



A movement to simplify legal language

Patron: Lord Justice Staughton

No 28: August 1993

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## Annual Supper

Friday, 29th October 1993  
6pm for 6.30

Chez Gérard, 119 Chancery Lane,  
London WC2

This annual event will follow the successful formula of recent years. We will begin to gather at 6pm. A meal at 6.30 will be followed in its own good time by one or two guest speakers (who usually speak for about 10 minutes each), than by a discussion of any CLARITY business that members want to raise, and elections.

Nominations for the committee and other proposals for discussion may be sent in beforehand or made on the night.

One matter which ought to be aired again is whether we should have a constitution, and if so, what it should be. This has not been debated for some years. When it was, the consensus was that we enjoyed the informality, and that as we managed without a constitution such a document would be otiose. However, now that CLARITY is more active, and that some members earn a living from plain language work and can have a conflict of interest, some formalisation may be desirable.

There has never been a contested election to the committee, or for the posts of chairman, treasurer, or editor of this journal. This is partly due to the well-known tendency in voluntary organisations to accept with gratitude the services of anyone willing to supply them. It is also due to the good-natured reluctance of members to hurt the feelings of those in office. The result is a friendly organisation, but not necessarily a healthy one. It also creates difficulty for those wanting to resign but unable to tease out

»» Continued on page 4

## 10th anniversary celebration

Our anniversary celebration was held at The Law Society's Hall on 8th June, ten years to the day since CLARITY was launched by a letter in the *Gazette*. The Law Society kindly lent us the Members' Dining Room without charge, and the buffet was provided by the resident concessionaires.

Sue Stapeley, The Law Society's press officer and a long-time member of CLARITY, opened the informal meeting by introducing us to the guests.

Mark Adler reviewed the progress

CLARITY had made in its 10 years and made some suggestions for the immediate future. A rough transcript of his remarks appears opposite.

Lord Justice Staughton paid tribute to John Walton, who in conceiving CLARITY, and in his four years as its first chairman, had developed an organisation and set a tone both of which remained substantially unchanged. The Lord Justice announced Mr Walton's appointment as Honorary Life President in appreciation of his contribution.

Mark Sheldon, the President of

The Law Society, said that the climate was changing in our favour but the work would take time yet to complete.

Patricia Hassett, at her last CLARITY meeting before returning to Syracuse, took the left-over food to a group of homeless in the Strand.

Guests were given packs containing the April issue of *Clarity*, leaflets about the group, a membership application form, the CLARITY poster, a copy of the press release about the evening, a copy of the "declaration of support" with a list of those subscribing to it (see page 5), and reproductions of John Walton's cartoons from the early issues of *Clarity*. A year's free membership and a CLARITY tie were offered to anyone joining on the night, and several did.

### Guest list

#### Guests

##### From the bench

Sir Thomas Bingham, Master of the Rolls  
Sir Donald Nicholls, Vice-Chancellor  
Mr Justice Brooke, Chairman of the Law Commission

##### From The Law Society

Mark Sheldon, President<sup>‡</sup>  
Rodger Pannone, Vice-President<sup>‡</sup>  
Charles Elly, Deputy Vice-President<sup>‡</sup>  
John Young, Deputy Vice-President Elect<sup>‡\*</sup>  
John Hayes, Secretary-General  
Jane Hern, Head of Co-ordination  
Andrew Lockley, Head of Legal Practice Directorate  
Walter Merricks, Head of Communications  
Jonathan Ames, Law Society's *Gazette*

##### From the profession and related sectors

Fiona Bawdon, *New Law Journal*  
Mike Foers, plain language consultant, Inland Revenue\*  
Daniel Hayes, *Law Student*  
Irene Kaplan, Fourmat Publishing\*  
Sebastian Payne, barrister  
Kate Redshaw, Charles Russell  
Audrey Stritch, secretary, Adler & Adler Sweet & Maxwell  
Helena Twist, Head of Training, Nabarro Nathanson\*

Guy Ainsworth Whalley, former senior partner, Freshfields  
Julian Washington, Charles Russell

#### Members

Lord Justice Staughton, patron  
John Walton, founder  
Mark Adler  
Judith Bennett  
Michael Daiches  
David Elliott  
Stewart Graham  
Patricia Hassett  
Alexandra Marks  
Lawrence McNulty  
Nick O'Brien  
Richard Oerton  
Alison Plouviez  
Daniel Rosenberg  
Sue Stapely  
Richard Woof

\* Those on the left marked with an asterick have now joined CLARITY

‡ Mark Sheldon's year of office has since ended and the others have each moved up a place.

## 10th anniversary celebration

### The chairman's remarks

Ten years ago we were looked on as eccentrics. I was going to say that there was strong resistance to our views, but that would imply that they were taken seriously. At about that time I sent out a draft lease to the solicitor for a prospective tenant and received it back with every punctuation mark neatly deleted in red. That would not happen now. Plain English drafts are generally welcomed by professional colleagues, even by those who don't write them themselves, as they know that they reduce the amount of work - much of it tedious - involved in a transaction.

In those ten years CLARITY has become accepted by the establishment. The Law Society is hosting us tonight; it has published *Clarity for Lawyers*; it has accredited our seminars; it seeks our help drafting its documents and training its own drafters. We have to a lesser extent the support of the Bar Council. We are consulted by the civil service. Amongst our members are members of the Council of The Law Society and of the Bar Council, representatives of government departments, and the members and representatives of the overseas equivalents of these bodies. Distinguished academic members include the editor of *Gowers* and The Law Society's chief examiner.

We now have 435<sup>1</sup> members in 20 countries. Many publish articles and books on plain English, and teach its use. Two overseas members are with us tonight: David Elliott, a solicitor and barrister who specialises in very plain parliamentary drafting in Alberta; and Judith Bennett of the academically and commercially successful Centre for Plain Legal Language at the University of Sydney.

Our progress has been achieved by the hard work of many people. Thanks are due to the committee, past and present, and to many other active members. My secretary, Audrey Stritch, and my former clerk, Stewart Graham, both here tonight, have done a lot of tedious clerical work with good grace.

But if CLARITY has achieved so much, why do most lawyers still write so badly? Let me quote comments from clients about a typical solicitor's letter:

- *Stuffy as well as unclear.*
- *A general woolliness.*
- *Sly.*
- *Prolix.*
- *I get a nasty feeling I might be missing out on something.*
- *It is verbose without containing the necessary information.*
- *The style is appalling ... arrogant.*
- *Pompous, platitudinous, cliché-ridden.*

What do lawyers say about it?

We recently sent a questionnaire to 163 solicitors, 62 junior barristers, and 44 silks.<sup>2</sup> 56 replied, spread over the 3 groups. As they were lawyers, I am afraid it was rather difficult to make sense of their replies, but the blame for

<sup>1</sup> This has since risen to 446.

<sup>2</sup> This research has since been written up, and a report appears on pages 29 to 41.

legalese seems to be shared between fear and ignorance.

Only one respondent said that he did not support the use of plain English by lawyers.

When asked if they used plain English themselves, only four said "no". 93% answered "yes" or "maybe". But when we tested their understanding of the basic principles of plain English, we found that 46 of the 56 (and 87% of the solicitors) had no idea what was involved. There was no objection to sentences of 100 words or more, or to the use of passive verbs when an active one would do. On the other hand, there was virtual unanimity in their adherence to cosmetic rules (barring split infinitives, and not ending a sentence with a preposition). Surprisingly, 89% of those answering favoured punctuation in all documents.

What are we asking of the profession?

There is nothing "professional" about being turgid. Lawyers have misled the public into fearing that a document needs convoluted language to be "legal". They forget that a bus ticket is a legal document, or a note for the milkman.

We would like to see lawyers taking courses to improve their writing, but we recognise that some have other priorities. For them, a few trivial changes in drafting habits would lead to an enormous improvement in writing style, out of all proportion to the minor effort involved:

- The one-sentence, three-page paragraph could be broken into shorter sentences and paragraphs. We see bad examples of this fault at the beginning of leases, where the date, parties, property, demise, term, rent, subsidiary rights, and reservations to the landlord are all covered in one unpunctuated

sentence. But there is no rule against stopping for breath. Not even a change of wording is needed to make a significant improvement.

- If 89% of lawyers say punctuation is acceptable in all documents, there is no reason not to use it. This requires a little more skill than stopping for breath, but lawyers do use punctuation in private life, so they should be able to cope without serious trauma.
- Avoid unnecessary verbiage. Say what you need to say unpretentiously, and then stop. Instead of writing in a letter

**the said John Smith, the plaintiff herein, wrote to your client on the 7th June 1993**

say

**Mr Smith wrote to your client yesterday.**

**We need encouragement from the bench:** messages that plain

English will be rewarded rather than penalised; that judges dislike reading and interpreting legalese as much as anyone else; and that the drafter's clients will benefit from clear, unambiguous prose.

At a recent conference, a Canadian responsible for training his country's judges summed up the state of affairs he took for granted: he said that judges do not want to have to read an unnecessarily long piece of text several times before they can understand it: they would rather read a short piece that they can understand first time. They are busy people; they either want to get on with the next case, or - if it is the end of their list - go fishing.

Many of you here will be familiar with Professor Joseph Kimble's research, but I hope you will forgive me if I mention it. He asked American judges and lawyersto choose between traditional and plain versions of the same documents. The results were consistent in states as diverse as Michigan, Louisiana, Florida, Texas, and [in a related study] California. In each

state 85% or 86% of judges chose the plain English version as the one they thought had been submitted by the more prestigious lawyer and as the version they found more persuasive. The results amongst the practising lawyers were just as consistent, though not quite so good. The figure there was 80%.

**We need encouragement from the Law Society and the Bar Council:** continued improvement in the revision of their own documents; publicity to emphasise not only that plain writing is approved by the legal authorities as good practice, but to establish that legalese is no longer an acceptable alternative. Both bodies could collaborate with CLARITY in training lawyers to write well.

Some years ago we proposed a practice rule; it was not taken up at the time, but perhaps The Law Society could look at it again. [That rule appears below left.]

**We need encouragement from senior partners.** Young solicitors and trainees who would prefer to write plainly say their principals do not allow it. This is so even in firms which have arranged plain language training in-house.

**And we need encouragement from the law schools,** so that new lawyers are literate.

Thank you all for coming.

**»» Continued from page 1**

a replacement. Perhaps the time has come to fix the size of the committee and to encourage contests for it and for the posts within it.

We usually attract about 20 members to the supper, but more would be welcome. If you would like to come, please return the enclosed application

**CLARITY's proposed rule of professional practice for solicitors**

(1) Solicitors in private practice must take reasonable steps to keep each client informed about

- the progress of the matter in hand and
- the client's rights and alternative courses of action

in language which that client can understand.

(2) This rule does not apply:

- to a client without a working knowledge of English, unless the solicitor has held him- or herself out to that client as competent in a language spoken fluently by the client
- to the extent that a client has released the solicitor from this obligation.

## Declaration of support

The following non-members endorsed this declaration of support for CLARITY:

***We congratulate CLARITY, on its 10th anniversary, for raising awareness of the need for plain legal English. We support CLARITY's aim of eliminating legalese. Let us all work to achieve this goal and ban 19th century language from the 21st century.***

Sir Donald Nicholls, Vice-Chancellor  
 Mrs Justice Bracewell  
 Mr Justice Brooke  
 Mr Justice Cazalet  
 Mr Justice Hutchison  
 Berwin Leighton  
 Douglas Hamilton, Norton Rose  
 Mike Jay  
 Linda Kelsey, journalist  
 Andrew Lockley, The Law Society  
 Robert McKay, Tolleys  
 Austin Mitchell MP  
 Roger Smith, Legal Action Group  
 Kate Redshaw, Charles Russell  
 F.H. Robertson, Braby & Waller  
 Patricia Scotland  
 Sweet & Maxwell  
 Julian Washington, Charles Russell

Other messages of support have been received from:

Sir Stephen Brown, President of the Family  
 Division  
 Mr Justice Owen  
 Mr Justice Rougier  
 Institute of Legal Executives (ILEX)  
 ILEX Tutorial Services Ltd  
 Lord Renton QC  
 John Taylor MP, Parliamentary secretary for  
 the Lord Chancellor's Department

We have excluded messages of support received from people who have since joined, on the basis that members' support is implied.

## EC legislation

### Council resolution for plain laws

#### Eirlys Roberts writes:

ERICA (European Research into Consumer Affairs) researches consumer questions in the 12 member states of the European Community, and concentrates particularly on the under-privileged.

We believe that obscure official language causes special hardship to the poor and under-educated. Governments and voluntary organisations may want to help them but often express their goodwill in incomprehensible language, so the help is not asked for, or given.

The European Commission (the Community's civil servants) are free with their information but their language is notoriously difficult. Official statements are hard to understand and sound superior, so that people already at a disadvantage are humiliated further.

ERICA decided to join the fight for plainer official language. The first salvo was fired by Dr Caroline Jackson, a conservation MEP, who put a resolution to the parliament asking the Commission to adopt a policy of plain language in their communications and to set up a unit in the Commission to monitor the progress of the policy.

The parliament approved the resolution and passed it for action to its Commission on Youth, Culture, Education, Information and Sport. Overwhelmed with work, the committee failed to do anything about it before being swamped by the next parliamentary elections, and the resolution sank without trace.

ERICA and another consumer organisation then arranged a competition in which they offered awards for examples of obscure language in official European documents. The Commission won.

This year we took a different approach. We offered prizes for the best translations into simple language of a piece of European agricultural obscurantism. Separate prizes were awarded for Dutch, German, French, Danish, English, Italian, and Spanish versions. A consolation prize went to

Jaques Delors for his speeches and statements in the European parliament and at the Edinburgh summit.

This has finally produced results. We are enormously cheered by the passage on CLARITY's 10th anniversary of the plain laws resolution, set out below. However, plenty of work remains. ERICA and its partner now have to decide what to do next to drive their point home.

Eirlys Roberts chairs ERICA at  
8 Lloyd Square  
London WC1X 9BA  
071 837 2492

**Resolution 93/C 166/01 of  
8th June 1993,  
on the quality of drafting  
Community legislation**

**THE COUNCIL OF THE EUROPEAN COMMUNITIES,**

Having regard to the treaties establishing the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community,

Having regard to the conclusions of the Presidency of the European Council meeting in Edinburgh on 11 and 12 December 1992 to the effect that practical steps should be taken to make Community legislation clearer and simpler,

Whereas guidelines should be adopted containing criteria against which the quality of drafting of Community legislation would have to be checked;

Whereas although such guidelines would be neither binding nor exhaustive they would aim to make Community legislation as clear, simple, concise and understandable as possible;

Whereas these guidelines are intended to serve as a reference for all bodies involved in the process of drawing up acts for the Council, not only in the Council itself but also in the Permanent Representatives Committee and particularly in the working parties; whereas the Council Legal Service is asked to use these guidelines to formulate drafting suggestions for the attention of the Council and its subsidiary bodies,

**HAS ADOPTED THIS RESOLUTION:**

The general objective of making Community legislation more accessible should be pursued, not only by making systematic use of consolidation but also by implementing the following guidelines as criteria against which Council texts should be checked as they are drafted:

1. the wording of the act should be clear, simple, concise and unambiguous; unnecessary abbreviations, "Community jargon" and excessively long sentences should be avoided;
2. imprecise references to other texts should be avoided as should too many cross-references which make the text difficult to understand;
3. the various provisions of the acts should be consistent with each other; the same term should be used throughout to express a given concept;
4. the rights and obligations of those to whom the act is to apply should be clearly defined;
5. the act should be laid out according to the standard structure (chapters, sections, articles, paragraphs);
6. the preamble should justify the enacting provisions in simple terms;
7. provisions without legislative

character should be avoided (wishes, political statements);

8. inconsistency with existing legislation should be avoided as should pointless repetition of existing provisions. Any amendment, extension or repeal of an act should be clearly set out;
9. an act amending an earlier act should not contain autonomous substantive provisions but only provisions to be directly incorporated into the act to be amended;
10. the date of entry into force of the act and any transitional provisions which might be necessary should be clearly stated.

**BACK NUMBERS**

of *Clarity* are available at the following prices:

<b>Issues</b>			
1-4	£1	each	
5-11	£1.50	"	
12-24	£2	"	
25-27	£3	"	

**CLARITY  
TIES**

**are available for sale  
at  
£8.50 each**

**Navy blue ties with the  
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(as nearly  
as it can be reproduced)

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cheque to  
our Surbiton address

## News

### Australasia

#### Another law firm opens plain English department

A dedicated Plain English Department opened in December at Phillips Fox, a firm of solicitors with branches throughout Australia and in New Zealand.

The department is headed by Christopher Balmford, former director of the now-closed Law Reform Commission of Victoria. He has been joined by Professor David Kelly, who used to chair the commission.

They have been asked to rewrite a wide range of documents, including employment contracts, guarantees, insurance policies, leases, legislation, manuals, mortgages, standard letters, superannuation policies, conditions of sale, and trust deeds. Meanwhile, the Life Insurance Federation of Australia has commissioned a report from Mr Balmford and Professor Kelly on "plain English and the life industry". They are to prepare four model policies and related documents as a practical guide for the industry.

### Canada

#### Organising plain language consultants

There is talk in British Columbia of a certification system so that

government bodies and other employers can ensure that the consultants and contractors they deal with are competent in plain language processes. John Warnock, who teaches in both the English and law faculties at the University of Arizona, spoke to the Plain Language Working Group on this topic in April. He thinks it is possible, but not necessarily desirable, to certify plain language consultants.

There is also talk of setting up an association of plain language consultants, so that they can work together on matters of mutual interest.

### England

#### Calls for plain English in the courts by ...

##### The Heilbron report

A report, *Civil justice on trial - the case for change*, says that all pleadings, affidavits, orders and other courts documents should be written in plain English. It also calls for simplified and uniform procedures in the county courts and High Court, as far as that is practicable.

The report was produced by a 39-member working party chaired by Hilary Heilbron QC and set up under a joint initiative of the bar and The Law Society.

##### The Chancery Division

Mr Bill Heeler, Head of Drafting in the Chancery Division of the High Court, has begun a major project to modernise the form and language of High Court orders.

The initiative comes from him

and from Sir Donald Nicholls, who as Vice-Chancellor is the senior judge of the Division. Both are enthusiastic proponents of plain language. The project has the support of the Supreme Court Procedure Committee and of the Judges' Council, which includes the Lord Chief Justice, the Master of the Rolls, and the President of the Family Division.

The Supreme Court Procedure Committee has agreed that the project should spread to all divisions of the High Court, creating consistency in place of the current variety. It is hoped that forms other than orders will eventually be reworked, but many are prescribed by statutory instrument and require secondary legislation to change them.

A working party is being formed. So far it consists of Mr Justice Cresswell of the Commercial Court, Master Winegarten, Mr J.N. Barnecutt (a solicitor with Sharpe Pritchard), a representative of the Family Division, and Mr Heeler.

Meanwhile, Mr Heeler has begun work on the simplification of injunctions, and an early (and rough) draft Anton Piller order is reproduced on pages 9 to 12, with its predecessor for comparison. Mr Heeler is presently continuing with his regular duties, but expects this initiative to dominate his workload for a considerable time.

He invites CLARITY members to submit suggestions to him - initially on injunctions and especially on Mareva and Anton Piller orders. He can be reached in

Room 509  
Royal Courts of Justice  
Strand, London WC2A 2LL  
(DX 44450 Strand)  
Tel: 071 936 6080  
Fax: 071 936 7345

##### The Court of Appeal

The Court of Appeal is translating

into plain English its explanatory leaflets for litigants in person.

Asked why the court forms themselves were not being changed, the Master of the Rolls said that there were no set forms as there were in the lower courts. The language of appellate documents is in the hands of the solicitors and counsel who prepare them. Their use of plain English would be welcomed.

### Hansard Society reinforces its call for plain legislation

On 7th July Lord Rippon chaired a seminar on behalf of the Hansard Society to examine the recommendations of its report *Making the Law* (see *Clarity* 27 [April 1993, pages 11-12]).

Various points of interest to CLARITY members were made by individual delegates (but to comply with an assurance of confidentiality given by the chairman, the speakers are not identified):

- There had been a steady increase in the informality of statutory language.
- Secondary legislation increases the need for cross-reference, but has the advantage that it is easier to amend.
- Parliamentary counsel were more sinned against than sinning. They had an impossible schedule, and were to some extent at the mercy of their instructions, which sometimes required them to deal with their subject in excessive detail. This latter fault had become worse over the years: witness the difference between the Nationalisation Acts (which were very clear and not too long) and the Denationalisation Acts (which were appalling - too long and detailed, and sometimes un-

fathomable).

- Purpose clauses were better for stating parliament's intentions than notes on clauses, because parliament could vote on them.
- We need detailed legislation so people know where they stand, but all the senior judges who gave evidence to the Renton Committee said they found detailed legislation difficult to apply to situations covered by the legislation but not foreseen by parliament. This problem can be addressed by a statement of the principles on which the Act is based (as appears in the Courts and Legal Services Act 1990).
- The key to understanding an Act is to know what it is about, and most Acts do not tell you. The reader needs an explanation, not a paraphrase.
- No-one is responsible to parliament for the style of drafting. The Attorney-General is the obvious person for this role, but he is already far too busy.
- Parliamentary counsel currently work as individuals, as in barristers' chambers. They need a more corporate or collegiate approach, with regular meetings, perhaps attended by someone from outside.
- A plain English approach would be a massive advantage. Martin Cutts' redraft of the Timeshare Act was "an infinite improvement".

### And parliament responds

Austin Mitchell MP has put down an early day motion welcoming the Hansard Report and calling for parliamentary time to consider and implement it. He said the public

should be able to understand legislation.

### But Brandreth goes quiet

We have not been able to get any news of progress of the Plain Language Bill introduced by Gyles Brandreth MP (reported in *Clarity* 26 [December 1992, pp 2,10] and 27 [April 1993, p.2]). Has this died?

### Clearer Timeshare Act

But Martin Cutts' Clearer Timeshare Act is making headway. (For details see *Clarity* 26 [Dec 1992, pages 3-9 and 21]).

On 27th July Cutts explained the "Act" to the Statute Law Society.

He said that since *Unspeakable Acts* was published he had produced a second edition of the "Act", incorporating many of the improvements and corrections which had been suggested. He had been helped - perhaps unintentionally - by parliamentary counsel, who had written a long critique of the first draft. And he had been encouraged by CLARITY's submission to the Hansard Society.

He has now started testing the Act, using students on vacation placement with law firms. He thought it an advantage that they were not volunteers, but were pressed into service by their employers. They do not know about his project. The first session had been held and four more were to follow.

He divides each batch into two groups, roughly matched in age, sex, and legal experience, one group seeing the real Act and the other the Cutts version. Neither is told about the existence of the other version. The results below,



from the first session only, are early and rough, but encouraging.

First, he asked the students to rate the Act on various points: its clarity of wording, the ease of navigation around the Act, and its design. The Clearer Act scored about 15% higher than the real Act on each point.

Then he asked questions to test their comprehension of the law stated in the Act. This time the advantages of the clearer version were even more marked. On one question, those using the real Act scored 57%, and those using the Cutts version scored 85%. On another, the respective results were 43% and 100%.

He recorded the length of time taken to answer a set of 11 questions. The average time under the old Act was 12.5 minutes, and under the Clearer Act 9.5 minutes.

Each group then saw the other version and was asked to compare them according to various criteria. There was overwhelming preference for the Clearer Act on each criterion.

There was vigorous discussion, but the meeting was firmly behind the Cutts initiative, and he was warmly received. Lord Renton congratulated him on what he had achieved.

A final version of the Act will be published next year.

### Developments in the profession

D.J. Freeman launched their plain language specimen "leasebook" at a reception in July. This is considered in detail on page 29.

Meanwhile, Adler & Adler, the suburban general practice which has been drafting in plain English

for some years, has announced a change of emphasis. Mark Adler, now the firm's only fee-earner, is promoting the plain English drafting side of the practice at the expense of his conventional work.

## Drafting snippets

### Criminal Justice Act

In *Clarity 29* [April 1993, p.16] we commented that s.29 of the Criminal Justice Act 1991 was unintelligible, in that the sentencing bench could not understand when they were to take previous offences into account. The general tenor was that previous convictions had to be ignored, but the exceptions were unclear. Apart from the confusion, the new rule was widely condemned as contrary to common sense.

Happily, s.29 has now been repealed, with effect from 16th August.

### Belt, braces, string, and/or sellotape

Since the attacks on "and/or" were published in *Clarity 26* and *27* I received a draft with the expression "A and/or B or either of them". Negotiations were delicate, and might have been upset by sarcasm, so I reluctantly resisted the temptation to amend it to read "A and/or B and/or either of them and/or both of them." I suppose a *very* cautious drafter might have added "and/or any of these alternatives and/or all possible combinations".

### Allegedly floating modifiers

Journalists demonstrate their lack

of prejudice, and their respect for the court, by inserting the word "alleged" into their reports of wrong-doing. Unfortunately, they do so at random, so that the modification sometimes attaches to the wrong part of the sentence.

A recent example was

... a phone call from the alleged kidnapper ...

The reported meant that the kidnapper (whoever that was) had telephoned, but the wording suggests that it was common ground that the defendant made the phone call, though disputed that he was the kidnapper. Similar confusion arises in America, where we hear that

**The suspect shot the bank clerk.**

## For all the right words

Seminars and courses on advanced writing skills (including plain English for lawyers)

Editing and design of plain legal documents

Martin Cutts  
69 Bings Road  
Whaley Bridge  
Stockport SK12 7ND  
Tel: 0663-732957 Fax: 0663-735135

**words**

**AT WORK**

# Anton Piller orders

For the background please see the item about the Chancery Division on page 6.

The current version appears on the left of this and the following pages, with Bill Heeler's revision on the right. We stress that the revision is a first, uncorrected draft, supplied as we went to press

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

MR JUSTICE ...

IN THE MATTER OF AN INTENDED ACTION

BETWEEN

... Intended Plaintiff

and

... Intended Defendant

UPON MOTION made by Counsel for the Intended Plaintiff (hereinafter called "the Plaintiff")

AND UPON READING the documents recorded on the Court File as having been read

AND the Plaintiff by Counsel undertaking

- (1) forthwith/on or before ... to issue a Writ of Summons claiming relief similar to or connected with that hereinafter granted
- (2) to make and file an Affidavit verifying what was alleged by Counsel substantially in the terms of the draft Affidavit of ...
- (3) as soon as practicable to serve upon the Intended Defendant (hereinafter called "the Defendant") a copy of such Affidavit and the exhibits capable of being copied and a Notice of Motion for ...
- (4) to serve on the Defendant forthwith after the Plaintiffs Solicitors receive the same a copy of a written report on the carrying out of this Order which shall be prepared by the supervising Solicitor mentioned below
- (5) to bring such Motion before the Court on the said date and on that occasion to place before the Court the written report of the supervising Solicitor

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

MR JUSTICE ...

BETWEEN

... Plaintiff

and

... Defendant

## ORDER FOR ENTRY AND SEARCH OF PREMISES

- IMPORTANT:-**
- (1) If you the Defendant disobey this Order you will be guilty of contempt of Court and may be sent to prison
  - (2) Anyone served with this Order should read the Note to this Order

On an application by the Plaintiff heard today [date] by Mr Justice ...

### IT IS ORDERED:

- 1) when the Defendant, or the person appearing in control of [name of premises], is served with this Order by Mr ... the solicitor who will supervise the Plaintiff in carrying out this Order or any other solicitor approved by the Court, he must allow the solicitor ("the supervising solicitor") and up to ... people approved by the Plaintiff to enter the premises and any vehicles on them controlled by the Defendant so that they can inspect, photograph,

- (6) to obey any order that this Court may make as to damages if it shall consider that the Defendant has sustained any damages by reason of this Order which the Plaintiff ought to pay

**AND** the Solicitors for the Plaintiff by Counsel for the Plaintiff being their Counsel for this purpose undertaking

- (1) to return the originals of all documents obtained as a result of this Order within 2 working days of their removal
- (2) where ownership of any article obtained as a result of this Order is disputed to deliver up such article to the custody of the Solicitors acting on behalf of the Defendant within 2 working days of receipt of a written undertaking by such Solicitors to retain the same in safe custody and to produce the same if required to the Court
- (3) save as mentioned above to retain in their safe custody until further Order all documents and articles obtained as a result of this Order

**IT IS ORDERED**

- (1) that the Defendant(s) (and each of them) either by himself / herself / itself / themselves or by a responsible officer or person appearing to be in control of the premises in question do permit the person serving this Order upon him/her/it/them and such other persons duly authorised by the Plaintiff (such other persons not to exceed in number ... (and not to include any person who might obtain commercial advantage over the Defendant by carrying out this Order) to enter forthwith on any weekday between 9:30am and 5:30pm the premises mentioned in the Schedule hereto (hereinafter called "the premises") and any vehicles on the premises to the extent that such premises or vehicles are in the occupation possession or control of the Defendant for the purpose of looking for inspecting photographing and delivering into the custody of the Plaintiffs Solicitors all documents and articles which are specified in the Schedule hereto (hereinafter called "the specified articles") or which appear to the supervising Solicitor to be specified articles

(2) **PROVIDED ALWAYS**

- (1) This Order shall be served and paragraph 1 hereof carried out only by ... of ... or failing

and deliver into the safekeeping of the Plaintiff's solicitors all the documents and articles listed in the Schedule to this Order (the listed items") or any articles the supervising solicitor believes to be listed items. If any of the listed items can only be read from a computer, the Defendant or person in control of the premises must immediately give a print out of the item to the Plaintiff's solicitors or display it so that it can be read;

- 2) the Defendant must inform the Plaintiff's solicitors immediately:
- a) where all the listed items he knows of are;
- b) to the best of his knowledge
- (i) the name and address of everyone who supplied or offered to supply him with listed items, and
- (ii) the name and address of everyone to whom he has supplied or offered to supply listed items, and
- (iii) full details of the dates and quantities of every such supply and offer.
- 3) within ... days after being served with this Order, the Defendant must prepare and swear an affidavit confirming all the information given regarding supplies or offers of the listed items;
- 4) that the Defendant must give the Plaintiff's solicitors immediately all the listed items he has or has control over;
- 5) unless it is to obtain legal advice from his solicitors, the Defendant must not directly or indirectly inform anybody of these proceedings or of the contents of this Order or warn anybody that proceedings may be brought against them by the Plaintiff;
- 6) The Defendant must not [Set out any further injunction]
- 7) The Defendant must not do any of the forbidden acts either himself or in any other way. He must not do so through others acting on his behalf or on his instructions or with his encouragement; and
- 8) the injunctions will remain in force until ... unless before then they are cancelled by a further Order of the Court.

**IMPORTANT**

You ... the Defendant can ask the Court to

## 12 Chancery Divison reform (Anton Piller orders)

him/her by ... or some other Solicitor approved approved for the purpose by the Court (the Solicitor serving the Order being referred to in this Order as "the supervising Solicitor") \*

- (2) Before any persons enter the premises pursuant to this Order the supervising Solicitor shall offer to explain to the person served with the Order its meaning and effect in everyday language and shall also advise such person of his/her right to obtain legal advice before permitting entry provided such advice is obtained at once
- (3) Save as to the extent that this is impracticable no documents or articles shall be removed from the premises until after a list thereof has been prepared and a copy of the list has been supplied to the person served with this Order and he/she has been given a reasonable opportunity to check the same
- ((4) Save to the extent that this is impracticable the premises shall not be searched or any document or articles removed except in the presence of an officer of the Defendant or a person being or appearing to be a suitably responsible employee of the Defendant)
- (3) that the Defendant do disclose forthwith to the Plaintiffs Solicitor:-
  - (1) the whereabouts of all specified items which are in his/her/its/their possession custody or power and
  - (2) to the best of the Defendants knowledge and belief
    - (a) the names and addresses of all persons who have supplied or offered to supply him/her/it/them with specified items and
    - (b) the names and addresses of all persons to whom he/she/it/they has/have supplied any specified items and
    - (c) full details of the dates and quantities of each offer to supply and supply referred to in (a) and (b) above
- (4) that the Defendant do forthwith deliver to the Plaintiffs Solicitors all specified items in his/her/its/their possession custody or power
- (5) that if any such item exists in computer readable form only the Defendant shall cause it forthwith to be printed out and shall deliver the print out to the

\* **2008:** The first lines of this page and the next are missing from my hard copy and seem to have been swallowed by the machine when the journal was printed. But something is still not right. Sorry: I no longer have the original document from which to correct the mistake.

change or discharge this Order provided you tell ..., the solicitors for the Plaintiff before you apply.

### **THE SCHEDULE**

#### **The listed items mentioned in the Order**

[Enter as required]

### **NOTE**

#### **1. Carrying out this Order**

Before you ... the Defendant or the person appearing to be in control of [name of premises] allow anybody onto the premises to carry out this Order you are entitled: to obtain legal advice, provided you do this at once, and to insist that there is nobody present who could gain commercially from entering your premises. You are also entitled to refuse to permit entry except between 9:30am and 5:30pm on a weekday

#### **2. The conditions on which the Order was made**

- 1) The Plaintiff undertook and promised to the Court
  - (a) that if the Court later finds that this Order has caused unjustified loss to ... he will pay for the loss;
  - (b) except when impracticable, before removal to make a list of all the listed items to be removed, to give a copy of the list to the person served and to give him an opportunity to check the list;
  - (c) to serve on the Defendant a copy of the supervising solicitor's report on the carrying out of this Order as soon as his solicitors receive it and to give a copy to the judge when the injunctions are again considered by the Court;
  - (d) except where impracticable, not to carry out the search or remove listed items save in the presence of the Defendant / an officer of the Defendant company or a person who appears to be a responsible employee; and
  - (e) as soon as possible to serve on the Defendant a notice of motion for... together with a copy of the affidavits and exhibits containing the evidence relied on by the Plaintiff
- 2) the solicitors for the Plaintiff undertook and promised to the Court:

Plaintiffs Solicitors or (failing a print out) shall cause it forthwith to be displayed to the Plaintiffs Solicitors in a readable form

**AND IT IS FURTHER ORDERED**

- (6)(1) that the Defendant (and each of them) be restrained until after ... or further Order in the meantime from (in the case of the (First) Defendant whether by itself or by its officers or employees or agents or otherwise howsoever and as regards the (Second) Defendant whether by himself/herself or by his/her employees or agents or otherwise howsoever) directly or indirectly informing any person company or firm of the existence of these proceedings or of the provisions of this Order or otherwise warning any person company or firm that proceedings may be brought against him/her/it/them by the Plaintiff otherwise than for the purpose of such Defendant obtaining legal advice from his/her/its/their lawyers
- (2) that the Defendant (and each of them) be likewise restrained until after ... or further order in the meantime from doing the following acts or any of them

...

AND the Defendant(s) is/ are to be at liberty to move to discharge or vary this Order upon giving to the Solicitors for the Plaintiff 24 hours notice of his/her/its/ their intention so to do

**THE SCHEDULE**

**The premises**

**The specified items**

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- (i) to return to the Defendant all the original documents owned by him within 2 week-days of taking them;
  - (ii) to hand over to the Defendant's solicitors all documents or articles the ownership of which is disputed if the Defendant's solicitors undertake and promise in writing to keep them safe and produce them to the Court when asked; and
  - (iii) to keep safe any other documents and articles taken from the Defendant.
- 3) Before anybody enters the premises under this Order the supervising solicitor will explain to the person served with this Order what it means, in everyday language, and will advise him he is entitled to take legal advice before permitting entry provided he does so at once.

All written communications about this Order should be sent to **The Chancery Orders Section, Room 508, Chancery Chambers, Royal Courts of Justice, Strand, London WC2A 2LL**. The office is open between 10am and 4:30pm Monday to Friday. The telephone numbers are **071 936 6322/6216**.

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# Report from Australia

Dr Robert Eagleson writes

Plain language is starting to become part of the psyche, especially in parliamentary committees and regulatory bodies. Certainly it now appears as almost an obligatory component in reports and recommendations. It has even appeared as a bargaining point in negotiations. In the tussle by banks to be allowed to charge customers annual fees for electronic charge cards, one undertaking extracted from the banks was the agreement to produce consumer documents in plain English. How banks will fulfil the undertaking remains to be seen, but at least there is the growing recognition that plain English legal documents are possible and can be legitimately required. It is an important shift in understanding, displacing the long held view that legalese was inescapable.

## The cost of justice

In its report on *The Cost of Justice* (February 1993) the Standing Committee on Legal and Constitutional Affairs of the Senate of the Australian Parliament considered "the following principles to be fundamental in its discussion of reforms of the legal system":

- The law must be made and administered for the good of the community generally, and this must be given priority over the interests of particular sectors within it, whether legislators, ministers, judges, lawyers or any others.
- Laws should be made only when needed. Makers of legislation, whether primary or subordinate, should restrain their output to what is

essential. Legislation should be drafted so that it is readily understood by the public and be as concise as practicable.

- Judges should give their decisions without undue delay, in terms which are lucid and as succinct as practicable.

In looking where the responsibility for fundamental reform lies, especially in reducing the cost of justice, the committee made some compelling comments which impinge on our plain language activities:

- It is difficult to establish how much of this legislation has been necessary or reasonable, but a considerable proportion has clearly been made without regard to the costs that result - costs which are ultimately borne by the community.
- Parliaments can and do produce legislation that is complex, ill-expressed, and difficult to distil from a myriad of amendments. For example, Mr Justice Sully when interpreting a particular Act of Parliament said that it was a disgrace that a sentencing judge was expected to deal with the personal liberty of the accused and the protection of the public "while hobbled by a statutory scheme, many of the provisions of which are internally inconsistent, and the conceptual framework of which is, to speak plainly, a mess".
- To some extent complexity arises from attempts to deal with an increasingly complex society. But it may also arise from philosophies of law-

making and drafting, some of which are flawed. Makers of legislation are ever ready to meet issues with which they are confronted by creating new laws. Whatever laws are made should be drafted in plain English, easy to understand and regularly consolidated. Unfortunately, these standards are not met often enough.

- Clearly, voluminous and poorly drafted legislation can add significantly to the delays in and the cost of legal proceedings. Parliament does not therefore come to this issue with clean hands.

In a section on lucidity in legal documents, the committee observed:

- The law which people must obey should be readily understood by them. Lord Justice Scott in *Blackpool Corporation v. Locker* spoke of a matter "of supreme importance to the continuance of the rule of law under the British Constitution, namely the right of the public affected to know what the law is." Law, whether made by legislators or made by judges, should be as comprehensible to members of the public as possible. It should not be set down at prolix length or expressed in tortured phrases or with complex words. It should be based on concepts that are as readily understood as practicable. It should be gathered physically into one place so that people do not have to search within a collection of documents or across a number of them to find its full terms.

To have the concern extended to the physical presentation and accessibility of laws is enheartening.

### Chief Justice supports clearer legal writing

In the opening address to the conference of NSW Supreme Court judges on 30th April, Sir Anthony Mason, the Chief Justice of Australia, urged his colleagues to improve the quality of legal writing, not least in judgments. He remarked:

Unfortunately, judgments do not speak in a language or style that people readily understand. That is why academic lawyers tell me that students are much more interested in reading speeches and papers presented by particular judges than the judgments they write, even though they may cover the same ground. The judgment is so encrusted with discussion of precedent that it tends to be forbidding. The lesson to be learned is that, if we want people to understand what we are doing, we should write in a way that makes it possible for them to do so. That, in some fields at least, is not easy. Better to be right and not understood by the media than to be wrong. Even so, there is scope for improvement.

I am inclined to think that, in some respects, apprehension of courts of appeal mars the performance of some first instance judges. I am sometimes surprised by the prolixity of the directions given to juries in criminal trials. The desire to cover all aspects of the case in vert great detail, presumably to satisfy the Court of Criminal Appeal and the High Court, ay result in a summing-up which tests the absorptive capacity of the average juror. Some people may say that High Court judgments exhibit a similar quality. But I do think that it should be possible to make the task of the jury more simple. At the least we, and I include myself, should identify that as a desirable objective.

### Home-building contracts

A discussion paper on the home-building industry produced by the Trade Practices Commission has recognised that in many parts of Australia people buying a \$20 toaster have more consumer protection than people spending tens of thousands of dollars on building a home.

Among its 30 recommendations, the Commission has proposed that contracts should be in plain English, with technical terms kept to a minimum.

### Life insurance

The Trade Practice Commission has also stepped up its pressure on the life insurance industry. It has called on the industry to reform its practices or face government regulation.

He pinpointed the poor state of policy documentation as one of the areas that the insurers needed to tackle. He recommended that rather than adopting an adversarial approach to consumer groups, insurers consult with them to devise innovative and cost-effective ways of solving problems.

The continuation of supportive remarks like these keeps plain language alive in the minds of the community as well as organisations. They may not lead directly to action in all cases but cumulatively they help to change attitudes. Indirectly they also help private practitioners who are encouraging clients to change. They provide us with additional arguments and inducements to persuade others to make the plunge. More and more of them are seeing that they can benefit. Whether the motive is noble or self-centred, we are getting opportunities to show that plain language works and to consolidate its position. Its status is improving.

### Action as well as words

Happily there is action as well as exhortation. Some notable examples:

- The Family Court of Australia is reviewing all its forms. The impetus is coming both from a concern for members of the public, who face considerable difficulty in completing current forms, and from judges and staff of the court, who find the documents unwieldy.
- Several banks have already taken up plain English mortgages, and one has prepared a plain language guarantee.
- The Judicial Commission of New South Wales is conducting a workshop on *Decision Writing for Registrars of the Supreme Court* in July. The objective is to enable registrars to produce more comprehensible decisions.
- A major finance house has produced a plain language prospectus which has eliminated the small print "additional information" section. One of its chief managers commented that at last he understood the prospectus.

#### Nicholas McFarlane-Watts

We are grateful to Mr McFarlane-Watts' company, Professional Productivity Solutions plc of Oxford, for donating software to replace the CLARITY database. The new application, based on Filemaker Pro but developed by his firm under licence, should, among other improved facilities, enable us to print legible labels for the envelopes in which this issue is distributed.

## Martin Cutts in India

There is a realm where the influence of colonial English is still strong, where *said*s and *aforesaid*s multiply promiscuously among the legal parchments, and where the ability to wield ornate language is a mark of erudition and status.

Recently I spent four weeks in the south of India giving public lectures and two-day plain language workshops. My tour was sponsored by the British Council and hosted by the Federation of Consumer Organisations of Tamil Nadu (Fedcot).

The workshops, for between 12 and 40 people, introduced plain language techniques to government officials, lawyers, academics and business people in Madras, Hyderabad, Bangalore and Madurai. They were probably the first such events in Asia.

Participants used a special workbook to practise the techniques on examples of legal and business writing, some home-grown and some from England. They also saw a film about plain language work in Britain during the last 15 years.

Fedcot's chairman, Mr R Desikan, is determined that plain language in public and legal documents will form part of the developing consumer movement in India. He is strongly supported in this by the mother of the movement, Mrs Jajie Mandana, whose pioneering work helped to create the Consumer Protection Act of 1986. Mrs Mandana attended the Bangalore workshop.

Vocal consumerism is a new phenomenon in India and appeals increasingly to middle class people who are becoming intolerant of obstructive public servants and the

adulteration of basic commodities like rice, sugar and petrol.

India is host to hundreds of languages but English is one of the main bridges between more educated people, being widely used in government, business and the law. Unfortunately the English found in documents often seems antiquated to British and, increasingly, Indian ears. Hence the visit, though I was keen to stress that what is plain language in Derbyshire may not be plain in Delhi or Vancouver, so India needs to find its own version of plain language and its own route to it.

At the lectures, hopefully entitled *The Plain Language Revolution*, questioners were keen to press claims for plain Hindi, plain Tamil and plain Telugu, as well as plain English. For example, many Tamils say that companies doing business in Tamil Nadu should be required to offer their consumer contracts in Tamil, not just in English. And if the base language is clear, translation becomes easier, a point equally relevant to Indian statutes which at present are written in several different tongues.

During my visit resistance to change was most marked among lawyers, but once they had grasped the principles, they were keen to have a go at clarifying their own documents. One lawyer brought along his business equipment lease for scrutiny by the workshop. Clause 10 said:

**The Lessee shall at all times keep and maintain the Equipment in good and substantial repair and working order at its cost. If the equipment shall go out**

**of order, the Lessee shall at its cost have the Equipment repaired by the person, firm or body corporate designated by the Lessor and in the event of the Lessee failing so to do then the Lessor shall be entitled to take possession of the Equipment and have it repaired at the cost of the Lessee and during such possession and repair, the lease charges shall nevertheless accrue and be payable by the Lessee to the Lessor. The Lessee shall forthwith repay to the Lessor the full cost of repairs incurred by the Lessor.**

His team's rewrite was:

**X must keep and maintain the equipment in good repair and working order at its own expense. If the equipment goes out of order, X must get it repaired by the person designated by Y. If X fails to do so, Y can take possession of the equipment and get it repaired at X's expense. During such possession, X must continue to pay the rental.**

Triumphant, the lawyer declared that he would now go away and redraft the other 45 clauses of boilerplate.

One Indian insurance company sells five million life policies a year, all of which start with a 200-word sentence of numbing obscurity. Representatives attending the Madras workshop were sufficiently enthused to set up a committee, including consumer representatives, to rewrite the policy. I left behind examples of British plain language policies to help them on their way.

The tour received good press coverage in the *Times of India*, the *Indian Express* and *The Hindu*, as



well as local TV in Tamil Nadu.

Materials from CLARITY and the Information Design Association were distributed at all events. The Law Society donated several copies of *Clarity for Lawyers*, while Michele Asprey's Australian publisher generously sent Fedcot a copy of her *Plain Language for Lawyers*. Fedcot hopes to set up its own plain language consultancy service to advise business and government, and may offer similar workshops in 1994.

I received marvellous hospitality and support from the British Council and Fedcot. But it's a tough life staging workshops amid the early summer sun as it filters lazily through the bamboo canopy, while one is constantly distracted by the view of a 1000-year-old complex of Hindu temples and by an occasional elephant sauntering down the street with covetous eyes on one's water jug. I'll just have to force myself to return next year and see if I can get used to it. Because it's a big place and there's a lot to be done.

# Letters

**CLARITY's slogan**  
**Dr Herman Schlindwein, Frankfurt**

I am not a native English speaker and therefore probably not competent to comment on CLARITY's proposed slogan. However, I have the feeling that the slogan improving legal language lacks indication of a direction (creation of a more technical/complex language?). The direction would be shown in the slogan

*legal language for all*

## College of Law Stewart Graham

I have just returned from a five-day intensive course at Keele University. It was the start of the College of Law's Distance Learning CPE. On my journey to Keele I was apprehensive about the level and quantity of work; on my journey back, I was relieved.

The quality of teaching was excellent. If I did not understand anything the lecturers would make it clear by explaining in another way. They spoke plainly yet articulately, and never lost patience with my ignorance of the law and constant questions.

The materials for the course are laid out with clarity in mind. Pages, paragraphs, and sentences are easy to find, and the text is written in plain English.

The College of Law lecturers should be commended for their level of expertise, the effort they put into the course to make it interesting, and the relaxed and friendly atmosphere that they created by their attitude.

## Rent review Richard Allen FRICS

I thought you might be interested in the enclosed rent review schedule from a lease of premises which measure 71 sq. ft. (without removing the area of the chimney breast). In essence, if I have understood it correctly, the rent is lifted every year on 21st October in line with the Retail Prices Index.

*The 5-page schedule is too long to reproduce, in full but here is one extract:*

1. The following respective yearly rents (or a proportionate part thereof in the case

of part only of a year) for the following respective periods that is to say:

- (a) In respect of the period of the term hereby created beginning on the date of commencement thereof and ending on the 20th day of October 1990 a yearly rent of ONE THOUSAND EIGHT HUNDRED AND FORTY TWO POUNDS (£1,842.00) (hereinafter called "the basic rent")
- (b) In respect of each of the following periods respectively of the term hereby created (hereinafter individually called "a rental period") that is to say:

- (i) the periods of twelve months commencing on the 21st day of October 1990 and thereafter sent [?] on the 21st day of October in every year of the term hereby granted
- (ii) the period commencing on the 21st day of October 1998 and ending on the expiry of the term hereby created such a sum as shall be equal to the basic rent multiplied by the variable factor (as hereinafter defined) applicable to the rental period in relation to which the calculation is being made

*Para (a) fixes the rent for the first part of the term at £1,842, and b(ii) varies that for the end of the term, but b(i), through a paraphrasing error especially common in leases, allows no rent for the middle eight years.*

## Ecumenical metaphors Harry Eaglesoup

A politician recently interviewed on the radio said that a particular decision had not been "handed down on tablets of stone from Mount Olympus"

I don't know if this was an example of mixed metaphor or of the falling educational standards his government was so anxious to combat, but it reminded me of a friend who was asked why she was imposing a church wedding on her Jewish atheistic fiancé. "Well," she replied. "I'm religious. I believe in the twelve commandments."

# The arguments in favour of using examples in legislation

by David Elliott

This paper formed the appendix to CLARITY's submission to the Hansard Society's Commission on the Legislative Process

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### Commentators on the use of examples

Renton Committee

Francis Bennion

Professor R.W.M. Dias

Report to the English Law

Commission

Judicial comment

## The next step

If examples are part of the way we internally process a text it is only a short step to including examples, in appropriate cases, in legislation.

A text is constantly tested during drafting by applying a series of examples to it. This is of critical importance in technical texts, when a minor change in wording can have a dramatic impact on the effect of the text. Not only does this process aid understanding but it turns dry text into real life situations<sup>1</sup>; examples help understanding by creating ideas that the text is intended to affect; and examples work with and stimulate readers' typical internal processing of what a text means.

## The argument in favour of using examples in legislation

### How we understand what we read

Whenever people read a text they bring to it all their accumulated knowledge. That knowledge is used to help understand the text. Research (and a moment of personal reflection) tells us that one way in which people interpret texts is by thinking through a series of examples to see what impact the text has on the example.

If we have a 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 what the text means.

Even if legislation is clearly written it is often difficult to understand because it deals with complicated subject matter. The use of examples in legislation can help make the text more understandable.

### Who would be helped by examples?

Examples would help:

- *administrators*: Concrete examples would help administrators deal with the

<sup>1</sup> Think of how a series of examples would transform a limitation of actions act into something much more understandable, and meaningful, for most readers.

day to day administration of legislation;

- *the general public*: Examples would help the general public understand their rights and obligations and how the legislation works;
- *legislators*: Legislators would be helped by understanding how the law will apply in practice; the legislator is then better able to make a decision about the legislation, and to explain it to others;
- *the legal profession*: The legal profession would be helped by a speedier and more complete understanding of the intention of the legislature and how the legislation applies to a matter on which legal advice is sought;
- *the judiciary*: Judges would also have a clearer and more complete understanding of legislative intention which, by analogy, they can apply to issues they must decide.

Examples can help the normal thought process of visualizing how legislation applies to particular situations. The reader is better able to create his or her own examples thanks to the initial stimulus created by the examples. This is much like how a child learns - by context and example.

The bottom line is that examples can help readers understand a text more quickly and completely. This is the prime reason that they are used in virtually every kind of technical book.

### Getting ideas across to readers

Examples illustrate ideas. The texts we write have ideas behind them - our ideas about how the text should be interpreted. If those ideas are not, or are inadequately, conveyed to the readers of the text there is a lack of communication. One way of getting our ideas across is to help readers with examples.

Unless we have in mind how legislation is likely to be interpreted we fail in part of the legislative drafting process. As we write, either instinctively or otherwise, we ask ourselves - how will others interpret what we have written?

### Way of using examples

The use of examples, or ideas, embedded in a text can take many forms.

- **a simple illustration like this**

(x) "writing" includes printing, typewriting, or any other intentional reduction of language into legible form, or to a form which can be converted into legible form by a machine or a device, such as language

- (i) on microfilm,
- (ii) in electronic, mechanical or magnetic storage, or
- (iii) in electronic data transmission signals;

(Extract from a Model Land Recording and Registration Act prepared by a joint Land Titles Committee representing all Provinces and Territories except Quebec, July 1990.)

This simple kind of illustration is similar to the typical formulation of regulation making sections in Acts which start with a general statement followed by a list (of examples) of specific regulation making powers.

- **an illustration of how a complicated section works**

This technique has been used to good effect. An outstanding example is the Consumer Credit Act 1974 (UK).

- **an explanation of what a particular section means**

Perhaps the Codes of India are the most outstanding example of this technique.

Legislation outside Canada has used each of these techniques. The Federal Australian *Interpretation Act* even says how examples are to be treated if they are used in legislation, and examples have been welcomed by a wide variety of readers, including academics and the judiciary. The appendix lists some of the past uses of examples and commentators' views on their use.

## Appendix

### *The use of examples in legislation*<sup>2</sup>

#### Australia

##### (a) *Interpretation Act*

The Commonwealth of Australia is sufficiently

<sup>2</sup> In all the extracts the emphasis is mine.

convinced of the usefulness of examples to deal with two issues that arise when examples are used in legislation.

Section 15AD of the Interpretation Act (Australia) says:

*15AD. Where an Act includes an example of the operation of a provision:*

- (a) the example shall not be taken to be exhaustive; and*
- (b) if the example is inconsistent with the provision, the provision prevails.*

**(b) Drafting instructions**

The Australian Commonwealth First Parliamentary Counsel, Ian Turnbull, issued a drafting instruction for his office which included these comments:<sup>3</sup>

- 1. ...After careful consideration I have decided that the use of examples should be one of the "tools" available to drafters to make Bills easier to understand.*
- 2. I do not propose any rules on the cases in which examples should be used or not used - the matter should be at the discretion of the drafters ....*
- 3. Every care should be taken to ensure that an example has the same effect as the text it illustrates. Also, when amending a provision illustrated by an example, it will be necessary to check the example to see whether*

<sup>3</sup> Drafting Instruction N.7 of 1988.

*consequential alterations are required. If there is no time to alter a complicated example it would be open to the drafter to repeal the example.*

*4. ....*

*5. Examples should not be treated as a substitute for clear text. Drafters should still try to carry out our general policy of making provisions as simple and clear as possible, while maintaining our standards of precision.*

**India**

**The Codes of India**

The use of examples was a key element in the development of the Codes for India in the late nineteenth century.

Free from traditional constraints, the authors of the Indian Codes wanted to make the law as intelligible as possible.<sup>4</sup> The authors knew that the laws would often be administered by people with no formal legal training and no access to a library; this knowledge stimulated the authors to help readers understand the text.

In the Indian Evidence Act 1872, drafted by Sir James Stephen, many sections are explained by describing situations which show how the section works. For example:

<sup>4</sup> I am grateful to Mark Duckworth of the Victorian Law Reform Commission, Australia, for bringing this to my attention.

Sir Courtenay Ilbert, a UK parliamentary counsel, was one of the authors of the Codes.

- a:** *5. Evidence may be given in any suit or proceeding of the existence or non-existence of any fact in issue and of such other facts as are hereinafter declared to be relevant, and of others.*

*Explanation - This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.*

**b: Illustrations**

- *A is tried for the murder of B by beating him with a club with the intention of causing his death.*

*At A's trial the following facts are in issue:-*

- A's beating B with a club;*
- A's causing B's death by such beating;*
- A's intention to cause B's death.*

- *A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. The section does enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.*

In the introduction to his *Digest of the Law of Evidence*, Sir James Stephen wrote that:

*I have in nearly every instance, taken cases actually decided by the Courts for the purpose.... [T]hey not only bring into clear light the meaning of abstract generalities, but are, in many cases, themselves the authorities from which rules and principles must be deduced.*

The actual status of the illustrations in the statutory text was considered by the Privy Council in *Mahomed Syedol Ariffin v. Yeoh Ooi Gark* (1916 2AC 575). Lord Shaw stated at page 581:

*... it is the duty of a Court of law to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of the text... [I]t would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to many any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the statute should not thus be impaired.*

Stephen tried to introduce similar legislation in the United Kingdom Parliament, but despite attracting interest, neither the Evidence Bill 1873 nor the draft Code of Criminal Law 1878 were successful. Of the Evidence Bill, Stephen wrote that it "contained a certain number of illustrations and Lord Coleridge's personal opinion was in their favour" [Lord Coleridge as Attorney-General sponsored the Bill].

However, there was concern about whether Parliament would be happy with them. Interestingly, in a report to the English Law Commission on a proposed criminal code, the authors included in a draft Bill a series of explanations of how the code would apply in particular situations.<sup>5</sup>

<sup>5</sup> See page 24, column 3.

**United Kingdom**

**(a) Occupiers Liability Act**

The Occupiers Liability Act 1957 used examples.

Section 2 reads in part:

(2) *The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.*

(3) *The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases -*

(a) *an occupier must be prepared for children to be less careful than adults; and*

(b) *an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.*

(4) *In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example) -*

(a) *where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it*

*was enough to enable the visitor to be reasonably safe; and*

(b) *where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.*

**(b) Consumer Credit Act**

The Consumer Credit Act 1974 made extensive use of examples.

Section 188 reads:

*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.*

Here is how the examples were laid out in Schedule 2:

SCHEDULE 2

Section 188(1)

Examples of Use of New Terminology

PART 1  
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
Consumer credit agreement	8	5,6,7,15,19,21
Consumer hire agreement	15	20,24
Credit	9	16,19,21
...		

PART 2  
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.

**Example 2**

Facts. Representations are made about goods in a poster displayed by a shopkeeper near the goods, the goods being selected by a customer who has read the poster and then sold by the shopkeeper to a finance company introduced by him (with whom he has a business relationship). The goods are disposed of by the finance company to the customer under a regulated hire-purchase agreement.

Analysis. The representations in the poster constitute antecedent negotiations falling within section 56(1)(b), the shopkeeper being the credit-broker and negotiator and the finance company being the creditor. The poster is an advertisement and the shopkeeper is the advertiser.

**Example 3**

Facts. Discussions take place between a shopkeeper and a customer about goods the customer wishes to buy using a credit-card issued by the D Bank under a regulated agreement.

Analysis. The discussions constitute antecedent negotiations falling within section 56(1)(c), the shopkeeper being the supplier and negotiator and the D Bank the creditor. The credit-card is a credit-token as defined in section 14(1), and the regulated agreement under which it was issued is a credit-token agreement as defined in section 14(2).

**(c) Race Relations Act**

The Race Relations Act 1976 also contains examples. Section 20 says:

**Discrimination in provision of goods, facilities or services**

20.-(1) *It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services -*

- (a) *by refusing or deliberately omitting to provide him with any of them; or*
- (b) *by refusing or deliberately omitting to provide him with goods, facilities or services of the like quality, in the like manner and on the like terms as are normal in the first-mentioned person's case in relation to other members of the public or (where the person so seeking belongs to a section of the public) to other members of that section.*

(2) *The following are examples of the facilities and services mentioned in subsection (1) -*

- (a) *access to and use of any place which members of the public are permitted to enter;*
- (b) *accommodation in a hotel, boarding house, or other similar establishment;*
- (c) *facilities by way of banking or insurance or for grants, loans, credit or finance;*
- (d) *facilities for education;*
- (e) *facilities for entertainment, recreation or refreshment;*

- (f) *facilities for transport or travel;*
- (g) *the services of any profession or trade, or any local or other public authority.*

Section 29(2) of the Sex Discrimination Act also contains examples.

**Commentators on the use of examples**

**Renton Committee**

The Committee report on *The Preparation of Legislation*<sup>6</sup> chaired by Sir David Renton said:

*10.6 The demand for elaboration comes not only from the government and the instructing department but also from Parliament itself. First Parliamentary Counsel put the position to us in these words-*

*For good reason, Parliament is rarely ready to accept a simplification if it means potential injustice in any class of case, however small. In particular, this is true of everything in a Bill which intervenes in private life, or in business. Powers of entry, and powers of obtaining information, will be looked at jealously. And much detail will often be needed before the Government is likely to be able to persuade Parliament that in this field no more than essential powers are being taken by the proposed legislation.... In many of the fields in which legislation is frequent, broad propositions may be, or may appear to be, oppressive. Parliament may insist that*

*the rights of the citizen should be spelt out precisely and may well refuse to accept the argument that the way the legislation is to be worked out can be left to the courts.*

*On the other hand we have not failed to notice that individual Parliamentarians are often vehement in their condemnation of detail and elaboration. As we said in paragraph 1.10, they cannot have it both ways.*

*10.7. The draftsman is at present often constrained by this approach to include a good deal of detail, in order to provide expressly for different combinations of circumstances, and so to express himself as to eliminate or reduce to the minimum the need for clarification by the courts and the risk of judicial interpretation in a sense contrary to that intended. Of course, judges endeavour in the interpretation of Acts of Parliament to give effect to the intentions of the legislature as expressed in the Act, but in modern times when the State intervenes to regulate the life of the individual with very great minuteness those intentions will not necessarily be clear unless spelt out in very great detail. At any rate that feeling is undoubtedly held in some quarters, and has influenced the style of much contemporary legislation. In a recent case Lord Simon of Glaisdale, supported by Lord Kilbrandon, repeated a suggestion he had made in evidence to us that -*

*Where the promoter of a Bill, or a Minister supporting it, is asked whether the statute has a specified operation in particular circumstances, and expresses an opinion, it might well be made a constitutional convention that such a contingency should ordinarily be*

<sup>6</sup> Command 6053 (1975).

*made the subject matter of a specific statutory enactment - unless, indeed, it were too obvious to need expression.*

*If, as we recommend (paragraph 19.26) there is to be no change in the rule about the non-admissibility of Parliamentary proceedings for interpretation, such a convention might seem helpful to the courts<sup>7</sup>; but it would at the same time tend to add a further element of undesirable elaboration to the statutes. This effect could perhaps be mitigated, and the number of occasions on which the convention would operate be kept to the minimum, if more use were made of examples showing how a Bill was intended to work in particular situations, and if such examples were ordinarily set out in Schedules as we recommend, for matters of detail generally, in paragraph 10.13.*

#### **Francis Bennion**

Francis Bennion, the Parliamentary Counsel who drafted the Consumer Credit Act 1974, says:<sup>8</sup>

*Where an Act includes examples of its operation, these are to be treated as detailed indications of how Parliament intended the enactment to operate in practice. If however an example contradicts the clear meaning of the enactment the latter is accorded preference, it being assumed in the absence of indication to the contrary that the framer of the example was in error.*

<sup>7</sup> The rule was abolished by a special committee of law lords on 26th October 1992, after this paper was written.

<sup>8</sup> F.A.R. Bennion: *Statutory Interpretation*, Butterworths 1984, 583 - 585.

Bennion concludes his comments on the use of examples in the Consumer Credit Act with this:

*On this Schedule, the Australian Attorney-General, Mr Peter Durack QC, commented: "The advantages of using such techniques in appropriate cases have perhaps been ignored or undervalued, or both." (Symposium on Statutory Interpretation, Canberra 1983, para 5.10.)*

*For an instance of examples in regulations see the University Elections (Single Transferable Vote) Regulations (1918 SR & O 1918 No. 1348, schedule 1).*

*Repugnant example: Where an example contradicts the clear meaning of an enactment the latter is accorded preference, it being assumed that the framer of the example was in error. This does not mean that the "clear" meaning will always be followed however. There are cases when the court will apply a strained construction, and an example may support the reasons for doing so. A repugnant example cannot in itself justify departure from the literal meaning of an operative provision however. (Mahomed Syedal Ariffin v. Yeoh Ooi Gark [1916 2 AC 575, at 581.] See also Consumer Credit Act 1974 s.188(3) [cited p.21 above], which is thought to express the general rule.)*

#### **Professor R.W.M. Dias**

Professor Dias, writing about statutory interpretation in *Jurisprudence* (4th edn, 1985) said:

*... legislators might perhaps give more thought than they do to the remedy in relation to the mischief. In particular, it would be helpful if they provide examples of the sort of thing that is designed to be covered.<sup>9</sup> Arguing by analogy*

*from such examples should have a powerful appeal to judges, who are well versed in this technique of reasoning.*

#### **Report to the English Law Commission**

In 1985 a report was made to the English Law Commission on the Codification of the Criminal Law.<sup>10</sup> The draft code included a series of illustrations. Commenting on these illustrations the report said:

*3.6 The context of the Act: illustrations. Legislation must be stated in general terms. However well this is done, in a matter of complexity - and the Code has to deal with some very complex matters - the purpose and effect of the resulting abstract propositions may, at first sight, be obscure even to the experienced reader of statutes. Every teacher knows that that the quickest and most effective way of illuminating any abstract proposition is by an example. We have therefore provided in Schedule 1 a series of illustrations of the functioning of the clauses of the Code wherever we think it will be helpful to the reader. We believe that the illustrations would be of value to members of Parliament in enabling them to appreciate the effects of the law, to members of the profession in applying the law, to students in*

<sup>9</sup> Lord Denning in *Escoign Properties Ltd v. IRC* (1958 AC 549 at 565 - 566 and 1958 1 All ER 406 at 414). See also *London Transport Executive v. Betts* (1959 AC 213 at 240 and 1958 2 All ER 636 at 651). Examples are incorporated into sections of the *Torts (Interference with Goods) Act 1977*.

<sup>10</sup> LawComNo143.



learning it, and to everyone concerned in understanding it.

Here are a few of the illustrations used in the Report:

*An information alleges that D, a motorist, was exceeding the speed limit in Leicester at 11pm on April 1, 1984. D has been convicted of reckless driving at that time and place after the court heard evidence that he was driving at excessive speed. The allegations in the information do not include all the elements of the offence of which he has been convicted and the trial must proceed unless stayed on the ground that it would be an abuse of the process of the court.*<sup>11</sup>

*D sets fire to a house in which, as he knows, P is asleep. P dies in the fire. There was an obvious risk that this would occur. But a finding either that D intended P's death or that he was aware that it might occur depends on a consideration of all the evidence, including the fact that the result was probable and any evidence given by D as to his state of mind.*<sup>12</sup>

*D and E, the parents of a child, P, do not feed P. If P dies as a result of not being fed, D and E are guilty of murder (s.56). If P survives but sustains serious injury, they are guilty of intentional serious injury (s.74). If the omission is "more than merely preparatory" to the commission of murder, they are also guilty of attempted murder (s.53(1) and (3)).*<sup>13</sup>

The report on the Codification of the Criminal Law says that it was the *Consumer Credit Act 1974* which acted as a "persuasive precedent" for

<sup>11</sup> S.15(1)(d)(ii)

<sup>13</sup> S.20

<sup>12</sup> S.18(a)

the authors of the report.

### Judicial comment

Judges have welcomed the use of examples in legislation. In addition to Lord Shaw's remarks in the *Mahomed Syedol Ariffin* case others have welcomed the use of illustrations.

Lord Denning MR said:

*... one of the best ways, I find, of understanding a statute is to take some specific instances which, by common consent, are intended to be covered by it. This is especially the case with a Finance Act. I cannot understand it by simply reading it through. But when an instance is given, it becomes plain. I can say at once: "Yes, that is the sort of thing Parliament intended to cover."*<sup>14</sup>

Commenting on the use of examples in section 29(2) of the *Sex Discrimination Act* (whose wording is almost identical to that of s.20 of the *Race Relations Act* quoted above), Lord Fraser of Tullybelton said, speaking for the majority in the House of Lords:<sup>15,16</sup>

*It was said that the granting of special vouchers for entry into the United Kingdom was the provision of facilities or services to a section of the public, and that the wide general words of sub-s(1) of s.29 were not cut down by the examples given in sub-s(2), which are only*

*"examples" and not an exhaustive list of the circumstances in which the section applies. Reliance was also placed on para (g) of s. 29(2), which expressly refers to the services of a public authority and which has been held to apply to the Inland Revenue: see Savjani v. IRC (1981 1 All ER 1121 and 1981 QB 458).*

*My Lords, I accept that the examples in s.29(2) are not exhaustive, but they are, in my opinion, useful pointers to aid in the construction of sub-s(1). Section 29 as a whole seems to me to apply to the direct provision of facilities or services, and not to the mere grant of permission to use facilities. That is in accordance with the words of sub-s(1), and it is reinforced by some of the examples in sub-s(2). The example in para (a) is "access to and use of any place" and the words that I have emphasised indicated that the paragraph contemplates actual provision of facilities which the person will use. The example in para (d) refers, in my view, to the actual provision of schools and other facilities for education, but not to the mere grant of an entry certificate or a special voucher to enable a student to enter the United Kingdom in order to study here. The example in para (g) seems to me to be contemplating things such as medical services, or library facilities, which can be directly provided by local or other public authorities.*

**This concludes the serialisation of David Elliott's submission on behalf of CLARITY to the Hansard Society.**

The committee, of behalf of members, would like to thank him for the enormous amount of work he put into it.

<sup>14</sup> *Escoign Properties Ltd v. IRC* (cited on p.24, note 9).

<sup>15</sup> *Amin v. Entry Clearance Officer, Bombay* (1983 2 All ER 864 at 872).

<sup>16</sup> Bennion comments that "These examples were also relied on by Ackner LJ in *Kassam v. Immigration Appeal Tribunal* (1980 2 All ER 330 at 335).

## Book Review

### *On Writing Well*

*an informal guide to writing nonfiction*

by William Zinnser  
(4th ed, 1990)  
HarperCollins, New York  
Paperback 288 + xiii pp  
\$9.95 (in 1990)

I have liked and disliked writing for as long as I can remember. In my youth I spent hours of private study time composing letters to friends and relatives; I took a typewriter on camping holidays and kept file copies of the postcards I sent; I considered a career in journalism. But writing was always a chore; it needed an effort of will to start, and perseverance to finish.

Zinnser's book dispelled the negative aspect, and made me want to write. At one stage, reading it in the small hours to make the best of insomnia, I jumped out of bed with an idea, and wrote an article in an hour and a half of self-satisfied euphoria.

Zinnser is not a legal writer but a columnist. He has written regularly for the *New York Herald Tribune*, *Life*, and the *New Yorker*. In the 1970s he taught non-fiction writing at Yale, and has written twelve other books. But his attitude to legal writing is clear. He quotes President Franklin Roosevelt's 1942 attempt to convert government memos into English. One memo read:

**Such preparations shall be made as will completely obscure all Federal buildings and non-Federal buildings occupied by the Federal government during an air raid for any period of time from visibility by reason of internal or external illumination.**

"Tell them," he said, "that in buildings where they have to keep the work going to put something across the windows."

*On Writing Well* is divided into 24 chapters. You can dip in and out and pick them at random, but the book is sufficiently easy and interesting to read right through.

## CLARITY SEMINARS

on writing

plain legal English

Mark Adler has now given some 30 seminars on behalf of CLARITY to a selection of firms of solicitors, to law societies, and to the legal departments of government departments, local authorities, and other statutory bodies. Five more are booked for the autumn. Participants have ranged from students to senior partners.

The seminar has slowly evolved since we began early in 1991, but it remains a blend of lecture, drafting practice, and discussion. The handout includes an outline of the lecture, the examples used, a self-tuition exercise, and a few documents selected in conjunction with the host organisation for redrafting.

The host organisation can include as many delegates as it wishes from its own ranks, and non-paying guests from outside.

The seminar lasts 3hrs 10mins (excluding a 20-minute break) and carries a 25% uplift under the CPD scheme.

The fee is £500 + expenses + VAT for a half-day, with long-distance travelling an extra.

Contact Mark Adler at the address on the back page.

The chapter on *Simplicity* includes one particularly interesting piece: two pages of the typescript from the first edition, with Zinnser's handwritten improvements. And in the chapter on *A Writer's Decisions* he analyses at length one of his own articles - a travel piece - explaining point by point how it came to be written as it was.

Some chapters deal with general matters of form (for example, *Clutter*, *Style*, *The Audience*); others with certain types of writing (*The Interview*, *Writing about a Place*, *Business Writing*, *Sports*, *Humour*). *On Writing Well* is not a plain English textbook but a collection of general tips for writers of nonfiction (he leaves out the hyphen). CLARITY members should enjoy it and find it useful.

## D.J. Freeman's leasebook

In 1989 CLARITY members Murray Ross and Richard Castle launched the *Rosscastle Letting Conditions*. Their purpose was to provide standard conditions in plain English which, like the Standard Conditions of Sale used in conveyancing contracts, would be incorporated by reference to form the backbone of a short lease. When we reviewed the *Conditions* in *Clarity* 16 [March 1990, p.27] we welcomed them as a substantial step forward, with the reservation that the reforms of language and content did not go far enough. No doubt these limitations were imposed by the commercial view that it was better to have a limited reform accepted than a radical one rejected. In the event, sadly, the *Conditions* do not seem to have been widely adopted.

The Law Society's *Standard Business Leases* followed in 1991 (and were reviewed in *Clarity* 21 [August 1991, p.17]). They went further than *Rosscastle*, both in improving the language and in redressing the bias in favour of landlords. By that time, of course, the market had deteriorated and tenants were beginning to dictate terms. But these leases (one for whole buildings and one for part) do not seem to have caught on either.

Now D.J. Freeman, the City solicitors whose partners Paul Clark and Susan Hall are members of CLARITY, have taken the idea one step further with its *Leasebook*. Like *Rosscastle* and the Law Society *Conditions*, there is a brief "Lease deed" setting out the particulars of the letting with any amendments and referring to a separate standard document - in this case the "leasebook". The novelty is that the leasebook not

only sets out the standard terms but operates as a users' manual. However, unlike the earlier schemes, the

*Leasebook* has been published not as a precedent but as a specimen to show what can be done; and this caveat is reinforced by the omission of essential parts.

Each topic (for example, "rent review", "alterations", "service charge") is dealt with in a short, well-presented chapter. Headings are set off by typesize and colour. Paragraphs are numbered, and sub-paragraphs indented and bullet-marked. Sub-sub-paragraphs appear only twice, and they are double-indented. Sentences are short and adequately punctuated. The language is clear and technical terms are generally explained, but the document is pitched at an intelligent tenant who probably has some experience of commercial lettings. Brief, no-nonsense specimen ancillary forms are included, one for applications for consent to alter, the other to record rent reviews; both are designed to avoid the expensive and generally pointless involvement of solicitors.

The law and the thinking behind certain terms is explained fairly. The specimen book - which may of course be substantially changed by adopting landlords - is so drafted as to stimulate an unconventional feeling of trust in the tenant.

D.J. Freeman say:

It is designed for multi-let buildings such as shopping centres, industrial estates and large offices. In place of the traditional lease, the landlord and its advisers produce a book setting out all the standard lease terms.... They might choose to negotiate the book with two or three major tenants. The book could be printed.

... The idea itself is not new, just its application to the lease. Many building society mortgages are structured this way, as are a number of domestic insurance policies.

Apparently Boots plc, who were involved in the original idea, are about to adopt a leasebook, and some of D.J. Freeman's other clients have versions in the pipeline. I hope they are successful. The scheme should be warmly welcomed by landlords and tenants, and by their solicitors and surveyors.

## Conferences

Legislatures in conjunction with the School of Law of the University of Puget Sound. It is

designed for senior staff with at least four years' experience, and should qualify for Continuing Legal Education credits for those whose states requires them.

According to the brochure:

The conference begins with a hands-on workshop (run by **Professor Jill Ramsfield**) in which participants will learn techniques that they can use to draft more precisely and concisely. Participants will then

**Senior legislative drafting seminar**

**University of Puget Sound, Tacoma (nr Seattle), Washington**

**10th - 12th October 1993**

This seminar is sponsored by the National Conference of State

have an opportunity to meet with **Professor Fredercik Bowers**, one of the leaders of Canada's plain language movement to discuss the Canadian experience with plain language drafting.

On the second day, the focus will shift to the ethics of legislative drafting. In large- and small-group sessions, participants will discuss such questions as *Who is the client?* (**Professors John Strait and John Weaver**) and *How can the drafter balance the demands of competing clients?* and *What happens when special interest groups become involved in the drafting process?* (**Professor David Boerner**). On the final day of the conference, the focus will be on administration. Participants will learn how they can train new attorneys more effectively (**Professors Laurel Oates and Anne Enquist**), and (in small groups) have the opportunity to share information about style manuals, staffing, and other administrative issues. **Professor Robert Aronson** will speak over lunch on the third day on the *Uniform Statutory Construction Act*.

Registration is \$275 for legislative staff and other government employees, and \$375 for others.

Further details from  
Seminars Department  
Nat'l Conference of State Legislatures  
1560 Broadway, Suite 700  
Denver, CO 80202  
Tel: (1) 303 830 2200

**International  
conference on legal  
language**

**Aarhus School of  
Business, Denmark**

**23rd - 27th August 1994**

**Pre-conference clinics  
(23rd-24th)**

There is a choice between two preliminary 2-day clinics, all given by CLARITY members.

*Principles and techniques for drafting legal documents* will be given by **David Elliott** (a parliamentary draftsman in private practice in Alberta) **Bryan Garner** (President of Lawprose Inc and chairman of the Texas State Bar Plain Language Committee), and **Joseph Kimble** (associate professor at Thomas Coolley Law School in Michigan). *Clear business writing: effective, efficient & productive communication* will be given by **Dr Mark Vale** (principal of IME Inc, Ontario).

The conference proper begins on the 24th. The following presentations have been invited:

*Lawyers and linguists working together: enlightening the community and upholding the law* by **Dr Robert Eagleson** (linguist, and consultant to Malleasons Stephen Jaques, Sydney).

*Writing rules: structure and style* by **David Elliott**.

*Straightening out gnarled trees: linguistic aspects of law reform* by **Bryan Garner**.

*Discourse analysis of trials* by **Professor Ludwig Hoffmann** of Mannheim.

*Language preferences of judges and lawyers in the US* by **Joseph Kimble**.

*What is legal language for linguists and what is language for lawyers?* by **Dennis Kurzon** (associate professor at the Hebrew University of Jerusalem).

*Working with clients: re-engineering communication processes in organisations* by **Dr Vale**.

Workshops have been proposed by **Dr Eagleson, Phil Knight** (of the BC government's Plain Language Office), and **Hanne Grøn** of Aarhus. **Mark Adler** of London is to speak about CLARITY's work.

Anyone interested in presenting work should submit an abstract before 15th January of a 30-minute paper or a 3-hour workshop.

For registrations before 1st March the fees are DKr 600 for a pre-conference clinic and DKr 600 for the conference. Both may be booked for DKr 1,000. It is not clear from the information we now have whether later bookings will cost more or whether all bookings must be made by then.

**Further details from**

Anna Trosberg and Jan Engberg  
Aarhus School of Business  
Fuglesangs Alle 4  
8210 Aarhus V, Denmark  
Tel: (45) 6 861 55588 (Fax: 50188)

**Plain English  
Campaign's 2nd  
international  
conference**

**London, May 1993**

CLARITY was not invited to this event, though several of our members were there.

I have heard that the conference fell far below the high standard of its predecessor (reported in *Clarity* 18 [October 1990]). Although it was billed as "international" it has been criticised as too insular, with many of the presentations given by the Campaign's British customers emphasising the work the PEC had done for them. The Campaign has always been good at publicity - a necessary skill for a campaign - but to be successful an academic conference must be more than a public relations exercise.

The Campaign preceded CLARITY in the field and has done excellent work over the last 14 years. I have been delighted to collaborate with it and to count Chrissie Maher as a friend. It is a well-respected organisation. Long may it remain so, but it needs to rethink some recent decisions.

# British lawyers' attitudes to plain English

by Mark Adler

Bron McKillop and I put our heads together in January 1993 while this article and his similar research (reported in Clarity 27) were in progress. I am grateful to him for sharing his ideas with me.

In 1992 I sent four versions of a lease assignment (shown on the following pages) to a selection of lawyers in England and Wales. Versions A and B were written in traditional style, C and D in plain English. A was more traditional than B, and D more radical than C (though C is arguably the better document). Minor deliberate mistakes were planted in the texts.

They were accompanied by a questionnaire designed to show:

- whether respondents thought they supported plain English in principle and used it in practice; and
- how accurate those opinions were.

An adapted form of the questionnaire was also sent to a selection of lay clients and their answers were compared with those of the lawyers.

*Note: The expression "plain English" (sometimes abbreviated to PE) has been preferred to "plain language". It is more familiar to British eyes, and we were speaking only of English.*

## Replies

Table 1 shows that there was a much higher reply rate among the non-lawyers, all of whom knew me. The personal connection may have helped, but none of the six or so solicitors who knew me (and with all of whom I was on good terms) replied. An alternative interpretation (supported by the reactions of the public to CLARITY's campaign) is that lay people are more concerned than lawyers about the unintelligibility of legal language.

CLARITY members were deliberately excluded from the survey on the grounds that they would distort the result. Only about 1 in 200 British lawyers is a member, and it was the attitudes of the others that I was investigating. One member, an experienced plain drafter, particularly asked for a copy of the questionnaire as a matter of interest only, and gave considerably more sophisticated answers than the others. These have not been included in the figures quoted.

Table 1  
The sample

	QCs	Junior barristers	Solicitors	Non-lawyers
Questionnaires sent to	44	62	163	30
Replies from	5	12	38	20
I have excluded from this table the answers of one respondent who overlooked two pages of the questionnaire. It was not clear whether he or she was a silk or a junior barrister.				
Percentage replying	11	19	23	67

Table 2  
Do you support the use of plain English in the law?

	QCs	Junior barristers	Solicitors	Non-lawyers
Yes	4	12	29	20
Maybe	1	1	8	0
No	0	0	1	0
%age answering "yes" amongst those replying	80	92	76	100
%age of "yes" + "maybe" amongst those replying	100	100	97	100

»» continued on page 34

## VERSION A

THIS ASSIGNMENT is made the seventeenth day of April One thousand nine hundred and ninety two BETWEEN TRUCK CHASSIS LIMITED whose registered office is situate at 15 Mole Street East Molesey in the County of Surrey (hereinafter called "the Vendor") of the one part and JOHN BROWN (BODIES) LIMITED whose registered office is situate at 24 King Street Worpleston in the County of Surrey (hereinafter called "the Purchaser") of the other part

### WHEREAS

1. By a Lease (hereinafter called "the Lease") dated the twenty third day of May One thousand nine hundred and ninety and made between ARTHUR BRIAN CHARLES of the one part and the Vendor of the other part ALL THAT Lock-up shop situate and known as 10 Moorgate London EC2 was demised to the Vendor for a term of twenty five years (less the last 10 days thereof) from the twenty fifth day of December One thousand nine hundred and eighty nine
2. The Vendor has agreed with the Purchaser for the sale to it of the premises comprised in and demised by the said Lease for a consideration of fifty thousand pounds (£50,000)

NOW THIS DEED WITNESSETH as follows:-

1. IN Pursuance of the said Agreement and in consideration of the sum of fifty thousand pounds now paid by the Purchaser to the Vendor (the receipt whereof the Vendor hereby acknowledges) the Vendor as Beneficial Owner hereby assigns unto the Purchaser ALL THAT the premises comprised in and demised by the Lease TO HOLD the same unto the Purchaser for all the residue now unexpired of the term thereby created and subject henceforth to the payment of the rent thereby reserved and to the observance and performance of the covenants on the part of the Lessee and the conditions therein contained

IN WITNESS WHEREOF the Vendor has caused its Common Seal to be hereunto affixed the day and year first hereinbefore written

THE COMMON SEAL of TRUCK CHASSIS LIMITED  
was hereunto affixed in the presence of:-

Director

Secretary

VERSION B

**ASSIGNMENT**

Date 17th April 1992

Vendor Truck Chassis Limited whose registered office is at 15 Mole Street East Molesey Surrey

Purchaser John Brown (Bodies) Limited whose registered office is at 24 King Street Worplesdon Surrey

**BACKGROUND**

1. By a Lease ("the Lease") dated 23rd May 1990 and made between ARTHUR BRIAN CHARLES (1) and the Vendor (2) the lock-up shop known as 10 Moorgate London EC2 was demised to the Vendor for a term of twenty five years (less 10 days) from 25th December 1989
2. The Vendor has agreed with the Purchaser for the sale to it of the premises demised by the Lease for a consideration of fifty thousand pounds

**ASSIGNMENT**

1. In consideration of the sum of fifty thousand pounds (£50,000) now paid by the Purchaser to the Vendor (the receipt whereof the Vendor hereby acknowledges) the Vendor as beneficial owner hereby assigns unto the Purchaser ALL THAT the premises comprised in and demised by the Lease for the residue of the term subject to the payment of the rent thereby reserved and to the observance and performance of the covenants and conditions therein contained

IN WITNESS whereof the common seal of the Vendor has been affixed the day and year first above mentioned

THE COMMON SEAL of TRUCK CHASSIS LIMITED  
was fixed in the presence of:-

Director

Secretary

VERSION C

**Assignment of lease**

DATE 17th April 1992

THE PARTIES

(1) **The Seller:** TRUCK CHASSIS LIMITED  
whose registered office is at  
15 Mole Street, East Molesey, Surrey.

(2) **The Buyer:** John Brown (Bodies) Limited whose registered office  
is at 24 King Street, Worplesdon, Surrey.

DEFINITIONS

**"the Property"** means the lock-up shop known as 10 Moorgate, London EC2.

**"the Lease"** means a lease of the Property dated 23rd May 1990 and made between  
Arther Brian Charles and the Seller for a term of 25 years (less 10  
days) from 25th December 1989.

**"the Premium"** means £50,000.00.

ASSIGNMENT

In exchange for the premium (receipt of which the Seller acknowledges) the Seller as beneficial  
owner assigns the Lease to the Buyer.

Signed as a deed on behalf of  
TRUCK CHASSIS LIMITED by:

\_\_\_\_\_  
Director

\_\_\_\_\_  
Diretor or company secretary



VERSION D

**Assignment of lease****Particulars**

Date	17th April 1992
Seller	Truck Chassis Limited of 15 Mole Street, East Molesey, Surrey
Buyer	John Brown (Bodies) Limited of 24 King Street, Worplesdon, Surrey
Shop	10 Moorgate, London EC2
Lease	That made 23rd May 1990 between Arthur Brian Charles and the Vendor, by which the Shop was let for 25 years (less 10 days) from 25th December 1989
Premium	£50,000.00

**Assignment**

In exchange for the premium (which the seller has received) the seller as beneficial owner passes its interest in the lease to the buyer.

Signed as a deed on behalf of  
TRUCK CHASSIS LIMITED by:

---

Director

---

Director or company secretary

»» continued from page 29

**Attitudes to plain English - in principle**

Table 2 shows a high claimed level of support for plain English among the lawyers, incompatible with the details of the answers as well as with experience. The results shown on this and the following pages suggest that this is because lawyers do not know what plain English is. Further research might investigate this apparent misapprehension.

Table 3 shows an extraordinary optimism by the profession, with no great difference between the branches; almost all think either that they use plain English or that "maybe" they do.

Our criteria for qualifying as one who knows the basic rules of plain English (in table 4) were:

- To prefer each of versions C and D to each of A and B.
- To disapprove of long sentences, long paragraphs and passive verbs in documents formal and informal, and to approve of punctuation.

Only ten passed the test.

We counted as "almost" those who failed the test on only one of the second group of criteria. This accounted for another six; five who accepted passive

verbs and one who allowed long sentences.

Table 4 gives a truer picture, and here a difference I was not expecting emerged between the branches. Barristers seem more aware than solicitors, 87% of whom showed as traditional drafters, with only 5% possibly plain.<sup>1</sup> Judging from my experience in

Table 3  
**Do you use plain English?**

	QCs	Junior barristers	Solicitors	Total
<b>Numbers</b>				
Yes	2	7	18	<b>27</b>
Maybe	2	5	17	<b>24</b>
No	1	0	3	<b>4</b>
<b>Percentages of those replying</b>				
Yes	40	58	47	<b>49</b>
Maybe	40	42	45	<b>44</b>
Yes + maybe	80	100	92	<b>93</b>
No	20	0	8	<b>7</b>

Table 4  
**Did respondents know the basic rules of plain English?**

	QCs	Junior barristers	Solicitors	Total	Non-lawyers
<b>Numbers</b>					
Yes	2	5	2	<b>10*</b>	3
Almost	0	3	3	<b>6</b>	7
No	3	5	33	<b>40</b>	10
<b>Percentages of those replying</b>					
Yes	40	38	5	<b>16</b>	15
Almost	0	23	8	<b>11</b>	35
No	60	38	87	<b>71</b>	50

\* The uncategorised barrister mentioned in the note to table 1 qualified.

<sup>1</sup> The sample of QCs is probably too small to show a trend. When the interim results were announced in Vancouver last year, only three silks had replied, two of whom qualified as plain. With the other table 4 figures this suggested that plain drafting would be found in direct proportion to seniority in the profession. But two later replies changed the picture.

general practice, even these results are over-optimistic. It may be that plain English sympathisers tended to respond to the questionnaire in higher numbers than the profession as a whole. But I suspect that the real reason is that more lawyers can pick out the "right" answers to questions about style than are able to apply the rules, particularly when they need to apply them whilst working under pressure. Had I anticipated this result I would have asked for specimens of the respondents' own drafting to provide a more reliable indication of their ability to write plainly.

Table 5 is a slight variation on Table 4, examining the accuracy of the respondents' self-assessments. The silks did noticeably better than the others: the two who claimed to be plain were; one who did not claim to be plain was also right; but neither of the "maybe"s passed the test, or even qualified as "almost"s.

**Attitudes to plain English - in practice**

It is clear from tables 6 to 9 that many lawyers expressing support for plain English do not in truth support it.

There is an encouraging lack of support for version A of the specimen document. But only 59% of those expressing a preference would rather send out version C or D than A or B. A few more would prefer to receive them, suggesting an element of timidity (which is borne out by table 12). More still would prefer to explain the plainer versions to a client.<sup>2</sup>

<sup>2</sup> Predictably, all lay respondents preferred versions C and D, with one exception. (The client who preferred version A did not understand it, and thought that the other versions were entirely different documents.)

Table 5  
**How many of those who said they used plain English know how to?**

Yes, according to them							
	QCs		Junior barristers		Solicitors		Total
Yes, according to us	2	100%	3	43%	2	11%	7
Almost " " "	0	0%	3	43%	2	11%	6
No " " "	0	0%	1	14%	15	79%	16
<b>Total</b>	<b>2</b>		<b>7</b>		<b>19</b>		

  

Maybe, according to them							
	QCs		Junior barristers		Solicitors		Total
Yes, according to us	0	0%	2	40%	0	0%	2
Almost " " "	0	0%	1	20%	1	6%	2
No " " "	2	100%	2	40%	15	94%	19
<b>Total</b>	<b>2</b>		<b>5</b>		<b>16</b>		

Table 6  
**Which of the four versions would you prefer?**

	Lawyers						Lay
	To send		To receive		To explain		
A	6	11%	5	9%	3	6%	1
B	16	30%	15	28%	11	21%	0
C	18	33%	18	33%	22	42%	9*
D	14	26%	16	30%	17	32%	13*
A/B combined	22	41%	20	37%	14	26%	1
C/D combined	32	59%	34	63%	39	74%	19

\* These figures include 2 respondents who gave "C/D" as their preference

Experience suggests that you would be lucky to get one plain document from all the 54 lawyers who answered this question. Why the discrepancy?

Perhaps some were saying that they would rather send

out plain documents if they could, but as they cannot, and there is a dearth of precedents, they stick to the old formulas. But only three respondents said they preferred to receive a plain version but send a traditional one. Let us look at their answers in detail.

#### Respondent 15

R15 did not give a name, but is a sole practitioner in outer London.

He or she preferred to receive D because "it is simpler and clearer" but to send A "because it is expected and the meanings of words and phrases are well established". D was better to explain to inexperienced clients, "who could read and understand it better".

R15 gave as the disadvantages of plain English generally (regardless of the merits of these particular documents) that the legal effect was less predictable, that it was probably disliked by judges, and was more likely to be perversely interpreted by a judge. Plain English, on the other hand, was easier and quicker to write and to read (both for lawyers and lay people), tended to permit fewer mistakes, was preferred by most clients, reduced costs, and was "generally more efficient". But R15 said: "I am reluctant to use plain English in legal documents for fear that the meaning could be misunderstood. It is safer to use phrases which are well defined. It would take many years for alternative phrases to be legally defined by judges and in the meantime there would be uncertainty. I cannot see any solution to (this) problem."

R15 was not interested in plain English training, nor in receiving further information about CLARITY, although the questionnaire had been "interesting". No return address was given. It is a pity that we cannot point out to someone who would prefer to write plainly were it not for certain perceived drawbacks that his or her reluctance is based on false assumptions. This shows the importance of publicising our work.

Surprisingly, R15 answered *maybe* to "Are you a PE user?"

#### Respondent 37

R37 identified herself as a solicitor in a medium-sized firm (one of between 6 and 15 solicitors), again in outer London. She had been qualified long enough not to need continuing education points.

She would prefer to receive version D because it was "clearer", but to send B to another solicitor because "that's what they're used to". She would prefer to explain D to a client.

Like R15, she thought that the legal effect of plain English was less predictable, that it was probably disliked by judges, and was more likely to be perversely interpreted by a judge. But she saw other disadvantages: it was harder and slower to write, and there was more chance of making a mistake in composition. Yet she agreed that PE was easier and quicker to read, for lawyers as for lay people, and that there was more chance of picking up mistakes in the reading that had been made in the

writing. On balance, she thought it was generally more efficient, and she considered herself a plain English user.

She was willing to spend up to £100 on a series of six evening seminars on plain legal drafting.

She did not say whether she wanted more information about CLARITY or our seminars, nor what she thought of the questionnaire.

#### Respondent 46

R46 was a solicitor in a small firm (2-5 solicitors) in a town in the north-east.

He preferred D to receive because it was "clear and concise. Only need to read it once". He preferred B to send because it was "typical of precedents that we use. (I am) more comfortable with it." D was preferred to explain to the inexperienced client because of its "simple language". He said: "I am at heart a 'Low Church' lawyer. The less the mumbo-jumbo, the more the commitment to the purpose. Whereas by tradition I am a fairly 'High Church' lawyer and feel that unless there is a fair amount of ritual the true and accurate message will not be transmitted."

He thought that PE was easier and quicker for everyone both to write and to read, that it gave a better opportunity to notice mistakes whilst reading, was easier to take instructions, was preferred by most clients and probably by judges, was less likely to be perversely construed by a judge, saved money, and was generally more efficient. But there was more chance of making a mistake when writing.

He supported the use of plain English by lawyers, but would like to see more precedents.

He was willing to spend up to £60 on a correspondence course, but did not want more information about CLARITY, though he had found the questionnaire "interesting".

#### All three respondents

Table 7 shows their answers to question 4, which (subject to an irrelevant simplification of coding) read:

*We have listed below several points of style. Please use the letter code to show the class of documents in which you think each is acceptable.*

*A: Acceptable in **any** document.*

*I: Acceptable only in **informal** documents (eg letters).*

*F: Acceptable only in **formal** documents (eg leases).*

*N: **Never** acceptable.*

Table 8 shows the answers of all lawyer respondents to that question, and table 9 separates out the answers of those who are neither plain nor "almost". Some interesting patterns emerge.

The cosmetic rules (not splitting infinitives and not ending a sentence with a preposition) are widely consid-

Table 7

**The application of various drafting rules (those preferring to receive plainer version than to send)**

	1 Paragraphs > 300 wds	2 Sentences 40-100 wds	3 Sentences > 100 wds	4 Passive verbs when active would do	5 Split infin- itives	6 Foreign words	7 Sentences ending in preposition	8 Punctuation
R15	F	F	N	F	N	A	I	A
R37	N	F	N	F	N	I*	N	A
R46	N	F	N	N	N	I	I	A

\* "or for precision".

Table 8

**The application of various drafting rules (all lawyer respondents)**

	1 Sentences > 100 wds	2 Paragraphs > 300 wds	3 Split infinitives	4 Sentences ending in a preposition	5 Sentences 40-100 words	6 Passive verbs when active wd do	7 Foreign words	8 Punctuation
<b>Acceptable</b>								
A	2	4	4	3	5	9	18	47
I	1	3	15	18	3	10	12	5
F	7	12	1	2	25	17	12	0
N	45	36	35	32	22	16	12	1
No reply	1	1	1	1	1	4	2	3
<b>%age of those replying who disapprove for all documents</b>	<b>82</b>	<b>65</b>	<b>64</b>	<b>58</b>	<b>40</b>	<b>29</b>	<b>32</b>	

Table 9

**The application of various drafting rules (possible PE users and "almost"s excluded)**

	1 Sentences > 100 wds	2 Paragraphs > 300 wds	3 Split infinitives	4 Sentences ending in a preposition	5 Sentences 40-100	6 Passive vbs when active would do	7 Foreign words	8 Punctuation
<b>Acceptable</b>								
A	2	4	2	1	5	5	12	32
I	1	3	11	13	3	9	10	5
F	7	11	1	2	24	16	10	0
N	29	21	25	23	7	6	6	1
No reply	1	1	1	1	1	4	12	2
<b>%age of those replying who disapprove for all documents</b>	<b>74</b>	<b>54</b>	<b>64</b>	<b>59</b>	<b>18</b>	<b>17</b>	<b>16</b>	

Table 10  
**The application of various drafting rules (lay respondents)**

	1	2	3	4	5	6	7	8
	Sentences > 100 wds	Paragraphs > 300 wds	Split infinitives	Sentences ending in a preposition	Sentences 40-100	Passive vbs when active would do	Foreign words	Punctuation
<b>Acceptable</b>								
A	1	1	4	1	2	3	3	16
I	3	3	2	3	4	3	3	2
F	1	1	1	2	4	3	2	0
N	14	14	9	9	9	7	11	0
No reply	1	1	4	5	1	4	1	2
<b>%age of those replying who disapprove for all documents</b>	<b>74</b>	<b>74</b>	<b>56</b>	<b>60</b>	<b>47</b>	<b>44</b>	<b>58</b>	

ered more important than the rules which aid understanding. Predictably, that finding is more marked if we exclude plain writers from the figures. Table 9 shows that a far higher proportion of the "excluded" group think it worse to split an infinitive (64%) or to end a sentence with a preposition (59%) than to use sentences of up to 100 words (18%), a passive verb when an active one will do (17%) or foreign words (16%). These two pseudo-faults are condemned by more table 9 respondents than any of the genuine faults except for sentences exceeding 100 words.

Yet Gowers says of the split infinitive:

**Since "to" is not an essential part of the infinitive, broadminded grammarians see no grammatical reason for the rule.**

**It is also a bad rule, which many people (including good writers) reject. It increases the difficulty of writing clearly and makes for ambiguity by inducing writers to place adverbs in unnatural and even misleading positions.<sup>3</sup>**

Eric Partridge gives as an example of an infinitive which should be split:

<sup>3</sup> *The Complete Plain Words* (3rd edition), Penguin Books, 1986, p.143.

<sup>4</sup> *Usage and Abusage*, Penguin Books, 1973, p.296.

<sup>5</sup> As note 1, p.106.

**Our object is to further cement trade relations.<sup>4</sup>**

On the preposition point, Gowers says:

**Do not hesitate to end a sentence with a preposition if your ear tells you that that is where the preposition goes best. There used to be a rather half-hearted grammarians' rule against doing this, but no good writer ever heeded it, except Dryden, who seems to have invented it.<sup>5</sup>**

Perhaps the most surprising result of the survey was the 87% majority of lawyers in favour of punctuation in all documents. I hardly ever receive a punctuated draft in the course of my practice. And there was little comment on the subject. Number 19 opposed punctuation on the ground that few people can do it accurately, but no-one else gave a reason for omitting it.

Substantially higher proportions of the lay respondents objected to sentences over 40 words, long paragraphs, unnecessary passive verbs, and the use of foreign words. All favoured punctuation in all documents, and three added that it was essential.

The perceived advantages and disadvantages of plain English are set out in tables 11 and 12. They show, as the main obstacles we must overcome, fear of error, of uncertainty, and of the hostility of judges. [See footnote<sup>6</sup> on the next page.]

Table 11

**Perceived advantages of PE (by lawyers)**

Does it have this quality?	Yes	No	No reply	Yes as %age of yes + no	Yes as %age of all respondents
Easier for lay person to read	49	1	6	98	88
Quicker for lay person to read	47	0	9	100	84
Preferred by most clients	39	1	16	98	70
Easier for lawyer to read	38	1	17	97	68
More chance of seeing error reading	36	3	17	92	64
Generally more efficient	35	6	15	85	63
Quicker to write	32	9	15	78	57
Easier to take instructions	31	3	22	91	55
Cheaper	29	2	25	94	52
Easier to write	29	9	18	76	52
Less chance of error writing	21	12	23	64	38
Less likely to be interpreted perversely by judge	19	13	24	59	34
Probably preferred by judges	17	14	25	55	30
Legal effect more predictable	15	20	21	43	27

The third of those fears should be the easiest to overcome, with the goodwill of the bench. Professor Kimble's research in America, as reported in previous issues, has shown that some 85% of judges prefer plain English, and - more importantly - find it more persuasive than traditional language. Unfortunately, we have not yet been able to repeat his research in England.

It may be difficult to overcome the fear of error but it is not impossible. Plainly drafted precedent books should be a considerable help; these have been appearing, and more are on the way. Training is the other clearly necessary step, but according to table 13 not many respondents were interested in it. Perhaps there will be more demand for it when the current financial hardship has eased: we cannot expect many lawyers to give PE training high priority in the present climate.

<sup>5</sup> Where doubts are expressed it seems reasonable to treat the "don't knows" - of whom there were many - as tentative "no"s; thus the last column of table 10. [I would treat the results in these two tables with caution in the light of the conclusion that different respondents understood different things by the expression "plain English". Further research might investigate these differing views.

<sup>6</sup> This myth has been roundly debunked by Professor David Mellinkoff in *The Language of the Law*, Little Brown & Co, 1963 (reviewed in *Clarity* 20 [April 1991], page 13).

Table 12

**Perceived disadvantages of PE**

Reason	Number so answering
Fear of error, ambiguity, or unpredictable effect	24
Belief that judges disapprove	14
Harder or slower to write (at least at first)	14
Dislike style; insufficient gravitas	8
Harder or slower to read	7
Unfamiliar, loss of tradition	6
Harder to take instructions	4
Contrary to expectation of other lawyers	3
Generally less efficient	3
More expensive	2
Legalese justifies fees	2
Restrained by employers	1
Disliked by clients	1

The fear of uncertainty of interpretation straddles the fear of judges' perversity and the fear of error. It feeds on the false belief that traditional legalese has been honed to precision<sup>6</sup>. And those who admit the fear seem to be expressing the extraordinary proposition that if they write more clearly they are more likely to be misunderstood.

Deliberate mistakes were noticed by only four respondents, but they only noticed the error in version D; the mistakes in the other versions all passed unnoticed. This supports the view I have formed from my practice

Table 13

**Which non PE users would undertake plain language training?**

	Type of training				Approximate £ willing to spend			% willing
	1/2-day	1-day	6-evenings	correspondence	0-50	51-100	more	
"Almost"s (out of 6)	1	0	0	0	0	1	0	17
Utter non-PE users (out of 40)	4	2	3	2	1	5	5	28

that many of us do not read documents carefully enough (or at all, sometimes). It is ironic that one of these respondents, no. 35, answered every part of section 6 (see table 12) in favour of plain English except the question *Is there more or less chance of seeing an error when reading (plain English)?*, which he left blank.

Only three people suggested changes as preconditions of plain English. These were:

Another Interpretation Act	1
A lead by parliament	1
A book of precedents	1

Two others specified:

Gradual change	1
General acceptance	1

There was a certain amount of inconsistency in the replies:

- One sensitive soul said "Why is it that we have to cater to the Lower Common denominator? If people can't understand a straightforward document like an assignment, perhaps we should look

to our schools and the teaching of english, not turn the law upside just to accommodate them." Yet, as can be seen from this extract, his own comments were full of mistakes.

- Two respondents said that sentences over 40 words were not acceptable, even in formal documents, yet they preferred version B with its 74-word sentence.
- Two respondents thought that plain English is generally less efficient, but claimed to favour its use.

The clients were asked a slightly altered version of the table 12 questions. The replies, set out in table 14, show that the public has much greater confidence in plain English than do lawyers.

**What did you think of the questionnaire?**

At the end of the questionnaire I asked whether completing it had been interesting, a chore, a matter of indifference, or "other (please specify)". This was

Table 14

**Perceived advantages of PE (by lay respondents)**

Does it have this quality?	Yes	No	No reply	Yes as %age of yes + no	Yes as %age of all respondents
Easier to write	18	1	1	95	90
Easier to read	19	0	1	100	95
Less chance of error writing	16	2	2	89	80
More chance of seeing error reading	18	0	2	100	90
Easier to communicate with your lawyer	20	0	0	100	100
Reduces costs	14	0	6	100	70
Generally more efficient	18	0	2	100	90



partly out of curiosity and partly a courtesy to those who had taken the trouble to reply.

The replies are shown in table 15, and were gratifying. An unexpectedly high proportion said they found it interesting, especially amongst the traditional drafters. Of course, this could have been politeness.

### Conclusion

The questionnaire could have been improved. If I were doing this again I would tighten the questions to avoid some replies which were difficult to categorise, and would ask for formal and informal samples of the respondents' drafting.

The survey was not conducted as rigorously as I would like, and the results must be treated cautiously. However, it does give some idea of the attitudes in the profession to CLARITY's work, and it points the way to further research. If any member would like to take this further, I will pass on the full text of my questionnaire - too long to reproduce here - and the collated replies.

	"Yes"s	"Almost"s	"No"s	%age of those replying
Interesting	3 50%	4 67%	24 75%	70
Indifference	0 0%	2 33%	1 3%	7
Chore	1 17%	0 0%	6 19%	16
Interesting chore	2 33%	0 0%	1 3%	7
No reply	3 -	0 -	9 -	-

## Competition

In *Clarity 27* readers were asked to list the faults in the text opposite, taken from the lease of a flat in a Surrey block.

Dr Robert Eagleson wins the prize for the list below, and has chosen Bryan Garner's *Dictionary of Modern Legal Usage*. Numbers refer to the footnote numbers in the text. Tedious repetition of errors has been avoided.

1. **hereby** is unnecessary.
2. **covenant** in this context is archaic.
3. **with the lessor** is unnecessary. Who else would the covenant be with?
4. The structure **covenant with and for the benefit of** is ungrammat-

2. The Tenant hereby<sup>1</sup> covenants<sup>2</sup> with the Lessor<sup>3</sup> and with and for the benefit of<sup>4</sup> the owners and lessees from time to time<sup>5</sup> during the currency<sup>6</sup> of<sup>7</sup> the term hereby<sup>1</sup> granted<sup>8,9</sup> of the other flats<sup>10</sup> comprised in<sup>11</sup> the Building<sup>12</sup> that the Tenant and the persons deriving title under him<sup>13</sup> will at all times<sup>14</sup> hereafter<sup>15</sup> observe<sup>16</sup> the restrictions<sup>17</sup> set forth<sup>18</sup> in the First Schedule hereto<sup>19</sup>

3. The Tenant hereby covenants with the Lessor<sup>20</sup> as follows<sup>21</sup>:-  
22,23

(1) ...

4. The Tenant hereby covenants with the Lessor and with and for the benefit of the owners and lessees from time to time during the currency of the term hereby granted of the other flats comprised in the Building that the Tenant will at all times hereafter during the said<sup>24</sup> term<sup>25,26</sup> so repair<sup>27</sup> maintain<sup>27</sup> uphold and keep<sup>28</sup> the Flat as to<sup>29</sup> afford<sup>30</sup> all necessary support<sup>31</sup> shelter and protection<sup>32</sup> to the parts of the Building other than the Flat<sup>33</sup> and to afford<sup>34</sup> to the lessees<sup>35</sup> of the neighbouring<sup>36</sup> or adjoining flats or premises<sup>37</sup> access for the purposes and conditions<sup>38,39</sup> set out<sup>40</sup> in Clause 3(9) hereof<sup>41</sup>

matical. It should read *covenant with the owners for their benefit* or, better still, *covenant with X to do Y for their benefit*.

5. **from time to time** is unnecessary. They are either owners or lessees or not.

6. **currency** is erroneous. A lease

- may have currency, not a term.
7. **currency of** is verbiage.
  8. **term ... granted.** As in note 6, a lease may be granted, not a term.
  9. **during the currency of the term hereby granted.** The whole phrase is unnecessary. The tenant's obligations end with the lease.
  10. **comprised in** is a misuse. Is it meant to be *comprising*?
  11. The separation of **of other flats from owners and lessees** is awkward. The sentence needs restructuring if all the items are to be included.
  12. **comprised in the Building** is unnecessary. Where else could the other flats be?
  13. The use of **the persons deriving title under him** is inconsistent. Why does this qualification occur only here and not in clauses 3 and 4?
  14. **at all times** is verbiage because *covenants* is the universal present.
  15. **hereafter** is unnecessary, not only because of point 14 but also because the tenant could hardly be bound for periods before the lease begins. [*Does hereafter release the tenant from breaches committed between the beginning of the term and the date of the lease, when the latter is later? -ed.*]
  16. **observe:** lucky tenant - he or she only has to watch the restrictions!
  17. **restrictions** is semantically incongruous with **observe** in the sense of *comply with*. Better *conditions* or *requirements*.
  18. **set forth** is unnecessary.
  19. **hereto** is unnecessary.
  20. **The tenant ... as follows** is repeated.
  21. **as follows** is unnecessary. The conditions obviously follow.
  22. **:-** is equivalent to *as follows*. So a double tautology here.
  23. The dash after the colon is triply unnecessary.
  24. **said** is covered by *the*.
  25. **during the said term** is unnecessary for the same reason as the wording criticised at note 9.
  26. The wording is inconsistent with the wording at note 9.
  27. The comma is missing.
  28. **repair maintain uphold and keep** is tautologous.
  29. **as to:** *to* is sufficient.
  30. **afford** is quaint.
  31. **afford ... support** is a nominalisation. Replace with *support alone*.
  32. **shelter and protection** is tautologous.
  33. **as to afford ... other than the flat** is unnecessary. If the tenant has to keep the flat in good condition then other flats could not be adversely affected.
  34. **and to afford** is grammatically wrong. The second *afford* is governed by *will*, not *so ... as to*. The current wording suggests that the repair is to give access.
  35. **lessees:** what of the owners, as before?
  36. **neighbouring** is ambiguous. Could these flats be in the building nextdoor?
  37. **premises** definitely suggests other buildings. Only flats have been mentioned up to this point.
  38. **purposes and conditions** is tautologous.
  39. **conditions** is semantically incongruous. You cannot give *access for conditions*.
  40. **set out** is inconsistent with *set forth* in clause 1, but just as unnecessary.
  41. **hereof** is unnecessary.

### Editor's apology for late arrival

The knock-on effect of the delay in finishing the March and June issues until April and August respectively dictate that the next issue be held back from September. We plan to distribute it just before Christmas, but the pressures of practice, the commercial printer's other commitments, and the seasonal post all make the time of arrival difficult to predict.

The editor apologises for reducing the number of issues in 1993 from four to three, but hopes the size of each will compensate. We intend to return to quarterly publication in the new year.

**Press date for the next issue: November 20th**

Contributions would be welcomed,

especially if accompanied by a copy on a Macintosh-readable disc using Ready Set Go, Microsoft Word, Teachtext, or MacWrite 1, in that order of preference.

## News about members

We were sad to hear that on June 30th **Barbara Child** left the profession at the end of an eight year stint as Director of Legal Drafting at the University of Florida. She began her career teaching English at Kent State, having graduated with a BA in English in 1960 and an MA in Creative Writing three years later, both from Indiana University, the home of the late Reed Dickerson. In 1977 she took her JD from Akron School of Law and was called to the Ohio Bar. In 1978 she was admitted to the US District Court for the Northern District of Ohio, and practised in the Portage County Legal Aid Office until 1981. There followed three years as adjunct professor and Director of Writing and Research at Golden Gate University, and a year as Special Projects Law Editor for Commerce Clearing House, before she moved to Florida in 1985. The second edition of her main work, *Drafting Legal Documents: Principles and Practices*, was reviewed in *Clarity* 26 (December 1992), and her article, *What does "plain meaning" mean these days?* appeared in the same issue. She now makes a second major career change, studying for the ministry at Thomas Starr King School in Berkeley California. She writes:

You are very kind to want to put in a word about my - well, no, not "passing", surely. Jumping off a cliff is what it is, or swinging out from the trapeze perch and hoping, trusting, that the person on the perch across the way will swing out the other trapeze at just the right moment. Right now I am in that empty space where I have let go and haven't yet a grasp....

Please do give my greetings to all my friends who receive *Clarity*....

We wish Barbara the very best of

luck but she will be greatly missed.

Those of CLARITY's British members who know her also say a reluctant goodbye to **Patricia Hassett**, who is going home to New York in August. She came to England in 1989 for a two-year stint at the London outpost of the University of Syracuse, where she is on the law faculty, and then took a sabbatical to stay on for two years with The Lord Chancellor's Advisory Committee on Legal Education and Conduct. She came to the CLARITY supper as guest speaker in 1990, and the same evening joined the group and was elected to the committee. She has not missed a meeting since, and her contributions of ideas, common sense, effort, and good humour cannot be replaced. She is now returning to her professorship in Syracuse, but is staying on as a corresponding member of the committee to build up CLARITY's membership in the States. Happily, she plans to summer in England in the coming years so that she can complete her pupillage, following her call to the English bar last November. Meanwhile, she will make a series of brief visits to England in the autumn to work on her bail project, more details of which will appear later.

**Judith Bennett** of Sydney, **Philip Knight** of Vancouver, and **Joseph Kimble** of Michigan were in England in May for the Plain English Campaign's conference. Joe Kimble is now on a four-month sabbatical at the Centre for Plain Legal Language in Sydney.

**Dr Robert Eagleson** will be passing through England in August.

**Michael Gunn**, formerly senior lecturer in law at the University of Nottingham, is now professor and head of the law school at the University of Westminster.

The vacancy left by **Trevor Aldridge's** retirement from the Law Commission at the end of this year is to be filled by another CLARITY member. **Charles Harpum**, a

Chancery barrister with a particular interest in legal history, joins the commission from Downham College, Cambridge on 1st January.

**John Hayes** is to be admitted as a solicitor on 13th September.

**Lord Justice Staughton** is giving talks on plain English, and may be approached for a booking.

**Robert Venables**, a Charity Commissioner, has been elected to The Law Society's Council.

**John Young** was elected unopposed as Deputy Vice-President of The Law Society at the AGM in London on 15th July. In the normal course of events he should progress to the vice-presidency next year and the presidency in 1995.

### Richard Castle joins the committee

We are very glad that Richard Castle has agreed to serve on the committee. He was one of the early proponents of plain English law, and a founder member of CLARITY. If I remember correctly, he was (with Trevor Aldridge?) a guest speaker at our first annual meeting, in 1984.

He spent four years in the legal civil service after his call to the bar in 1965. He qualified as a solicitor in 1971, and has specialised in property work ever since. For several years he was a sole practitioner in Plymouth. He now divides his time between active consultancy in a small practice in Sussex and teaching in the Department of Land Economy at Cambridge University. He was one of the authors of *The Law Society's Standard Conditions of Sale*, which imposed plain English standard contractual terms on the conveyancers of England and Wales; and with Murray Ross he produced the *Rosscastle Letting Conditions*, which offered landlords the use of a clear commercial lease. Last year he edited Barnsley's *Land Options*, and earlier wrote a handbook on conveyancing.

**Welcome to new members**

**Canada**

**Cynthia Bartholomew;** Legal Services Society; Vancouver, BC  
**Andrew Sims QC;** chair, Alberta Labour Relations Board; Edmonton, Alberta

**Denmark**

**Anna Trosberg;** linguist; Dept of English, Aarhus School of Business

**England**

**Richard Allen;** chartered surveyor; East Molesey, Surrey  
**Robin Edmunds;** company solicitor, South Western Electricity plc; Bristol  
**Mike Foers;** inspector of taxes, forms designer, and plain English consultant, Inland Revenue; St Albans, Hertfordshire  
**Donna Harris;** solicitor, Norwich Union Legal Services; Norwich, Norfolk  
**John Hayes;** trainee solicitor; London SW2  
**Irene Kaplan;** legal commissioning editor, Fourmat Publishing; London NW3  
**Timothy Norman;** solicitor, Debenham & Co; London SW3  
**William Shelford;** senior partner, Cameron Markby Hewitt, solicitors; London EC3

**Susie Smith;** solicitor, Bradford Met. Council  
**Kim Thornley;** solicitor, Reckitt & Colman plc; Hull  
**Helena Twist;** director of legal education, Nabarro Nathanson, London W1  
**John Young;** solicitor, Cameron Markby Hewitt; London EC3

**Ireland**

**Anthony Brady;** solicitor, Taylor & Buchalter; Dublin

**Malta**

**Dr Paul Micallef;** senior legal officer, Dept for Consumer Affairs; Valetta

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 As we go to press on 17th August, CLARITY has 446 members in 20 countries. They include some:

243 British solicitors	236 lawyers in private practice
27 British barristers	38 in industry
43 overseas lawyers	46 in government or public service
2 judges	(inc govt departments & justices' clerks)
2 chairmen of tribunals	24 academics
1 surveyor	7 on professional bodies
47 teachers	2 in the voluntary sector
35 writers (inc infmn designers)	3 retired
5 journalists	
5 students	

These figures are only approximate and do not take all members into account. Most whose occupation is unknown are probably solicitors or barristers. Some members fall into more than one category. We are trying to improve our records and will publish more reliable statistics when they are available.

**Honorary President:** John Walton

**Committee**

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**and in the United States**

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This journal is edited by Mark Adler and published from the Surbiton address.