CLARITY

A movement to simplify legal language

Patron: Lord Justice Staughton

No 36: August 1996

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Annual meeting, supper, and the DJ Freeman CLARITY awards

now **Thursday, 5th December**

The arrangements have changed slightly since the announcement in *Clarity* 35. The date of the event has been pushed back, and as we go to press the precise locations within the Chancery Lane area and the exact timings of each part of the event are still fluid. We hope this does not inconvenience anyone. Final details will be announced in the October newsletter. Enquiries and entries should be addressed to

CLARITY awards
D.J. Freeman
DX 103 London *or*
43 Fetter Lane, London EC4A 1NA

Entries for the awards are already arriving, but as the ceremony has been delayed they can now be submitted until 21st October. Please send 5 copies.

We are very grateful to Messrs D.J. Freeman for their generous sponsorship in money, time, and organisation.

Subscriptions

Our thanks to those members who answered last month's appeal for 1995 subscription arrears, and to the three who responded generously even though they were not in arrear themselves. Less than 100 of our 634 members are now behind, and we are asking them to settle before we send them this issue.

The 1996 subscription is due on 1st September and we ask those of you who joined before April and who have not given us a bank standing order to settle now before you forget. If you are in Australia, Canada, South Africa, or USA please send your subscription in local currency to our local representative. Addresses are on renewal form.

CLARITY member appointed Lord Chief Justice

We congratulate Sir Thomas (now Lord) Bingham, on his appointment as Lord Chief Justice of England.

Code of practice for commercial leases

A voluntary Code of Practice has been published governing commercial property leases in England and Wales.

Section 4 reads:

AN EFFECTIVE LEASE

4.1 Because a lease is such an important document, it has to be carefully worded and must cover all the important rights and duties of both landlord and tenant.

4.2 Sometimes these can be complex, but as far as possible leases should:

(a) be written clearly in plain language and in a manner which can be understood by people other than lawyers;

(b) be concise and relevant;

(c) link the various parts of the document (especially clauses and schedules) by a proper system of page numbering and cross-referencing so that they can be easily and quickly assimilated;

(d) state explicitly (consistent with the need to be concise) any important legal position relevant to the transaction, for example, that certain consents cannot be unreasonably withheld, even where this is already covered by statute.

4.3 A number of organisations including the Law Society have produced examples of model leases for the letting of the whole or part of a building. These may not suit the circumstances of all landlords and tenants or all property transactions, but they are useful models and show how clarity an be achieved.

The Code has been produced under a government initiative by a "Commercial Leases Group" comprising the

Association of British Insurers
British Council for Offices
British Property Federation
British Retail Consortium
Confederation of British Industry
Federation of Small Businesses
Incorporated Soc'y of Valuers & Auctioneers
Law Society
Property Market Reform Group
Royal Institution of Chartered Surveyors.

It is published by RICS Business Services Ltd and can be obtained from Law Society Publications. An individual copy costs £3.95 but there are reductions for bulk. You can order by credit card on

0171 242 1222
(44 171 from overseas)

Robert Jones MP, the minister for planning, construction and energy efficiency, says:

Following last year's review of commercial property leases, the government urged the commercial property industry to produce a Code of Practice. I very much welcome the positive response from the property industry, tenants' groups and professions, who have drawn up this Code. I pay tribute to the hard work and constructive negotiations that resulted in its production.

I am pleased to endorse the Code. It provides sound advice to those involved in business lease negotiations - tenants, landlords, and professional advisers. I think it will be particularly helpful to small business tenants and I urge them to read it carefully.

I hope that the Code will do much to bring about a better informed and more transparent market: one where all are fully aware of their rights and obligations. In particular, I hope that it will encourage flexibility in lease negotiations and greater transparency. As we announced last year, we intend to take a careful look at how well the Code works in practice.

The Code is meant to become part and parcel of normal dealings between landlord and tenant. The effort and skill which have gone into its preparation give it entirely the right start.

Solicitors acting for tenants should challenge their opposite numbers for any breach of s.4.

SEC supports plain language in formal documents

The US Securities and Exchange Commission hopes to issue a plain English manifesto by the autumn. It will encourage companies to file documents understandable by most investors, and as an incentive the SEC will give administrative priority to plain documents. They hope to issue a style guide in the near future.

Meanwhile, the Disclosure Simplification Task Force has recommended that the language of company prospectuses be simplified.

Singapore embraces plain English

by **Robert D Eagleson**

For a week in January - February the Singapore Academy of Law conducted seminars and specialist workshops on drafting in plain English in a drive to have it practised widely in the Republic. The response was overwhelming, with every session packed out and numbers turned away. By the end of the week, some 800 of the Republic's 3,500 lawyers had participated in a session and had been led to see the advantages of plain legal drafting.

Three Australians conducted the seminars and workshops for the Academy: Robert Eagleson (plain English consultant to Mallesons Stephen Jaques) and Ted Kerr (partner and head of that firm's Plain English Unit) — both active members of CLARITY— and Jim Kennan QC (former Attorney-General of Victoria). Jim Kennan was the attorney-general who initiated the reference on plain English in legislation to the Victorian Law Reform Commission, which had Robert Eagleson as its Commissioner-in-charge and which led to the ground breaking report *Plain English and the Law.*

Solid backing from Government

The Attorney-General of Singapore opened the week-long program with a keynote address in which he gave strong support for lawyers drafting in plain English and reaffirmed the government's commitment to comprehensible laws and legal documents.

Who, what and when

The Academy's program ensured that all main branches of the profession were touched. The opening seminar targeted particularly heads in legal firms, courts and government. The workshops were aimed at practitioners in the various areas. Brief details (with the numbers attending) are:

Opening Seminar	Saturday	200
Workshops for		
Banking lawyers	Monday	110
Insurance lawyers	Tuesday	115
Parliamentary counsel and government drafters	Wednesday	95
Government departments	Thursday	100
Lawyers in private practice	Friday	100
Lawyers in private practice	Saturday	80

The final workshop was organised at the last minute to satisfy at least some who had previously been turned away.

In view of the demand and the numbers turned away the Academy is already talking about a follow-up program.

The response

The response was thoughtful, considered and substantial. As we worked through examples, it became clear from the questions and comments that participants were seeing the benefits of plain drafting as much for themselves as for their clients.

More substantial and enheartening still is the evidence that a number have begun to adopt plain English in their daily practice. We have learnt of several redrafting ventures already.

Cutts visits India

Martin Cutts, research director of the Plain Language Commission, has visited India for the third time in four years at the invitation of The British Council. The visits are raising interest in plain language among government officials, lawyers and business leaders. This time, events were held in Delhi, Bangalore and Madras, including sessions for students and faculty members at the National Law School of India University.

OFT enforces UK plain language law

by **Martin Cutts**

The Office of Fair Trading has warned nine mobile phone airtime suppliers that they face legal action if they do not alter their consumer contracts in line with the Unfair Terms in Consumer Contracts Regulations.

The OFT cites unintelligible terms and tiny print as two reasons for its view that the contracts are unfair. John Bridgeman, the director general, said:

> **Contracts can contain up to 100 clauses and sub-clauses and few customers would understand [them] without legal advice; to comply with the regulations, terms have to be readily understandable. [They] should not be in print much smaller than is used in any other documents that are intended to be read and understood.**

Plain Language in Australia

Peter Butt's address to the annual meeting 26th January 1996

Peter Butt is an associate professor of law at the University of Sydney, Australia, and a founding director of the Centre for Plain Legal Language established at that University. He teaches a course on plain language legal drafting at the University of Sydney and writes extensively on land law. He is in England for 1996 as a visiting professor at the Department of Professional Legal Studies, University of Bristol.

Professor Butt began by noting the appropriateness of the date: January 26 is Australia Day. He also commented that some might consider it presumptuous of an Australian to address the English on the use of their native tongue. But (he said) Australia had much in common with England when it came to legal language. This was not surprising, seeing that all the earliest Australian lawyers were English-trained. Unfortunately, most of them had emigrated to Australia involuntarily.

Centre for Plain Legal Language

He told of the work of the Centre for Plain Legal Language. It had been established in 1990 with funding from the Law Foundation of New South Wales. One of its better-known activities (in Australia, at least) was a monthly "words and phrases" column it published in the New South Wales *Law Society Journal*. Each month, the Centre took a well-known legal term, researched its meaning through the cases, and suggested a plain language equivalent that would capture the legal nuances of the original. The purpose was two-fold: to offer plain language phrases that were safe to use; and (more subtly) to emphasise that lawyers should be careful not to adopt plain language versions of traditional words and phrases without careful thought to the consequences. Some of the plain language alternatives had provoked strong debate in the columns of the *Law Society Journal*, and this had served to bring the topic of plain language to the profession's attention.

The Centre was also undertaking a cost-benefit analysis (to use a piece of jargon) of plain language, in an effort to assess objectively the savings that plain language can bring.

It had also produced a report on the design of legislation. This report, written in conjunction with the New South Wales Parliamentary Counsel's Office, had recommended substantial alterations to the design and layout of legislation, in an effort to improve readability. The recommendations have now been adopted in New South Wales, and similar design changes are being tested in other Australian jurisdictions.

Conscious of the need to practise what it preached, the Centre had rewritten a number of commercial documents for substantial organisations. These included a bank mortgage and a shopping centre lease; both documents were in use.

Law Society committees

An important development in Australia had been the establishment of Plain Language Committees in the Law Societies of several states. These committees — following the lead established by CLARITY members such as Professor Joe Kimble in the United States — were a way of working change from within the legal profession. In the case of the New South Wales committee, it was resourced by the Law Society. Although only a year or so old, it had already undertaken a survey of lawyers' attitudes to plain language: 93% were in favour; 83% said they used plain language in documents; and a staggering 96% said they used it in letters. (All of which showed, Professor Butt suggested, that the profession may have been under some misapprehension as to just what is plain language.) The committee was also redrafting commercial documents. Its first chair was Michele Asprey, also a CLARITY member.

Law firms

A number of leading Australian law firms had set up "plain language units", to produce plain language precedents. Here also CLARITY members were active: in at least four firms, the units were headed by CLARITY members. These firms had invested large amounts of time and money in the projects, and were openly promoting

themselves as plain language firms: "Come to us — you can understand our documents." Peter proffered the view that this could well be one of the more important developments in the plain language movement, because if the largest firms all move to plain language, others will have to follow to remain competitive.

Legislation

Finally, he mentioned the progress towards plain language in Australian legislation. A number of States — notably New South Wales, Victoria and Queensland — had begun to produce noticeably plain legislation. A particular example was Queensland's Land Title Act 1994, which he recommended to sceptics who argue that complex concepts require complex language. Another was the New South Wales Local Government Act, which used not only plain language but also boxes and charts to help get the message across to readers.

Also, the Federal government had recently set up task forces to redraft the Corporations Law and the Tax Act in plain language. Each task force had CLARITY members on its panel. The first sections of the corporations redraft had already passed into law. To illustrate the impact of the redraft: the corporations task force reduced the number of words in one part of the Corporations Law from 15,000 to 2,000 — an 85% reduction!

Conclusion

Although much had been achieved, much remained still to be done. For example, law students needed training in the principles of clear writing — a skill that few law schools thought important to cultivate. And judges needed to be made aware of the aims of the plain language movement — not just to make their judgments more readable (though that was to be encouraged), but to ensure that when construing documents drafted in plain language they were sympathetic to the drafters' aims.

CLARITY document services

CLARITY offers two related but distinct services: the first is document drafting; the second is vetting documents for the award of the CLARITY logo. Both are co-ordinated by committee member Richard Castle.

1. Drafting

A CLARITY member will draft or redraft your documents applying the principles we advocate. Members working on this basis do so on their own account. CLARITY is not a party to the contract.

Fee: The fee is negotiated between you and the drafter.

2. Vetting

A CLARITY vetter will consider a document and

- approve it as drafted;
- approve it subject to minor improvements; or
- reject it with a note of the reasons.

If the document is approved, or approved subject to improvements which are made, you may use the CLARITY logo on the document provided the document remains exactly in the approved form.

Fee: The standard fee is £100, but may be higher if the document is long or complex. Our vetter will quote before starting.

Common principles

In both cases:

- all types of document are included - for example letters, affidavits, pleadings and manuals.
- confidentiality will be respected.
- the applicant is responsible for ensuring that the document does the job intended.
- CLARITY is not insured and will not accept liability.

We will try to see that the drafter is not also the vetter but we cannot guarantee this.

Applications should be made in the first instance to:

Richard Castle
Wolfson College
Cambridge CB3 9BB
Tel: 01223 331879 Fax: 331878

Access to Justice

Lord Woolf's final report on the civil justice system in England and Wales

Lord Woolf's objective is to make the courts more accessible to the general population by reducing the complexity, and with it the expense, of litigation.

He recommends that the procedural rules be simplified, both in content and style. His new rules are to apply a unified code to the county courts, the High Court, and the civil division of the Court of Appeal (except that a few special areas, like family and insolvency proceedings, will — as now — retain their own rules).

Brief extracts from the report and draft rules (which are copyright) are reproduced below with the kind permission of the Lord Chancellors Department

Access to Justice is published by HMSO and is also obtainable from some bookshops. The main report (370 A4 pp) costs £19.95; the draft rules (212 A4 pp) cost £21.50. Orders may be telephoned (0171 [44 171 from overseas] 873 9090) or faxed (873 8200)

Comments on the draft rules are invited. They should be sent by 29th November to Michael Kron, Lord Chancellor's Department, 54-60 Victoria Street, London SW1E 6QW

Simpler and clearer language

13. I said in the interim report that one of my aims was to modernise terminology. I have not approached this dogmatically but on the basis that terminology should be changed where it is useful to do so. I have sought to remove expressions which are meaningless or confusing to non-lawyers (such as *relief* when used to mean a remedy) or where a different expression would more adequately convey what is involved (such as *disclosure* of documents instead of the archaic *discovery*). The various terms for methods of starting a case, such as writ, summons, originating application, will all be replaced by a *claim*. The word *plaintiff* will be replaced by *claimant*.

14. I have suggested that the word *pleading* should be replaced by *statement of case*. Although it is a very familiar expression to lawyers and in some respects a convenient one, the word has become too much identified with a process which the legal profession itself readily acknowledges has to change. This is an instance where a change of language will, I believe, help to underpin a change of attitude and a real change of practice to a more open and straightforward method of stating a claim or defence.

15. I recognise that changes of terminology are discomforting and temporarily inconvenient for those who are very familiar with the existing expressions. But, as I made clear in the interim report, the system of civil justice and the rules which govern it must be broadly comprehensible not only to an inner circle of initiates but to non-professional advisers and, so far as possible, to ordinary people of average ability who are unlikely to have more than a single encounter with the system.

16. A system of procedure cannot completely avoid technical terms. Some of them are, I believe, reasonably well understood and are difficult to replace conveniently. Where these are kept, the rules will define them where it is possible to do so. Provisions defining the exact meaning of expressions are a standard tool of legislative drafting: in the new rules, for example, *child* is defined as a person under 18 and *filing*, in relation to a document, means delivering it to the court. However, some expressions are useful to keep but not so easy to define precisely. An example is *service* of documents. The existing rules provide a limited number of permissible methods of serving a document. I am proposing (in chapter 12) that in future any method which is reasonably likely to bring the relevant document to the intended recipient's attention may suffice, so it will no longer be possible to 'define' service by reference to specific ways of doing it. Even under the existing rules, it is not easy to define service in terms of bringing the document to a person's attention, because the process may be effective in certain circumstances even though the document has not come to his

attention. I am attempting, in the new rules, to make the basic legal test of good service somewhat clearer. In addition, however, I am also proposing the inclusion in the rules of a glossary of terms. This gives a brief, general explanation of certain terms used by the rules. For example, the rules refer to legal concepts such as *special damages*, *contribution* and *indemnity*. These expressions take their meaning, not from the rules themselves, but from the general law. Often they have a broad meaning but one which is well understood by the legal profession. Their meaning may have been refined by case-law. They do not have an exact definition and, for the purpose of the rules, they do not need one. It is, nevertheless, helpful to the non-specialist reader to give a broad indication of their meaning. Unlike the definition of terms within the main rules, the explanation of terms in the glossary would not directly affect the way in which the relevant rules operate. It is simply an aid to understanding.

Incorporating case-law

17. The right balance between general statements and detail has to be considered afresh in each case. In some cases, where the present rules are very brief, I have chosen to be more detailed. An important example is the power to set aside judgment for failure to defend.... The existing rule in the Rules of the Supreme Court is extremely short and deceptively simple; it provides that the court may, on such terms as it thinks just, set aside or vary a default judgment. In fact the courts have had to evolve different tests for setting aside judgment depending on specific factors, such as whether the judgment was correctly or incorrectly obtained in the first place. Since this is a common situation and the various considerations are well-established, I have thought it helpful to set out these matters in the rules themselves.

From the existing county court rules

ORDER 14

DISCOVERY AND INTERROGATORIES

Discovery of documents

1. —(1) Subject to the provisions of this rule and of rule 8, the court may, on the application on notice of any party to an action or matter, make an order (in these rules referred to as an "order for discovery") directing any other party to make a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the proceedings and may at the same time or subsequently also order him to make an affidavit verifying such a list.

(2) Where the applicant for an order for discovery did not make a written request for the discovery he desires, the court may refuse to make the order unless satisfied that there were sufficient reasons for not making such a request.

(3) An order under this rule may be limited to such documents or classes of document only, or to such only of the matters in question in the proceedings, as may be specified in the order.

(4) An order under this rule shall be drawn up by the proper officer and shall be served on the party against whom it is made.

(5) A copy of the list of documents made in compliance with an order or request, and any affidavit verifying such list, shall be served on the applicant [1990].

NOTES TO ORDER 14, RULE 1

Generally.—Discovery in all actions except those excluded by Ord. 17, r. 11(1) is now regulated by automatic directions under Ord. 17, r. 11

Application to the court.—As to the procedure on interlocutory applications generally, see Ord. 13, r. 1, ante.

For the disclosure of documents before commencement of proceedings or against a person not a party to proceedings, see Ord. 13, r. 7 (1) (g), ante.

Discovery of documents.—The general rule is that a party is entitled to discovery and production of all documents that relate to the matters in issue and, subject to r. 8, this right does not depend on the admissability of the documents in evidence: *O'Rourke v Darbyshire* [1920] AC 581, *Rush & Tomkins Ltd v. Greater London Council* [1989] AC 1280, [1988] 3 All ER 737 HL. The test of relevance is not the probative value of the documents ....

From Lord Woolf's draft rules

PART

Disclosure of Documents 27

Contents of this Part

Scope of this Part Rule 27.1
Standard disclosure — what documents are to be disclosed Rule 27.2
Duty of disclosure limited to documents which are or have been in party's control Rule 27.3
... *[next page]*

Scope of this Part

27.1 (1) This Part sets out rules about the disclosure of documents.

(2) This Part applies to all claims except a claim on the small claims track.

Standard disclosure — what documents are to be disclosed

27.2 (1) Where a party is required by a direction under Part 25 to disclose documents by way of standard disclosure, he must disclose —

(a) documents on which he relies; and

(b) documents of which he is aware which to a material extent adversely affect his own case or support another party's case; and

(c) *[any documents which he is required to disclose by an practice direction.]*

(2) A company, firm, association or other organisation complies with the duty to disclose adverse documents as specified in paragraph (1)(b) by disclosing any such documents of which its officers or employees identified in accordance with rule 27.7(5) are aware.

Dut of disclosure limited to documents which are or have been in party's control

27.3 (1) A party's duty to disclose documents is limited to documents which are or have been in his control.

(2) For this purpose a party has or has had a document in his control if -

(a) it is or was in his physical possession; or

(b) he has or has had a right of possession of it.

Plain *and* intelligible language

Professor J E Adams

From 1st July 1995, a statutory instrument requires the use of plain intelligible language in consumer contracts. The Unfair Terms in Consumer Contracts Regulations 1994, enacting the European Directive 1993/13 (six months late), imposed the obligation in two respects.

First under Regulation 3(2), no assessment may be made of the fairness of any term which (a) defines the main subject matter of the contract or (b) concerns the adequacy of the price or remuneration, for the goods sold or services supplied. Defining the "main subject matter" may prove troublesome in practice, but that is for the future. For present purposes, the significant fact is that even this immunity from scrutiny is qualified by "so far as it is in plain, intelligible language".

Secondly, Regulation 6 requires sellers or suppliers to ensure that *any* written term is expressed in plain, intelligible language. Some of the American plain language statutes impose damages as the sanction for non-compliance; that is not the solution of the Directive or the Regulations. Instead, if there is doubt about the meaning of a written term, the interpretation most favourable to the consumer shall prevail. That goes beyond the *contra proferentem* principle, which requires proof of ambiguity before it operates, because the Regulation only requires that doubt exists. How effective a sanction it will prove to be remains to be seen.

The advocates of plain language can take pleasure in this development (of which there have been some other earlier scattered instances in European legislation). What, however, is the effect of adding "intelligible" to "plain"? Is it, ironically, a modern example of adding a second, superfluous, adjective? The dangers of duplication like this have been pointed out by the proponents of modern drafting over the years, namely that the court will not treat the pair as just superfluous synonyms, but will instead seek to give significant, complementary but different effect to both words. Before discussing the possible application of this approach in a typical consumer context, another comment arises; by whose standard of comprehension will intelligibility be judged? In a consumer protection measure, it must surely be a consumer, but what attributes of literacy and understanding does (s)he possess? It is ironic that the average man on the Clapham omnibus might well not know, today, what an omnibus is, let alone recognise the Latin pun involved.

To return to the plain/intelligible dichotomy, it can be illustrated by what insurers have used for 160 years, namely the "basis of the contract" device. The use of those four words turns all statements in a proposal into warranties, so that any inaccuracy permits repudiation of liability, irrespective of the materiality of the false statement or lack of any causal connection with the loss or risk involved. Although the use of the phrase to achieve this result has been "outlawed" in consumer insurance since 1977, by the ABI Statement of General Insurance Practice, examples can still be found of its continuing use. It appears in the proposal form for insuring personal belongings of students offered by one of the principal banks, for example.

"Basis of the contract" is plain wording - "bus queue English" as the phrase goes - but few laymen, and even not all lawyers, would ascribe the established wide-ranging effect to the seemingly simple phrase. Hence, it is submitted, the wording fails the test of being intelligible. The same would or could apply to "time of the essence", "without prejudice" or "jointly and severally".

It may be that even the wording advised by the ABI to "disclose all material facts" may no longer be effective. How many consumers understand what is "material" in terms of insurance law and practice? More intractable problems can be foreseen as the key wording of the new Regulations comes to be litigated or arbitrated and we will see whether the use of the double test proves sensible. The writer is sceptical.

The Australian Language and Literacy Council has recommended the appointment of a plain English guardian to the Prime Minister's Office to supervise government departments' and agencies' communications with the public.

The UK tax law simplification project

At the end of July the Inland Revenue published its consultative document *Tax Law Rewrite: the way forward.* It is published in two A4 booklets, an 87-page main document and a 25-page summary. The last chapter of the main document is also a summary, but it is not identical to the other one.

Copies may be obtained from

Ajit Philipose, Room 643, SW Wing, Bush House, Strand, London WC2B4RD (at £4) or
http://www.open.gov.uk/inrev/condoc2.htm (at no charge)
Members are invited to send comments by 1st November 1996
by traditional methods to Mr Philiposes or by email to n.munro.ir.bh@gtnet.gov.uk

The extract below is the summary chapter of the main document. Although it is published on the internet, crown copyright is reserved and it is reproduced by kind permission of the Inland Revenue.

Unforturnately, we do not have space for the annexes referred to in the text.

Summary and list of views sought

1. In this Chapter, we summarise the conclusions set out in Chapters 2 to 9 and list all the points on which we would welcome your comments.

Chapter 2: General Drafting Approach

2. We continue to believe that purposive or general principles drafting cannot be used as a blanket approach for the rewrite. But we shall consider using more generally drafted provisions, or even statements of purpose, where we are sure that this does not increase uncertainty for users.

3. We do not see much scope for making tax legislation more user-friendly by systematically shifting the boundary of primary legislation. But in some specific cases we may incorporate in the primary legislation material which is at present outside it, and vice versa.

4. We shall aim to make the rewritten law as easy as possible to understand, through logical ordering of sections and subsections, directness of expression and the way it is laid out. We believe drafting guidelines are necessary to try to ensure a measure of broad consistency. We have set down our current thoughts on some of the more important aspects at Annex 1. But no guidelines can be applied in a rigid way.

5. The principles and techniques evolved for the rewrite will inform future Finance Bills. But we doubt that the draftsman can introduce them in full for Finance Bills in the immediate future.

We would welcome comments on both the general approach summarised above and on the detail of Annex 1. The extracts from earlier rewrites of tax legislation set out in Annex 2 may assist in this.

We would particularly like views on the following specific topics:

Length of sentences: We intend to use short sentences wherever possible. Would users like a single subsection to contain more than one sentence more frequently than at present?

Use of 'shall': Would users be content for us to minimise the non-future use of 'shall', except where it imposes statutory duties?

Drafting in the second person: Would second-person drafting be a helpful approach? If so, which areas of legislation would benefit from it? Could it be confusing to use it only in certain areas?

Choice of words and phrases: Are users happy for us to remove archaic terms and some existing drafting conventions and shorthand wherever we can, without losing precision and certainty or destroying the link with case law? We would welcome suggested additions to the lists of alternatives to first, archaic words and second, difficult words and phrases in Annex 1.

Definitions: Which would be the most helpful way of labelling and signposting definitions?

Gender-free drafting: What importance would users attach to gender-free drafting, and what drafting techniques would you suggest?

Explanatory material: Would it be helpful to have more material in the legislation itself? If

so, which particular aids (road map sections, flowcharts, diagrams, etc.)? What legal status should they have?

Chapter 3: Design and Layout

6. If legislation is to be as user-friendly as possible, any improvement in language needs to be matched by improvements in the legislation's appearance. We shall seek improvements in both typography — the size and shape of the print, etc.— and in the text's layout on the page, including the spaces around it, signposting and other matters.

We welcome views on how we should proceed. Again the extracts of rewritten law in Annex 2 may assist.

Chapter 4: The Order of Tax Legislation

7. In Chapter 4 we discussed the way tax legislation is divided into separate Acts and grouped and ordered within them. Although ICTA 1988 has a definite order, it is not clear that it is now the best approach.

8. We therefore looked at some options for reordering. These were:

- a minimum change option under which the aim would be to leave the division between Acts either exactly as we have it at present, or broadly so
- an activity-based or transaction-based approach, ordering the legislation according to a series of activities or transactions
- a subject-based approach which would refine the previous approach by grouping tax legislation according to a series of subjects or topics, which would normally embrace several different kinds of taxpayer activity
- ordering by separate taxes, following the existing pattern but splitting the Income Tax and Corporation Tax elements of ICTA 1988 into separate Acts
- ordering by type of taxpayer, producing separate Acts for each type of person charged or given rights or obligations under UK tax law: individuals; companies; trustees and others charged in a representative capacity; employers; and others such as pension fund administrators.

9. Each of these approaches has too many drawbacks to be the sole guiding principle of any reordering. We shall draw on the best of them.

10. However tax legislation was divided up at a high level, core provisions could be used to enable users to see very quickly how the blocks of legislation within an Act fit together.

Which of the above approaches to ordering tax legislation would users find most helpful generally? If users favour either of the last two, would they wish to see that taken to its logical conclusion by splitting Income Tax and Corporation Tax?

Chapter 5: Numbering

11. An ideal numbering system would be both durable and brief; it is an added advantage if it assists with signposting. No system will completely satisfy all these criteria, but some may be better than others. The question is whether we could improve on the present system.

12. There are two main alternatives to the present sequential numbering system:

- a multi-character system with either two or three components to denote the Part, section and (in the 3-part variant) Chapter. Each component could be either a number or a letter although it would seem sensible always to use numbers for the section component
- leaving gaps in the legislation when first enacted might allow new legislation to be slotted in without disturbing existing numbers.

13. We see advantages in a multi-character system, but not in leaving gaps.

We would welcome comments on all this. If a multi-character system were adopted, should it have two characters or three? Should the characters all be numbers or a combination of numbers and letters?

Chapter 6: Implementation of Ordering and Numbering Proposals

14. The ordering and numbering systems chosen affect the way we implement the rewrite. There are four main approaches:

- do a substantial amount of rewriting before making decisions on ordering
- reorder the legislation before the rewriting begins
- do some rewriting and then enact a reordered Taxes Act, fitting subsequent rewritten legislation into this

- reorder into a 'ghost code' which is not implemented but provides a guide for the rewriting.

15. Our conclusion is that the first two options have too many disadvantages when applied to a project of this scale. So the real choice, as we see it, lies between the two compromise options, and our current inclination is to go for the 'ghost code' approach as giving the best balance between discipline and flexibility.

Would users agree that the 'ghost code' is the best solution?

Chapter 7: Big Bang v Staged Implementation

16. There are two basic options for implementing the legislation:

- bring all the rewritten legislation into effect on a single date ('Big Bang'); or
- bring the legislation into effect in stages.

17. The rewrite itself would probably, on balance, be easier to do with the flexibility given by 'Big Bang'. But staged implementation would pose no insuperable difficulties, although making the new and old legislation work together would be complicated. The most important question is how the advantages and disadvantages of the two approaches balance up for the users.

Would staged or 'Big Bang' implementation be the better option for users?

Chapter 8: Where Should the Rewriting Start?

18. The sequence in which we do the rewriting affects how easy the rewrite will be to carry through and determines the earliest date at which each part of the rewritten law can be implemented. We do not think it makes sense to try to plan now a whole five-year sequence for the rewrite. But we need to decide which part or parts of the legislation to rewrite as the first tranche so that the work can get underway.

19. We have concluded that the *charging provisions for trading income of individuals* should be the central element in the first tranche of the rewrite. But, to provide a fuller test of the various possible drafting techniques, the first tranche should include one or two reasonably-sized pieces of more technical legislation. We do not have a firm recommendation at this stage, but possible choices include: Corporation Tax losses for a single company; the definition of company distributions; and the Schedule E foreign earnings deduction.

We would appreciate views on the proposal that trading income should be the main element in the first tranche and suggestions of more technical legislation to include in it.

We would also welcome views on what we should move on to after the first tranche has been completed.

Chapter 9: Rewrite Arrangements

20. Ministers have concluded that a dedicated project team within the Revenue should carry out the rewrite. But since its whole focus is to make tax legislation easier to use, an exceptionally high degree of user involvement is essential, making the rewrite, in effect, a joint venture. It is therefore particularly important to plan arrangements from the outset to ensure that every stage of the project takes full account of the user's perspective.

21. We intend to include a number of members drawn from the private sector in the project team. In addition to this, we are firmly committed to carrying out the rewrite in very close consultation with those who represent the users. The arrangements might follow those adopted for Self Assessment and involve a standing committee, chaired by the Revenue, of users' representatives. There will also be a small joint private sector/Revenue steering committee, reporting to the Financial Secretary but feeding its advice on day-to-day matters direct to the Project Director, to provide strategic guidance on the project.

22. We expect the full rewrite project to take about five years. But there will be a stocktake once the first tranche or tranches or rewritten law are complete. This may of course result in the curtailment of the project, but Ministers do not expect that to happen.

23. We think the stocktake should take place in the latter part of 1997. It should gather as much cost/benefit information as possible as well as looking at whether we have the right processes in place and, if not, how we can improve them. We believe that everyone involved should seek to evaluate each of the processes as the first tranche of the rewrite progresses. It may be useful to supplement this on-going evaluation with some wider user-testing of the finished project.

Do these arrangements best meet users' needs from the stocktake? If not, what additions or alternatives would they suggest?

Book reviews

The Oxford English Grammar

by Sidney Greenbaum

Oxford University Press 1996

Although as adults and lawyers we have an internal knowledge of the grammar of our language and are reasonably competent users of it, there are times when we feel uncertain about the acceptability of a sentence we have written or would like to know more about an item of grammar. This is particularly so in those areas where the language is undergoing change or we are conscious that it may have moved on since we were at school.

Sidney Greenbaum's *Oxford English Grammar* is an admirable text to satisfy these needs and to provide along the way a sound, open understanding of language. With its brief commentaries on the history of punctuation, the growth of vocabulary, the use of English and the differences between speech and writing, it is more than a technical reference book.

The book is a comprehensive grammar in the sense that it is not limited to syntax and grammatical morphology but also encompasses words and their meanings, the formation of words, punctuation, spelling, sounds, and textual matters such as cohesion and coherence, paragraphs and conventional textual patterns. So it is a mine of widesweeping information.

Furthermore, the evidence for its information and description of the language is contemporary English usage. Its statements and conclusions are based on the material collected by the Survey of English Usage, University College London, the British component of International Corpus of English (over 1 million words) and - to include American evidence - the Wall Street Journal (about 3 million words). In short, it reflects the practice of real English rather than the notions, whims or prejudices of the grammarian. While, to this extent, it describes modern usage rather than prescribes it, nevertheless it provides valuable insights into stylistic variation - for example into whether *can* occurs in a permissive sense in place of *may*, whether *media* and *data* are treated as plurals, the use of the subjunctive, and variations in punctuation. It also goes beyond the formal description of language items to discuss the functions and uses to which those items are put.

The modernity of the *Grammar* is important; it was released only in April. Too often the only dictionaries and grammars on our shelves are the ones we bought during our school and university days. They can be 10, 20, or even 40 years old. They are no longer safe guides. Our language is continually growing and changing. We need up-to-date, accurate tools.

The text has many features to warm the hearts of those interested in plain language. Each chapter begins with a helpful summary and an extensive table of contents. The material in each chapter is divided into manageable units and each unit is clearly labelled with a meaningful heading. The headings themselves are placed in their own column on the left of the page so that they can be located easily. There is a helpful glossary of technical terms at the back of the book and an excellent index, so that readers who need to dip into the text have useful supports.

Sidney Greenbaum was Quain Professor of English Language at University College London and Director of the Survey of English Language. Previously he had been a teacher in schools, and he held posts as professor in the United States as well as London. He was co-author of the *Comprehensive Grammar of the English Language* (1985: 1800 pages), which is recognised as the standard reference grammar of English. He wrote many books and papers about language and usage, including the 3rd edition of Gowers' *Complete Plain Words*. He was an impeccable scholar and humane being - and both those attributes shine through in the *Oxford Grammar* for he has made the material readily accessible for the non-specialist. Sadly, he died suddenly just after its publication. It becomes a superb final product and epitaph for an outstanding career.

One final comment of interest to *Clarity* readers: plain English activities rate a favourable mention during the discussion on good English in chapter 1.

Robert Eagleson

Cook on costs

A guide to legal remuneration in civil contentious and non-contentious business

by Michael J Cook

2nd edition: Butterworths 1995

In his preface to the first edition, Michael Cook notes the basic lack of understanding and interest which most of the solicitor's profession have in all aspects of costs. His stated aim in writing this book was to impart his understanding of and enthusiasm for costs which was instilled in him by one of his partners years ago.

The book succeeds well in Judge Cook's first aim of imparting understanding. It is organised into 5 main sections dealing with the quantification of contentious and non-contentious costs, solicitor and client costs, inter partes costs, matrimonial costs and legal aid costs. The law is stated as at 20th March 1995. Each area is dealt with in a logical way with a minimum of disruptive cross referencing and a pleasing lack of footnotes. The relevant statutory and other references are helpfully set out in the text. There are also useful illustrations and precedents. The book could be readily understood by a trainee solicitor and would also be useful as a reference work for solicitors and others with a deeper knowledge of the subject.

The section on recent decisions on hourly rates and mark-up is very useful, particularly as most of these important decisions are unreported. Similarly, most solicitors will probably be surprised by at least one important piece of information in the chapter which deals with the retainer. How many solicitors, for instance, who routinely deliver interim bills understand the difference between an interim bill on account and an interim statute bill?

As to imparting enthusiasm, for me the book did not succeed. True, it is written in an entertaining and informative style, but it brings home to the reader the unnecessarily complex state of this area of law which surely cries out for reform. Mr Cook laments the trend towards time charging in recent legislation on costs, which he points out provides no proper reward for efficiency. However, consideration of his explanation of the alternative basis on which costs are currently taxed (the A and B factors) makes it plain that this is unsuitable as a basis for charging in modern times, simply because it cannot be readily explained to clients. This is amply illustrated by the example general letter for contentious business set out in Chapter 6 of the book, which is itself taken from the Law Society's Client Care - A Guide for Solicitors.

That said, while we wait for fundamental reform (and the wait is likely to be a long one), this book is a welcome and readable guide to this area of law. It will enable solicitors and others to answer their queries quickly and reliably and to return to other areas of work with the minimum of delay.

Susan Holland

Legislation manual: *structure and style*

New Zealand Law Commission
Tel: 64 4 473 3453 Fax: 471 0959

87 pages including index

Since its creation, the New Zealand Law Commission has had a particular interest in statute law, partly because of its legislated mandate and particularly because of the interest of its Commissioners in the subject. This manual represents years of work.

The manual is full of information and advice. It is well written and well organised. Its appeal will largely be for those involved in drafting Acts, regulations and bylaws, and those who are involved in the preparation of drafting instructions. Although the Manual's appeal will be limited in some respects (principally because it is written to a New Zealand audience assuming the adoption of a yet-to-be-introduced new Interpretation Act) the Manual is still a welcome addition to drafting texts and will be a useful source text for a non-New Zealand audience.

The Commission envisages the ultimate production of a Legislation Manual comprised of four parts, two of which are encompassed by the Manual. The other two parts will deal with the enactment of legislation and detailed discussion of precedents for recurring drafting issues in legislation.

The Manual deals with

(1) the structure of legislation, which is largely related to the ordering of sections and the components of Acts (Preambles, purpose sections, application sections, definitions and so on), and

(2) matters of style, which encompasses plain language drafting, paragraphing, gender-neutral expression and commentary on capitalisation, punctuation, spelling, and like details.

Two schedules comment on the drafting of subordinate legislation and drafting amending laws.

I found the discussion of issues surrounding the application of new legislation (p 16-22) to be particularly well developed in drawing attention to often difficult and sometimes overlooked transitional and temporal issues in legislative drafting.

Although the Manual gives welcome support for plain language drafting (which it defines as "ordinary language, expressed directly and clearly") its advice on stylistic matters is often terse, providing relatively few examples and no references for additional reading. (A general bibliography is included at the end of the Manual, but it only refers to texts. A list of some of the better articles, for example some of those appearing in the Statute Law Review and other periodicals, would have been useful). Most of the advice is standard stuff, of no surprise to *Clarity* readers, but I was shocked to find "and/or " listed under the "avoid" heading instead of the "never use" heading.

But these are minor niggles when the work is viewed as a whole.

The Manual comments, briefly, on the "must/ shall" debate, preferring "must". It supports the use of diagrams, examples, and flow charts as a supplement to, or in place of, words whenever they assist in communication. The use of examples to illustrate the advice is uneven.

Although legislative drafters from Australia and Canada are recognised as contributing to the Manual, I could not recognise any current member of the New Zealand Parliamentary Counsel Office as a contributor. The Commission deserves credit for persevering with this work.

David C Elliott

The Plain English Guide

by Martin Cutts

OUP : £10.99
Available in paperback in August at £4.99
ISBN 0-19-860049-6

This book is not designed to convert, but to instruct: it assumes the reader already wants to write plain English and sets out to show him or her how.

It aims to help the user write and set out essential information clearly by stating and examining 20 specific guidelines, such as -

- *Use only as many words as you need*
- *Prefer the active voice unless there is a good reason for using the passive*
- *Put your points positively when you can*

The author's reason for recommending plain English is restricted to a couple of paragraphs; indeed, it is encapsulated in a single sentence: "clearer documents can improve people's access to benefits and services, justice and a fair deal".

The guidelines themselves should be second nature to most CLARITY members, though they are worth reiterating for all that. They range from the basic -

- *Use words your readers are likely to understand*
- *Use vertical lists to break up complicated text*
- *Plan before you write*

to the more thought-provoking -

- *In letters, avoid fusty first sentences and formula endings*
- *Avoid being enslaved by writing myths*

The great advantage of this book is that it deals with each guideline in a straightforward, even basic, way. A chapter is devoted to each guideline, explaining and expanding it, using examples and lists.

Two chapters I found of particular interest are -

Lucid legal language (guideline: *Apply plain English techniques to legal documents such as insurance policies, car-hire agreements, laws and wills*), which

is clearly of direct relevance to CLARITY members; and

Basics of clear layout (guideline: *use clear layout to present your plain words in an easily accessible way)*, which explained to me much I had not previously appreciated about type size, column width, leading, emphasis, justification, etc.

Its practical, low level approach makes this book extremely useful for someone who wants to take practical steps towards writing plain English. It is not a polemic, but a handbook, and at such an affordable price I certainly recommend it.

Justin Nelson

Utter Drivel

and

Language on Trial

both by Plain English Campaign

Robson Books, London 1995

ISBN 0-86051-949-X, 116 pages, 1995 , £6.99
ISBN 1-86105-006-2, 90 pages, 1996, £5.99

Plain English Campaign says in *Utter Drivel* that it "leads the way in effective communication". On this evidence, I doubt it, as both books are a disappointment. *Utter Drivel* consists mainly of examples of bureaucratic writing, spliced with a sardonic commentary. A few pieces are rewritten "by the application of the principles of plain English", but since these principles are neither stated nor justified, the results are pretty meaningless. The book is in fact a triumph of recycling, much of it being derived from previous PEC publications.

Language on Trial is subtitled *The Plain English Guide to Legal Writing*, so it must be meant to stand comparison with notable guides in this field, such as Asprey's *Plain Language for Lawyers*, Adler's *Clarity for Lawyers* and Wydick's *Plain English for Lawyers*. The comparison is wholly unfavourable to PEC. Though there is some passable polemic, the guidance sections are thin and the writing so unclear in places that the book is a weak advocate of its own cause.

Alarm bells begin to ring with the dedication, which is "... to Chrissie Maher our founder and Director who has dedicated her life to fighting gobbledygook". A book advocating proper punctuation ought to have done better with that sentence. And this is the first work I have ever seen which appears to be dedicated to its author: the exact authorship is unclear, but Mrs Maher signs the introduction and no other human author is identified in the book.

In the introduction, we learn that "plain English is . . . a positive advantage for everyone." For a book that damns "residue unexpired" and other tautologies, "positive advantage" is grim indeed.

The introduction continues: "We can define plain English as 'writing which communicates to the reader as clearly as possible'." You can, but would you want to, since this omits any reference to layout (like the rest of the book) and assumes that communication is a one-way process in which the reader is a passive recipient? The introduction claims that "Chapter 3 looks at the practicalities of writing law in plain English." But in fact the book has nothing to say about statutes.

We learn that "legal language has been shaped by the constant threat of attack in court", but that "this isn't the place to discuss the arguments about legal interpretation". Yet if this isn't the place, where is? And if it's discussed elsewhere, may we please have a reference to the source? (Garner's *A Dictionary of Modern Legal Usage* might help but isn't mentioned. Nor, in a book intended mainly for British lawyers, is CLARITY.) Later we are told that "clear legal writing depends on ... a clear interpretation of the law".

In trying to be trenchant the book becomes pompous and vague:

- "But if people cannot understand the legal documents which they must live by, you have to ask quite what we mean by a democratic society."
- "... because legal language baffles the lay person, it contributes to the differences which it marks."
- "We believe that legal documents should and can be written in plainer language. But is this true?"
- "... legal language has been shaped by its environment and uses. Much of what we have now is unnecessary and unclear. But a part is not."

The case for plain legal English is so strong that even a book as poor as this will not diminish it. But the smugness and flawed logic could easily deter potential converts, while giving ammunition to those who prefer traditional forms of drafting.

Martin Cutts

We hope to review in the next issue:

Michèle Asprey: *Plain Language for Lawyers* Federation Press, Sydney, 2nd edn, 1996 and

Carol Ann Wilson: *Plain Language Pleadings* Prentice Hall, New Jersey, 1996.

UK social security reforms

The Department of Social Security and its Northern Ireland equivalent intend to simplify decision making and appeals. Both content and the style are to be simplified. The full consultation document is available from HMSO, but free copies of the summary can be obtained by telephoning 0345 660828. Comments are invited, to arrive by 18th October.

Conferences

Statute Law Society

The Progressing Statute

19th October 1996: 9.30 - 4.00

at The Institute of Advanced Legal Studies
17 Russell Square, London WC1B 5DR

The rise of the parliamentary counsel: Sir George Engle QC (former first parliamentary counsel)

Progress in improving the quality of legislation: Christopher Jenkins QC (first parliamentary counsel, and a CLARITY member)

The Inland Revenue tax law simplification project: G.B. Sellers (parliamentary counsel)

Statutory interpretation, especially in New Zealand: Rt Hon Lord Cooke (former Chief Justice of New Zealand)

Panel discussion

SLS members: £40; others: £45

Contact Juliet Fussell at the IALS (above)
Tel: 0171 (44 171 from overseas) 637 1731
Fax: 580 9613

Plain language conference next year in Canada?

Kate Harrison and Cheryl Stephens are mooting the idea of a plain language conference in Calgary in 1997. They are active in Canadian plain language circles, as consultants (Plain Language Partners) and as publishers of the quarterly magazine *Rapport*. They propose this conference under the auspices of their International Plain Language Consultants Network. Their interest is in plain language generally, not specifically legal language.

For information or to volunteer, contact:

Kate Harrison
Box 3208, Winnipeg, Manitoba, Canada R3C 4E7
Phone: 1 204 452 7952 Fax: 1 204 475 5273
plkate@webt.net

Plain English Campaign's conference cancelled

PEC's London conference, scheduled for September, has been put off. They hope to hold it next summer.

To reach a conclusion on this matter involved the court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a Slough of Despond through which the court would never drag its feet, but I have by leaping from tussock to tussock as best I might, eventually, pale and exhausted, reached the other side.

Harman LJ: *In Davy v. Leeds Corp* (1964 3AER 394)

This and the similar judicial quotations on pages 22 and 28 are taken, with thanks, from Tedd Kerr's Singapore seminar (see page 3)

Better drafting

This extract from a will was taken from a 1992 precedent book. Let us look at it in detail and consider how it might be improved.

(1)[1] I bequeath[2] to the vicar and churchwarden[3] of the parish church of .....[4,5] and their successors the sum of[6] £..... upon[7] trust[8] to invest the same[9] and during the period of twenty-one years from[10] my death (which period[11] shall[12] be the perpetuity period[13] applicable to this gift) to apply the income thereof[14] for the purpose of maintaining[15] [description of grave] in good order[16] and repair[17] and[18] in keeping the lettering[19] on any gravestone[20] or to be erected[21] thereon[22] legible and causing[23] the same[9] to be recut from time to time[24] when necessary for that purpose[25] and[26] to apply the balance of the said[27] income as[28] shall not be[29] required[30] for such[31] purpose[32] in keeping the said graveyard in good order and repair. (2)[33] After the expiration of[33a] the said period of twenty-one years[34] the said vicar and churchwarden and[35] their successors shall[36] hold the said sum and investments representing the same[37] upon trust[38] to apply the income thereof in keeping the said graveyard in good order and repair AND[39] I request but without imposing any legal obligation on them that they will[40] maintain the [description of grave] in the manner hereinbefore described[41].

These two sentences contain 121 and 70 words respectively. A broad "plain language" consensus recommends a maximum of about 40 words, and an average between 15 and 25.

1 Wrapping the text under the paragraph number makes both number and paragraph break inconspicuous.

2 *I give* would do.We are taught that real property is devised and personal property is bequeathed, but (a) there is no point in distinguishing them; (b) it is in any case clear that this is a gift of money, not land; (c) the distinction can create unnecessary problems [David Mellinkoff, *The Language of the Law,* Little Brown & Co, 1963, pp 353-358]; and (d) "Not until the nineteenth century did it become a lawyerly custom to *devise realty* and *bequeath personalty*, a subtlety contrary to the linguistic and legal history of the words and never uniform in practice" [Mellinkoff, p.354].

3 There could be more than one churchwarden.

4 *Of the parish church of Westcott = Of Westcott Parish Church. Of* is a common marker for verbosity [Bryan Garner, *The Elements of Legal Style,* OUP, 1962].

5 Since the gift is to the church rather than to the vicar and wardens, it would be better to say so than to imply the opposite. (We may think that we as lawyers know the code, but why use code?)

6 *The sum of* adds nothing to £.....

7 *Upon = on.*

8 Logical paragraphing would have shown that *on trust to* governs the rest of paragraph (1) and all of (2). This would have made (1) clearer and would have saved repeating the words in (2).

9 *trust = it.*

10 *During the period of twenty-one years from = For 21 years after.*

11 *Which period* is clumsy repetition.

12 Is *shall* the imperative or the future? But you cannot command a period to be a particular length, and the future is inappropriate: when is it to be the period? Surely at all times, including now. The present is the correct tense.

13 The rule against perpetuities would make this gift void if the obligation to maintain the grave lasted longer than "a life in being (at the testator's death) plus 21 years". The testator could therefore extend the period by nominating someone

whose life — while he or she survived the testator — would defer the start of the last 21 years of the trust. [So an obligation to last "for X's life and for 21 years after his death" would last for 37 years if X survives the testator by 16 years.] (However, the similar rule against accumulations would limit the accumulation of unused trust income with the capital to the basic 21 years.) But there is no need to mention these rules, so the text in parentheses is unnecessary. [See, for example, Parker and Mellows, *The Modern Law of Trusts*, Sweet & Maxwell, 3rd edn (1975), pp. 90ff.]

14 *Thereof* is pompous and unnecessary.

15 *For the purpose of maintaining = to maintain.*

16 What does *good order and* add to *repair?* Not necessarily cleanliness [Adler, *Tried and tested: the myth behind the cliché*, Clarity 34 (Jan 1996), p. 45].

17 *For the purpose of maintaining in repair = To repair.*

18 These separate purposes would be more clearly presented as a list.

19 The *for the purpose of* introduction has forced the drafter to use too many clumsy *...ing* endings. *Lettering* sounds as though it is part of the list, though of course it is not. *Letters* would do.

20 The drafter (or the typesetter) omitted a word here, and it passed unnoticed amidst the mass of verbiage.

21 *Erected or to be erected* would only be written by a lawyer, and could be omitted without loss of sense.

22 *Thereon* has no technical meaning but is used only by lawyers. There must be an alternative preferable to everyone else.

23 If the obligation was to *recut* rather than *cause to be recut* no-one would suggest that the vicar was in breach of trust if he arranged for the work to be done by a specialist.

24 *From time to time* adds nothing to *when necessary.*

25 *For that purpose* adds nothing.

26 *X and Y and Z* suggests that X, Y, and Z are all items in the same list. But here we have *to invest ... and apply ... for maintaining ... in good order and repair ... and in keeping ... and causing ... and to apply...in keeping....* This is messy drafting.

27 *The said = the.*

28 *The balance ... as* is wrong. It should be *any balance which.*

29 This is another misuse of shall.

30 *Needed* is less portentous than *required.*

31 *Such* is used in this way only (and unnecessarily) by lawyers.

32 The repetition of *purpose* is clumsy. *The balance of the said income as shall not be required for such purpose = any surplus* or perhaps, for caution, *any surplus income.*

33 A space between paragraphs would rest the eye and help the reader navigate the document.

33a *Expiration = end; after the end = after.*

34 What other said period?

35 *Or?* Better, *the trustees.*

36 The imperative force is weakened by the earlier non-imperative uses of *shall.*

37 *The said sum and investments representing the same = the trust fund.*

38 We have established that it is a trust.

39 Capitals are a poor substitute for proper paragraphing.

40 *I request ... that they will = I ask ...them to.*

41 *In the manner hereinbefore described = as described.*

Suggested revision

I give £.... to the parish church of ..... on trust to use the income:

(A) For the first 21 years after my death:

(1) To keep [description of grave] in good condition, recutting the inscription when necessary; and

(2) To the extent that there is surplus income, to keep the rest of the graveyard in good condition.

(B) After those 21 years to keep the whole graveyard in good condition. (And without imposing any legal obligation I ask them to continue to maintain the [description of grave].

Letters

From Timothy Norman
Debenham & Co, London SW3

I have recently received the following proposed clause for insertion into a draft contract for the sale of land:

> During the subsistence of this Agreement the Vendor shall not exercise (and the Vendor warrants that it has not on or prior to the date hereof exercised) any election in terms of paragraphs 2 and 3 of Schedule 6A to the Value Added Tax Act 1983 (sic) which has or may have or had the effect of waiving any exemption from Value Added Tax in relation to the Property or any part thereof (having regard to paragraphs 3(3) and (4) of the said Schedule 6A) or which may otherwise have had the effect or (sic) rendering Value Added Tax payable on any amount due from the Purchaser to the Vendor under this Agreement and for the avoidance of doubt it is hereby agreed and declared that the Vendor shall not be entitled to treat the making of an election as being a change in the tax charged on a supply as provided in Section 42(2) of the Value Added Tax Act 1983.

At the risk of blowing my own firm's trumpet, our standard preferred wording to cover such circumstances is:

> The Vendor has not made and will not make an election to waive exemption to VAT in respect of the Property.

From Carol Ann Wilson
Houston, Texas

I recently cleaned up a form "Confidentiality Notice" my firm had been using (probably since vintage fax days). The original read:

> You are hereby NOTIFIED that the information contained in this facsimile is legally privileged and confidential, which is intended only for the use of individual or entity hereinabove named. If the reader of this message is not the intended recipient, you are hereby notified that any use, dissemination, distribution, or reproduction of the telecopy is strictly prohibited. If you have received this telecopy in error, please immediately notify the sender by telephonic means and further, return the original message to us at the address above stated via the United States Postal Service.

I changed it to:

> The information in this fax is legally privileged and confidential, intended only for the use of individual or entity named above. If the reader of this message is not the intended recipient, you are notified that any use of this fax is prohibited. If you have received this fax in error, please immediately notify us by phone and return the original message by mail.

But my personal preference is:

> This information is protected by privilege. If it is not for you, don't read it, don't make a copy, and please send it back.

Now, the changes going from eight lines to six lines did not strip the original of all its verbosity, but they did make it more concise and therefore, more acceptable in terms of plain language principles. It had been called a "Facsimile Cover Sheet" and was changed to a "Fax Cover Sheet." Then the confidentiality notice referred to it as both a "facsimile" and a "telecopy," so I uniformly called it a "fax." Nothing needs to be in all caps, ever, and the "which" clause was, of course, used wrongly. But when it comes to correcting many generations of habitual legalese, change comes slowly. So we take what we can get.

Why were the changes made? First of all, nobody calls a fax a "telecopy" or a "facsimile." We call it a "fax." Neither do we speak of the "United States Postal Service." We speak of the "mail" or the "post office." And I personally cringe whenever I see the term "via" as applied to a method of service. I think the post office must have started it with the term "via air mail" long ago--or was it the stationers? The term "via" was originally defined as "by a route passing through," or "by way of," and applied to things geographical. Through this continued custom and practice, however, Webster's has now added a second definition, "by means of" or "by the medium of." So I suppose it is now accepted, although it strikes me as affected and I will change it at every opportunity. If we send something, we send it by fax, not via fax or via messenger, or via Federal Express. We even use "fax" as an action verb, do we not?

One of my guiding plain language principles

is "write the way you speak," which works well, if you speak well. I usually reserve one round of the editing process to read a piece aloud to find those little lurking pests that defy plain language.

From Anne Stanesby

Official Solicitor's Dept, London

I am often asked to represent in civil proceedings defendants with a mental disability.

Recently, I have been involved in several Family Division cases where plaintiffs are seeking declarations about such things as where my client should live, who should care for them, and who should be allowed to visit them.

I always begin by finding out if my client has an advocate. Often they do not but in one of these cases I was pleased to find that an advocate had been appointed. The lady in question was most helpful and assisted us all to reach an amicable agreement about the issues before the court. She also attended the final hearing when the proposed agreement was presented to a High Court judge for his consideration. The co-defendant father was unrepresented; he had been refused legal aid because of his means but could not afford a solicitor.

Counsel for the legally aided plaintiff mother drafted a consent order which was shown to my client's advocate and to the father. Our advocate looked at the order and commented:

> **I can see you lawyers haven't heard of the Plain English campaign.**

I told her about CLARITY and explained the draft order to her and the father. Later I prepared a translation for the father. I found this quite difficult. I can't reproduce the confidential provisions but here are the last three (standard) paragraphs with suggested translations:

> *Liberty to apply to all parties on not less than 48 hours notice.*
>
> **X** [the plaintiff]**, the Official Solicitor's office, or Y** [the father] **may come back to the court for another order if they give at least 48 hours' notice of the hearing to the others.**
>
> *There be no order for costs inter partes.*
>
> **None of the parties need pay any of the others' legal costs.**
>
> *The costs of the Plaintiff and the First Defendant to be taxed on a standard basis in accordance with the Civil Legal Aid (General) Regulations 1987 (Regulation 107).*

Translation abandoned; explanation takes over:

> **The court will check X's and Z's solicitors' and barristers' bills for the Legal Aid Board. This is called a "legal aid taxation." The solicitors then send the amended bills to the Legal Aid Board for payment.**

Perhaps the increased presence of unrepresented parties will force us to do what we ought to be doing anyway: expressing ourselves at all times in plain English.

From John Pare

Marshall Pugh & Co, Oswestry

In the small town where I practise there is a partner (of no longer qualification than I) in one of the other firms who seems to approach drafting from a diametrically opposed standpoint.

Over the years I have sought to adapt my drafting style to the times. Initially this was to ensure that we used our new-fangled word-processor to the best advantage, keeping all variable information in the same area of the document. This made me question the traditional approach to document construction, sentence structure, punctuation, and terminology.

My colleague and I are now light-years distant from each other. A recent conveyancing transaction has thrown our styles into sharp contrast.

My initial draft began:

> **"The Date":**

I am not sure why I used quotation marks - I think to show it was to be a defined term, though it preceded the definitions clause. Opposite this against the right margin he inserted *1996.*

The definitions clause began:

> **In this Conveyance made on The Date written above the words set out in the left-hand column below have the meanings respectively set against them in the right-hand column.**

To this he added, unnecessarily, *below.*

Probate of the Will of the Deceased

became *Probates of the Last Wills and Testaments of the Deceased.*

I would have thought that my trust for sale clause was not really his concern, but

> ... **upon an immediate and binding trust for sale for themselves as tenants in common in equal shares**

got a *beneficial* before"tenants".

> **In witness whereof** [dash it, I thought I had changed all these to *all of this*] ... **have executed this Deed on the Date**

was transformed into *In witness whereof the parties hereto* — where else, for goodness sake? — *have executed this Conveyance on the Date first above written*

There were many other amendments in the same vein. I took on board those which went to the heart of the conveyancing but engrossed without those to which I have drawn attention and sent it to my colleague. A few days later back came the copy with all his amendments reinstated, and the plaintively worded letter:

> **With further reference to this matter.**
>
> **For all practical purposes this is a gift to your clients - our clients carrying out a moral obligation of the deceased. Surely therefore we on behalf of our Clients are allowed to choose the wording of the proposed Conveyance between our respective Clients provided that same is not prejudicial to your Clients.**

I gave in.

The price paid for the Act's economy of language lies in the complexity of the Student Assistance Regulations which govern the grant of benefits. Amended on more than forty occasions in their six years of existence, these regulations now represent an administrative scheme of great intricacy and much ambiguity. No applicant is likely to gain from them any clear impression of his entitlement to a benefit and this case suggests that even those who have to administer the scheme have great difficulty in understanding it.

Stephen J: *In re Student Assitance Review Tribunal; ex parte Emery* (55 ALJR 387)

The policy is made up of a jumble of ill-assorted documents expressed in that distinctive style which insurance companies have made their own.

CJ, High Court: *Guardian Assurance v. Underwood Constructions* (1974 48 ALJR 307 at 308)

Editor's note

With all due respect to John Pare, much of his offending draft could have been (dare I say?) pared down much further. I would have omitted as redundant the whole sentence about the words in the left (hand?) column having the meanings in the right column, and the *in witness* clause. And do we need more than ... *to X and Y as beneficial tenants in common in equal shares* [whose meaning will have been explained to the clients when they were asked for instructions on the point]? (Incidentally, shouldn't the conveyance have been an assent?)

May I also recommend to readers a more robust view with such irritating amendments? It was, after all, Mr Pare's document, and neither the executors nor their solicitors were making the gift. I was taught in articles — as I never tire of telling amenders — that it was considered discourteous to make merely stylistic amendments, and that when our roles are reversed I accept their strange phraseology. It is also worth quoting some authority: the dicta in *Trafalgar House* (p.21 of this issue) should do nicely.

One final point. Like John Pare (and many others), I list all the variable details together at the beginning of a document. But this is dangerous if we allow it to persuade us that the rest of the document is invariable, inclining us not to re-read it each time in the light of our particular instructions. We should always read it. I have just been forced to waste many expensive hours (delaying an urgent completion) drastically amending on behalf of a tenant a lease containing many usual clauses inappropriate to his transaction. The proposed tenant was a dentist leasing for a short term one room in a surgery whose reception area was shared with the dentist landlord. Among many inappropriate standard clauses were:

- The inclusion of the non-existent internal walls in the demise.
- The definition of the lower boundary of the premises by reference to floorboards (when the floor was concrete).
- The inclusion of the structural repairing costs in the service charge. (These had been excluded during the clients' negotiations. This amendment required extensive recasting, to separate out from the landlord's other covenants those towards whose cost the tenant was not to contribute.)

And I am not sure whether I was being serious or flippant in inserting after "not suffer any person to sleep on the premises" the rider "except under anaesthetic".

Drafting snippets

I recently received this letter in reply to a telephone call pressing for a reply to my letter written two weeks earlier:

> **Thank you for your letter of the 26th March upon which we are taking instructions, we will respond as quickly as feasible.**

What did this mean? Were they only just taking instructions? Whether they had or not, why was it taking so long, and how much longer was it likely to take? (Several weeks, in the event.)

What should have been a simple two-line letter reveals slackness of thought as well as of practice.

The omission of the comma after the date may not change the meaning in this case, but was that luck or judgment? Presumably luck, because the sentence sounds odd without the pause, and the mistake should not have survived re-reading.

More serious is the use of a comma instead of a full stop. This is more than just an error of punctuation. It suggests that the writer does not understand the structure of the message.

Those using English and Welsh courts will have noticed widespread adoption of plain language by the administrators. Here is a random sample to give the flavour, from the recently published *Charter for court users.*

THE COUNTY COURTS

Issuing a summons

Most county court cases begin with the issue of a summons by the plaintiff (the person making the claim), directed to the defendant (the person against whom the claim is made). Court staff can provide you with forms to issue a summons and will help you to complete them. *They cannot give you legal advice or tell you what to say.* You can get advice from a solicitor, a Citizens Advice Bureau or other advice agency. You will have to pay a fee to issue a summons. The fee depends on the amount of the claim, but those receiving income support or family credit do not have to pay.... If you ask us to

Signs

Theambiguity of the sign below left (seen in the advocates' room at Kingston-upon-Thames County Court) arises from the appearance of the heading as part of the text.

Centre and right are two possible revisions (though a graphic might be better still).

THIS IS AN OVERFLOW
WARNING
NOT TO BE USED
AS AN ASHTRAY

Warning

This is an
overflow
Not to be used as an ashtray

Overflow

Not to be used
as an ashtray

And I spent some time wondering about the nature of a vehicle stuck in traffic and marked

Incident Support Unit

until I saw a less obtrusive sign "Ambulance"

issue a summons:

- **we will issue and send it to the defendant usually within 5 but not later than 10 working days**
- **if you are the plaintiff, we will send you a notice within the same period of time giving the number of your case and, where appropriate, the date on which you must come to court**

This could be further improved*, but The Court Service has produced an impressive array of booklets, leaflets, and (in the waiting areas) notices (though advocates are not accommodated: see foot of previous page).

We look forward to hearing that the judges are being trained in the use of plain language.

* For example:

Most county court cases begin when one person (the plaintiff) issues a summons against another (the defendant).

And is the defendant not told the hearing date?

Brian Rangeley, a London solicitor, reported in the Law Society's *Gazette* (and kindly allowed us to repeat) this extract from the use clause of a lease:

Not to keep or permit or suffer to be kept on the demised premises any materials of a dangerous combustible or explosive nature ... but to use the same only as an indoor shooting centre and instruction in the handling and firing of firearms and the servicing and repair of firearms.

Cheryl M. Stephens writes

via "CBA - Plain Language Law List"<PLAINL@admin1.algonquinc.on.ca>

British Columbia's CBA's (Canadian Bar Association?- ed) Wills and Estates Section has (in its April minutes) discussed a concern about plain language drafting.

BC has new adult guardianship legislation (passed but not in effect) which accepts the use of "Representation Agreements". The Community Coalition for the Implementation of Adult Guardianship Legislation has written and now circulates a draft representation agreement. The agreement is touted as plain language (CS's editorial comment).

A sample bit of the agreement reads:

...My friends Jean and Pat, and my daughter Elly, are my representatives.

My son Ron will be my alternate representative.

I appoint Jean and Pat to make decisions about health and personal care and financial matters related to daily living. I appoint Elly to handle any larger financial matters and my legal affairs. Jean and Pat will make decisions together. If they disagree, the will contact Elly and I want all three of them to come to an agreement....

The Wills and Estate Sections says:

Obviously, lawyers are urged to review any draft representation agreements with caution as the Act is not yet in effect and the regulations are not yet available. If laywers encounter these sorts of agreements, be wary as, of course, we have no juudicial interpretation of terms such as "financial matters related to daily living" or "larger financial matters".

The internet

Cheryl Stephens has set up a web chatline about plain language. To subscribe send to

listserv@cba.org

the email message

Subscribe PLAINL John Smith

(or whatever your name is).

You will automatically receive in your mailbox everything posted to the list PLAINL. There is no charge.

To contribue articles or messages to the list, send mail (with a subject) to **plainl @ cba.org**

A digest form of the list is available by sending to **listserv@cba.org** the message **set plainl digest** which you can cancel with **set plainl nodigest.**

Your subscription can be cancelled by sending to

listserv@cba.org

the message

unsubscribe plainl

Case report

Trafalgar House Construction v. General Surety & Guarantee Co

CA: Bingham MR, Beldam & Saville LJJ

22nd February 1994

66 Building Law Reports 47

This case arose from the difficulty of extracting the meaning from the traditionally drafted legal document reproduced below. Several important aspects were unclear.

Lord Justice Saville began his analysis by quoting Lord Atkin in *Trade Indemnity Co Ltd v. Workington Harbour & Dock Board* (1937 AC 1)):

> **"...(I)t is difficult to understand why businessmen persist in entering upon considerable obligations in old-fashioned forms of contract which do not adequately express the true intention."**

And he continued:

> **Nearly sixty years on little if anything seems to have changed.**

Although this "bond" was probably meant to be a guarantee, it lacked the essence of such a document, in that there was no obligation on the surety to "see to it" that the sub-contractor fulfilled his commitments. (Breach of such an obligation lays the surety open to a claim for damages.) On the contrary, the obligation of sub-contractor was expressed in the same words as that of the surety, and the sub-contractor could not guarantee himself.

Another oddity was that the document seemed to impose an obligation (on surety and sub-contractor jointly and separately) to pay the maximum sum even if that exceeded the loss caused by the sub-contractor's failure.

By this Bond we K. D. Chambers Limited whose Registered Office is at 1 London Road Sittingbourne Kent (hereinafter called 'the Subcontractor') and General Surety & Guaranty Co Limited whose registered office is at Hawthorn Hall Road Wilmslow Cheshire SK9 5BZ (hereinafter called 'the Surety') are held and firmly bound unto A. Monk Building and Civil Engineering Limited (hereinafter called 'the Main Contractor') in the sum of £101,285.00 (One hundred and one thousand two hundred and eighty five pounds) for the payment of which sum the Subcontractor and the surety bind themselves their successors and assigns jointly and severally by these presents

Sealed with our respective Seals and dated this twenty seventh day of November 1989

WHEREAS

1. The Main Contractor has entered with the Maidstone Borough Council for the construction of Leisure Centre at Mote Park Maidstone Kent (hereinafter referred to as 'The Main Contract Works')
2. The subcontractor by a subcontract agreement evidenced by subcontract order no. SC1839/C5495 dated the Thirty first day of October 1989 made between the Main Contractor of the one part and the Subcontractor of the other part has entered into a subcontract (hereinafter referred to as 'the said Subcontract') for the construction and completion of the Subcontract Works (being part of the Main Contract Works) as therein mentioned in conformity with the provisions of the said Subcontract

Now the condition of the above-written Bond is such that if the Subcontractor shall duly perform and observe all the terms provisions conditions and stipulations of the said subcontract on the Subcontractor's part to be performed and observed according to the true purport intent and meaning thereof or if on default by the Subcontractor the Surety shall satisfy and discharge the damages sustained by the Main Contractor thereby up to the amount of the above-written Bond then this obligation shall be null and void but otherwise shall be and remain in full force and effect but no alteration in terms of the said Subcontract made by agreement between the Main Contractor and the Subcontractor or in the extent or nature of the Subcontract Works to be constructed and completed thereunder and no allowance of time by the Main Contractor under the said Subcontract nor any forbearance or forgiveness in or in respect of any matter or thing concerning the said Subcontract on the part of the Main Contractor shall in any way release the Surety from any liability under the above-written Bond

Any proceedings against the Surety to recover any claim hereunder must be served within six months after the fourth day of February 1991 or such other date as may be certified by the Architect as the date of Practical Completion of the Main Contract Works.

Both sides agreed it should not be read that way.

So the court had to work out as best it could what the parties had intended. Lord Justice Saville continued:

> ...(I)t seems to me that what the bond does is to impose upon the surety an independent obligation to pay the damages sustained by the main contractor (up to the amount of the bond) from a failure of the sub-contractor to carry out the sub-contract. It is true that the bond does not in express terms impose this obligation on the surety, but instead describes the satisfaction and discharge of the damages by the surety as a "condition" of the bond, but given (as I understand both parties accept) that the literal meaning of the words in the bond would produce the unacceptable result noted above, it seems to me that to make any sense at all the bond must be read as though in effect this "condition" contained the undertaking of the surety.

The next unclarity was when the obligation arose. The judge decided it was implicit that it arose on demand by the main contractor.

Finally, he had to decide the amount due under the bond.The surety said it was the amount due from the sub-contractor to the main contractor after taking into account any counterclaims or other set-offs. The judge disagreed: it was the additional expenditure incurred by the main contractor as a result of the sub-contractor's failure to complete the sub-contract; this would include the extra cost of completing the works and any other consequential loss, like the payment of damages to the employer. Moreover, because the purpose of the bond was to provide urgent funds to remedy the cash-flow difficulties caused by the sub-contractor's failure, the contractor's assertion and calculation of this figure should be accepted unless there was evidence of bad faith. Otherwise the purpose would be frustrated by the delays of complex litigation.

Lord Justice Saville concluded:

> I would only add a suggestion both to those who seek and to those who provide securities for the performance of commercial obligations. They would save much time and money if in future they heeded what Lord Atkin had said so many years ago and set our their bargain in plain modern English without resorting to ancient forms which were doubtless designed for legal reasons which no longer exist.

Lord Justice Beldam and Sir Thomas Bingham, the Master of the Rolls, agreed.

Editor's note

Pruning the verbiage can emphasise the absurdity of the language. For instance, the second recital in the bond can be reduced to the Groucho Marxian:

> The sub-contractor by a subcontract contract evidenced by subcontract number X betwen the contractor and the sub-contractor has entered into a subcontract (hereinafter called 'the subcontract") to carry out the subcontract work (which is part of the contract work) in accordance with the subcontract.

A debate between a traditional drafter and a CLARITY member

An elderly widower of modest means (A) was anxious to protect his disabled daughter (B) after his death (and before, if he had to go into care). He had the house they lived in and a little capital.

The house was to go into trust immediately but A would retain a life interest. On his death the house and capital would be used for B during her life, and would then pass to the other daughter C or, if she had died, to her children. A, C and I were the trustees.

A asked a welfare law specialist to prepare the documents. He produced a 21-page deed of settlement and a 7-page will. The longest sentence was over a page long and many others were not much shorter. There was no punctuation.

A asked me what it all meant. I wasn't sure. Decoding the documents and explaining them to A wasted many hours and required extensive correspondence with the drafter. Here is a flavour.

Text

8.1 Trust moneys may be invested or laid out in the purchase of or upon the security of such stocks funds shares or securities or other investments or property of whatsoever nature and wheresoever situated in any part of the world and whether involving liability or not (including the purchase improvement repair building rebuilding decoration or furnishing of any real or personal property of any nature or any interest therein and wheresoever situated as aforesaid and whether for investment purposes or for the beneficial occupation use or enjoyment of any of the Beneficiaries for the time being in existence) or by way of loan to any Beneficiary upon such personal credit with or without security and upon such terms as the Trustees shall in their absolute discretion think fit and to hypothecate all or any part of the Trust Fund as security for the repayment of any loan made to any Beneficiary as the Trustees may in their absolute discretion from time to time determine for the benefit of any Beneficiary and in this connection to issue guarantees of indebtedness of the Beneficiary and to pledge the said Trust Fund to secure any such guarantee and the decision and acts of the Trustees shall be conclusive and binding on all Beneficiaries

8.2 The powers of investment hereunder shall include the making of any investment in gold silver precious metals gold and silver coins commodities works of art precious stones and other items of value (intrinsic or non-intrinsic) as well as options and future contracts in respect thereof

My question

In clause 8.1 you give a power of investment in "other investments or property of whatsoever nature" but it is not clear whether you mean this literally or if it is to be read *eiusdem generis* with the rest of the clause. If the former, would it be a good idea to delete all the detailed references in clause 8 [which continued for another five subclauses], and rely on the general words?

A similar point arises about the interpretation of "items of value" in 8.2, if that clause survives my last comment.

His answer

I do not believe that the confusion which you suggest would arise. This deed was in fact settled by Counsel.

Supplementary question

The confusion already has arisen, whether or not the deed was settled by Counsel, as I do not know what my powers as trustee will be. I doubt either A or C are any wiser.

Answer

With respect I believe that the terminology is perfectly clear. However, in view of your particular objection in the case of this Trust I have deleted the words in clause 8(1) "stocks funds shares or securities or other".

With the deletion of the words that you wish at clause 8.1. I believe that 8.2 is now abundantly clear and I would not propose to make any alteration to that clause.

Speculation

But what do these two clauses mean?

The trustees may invest in any property[1], even if it involves liability[2], or by way of loan to a beneficiary on any terms the trustees think fit[3], and may hypothecate the trust fund to secure a loan to a beneficiary[4].

1. Really *any* property?

If so, why mention particularly "stocks funds shares or securities", which strongly suggest (as a matter of common sense, apart from the *eiusdem* and *inclusio* rules) a limitation to investment in the stock market?

If the limitation is intended to apply, why confuse the issue with "property of whatsoever nature and wheresoever situated in any part of the world"? (Incidentally, none of those involved had any intention of investing outside England.)

And again, if the limitation is intended, how can such investments include residential property, which was apparently envisaged by the inappropriately general (and repetitive) following words "any real or personal property of any nature or any interest therein and wheresoever situated as aforesaid"? (Could it be "wheresoever situated *not* as aforesaid"?)

Could the trustees build, decorate, and furnish a share certificate for the occupation of a beneficiary? If not, why "or personal property of any nature" when he meant "leasehold property"?

And what does "enjoyment" add to "use"? Can the trust fund be squandered on fleeting pleasures? A's instructions were to provide a secure home for B (preferably the one she had lived in for many years) and to support her from the meagre capital.

The drafter returns to the definition of property in 8.2. It now includes investment in precious metals, precious stones, works of art, and [back to the generality] "other items of value (intrinsic or non-intrinsic)", not to mention options and futures [in anything?]. Does "non-intrinsic" include items of only sentimental value?

2. Is there any property which *cannot* involve liability? Surely he meant property which diminished in value, although he doesn't say so? And is this a licence to make a very bad investment?

3. "Or by way of a loan to any Beneficiary ... without security ... for the benefit of any Beneficiary" may not be — at least if it is interest-free — an investment at all, but a distribution. So what is it doing as part of the powers of investment?

4. I hadn't heard of hypothecation. My *Shorter Oxford Dictionary* defines it as "To give or pledge as security; to pawn, mortgage". But *Stroud*, a safer source for a technical legal use, distinguishes hypothecation from both pledge and mortgage. Whichever definition is adopted, the drafter's "to hypothecate ... and in this connection ... to pledge" suggests some conceptual confusion.

   In any event, it is hardlty best practice to pawn the trust fund.

The drafting solicitor has since publicly supported traditional legal language on the grounds that it is essential for its greater precision than plain language.

The obligation clause in the mortgage provides yet another example of a rigmarole of close spaced fine print in 36 long closely set lines lacking punctuation and paragraphs and which is more likely to obscure ... than to reveal the extent of the obligation ... intended to be defined by it.

Wickham J in the Supreme Court of Western Australia (1981)

The difficulty chiefly arises because the policies, and other documents, emanating from the insurer could not be more perplexing if they had been specifically drafted in order to generate ambiguity.

Meagher JA in the New South Wales Court of Appeal: *Edwards Dunlop v. C.E. Heath*

Litigators should find useful **Professor Richard Wydick's** *The ethics of witness coaching* (Yeshiva University's *Cardozo Law Review* Vol 17, Sept 1995). It is not about plain language, but is a clear and helpful guide to the important but difficult line we must draw between writing a coherent witness statement and putting in a witness's mouth words which don't belong there.

Legal Secretaries International Inc, a Texas non-profit corporation run by CLARITY member **Carol Ann Wilson**, supports plain legal language. Contact:
8902 Sunnywood Drive
Houston, Texas 77088-3729
Tel: 1 713 847 9754 (fax 2121)
http://www.compassnet.com/legalsec

David Colenso, a partner in a Queensland law firm, has published *Plain English leases - clearly better leases* in the *Queensland Law Society Journal* April 1996 pp 157-171.

News about members

Sidney Greenbaum collapsed and died recently while giving a lecture in Moscow. He was a quietly religious Jew, and a well-respected Hebrew scholar before he became a world-renowned authority on English. He was a kind and gentle man who would chortle happily at a joke at his own expense. His loss is very sad. (A review of his *Oxford English Grammar*, published just before his death, appears on page 13.)

England

John Griffiths has left Plain English Campaign. He has formed Legal Communications Ltd, under which he is continuing as a writer, editor, and trainer, (with a legal bias).

Martin Kay has completed his year as president of the Suffolk and N. Essex Law Society.

Timothy Norman has left Debenham & Co of Knightsbridge to join Donne Mileham & Haddock in Brighton.

David Pollacchi, a solicitor specialising in company and commercial law, has moved from Watford to join Lass Salt Garvin in Piccadilly.

Mike Petley has been appointed director of the Guildford branch of the College of Law.

James Rowley has retired from practice.

Sue Stapely has left The Law Society, where she was Head of Public Relations, to join Fishburn Hedges, a central London communications consultancy, as director designate. She hopes to continue writing, broadcasting, and training, and to find time for some solicitor's work.

Helena Twist has moved from Nabarro Nathanson to Hammond Suddards, where she is Director of Legal Development.

New Zealand

Sir Kenneth Keith, formerly President of Law Commission, has been appointed a judge of the Court of Appeal.

United States

Professor Joseph Kimble has been appointed managing editor of the *Scribes Journal of Legal Writing*. **Bryan Garner** remains editor-in-chief.

Committee

Standing down

Patricia Hassett's professional career began in private practice in her native New York. Later she took part-time appointments first as an assistant district attorney and later as assistant counsel to the municipality. She taught for a while at Harvard before moving to Syracuse University, where she became Professor of Law in 1980. Ten years later she came to England for an 18-month stint at the university's London outpost, and was elected to the CLARITY committee in autumn 1990. She stayed in London until 1993, on leave from Syracuse, to serve on the Lord Chancellor's Advisory Committee on Education, and was meanwhile called to the English bar. Throughout this period she was an active member of the committee, which for a time met regularly in her Millbank flat. When she returned to the States she stayed on the committee as our prototype overseas representative, but the pressure of her many other commitments — which include a British Home Office consultancy on a smart bail-application computer system — led her to withdraw from active participation. Meanwhile the overseas committee has developed into a small network.

Alison Plouviez was admitted a solicitor as a mature student in 1986, after working for several years in the voluntary sector. She had a brief spell in private practice but has been on the Law Society staff since 1987. She wrote the *Probate Practitioner's Handbook* and is now secretary to the Employment Law Committee. She joined the CLARITY committee in 1992, and although she has now left to take life a bit easier she continues to promote us at the Law Society.

Alison and **Patricia** both generated a constant stream of good ideas and helped make committee meetings a pleasure. We miss them both.

Arriving

Simon Adamyk is a barrister practising chancery and commercial law at Lincolns Inn, London. He was called to the bar in 1991, having graduated from Downing College Cambridge and from Harvard Law School. He has an interest in all things American, his other half coming from New York City. He is keen to see computers and other technology used to their full potential in the law. His chambers' website is http://ourworld.compu-serve.com/homepages/12NewSquare (from which his conventional address can be deduced).

Christine and **Stewart Graham** are our first husband-and-wife team. An administrative change meant that **Stewart** was at Kingston University for only two days before graduating in sociology in 1992. He studied law externally for a time, working hard and unsung for CLARITY while clerking for the then chairman, and he remained an enthusiastic member when he left to join what is now Coleman Tilley Tarrant Sutton, where he is projects manager and handles personal injury cases. He is an active member of the local Conservative Association. He joins the committee with responsibility for promotion and fundraising. **Christine** graduated in accountancy &economics from the University of Wales at Aberystwyth in 1984 and qualified as a teacher the next year. She is now head of maths at Carshalton High School for Girls. She has been the treasurer of several staff room associations and Surbiton Junior Rotary and is now treasurer of SE England Conservative Association. Although unconnected with law and not a member of CLARITY, she has very kindly offered to assist our treasurer Nick O'Brien.

Richard Oerton was admitted as a solicitor in 1959 and worked in private practice till 1968. There followed a stint at Butterworths, where he edited *Underhill on Trusts* and wrote supplements to that, *Williams on Wills, Williams on Title,* and *The Encyclopaedia of Forms and Precedents.* In 1972 he joined the staff of the Law Commission, later becoming the senior staff member of the land law and landlord-and-tenant teams. He worked on reports on rentcharges, local land charges, charging orders, gazumping, home co-ownership, rights of access to neighbouring land, positive and restrictive covenants, and several aspects of landlord-and-tenant law. Since 1985 he has been a part-time consultant to Bircham & Co, spending the rest of his time writing on legal and other matters. He is the author of *Who is the Criminal?* (Hodder & Stoughton 1968), *A Lament for the Law Commission* (Countrywise Press 1987), and the wills division of Butterworths' *Wills Probate & Administration Service.*

John Pare took a BA in law at the University of Kent at Canterbury in 1969. After 2 years' articled to Tony Girling's firm, in 1972 he qualified as a teacher and as a solicitor, joining Minshal Pugh & Co in Oswestry as an assistant. He has been a partner in the firm since 1975. He is a member of the Solicitors' Family Law Association and the Association of Lawyers for the Defence of the Unborn. He is a Church of England lay reader and a school governor, and spent 18 years as a RELATE (marriage guidance) counsellor. Since 1970 he has been married to Sandie, now a primary school headteacher, and they have 4 (now mostly grown) children, one of whom is about to start reading for the bar.

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