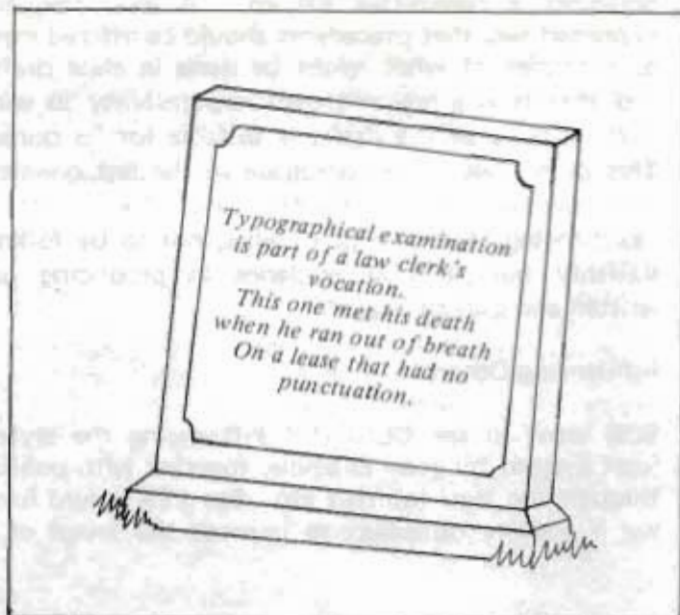
Signed by the above-named as his last will in the presence of us present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

The simpler form given judicial approval in *Re Selby-Bigge* was:

Signed by the above-named in our presence and attested by us in the presence of him and of each other.

The even simpler form approved and even welcomed by the Principal Registry of the Family Division is:

Signed by the above-named in our presence and then by us in his.



A report under this heading has recently been submitted to the National Consumer Council by Plain English Campaign organisers, Martin Cutts and Chrissie Maher. It is about the language and layout of consumer contracts, primarily the standard agreements made available by trade associations for use by their members. They cover such matters as hire purchase, furniture removals, vehicle repairs and the purchase of electrical goods and cars through credit. All of these agreements examined were written in a complex, legalistic style. All were above the level of difficulty of the most difficult daily paper, the Guardian. And to make life even more difficult for the customer, the contracts have been designed with small print, line lengths which are too long and a lack of clear graphic structure in the documents, including inadequate space between sections or between lines.

But the report doesn't merely criticise the language and layout of consumer contracts. The authors have also produced their own versions of a hire purchase contract and a removals contract. They have used the plain English principles of addressing the reader as "you", keeping sentences short with only one main idea per sentence and preferring active forms of verbs to passive. The design includes sensible typesize, line length and spacing and uses bold print for emphasis. But this has not been only an exercise in "translating" the contracts on which these models were based. The opportunity has also been taken to remove unnecessary or over-cautious provisions altogether.

The standard hire purchase agreement issued by the Consumer Credit Trade Association includes this expenses provision:

The Hirer shall repay to the Owners on demand, all expenses, legal and other charges incurred by the Owners in ascertaining the whereabouts of the Hirer or the goods or in taking steps to resume possession of the goods or in applying for or enforcing payment of any sums payable by the Hirer to the Owners under this Agreement.

This is the wording suggested by the report:

You must pay our expenses and legal costs for the following:

- * *Finding out if you have changed address without notice, or finding the goods;*
- * *Taking steps including court action, to recover the goods or to obtain payment for them.*

The British Association of Removers' standard contract includes such clauses as:

GENERAL LIEN - The Contractor shall have a general lien upon all goods in his possession for all monies due to him from the customer or for liabilities incurred by him and for monies paid on behalf of the customer, and if part of the goods shall have been delivered, removed, despatched or sold the general lien shall apply in respect of such goods as remain in the Contractor's possession. The Contractor shall be entitled to charge a storage charge and all other expenses during which a lien on the goods is being asserted and all these conditions shall continue to apply thereto.

In the Plain English Campaign version, this becomes:

OUR RIGHT TO HOLD THE GOODS

We have a right to hold some or all of the goods until you have paid all our charges and other payments under this contract. These include charges, taxes or levies that we have paid to any other removal or storage business, carrier or official body. While we hold the goods and wait for payment you will have to pay storage charges and all the other necessary expenses. This contract will apply to the goods held in this way.

The report argues that the intention of any consumer contract should be to bind both sides to a bargain whose terms are unambiguous and capable of being fully understood by both sides. This is particularly important when one bears in mind that in most consumer contracts the customer will not have the benefit of legal advice. In the words of the report "the language should be clear and unambiguous to the legally unsophisticated mind of a person buying a fridge on the never-never."

"Small Print" costs £3.50, including postage. Copies are available from the Plain English Campaign, 131 College Road, Manchester M16 0AA (Tel: 061 881 7784).

SNIPPETS

A few more comments from members:

Certainly there are some archaisms ("This Deed Witnesseth") but at least they are readily understood. More damaging to our reputation as solicitors is the unthinking use of nonsensical phrases such as "for the purposes of identification only more particularly delineated".

M.R. Arrowsmith-Brown, South Walsham.

There is an obvious need to influence local education - universities, poly's, college of law etc.

Richard Thomas, National Consumer Council

I would like to campaign for our cause through my teaching of law students to improve the lawyers of the future.

Julie Brandler, Brentwood

Worthwhile publicity could be obtained if the Inland Revenue could be persuaded to accept a simplified form of Certificate of Value.

N.P. Roffey, Croydon.

Solicitors who've spent many hours setting up good clear precedent libraries won't be willing to give away the fruits of their labour to competitors.

Tony Duncombe, Thame

Our job is to persuade solicitors that it is in our own interest to avoid archaic language where possible. Our image suffers and we are likely to lose out (on conveyancing) to other "modern" competition.

A. Langleben, W.C.1.

I believe that all lawyers ought to be made to read "The Complete Plain Words" (Gowers E.) before they are allowed to put pen to paper.

R.M. Wiseman, S.E.1

UNCERTAINTY IN STYLISTED ARCHIASMS

Stephen R. Lacher (Solicitor of England & Wales and of New South Wales)

One of the hallowed justifications for the use of stylised wording in legal documents is that adherence to previously defined meanings brings certainty in relation to terms of art recognized by the courts (generally nouns), established trade usages of the type which have been held to be sufficiently "notorious" to be recognised by the courts (again generally nouns), Latin tags and short forms of words importing statutory clauses.

On examination of the words involved in these special use categories it is clear that very few stylised archaisms are included. Despite that, the argument of certainty is still frequently and in my opinion illegitimately held up in defence of their continued use. One wonders whether the users of these antiquated phrases have ever stopped to consider what they actually mean. Use of these familiar but antiquated phrases may easily generate **uncertainty**. To take examples, consider the following:

From Time to Time

- (i) "The directors shall meet at any place as they shall **from time to time** decide".

In this sense the phrase "from time to time" means "upon various occasions in the future".

- (ii) "The directors shall meet **from time to time** but in any event not less often than once a year".

In this example, the words "from time to time" mean "repeatedly" or "at least more than once".

Provided That

- (i) "The directors may meet from time to time **provided that** they are supplied with a copy of the agenda for the proposed meeting not less than seven days prior to the meeting".

In the above example the words "provided that" mean "if". The proviso could therefore be construed as a condition precedent if the supply of the agenda were construed to be not only sufficient but necessary.

- (ii) "The directors may meet from time to time in London **provided that** any director may call an emergency meeting to take place at any other location upon seven days' written notice".

In this case, "provided that" means "as an exception to what has just been stated".

- (iii) "The directors may meet from time to time in London **provided that** there is not an R in the month."

In this case "provided that" is best translated as meaning "but not".

In Respect Of

- (i) "And the remaining partners shall cause the accounts to be prepared **in respect of** the period between the last annual accounts and the termination of the partnership".

In this example "in respect of" means simply "for".

- (ii) "And upon acceptance of the final accounts by the non-retiring partners the retiring partner shall be released **in respect of** all liabilities incurred prior to his resignation of the partnership".

In this example the words "in respect of" means "from".

- (iii) "And the landlord shall serve upon the defaulting tenant notice **in respect of** such default".

In this example the words "in respect of" mean "about".

Subject To

- (i) "The directors' meeting shall be held every Thursday **subject to** the right of any one director to require postponement of the meeting for 24 hours".

In this example "subject to" means "despite what has just been said" or "however".

- (ii) "The directors' meeting shall be held every Thursday **subject to** the boardroom being available." "Subject to" means "if".

- (iii) "The directors' meeting shall be held every Thursday **subject to** military discipline".

In this sense "subject to" means "under the jurisdiction of".

Continual use of antiquated gobbledegook is not an intelligent adherence to tradition, but displays an ignorance of both the language and the law. The task of those attempting to eradicate the use of stylised archaisms is not simple. It is not merely a matter of attempting to change a style of expression. It involves the far more onerous task of educating the illiterate and the uninformed.

NOW THERE'S A GOOD IDEA!

Criticism of lawyers' writing is hardly a new fashion. When a particularly wordy document was filed in Chancery in *Mylward v Welden* (1596), the Chancellor was none too pleased. A hole was cut through all 120 pages of the document. The writer was then ordered to have his head stuffed through the hole and to be led around to be exhibited to all attending court at Westminster Hall. Gives a whole new meaning to the expression "legal loophole", doesn't it?