CLARITY

A movement to simplify legal language

Patron: Lord Justice Staughton

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Change of address

The editor has moved from 28 Claremont Road, Surbiton to a new office at:

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Annual supper and meeting

Friday, 26th January 1996

I am sorry that this issue has taken so long to prepare that we could not use it to announce the meeting. Instead, all English members were notified separately, and I hope those further afield will not be offended by the decision that the chance of their coming did not justify the considerable cost of circulating them. This issue will be at the printer's when the meeting is held, and a report will appear in *Clarity* 35.

The arrangements are different this year. Instead of holding the meeting at the end of the supper, when interest in formalities has waned, we are starting at The Law Society's Hall with CLARITY business. This is to be followed by a talk by Peter Butt on plain language in Australia. We will then move to restaurant Chez Gérard for a meal.

Professor Butt's is a familiar name to CLARITY members, but few have had the chance to meet him. He was (with Robert Eagleson) a founder-director of Sydney's Centre for Plain Legal Language, but has since reverted to his normal post in the University of Sydney's law department. He guest-edited the last issue of CLARITY from Australia, and has tentatively agreed to do another one. Meanwhile, he is spending 1996 as visiting professor at the University of Bristol's Department of Professional Legal Studies, where he will be teaching legal drafting, and researching and writing on land law.

News

Tax law to be simplified

A flurry of activity at the Inland Revenue, which could lead to the first serious attempt to write tax laws in plain language, has been caused by section 160 of the Finance Act 1995:

> **The Inland Revenue shall prepare and present to Treasury Ministers a report on tax simplification . . . before 31st December 1995 . .. . The report shall give . . . a summary of recent criticism of both the complexity of tax legislation and parliamentary procedures; and the advantages and disadvantages of possible solutions including a Royal Commission on taxation and a tax law commission.**

In response, the Revenue has set up the Pathfinder Simplification Project. Team members have visited Australia to study progress towards simpler legislation. It seems likely that the project will recommend a major rewriting exercise on current tax law, widely regarded as incomprehensible to tax experts and judges – as well as to the taxed.

Two separate committees of tax, banking, and accountancy experts have been at work in parallel to the Revenue initiative. A brief report on the work of one of them, the Tax Law Review Committee, appeared in the London *Times* on 23 November 1995. It quoted Graham Aaronson QC, chair of the committee and of the Revenue Bar Association, as saying: 'The style [of tax law] is like a puzzle – and one which does not even have a picture on the box. This is quite intolerable.'

The committee has rewritten two chunks of tax law to show what can be done. 'We have no doubt that tax legislation can be written in an accessible style, that it can be no less accurate than the current drafting style, and that there would be very substantial benefits for taxpayers, practitioners and the government if it were,' said Mr Aaronson. Chaired by Lord Howe of Aberavon, a former deputy prime minister, the committee calls for 'a full rewrite of income tax, corporation tax and capital gains tax legislation.' The committee's report has just been published (see note 2 at the foot of this column).

The Special Committee of Tax Law Consultative Bodies has also rewritten a chunk of tax law, schedule 10 of the 1992 Finance Act, a stunningly obscure piece intended to give a tax relief to people who rent out a room in their own homes. The committee asked the Plain Language Commission to take the lead in the redrafting project, but supported it with tax and legal expertise.

Excluding headings, the original schedule runs to 2,050 words, includes 36 internal cross-references, and has an average of 512 words per subheading. The revision has only 1,100 words (a saving of 47%), 5 cross-references, and an average of 122 words per subheading. It has been checked for accuracy by a QC and tax experts. The Revenue asked the First Parliamentary Counsel to comment on the draft and, though he did not examine it in depth, he offered several redrafting suggestions, most of which were incorporated.

The Revenue's report on the Pathfinder project is expected to include the Special Committee's redraft and will be available soon. More details in the next issue.

Martin Cutts

Note 1

Since this was written the Chancellor has announced in his budget speech that a simplified tax code will be enacted. The simplification is to be both linguistic and substantive.

Note 2

"+Interim Report on Tax Legislation"
available from
the TLRC Secretariat
Institute for Fiscal Studies
7 Ridgmount Street
London WC1E 7AE
price £12.50 (inc. UK postage) for non-IFS members, £6 for others.

A digest of the recommendations in the TLRC' report appears opposite, and is followed by a an extract of the "before-and-after" example appended to the report.

Comments should be sent to Chris Davidson at Ridgmount Street, to arrive before 28th February if possible.

Summarised recommendations of

the Tax Law Reform Committee's

Interim report on tax legislation

(see p.2 opposite)

General principles drafting

General principles drafting may be suitable for some tax legislation, but only if the details are filled in by regulations. The regulations would have to be better scrutinised than they now are.

The climate is not right for such a change.

Statements of purpose

Statements of purpose are not essential but are sometimes helpful.

There may be a case for a statutory power encouraging the courts to interpret legislation purposively.

Language

The committee broadly agrees with the Renton Report *The preparation of legislation,* (1976, Cmnd 6053 para 17.9):

- The language should be pitched at those professionally qualified to interpret tax law, such as accountants, lawyers, and tax inspectors.
- Many of the basic provisions which are all that affect most people could probably be framed simply enough to be understood by the ordinary taxpayer, at least with the help of explanatory material.

The committee thinks that the Australian attempt to pitch the language of their rewritten tax law at unqualified high street tax agents goes too far.

Drafters should in the first instance treat clarity and accessibility as being as important as accuracy, giving priority to accuracy only as a last resort.

Aspects of drafting technique

The objective should not be to convey information in the smallest number of words possible, but to enable the user to understand the message in the shortest time possible.

Subsections should be given marginal notes to ease navigation.

Defined words should be italicised on first use.

Typographical design should be modernised.

Worked examples should be given. The committee invites views on whether they should be in the primary legislation or the explanatory memoranda.

Explanatory memoranda

Explanatory memoranda will always be needed. They should be directed at general practitioners who deal with the subject-matter of the legislation.

They should be more authoritative than they are, and should be available to the courts as aids to interpretation.

They should be written by revenue department officials and approved by parliamentary counsel and ministers.

They should be published as early as possible, preferably at the same time as the Bill to which they relate. This means they will have to be amended with the Bill.

Explanatory memoranda should eventually become the norm for non-governmental amendments.

The memoranda for any Finance Act should be published in a single handy reference book.

Rewriting existing legislation

The best way to consider whether the advantages of rewriting all current legislation would justify the cost (including the cost to practitioners) is to rewrite a part.

The committee recommends a pilot scheme. This, if successful, would form the first tranche of a piece-by-piece rewriting (probably taking some 5 or 6 years) of income, corporation, and capital gains taxes. A decision could then be taken on other taxes.

The work should be done by a team made up of revenue officials, lawyers, accountants,

drafters, and possibly experts in plain English, design, and information technology. Not all would necessarily be involved full-time or throughout the life of the team. Different types of taxes might be rewritten simultaneously by separate teams, though they would have to liaise closely.

The teams should report to a steering group which represents ministers (through senior revenue officials), the professions, and taxpayers.

Enactment is the overriding requirement. This needs cross-party and generally widespread support, and strong commitment from ministers and treasury officials. There should be full public consultation.

Small changes in the effect of the legislation should be allowed, mainly to cure anomalies uncovered by the revision. Major policy changes should be made separately, co-ordinating the project with the normal Budget process. A balance is needed between clarifying the existing law and the practical expense of substantive change.

Constraints

By far the most important impediment to comprehensible legislation is shortage of drafting time. To ease the pressure, more drafters should be recruited, and policy decisions should be taken in good time whenever possible. (The traditional pre-budget secrecy may be overdone.)

The distinction between policy and drafting should be preserved in the consultation process.

In Canada, draft clauses take effect when they are released for consultation, though they are not enacted until later. Would this be acceptable in the UK?

Structure of the legislation

The committee would welcome views on the structure and numbering of legislation.

Uniformity

The new legislation should apply uniformly across the UK.

Old style

PART V

TRANSFER OF BUSINESS ASSETS

CHAPTER 1

GENERAL PROVISIONS

Replacement of business assets

152.—(1) If the consideration which a person carrying on a trade obtains for the disposal of, or of his interest in, assets ("the old assets") used, and used only, for the purposes of the trade throughout the period of ownership is applied by him in acquiring other assets, or an interest in other assets ("the new assets") which on the acquisition are taken into use, and used only, for the purposes of the trade, and the old assets and new assets are within the classes of assets listed in section 155, then the person carrying on the trade shall, on making a claim as respects the consideration which has been so applied, be treated for the purposes of this Act—

(a) as if the consideration for the disposal of, or of the interest in, the old assets were (if otherwise for a greater amount or value) of such amount as would secure that on the disposal neither a gain nor a loss accrues to him, and

(b) as if the amount or value of the consideration for the acquisition of, or of the interest in, the new assets were reduced by the excess of the amount or value of the actual consideration for the disposal of, or of the interest in, the old assets over the amount of the consideration which he is treated as receiving under paragraph (a) above,

but neither paragraph (a) nor paragraph (b) above shall affect the treatment for the purposes of this Act of the other party to the transaction involving the old assets, or of the other party to the transaction involving the new assets.

New style

Roll-over relief

1 Introduction

Purpose

1.1 The purpose of this legislation is to defer payment of tax where specified types of assets used in business produce a gain on disposal and where other assets of a specified type are acquired for use in business. The following sections explain how that purposes is achieved.

Name; roll-over relief to be claimed

1.2 This tax relief is called roll-over relief and is available only if it is claimed.

Definitions

1.3 Definitions are in section 9. The first time a defined word is used it appears in *italics.*

Examples

1.4 Schedule 2 gives, for illustrative purposes only, examples of the way in which roll-over relief operates. Therefore if there is conflict between the examples and the legislation, the legislation prevails.

2 Qualifying for roll-over relief

Primary conditions to be satisfied

2.1 A person is entitled to claim roll-over relief if:

A he disposes of an *Eligible Asset;* and

B he applies all or part of the *Disposal Proceeds* in acquiring another Eligible Asset; and

C the *time of disposal* and the *time of acquisition* are within the time limits specified in section 4.

Old Asset: use

2.2 The *Old Asset* must have been used throughout the *Period of Ownership* solely for the purposes of a *Qualifying Activity* carried on by the person making the disposal. Modifications to this condition are set out in sections 5 and 8.

New Asset: use

2.3 The *New Asset* must be acquired solely for the purposes of a Qualifying Activity carried on by the person making the acquisition. It must be taken into such use promptly after its acquisition. Modifications to this condition are set out in sections 5 and 8.

New Asset: exclusion if acquired for gain

2.4 The purpose of acquiring the New Asset must be for use in a Qualifying Activity and the New Asset must not be acquired wholly or partly for the purpose of realising a gain from its disposal.

Partial reinvestment of Disposal Proceeds

2.5 If only part of the Disposal Proceeds is reinvested but all the other conditions are satisfied, then restricted relief is given under section 6 below.

Depreciating Assets

2.6 If all or part of the Disposal Proceeds are reinvested in a *Depreciating Asset* then section 7 applies.

Publicity

Solicitors' Conference 1995

This is the renamed Law Society's conference, held this year in Birmingham.

For the second year running CLARITY used a fringe meeting to hold a drafting seminar. Our presentation *If you write plainly, will you be misunderstood?* challenged the common belief that traditional legal forms were both precise and dictated by precedent, and showed how uncontentious stylistic changes could benefit lawyers as well as their clients.

Statute Law Society

In December Mark Adler spoke to the Statute Law Society about plain language in private practice. A talk by second partliamentary counsel on plain language legislation is planned for the coming months.

The Society favours plain language bias, and shares several members with CLARITY, including its founder and its current president.

The Society's £15 annual subscription entitles members to attend several meetings a year, but the journal, *Statute Law Review,* which it publishes in association with OUP, requires separate subscription. Anyone interested in joining should contact:

Carol Page
Robson Rhodes
186 City Road
London EC1V 2NU
0171 251 1644

Legal Network Television

CLARITY and the Plain English Campaign each helped Legal Network Television prepare a programme on plain legal language, distributed on video tape to subscribers.

I found the programme itself disappointing, in that editorial policy "balanced" the sensible views of Judge Michael Cook and other CLARITY members interviewed against the unspportable (but prevalent) view of a traditionalist that legalese was both precise and necessary. A rebuttal would have been informative and stimulating. However, the more detailed printed materials which accompanied the videotape included a useful guide to the principles of plain drafting, and referred subscribers to CLARITY.

Radio 4

Law in Action, BBC Radio 4's Friday evening law programme, ran an item on plain legal language in December, in response to the Chancellor's budget statement (reported on p.2).

Legal Information Network (Link)

An advertisement for CLARITY on the editor's free electronic mailbox has so far produced one enquiry (but no new members).

World Wide Web

Cheryl Stephens, a Vancouver-based CLARITY member and founder of *Rapport Communications,* is giving details of CLARITY on her organisation's internet homepage:

http://www.web.apc.org/~raporter/English/Organizations/clarity.html

The Clear English Standard

Martin Cutts' Plain Language Commission (now at the new address below) reports that its Clear English Standard accreditation scheme is gaining good momentum, 12 months after launch. Some 660 documents now carry the mark, among them the Law Society's conditional fee agreement and a series of booklets for the Prudential and for Furness Building Society.

An organization's first use of the Standard is normally free of charge. After this the cost is £175 + VAT for short documents (less than 1,200 words) and £250 + VAT for others. The fee includes up to two hours editing.

For an explanatory leaflet contact:

Plain Language Commission
The Castle, 29 Stoneheads,
Whaley Bridge, Stockport SK12 7BB, UK
Tel: 01663 733177 Fax: 735135
Email: cutts@plc--waw.demon.co.uk

Drafting snippets

Wilful resistance or style-blindness?

Traditional lawyers are fighting a rearguard action against - or perhaps just stumbling blindly over - the plain precedents offered to them.

Conveyancing contracts

In 1990 the two main rival sets of standard conveyancing terms, used in the contracts for sale of most residential and commercial properties, were replaced by the much plainer Law Society's Standard Conditions of Sale, now in its 3rd edition.

Some firms do not use the new version - either because they consider the terms unacceptable and not worth amending or because they do not like the language. They rely instead on obsolete pro formas which are no longer in print and do not reflect recent changes in practice.

Most *do* use the new form. But they draft their "special conditions" (the variations relevant to the particular case, or adopted by individual solicitors as personal standard terms) in uninhibited legalese. So we have, for example:

> **If the deposit actually paid on exchange of contracts shall be less than 10% of the purchase price then notwithstanding a payment of a lesser amount by way of deposit the balance of the 10% deposit shall at all times remain due to the Seller and in the event of rescission other than through the fault of the Seller such balance shall be a legal liability of the Buyer to the Seller as a condition of this Agreement.**

The Standard Conditions already provide:

> **On receipt of a notice to complete:**
> **...(b) If the buyer paid a deposit of less than 10 per cent, he is forthwith to pay a further deposit equal to the balance of that 10 per cent.**

Deeds

The Law of Property (Miscellaneous Provisions) Act 1989 recognised that few people still validate documents by impressing their coat of arms into hot sealing wax. So

> **Signed sealed and delivered by X**

can now be replaced by

> **Signed as a deed by X.**

(Incidentally, has the Law Commission considered whether the distinction between deeds and other documents serves a useful purpose?)

But why use those 6 short words when 31 longer ones would do as well? I received a draft ("accepted without amendment by hundreds of solicitors", I was told) which "ended" (if that is the word, since the clause was followed by many pages of schedules):

> **The parties hereto hereby declare that this Instrument is executed or signed by them as a Deed in accordance with Section 1 of the Law of Property (Miscellaneous Provisions) Act 1989**

Leases

Another firm submitted a draft lease for a factory ("industrial unit" in the fashionable jargon) in which the service charge was dictated by the landlord's surveyor's calculation of his employer's expenses.

I added the words **unless clearly wrong.** The other solicitor accepted the amendment in principle, but deleted my words and replaced them with **save in the case of manifest error.**

Why? "Because the meaning's been established by case law," she said. I was interested to read the cases, but she did not know what they were. Had these unknown cases established a meaning different from "unless clearly wrong"? "No." Then why the change? "Because the longer form sounds better."

The prospective tenant thought the solicitor came from another planet, and that she would have done better to stay there.

Word order

Traditional drafting discounts the importance of word order. This would be bad enough with short sentences, but is an absurd fault with long ones.

Modifying clauses float aimlessly about the text, leaving a trail of ambiguity, usually unnoticed:

> **The right at all reasonable times by appoint-**

ment to enter upon the premises adjoining the said flat hereby demised and the retained property for the purpose of cleaning and executing repairs and alterations to the said flat as the same shall be necessary making good to the Lessor or to the tenants or occupiers of such adjoining premises all damage thereby occasioned

This could be a right to enter

the premises which adjoin (a) the flat or (b) the retained property

or only

the premises which adjoin both the flat and the retained property

or (though [b] would be superfluous)

(a) the premises adjoining the flat or (b) the retained property.

And does "as the same shall be necessary" apply to the access or the cleaning"? (In passing, why do lawyers always expect people to "enter (go inside) upon (on top of)", when they cannot be in both places at once and everyone else just "enters"?)

Sometimes the sentence structure is deliberately distorted "because everyone does it". So we have:

(The vendor sells) ALL THAT the premises.

"Or"

Careful drafters should particularly beware "or".

Executed or signed

(as in the example on the previous page) does *not* cover both possibilities as was intended, but asserts neither.

And in the example under "word order" near the top of this page, does the donee of the power have a choice of people only one of whom need be satisfied with the standard of work?

Pouring words in

Some lawyers are so complacent about their style that they retain absurdities, even after they have been pointed out, rather than correct them.

An office lease called upon the tenant to pay a share of the landlord's expenses

in constructing repairing rebuilding cleansing painting and decorating the foundations walls and principal load-bearing timbers roof and other structural and external parts of the Building

The tenant didn't mind the landlords decorating the foundations if they wanted to, but was disinclined to pay for it. "Would you rather I listed everything separately?" asked the drafter, who left it as it was.

Similarly, a developer's standard contract for sale provided for

conduits for the supply to and from the land hereby agreed to be sold of sewage water gas electricity and telephone supplies.

I was assured that the developer had no intention of delivering sewage to my clients. But what was meant by "the supply of telephone supplies"?

Split infinitives

I vote with the conservatives against splitting infinitives, except in the rare case that the split is needed to avoid ambiguity.

I have no scholarly justification. Split infinitives sound clumsy, and they grate on my ears. But some of the alternatives are equally clumsy, often quite unnecessarily. I heard recently:

... made no attempt realistically to estimate the demand.

This is ambiguous as well as gauche. They might have said:

... made no attempt to estimate the demand realistically.

It might even be worth a (usually condemned) nominalisation:

... made no attempt to provide a realistic estimate of the demand.

And a recent *Gazette* quoted Law Society President Martin Mears quoting a House of Commons committee report as saying

... has failed to resolve satisfactorily this problem

when the natural phrasing would have been

... has failed to resolve this problem satisfactorily.

Absent-minded drafting

It is ironic that "traditional" legal writing is usually anything but traditional. I doubt the same wording is often used twice unless its source on both occasions is the same computer file. It is the legal *style* that is common, and *ideas* are copied, but the *wording* varies from one document to another. (See *Tried and tested: the myth behind the cliché* on p.45.)

Busy lawyers, dictating from memory what they think is standard, often produce nonsense. Because they do not think what they are writing, it passes unnoticed. I recently saw:

> **The land situated at and known as land off Norwich Road.**

The plot had just been carved out of a much larger area on which an estate was being built. Did the writer imagine that the locals referred to our little piece - but not the adjoining plots - as "land off Norwich Road"? Did he think it sensible to describe land as "land .. known as land"?Since he clearly wasn't an idiot, I can only assume that he was asleep.

Even this short and simple letter had to be complicated and rendered ungrammatical:

> **Dear Sirs,**
>
> **17 Longwind Road Brockley SE4 - X Ltd from Collins**
>
> **Thank you for your letter of 31st ultimo and acknowledge safe receipt of the enclosure therein.**
>
> **Yours faithfully**

Secretive drafting

As I took a break from writing this column to work on a client's lease I came across this among the definitions at the beginning:

> **"the demised premises" means the premises hereby demised and where the context so admits includes any part thereof and anything erected thereon and the rights easements and priveleges appurtenant thereto**

But where *are* the premises? The next clause should have helped:

> **IN CONSIDERATION ... THE LESSOR doth hereby DEMISE AND LEASE unto the Lessee A L L THAT ...**

Are we about to find the answer? No.

> **... the premises described in the First Schedule hereto TOGETHER WITH the rights set out in the Second Schedule hereto**

I finally found the first schedule on the 5th of the document's 13 unnumbered pages. It is so unfriendly that I reproduce it as I see it:

> */*(a)*/ ALL [THAT] [~~THOSE two~~/*piece~~/s~~/ of land situate at West Molesey in the County of Surrey being on the* South *side of* Dundas Gardens
>
> . at West Molesey aforesaid being part of the Hurst Park No.2 Estate and */~~being together~~/* known or intended to be known as No. 16 in Dundas
>
> . Gardens aforesaid as the same is */~~are~~/* for the purposes of identification only delineated and described on the plan and thereon coloured pink */~~and yellow~~/* TOGETHER with the Lessee's house */~~and the garage~~/*

This verbal and visual mess could have been simplified by defining the property as

> **16 Dundas Gardens, West Molesey, Surrey, [approximately?] shown on the plan by red edging**

and providing that

> **The landlord lets the property to the tenant.**

Readers are invited to compete for a small prize which will be given to the wittiest drawing of this house in a style matching that of the paperwork.

A rogue *Times* law report

It took me 10 minutes to work out how this 129-word introductory sentence fitted together:

> **Since upon an individual's bankruptcy, any right of his to receive income support did not vest in his trustee, the general rule that the creditor of a bankrupt could not plead a debt owed by him to the bankrupt, that had been constituted prior to the sequestration, in compensation of a debt owed by the creditor the bankrupt arising after the sequestration, did not apply to prohibit the Department of Social Security from setting off an obligation of the bankrupt's to repay a social fund loan that predated his sequestration against his right, after his sequestration, to receive income support, because the reason for the general rule was to prevent a creditor from pleading compensation of debts against the trustee to**

the prejudice of the general body of creditors.

Why is it so difficult?

- Far too many different ideas are crammed into a single sentence.
- It is three or four times longer than a sentence should be.
- There is a comma missing after the first word, which confuses the phrasing.
- Other commas are wrongly used.
- "To" is missing after "creditor" at the end of the 7th line.
- Forty badly punctuated words, comprising several phrases, separate the subject "the general rule" from the main verb "did not apply".

Although the punctuation is poor the piece would have been impossible without the clues it gave to the phrasing.

Who was that spouse I saw you with last night?

Spouse is defined as the person to whom the Cardholder is legally married or the person with whom the Cardholder is cohabitating as husband and wife and has been cohabitating for at least two years provided that where there is a legally undissolved marriage and cardholder is cohabitating with a person as husband and wife and has been so cohabitating for at least two years, the spouse is the person with whom the Cardholder has been cohabitating.

That was no spouse. That was my wife.

Clarity marks

To publicise CLARITY and its aims, we are making two logos available (on disc and bromide, see opposite) for use in suitable cases.

Supporter's mark

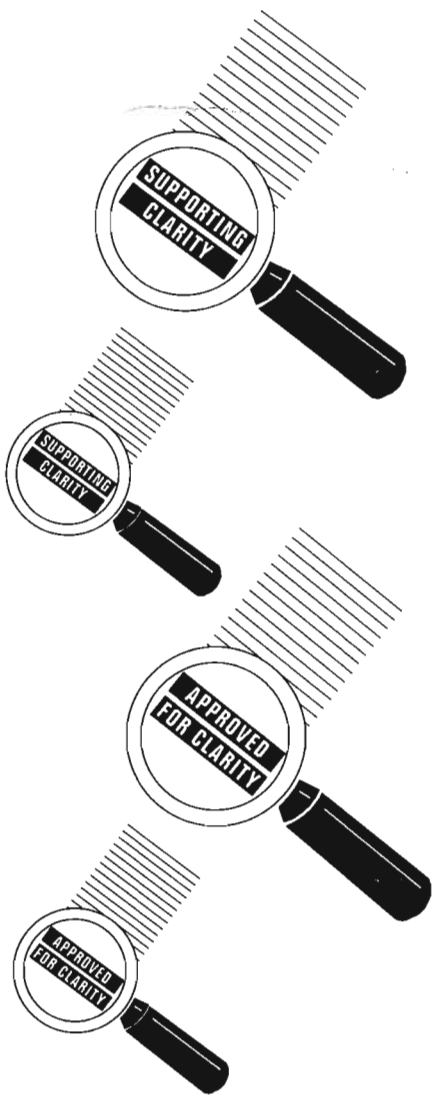
This logo reads "SUPPORTING CLARITY", and is designed to be included on members' notepaper, brochures, etc, to indicate their commitment to CLARITY's aims. It does not imply that the user has reached a particular standard of clarity, only that they support our aims. Displaying the mark is intended to show what the user's aims are, not to suggest that those aims have necessarily been fulfilled.

Details of how to obtain the supporter's mark will be publicised when certain technical design problems have been solved - by the next issue, we hope.

Approval mark

This logo, which reads "APPROVED FOR CLARITY", is available to endorse suitable books, standard documents, etc, if their clarity justifies it. Organisations who want to use the mark on particular documents must submit them, with a non-refundable fee (usually £100), for assessment. If the standard of clarity is high enough, use of the logo will be authorised. If no, we will indicate the problems.

This scheme is run by Richard Castle, and full details will appear in the next journal.



Letters

Court orders

From David Pedley, West Yorkshire

Many lawyers claim they do not use legal jargon unthinkingly, but because ordinary English is too abbreviated and therefore ambiguous. A situation I came across recently can disprove this.

Solicitors had agreed the form of a consent order to pay maintenance "from the date hereof". It went to the district judge for approval, but after many months' delay in the court office, the order had still not been formally made.

The question arose as to when the maintenance should start. The solicitor who drafted it, a stalwart user of lengthy legalese, thought it was the date of the agreement; I thought it was the date the order was made.

The agreement should have said "from the date of agreement" or "from the date of this order". This is longer, but clear. "Hereof" is shorter, legalese, and unclear.

How about "from 1st March 1995"? - Ed.

Clarity journal

From Sue Stapely, London WC2

As you know I have long been an enthusiastic member and supporter of Clarity and all its works.

I just wonder why it is that amongst the innumerable newsletters I receive from legal organisations Clarity now seems to be the most dense, unappealing to the eye and hardest to wade through.

Its content may be flawless but the layout looks suspiciously like the legal documents against which you have often campaigned.

I also feel, though I am well aware this is an entirely personal view, that many of the contributions are over-long and some what turgid in style which again does not fit entirely comfortably with the ethos of the organisation. Perhaps it would help for just one issue to restrict word count more rigorously?

From Katharine Mellor, Manchester

Whilst in no wishing to deny the strength and validity of any of the articles in the latest *Clarity* , I am afraid it has now become so long and "in depth" that I have to put it on one side for future consideration. This inevitably means it does not get read for many months.

Could you consider smaller but perhaps more frequent publications? I am sure that members would absorb more easily articles in bite sized chunks.

Editor's reply

These letters arrived some time ago and do not relate to the latest issue.

My policy has been not to restrict articles to a particular number of words. Contributors are invited to use as many words as they need to make their point, but no more. But I try to trim the style if necessary, and to omit material which I think will not interest members. Nevertheless, what bores one reader may be of great interest to another.

I have tried to balance serious material with the occasional light touch, an approach criticised on one occasion as reducing the journal's "bottom" but approved by most of the few who expressed an opinion.

I have long been conscious that my 10-point, 3-column, layout crammed rather a lot into a single page, but each extra page adds to the heavy cost of printing and postage, and with a £15 subscription funds are limited. However, in this issue I have followed the guest editors' standard of a 12-point, 2-column, page.

Though I would like more frequent issues, Katharine Mellor's proposal is not practicable: apart from the work involved in preparing each issue for the printer, each mailing costs several hundred pounds and a takes a full day stuffing, labelling, and posting envelopes. I try to publish quarterly, but ask members to accept that this is often not possible.

Case report

Watson v. National Children's Home and others

(*The Times*, 31.10.95, p.39)

Judge Colyer QC

Chancery Division

A testator left his £120,500 estate

as to one half ... to the National Children's Home ... and as to the remaining one half ... to the National Canine Defence League ... on the condition that the said League will look after my domestic pets in their kennels during the remainder of their natural lives but in the event of the said League not agreeing to such condition I bequeath such one half ... of the residue of my estate to the National Children's Home.

When the testator made his will in 1974 he only had one pet, a doberman. He had no pet when he died, and the Times report suggests (without being categorical) that he had had no other pet in the meantime.

The National Children's Home argued that the gift to the Canine Defence League failed because the condition attached to it could not be fulfilled. The Canine Defence League argued that the condition lapsed when the testator died petless and it claimed its gift outright. The executor joined the next of kin but they took no part in the action.

The judge weighed the authorities and agreed with the Canine Defence League on two grounds:

- He understood the will to mean that the League should care for any domestic pets the testator may have had when he died, and that the gift would pass absolutely if there were none.
- If he was wrong on the first point the will was ambiguous. This would trigger section 21 of the Administration of Justice Act 1982, which allows the judge to consider extrinsic evidence to construe an ambiguous will. And there was a hand-written note from the testator to his solicitor that half his estate should be given to an animal welfare charity, with the proviso that it care for any pets he might leave behind.

Comment

The will was full of pseudo-technical jargon ("in the event of the said League not agreeing to such condition I bequeath such one half"). Yet the drafter ignored the obvious practical difficulties of interpretation:

- Is it not standard practice to ask a testator what is to happen to a gift if the beneficiary - in this case the doberman - does not live to claim it? Yet the drafter only considered what would happen if the League did not agree to the condition.
- What was meant by "the remainder of their *natural* lives"? Was this a subtle direction not to maintain a persistently vegetative pet on a life-support system?
- What of non-canine domestic pets? If only dogs were included, as is suggested by the choice of charity, by the reference to kennels, and by the identity of the testator's last companion, why did the will not say "dogs" instead of "domestic pets"? Could a budgie with a smart lawyer have presented itself to the Canine Defence League with £60,000 and a specially adapted kennel?

How could the will have been written to avoid what must have been very expensive litigation?

I give half my property to the National Canine Defence League on condition, if I leave one or more dogs, that the League will look after them for the rest of their lives.

Subject to that I give all my property to the National Children's Home.

Reviews

The plain English guide: how to write clearly and communicate better

by Martin Cutts

Oxford University Press 1995

This is still with the reviewer, but we expect to include it in the next issue. Meanwhile I hear that the first print quickly sold out, and the second is not yet available. For information contact Mr Cutts at the address on p.32.

A Dictionary of Nabarro Nathanson's short form of lease

In March this year Nabarro Nathanson produced a short form of lease (called, it seems, a 'Eurolease') for part of a building. The Eurolease is intended to be for a short-term letting, so there is no provision for rent review. Principal features are:

- brevity of text: only three A4 columns are taken up
- clear layout and paragraphing
- modern English, except for one or two minor lapses like '...but this shall not prejudice any antecedent rights or claims of the Landlord'
- boxes for insertion of variables
- readable headings.

The Eurolease will not fit all circumstances - assignment, subletting and sharing are absolutely forbidden, for example. Nothing is said about mere parting with possession. And the use of square brackets is confusing, particularly in relation to the charging of VAT on rent. "Property let" is a defined term, but later "the property" appears more than once. There is no covenant to repair the structure or to decorate the exterior - but if that is a defect, it is a defect found in many short-term leases. Whilst it seems clear that the Eurolease has been influenced by the Law Society's business lease and by Trevor Aldridge's *Practical Lease Precedents*, it makes a fresh contribution to the art of drafting. Nabarro Nathanson are to be congratulated on a bold foray into modern documentation.

Richard Castle

Residential leases

by Stuart Bridge

Blackstone Press 1994

286 pp + tables and index. Paperback £22.95

Anyone who sets out to write a wide-ranging textbook on residential leases is a brave person. Mr Bridge is certainly that, and more. He covers assured tenancies, regulated tenancies, long tenancies at a low rent, enfranchisement, secure tenancies, the right to buy, and protection from eviction.

He rightly describes various statutory provisions as "horribly complicated", "highly convoluted", and "not noted for their clarity of expression". Once or twice the sheer mind-numbing detail gets to him, but on the whole his exposition is admirably clear.

There are also some editorial lapses, to satisfy the over-fussy reviewer. They don't matter, and Mr Bridge's experience as both academic and practitioner shines through.

His analysis of the relationship between forfeiture and possession under the statutory codes is first rate. So too are his cautionary words about the drafting of consent orders, and his explanation of the accelerated possession procedures for assured tenancies and assured shortholds.

Users may well need to supplement their researches elsewhere. As Mr Bridge acknowledges, under three hundred pages is simply not enough to cover the topics in every particular. But this book can be commended to both studen and practitioner alike.

Richard Castle

Understanding the EU

Clifford Chance has produced a useful plain guide for those who don't know the EC from the EU.

For a free copy of their 46 page A4 booklet *The European Union: understanding and influencing policy and law making*, contact Richard Thomas, a founder-member of CLARITY and currently Director of Public Policy at Clifford Chance:

200 Aldersgate Street, London EC1A 4JJ
Tel: 0171 600 1000 Fax: 600 5555
Overseas code: 44 171

The legislated double bluff

How democratic rights are undermined by the language of the new consitution In South Africa

by

Ailsa Stewart Smith

a linguist specialising in legal language

The new (interim) constitution in South Africa promises [1]

> **a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.**

These promises are effectively self-cancelling if the language in which they are written is not simplified.

The language referred to is legal English. English is likely to remain a working official language [2], from which other languages are translated. It may also be the language of record. If the basic language from which translations are made is confusing, subsequent translations will be more complicated and inaccurate. Furthermore, these other languages often lack the terminology with which to express certain legal concepts. A lexical gap therefore exists. The more technical legal English is, the greater this gap becomes.

1. Preamble Constitution of the Republic of South Africa Act 200 1993.
2. The final consitution is currently being drafted in English. Many of those involved are not English first language speakers. They are therefore dealing with two languages - English and legalese - neither of which is familiar.

Section 3 of the new Constitution gives official status to 11 languages, and recognises 11 more [3]. Nine of the new official languages are African ones. The social experience and culture of speakers of these languages is non-Western. For example, the concept of ownership in African customary law differs from that of Roman law [4]. This difference is reflected in language where the absence of an elaborate vocabulary specifying rights to commodities not only reveals much about African societies, but increases translation problems.

In addition to lexical-conceptual differences, there are the related problems of multilingualism and of educational disparities. Many non-English speakers have had inadequate education [5], and not necessarily in English. Non-English first language speakers find complicated language particularly difficult to understand, but they are entitled to benefit from their new legal rights. This they cannot do unless the language of legislation is written more simply.

All the users of law have the right to be informed in language which they can understand. They do not all have to understand it completely, nor to the same extent, but it is non-democratic to deny users even entry level comprehension [6]. Although it is unrealistic to expect laws to be written at the lowest comprehension level, it is both right and realistic to require legal documents to be comprehensible to people with an average

3. Act No. 200 1993.
4. Customary law is more concerned with the relationship of people in respect of objects, as opposed to the relationship between a person and an object (the traditional expression of ownership in Roman law).
5. Estimates of illiteracy are put at 12-16% of a society of 40 million. However, this does not take into account semi-literacy (on average four years of primary schooling), and the loss of even these literary skills when people do not use the little education they received. A lawyer at *Lawyers for Human Rights* defined their average client as possessing Standard 4 level schooling (four years primary education) and earning R1000 per month.
6. `Entry level' is obviously suggestive rather

education [7]. In order to achieve this comprehensibility, legal texts must be written more simply. Our emergent democracy needs to discard the inherited imbalance where an elite minority has the knowledge to understand the laws of which they are also the crafters, administrators and practitioners [8]. This power differential has been supported by traditional legal language.

The complexity of legal language, combined with the feeling of vulnerability arising from the situation in which they encounter it, obstruct the already complicated process of reading and understanding. Readers cannot focus on structure and substance equally. Texts which are structurally complicated demand greater reader energy, to the detriment of their content. Language experience acquaints readers with standard and possible patterns. This knowledge involves grammar, but also expectations of where certain information is likely to be found in a sentence. The first position in a sentence very often conveys what the sentence is about. The final position, towards which a linear language like English moves, carries emphasis. Often termed the stress position, it is effectively used to express new information.

A relationship exists between first and final positions in a sentence which, if used effectively, develops and connects meaning. Readers expect that what they read first will logically lead on to what is at the end of the sentence. And the same principle generally applies to paragraph structure and extended text.

A legal style which meets these expectations will be effective: traditional legal writing violates them.

The language used in the interim Constitution is simpler than in previous statutes, but this improvement is neither consistent nor extensive enough [9]. Chapter 3 deals with Fundamental Rights. The argument often put forward by lawyers that non-legal people do not have to deal with statutes is automatically dismissed by the content of this section. It lays down the rights of all South Africans. Many will want to know what these are, particularly after the deprivation of rights during the apartheid era. However, even reasonably educated readers will be confused by the ambiguous and complex language.

A brief analysis of just two clauses illustrates that the democratic rights are removed linguistically in two ways. First, the language used is non-egalitarian. It privileges those with legal knowledge: those without it (the majority), will find the text difficult to understand. This disempowerment works at a second level. The structures used do not actually guarantee rights. In many cases the beneficiaries are dependent on the actions of

than specific. A general estimate would be 10-12 years; ie primary and secondary schooling. Most people in South Africa do not acquire anywhere near this (see n.5). Readability tests can indicate the level of education required to read a text. Computer programs such as *RightWriter*, *Styleguide* and *Grammatik* measure document intelligibility according to various factors. The resultant "scores" can be linked to the number of years required to understand the document. My argument is not that legal texts be written down to the lowest educational level, but that their complexity be reduced, so that mediators with average education can explain the content to those whose education will never equip them to understand legal texts.

7. The Law Reform Commission of Victoria tested Division 16E of Part III of the Income Tax Assessment Act 1936 (Commonwealth). Before revision, 27 years of formal education were required to understand this text. When written in plainer language this was reduced to 12 years. See C Balmford *Adding value by writing clearly* (1994 111 III South African Law Journal 514-541 at 532).

8. Legal texts target four general audience groups. The first three (Members of Parliament; legal professionals; and officials who administer the law, such as police officers) are all familiar with legal texts to varying degrees. The final, and largest, group is the society constituted and regulated by legislation it cannot understand, and has little role in constructing.

9. Section 236 (1) compresses 155 words (excluding alpha-numerical units) into a single sentence. The subject matter is the transitional arrangements of public administration, and therefore deals with information which the general public needs to know. The language used denies them this information.

others, and not in control of establishing their rights. Guarantees which depend on the authorisation of unidentified others have debatable worth.

Section 3.8 deals with equality.

8.(1) Every person shall have the right to equality before the law and to equal protection of the law.

This commendable vision is ambiguous and confusing. The clause is only apparently straightforward. The phrases *right to equality* and *equal protection* are legal formulae, non-specific and (taken together) tautologous. Tautology always confuses the lay person. Because the law is presumed to be accurate, and words are thought to count, different words are assumed to have different meanings. This may or may not be the case. For example, *will* and *testament* are synonyms; *rights* and *remedies* are not. The inconsistency of the pattern confuses.

In addition, the high degree of abstraction involved obscures meaning. Equality is abstract. The prepositional phrases increase the complexity. Reference to *before the law* is metaphoric; one does not really stand before the law, and the preposition *before* is not used in its most usual sense, *in front of*. The nominalisation *protection* is an abstract noun whose meaning refers to its verb source - the focus is on those involved in the process of protecting; who they are is not made clear. There is no identifiable agent to whom a denial of equality can be reported. *The law* is another abstraction. Abstract entities are non-observable and difficult to quantify. Fundamental rights are difficult to guarantee when they are described in unrealisable terms.

Shall is used ambiguously and inconsistently. Because it can be used to express both obligation and futurity, it has modal and temporal meaning [10]. The distinctions are not always clear because both obligations and intention concern future time [11]. This dual function is further confused in legal usage because it is conflated; laws express obligation in perpetuity. Unless *shall* is used to mean *has a duty to*, it acts as a false imperative [12]. Confusion as to whether permissive or discretionary meaning is intended is the result [13]. Are these rights to equality and equal protection guaranteed or probable?

In 3.8 (1), *shall* does not convey *has a duty to*, and is therefore incorrectly, because ambiguously, used. This ambiguity is extended with the repeated occurrence of *shall* in different constructions in following clauses: in (2) *shall be;* (3)(a) *shall not preclude*; (b) *shall be entitled*; (4) *shall be presumed*.. The apparent similarity is belied by the different meanings in each case. Perpetuity is usually better expressed through present tense verbs. This eliminates the modal uncertainty inherent in *shall*. In 3(a) substituting *does not preclude* expresses the continuing effect of the provision more effectively; 3(b) intends to confer rights, so *is entitled to* is clearer; (4) deals with future action and so *will* is preferable. There is really only one commonality; they are all used incorrectly. None of these express *has a duty to*; all can be replaced by more accurate expressions [14]. Because this constitution

10. This future meaning use of *shall* is debatable. According to R Quirk and others (*A Comprehensive Grammar of the English Language* 1985 4.42, 4.58, cited in Kimble, *The Many Uses of "Shall"* 1992 3 *Scribes Journal of Legal Writing* 61-77) the usage of *shall* for plain future is infrequent, and the *shall, will, will* distinctions between first and the second and third persons `is old fashioned and nowadays widely ignored'.

11. Kimble, as in note 10, p.62.

12. Kimble, as before, pp.64-65. The *obligation* meaning of *shall* is incorrect if used either:

    (a) to express a legal result: *The law of Michigan shall govern this contract*; or

    (b) in a conditional or relative clause: *If the tenant shall not pay the rent on time*; and *I give to X all the property that I shall have at my death.*

13. Kimble, as in note 10, p.73. See also Y Maley, *The Language of Legislation* (1987 16 Language in Society 25-47 at 30).

14. Reed Dickerson, *The Fundamentals of Legal Drafting* (cited in Kimble [as before, p.66]) sets out the following conventions for using terms of authority:

    (1) To express a right say *is entitled to*.

    (2) To create discretionary authority say *may*.

establishes rights in the present, *is entitled to* is clearer.

Rewritten in simpler language this clause states clearly:

Every person is legally entitled to equal treatment.

In clause (2) the comprehenson problems are due to poor organisation and complicated language.

(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

Legal texts are notoriously verbose. This single, long (47 words) sentence is composed of multiple phrases. Several of these interrupt the progression from verb to object, delaying progress towards the important information on what constitutes discrimination. Many of the structures and words used are unclear, confusing and repetitive.

Tautology operates at two levels. First, the generality explicitly expressed and guaranteed in *No person shall be unfairly discriminated against, directly or indirectly*, arguably makes the long list of particularised discrimination unnecessary. Second, the legal tendency to use a phrase for a word is clear; for example *on one or more of*, where *any* would have expressed the same idea. Unnecessary words combined with complicated syntax obstruct comprehension.

The important first position is occupied by negative information, *No person*. This sets up default comprehension - what the clause is not about. Arguably *No person* is such a simple negative that decoding and re-encoding problems do not occur, but this negative is extended by the implicit negatives in the prefixes *un-* in *unfairly*, and *dis-* in *discriminated*. Multiple negatives are difficult to understand because they extend the reverse mode in which readers have to work in order to understand negated information [15].

The complex verb phrase, shall be unfairly discriminated against, adds to the difficulties. In addition to the ambiguity of shall, the passive structure allows the identity of an agent of discrimination to be concealed. The combination of an agentless passive and the abstract reference of unfair make establishing rights remote and complicated.

Further, there are actually two actions subsumed in this one phrase: that of discrimination, and that of evaluating whether this discrimination is unfair or not. They are unlikely to be performed by the same agent. There are therefore two possible agents, and neither is identified. The question of who decides on whether unfair discrimination has

(3) To create a duty say *shall.*

(4) To create a mere condition precedent say *must.*

To these guidelines must be added the substitution of present tense phrases for *shall* expressions because `A legal document speaks constantly' (Kimble p.65).

15. In order to understand negative expressions, readers have to convert the negative back to its basic, positive form, understand that, and then negate it. In simple constructions, and with familiar content, this happens so automatically as to be almost unconscious. *Do not enter* is quite comprehensible, provided that the meaning of *enter* is known. Extended negation, however, is more complicated. First, multiple negatives increase the time that the reader must use this reversed method of understanding. Extended negation taxes comprehension because it obliges readers to keep an awareness of the positive, from which the negative is derived, over large pieces of text. Second, English grammar stipulates that two negatives generally cancel each other out. The multiple negatives in legal texts, therefore, cause uncertainty as to whether these negatives emphasise what is not to be done, or cancel previous negation.

Discriminate is inherently negative because of the meaning attributed to it by the negative prefix *dis* (from the Latin *dis-* meaning *opposite of; lack of; not*). It is also one of those words which lacks a positive form, like *disgruntle*. Further complication occurs with the permissable addition of another negative prefix, *non-* in *non-discrimination.*

occurred remains unanswered, and unanswerable because there is insufficient information in the text with which to identify the agents.

The passive structure adds to the uncertainty because the beneficiary is placed in the subject position, but still as the object of the verb action of non-discrimination. This is one reason why the passive confuses: it changes the surface order of a sentence, but not the underlying meaning. Instead of being empowered by this right to non-discriminatory treatment, the beneficiary is dependent on the actions and decisions of unidentified others.

There is also a confusion of positive and negative when rights are attributed restrictively, as in *No person.* Two basic functions of laws - to bestow rights and enforce restrictions - are confusingly mixed.

The mixing of general and particular referents in the same sentence is potentially confusing. The scope of *No person shall be unfairly discriminated against* seems to make specified instances unnecessary, particularly because the generality is emphasised in *without derogating from the generality of this provision.* In fact, the itemisation adds to the complexity: what is the difference between gender and sex? Because the two are distinguished, readers are likely to assume that they have significantly different meanings. Because the specified areas are not given as examples (which would have allowed for additional information to be included), the specificity works against itself (see discussion on lists below).

In addition, the logical process of moving from general to particular, using deductive organisation of material, is interrupted by the intervening phrases: *directly...indirectly*; *without...provision*; *on...grounds.* These phrases are also lexically complicated: *derogating* is a technical legal term; *provision* is misleadingly familiar, but used with specific legal meaning. The issue of unfair discrimination has to be understood in conjunction with the complicated *and without derogating from the generality of this provision* because they are connected by the coordinate *and.* Knowing one's rights now hinges on an incomprehensible phrase with cautionary implications, *and without... .*

The tendency of legal writers to use co-ordinate pairing inconsistently is a source of confusion for the reader. Lists such as this one, *race...language*, are in a co-ordinated relationship, with the commas substituting for *and.* It is impossible for the non-legal reader to know if there is any overlap of meaning, for example, *gender and sex..*

In addition, listing often works against its own purpose; that of detailing what is appropriate. Actually, the more detailed a list is, the more it excludes by implication [16]. For example, *size* is not listed, and yet there are occupations with weight and height restrictions. Presumably, discrimination on these grounds would not abuse fundamental rights [17].

This clause could be reworked as:

Every person is entitled to freedom from all discrimination, whether directly or indirectly applied.[18]

Several points must be made about the reworked version. First, the process of

16. Obviously some itemisation is necessary as a guide to what constitutes discrimination, but the more detailed the referents become, the more they are likely to confuse. Detail implies distinction between terms, but this is not clear with *sex* and *gender*, and possibly *conscience* and *belief.* Additionally, particularisation excludes.

17. Air Zimbabwe dismissed several cabin crew staff because their hefty size made it difficult for them to move along the aisle.

18. This is a radical revision with which the lawyer I worked with agreed in a mood of bravado, but then suffered qualms of legal conscience! For the less daring this version might be more acceptable:

    No person is to be discriminated against, directly or indirectly, on any grounds, which include race, gender, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

    But this is concessionary. I still contend that positive sentences which use familiar vocabulary are more effective, and can be legally sound. The point is that there is more than one possible version. The differences between the original and amended texts show the difference between obscure and effective language.

reworking must recognise which linguistic features contribute towards complicated texts. Second, these must be adjusted to conform to the estimated language skills of potential readers. Third, reworking is usually a group effort, involving legal and language specialists and document designers. Plain language practice is particularly appropriate in the new South Africa because it does away with the protocol of the expert.

Finally, plain language is a process not a translation. There is probably no final and perfected document. The intention is not to purge legal language of its predominant characteristics, but to adjust the language so that it corresponds more to the language forms which are familiar to non-legal readers. The point is, however, not that all texts should be submitted to such detailed linguistic dissection, but that the areas of confusion which this kind of analysis shows up are common problems which need to be corrected.

Because plain language communicates more effectively, it is an essential component in our fledgling democracy. Lawmakers must acknowledge the need for laws to be comprehensible if they are to be functional and democratically viable. Democracy in South Africa cannot provide equality at every level for all citizens. This democracy does, however, aim to protect basic rights. Language rights are one of these, and comprehensible legal language one of the most essential.

Section 8 of the Constitution of the Republic of South Africa Act (No 200 1993)

Original text

(1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly, and without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

(3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.

(4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

Suggested revision

(1) Every person is entitled to equal treatment.

(2) No person is to be discriminated against, directly or indirectly, on any grounds, which include race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

or

Every person is entitled to freedom from all discrimination, whether directly or indirectly applied.

(3) (a) This section does not preclude measures designed to protect and advance those persons or groups previously discriminated against. Such people must be able to enjoy fully and equally all the rights and freedoms to which they are entitled.

(b) Persons or communities who lost rights to land under any law, which would now be inconsistent with subsection (2) above, may claim restitution of those rights in accordance with sections 121 (Claims), 122 (Commission), and 123 (Court orders).

(4) Any proof of discrimination, as set out in ss (2) above, will be presumed to be sufficient proof that the discrimination was unfair unless evidence to the contrary is proved.

CLARITY in South Africa

by

Phil Knight

In *Clarity* 33 (July 1995) Joe Kimble and Christopher Balmford reported the beginnings of plain language efforts by the government of South Africa. The seminar organized by the Ministry of Justice last March stimulated the interest of a number of practicing lawyers both inside and outside the administration, some of whom are well placed to influence the style of legal writing in that country. The immediate effect of the work done in South Africa by CLARITY members - and the Plain English Campaign (PEC) - can be seen in several significant projects undertaken in 1995.

The constitution

The 1993 interim constitution (which includes the Bill of Rights provisions about which Ailsa Stewart-Smith wrote on the preceding pages) expires on 9th May 1996. It must be replaced by that date, and the Constitutional Assembly has spent nearly two years working on the project. In November they published a discussion draft, complete with a proposed new Bill of Rights. I believe that the revision is significantly clearer. Many of the issues raised by Ailsa have been addressed.

But the revision is only a discussion draft. It has been approved by the central committee of the Constitutional Assembly (a political body) for publication. The public is invited

> **to comment on everything that is in the working draft, including the use of language, and to offer fresh ideas.**

The draft, with any further amendments, will then need the approval of the committee and then of the full Assembly.

However, I believe the prospects are very favourable for clarity to carry the day in the final language of the new constitution. The "plain language style" of the working draft was the second major story covered in the Assembly's tabloid-style publication Constitution Talk, which reported that

> **the ... Assembly has committed itself to making the document as accessible as possible.**

The executive director of the Assembly is quoted as saying:

> **When the final constitution is adopted ... it will be one that people can get to know, to understand and to use. They will be able to relate to it. It will be truly owned by the people of South Africa.**

(Editor's note: I have just heard, as we go to press, that the Assembly has called Ailsa into the project as a plain language consultant.)

Human Rights Commission Act

The Bill of Rights provisions of the 1993 interim constitution (considered in the last section) establish the legal basis for courts to review legislation, regulations, policy, and other state actions. They are not to be confused with the Human Rights Commission Act. There is a very limited overlap between the two documents, inasmuch as the HR Commission has power to investigate violations of basic human rights guaranteed in the constitution. "Basic human rights" are a limited sub-set of all the matters addressed in the Bill of Rights.

The Ministry of Justice received the redrafted Human Rights Commission Act offered as a prototype by CLARITY members (see *Clarity* 33 page 10), and will circulate it through government and the legal profession as a discussion document. They hope this process will elicit sufficient comment that they will be able to work from that towards creating a modern set of protocols for legislative drafting in South Africa.

Meanwhile, financially supported by PEC, and with the moral support and cooperation of the Ministry of Justice, I designed, and conducted in Cape Town, a useability/ comprehension study comparing the two versions of the Human Rights Commission Act. I expect PEC will publish the report of that study early in 1996, and that the results will be used by South Africa in establishing their drafting protocols.

Constitutional Assembly

The Constitutional Assembly administra-

tion office consulted with me as they prepared a consolidated first draft of the new constitution now being published for public discussion. They also arranged for me to make a formal presentation in September to the central committee of the Constitutional Assembly, at which I was able to outline to the politicians the importance and some key principles of clear and effective drafting. That committee has instructed the administration that the new Constitution must be written as clearly and simply as possible. At the time of writing this note, the administration is considering proposals to test the draft text of the constitution with ordinary citizens in time to use the results in preparing the final text early in 1996.

Labour Relations Act

The Ministry of Labour consulted with me through July and August, as their drafting team developed the new Labour Relations Act. This Bill, one of the major pieces of economic legislation under the new administration, had been requested by Cabinet in July 1994, with 13 specific stated objectives. The first 3 objectives were to give effect to government policy, to give effect to international legal obligations, and to comply with the Constitution. The fourth was:

> **The Labour Relations Bill is to be simple and, wherever possible, written in language that the users of the legislation, namely workers and employers, can understand, and provide procedures that workers and employers are able to use themselves.**

The Ministers of Labour and Justice reaffirmed that mandate during the drafting process whenever serious objections were raised about the novel drafting style. It was wonderful to enjoy that level of consistent support, and to have a free hand to be creative in developing solutions to the difficult communications problems that inevitably arise in drafting a complex legal document of this scale. The 350-page Bill, as passed by Parliament in September, features these innovations in the interest of enhanced clarity -

Labour Relations Bill

Before

The governing body, in the name of the Commission, shall open and maintain with a bank registered as such in the Republic or with any other financial institution so registered and approved by the Minister of Finance, an account, in which there shall be deposited, subject to the provisions of section 125, the monies received by the Commission as contemplated in section 123 and from which payments for it or on its behalf shall be made.

After

The governing body must open and maintain an account in the name of the Commission with a bank registered in the Republic, or with another registered financial institution approved by the Minister, and subject to section 125, must -

(a) deposit to that account any money that the Commission receives; and

(b) withdraw from that account any money that the Commission pays.

* A Table of Contents, complete with page number references.
* Running page headers, showing chapter titles and the opening section number for each page.
* A hierarchical indentation system setting out each level of text, so that section, subsection and paragraph numbers are clearly and easily visible.
* Every word that has been defined in the Act printed in italics whereverever it appears in the text, so readers are alerted to the fact that it has been specially defined.
* A grey band printed down the outside edge of the pages on which the definitions section is printed, so users can find that section easily by glancing at the outside edge of the book.
* Several schedules which contain supplementary information presented in the form of guidelines, flowcharts, tables, or codes, as necessary to improve effective communication.
* "Gender free" language, as the Act applies to all citizens equally. Nouns carefully chosen to avoid any inference of a male (or female) generic. Sentences carefully crafted to avoid the use of singular personal pronouns.
* Sentences written in a "subject - verb - object" order (with a few exceptions).
* Careful organisation of the material (in

the whole Act, within each chapter, and within each section) to provide a logical flow of information, introducing most important matters first, and referring to familiar concepts before introducing new ones. Similar matters clustered together as much as possible. Cross references avoided as much as possible.

* Words carefully selected. Latin was replaced with English equlivelents; *shall*, used to mean at least 5 different ideas in previous South African law, was replaced completely with either *must*, *may*, *may not*, or a form of the verb *to be;* conditional were consistently introduced with either *if* (for conditions whose occurrence at all is uncertain), or *when* (for conditions that will occur, but whose timing is uncertain); nominalizations avoided; *which* used to introduce descriptive clauses, *that* used to introduce restrictive clauses (although this conforms to most usage guides, it was a radical shift for South Africa, where all legislation over the past 20 years has used *which* for both purposes).

The excessive leaden wordiness, so typical of much legislation in the English speaking world, was edited out. The inset below shows an example of one subsection, before and after editing.

These projects are important steps forward in bringing clarity to the law. When one considers the vast range of matters demanding the attention of the new government in South Africa, it is all the more encouraging to see their sustained commitment to clarity, and to be able to participate with them in this work.

In Trafalgar House Construction (Regions) Ltd v. General Surety and Guarantee Company (1994 66 BLR 42) all three Court of Appeal judges criticised the archaic and ambiguous wording of a routinely worded performance bond. I hope to report this and a related decision in more detail in the next issue.

An insurer wrote to a claimant

We must advise that unfortunately our enquiries regarding the circumstances surrounding this incident are genuinely proceeding at present

sent in by Anthony Rich

Pitching plain language to the American Bar Association

As reported in the last two issues, the American Bar Association had a plain language program at its annual meeting last August in Chicago. The program was sponsored by the Committee on Communication Skills and organized by Professor Joseph Kimble of Thomas Cooley Law School, Lansing, Michigan.

The materials that follow are from the handout that he prepared for the program. (The handout also included a list of case studies to demonstrate the cost benefits of plain language.) Several hundred copies were distributed during the meeting.

Myths and realities about plain language

Myth

Plain language means baby talk or street talk. It's not "literary."

Reality

Plain language has to do with clear and effective communication — the language that good writers use when they are determined to be understood. What's more, plain language has a long literary tradition. It is the style of Abraham Lincoln, and Mark Twain, and Justice Holmes, and George Orwell, and Winston Churchill, and E.B. White.

If anything is antiliterary, drab, and ugly, it is traditional legal writing. Professor John Lindsey says that law books are "the largest body of poorly written literature ever created by the human race."

Myth

Plain language is only concerned with getting rid of archaic terms like *hereby* and *aforesaid.*

Reality

Plain language is concerned with all the techniques for clear communication — dozens of them. These techniques and guidelines are flexible and varied. They range over planning, design, organization, sentences, words, and testing.

Getting rid of archaic terms is only a liberating first step.

Myth

Plain language is not as accurate or precise as traditional legal style.

Reality

In many demonstration projects worldwide, statutes and contracts have been redrafted into plain language with no loss of precision. Just one example: The Law Reform Commission of Victoria rewrote Victoria's complex *Takeovers Code.* They cut it by almost half. The redraft was checked and rechecked for accuracy by substantive experts. And in testing, lawyers and law students took between a half and a third of the mean time to comprehend the new plain-language version of the statute.

So plain language is not normally at odds with precision. In fact, clarity and precision are most often complementary goals. Clear, plain writing lays bare the ambiguities and uncertainties and conflicts that traditional style tends to hide. At the same time, the process of revising into plain language will often reveal all kinds of unnecessary detail.

The notion that traditional legal writing is precise is a dubious assumption to begin with. As Professor David Mellinkoff showed in *The Language of the Law*, the law has only a "nubbin of precision."

Myth

Judges and clients expect and prefer traditional legal style.

Reality

In a study that was carried out in four states, almost 1,500 judges and lawyers were invited to choose between the A or B version of six different paragraphs. One choice was written in plain language and the other one in traditional style. In all four states, the judges and lawyers preferred the plain-language versions by margins running from 80% to 86%.

Similarly, in California, ten appellate judges and their research attorneys, reading passages

from appellate briefs, rated the passages written in legalese as "substantively weaker and less persuasive than the plain English versions." And the readers inferred that the attorneys who wrote in legalese came from less prestigious firms than those who wrote in plain English.

As for clients, a survey conducted for the State Bar of California found that 90% of the public said there is a need for simpler legal documents. In another public survey, for the Plain Language Institute in Vancouver, British Columbia, 57% said that legal documents are poorly written and hard to read; and 33% said that lawyers do not even try to communicate with the average person.

If some clients expect legalese, it's because they have been conditioned to think that legal documents have to be that way. Increasingly, clients are learning that it's not true.

Myth

Plain language is impossible because lawyers have to use terms of art.

Reality

Real terms of art are a tiny part of any legal document — less than 3% in one study. The rest can be written in plain language. And even technical terms can often be translated into plain language at the cost of some extra words.

References

Robert W. Benson
The End of Legalese: The Game is Over, 13 N.Y.U. Rev. L. & Soc. Change 519, 559-67 (1984-85).

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A Dictionary of Modern Legal Usage 661-65 (2d ed. 1995); *The Elements of Legal Style* 7-15 (1991).

Joseph Kimble
Plain English: A Charter for Clear Writing, 9 T.M. Cooley L. Rev. 1, 11-27 (1992); *Answering the Critics of Plain Language*, 5 Scribes J. Legal Writing (1994-1995).

Law Reform Commission of Victoria
Plain English and the Law 45-62 (1987; repr. 1990).

What the ABA has said about legal writing

Given the central importance of effective writing to a wide range of lawyer work, the Task Force believes that too few students receive rigorous training and experience in legal writing during their three years of law study. . . . [M]any students, probably most students, receive very little opportunity to write with close supervision and critique as a continuing part of their law school experience.

Section of Legal Education and Admissions to the Bar
Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools 15 (1979).

Legal writing is at the heart of law practice, so it is especially vital that legal writing skills be developed and nurtured through carefully supervised instruction.

Council of the Section of Legal Education and Admissions to the Bar
Long-Range Planning for Legal Education in the United States 29 (1987).

One theme that arose with regularity at the Just Solutions conference was language. In its simplest form, it found its expression in questions such as 'Why can't lawyers speak and write in simple declarative sentences?' Again and again, public delegates spoke of widespread public failure to understand the courts, the strange language that is spoken there, and the law's mysterious processes. . . .

[C]omprehensible legal language is not just a positive public relations effort, not merely helpful to counter negative public opinion about lawyers and the law, but actually confers a competitive advantage on the practitioners who use it. A just solution would be the creation of plain English committees in every state bar association and charging them with rooting out unneeded legalese wherever it occurs.

Stephen P. Johnson
Report on the American Bar Association's "Just Solutions" Conference and Initiative, Just Solutions: Seeking Innovation and Change in the American Justice System 35 (1994).

Finally, the American Bar Foundation carried out a large survey of practicing lawyers. They asked these lawyers what skills are the most important — from a list of about 17 different skills. At the top of the list, in a class by themselves, were oral communication and written communication.

Bryant G. Garth and Joanne Martin
Law Schools and the Construction of Competence, 43 J. Legal Educ. 469, 473, 477 (1993).

Outline of a serious law-school legal-writing program

- It should be taught primarily by full-time professionals who teach writing full-time and who have long-term job security or at least multi-year contracts.
- It should include all three years of law school, with six or eight required credit hours plus electives.
- It should include several rounds of feedback in each course, the more individualized the better.
- It should make use of adjunct or student assistants, closely supervised, to help give some of the feedback in classes of over 30.
- It should build on the same writing principles and models throughout the courses, and even the non-writing faculty should be made aware of those principles.
- It should include all forms of legal writing — memorandums, briefs, litigation documents, and the form that we now call drafting (statutes, contracts, wills).
- It should work assignments into some of the non-writing courses.
- It should provide remedial help for students who need it.
- It should include a course in advanced research, at least as an elective.

Joseph Kimble
Plain English: A Charter for Clear Writing, 9 T.M. Cooley L. Rev. 1, 7 (1992).

What the legal-writing teachers say

At the 1992 Con*ference of the Legal Writing Institute*, which has about 1,800 members worldwide, the participants adopted the following resolution:

1. The way lawyers write has been a source of complaint about lawyers for more than four centuries.
2. The language used by lawyers should agree with the common speech, unless there are reasons for a difference.
3. Legalese is unnecessary and no more precise than plain language.
4. Plain language is an important part of good legal writing.
5. Plain language means language that is clear and readily understandable to the intended readers.
6. To encourage the use of plain language, the Legal Writing Institute should try to identify members who would be willing to work with their bar associations to establish plain language committees like those in Michigan and Texas.

What Can Be Done After Law School?

- Programs of continuing legal education. See Bryan A. Garner, *Planning an in-house writing workshop? Reflections from a veteran* CLE Instructor, Lawyer Hiring and Training Report (Prentice-Hall Law & Business), June 1993, at 4.
- In-house editors at larger firms. See C. Edward Good, *The writer-in-residence: a new solution to an old problem*, 74 Mich. B.J. 568 (1995).
- In-house training programs for new associates.
- Activities within national, state, and local bar associations. Three states — Michigan, Texas, and Missouri — now have Plain English Committees.
- Other organizations devoted to legal writing and plain language. If you have published a book or two articles or published a judicial opinion in an official reporter, you should join SCRIBES. For an application form, write to SCRIBES, School of Law, Box 7206, Wake Forest University, Winston-Salem, NC 27109. And everyone should join CLARITY....
- Most of all, a willingness to learn new things and to change. Law schools are changing. See *Combating legalese: law schools are finally learning that good English makes good sense*, U.S. News & World Report, Mar. 20, 1995, at 78. But will the profession allow these new lawyers to practice the clear style that law schools are trying to teach?

Heels over head

From the *Daily Telegraph,* about a boy who wants to be an Olympic skier:

Roderick has a very hard path to go down to get to the top.

Keeping it simple

A law firm marketing strategy

by

Thomas M. Clyde

A longer version of this article has appeared in several marketing publications in the United States

The Competitive Opportunity

One marketing opportunity that law firms pass up lies in today's arduous, overlong legal papers. Business executives have grown increasingly impatient with the length, complexity, and cost of legal documents, yet few law firms have moved to meet those concerns. A firm can gain a competitive advantage by streamlining its writing and making its papers more readable and cost- effective.

Heavy Going

By 3:30 in the morning the conference room had the usual stale and slightly desperate feel. Eight people, displaying varying levels of discontent, were sitting around the table. What was bringing us together for all of a summer night was a 60-plus page, single spaced draft of an agreement for the sale of one of my employer's subsidiaries. The buyer's law firm had prepared the draft, and now representatives of both sides were trying to stay awake, to negotiate in reasonably good faith, and to get to the next draft. A familiar scene in the course of a substantial business transaction.

Familiar also was the draft agreement over which we were toiling. In its length, its preordained organization, its taxing style and legalese, and its goal of exhaustive content, the draft was an immediately recognizable product of a sophisticated American law firm. It was standard fare for the transaction but a pretty difficult instrument of communication.

At 3:30 a.m. the hot topic was the level of materiality that should apply to the 14th of the 33 seller representations proposed by the buyer. Timeworn artillery exchanges over the representations droned on almost by rote. Since covenants and conditions followed the representations, we definitely had a long way to go.

It had become obvious that our little band was stuck there for the entire night, and at least one of us blamed the length and difficulty of the draft. Working through its tangled provisions was taking forever. Also, the continuous opportunities to disagree over details and remote contingencies - virtually all of them meaningless as a practical matter - seemed to be pushing the parties apart. Intruding repeatedly was the thought that a simpler, more direct piece would have been a contribution, rather than an obstacle, to reaching an overall agreement - and would have had us home in bed several hours before.

We were not even discussing important issues. Several remained open, but the business chiefs would not be taking those up again until normal hours. Instead, we were grinding away, line by line, on "technical matters". That meant we were arguing, suggesting, discussing the grammar and punctuation of, correcting, and conforming the details of the wording in every one of the draft agreement's knotty and intertwined provisions.

The session continued doggedly on until mid-morning, and further sessions followed. Over the next few days the parties resolved their differences and signed an agreement. That outcome somewhat offset the aggravation, at least temporarily.

But I came away with a sense that we had wasted a lot of time and energy. The conventional approach to drafting had seemingly prolonged - and even endangered - the negotiations. One measurable penalty had been the escalation of both sides' legal fees.

Further, we learned later that, in grinding through the endless language and detail, both sides had overlooked a significant, and subsequently troublesome, issue. We had missed a forest for the trees.

There had to be a better way to paper a deal.

Penalties of Complexity

The style, content and organization of legal papers have reflected what lawyers like to produce and, to an unfortunate extent, lawyers' own sense of self-importance. It is lawyers alone who have decided what legal

papers will contain and will look like, without much reference to their clients. Lawyers have just not had to be that concerned about the readability or efficiency of papers.

This approach has made documents more and more involved, exacting, and time-consuming. As a result, the client, even the well educated client, has found business legal papers increasingly difficult to grapple with.

This trend has ignored clients' anxieties over the increasing costs of legal services. Clients are concerned as well that, since length and complexity interfere with communication, overdone legal papers can delay, and even pose risks to, transactions.

Intricate documentation confuses - sometimes even misleads - the client. Even the sophisticated client can have difficulty understanding from the documents where the transaction stands and whether the client's priorities (sometimes poorly communicated) are getting the right attention. Needless length and complexity inhibit the client's participation.

Elaborate, overdetailed papers can lead lawyers and clients to miss or mishandle key points. Absorption with details and technical points can reduce the alertness needed for the important issues. Shorter, simpler, and clearer papers keep the focus on important items and help to prevent mistakes.

Conventional documents can also delay transactions. Unnecessarily complex papers draw out negotiating and closing processes. It takes longer to work through and resolve the intricacies of conventional documentation than to deal with simpler, more coherent papers.

Confusion, extended negotiations, and delayed closings all translate directly into higher legal fees for the client. The process of working through the detail and technicalities of conventional agreements and papers is an expensive one for the client, and corporations and businesses have come to realize it.

Length and complexity also contribute to misunderstandings after signing. Confusing, artificially organized, hard-to-read provisions are ripe for later challenge and dispute. This damages the relationship between trading partners and involves them in another, avoidable, round of heavy legal fees.

Finally, traditional drafting sustains the corrosive notions that the law is a mystery and the legal profession its remote priesthood.

A client-based approach

A client-based strategy for drafting can respond to the concerns of business, attract new clients, and expand a firm's legal work and billings.

Law firms have until now not competed with each other on the basis of the style, clarity, or readability of their business papers. American firms do compete hotly to be "better", "more effective", "more responsive", or "tougher" in providing advice and negotiating support. But, with a few comparatively recent exceptions, the documents look pretty much the same from firm to firm.

This sameness provides an opening to break away from the pack. A firm can adopt a client-oriented strategy of simplicity and clarity for its paperwork and publicize that new approach to its clients and prospects. In promoting the new strategy, the firm might emphasize several themes:

- Its documents will be in plain English - clear, concise, and hard-hitting.
- It tries to operate so that a reasonably well-educated person can easily understand its services and assess their value.
- This will save the client time, effort, anxiety, and money. Through its commitment the firm intends to provide more effective services and better results at less cost.

The firm would communicate the new approach both to clients and prospects and to the firm's own people. The object is to to build into the firm's culture and reputation a mandate for clear and concise communication. That effort will soon distinguish the firm from its competitors, strengthen the regard of clients and prospects, and be a source of pride for those who work there.

A firm might want to combine this strategy with a "value" approach to billing. Clearer communication will help a client to understand the value of the firm's services and to assess the fairness of its bills.

A firm can of course introduce the new approach in stages - as cautiously as it wishes - or even just as an experiment. The firm may feel that certain forms or papers are more

susceptible than others to simplification efforts. Further, the new approach may be more effective with certain clients and propects than with others. For example, many foreign clients would almost certainly welcome simpler and clearer papers.

Examples

Awful

No Conflict with Other Instruments. The execution, delivery and performance of this Agreement does not and will not (a) conflict with the certificate or articles of incorporation or byelaws of the Seller, (b) result in a breach of the terms, conditions or provisions of, or constitute a default (or an event which with notice or lapse of time or both would become a default) under, or terminate or give rise to a right to terminate or bring into operation any penalty or price escalation provision of, any indenture, mortgage, lease, license, contract, agreement or other instrument to which the Seller is a party or by which the Seller may be bound or affected, or (c) violate any law, regulation, order or decree of any government body or authority to which the Seller is subject or by which the Seller may be bound or affected.

Clear

This agreement will not conflict with any other duty of the seller.

Awful

No-Shop. From the date hereof through the Closing, the Seller shall not, directly or in-directly, (a) solicit, initiate, encourage or approve, or discuss or participate in negotiations or discussions with respect to any inquiries or proposals for, a merger or other business combination involving the Company or for the acquisition of a substantial equity interest in, or a substantial portion of the assets of, the Company (any of the foregoing being an "Acquisition Proposal"), (b) agree or agree in principle to any Acquisition Proposal, or (c) except for disclosures required to be made in accordance with any law, regulation or order of a court or regulatory agency of competent jurisdiction, or any rule of a stock exchange, disclose any information not customarily disclosed to the public concerning the business and properties of the Company or afford to any other person (except the Purchaser and its officers, employees, counsel, accountants and other authorized representatives) access to the properties, books or records of the Company or otherwise assist any person preparing to make or who made an Acquisition Proposal. The Seller shall advise the Purchaser of the receipt of any unsolicited Acquisition Proposal and the details thereof within 24 hours of the receipt thereof.

Clear

No-Shop

(a) The seller will not:

  (1) Seek, discuss, or agree to any other proposal to transfer the company; or

  (2) Disclose to anyone other than the buyer any confidential information about the company.

(b) The seller will immediately inform the buyer of any other proposal the seller receives to transfer the company.

Awful

Multiple Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original for all purposes and all of which shall be, collectively, one agreement.

Clear

Who cares? Scrap this entirely.

A singular use of THEY

Extracts from a leaflet produced under the auspices of the Australian Attorney-General's Department as part of the Corporations Law Simplification Program

We are grateful to Robert Eagleson and his colleagues on the Task Force for allowing us to reprint this

The issue

In the First and draft Second Corporate Law Simplification Bills, **they** has been used to refer to an indefinite noun, rather than the traditional legal **he** or the cumbersome **he or she**. Proposed new subsection 242(5) in Schedule 6 of the First Bill, for instance, reads:

> **A person is entitled to have an alternative address included in notices under subsections (1), (2) and (8) if:**
>
> **(a) their name, but not their address, is on an electoral roll ...**

This paper sets out the reasons for this decision.

What the dictionaries say

The 3 great unabridged dictionaries of the English language are the *Oxford English Dictionary* (Clarendon Press : 1989), *Webster's Third New International Dictionary* (Merriam-Webster : 1986), and the *Dictionary of the English Language* (Random House: 1987). Here are extracts from their entries for **they, them, themselves** and **their.**

Oxford **they**

2. Often used in reference to a singular noun made universal by *every, any, no*, etc., or applicable to one of either sex (='he or she').

1759 CHESTERF.Lett.IV.cclv.170 If a person is born of a .. gloomy temper .. they cannot help it

their

3. Often used in relation to a singular sb. or pronoun denoting a person, after *each, every, either, neither, no one, every one*, etc. Also so used instead of 'his or her', when the gender is inclusive or uncertain ... (Not favoured by grammarians.)

Webster's third

they

1b: he or she : ... - used with an indefinite singular antecedent <everyone tries to make the person they love just like themselves - H.D. Skidmore> ... <the liability for damages lies against whoever is knowingly involved in such sale whether or not they receive any part of the consideration - U.S. Code >

themselves

3: HIMSELF, HERSELF - used with a singular antecedent that is indefinite or that does not specify gender < nobody can call themselves oppressed - Leonard Wibberley >

Random House

they

3: (used with an indefinite singular antecedent in place of the definite masculine *he* or the definite feminine *she*) : *Whoever is of voting age whether they are interested in politics or not, should vote.*

- Usage. Long before the use of generic HE was condemned as sexist, the pronouns, THEY, and THEM were used in educated speech and in all but the most formal writing to refer to indefinite pronouns and to singular nouns of general personal reference probably because such nouns are often not felt to be exclusively singular. Such use is not a recent development, nor is it a mark of ignorance.

It isn't new

The entries from the *Oxford English Dictionary* forcibly demonstrate that the use of **they** to refer to a singular noun is not an innovation of recent decades or even of this century. The first citation in the Dictionary's files is from the 14th century so that we know that the practice had been adopted in writing

at least by then. There may have been much earlier examples which have been lost and the practice may well have been established in speech before it found its way into writing.

In adopting **they** with singular reference we are simply following a long established convention of the English language.

Furthermore, as our illustrations from literature on this page demonstrate, the usage has enjoyed continued strong support down the centuries. Even those who are universally regarded as among the finest composers of our language can be found using **they** with singular antecedents and as far back as 1926, H W Fowler declared in *Modern English Usage* that *as anybody can see for themselves* was the 'popular solution' (pp 391-392).

Equally significant, the editors of the *Oxford English Dictionary* prepared the entries for the letter *t* between 1909 and 1915. In other words, lexicographers have been recognising this use of *they* as normal standard practice - despite what some grammarians say - all this century.

How popular is *they*?

Up to the 1960s at least English teachers conducted campaigns against the use of **they** in such contexts as: *Everyone has their off days.*

In 1974 Robert Eagleson conducted a series of usage tests in Sydney to see how much support remained for **he** in a universal or indefinite context and how effective the efforts of teachers had been ('Anyone for his' in *Working Papers in Language and Linguistics* (1976) 4: 31-45). One area investigated was the use of pronouns in the environment of question tags, for example:

Somebody showed her the way, didn't ... ?

In tests in which 95 informants had to write their answers, 87% favoured **they**. In 2 items in the test, of the 190 potential occurrences, 168 were **they**, 7 were **he** or **she**, 1 was **one**, and 1 was an aberrant **we**. Very much to the point, most of the answers with **he**, **she**, or **one** were produced by graduate teachers or lecturers of English. Even so, there was regular support for **he** only among 20% of the English teachers: 80% of the teachers never used **he** or **she**.

These findings have been confirmed by a recent survey conducted by the Dictionary

Literary examples

Now leaden slumber with life's strength doth fight,
And every one to rest themselves betake.
William Shakespeare

So likewise shall my heavenly Father do also unto you, if ye from your hearts forgive not everyone his brother their trespasses.
The Bible (King James Version)

God send everyone their heart's desire.
William Shakespeare

Little did I think ... to make a ... complaint against a person very dear to you, but don't let them be so proud ... not to care how they affront everybody else.
Samuel Richardson

Everybody fell a laughing, as how could they help it.
Henry Fielding

A person can't help their birth.
William Thackeray

But how can you talk with a person if they always say the same thing.
Lewis Carroll

Some people say that if you are very fond of a person you always think them handsome.
Henry Jones

I know when I like a person directly I see them.
Virginia Woolf

Everyone was absorbed in their own business.
Andrew Motion

'There's a bus waiting outside the terminal to take everybody to their hotels', said Linda.
David Lodge

Nobody would ever marry if they thought it over.
George Bernard Shaw

You just ask anybody for Gordon Skerrett and they'll point him out to you.
Scott Fitzgerald

His own family were occupied, each with their particular guest.
Evelyn Waugh

Research Centre at Macquarie University (*Australian Style* (December 1994) 3:1: 13-14). Again, the use of **they** with **everyone** and **anyone** was strongly preferred overall, and with the under 25 age group reached 98%. However, older participants, especially those in the 65+ group, were less supportive, perhaps still feeling the chastisements of school lessons. The results are unmistakeable, however: there is a widespread acceptance of **they**.

Both studies concentrated on single sentences, for instance, *A doctor has a responsibility of care to ... patients.* Higher scores in favour of **they** might well have been obtained if participants had been confronted with several consecutive sentences, such as:

> If a person was asked to define a *zebra*, **he or she** could do this quite efficiently without calling up a whole 'zoo' or 'safari' frame. But if **he or she** overheard someone talking about a zebra seen in London earlier in the day, then **he or she** could go deeper into **his or her** memory, and call up a zoo frame, which would allow **him or her** to fit the narrative into a predicted set-up.

We may be prepared to accept a sole use of **he or she** but in a string of sentences it becomes far too cumbersome and **they** is the happier solution. (**They** was actually used by the author of these sentences, Jean Aitchison, Professor of Language and Communication, Oxford University.)

That we are not exaggerating the continued - and increasing - use of **they** is evidenced by the range of examples in these pages. They all come from written - not speech - texts and from a wide variety of sources.

A miscellany

Literary critic
It is therefore the fist duty of any teacher of literature to give their pupils a chance of enjoying it. *The Times*

Political commentator
... further amendments which will outlaw discrimination against a person because of the identity of their husband or wife.
The Australian

Education commentator
A mission statement that is sufficiently bland to encompass everyone's conception of their role. *Daedalus*

University
This certificate lists the four courses for which the student was registered, showing both grade assessments of their work over the year and grades for their examination performance. *University of London*

If somebody earns $40 000 a year we would expect them to pay for their course.
a Vice-Chancellor

Linguist
To turn to badness, someone bad commits anti-social actions, is aware that their actions are anti-social and could control their behaviour if they wished. *Words in the Mind*

Critic
The poem exists if everyone who finds it finds themselves in it. *The Listener*

Financial - legal

Prospectus
If a licensed financial adviser in Australia or a registered broker in New Zealand introduces you to the trust we can pay them commission.

Financial planning brochure
For example, to set up a protective trust for a child who may not be able to look after their own affairs.

Bank technical bulletin
Currently the concessional component of an ETP can be made up of the following:
- payments made to an employee as a consequence of physical or mental incapacity that renders them unable to fulfil their particular employment.

Bank guarantee and indemnity
Each guarantor is liable for all the obligations under this guarantee and indemnity both separately on their own and jointly with any one or more other persons named as "Guarantor".

Notice
Intel will exchange the current version of the processor for an updated version for any owner who requests it, free of charge anytime during the life of their computer

Advertisement
We are looking for a young man or woman in their mid-twenties to join our Salary Administration Department.

It has happened before

In earlier centuries English had a regular system of pronouns which distinguished between singular and plural:

Person	Singular	Plural
First	I	we
Second	thou	ye (you)
Third	he, she, it	they

Gradually through the late Middle Ages **you** came to supplant **thou** and by the end of the 17th century held virtual sway as the pronoun for the second person. It has continued now as the sole form for singular and the plural for 3 centuries.

It is critical to remember this episode in the linguistic history of English. It illustrates that the language can - and does - change without a collapse in successful communication.

Again, English speakers have demonstrated by their usage that they are not disturbed by using the one pronoun in both a singular and a plural sense. Indeed, some speakers who boast a knowledge of grammar - including those who now oppose a singular use of **they** - soundly condemn other members of the community who want to introduce a distinctive plural form **yous** to escape the potential ambiguity! If **they** as a singular is wrong, ungrammatical or whatever, so also is **you** as a singular on this score.

... and in legislation

The Task Force cannot claim to be innovators in taking this decision on **they**. It has occurred as a singular before in legislation, as this example from section 9 of the Nurses (Amendment) Act 1985 (Victoria) establishes:

> **(10) The Council may charge the fee (if any) prescribed by the Governor in Council for -**
>
> ...
>
> **(b) the provision of a copy of any roll or a part of a copy of any roll to a person for their own use.**

Does it work?

If we would listen to ourselves and reread our writings, we would realise that **they** serves us most successfully without causing any confusion. All of us say: *If anyone calls, tell them I'll be back at 4 o'clock* and write: *No-one in their right mind would do that.*

We use **they** often without qualm or disquiet. Indeed, it comes out so naturally that we are scarcely aware of our practice. And we are never misunderstood or misinterpreted.

An area for caution

There are some situations in which the use of **they** could lead to ambiguity, for example:

> **Where an applicant notifies the other residents, [?] must lodge a section 12 notice within 14 days.**

To insert **they** in the blank here would not work if we want it to refer unequivocally to **an applicant**. Readers could quite legitimately - and most probably would - interpret **they** in this sentence as referring to **the other residents.**

The answer

Two observations are in order.

First, the number of times sentences with this potential ambiguity actually arise in legislation and legal documents is relatively rare. We should not allow exceptions to frustrate us from using a valuable device and force us into a cumbersome one.

Rather than using **they**, we should reconstruct the original sentence to remove the potential ambiguity or, for this rare occasion, use another device, such as repeating **applicant** or **resident**.

Secondly, to offer this solution is not to resort to a ruse in order to avoid a difficulty for our proposal. If we were to allow the possibility of ambiguity to dominate, then we would have to eliminate many valuable resources from the language. Even the singular pronouns would have to be abandoned for they too can be ambiguous. For example:

> **The matron told the nurse that she was ill.**

To whom does she refer to: the matron or the nurse? Nor will replacing **she** with a noun help here:

> **The matron told the nurse that the matron was ill.**

The second **matron** would be interpreted as referring to a different person and not the first matron. A similar interpretation would follow if we substitute **nurse**. To resolve this problem, we have to reframe the sentence.

Examples like this do not mean that we should abolish third person singular pronouns just because they fail us and produce ambiguity in these situations. The instances are too small for this drastic remedy. What these examples confirm instead is the principle that writers are always responsible for what they

write and cannot follow rules of language mindlessly.

Just because the rules of grammar say that we may substitute pronouns for nouns does not mean that we should always do so. So it is with **they**. Writers may - and should - use it in the contexts we recommend because it produces a smoother, less cumbersome text, but writers need to exercise care with it as with every other item of language to avoid any ambiguity or trace of confusion.

Used judiciously, **they** as a singular is effective. Because it is the established practice of the community, it enables us to offer legislation in a language form that is familiar and obviously congenial to the community, yet clear in meaning.

Making legislation more accessible through

Layout

From the Corporations Law Simplication Program, New South Wales
Reprinted by kind permission of Robert Eagleson

There are occasions when we read an Act from beginning to end, but most times we consult only a particular section. This means that our use of Acts is more like our approach to reference works such as dictionaries and encyclopedias, which we consult constantly in a piecemeal fashion.

In these circumstances, users need to be able to find sections without trouble. Having found the section, they also need some indication of the context in which the section operates. They can - as they have to do at present - skim back through the preceding pages to find the Division or Part, or they can refer to the contents pages to find this contextual information. But all this activity distracts them from the task in hand.

Layout through the use of running headers and footers can give readers immediate reliefa and, if judiciously treated, without overshadowing the text. As a result, the top of each page of the First Corporate Law Simplification Bill contains the number and title of the chapter, part and division to which a section belongs. In addition, the first and last section numbers appear in larger type on each 2 pages. The section title is not given. Readers will be more frequently looking for a section number so it is better if the top of the page is left uncluttered. As well, readers can quickly find the title simply by glancing down the page.

The name of the Bill and a page number appear at the bottom of each page.

Once readers have located the correct page, layout can give them further assistance in comprehending the material. Systematic indenting of subsections and paragraphs within sections enables readers to recognise at a glance the hierarchies in the structure of the information. Liberal and differential spacing between the various elements also contributes to this by highlighting the different layers of structure. At the same time, generous spacing gives an open uncluttered appearance to the page and the text becomes easier to read.

Section numbers have been moved up alongside the section headings. This has the effect of tying the heading more closely to the text and increasing the cohesion of the material. It also allows the section number to stand out more clearly. Section and subsection numbers are also printed in the same distinctive left hand column so that these numbers can be easily identified.

The design innovations in the First Corporate Law Simplification Bill are experimental. During our testing program, we showed different versions to readers and the features adopted had wide acceptance. They contribute to a larger investigation on the layout of legislation now being undertaken in the Commonwealth [of Australia] and New South Wales Parliamentary Counsel Offices and the Taxation Law Improvement Project.

The objective behind these developments is to increase the comprehensibility and readability of legislation. Design interplays with language and contributes to the message by highlighting the levels of structure in a text. This makes it easier for readers to find and to absorb the material.

Design features of the First Corporate Law Simplication Bill

Informative running header — number and title of chapter, part, division om 10pt bold — section number in 12pt bold

Part number and title highlighted by lines and larger type

Section number on same line as heading

Section and subsection numbers in left hand column for ease of finding — section number in bold

Notes in 9pt type

Text unjustified on right

Generous spacing between sections

Shorter line length for more efficient reading

Text indented to show structure

Subsection headings in light italics to differentiate from main headings

Running footer — page number, details of Bill

Part 2.5—Company registers

216A Registers to be maintained

(1) A company must set up and maintain:

(a) a register of members (see section 216B); and

(b) if the company grants options over unissued shares— a register of option holders and copies of option documents (see section 216C); and

(c) if the company issues debentures— a register of debenture holders (see section 216D).

Note 1: See also section 271 (register of charges) and section 702 (register of unclaimed property of dissenting shareholders).

Note 2: The registers may be kept on computer (see section 1306).

(2) *Extended reach of debenture concept*

For the purposes of this Part, documents that fall into one of the exceptions in paragraphs (a), (b), (c) and (f) of the definition of "debenture" in section 9 are treated as if they were debentures.

216B Registers to be maintained

(1) *General requirements*

The register of members must contain the following information about each member:

(a) the member's name and address

(b) the date on which the entry of the member's name in the register is made.

(2) *Index to register*

If the company has more than 50 members, the company must include in the register an up-to-date index of members' names. The index must be convenient to use and allow a member's entry in the register to be readily found. A separate index need not be included if the register itself is kept in a form that operates effectively as an index.

Drafting pleadings

This typical pleading was recently used in litigation.
On the following pages we look at it in detail and ask how it could be improved.

IN THE BRIGHTON COUNTY COURT **CASE NO.** BN 502575
IN THE MATTER OF SECTION 68 AND 70 OF THE SOLICITORS ACT 1974 AND IN THE MATTER OF EDWARD FOX SOLICITOR OF THE SUPREME COURT

BETWEEN

ARTHUR BRIAN CHARLES DAVIS AND DOREEN EVA DAVIS Applicants

and

EDWARD FOX PRACTISING AS GILLESPIE & HUGHES Respondent

Notes

by line number

1-11 The capitals in the heading are a relic from the typewriter days when they and underlining were the only way to make text stand out. Now most of us have a wide range of sizes and styles we may as well use them.

The first four lines are made quite unnecessarily hard on the eye, and intended highlighting lost, by the relentless, unspaced, bold capitals.

Moreover, the emphasis is haphazard. The unimportant "between" is given - by emboldening - greater prominence than the real heading "originating application" (l.11); "applicants" and "respondent", though not bold, are underlined.

1. Why do we always write "In the ... court"? In itself it doesn't matter, but it shows we write without thinking, which does matter.

But congratulations to the Lord Chancellor's Department for improving the numbering system (as well as many other aspects of the county court precedents). The old "plaint no" has been replaced by "case no", and the initial letters indicate the court. The number (and the letters of the court of origin) now follow the case if it is transferred to another court, avoiding the old confusion with proliferating numbers.

2-3. "In the matter of" means no more than that what follows is the heading, and it is made redundant by adequate typography.

In any case, it is inappropriate in line 2. A section of a statute is hardly a "matter", and certainly not "*the* matter", but if it was two sections would presumably be "matters".

Nor does there seem any point in repeating these words in line 3.

There should be a comma after "Fox".

"Of the Supreme Court" seems unnecessarily pompous. In this jurisdiction "solicitor" would not be confused with anything else.

6. Is it necessary to use middle names?

6-10. The centring of the names does not balance with the right-justified description of the partes.

ORIGINATING APPLICATION

WE ARTHUR BRIAN CHARLES DAVIS and **DOREEN EVA DAVIS** of 18 Arnison Road, Chesterfield and 39 Beauchamp Road, Hastings, East Sussex, BN1 9XY respectively the above named Applicants apply to the Court for an Order in the following terms:

1. That the bill of costs delivered by Edward Fox the above named Respondent to the above-named Applicants on the 4th May 1994 be referred to a District Judge to be taxed.

2. That the action commenced in Brighton County Court under Case Number BN 501746 be stayed pending the reference.

3. That the Respondent give credit for all monies received by him for or on behalf of the Applicants.

11. These tramlines are another remnant of typewriting days, and there is scope for more imaginative layout.

11-12. There is, illogically, less space between the heading and the text than between the individual paragraphs of the text.

12-13. "A of address 1 and B of address 2" is neater than "A and B of address 1 and address 2 respectively".

And the capitals are unnecessary.

13. If the county and postcode are necessary for the second address, why have they been omitted from the first?

14-16. "Above named" as opposed to which other applicants? They have already been defined as the applicants, and in any case the sense of this paragraph *makes* them the applicants, so this phrase is unnecessary. But if it is included it should be in parentheses (either by brackets or commas); and "above named" should be hyphenated.

"Applicants", "court", and "order" are all common nouns, which do not warrant an initial capital.

"Apply to the Court for an Order in the following terms" = "apply for an order that".

16-26. "That" does not fit as part of the order but has strayed from the introductory clause (which is why it is repeated at the beginning of each clause).

16-18. This clause is made more cumbersome by the passive construction.

17. "Be referred to a District Judge to be taxed" = (for all practical purposes) "be taxed".

The capitalisation of "district judge" and "court" is sometimes justified as deferential, but lower case is normal usage, not disrespectful.

19. The "commencement" of the other action is immaterial. The point is that the other action is in Brighton CC.

"Brighton County Court" = "this court".

The "Case Number" is hardly worth deference.

20. "Pending the reference" means "until the case is referred" (which would have been better expressed as "meanwhile"). But that is not long enough: the applicants meant "until after the taxation".

21. "Money" is just as plural as "monies", and more natural.

"On behalf of" adds nothing to "for".

23. "Such monies, if any, which" = "any money which".

23-24. The applicants did not mean "which ... appear to have been overpaid" but

4. That the Respondent refund such monies, if any, which on taxation appear to have been overpaid.

5. That the costs of the taxation be charged according to statutory provision.

6. That the Respondent do within seven days deliver up to the Applicants or as they direct the deeds and documents in their possession, custody or power belonging to the Applicants and, in particular, the deeds to Flat 8 and the basement 15 Wincanton Road, Horsham and First Floor, 83 Cedar Close.

"which the judge finds was overpaid".

21-24. It was common ground that nothing had been paid under the bill and that the respondent was not holding any money for the applicants, so paragraphs 3 and 4 were otiose.

25. This paragraph is also unnecessary, since the costs would necessarily follow the statute. (S.74 of the Solicitors Act 1974 provides that the solicitor must pay the costs of taxation if at least 20% is deducted from the bill, and the client if not.) If the paragraph was included as a reminder, it was little use without the Act and section.

26. The "do" is beloved of traditional order drafters, but unnecessary and pompous. Nor does "up" add anything. "That the solicitor deliver" is adequate.

But if "do" is used the verb phrase should not be broken up without reason: "do deliver within 7 days" is better. The nesting of phrases within phrases is one of the main techniques of pointless obfuscation.

"Deliver (up) to the Applicants or as they may direct" is unnecessarily convoluted. The applicants wanted their papers back, and could have said so.

27. Deeds are documents.

The "possession, custody or power" formula was copied from the standard order for discovery but was inappropriate here. The solicitor was exercising his lien over the clients' papers and there was no question of them being in his custody or power but not in his possession.

"The deeds belonging to the Applicants" = "the applicants' deeds".

28. What is the purpose of " and in particular"? There might have been some reason if this was a request in general terms, with a particular request as a fall-back provision if the judge thought the general terms too wide. But this is the wording of the order sought. It sounds as though the applicants meant that the respondent should be permitted to disobey the rest of the order so long as he returns the particular documents. If they meant that those were the only documents the respondent was to return, why precede the request with a line of unintended generality?

28-29. Neither flats nor first floors deserve capitals (any more than "basement" does).

"Of" has been omitted after "basement".

It would be better to repeat "to" before the Cedar Close address to signal that a separate address is about to be introduced. Otherwise the two "ands" momentarily indicate that the relationship between flat 8 and the basement is the same as that between the basement and the first floor.

29. Cedar Close, where?

30. This line could usefully have been highlighted as the heading to what follows.

31-36. It would be helpful to change the numbering system to avoid duplicating the clause numbers used in lines 16-29.

30. "On which the Applicants claim to be entitled to the Order" = "of this application".

31. "That" should govern both grounds, and should therefore be included in

30 The grounds on which the Applicants claim to be entitled to the Order are:

31 1. That the Respondent has done no work for the Applicants in respect of which he is
32 entitled to be paid and had wrongly retained the title deeds and other papers belong-
33 ing to the Applicants.

34 2. Despite requests so to do the Respondent has failed to provide the Applicants with
35 any or any adequate breakdown in respect of the work, the subject of the said bill of
36 costs.

37 The name and address of the person upon whom it is intended to serve this application is
38 Edward Fox of Gillespie & Hughes, Solicitors, 17 Manor Road, Cheltenham, Gloucester-
39 shire, BS8 7EX.

40 The Applicants address for service is High Commission House, Painsby Street, Baker-
41 field, Derbyshire, S80 2KX

42 Dated this 27th day of March 1995

.....

43 Grimm Reader
44 High Commission House Painsby Street Bakerfield Derbyshire S80 2KX

45 Solicitors for the Applicants

1.30. It has been wrongly omitted from 1.34.

"In respect of " = "for".

31-33. The hearing was adjourned, and the costs of the adjournment awarded against the applicants, because of the confusion of thought buried in this clause. The applicants' case was that the solicitor was contractually barred from charging them for the work, and taxation does not address that issue.

32-33. The second limb, about the retention of deeds, should have been included in a separate clause. It is relevant only to paragraph 6 of the proposed order. "Had wrongly retained" should be "has wrongly retained".

34. "So to do" = "to do so".

34-36. The respondent pointed out that the applicants' solicitors knew this clause was false (as he had given them a detailed breakdown of the work) and that it was therefore improper to plead it. The applicants' solicitor withdrew the allegation, excusing its original inclusion on the ground that "it was in the precedent". We are supposed to adapt pleadings to fit the facts, not vice versa.

35-36. "The subject of the said bill of costs" is mere verbiage.

37. "The name and address of the person upon whom it is intended to serve this application is" = "The applicants intend to serve this application on ..."

38. The respondent's occupation is not part of his address.

39-42. The spacing between lines 39 and 40 should be less, not more, than that between lines 41 and 42.

42. "Dated this 27th day of March 1995"= "27th March 1995". "This" as opposed to some other 27.3.95? And if we do not need to say that March is a month or 1995 a year, why do we have to spell out that the 27th is a day?

44. The repetition of the address is unnecessary, and the punctuation inconsistent.

In Brighton County Court Case No. BN 502575

In the matter of **Edward Fox,** solicitor

Between:

Arthur Davis and
Doreen Davis Applicants

and

Edward Fox, solicitor practising as Gillespie & Hughes Respondent

Originating application

under sections 68 and 70 of the Solicitors Act 1974

Arthur Davis of 18 Arnison Road, Chesterfield, Yorkshire SM5 6JK and Doreen Davis of 39 Beauchamp Road, Hastings, East Sussex, BN1 9XY apply for an order that:

1. The bill delivered by Edward Fox on 4th May 1994 be taxed.
2. The action brought against them by the respondent in this court under case number BN 501746 be stayed meanwhile.
3. The respondent within 7 days send those of the applicants' papers which he is holding to their solicitor.

The grounds of this application are that:

A. The respondent has failed to justify his costs.

B. The applicants on 1st February 1995 asked for the return of their papers, but the respondent has wrongly asserted a lien over them.

This application is to be served on:
Edward Fox, Gillespie & Hughes, 17 Manor Road, Cheltenham, Gloucestershire, BS8 7EX.

The applicants' address for service is c/o Trimm Scissors at the address below.

..... 27th March 1995
Grimm Reader
High Commission House, Painsby Street, Bakerfield, Derbyshire S80 2KX
Solicitors for the applicants

Note: I would have used my defence to action 501746 to deny liability for any fees, and counterclaimed there for the return of my papers on the basis of that denial, using the originating application only to seek taxation.

The "CLARITY" Interpretation Clauses 1996

by Richard Castle and Justin Nelson

Our Basic objectives

We received several helpful suggestions following publication of our first draft of the CLARITY Interpretation Clauses in issue 31 of this journal. Several of those suggestions have been incorporated in our revised draft, which appears below. Our fundamental aim has been to provide a means by which specific documents can be drafted more plainly and briefly, without repetition of interpretation provisions which are nowadays virtually universal. So we have adopted what might be called the "highest common factor" approach. Our objective is thus maximum acceptability but not necessarily maximum applicability. It follows that our last main clause, which relates to leases, is the most tricky and contentious and we will return to that clause a moment. We share many of Alison Plouviez's concerns about the use of gender-specific language and standard forms. But our clauses are merely a drafting tool; they are not promoting a cause.

Some specific provisions

In many instances, our clauses merely reflect what is already provided through section 61 of the Law of Property Act 1925: "month" means calendar month; "person" includes a corporation, singular includes the plural and masculine includes the feminine. In other cases, the clauses replicate what is imported to private documents by section 23 (1) of the Interpretation Act 1978: references to time of day, and citation of and references to Acts of Parliament. For other inspiration we looked to what documents now customarily say in their interpretation clauses: on the use of headings and references to plans, for example. Sometimes however (and perhaps most provocatively on service of documents) we used our own judgement and set out what we felt should be the professional norm.

What the clauses cannot do

Since the clauses are simply an aid to interpretation, they still require the draftsman to apply his mind to the particular task and to use appropriate language when he does. "If a pregnant woman qualifies, he may..." would be patently absurd. But "actor" and "author" are surely perfectly acceptable for both sexes (and moreover may be desirable for both sexes) and we have no objection ourselves to "testator" or "executor" where the individual concerned is a woman. We do not seek either to change a style or a word merely to appear politically correct. Hence we prefer "draftsman" to "drafter" but the choice is entirely personal and no one need go to the stake about it.

Our clause 1.1 ("words of one gender include all genders") will not by itself extend one gender to the others where that would be inappropriate: see for example *Chorlton v Lings* (1868 LR 4 CP 374). Nor does our clause 1.2 ("singular words include the plural and vice versa") mean that a power, discretion, duty or privilege apparently given to one person will always be available to him or binding on him even though the general law stipulates that two persons are called for: see for example *Wealex Properties v Brooks* (1966 1 QB 542). See also *Re Wuxbury's Settlement Trusts* (1995 1 WLR 425), a case about a sole trustee acting in a trust where no power was to "be exercisable at any time when there are less than two trustees". No mention of section 61 of the Law of Property Act 1925 appears to have been made at all.

Leases

We now return briefly to our clause 15 which deals with leases. Clearly this clause is not always applicable but we aim to make its provisions generally acceptable. We decided to leave out our earlier provision describing the demised property. Such a provision can never be universal. The draftsman should in every case consider the nature of the building, what is to be let, and the bargain between the parties. Currently, many leases show some alarming gaps and inconsistencies. The extent of the demised property and the obliga-

tions relating to repair are often unclear. In many tenancy agreements it will be wise to consider what constitutes a window, to take one important example. One of our correspondents pointed out the impracticality of a landlord being given responsibility for external decoration but not for the fabric of a window. Painting over rotten wood is not a good idea! In clauses 15.5 and 15.6 we have drawn a distinction between maintenance and repair. Clause 15.6 reproduces the principle set out in *Proudfoot v Hart* (1890 25 QBD 42 at 50 - Lord Esher MR).

Repair is a notoriously tricky area, and in all probability no draftsman can hope to cope with all eventualities particularly when the length of the term is longer than the life of the building could ever be. On this topic we merely draw attention here to *Credit Suisse v Beegas Nominees* (1994 11 EG 151) where in a lengthy judgement Lindsay J. differentiated between an obligation to repair and an obligation to keep in a particular condition.

We were tempted to define structure, but on reflection declined. In *Irvine v Moran* (1991 1 EGLR 261) Mr Recorder Thayne Forbes QC said that the structure of a dwelling consists of those elements of the overall dwelling which gives it its essential appearance, stability and shape. Thus he found that the internal wall plaster and door furniture were not part of the structure, but external windows (including sashes, cords, frames and furniture) and doors were. Yet in *Staves v Leeds City Council* (1990 23 HLR 107) it was accepted without argument that internal plaster was part of the structure. In any event, a clear distinction must be drawn (as it was in *Irvine v Moran*) between the structure of a building and parts of it which are structural. Brick infill in a steel frame building is not structural but it is surely part of the structure.

If we had attempted a definition it would have read along these lines:

"The structure" means all parts of the building except its internal surface finishes.

Conclusion

The CLARITY Interpretation Clauses can be adopted piecemeal or as a whole. They can always be amended. Where they do not fit the circumstances, they should be amended. To be used, they must appeal to the profession. Accordingly they have to be attractive to draftsmen who are not CLARITY members and even to those who are not particularly committed to the use of plain English. If the style, the content or the language of the clauses alienate the majority of the profession they will not be taken up and we will have produced something which has to all intents and purposes failed. We commend the CLARITY Interpretation Clauses, and welcome further constructive criticism and comment from any quarter.

CLARITY Interpretation Clauses 1996

An instrument which incorporates these clauses must be interpreted in accordance with them, except as far as the instrument indicates otherwise.

In any conflict between the provisions of the instrument and these clauses, the provisions of the instrument prevail.

Each clause incorporates the provisions of all the others.

1 Gender and number

1.1 Words of one gender include all genders.

1.2 Singular words include the plural and vice versa.

2 Persons

"Person" includes a body of persons, whether corporate or incorporate.

3 Office holders

A reference to an office holder is a reference to the holder of that office (or their deputy) at the relevant time.

4 Statutes

4.1 If an Act is repealed and re-enacted (with or without amendments), references to a repealed provision are references to the re-enacted provision.

4.2 References to an Act (or a section or other portion of an Act by number or letter) are references to the Act (or section or other portion) as amended.

4.3 General references to an Act include all derivative regulations or orders.

5 Planning

5.1 "The Planning Acts" means -

- the Town and Country Planning Act 1990;
- the Planning (Listed Buildings and Conservation Areas) Act 1990;
- the Planning (Hazardous Substances) Act 1990;
- the Planning and Compensation Act 1991.

5.2 "Development", "planning control" and "planning permissions" have the meanings given to them by the Town and Country Planning Act 1990.

6 Consents

6.1 Any consent, approval or authorisation must be in writing and signed by or on behalf of the person giving it.

6.2 Any provision that a consent, approval or authorisation must not be unreasonably withheld also means that it must not be unreasonably delayed.

7 Rights and obligations

7.1 As far as the law allows, rights and obligations pass to successors in title.

7.2 All rights and obligations are cumulative.

7.3 Rights granted are not exclusive to the grantee.

7.4 An obligation not to do an act includes an obligation not to allow that act to be done by another person.

7.5 If an obligation is owed to or by more than one person, that obligation is owed to or by those persons separately, all together or in any combination.

8 Headings

Headings are for guidance only, not interpretation.

9 Plans

References to plans are to plans attached to the instrument.

10 Days, dates, etc

10.1 References to a working day exclude Saturdays, Sundays, bank holidays and the period beginning on Christmas Eve and ending on New Year's Day.

10.2 A working day starts at 9.00am and ends at 5.00pm.

10.3 "Today" means the date of the document.

10.4 "Month" means calendar month.

10.5 Subject to section 3 of the Summer Time Act 1972 (construction of references to time during summer time), all references to a time are to Greenwich mean time.

11 General and particular words

General words are not limited because they are preceded or followed by particular words in the same category or covering the same topic.

12 Pipes, etc

12.1 References to conducting media or conduits include all pipes, wires, cables, drains, channels, sewers, flues, ducts, watercourses, gutters, culverts, soakaways, fixings, cowls, covers and other ancillary apparatus.

12.2 References to conducting media or conduits being "in" or "on" property include conducting media or

conduits in, on, under, over or through that property.

13 Interest

"The interest rate" is the Law Society's interest rate.

14 Service of documents

14.1 Place of service

Documents may be served on recipients at -

(a) their last known home or business address; or

(b) any other address notified by them as an address for service; or

(c) at their registered office (if the recipient is a company with a registered office in England or Wales); or

(d) the property of which they are tenants (if served as tenants); or

(e) the property of which they are mortgagors (if served as mortgagors).

14.2 Methods and time of service

A document is served when it is received. Unless the actual time of receipt is proved, documents sent by the following means are to be treated as served at the time shown -

(a) first class post:	the beginning of the second working day after posting
(b) fax:	when fully transmitted
(c) document exchange:	the beginning of the next working day after collection.

14.3 Notices

Notices must be in writing, so are documents which may be served as specified in clauses 14.1 and 14.2.

15 Leases

15.1 "Lease" includes -

- an underlease, tenancy or sub-tenancy; and
- an agreement for a lease.

15.2 "Landlord" means the person who, at the relevant time, is entitled to the reversion on the lease.

15.3 "Tenant" means the person who, at the relevant time, holds the lease.

15.4 The let (or demised) property includes the property's -

- ceilings
- internal wall plaster, coverings and decoration
- floorboards
- internal non load bearing walls
- doors and door frames
- shop fronts

and conducting media which serve only the property

but **excludes** all other parts of the building.

15.5 Rent must be paid quarterly in advance on the usual quarter days without any deduction or set off.

15.6 An obligation to maintain property is an obligation to keep it in the same state of repair and decoration as it was in at the beginning of the term.

15.7 References to the expiry of the term (or to the last year of the term) are to the end of that term (or its last year) however the lease comes to an end.

15.8 "The 1954 Act" means Part II of the Landlord and Tenant Act 1954.

Tried and tested: the myth behind the cliché

by

Mark Adler

I am very grateful to Richard Castle, Justin Nelson, and Richard Oerton for their helpful criticism of the first draft of this article.

The traditional wisdom

Those who mistrust plain English say that the traditional style of legal writing brings to new documents the wisdom of earlier litigation. But that is not true. If anything, it brings the folly which triggered the litigation.

Lawyers are so fearful of departing from precedents that they often include things which neither they nor their clients mean. Once a clause has been allowed into a firm's standard document (or spotted in someone else's draft) it is copied indefinitely. So we get covenants for maintaining a lift in a single-storey building, and much less obvious but equally superfluous nonsense.

I am often told that it is dangerous to adopt plain language because, unlike traditional language, it is not "tried and tested"[1]. This cliché is itself typical of legalese, in that it uses three words where one would do, and is both ambiguous and inaccurate.

Documents are litigated because their meaning is unclear. This sort of litigation represents a failure by the drafting lawyers (except on what must be the rare occasions on which they were instructed to leave the meaning deliberately obscure). Usually the clients thought they had a firm arrangement, but have been let down by their lawyers, and the courts must do their best to unravel the mess. Similar wording is then used in other documents on the assumption that its meaning has been laid down by the courts. But the wording is in fact rarely identical, and of course the circumstances (including the parties' intentions) are also likely to be different. And there will probably be a different bench. So we get a hotchpotch of decisions which are confusing or impossible to reconcile. Professor Mellinkoff reports (*The Language of the Law*, Little Brown & Co, 1963, p.377) that epitomes of judicial interpretations of "accident" fill over 200 pages of his law dictionary. At what stage in this history of litigation does "accident" become precisely defined, so that it need never again be disputed?

But does "tried and tested" means "tested by the courts"? The other possible meaning is that the drafter's firm has used the precedent many times before. "Tried", perhaps, but not "tested". I am frequently told, when I ask the intention behind a clause that is either ambiguous or has no identifiable meaning, that it has been accepted by all previous recipients without objection. Sometimes, if I am to believe what I am told, developers' conveyancing documents have been accepted hundreds of times with gibberish unquestioned. I strongly suspect that many solicitors do not have the patience to read the documents they are paid so much to vet. So much for testing.

An example

Let us take as an example a typical repairing clause picked at random from a recent lease, and ask to what extent the wording has been dictated by precedent:

> **To repair and keep the Demised Premises and every part thereof and all Landlord's fixtures and fittings therein and all additions thereto in good and substantial repair order and condi-**

1 A solicitor recently gave me as an example of the dangers of plain language the need to include the following italicised words for their "technical meaning": "I hereby revoke all former wills *and testamentary dispositions*". When I pointed out that the Wills Act made clear that any testamentary disposition was a will he was left speechless but still unwilling to join CLARITY.

tion at all times during the said term including the renewal and replacement forthwith of all worn or damaged parts but so that the Lessee shall not be liable for any damage which may be caused by any of the risks covered by the insurance referred to in the Fifth Schedule hereto (unless such insurance shall be wholly or partially vitiated by any act or default of the Lessee or of any member of the family employee visitor of the Lessee or other such occupiers) or for any work for which the Management Company may be expressly liable under the covenants on the part of the Management Company hereinafter contained.

The case law

[Quotations are from the reports, in which the disputed covenants may have been summarised.]

Gutteridge v. Munyard (1 Moo & R 336, 1834)

The tenant's covenant

"That he, his executors, administrators, or assigns, should and would from time to time, and at all times during, &c, at his and their own proper costs and charges, well and sufficiently repair, uphold, support, maintain, glaze and amend, and keep the said messuage or tenement, and other the buildings, and the windows and sashes, tilings, &c, and all other the appurtenances thereby demised, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever. And should and would at the end or other sooner determination of the said demise, leave, surrender, and yield up unto the said John Stayley, his heirs and assigns, the said messuage or tenement, and all and singular other the premises, with the appurtenances thereby demised, so well and sufficiently repaired, upheld, supported, maintained, glazed, &c, and kept as aforesaid, and all new erections, buildings, and improvements that should or might be made in or upon the said premises in the meantime, (reasonable use and wear thereof in the meantime only excepted)."

The facts

The building was at least 200 years old, and perhaps more than 300. It was very dilapidated. The walls were out of perpendicular, and cracked; the floors had sunk; many timbers were rotten; the tiling and woodwork were broken; and there were other defects not listed in the report. The tenant had painted the inside two or three years before the trial, but "it did not appear that much else had ever been done to it".

The dispute

Could the landlord forfeit the lease because the tenant had broken the covenant to repair?

The jury instruction (by Tindal CJ)

"Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or (to be) of greater value than it was at the commencement of the term.... But the tenant is to take care that the premises do not suffer more than the operation of time and nature would effect; he is bound by seasonable applications of labour to keep the house as nearly as possible in the same condition as when it was demised. If it appears that he has made these applications, and laid out money from time to time upon the premises, it would not perhaps be fair to judge him very rigorously by the reports of a surveyor, who is sent upon the premises for the very purpose of finding fault. Still, there is only a certain latitude to be allowed in these cases."

The result

The tenant won. (The landlord lodged a motion before the Lord Chancellor on the ground that the verdict was against the weight of the evidence, but did not object to the jury instruction. The outcome is not recorded.)

Comment

The judge ignored the detailed verbiage of the covenant, and treated it as a simple covenant to repair.

Scales v. Lawrence (1860 2 F&F 289)

The tenant's covenant

"So often as need should require, well and sufficiently to repair, uphold, sustain, paint, glaze, cleanse, scour, &c a house and premises, with all needful reparations and cleansings, and to leave the premises in such repair, reasonable wear and tear excepted."

The facts

The tenant had spent a substantial amount at the beginning of his seven-year lease, and more the year before it ended, but work was needed after he left.

The dispute

Was the tenant liable for replacing dirty wallpaper?

The jury instruction (by Willes J)

"The tenant was bound to do the things specially mentioned, and also all that was necessary to leave the house in a good condition.... You must consider the character and condition of the , thus if he takes an old house, he must not let it tumble down, he must keep it up; but only as an old house.... And if he painted the ... inside within seven years, he is not bound to do it again when leaving, unless so far as is required by actual dilapidations or destruction of the paint.... He should 'cleanse' the old paint, &c (or renew it only where destroyed), and give up the house in a clear and fair condition, and for fair wear and tear he would not be liable. Questions of this sort are questions of fact for you, to be decided on what are the substantial merits of the case rather than on strict rights or extreme law. The landlord is not to claim for every crack in the glass or every scratch on the paint. The reasonable rule probably would be not to charge for a pane of glass merely with one crack in it.... Such covenants must not be strained, but reasonably construed, on the principle of 'give and take'."

The result

The tenant won.

Proudfoot v. Hart (1890 25 QBD 42)

The tenant's covenant

"During the said term keep the said premises in good tenantable repair, and so leave the same at the expiration thereof".

The facts

At the end of a tenancy, the house needed redecoration: the wallpaper had worn; the paint on the woodwork had faded; the staircases and ceilings were ready for cleaning and whitewashing. And the kitchen floor needed replacement.

The dispute

Was the Official Referee right in assuming that the tenant was responsible for the cost?

The judgment (by Lord Esher MR)

"What is the true construction of a tenant's contract to keep and deliver up premises in 'tenantable repair'? Now, it is not an express term of the contract that the premises should be put into tenantable repair, and it may therefore be argued that, where it is conceded, as it is in this case, that the premises were out of tenantable repair when the tenancy began, the tenant is not bound to put them into tenantable repair, but is only bound to keep them in the same repair as they were in when he became the tenant of them. But it has been decided - and, I think, rightly decided - that, where the premises are not in repair when the tenant takes them, he must put them into repair in order to discharge his obligation under a contract to keep and deliver them up in repair....

"Now, what is 'tenantable repair'? ... In *Belcher v. Mackintosh* (8 C&P 720) Alderson B ... says ..: 'It is difficult to suggest any material difference between the term "habitable repair" used in this agreement, and the more common expression "tenantable repair"; they must both import such a state as to repair that the premises might be used and dwelt in not only with safety, but with reasonable comfort, by the class of persons by whom, and for the sort of purposes for which, they were to be occupied. That is the whole definition, and, so far as it goes it is a good one.' .... In *Payne v. Haine* (16 M&W 541) the contract was to keep the premises, and at the expiration of the tenancy deliver up the same, in "good repair", which is much the same thing as "tenantable repair".... Parke B ... said: 'This is a contract to keep the premises in repair as old premises, but that cannot justify the keeping them in bad repair because they happened to be in that state when the defendant took them. The cases all shew that the age and class of the premises let, with their general condition as to repair, may be estimated in order to measure the extent of the repairs to be done. Thus a house in Spitalfields may be repaired with materials inferior to those requisite for repairing a mansion in Grosvenor Square; but this lessee cannot say he will do no repairs, or leave the premises in bad repair, because they were old and out of repair when he took them....' Lopes LJ has [in *Proudfoot*] drawn up a definition of the term "tenantable repair" with which I entirely agree. It is this: '"Good tenantable repair" is such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it.'...

"I will add a few words as to the way in which the definition should be worked out in the present case. The official referee appears to have said that in his view 'tenantable repair' included painting, papering, and decorating. If he meant, as I think he must have meant, that it included all painting, papering, and decorating, I have no hesitation in saying that his construction of the term 'tenantable repair' was wrong... I agree (with Cave J in the court below) that (the tenant) is not bound to repaper simply because the old paper has become worn out."

Comment

Lord Esher reads an implied covenant to "put into repair" in an express requirement to "keep and deliver up in repair". It would make the tenant's obligations clearer - but no more onerous - to make this duty explicit; if the extra liability is not intended, it should be clearly excluded.

From one line to another, Lord Esher uses "tenantable repair" without comment as a synonym for "good tenantable repair", and he draws no distinction between that and "habitable repair". He also says that "good repair" is "much the same thing", without committing himself to any particular difference.

But "repair" does not include all decoration, for which a lease should explicitly provide.

Lister v. Lane & Nesham (1893 2 QB 212)

The tenant's covenant

"When and where, and as often as occasion shall require, well, sufficiently and substantially repair, uphold, sustain, maintain, glaze, pave ... amend and keep all and singular the said wharf, Shot Tower, warehouse, messuage, buildings and premises ... and all the walls, pavements, &c, to the said premises belonging or in anywise appurtaining ... and the said wharf, Shot Tower, warehouse, messuage, buildings and premises ... so well and substantially repaired, upheld, sustained, maintained, glazed ... amended, and kept, at the end or other sooner determination of the said term hereby granted, will peaceably and quietly leave, surrender and yield up" to the landlord in such good and substantial state and condition as the landlord "may be bound to deliver up the same premises to the superior landlord or landlords thereof at the expiration of the lease under which they now hold the premises".

The facts

The house was over 100 years old, and had been built on a platform of timber floating on mud. It had not been anchored in the gravel 17 feet below. The tenant had often repaired the house, but its nature and age called for underpinning (that is, anchoring to the gravel) if it

was to be stabilised, and this the tenant had refused to do. Consequently, the house became dangerous, and after the tenancy ended the landlord had to demolish and rebuild it.

The dispute

Was the tenant responsible for the rebuilding costs?

The result

No.

Lord Esher MR said: "However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant."

Comment

Despite copy-typing the passage and reading it several times, I did not notice, until Richard Oerton pointed it out, that a grammatically essential "and" was missing from between the two parts of the covenant. Such hidden errors are surprisingly frequent in traditional, "precise" legal writing.

Ravenseft v. Davstone (1980 1 QB 12)

The tenant's covenant

"When where and so often as occasion shall require well and sufficiently to repair renew rebuild uphold support sustain maintain pave purge scour cleanse glaze empty [!] amend and keep the premises and every part thereof (including all fixtures and additions thereto) and all floors walls columns roofs canopies lifts and escalators (including all motors and machinery therefor) shafts stairways fences pavements forecourts sewers drains ducts flues conduits wires cables gutters soil and other pipes tanks cisterns pumps and other water and sanitary apparatus thereon with all needful and necessary amendments whatsoever ...."

The facts

In accordance with the practice then current, stone cladding had been fixed to the concrete during construction of a building without expansion joints. After completion, the building was let, the tenant being responsible for repairs. Some years later, the different coefficients of expansion of the stone and concrete pushed the stones away from the frame and created a danger that they would fall. The cost of the expansion joints was some £5,000 and the cost of reattaching the cladding some £50,000; against this it was estimated that the cost of erecting the building as new at the time of the repairs would have been at least £3,000,000.

The dispute

The landlord sought to recover the cost of repairs from the tenant under the repairing covenant in the lease. The tenant company argued that the repairing covenant did not make it liable for inherent defects.

The judgment

There is no rule excepting inherent defects. Whether the repair would result in giving back to the landlord a different building from that let - so exempting the tenant under the *Lister v. Lane* rule - is a matter of degree, and does not depend on a distinction between inherent defects and those arising later. "The expansion joints form but a trivial part of this whole building and looking at it as a question of degree, I do not consider that they amount to such a change in the character of the building as to take them out of the ambit of the covenant to repair."

The judge's comment on the drafting

This was a complex case, but the complexity had nothing to do with the verbosity of the repairing covenant. Mr Justice Forbes said: "I have already mentioned the plethora of words used to describe the obligations of the tenant.... The view I have formed is, of course, relative to the use of the word 'repair', and that by itself seems to me to be sufficient to render the tenant in this case liable for the whole cost of the remedial works. It is not, therefore, necessary to pursue the question of whether, if it had not been so, other words used would have been sufficient to fix the tenant with liability."

Post Office v. Aquarius Properties Ltd (1987 1 All ER 1055)

The subtenant's covenant

"Well and substantially to repair ... amend ... renew and keep in good and substantial repair and condition...."

The facts

A new office building was let in 1966 for 125 years, and in 1969 underlet for 22 years. Between 1979 and 1984 the basement had been flooded by a combination of poor design, careless construction, and a rise in the water table. There was no residual damage when the water had receded but it was necessary to prevent recurrence. This would require "a very substantial structural addition to the building", costing over 15% of its capital value.

The dispute

Was the sub-tenant responsible?

The judgment (by Hoffman J)

No.

"In the end ... the question is whether the ordinary speaker of English would consider that the word 'repair' as used in the covenant was appropriate to describe the work which has to be done. The cases do no more than illustrate specific contexts in which judges, as ordinary speakers of English, have thought that it was or was not appropriate to do so."

Norwich Union v. British Railways Board (1987 2 EGLR 137)

The landlord's covenant

"To keep the demised premises in good and substantial repair and condition and when necessary to rebuild, reconstruct or replace the same and in such repair and condition to yield up the same at the expiration or sooner determination of the said lease."

Comment

This case was unusual on three counts:

- The tenant (rather than the landlord) argued that "rebuild and reconstruct" meant what it said, imposing a more onerous duty than the normal repairing covenant; (the tenant's motive was to minimise the reviewed rent).
- The judge stressed the fundamental importance of the "plain meaning" rule.
- He used it to impose the "complete rebuilding" obligation for which so many landlords have argued unsuccesfully.

The judgment (by Hoffman J)

"According to normal rules of construction the additional words should be given some additional meaning. But [counsel for the landlord] says, with some justification, that this rule frequently can not be applied in its full force to documents such as leases, where a torrential style of drafting has been traditional for many years. He contrasts the repairing covenant with the insuring covenant which says that the tenant shall be obliged:

> 'in the case of loss or damage or destruction ... (to use the proceeds) in rebuilding, reinstating or replacing the demised premises or erecting alternative new buildings approved by the lessor.' ....

"Now I accept that in the construction of covenants such as this one one cannot ... insist upon giving each word in a series a distinct meaning. Draftsmen frequently use many words either because it is traditional to do so or out of a sense of caution so that nothing which could conceivably fall within the general concept which they have in mind should be left out. I also accept that if the language is not entirely clear the covenant should not readily be assumed to impose unusual obligations. In the ordinary way a covenant in a lease to rebuild the entire premises would be unusual....

"This is, however, a lease for a term of 150 years, and it seems to me that in such a case it is not as inconceivable as it would have been in *Lister v. Lane* that the tenant should have accepted an obligation to rebuild the premises when they come to the end of their natural life.

"One therefore returns to the language of the covenant. I could ... perhaps say no more than that in my judgment the language of the covenant is clear and indicates that the draftsman had two separate concepts in mind....

"After all that analysis (omitted here), however, I come back to what seems to me to be the plain question: what as a matter of ordinary English do the words of the covenant mean?"

Credit Suisse v. Beegas Nominees Ltd

(1994 1 EGLR 151)

The landlord's covenant

"To maintain repair amend renew cleanse repaint and redecorate and otherwise keep in good and tenantable condition... Provided that the landlord shall not be liable ... for any defect or want of repair ... unless [it] has had notice thereof...."

The facts

A prestigious office building was erected and the relevant part let to bankers. A certificate of practical completion had indicated that the only leak was trivial, but because of an inherent defect in the cladding many serious leaks soon appeared - and could not be cured. Consequently, no final certificate was granted. For this and unrelated reasons the tenant decided to move out, but the persistent leaking prevented it from selling the lease.

The dispute

Was the landlord's failure to stem the leaks a breach of its covenant? The landlord argued that the necessary work (recladding to a better design at a cost of £1.2m) was not "repair" and fell outside its covenant.

The reasoning (by Lindsay J)

The parties to a contract are free to contract in any terms they like, and may add obligations to the usual form of repairing covenant if they wish.

The normal rule of construction is that additional words should be given additional meaning.

A covenant 'to repair and otherwise to keep in good and tenantable condition' suggests something more than a covenant merely 'to repair'. And it is established that a covenant 'to keep' premises in good condition includes a covenant 'to put' them into that condition.

There can be no breach of a covenant to repair until there is disrepair. But a covenant to keep (and put) in repair can be broken before there is disrepair.

The cladding has not been put into, nor kept in, good and tenantable condition.

The replacement of the cladding with a new design is not 'repair' but it does come under 'amend (and) renew'. And even if the state of the cladding is not a 'want of repair' it is a 'defect', and so is covered by 'defects or wants of repair'.

The judge's comment on the drafting

"The lease is over 45 pages of single-spaced typescript and I am far from confident that its draftsmanship is of a quality such that on can derive very much from [contrasts between the wording of two clauses 30 pages apart]...."

Comment

Superficially, *Credit Suisse* is a counter-example to my theme, which is that the torrential style of drafting is pointless. Clearly, in this case the extra words did have an effect (though one that backfired on the drafter's client). It does, however, support my argument that torrential drafting creates rather than resolves doubts about the meaning, so promoting expensive and unpredictable litigation. This decision was not predictable and might not be followed in future.

Applying the cases to the example

None of the cases - and certainly no statute - suggests that the tortuous traditional language is necessary, or that it does anyone the least good. Drafters cannot be sure that their additional words will be given additional meaning (preferably by the other side, without recourse to the courts) unless they make it clear that each word is used advisedly. The torrential stye is self-defeating. Because judges know that lawyers pour in unnecessary words with little thought about their meaning they generally (though with occasional unpredictable exceptions) treat a repairing covenant in much the same way however it is phrased, and the exact wording chosen by the drafter is largely irrelevant.

The excuse that lawyers write as they do because the words have been litigated is almost invariably false, because:

- Few practising lawyers have memorised - or look up - the facts giving rise to the litigation, nor copy the precise wording of the disputed clauses (so the particular words whose justification is claimed have probably not been litigated); and
- What litigation there has been provides no rational basis for the wording in question.

Note, incidentally, how plain and unpretentious is the language of the judges compared to that of the disputed documents.

Analysing the example

The Flesch test (see *Clarity* 20 (April 1991), p.9) provides a very rough guide to readability (based on sentence length and the number of syllables to a word). On the Flesch scale from 0 (very difficult) to 100 (very easy), the passage I used as an example scores minus 71. It would not do as well with a more sensitive test; it is made opaque by the absence of punctuation, the use of unfamiliar words, and the nesting of clauses within clauses. None of these faults is required - or even suggested - by law.

Let us look again at this clause, and examine it in detail using footnotes. I have italicised the words which have no function.

To *repair*[1] *and* keep the *Demised* Premises[2,3] *and every part thereof*[4,5] *and all Landlord's fixtures*[6] *and fittings*[7] *therein*[5] *and all additions*[8] *thereto*[5] in *good*[9] *and substantial*[10] repair[11] *order and* condition[12] *at all times*[13] *during the said*[14] *term*[15] *including*[16] *the renewal*[17,18] *and replacement*[19] *forthwith*[20] *of all*[21] *worn or damaged parts* but[22] *so that*[23] the Lessee[24] shall[25] not be liable for any damage which may be[26] caused by any *of the*[27] risks covered by the insurance referred to in the Fifth Schedule[28,29] hereto[5,30] (unless[31,32] such[33] insurance shall be[34] *wholly or partially*[35] vitiated[36] by any act or default of the Lessee or of any member of the family employee[37] visitor of the Lessee or other such occupiers[38]) or[39] for any work for which the Management Company may be[40] *expressly*[41] liable *under the covenants on the part of the Management Company*[42] hereinafter contained[41,43].

1 "Repair" is implied by the "keep ... in ... repair" which follows. But see note 12.

2 The initial capitals are supposed to warn us that the phrase has been defined. But capitals are used at random for undefined common nouns (as in "the Fifth Schedule" and "the Lessee").

3 It is illogical to pad out with redundant words the short name by which the property is to be referred throughout the document. We know the premises are demised. Why not call them "the premises" or, if appropriate, "the shop"?

4 The last four words are empty verbiage. Might anyone argue that an obligation to maintain the premises could be satisfied by maintaining only part, while some other part was neglected?

5 "Thereof", therein", "hereto", and "thereto" are pompous words used only by lawyers. They are not terms of art. Nor are they necessarily precise; it is not always clear to which noun they refer.

6 As a matter of law, fixtures are part of the property, so the explicit reference is unnecessary.

7 "Fittings" are the same as "fixtures".

8 Additions are also part of the property.

9 "Good" is superfluous. If it were not, the drafter must have intended a different standard between "repair" in line 1 and "keep in good repair" in lines 1-5.

10 Was this an unusually tolerant landlord who meant to exempt the tenant from minor repairs? Presumably not, judging from the context and from the absence of the exemption from the line 1 "repair". So what does "substantial" mean?

11 "Repair" completes the verb phrase begun with "keep" 23 words before. Implanting long subordinate clauses confuses the reader, who forgets the beginning of the verb phrase before the end is reached.

12 *Credit Suisse* and the similar *Anstruther-Gough-Calthorpe v. McOscar* (1924 1 KB 716) are authority for the view that "good order and condition" can add something to "repair", but not

that "repair [and] order" adds to "good condition". However, the reasoning in those cases (that extra words imply extra meaning) would be difficult to support where there is much obvious redundancy.

13 Would the omission of the last three words mean that the tenant need only sometimes comply with this obligation? (We often read [as in *Gutteridge v. Munyard* above] "at all times and from time to time", which means, illogically, "continuously, but with breaks".)

14 "Said" merely repeats the sense of "the". Like the "therein" group of words, it is a pompous lawyerism with no technical meaning.

15 "During the term" would go without saying, as it did in other covenants in the lease.

16 Everything from "including" to "damaged parts" is covered by the repairing covenant already expressed.

17 Does "renewal" mean "repair" or "replacement"? Either way, it duplicates what is said elsewhere in the passage.

18 "To repair ... including the renewal" is ungrammatical. (As a matter of logic, an obligation to do something can only include obligations to do other things: a noun doesn't fit.)

19 The case law either includes this under "repair" or, in the absence of particularly clear words to the contrary, absolves the tenant from liability.

20 "Forthwith" means not "forthwith" but "within a reasonable time", which is implied anyway *(Doe d. Pitman v. Scrutton* [9 C&P 706], quoted in *Woodfall.*) In any case, the adverb, if of any use at all, should be applied not here but to the main verb (word 2 of the passage).

21 Could "only some" be implied if "all" was omitted?

22 This signals what should be a new paragraph.

23 If the text was less precious "so that" would be omitted.

24 Why use the unfamiliar term "lessee" rather than "tenant"?

- The drafter has used "landlord" not "lessor".
- Our clients confuse "mortgagor" and "mortgagee", and may confuse "lessor" and "lessee".
- It is easy for us - and our typists - to use the wrong suffix under the soporific effects of 50 pages of this deathless prose.
- "Landlord" and "tenant" is less repetitive than "lessor" and "lessee".

25 The archaic "shall" is supposed to be a precise form of imperative, but can be ambiguous and is often inappropriately used; (Peter Butt and Richard Castle, in a work still in preparation, list 10 different meanings). The drafter of this clause is not ordering the tenant not to be liable. Here "shall" expresses the future. Why not simplify the unnecessary future, with its complex "shall have been"s to the "always speaking" present?

26 No tenant is liable for damage which "may be" caused, but only for damage which *is* caused. "May be" and "perhaps" are overused by those too diffident to say what they mean (a serious fault in a lawyer).

27 "Of" constructions can often be trimmed (as pointed out by Bryan Garner), in this case to "caused by any risk".

28 It would have been better to define "the insured risks".

29 Why tuck these details away in a fifth schedule? It should be where a reader can easily find it. (Incidentally, it is often impossible for readers to tell from each page which schedule (if any) they are in; shoulder-notes would be a useful navigational aid.)

30 If "hereto" was omitted, would the reader look for the fifth schedule in some other document?

31 "Shall not ... unless" is a double negative, best avoided (especially as the following limb - "or for any work" - is positive).

32 As drafted, the tenant loses the benefit of all the insurance even if only part of the proceeds are withheld. Presumably the drafter meant "to the extent that" rather than "unless".

33 "Such" used for "the" is another pompous lawyerism.

34 "Shall be" = "is".

35 "Partially" = "partly".

36 How many of us have seen "vitiated" in any other context, and know (rather than guess) what it means?

37 The omission of commas can create ambiguity in lists whose individual items contain more than one word. The refusal to punctuate is an affectation criticised by the House of Lords in *Houston v. Burns* (1918 AC 337).

38 This implies, wrongly, that anyone in the categories mentioned is an occupier, and leaves open the argument that the exception would not bite against one who was not. (Perhaps a confused drafter or typist omitted an "or" between "employee" and "visitor".)

39 The reader must search back for the beginning of the first alternative to see how the different parts of the sentence fit together. The answer is 40 words back.

40 "May be" should be "is".

41 Presumably the tenant would be exempted from any work for which the management company is liable, whatever the basis of that liability.

42 "The covenants on the part of the Management Company" = "the management company's covenants".

43 "Hereinafter contained" is mere pomposity.

How we might improve it

How might this clause be better expressed?

I recommend a three-stage rule of thumb for writing:

1. Think what you want to say.
2. Say it unpretentiously and without fuss.
3. Then stop.

Applying that rule, we might get something (depending on instructions and negotiation) like this:

[The tenant must:]

(A) Subject to clause (B):

(1) Repair the premises at the beginning of the term; and

(2) Keep them in repair, and well decorated, throughout it;

(B) But the tenant need not repair:

(1) Damage from an insured risk, except to make good any loss of insurance proceeds caused by the fault of the tenant (or of anyone under the tenant's control); or

(2) Defects of design or construction.

Centre for Plain Legal Language

University of Sydney

The Director of the Centre, Mark Duckworth, has resigned to take up a position in the New South Wales Cabinet Office.

He will be advising on inter-governmental relations - that is, all those inter-jurisdictional issues that come from living in a Federation. But he will not be abandoning the plain language cause. The New South Wales Government is a supporter of plain language, so he will be working in a friendly environment. And he is completing a report on the effect of plain language.

Anne-Marie Maplesden, the Centre's Principal Drafter, is now managing the Centre.

The Centre's most recent drafting work includes:

- guidelines on writing industrial awards in plain language for the Australian Industrial Relations Commission.
- an employment contract for the New South Wales Legislative Council
- forms and standard letters for State Super - a major superannuation organisation
- policy documents for the New South Wales Legal Aid Commission.

The Centre has just published *Law Words: 30 essays on Legal Words and Phrases*. You can order a copy from:

The Centre for Plain Legal Language
University of Sydney Law School
175 Phillip Street, Sydney, NSW 2000
Australia
Tel: 61 2 351 0323 (Fax: 0200)

The cost is A$24.95 + airmail postage & packing
(A$5.00 in Australia & New Zealand,
A$10.00 elsewhere)

Please make cheques payable to "University of Sydney"

Chris Balmford

CLARITY's representatives around the world

Building on the arrangement under which Professor Hassett became our committee representative in the States, and following a suggestion by Chris Balmford and Judith Bennett, various members have agreed to act as focal points for CLARITY in their own countries.

The addresses of all concerned are given on page 54

United States

Patricia Hassett's other committments have prevented her spending much time on CLARITYaffairs. Professor Joseph Kimble is therefore sharing the responsibility, and has been actively recruiting. Membership in the States has grown from 12 a year ago to 42, and he aims to reach 100 during 1996.

Joe Kimble teaches legal writing at Thomas Cooley Law School in Lansing, Michigan. He has published many articles about legal writing and plain language. He edits the "Plain Language" column in the *Michigan Bar Journal,* and he served as the writing consultant to the U.S. Sixth Circuit Committee on Pattern Criminal Jury Instructions. He has given presentations throughout the United States, Canada, Australia, and New Zealand, and in England, Sweden, Denmark, and South Africa.

Canada

Phil Knight has agreed to take on Canada.

He began his professional life as an attorney in private practice. Later, as director of the Plain Language Institute of British Columbia he organised and hosted the excellent *Just Language* conference of 1992. Government funding problems translated the PLI into the Plain Language Office, but when that too closed he set up his own plain language consultancy. As reported on page 20, this recently took him to South Africa to help produce plain civil rights legislation.

Australia

CLARITY's Australian agent is Christopher Balmford.

He is the head of the Plain English Team in the Melbourne office of the law firm Phillips Fox. The firm has offices throughout Australia, and in New Zealand and Vietnam. The Plain English Team provides training and rewriting services to clients. It is also involved in Phillips Fox's Clear Communication Strategy. That Strategy involves:

- rewriting the firm's precedents in plain English
- training all lawyers in the firm how to write plainly, and
- preparing a Plain English Style Manual.

He delivered a paper on that strategy at the 1995 American Bar Association Conference in a session organised by Joe Kimble (see page 23). Copies of the paper are available from Christopher Balmford.

Before joining Phillips Fox, Mr Balmford worked at the Law Reform Commission of Victoria. There, he provided plain English services to clients and helped the Commission with its plain English work.

He believes that the long term success of the plain English movement depends on law firms competing on the basis of the plainness of their documents.

He is spending 1996 at his firm's Sydney office but should still be contacted through his Melbourne address.

South Africa

Ailsa Stewart Smith, recruited to CLARITY earlier this year by Joe Kimble, has agreed to be our South African contact.

She is not a lawyer, but a linguist specialising in legal language. She took her MA in English language in 1976, specialising in medieval studies, which she taught at the University of Cape Town from 1977 to 1994. During this period she also taught communication studies, and edited a law journal. She has been researching legal language since 1990, and has taught courses in both English and Law departments on how to work more productively with legal English. Her plain language work for the South African government is reported on page 20.

She is now writing a PhD thesis on *Linguistic skills in written English required for legal training, qualification and practice in South Africa, and the extent to which these requirements are satisfied by existing training courses*. It covers three main areas:

- The characteristic linguistic features of legal English.
- Why they cause confusion and increase incomprehensibility.
- How they can be changed to produce more comprehensible texts.

Around these issues she is considering the ideological system which produced and maintained legalese for so long; why this is no longer acceptable in South Africa's rather vulnerable democracy; and where in law curricula language skills should be taught.

She says:

Courses which develop reading and writing skills would replace the old language requirement courses. Latin is no longer mandatory; the proposal to drop English and Afrikaans as requirements for admission to the Bar and Side Bar is at the Bill stage.

Postscript: Centre for Plain Legal Language, Sydney

We have just heard that funding is again in doubt, and hope that this does not mean that the Centre will close.

It is a valuable resource, and at present the only plain language institute in the world.

Welcome to new members

Australia

Office of Parliamentary Counsel for Queensland: Brisbane

Denmark

Henriette Faber; student translator, Copenhagen

England

Stella Abrahams; solicitor, Ireland Abrahams; London EC4 (winner of a CLARITY award 1995)
Emma Chamberlain; solicitor, Cole & Cole; Aylesbury, Buckinghamshire; (member of secretariat, Tax Law Review Committee)
Irene Cox; solicitor; Durham
Trevor Grundy; legal executive, Bolton Borough Council (and drafter of the overall winner, CLARITY awards 1995; Lancashire
Christopher Jenkins QC; first parliamentary counsel; London SW1
Martin Kay; solicitor, Greene & Greene; Bury St Edmunds, Suffolk
Christopher McGarvey; law student; Blackpool, Lancs
David Pollachi; solicitor, Mathew Arnold & Baldwin; Watford, Herts
Inland Revenue; London WC2
Steven Pearce; solicitor, Simmons & Simmons; London
Stephen Pitts; solicitor, Thursfields; Kidderminster, Worcs
Francesca Quint; barrister; London WC2
Alec Samuels; academic barrister; Southampton
Park Sims; management & training consultant; Woodbridge, Suffolk
Graham Thomas; law student; Newcastle on Tyne

South Africa

Jennifer Banks; plain language consultant, Plain Language Express (Pty) Ltd; Cape Town
Ailsa Stewart Smith; legal linguist; Cape Town

Sweden

Ministry for Foreign Affairs Stockholm (contact Gunhild Ollén)

United States

Stephen Armstrong; attorney; director of professional development, Shearman & Sterling; New York
Frederick Baker; attorney, Honigman Miller Schwartz & Cohn; East Lansing, Michigan
Prof Anita Barry; Eng. Dept, Univ of Michigan; Flint
Jefferson Bates; author & consultant; Roston, Virginia
Karl Benghauser; attorney, state government; Lansing, Michigan
June Brott; teacher, & owner of Writing at Work; Oakland, California
Beverly Ray Burlingame; attorney, Thompson & Knight PC; Dallas, Texas
Thomas M. Clyde; attorney; Boston, Massachusetts
Howard Darmstadter; assistant general counsel, Travelers Group; New York
DePaul College of Law; Chicago, Illinois (contact Maureen Collins)
Randy Dixon; attorney, Dixon & Dixon; Toledo, Ohio
LuAnn Frost; attorney, Dept of Attorney-General; Lansing, Michigan
Marlyne Marzi Kaplan; adjunct professor of law, University of Miami
Prof Kenney Hegland; College of Law, University of Arizona; Tucson
Marcy Krugel; director of graduate communications program, College of Business, Florida Atlantic University; Boca Raton
Prof John M. Lindsey; Temple University School of Law; Philadelphia, Pennsylvania
Duncan MacDonald; attorney, Citibank; Long Island City, New York
Mark Mathewson; managing editor, Illinois Bar Journal; Springfield
David I. McCaskey; attorney; Staunton, Virginia
Nelson P. Miller; attorney, Davis Fajen & Miller; Grand Haven, Michigan
Sue Plimpton; public health administrator, University of New England; Biddeford, Maine
Denis Quinlan; attorney; Chicago, Illinois
John Rohe; attorney; Petoskey,Michigan
Judge Joseph Stevens jr; US District Court; Kansas City, Missouri
Justice Philip Talmadge; Supreme Court; Olympia, Washington
Professor Mark Wojcik; The John Marshall Law School; Chicago, Illinois

Editor's note

I am very grateful to Joe Kimble and Peter Butt for editing the last two issues, and for doing it so well. Everyone I have spoken to about it has congratulated them. Each has overcome his initial "never again!" reaction to offer to edit another.

Membership application form

Membership in name of individual

Title		**First name**		**Surname**	
Firm			**Position in firm**		
Professional qualification			**Occupation if different from qualification**		

Membership in name of organisation

Name of organisation	
Nature of organisation	
Contact	

All members

Home or business address (please specify)				**DX**	
Home telephone		**Fax**		**Work telephone**	
Specialist fields				**Email**	

Subscriptions	**Please send this application to** (addresses on p.54)				
	Canada	**USA**	**South Africa**	**Australia**	**Elsewhere**
	Phil Knight	Joe Kimble	Ailsa Stewart-Smith	Chris Balmford	Mark Adler
Normal	$25	$25	R100	$30	£15
Unpaid student	$10	$10	R35	$10	£5

Your details will be kept on a computer; please tell us if you object. By completing this form, you consent to your details being given to other members or interested non-members (although not for mailing lists), unless you tell us you object.

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Please pay to CLARITY's account 0248707 at the Cranbrook branch of Lloyds Bank (sort code 30-92-36) quoting CLARITY'S ref ..... [we will insert this] £15 immediately, and [we will delete this line if you join between 1st April and 31st August] £15 each 1st September.