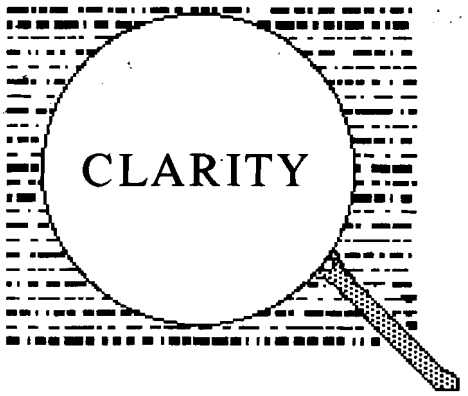


A MOVEMENT TO SIMPLIFY LEGAL ENGLISH

Patron: Lord Justice Staughton

No 20: April 1991

INDEX

The press date for the

JUNE 1991 ISSUE

is June 19th

The editor apologises for the delay of this issue from March

THE COMMONHOLD PROPOSALS

It has been a pleasure to read that the Lord Chancellor intends to introduce commonhold by legislation along the lines recommended by the Law Commission.

In the course of my high street practice I regularly advise the prospective buyers of flats in converted houses. As every lease is different, each must be read carefully and an individual letter written to the clients explaining their rights and obligations. This is a long and tedious task, invariably taking several hours.

More often than not, the lease is badly drafted, sometimes to the extent that the clients or their lenders must be advised to look elsewhere. I have never seen such a lease that is literate, and rarely one that is sound. Sometimes a buyer will not proceed without a deed of variation, which involves expensive negotiations and formalities involving solicitors for the freeholder, for all the tenants and for any mortgagees.

All this wastes much time and money, generally at the expense of those at the bottom end of the market (or of their solicitor, if they cannot afford to pay for the extra time at a commercial rate). Moreover, whilst problems are considered, the transaction and those linked to it are delayed. If the buyer backs out, legal and surveying fees have been thrown away, and everyone's plans are spoiled.

The most recent residential lease to arrive on my doorstep has (among others) the usual fault of leaving unclear where the common parts begin and end, as well as some strange provisions about the service charge. It is badly thought out, but not so unusual as to be a surprise. An annotated extract appears on page 5.

Life would be much easier for solicitors and clients if all such titles were identical. There would be no lease to read, and the advice to the client could be standardised. That the draft commonhold rules are in plainer English than is traditional is a welcome bonus, though they could be improved.

There are problems to be resolved, particularly if the scheme is compulsory. But the Law Commission has produced an excellent proposal which will bring great benefits, and I hope that we will see it enacted.

NEWS

ENGLAND

Law Society to encourage plain English wills ...

In March The Law Society announced a new initiative encouraging the public to make wills, using solicitors to draft them and as executors.

Solicitors are to be provided with packs containing advice and plain English precedents. These are currently in draft and should be available for distribution in about 3 months.

... and commercial leases

The Law Society has just announced the May launch of standard commercial lease forms.

We have not seen them, but understand that they are 12-14 pages long, and in plain English.

Solicitors will be encouraged to accept them without undue amendment.

Conveyancing protocol

We have suggested some minor amendments to the Standard Conditions of Sale Working party, and also that:

> The questionnaire completed by sellers, with the help of their solicitor, be sent to the buyer's solicitor, without processing the information onto a separate Property Information Form.
>
> Tthe blue explanatory book be substantially revised, using shorter sections, clear headings, more standard advice and possibly an index.

The Protocol working party is due to meet next at the end of May, and the Standard Conditions of Sale working party in mid-June. Suggestions should be sent to Joanna Davies-Evitt in the Legal Practice Directorate at Chancery Lane.

Rules of Court

We are continuing to submit drafting comments to the Lord Chancellor's Department, which has recently written an appreciative note acknowledging our suggestions about a draft amendment to Order 62, rule 28(4). Some of our proposals have been accepted.

CLARITY Seminars

In January CLARITY gave a half-day drafting seminar for 15 fee-earners at Nabarro Nathanson's recently opened Doncaster office.

This has been repeated twice in March for articled clerks at Nabarro's main office in London, and it is hoped that more will follow.

Other firms, and The Law Society, have shown an interest, but no more bookings have yet been made.

Details of the seminar are given on page 7.

British Telecom plc

BT's legal department has expressed an interest in clarifying corporate documents and Patricia Hassett recently met representatives to discuss CLARITY's possible co-operation.

The Law Society's 1991 conference

Our application for a platform at the Brussels conference has been refused, though we have been told that we might do better next year.

Nor will we exhibit at the exhibition this year. The promotion in Glasgow was useful, but it is too expensive.

However, we would like to hear from any member who will be at Brussels anyway, and who is willing to wear a CLARITY lapel badge and represent us informally.

The press

In December we criticised a *Times* leader which attributed gobbledegook to a conspiracy by lawyers against the public. The newspaper had published only one reply, by Richard Oerton.

However, others followed, notably from Andrew Lockley, referring to The Law Society's promotion of plain English.

An item similar to that in the *Times* appeared in *The Spectator* on 9th March, when Theodore Dalrymple's said that "lawyers are to language what vandals are to telephone kiosks" and that "they never pay their bills". A comment about his unwarranted generalisations has been sent, in plain English, and answered as we go press.

AUSTRALIA

Centre for Plain Legal Language

Director Peter Butt writes:

> The Centre is now up and running. Our first, and major, employee has been with us for a month now, and we are advertising for two more.
>
> We have a number of research and writing projects in the pipeline. For example:
>
> - We are planning some research on public and judicial perceptions of traditional legalese.
> - We are planning our first in-house plain legal writing course.
> - We have been negotiating with courts and other organisations to work on forms and precedents, including a mortgage and a standard contract for the sale of land.
> - We have been asked by two

important semi-government authorities to help draft brochures explaining their activities.

UNITED STATES

Books

Professor Bryan Garner's new book, *The Elements of Legal Style*, is about to be published by OUP in Britain and America, and we hope to review it in June.

He is now starting work on its companion volume, *The Elements of Legal Drafting.*

Texas judges support plain English

The *Dallas Morning News* [17th March 1991] reported a survey which showed that 80% of Texas judges preferred plain English to legalese. This supports the results of similar surveys in other states.

The Plain Language Committe of the State Bar Association canvassed 500 district and appellate judges across the state. Brian Garner, its chairman, said:

> Legalese is using unnecessary terms that are nothing more than bloated, pompous expressions with no special legal meaning.

He went on to say that half the briefs presented to judges were poorly written, making it difficult to understand the lawyer's case.

"I certainly favor doing away with the old stilted legalese and adopting in its place a simpler and more straightforward language wherever possible," said Judge Ward L. Koehler of the 8th Court of Appeals in El Paso.

And Federal District Judge Lynn Hughes edits all draft orders submitted for his approval into plain English. Particularly bad examples are returned with a plain language stylesheet attached. And he asks for the worst to be rewritten.

State District Judge Rachel Littlejohn is less radical, accepting briefs regardless. But she says:

> Some inexperienced, or even experienced, lawyers, try to impress me with long, windy words. (But) it only makes reading more difficult.

CANADA

Notes from David Elliott and Peter Butt

Plain Language Institute of British Columbia

The new Plain Language Institute of British Columbia has hired Philip Knight as Executive Director, and three research and training staff. Its address is

Harbour Centre
1500
555 West Hastings Street
Vancouver
B.C. V5X 4W6.

Plain Language Project in British Columbia

This small organisation is not connected with the Institute, but the directors of the two organisations are trying not to duplicate each other's work.

The Project has been running for less than a year. It has one full-time director (Mrs Peg James), a part-time expert in plain language drafting (Ms Cheryl Stephens), and a part-time administrator.

It began by preparing and editing materials put out by its parent body, the Continuing Legal Education Society of British Columbia, but the emphasis has shifted towards the creation and testing of precedents.

Drafting municipal bylaws

In March, municipal government lawyers attended a seminar on drafting municipal bylaws, sponsored by the Canadian Institute for the Administration of Justice. The first of its kind, the seminar focused on both the substance of the law and the way in which it can be written to help those affected to understand it.

CBA promotes plain language in the law office

Still in B.C., the March meeting of the Canadian Bar Association included a session on using plain language in the law office. There was a two-hour presentation, followed by a panel discussion.

CLIC brings together government and non-profit-making organisations

In January, the Canadian Law Information Council sponsored the first ever meeting of government and non-profit organisations interested in plain language. There were sessions on

- the production of forms;
- field-testing documents;
- drafting bilingually plain documents;
- implementing plain language in organisational change in government *[! - ed].*

While some of the sessions were interesting and informative, there was some disappointment that too little time was left for discussion of a national strategy on plain language. However, the good attendance and the opportunity to meet fellow plain-language activists made the meeting worthwhile.

Plain language rap

The Saskatchewan Government has started to implement a clear language policy, promoted with the *Bafflegab Rap*, the first four lines of which go like this:

We've been in the 90's for a while
And bafflegab is out of style
Clear language now is where it's at
Sit back and listen to our rap.

FRANCE

Professor Patricia Hassett writes:

The Palais de Justice held an open day in March 1990.

Initiated by the President of the Court of Appeal and supported by the Prime Minister, *La Justice et Vous* was an attempt to make the law seem more accessible. The organisers allowed for 10,000 visitors, but 120,000 attended.

The main features were:

- Five areas of law were explained by separate, user-friendly exhibitions staffed by specialists.
- The same topics were discussed in debates chaired by journalists for the benefit of the lay audience.
- Each hour answers were given to written questions submitted by the public.
- Visitors were allowed unimpeded access around 10 courtrooms, and staff were on hand to answer their questions.
- Each branch of the legal profession was represented at a recruiting stand.

Apart from the problems of over-crowding, the reaction of the public was consistently positive.

An event modelled on this, but restricted to criminal justice, has been proposed by the Institute for the Study and Treatment of Delinquency, King's College, London, in collaboration with the London-based Syracuse University College of Law.

SPAIN

In June the Public Administration School of Catalonia is mounting a one-day symposium on the plain English movement.

The speakers, all of whom are associated with CLARITY, will be:

Gail Dykstra or Mark Vale, of the Canadian Law Information Council, on *The present situation of the plain English movement in English-speaking countries;*

Robert Comet of Switzerland, a former international civil servant, on *The effect of the plain English movement on the modernisation of legal-administrative languages in non-English speaking countries*; and

Mark Adler of England, on *The history, principles and techniques of plain English..*

The symposium will be open to Catalonian civil servants, lawyers and linguistic consultants, teachers of law and administration, and students of translation and interpretation.

LETTERS

The Flesch Test

From HarperCollinsPublishers
10 East 53rd Street, New York,
NY 10022-5299

... You may reprint the Flesch test in *Clarity* free of charge ....

We would gladly send you a copy of *How to Write in Plain English* for review, but unfortunately it is out of print....

Other books by this author are still in print, including *Rudolph Flesch on Business Communications* and *The Art of Clear Thinking*. Copies can be ordered through HarperCollins Ltd, 77 Fulham Palace Road, London W6 8JB.

Students on the premises

From Chris Elgey
The College of Law,
Braboeuf Manor, St Catherines,
Guildford, Surrey GU3 1HA

Students were asked to draft a statement of claim.

One wrote: "In the premises it was an implied term of the contract that the car should be of merchantable quality." When asked what "in the premises" meant, the student answered "in the showroom".

In another exercise students were asked to indicate what further and better particulars they would raise on a similarly drafted pleading. Several asked for further particulars of the building referred to.

Drafting treaties

From Fay MacSween
Director of Studies
Rudolph Bärenhartgasse 15/1
1170 Vienna, Austria

I have been asked to run a seminar in Vienna for legal experts from various Austrian ministries and would appreciate it very much if you might be able to forward me some addresses for sources of authentic materials in this field of English. In particular, I am looking for materials connected with the drafting of treaties.

I would be grateful if you could tell me if a glossary of terms exists, with particular reference to political treaties or a skeleton sample of such treaties which we could work on.

THE GRUFF AWARD

An extract from the lease of a flat in a converted London house.

3. The Lessee [1] HEREBY [2] COVENANTS [3] with the Lessor [1] in [4] manner following [5]:- [6]
(1) .....
(2) SUBJECT [7] as hereinafter [8] provided to pay and contribute [9] to the Lessor a yearly [10] sum equal to [11] a proportion in [12] ratio [13] that the net rateable value of the flat bears to the total net rateable value of the building [14] of the costs expenses outgoings and matters mentioned in the Third Schedule [15] hereto [16] (hereinafter called [17] "the service charge") or a sum of Ninety [18] pounds [19] whichever shall be[20] the[20a] greater [21,22] The service charge shall[23] be ascertained and certified[24] by the Lessors' surveyor[25] (whose certificate shall[26] be final and binding[27] on both parties hereto[28]) on the Twenty ninth[18,29] day of[30] September in each[31] year[32] commencing on the Twenty ninth day of September next[22] The Lessee shall[33] on the Twenty fourth day of June[34] in each year (in addition to the rent due on that day[35]) pay such[36] proportionate[37] contribution[37] and on the Twenty ninth day of September in each year pay[39] the balance (if any)[40] ascertained and certified as aforesaid[41]

Notes

1. *Tenant* and *landlord* would be less repetitive and clearer to lay readers.

2. *Hereby* is superfluous.

3. So is *covenants*. As the lease is a deed any commitment in it is a covenant.

4. The omission of *the* is a legal mannerism I find irritating. It is more common in America than Britain.

5. *In manner following* is even more verbose than the more usual *as follows*.

6. When punctuation is otherwise omitted, why add a dash to the colon?

7. The sense would be easier to extract if the rule was given first, with the exceptions following.

8. *Hereinafter* is archaic, unnecessary and too vague. The reader should be referred to the clause number.

9. *And contribute* adds nothing to *pay*.

10. The tenant is to repay the landlord's expenses and the timetable is set out below; *yearly* is unnecessary.

11. *A sum equal to = the amount*, and that cannot be equal to a proportion.

12. *The* is missing again.

13. A proportion is a ratio.

14. It would have been easier to say what the proportion was. Or was it changeable on re-rating?

15. Are there four different sorts of things – costs, expenses, outgoings and matters? And were they all lumped together in the third schedule? Or was the landlord to recover any expenses (etc) as well as *matters mentioned in the third schedule*?

16. *Hereto* is otiose. No-one would suggest relying on the third schedule to any other document.

17. *Hereinafter* is archaic and *hereinafter called* is unnecessary. And it is better to begin with definitions clearly laid out than to bury them in the middle of the text.

18. Numbers do not justify a capital.

19. *Pounds* makes *a sum of* unnecessary. What is £90 if not a sum? And what is the matter with figures?

20. *Shall be = is.*

20a. This *the* is unnecessary.

21. If the landlord spends less than £90 on maintenance he is entitled to the balance of that sum as profit. This has since become unlawful, but were tenants expected to agree to it, even in 1962 when this lease was granted?

22. The drafter acknowledges the need to signal a new sentence with a capital letter, so a full stop would do no further harm. But additional sentences (and in particular those imposing obligations on the landlord) do not fit into a sub-paragraph introduced *The tenant must ....*

23. *Shall = must.*

24. No formalities are required by the need to certify (*Roberts v. Watkins* 1863 32 LJCP 291), and *certified* adds nothing to *ascertained* except the obvious requirement that the surveyor pass the information on.

25. Is a surveyor necessary to check the accounts, which may be for nothing more than cleaning the common parts? Moreover, the third schedule allows the landlord to charge the fees of the managing agents, but does not mention a surveyor.

26. *Shall = will.*

27. *Binding* adds nothing to *final*, but should there not be a saving for mistakes?

28. *Hereto* is otiose.

29. *Twenty ninth* is better in figures but, if in words, should be hyphenated.

30. *Day of* is nugatory.

31. *In each year = every.*

32. No date is set for the end of the financial year, but the (wrong?) impression is given that it should be 29th September. But that suggests that the surveyor must prepare the figures on the day the year ends, which is absurd.

33. *Shall = must.*

34. Does the landlord really want the first instalment in June and the balance in September? Would he not prefer 6-monthly intervals, or an estimated advance payment each September for the following year?

35. The words in parenthesis add nothing, and unnecessarily delay the second part of the verb *shall ... pay*, which is split by 19 words arranged in 2 clauses.

36. *Such = that.*

37. It is unnecessary to repeat that the contribution is proportionate.

38. This is a fundamental flaw in thought, not just style. How can the tenant pay in June an amount which will not be calculated until 3 months later?

39. The tenant cannot be expected to pay on the day the surveyor calculates the figure.

40. *The balance (if any) = any balance.*

41. *Ascertained and certified as aforesaid is* both clumsy and unnecessary.

A CAUTIONARY TALE

A solicitor wrote to a private client:

> **As you are no doubt aware, X owns 71.93% of the property and therefore he is a tenant in common and a trustee for sale and consequently the Mortgage Deed will be an "equitable charge" under which he assigns his beneficial interest to you, pending repayment. On completion of the mortgage, notice of the assignment will be given to his Co-Trustees, whereupon they will become liable to account to you for his proportion of the sale proceeds in the event of any sale. If the property is already mortgaged, the consent of the first mortgagees will be required.**

Not surprisingly, the client did not understand this, and did not discover until long after the borrower defaulted that her loan was not secured on the house, which had meanwhile been charged to the bank without notice to her. (Notice of the equitable charge had not, after all, been given to the trustees.)

The mortgage itself provided:

> **... the Borrower hereby covenants with the Lender that he will on the expiration of five years from the date hereof or on the sale or other disposition whether or not for value of the property whichever the earlier pay to the Lender the said sum of Twenty Five Thousand Pounds plus 10% of 71.93% of the value of the property on the open market with vacant possession on the said day of One thousand nine hundred and or on the sale or other disposition of the property if earlier No right to interest on the said sum of Twenty Five Thousand Pounds shall be herein implied**

This led to three problems:

Someone - either the borrower or the solicitor - had inserted by mistake the date of completion of the mortgage in the blanks. This sabotaged the arrangement that, instead of interest, the lender would get a percentage of the increase in value of the property.

The parties disagreed about the date which should have been inserted. Was it five years from completion, as the borrower maintained, or five years from the date of the loan, which had been made twelve months earlier?

During the term the borrower raised a very small loan on the security of the house. The lender argued that she was then entitled to repayment, as this mortgage was a disposition. The borrower, who had not been separately advised, claimed that the parties had not intended that the loan should be repayable in these circumstances.

The matter was resolved to the client's satisfaction, but only after a long and worrying delay, and at some cost to the solicitor's purse and pride.

DEVELOPERS' TRANSFERS

Solicitors acting for buyers waste a great deal of time wading through long and indigestible documents submitted on behalf of developers. Amendments are almost invariably refused. The mischief is perpetuated when the covenants are copied verbatim into the land certificate, expanding what should be a simple and concise document into a long and obtuse one.

One developer's standard transfer granted:

> **The full right of passage and running of water soil electricity gas and telephone services through all *drains channels sewers gutters watercourses pipes cables wires and conduits* now or within twenty-one years hereafter in on or under or belonging to neighbouring premises part of the Development or any part of the Development and either used in common by such neighbouring premises and the Transferred Property or *(in the case of pipes and cables wires and conduits only)* serving the Transferred Property ...**

[my italics)

What in the first list was excluded from the second? Drains, channels, sewers, gutters and watercourses. But these are all conduits, and so included. What did the developers (or their solicitors) intend?

The following paragraph granted:

> **The right to use for all proper purposes connected with the Transferred Property the sewer marked by a blue line ...**

For what other purposes did the solicitors fear their sewer might be misused?

HELP NEEDED

KELLY'S *DRAFTSMAN*

Roderick Ramage thanks all those who have so far made suggestions for the new edition of Kelly's, now in preparation.

Please note that the deadline has been brought forward.

Contributions should please be sent as soon as possible, but at the very latest by 31st August, to:

R.W. Ramage
c/o Kent Jones & Done
47 Regent Road
Hanley
Stoke-on-Trent
ST1 3RQ

CLARITY & CHARITY

by

James Kessler, barrister

Last year, I was asked to draft the constitution for a new charity. The charity was to be run by a small and informal group of individuals.

A charity can have the legal form of a trust, company, or unincorporated association. The ideal legal form for us was clearly an association; a trust would be undemocratic; a company too expensive and administratively cumbersome.

My aim was to frame a constitution which:

(i) was readily comprehensible to every member of the charity (ie, drafted with CLARITY principles in mind); and

(ii) fitted into a single A4 page.

In addition, of course, the constitution had to work legally; to allow the proper running of the assocation, and to qualify us as a charity for tax purposes.

After some labour this was achieved, and submitted to the Charity Commissioners. Back came a rejection letter:

> The form of the draft Constitution is not suitable for our purposes as a Governing Instrument for the proposed charity, and we suggest that a Trust Deed would be the most appropriate vehicle.... For the form of the Trust Deed, we would recommend consultation with the *Encyclopedia of Forms and Precedents*....

The *Encyclopedia* is not, as readers will know, particularly CLARITY-minded.

The Commissioners were clearly unused to charitable unincorporated associations in short form, or in everyday English.

There followed a reply by return of post (well, very nearly) in support of the original draft; also copying the article of Charity Commissioner Robert Venables with appeared in the last issue of *Clarity* on the Commission's approach to plain English. One or other of these must have done the trick, as with only minor amendments the draft was then accepted.

So the moral, it seems, is to persevere, and contest a precipitous rejection.

That is easier said than done. It does entail some additional energy, and also some delay. The application was made on 16th May, and accepted on 23rd November. But now the precedent is set, the road may be clearer for others.

THE USE OF EXAMPLES IN LEGISLATION

Extracted from **Legal Drafting: Language and the Law,** *a paper given by David Elliott in November 1990 to the Canadian Institute for the Administration of Justice, and reprinted by kind permission of the author.*

How we understand what we read

Whenever we read a text we bring to it all our accumulated knowledge. We use that knowledge to help us understand it.

The first time we read a technical text our minds race to understand it as we read. Research (and a moment of personal reflection) tells us that one way in which we interpret texts is by thinking through a series of examples to see what impact the text has on the example.

If we have limited background knowledge about the subject matter of a text it is that much more difficult to understand. It is through the internal processing of examples that we develop a keener understanding of the text.

Even if legislation and legal documents are clearly written they are often difficult to understand because they deal with complicated subject matter. The use of examples in legislation and legal documents can help to make the text more understandable.

One example given is the UK Consumer Credit Act 1974 :

S.188: Examples of use of new terminology

(1) Schedule 2 shall have effect for illustrating the use of terminology employed in this Act.

(2) The examples given in Schedule 2 are not exhaustive.

(3) In the case of conflict between Schedule 2 and any other provision of this Act, that other provision shall prevail.

(4) The Secretary of State may by order amend Schedule 2 by adding further examples or in any other way.

Schedule 2: Examples of use of new terminology

Part I: List of terms

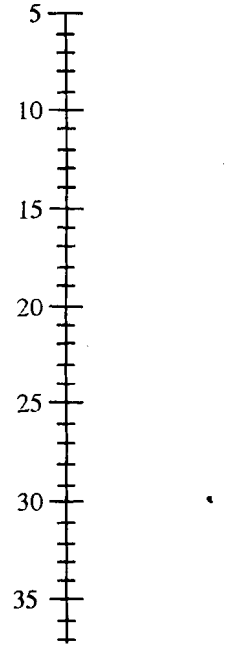
Term	Defined in section	Illustrated by example(s)
Advertisement	189(1)	2
Advertiser	189(1)	2
Antecedent negotiations	56	1,2,3,4
Cancellable agreement	67	4
...		

Continued on page 10

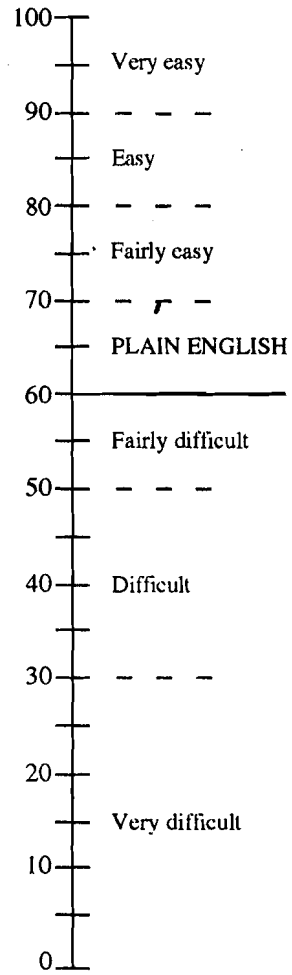
FLESCH READABILITY CHART

From the book
How to Write in Plain English: A book for lawyers and consumers
by Rudolph Flesch

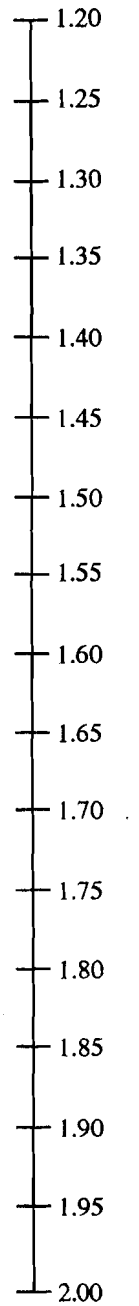
WORDS PER SENTENCE



READABILITY SCORE



SYLLABLES PER WORD



HOW TO USE THIS CHART

Take a pencil or ruler and connect your "words per sentence" figure (left) with your "syllables per word" figure (right). The intersection of the pencil or ruler with the center column shows your readability score. The minimum Plain English score is 60.

AN ALTERNATIVE FORMULA

Multiply the average sentence length by 1.015.

Multiply the average word length by 84.6.

Add the two numbers.

Subtract this sum from 206.835.

The balance is your readability score.

This is hardly plain arithmetic. Any explanations? - Ed.

HOW TO COUNT

Ignore titles headings paragraph numbers captions date-lines signature-lines

Count as one word contractions hyphenated words abbreviations
figures symbols combinations (eg £3)

Count as one syllable abbreviations figures symbols combinations
those that can be pronounced as one or more syllables

Count as one sentence each full unit of speech marked off by a
full stop colon semi-colon dash question-mark exclamation mark

ignoring paragraph breaks, colons, semi-colons, dashes or initial capitals *within* a sentence.

Another snippet from *How to Write in Plain English*

When you're turning subordinate clauses into independent sentences, you'll find a lot of them will start with *And*, *But* or *Or*. Don't let that bother you. It's perfectly good English and has been good usage for many centuries. The Old Testament says, "And God said, Let there be light; and there was light." The New Testament says, "But Jesus gave him no answer." And Mark Twain wrote, "Man is the only animal that blushes. Or needs to." So never mind that old superstition.

For publication details, see p. 9

Home-made improvements to standard drafts

The Law Society's conveyancing protocol: amending the standard contract

When TransAction was launched its promoters asked solicitors not to amend more than they could help. King Canute was more successful. Not only are firms adding their own standard conditions, but they are grafting unreconstructed legalese onto the plain English standard clauses. Is this from lack of will or skill, or just insensitivity to the language?

The imaginative drafting of leases

This drafter was obviously bored, and tried juggling around the usual formula to pass the time:

> **... then and in any of the said events it shall be lawful for the Lessor into and upon the flat or any part thereof in the name of the whole to re-enter and the same to have again repossess and enjoy as in the**

The use of examples in legislation
Continued from page 8

Part II: Examples

Example 1

Facts. Correspondence passes between an employee of a moneylending company (writing on behalf of the company) and an individual about the terms on which the company would grant him a loan under a regulated agreement.

Analysis. The correspondence constitutes antecedent negotiations falling within section 56(1)(a), the moneylending company being both creditor and negotiator.

AUSTRALIAN LEGISLATIVE DRAFTING

Extracted from **Clear Legislative Drafting: New approaches in Australia** *by Ian Turnbull QC, first parliamentary counsel. We would have liked to publish more of this, but it is soon to appear in Statute Law Review. This taster is printed by kind permission of the author.*

Some examples of traditional forms that we are avoiding are set out below.

Connecting associated provisions

In a section with several subsections, the traditional practice is to bind the later ones to the earlier ones by expressions like "an application made by a corporation under subsection (1)...". In such a case we would simply say "an application...".

Proportions

The traditional form "an amount that bears to ... the same proportion as ... bears to ..." is very cumbersome when the factors are long. We now express all proportions by mathematical formulæ.

Classes

Traditional style has been unduly particular about distinguishing between a class and its members, e.g. "a person included in a specified class of persons". Sometimes this form is necessary, but more often it is not. A provision that "the Minister may declare that this section applies to a specified class of persons" would be enough to cover the persons included in that class.

Under, pursuant to, in pursuance of, by virtue of

It has been held judicially that these expressions are synonymous, so we are using "under" as being shorter and more familiar.

FROM THE COMMITTEE

The logo

Margaret James of the Continuing Legal Education Society of British Columbia has kindly sent two alternative logos for CLARITY, designed by her husband. Unfortunately, as we do not have the appropriate software, we cannot reproduce them.

The committee also thought that we should not keep changing the logo, so that whatever themerits of the new versions, we felt it would be better to retain the one.we have.

However, we have adopted the James' improvements to the index on page 1, and thank them for their suggestions.

Editorial and design suggestions for the journal are appreciated, but we are limited by the software. *Clarity* is produced on an Apple Macintosh, using *Ready Set Go!* - a desktop publishing program - and, for artwork, *Superpaint.* The master copy is printed on a Hewlett Packard Deskwriter.

We may have access to more software and a laser printer later in the year. Meanwhile the limitations of the existing package have prevented the use of the improved artwork sent in by Ian Paulson of the Inland Revenue.

Annual meal

One member has asked if the supper could sometimes be held other than on a Friday.

Meetings were originally held on Saturday mornings in Rugby. When we switched to London a few years ago, there was a slight preference for Friday evenings; this is presumably better for those who commute into London and do not want an extra trip in over the weekend.

However, perhaps it is time to canvass views again.

Please write to Mark Adler at the address on the back page if you have any preference for place, day or time. It may be worth varying these from year to year so that more people can attend at least sometimes.

Local authorities

John Walton has kindly agreed to act as our liaison with local authorities.

Precedent library

John Adams and James Kessler have offered to help with this. Arrangements are in hand and more details should be available in the next issue.

ACCOUNTS

to 31.3.91

Brought forward		£732.20
Income		
62 new members	£620.00	
230 renewals	£2,300.00	
Donations	£25.00	
Supper payments	£362.50	
Seminars	£300.00	
Bank interest	£71.96	
Misc	£68.00	£3,747.46
		£4,479.66
Expenses		
2 x *Clarity* printing	£750.00	
postage	£235.94	
Annual meeting	£603.64	
Exhibition	£99.48	
Bank charges	£2.00	
Administration	£67.11	
Misc	£18.25	£1,776.42
Current balance		£2,703.24
Represented by		
Deposit account	£1,742.39	
Current account	£760.85	
Debtors	£200.00	
	£2,703.24	

JUSTIN NELSON

We are very sorry indeed to announce that after two years of hard, valuable and much appreciated work Justin is having to give up his care of the membership list and the accounts. He will shortly be moving from his present firm, on whose facilities he has relied.

We urgently need a replacement with the use of a computer. The records are at present on a Phillips 2203 with 8.25" discs. Unless we have a volunteer similarly equipped, which is extremely unlikely, the details will have to be retyped.

Meanwhile, Justin will remain active in CLARITY and can be contacted at the address on the back page.

BOOK REVIEWS

A New Interpretation Act: To Avoid "Prolixity and Tautology"

Law Commission of New Zealand, Report no.17
Wellington, New Zealand, Dec 1990

I would say an Interpretation Act has advantages CLARITY members value. It reduces the length of the statute book by setting out in one Act common provisions that would otherwise need to be repeated in numerous places. By doing this it promotes uniformity, since different drafters are likely to say the same thing in different words. It eases pressure on drafters by removing the need to spend time over common provisions in their Bills. It can clarify the law by codifying the principles to be applied in statutory interpretation, again promoting uniformity.

I admit there can be drawbacks. If not well drafted, the Interpretation Act may itself be a cause of obscurity. Since the statute user needs to look not only at the enactments of direct concern but at the Interpretation Act as well, the legislative vice of Scatter (see my *Statute Law*, pages 227-9) is exacerbated. As users (including some judges) are prone to overlook the Interpretation Act, mistakes in construction can arise.

Balancing these considerations, I conclude that it is well worth statute users putting up with increased Scatter if they can get themselves a good Interpretation Act, and remember it exists.

Following extensive and thorough consultation with those interested, the Law Commission of New Zealand have tried very hard, and with great skill, to draft a good Interpretation Act for their country. It is intended to replace the Acts Interpretation Act 1924. The Commission's report and draft Bill interests us all, because problems of statutory interpretation are much the same in all common law jurisdictions.

The draft Bill consists of 26 clauses arranged in 7 Parts respectively dealing with the purposes and application of the Bill, the commencement of enactments, the prospective application of new enactments, the principles of interpretation, the exercise of powers, the meanings of 16 defined terms presented as a "dictionary", and finally repeals and amendments.

The first thing I noticed was that the draft Bill halves the number of definitions and other provisions included in the 1924 Act. Some of these the Commission regarded as obsolete, while others are thought to be unnecessary or better placed elsewhere. A further consideration is expressed as follows:

> The list needs to be prominent in the minds of those who write and read statutes; there is considerable evidence of neglect of the [existing] definitions and as a result the purposes of having a single definition are lost.

One would have thought that neglect by the profession of the Interpretation Act (which also happens in the UK) was a signal not for cutting down the number of its provisions but for improved education in principles of statute law. Evidently the Commission do not see it that way.

That the Commission should consider a mere 16 terms worthy of definition suggests that they do not understand the potential utility of an Interpretation Act. After all, Britain's 1978 Act, which has been criticised as insufficient, has 65 terms in its "dictionary". That of Northern Ireland, passed in 1954, has 88. (The Renton Report quoted an estimate that the latter had reduced the length of subsequent Acts by a quarter.)

In judging these figures we should appreciate that there are six kinds of statutory definition: clarifying, comprehensive, enlarging, exclusionary, labelling and referential (see *Statute Law*, pages 131-5). Particularly useful is the labelling definition, by which a complex concept can be set out in one place under a brief descriptive label. Use of the label then attracts the concept. Few of the Commission's definitions are of this type.

The Part of the draft Bill headed "Principles of Interpretation" contains only five principles. One of these, that an amending enactment is to be read as part of the enactment which it amends, is of limited utility, since amendments should be textual wherever possible. The opportunity has been missed to codify the whole range of rules, principles, presumptions and linguistic canons used by the courts in statutory interpretation. The Commission have even passed by the chance of clarifying the law on the vexed question of reference to *Hansard*, and the reason they give is significant. The omission is in accordance with "the strong view of most of those who expressed views to us on this issue". In other words, the Commission have not judged for themselves, but reflected the views of their constituency.

Having carried out this comprehensive codifying operation in my book *Statutory Interpretation*, which embodies a code of 396 sections, I am disappointed by the failure of the Commission, which I suspect is really the failure of the New Zealand community of statute users generally, to grasp the nettle. This is paralleled elsewhere. Why are statute users so reluctant to ask for measures that would lighten their task? On this I refer those interested to my 1989 article *Statute law reform: is anybody listening?* [133 Solicitors Journal 886].

The Commission's report is thoughtful and enlightening, so far as it goes. Their Bill is beautifully drafted, again so far as it goes. It contains a number of improvements, but an opportunity has been missed.

Francis Bennion

The Language of the Law

by David Mellinkoff
Little, Brown & Company, Boston
11th printing, 1990
526-page paperback

Everyone knows the sad tale of the man who was almost literally hanged by a comma. Sir Roger Casement was an Irish nationalist who during the First World War incited Irish soldiers in the British army to defect to the Germans. This was a clear case of treason - or would have been, were it not for the fact that Casement's alleged offences were committed on foreign soil. The chief question at his trial depended on the punctuation of a section of the Statute of Treasons 1351: *R v. Casement* [1917 86 LJKB (ns) 482].

A close study of the case reveals that, contrary to common belief, statutes have long been punctuated and that the courts do pay attention to punctuation. Lord Atkin (as he was later to become) and Mr Justice Darling went off to the Public Record Office together, where they consulted the original Norman-French text of the 1351 statute and compared it with the version in the Parliamentary Roll. And it was on the basis of their diligent researches that Sir Roger Casement was hanged.

This may perhaps give you a flavour of Mellinkoff's book, which contains a full discussion of *Casement* (p 167 ff), together with innumerable other illuminating titbits. It is a veritable treasure trove of lore on the language of law from the earliest times down to the early 1960s. The reason it is not more up-to-date is that it is not a new edition but only another reprint of the original book published in 1963.

Nevertheless, by the early sixties the movement for plain English drafting had already made a good deal of headway in America, and Mellinkoff has some interesting comparative tables showing, for example, how New York plain language laws differed from Californian legalese.

> California Penal Code section 384 makes it a misdemeanour for any person who shall wilfully refuse to immediately relinquish a telephone party-line when informed that such a line is needed for an emergency ...

becomes in New York:

> New York State law requires you to hang up the receiver of a party line telephone immediately when told the line is needed for an emergency call ... (page 430)

Not only is this shorter and easier to understand but it also disposes of the split infinitive.

Though Mellinkoff's preference for plain English is not hard to detect, the book is not a party political broadcast. It is essentially a learned treatise on the history of the use of language by lawyers in the English-speaking world. It is therefore descriptive and explanatory rather than argumentative or didactic. For the plain English enthusiast, however, it can prove a valuable armoury as well as a thoroughly delightful reference book - and an utterly riveting read!

Michael Arnheim

A Dictionary of Modern Legal Usage

by Bryan A. Garner
Oxford University Press 1987
587-page paperback; $15.95 or £9.95

Justin Nelson would have reviewed this book in the last issue, but I was too attached to my copy to pass it on to him.

The *Dictionary* doubles as a scholarly work of reference and a bedside book. I have been using it both to check drafting points whilst working, and to browse in idle moments. (For some reason, my habit of picking up something to read during the television commercials irritates my wife. At the risk of divorce, I discovered last night that "nocent" was an obsolete synonym for "guilty", and that "fieri facias" does have a meaning, contrary to what I was told as a student.)

It is both dictionary and a style-book. The entry for "gobbledygook" begins:

> GOBBLEDYGOOK is the obscurantist language characteristic of jargon-mongering bureaucrats. Thus *iterative naturalistic inquiry methodology* = a series of interviews. Much legal writing is open to the criticism of being gobbledygook. One of the goals of this book is to wage battle against it. See LEGALESE, LATINISMS, JARGON & OBSCURITY.

Garner's dedication to plain English is apparent throughout. So:

> **Hereby** is often a FLOTSAM PHRASE that can be excised with no loss of meaning; *I hereby declare* has no advantages over *I declare*..

But this book, like Mellinkoff's, is a source of information, not a tract. For example:

> **Ignoramus.** Until 1934 in England, if a grand jury considered the evidence of an alleged crime insufficient, it would endorse the bill *ignoramus*, meaning literally "we do not know" or "we know nothing of this." This use of the term was a survival of the medieval practice of having juries act on personal knowledge. By extension, and as early as the seventeenth century, *ignoramus* came to mean "an ignorant person". See POPULARIZED LEGAL TECHNICALITIES...

The *Dictionary* is also a useful guide to the differences between U.S. and British English language and practice, though the U.K. reader must remember that it was written by an American. For example:

> **Encumbrancer** is a slightly archaic equivalent of *lienholder*. (See **lienor**.) A variant spelling to be avoided is *incumbrancer*.
>
> **Lienor; lienholder.** The former, an Americanism, is best left unused; it is hardly known in G.B. *Lienholder* is also more likely to be understood by laymen....

I am still enjoying this book, and meanwhile look forward to its companion, *Elements of Legal Style*, now due for publication by OUP on both sides of the Atlantic.

Mark Adler

REFERRALS REGISTER

The full list is published from time to time but copies are available from Mark Adler on request.
Please send stamped or DX addressed envelope.

The list is open to any member willing to accept referrals of clients from other members.
All are solicitors unless indicated.
Please write in if you would like to be included.

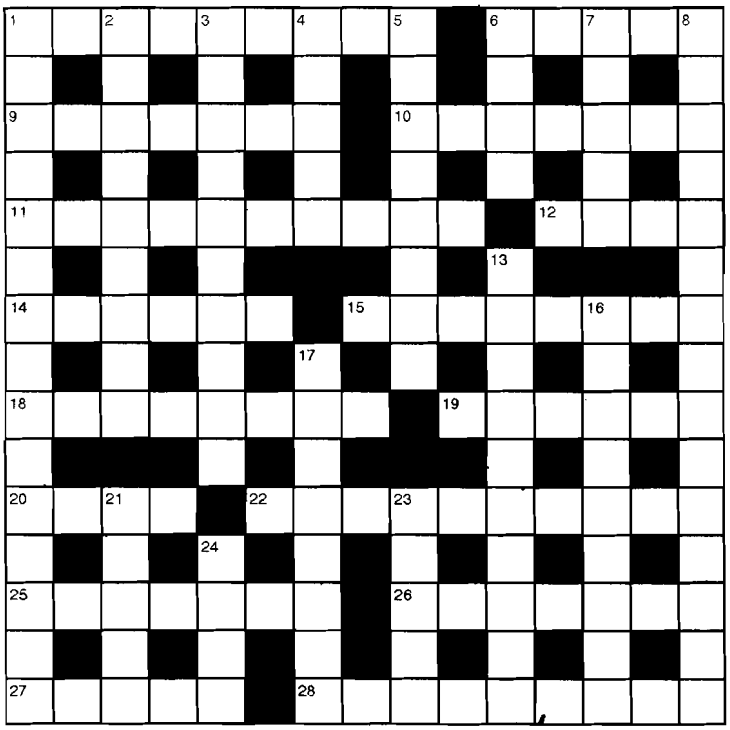
New entries only are listed below.

Name	Area	Telephone	Field
Michael Anderson	London WC1	071 242 5473	Litigation (mainly commercial/property)
John Blank	London WC1	071 242 1160	Property, commercial and computer law
Anthony Curtis	Luton, Beds	0582 21181	
Angus Gribbon	Maidstone, Kent	081 770 7000	Company/commercial
Jeremy Holt	Swindon, Wiltshire	0793 617444	Computer law
G.F.Martin	Newcastle on Tyne	091 232 6002	Child care
D.P. Rosenberg	London EC4	071 623 3144	Commercial property, corporate finance, litigation, banking, shipping and tax
Dr Hermann Schlindwein	Frankfurt, Germany	(49) 69 170 0030	Tax and company law

NOTE

Some members who are not in private practice have asked to be included, but as the register is intended for the referral of clients, I have not added them to the list. I am afraid that pressure of work has prevented me from contacting all of them to explain in person.

We hope to make a fuller list, showing specialities on which members can be consulted informally, when the new membership database is set up.



CROSSWORD

by John Walton

ACROSS

1. Adler ends redrafting when calumniated. (9)
6. Take shelter from legalese – and encounter storms. (5)
9. Quoted verse beginning 'whereas"? (7)
10,15. Legal maxim: it speaks for itself, though not in plain English! (3, 4, 8)
11. Revives letters re USSR etc. (9)
12. 'Scots, wha hae wi' Wallace --- '; there's a bit of gobbledegook! (4)
14. Cite me inaccurately? It makes me sick! (6)
15. See 10.
18. Threw in the air and spun. (6, 2)
19. Engross when brothers return with degree. (6)
20. Oil exporters address Plain English Campaign. (4)
22. CLARITY begins at home with the German girl – and she lived happily ever after. (10)
25. First part of e.g. Latin. (7)
26. Give her a ring! (7)
27. Old instrument for lettering – with which CLARITY members seek to write. (5)
28. Makes lawful for little boy (or girl) to hold back fodder. (9)

DOWN

1. Plain Words man writes gross distortion about eagle. (3, 6, 6)
2. Those who attack maples, including the price. (9)
3. Resolute, legally put an end to ... (10)
4. ... Barnaby's resentment after losing head. (5)
5. Continuance of legal reason in demand for payment. (8)
6. Cut gas – hydrogen. (4)
7. The French and Spanish have quiet place for badge. (5)
8. They carry flags to make Brenda read stars. (8, 7)
13. Blurt abler to be deciphered by bouncer. (6, 4)
16. Put into pairs where you can't be at the same time! (3, 6)
17. Julia upset about detectives coming up concerning a judge. (8)
21. Each of you embracing clergyman on rising. (5)
23. Improve readability of author (mostly) – grand! (2-3)
24. Exercises between two points – as used in fencing. (4)

QUOTE OF THE QUARTER

On the Gulf War:

Violent aggression is not a viable option in terms of peace.

Her lawyer made me an offer
I can't understand

Generally, the court clerks do not interfere with sensible drafting, but a recent draft order was returned by the Queens Bench Division of the High Court with "may" deleted, and "be at liberty to" written in.

WELCOME TO NEW MEMBERS

Mr K.G. Allison, solicitor, Allison & Humphries, London E1
Michael Anderson, solicitor, Wright Son & Pepper, London WC1
Miss S.K. Barhey, solicitor, Hardwick & Co, London EC1
D.P.Rosenberg, Berwin Leighton, solicitors, London EC4
John Blank, solicitor, Shupak Blank & Landys, London WC1
Philip Britton, law lecturer, University of Warwick, Coventry, Warwickshire
Sue Carey, head of information services, Dibb Lupton Broomhead & Prior, Leeds
M. Cooper-Smith, financial services dept, Allied Dunbar, Swindon, Wiltshire
Kenneth Crawford, chief legal executive, Borough of Newcastle under Lyme
Anthony Curtis, solicitor, Machins, Luton, Bedfordshire
Paul Firmin, solicitor, Cheung Chau, N.T., Hong Kong
Peter L. Freeman QC, The Law Society of Alberta, Calgary, Alberta, Canada
Angus Gribbon, solicitor, Maidstone, Kent
S. J. Hardwick, solicitor, Hardwick & Co, London EC1
Judith Holley, solicitor, Anthony & Jarvie, Bridgend, Mid-Glamorgan
Juricom, Montreal, Canada
Dr Bruno Maier, company lawyer, F. Hoffman La Roche Ltd, Basel, Switzerland
Mr G.F. Martin, solicitor & senior lecturer, Newcastle Polytechnic
Peter Mott, lecturer in philosophy and computer science, University of Leeds
Mrs E.M. Rees, barrister and justices' clerk, Bexleyheath, Kent
Dr M.J. Russell, solicitor, Great Bookham, Surrey
Dr Hermann Schlindwein, lawyer, Frankfurt, Germany (on secondment to Nabarro Nathanson)
Anthony J. Williams, solicitor, Oakham, Leicestershire
Tim Wolstencroft, principal lecturer in law, Huddersfield Polytechnic

AND TO OLD

Apologies to Howard Wilson, solicitor, Vardy Wilson, Sutton-in-Ashfield, Nottinghamshire, for omitting his welcome when he joined in 1989.

CONGRATULATIONS TO

Tamara Gorieli, on her appointment to the Authorised Conveyancers Practitioners Board
David Ward, on his appointment to the Lord Chancellor's advisory committee

COMMITTEE

Mark Adler (chairman)	35 Bridge Road, East Molesey, Surrey KT8 9ER DX 80056 East Molesey	081-979 -0085 Fax: 081-941 0152
Michael Arnheim	8 Warwick Court, Grays Inn, London WC1R 5DJ DX 1001, Chancery Lane	071-430 2323 Fax: 071-430 9171
Prof. Patricia Hassett	24 Kensington Park Gardens, London W11 2QU	071-229 0005 Fax: 071-792 0791
Alexandra Marks	59 Gresham Street, London EC2V 7JA DX 10, London	071 606 7080 fax: 071 606 5113
Justin Nelson	66 Rogersmead, Tenterden, Kent TN30 6LF	05806 5313 fax: 05806 4256

Please contact

Justin Nelson about membership, finance or book reviews
and
Mark Adler about this journal

COMBINED TREASURER/ MEMBERSHIP SECRETARY NEEDED

Please see page 11