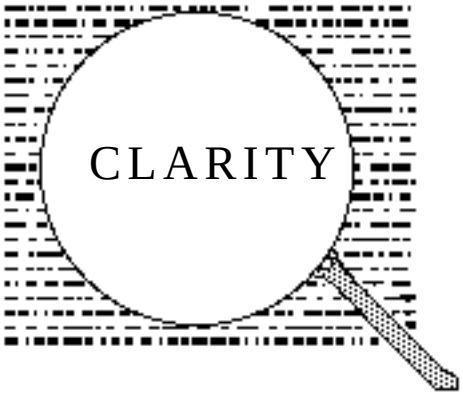

A movement to simplify legal language

Patron: Rt Hon Sir Christopher Staughton

No 41: April 1998

Contents

Articles

Clarity in pleadings in the light of the Woolf report: His Honour Judge Paul Collins 2
Plain language in consumer contracts: Cut out the jargon, says OFT: Robert Lowe 4
Europe en clair: Eiryls Roberts 7
A chair with no leg to stand on: gender-neutral language: Michèle Asprey 9
Armed police! Don't move! Now start talking: Michèle Asprey 11
Why should lawyers be concerned about literacy? Cheryl Stephens 15
Rewriting UK tax laws: a progress report: Inland Revenue 16
Rewriting UK tax laws: extracts from the IR's second technical discussion document 17
Extracts from the *Proceedings of the Auckland tax drafting conference* 24

Letters 27

Drafting guidance

Extracts from the SEC's drafting handbook 28
Drafting tips 1: Omitting surplus words: editor 31
A defective headnote: Nick Lear 32
Before and after: revising a will precedent: editor 32
Standard leases - lurking traps: from LS *Gazette* 33
Second person drafting: various 34
Comment (clichés): editor 35
Drafting pleadings: editor 36

News

Plain Language Commission awards 1997 40
Training 41
News from around the world 43
Committee news 45
News about members 46
Other news 47
New members 48

Advertisements 33, 38, 40, 42, 47

CLARITY awards

We will shortly be calling for entries for our 1998 awards, sponsored by D.J. Freeman and supported by the *Solicitors Journal*. Details will be announced on our website. Enquiries and submissions to Alexandra Marks at Linklaters, 59 Gresham St, London EC2V 7JA, UK (DX 10).

Clarity's layout

The layout of this issue has been changed in an effort to make it easier on the eye. We have in the past used 10pt Times (so increasing the wordage per page to economise with postage and printing) and 12pt Times (reducing eyestrain for some readers). The standard text in this issue is 11pt Times with 2pt white space between the lines. We have also introduced a vertical line between unboxed columns. We are very grateful to Celia Hampton (who edits the *Financial Times' Business Law Review*) for her considerable help with this.

Clarity's content

Several readers have complained that *Clarity's* content has been unbalanced, with too many academic articles and insufficient practical guidance. I have tried to redress that in this issue, and guest editors will be asked to maintain the new policy. In particular, we are starting (on page 31) a series of before-and-after analyses, each one seeking to remedy a particular drafting fault. Different authors will be asked to contribute to the series.

CLARITY's membership

As we go to press we have 864 members in 26 countries. A breakdown by country appears at:

http://www.adler.demon.co.uk/clamem.htm

CLARITY's website

http://www.adler.demon.co.uk/clarity.htm

CLARITY's website is slowly building up and we would welcome suggestions for improvement. Members with plain language practices are invited to exchange links with us.

Clarity in pleadings in the light of the Woolf Report

by His Honour Judge Paul Collins

Judge Collins has been a judge at Wandworth County Court in London since 1992 but is now spending a year as Director of Training at the Judicial Studies Board. This article is the (approximate) text of his address to CLARITY"s annual meeting in December.

I feel quite fraudulent in addressing this audience on this topic. Before going on to the county court bench nearly six years ago I spent 25 years at the bar deliberately trying to make my pleadings obscure but unobjectionable at the same time. But even then I did not find it possible to hide a tendency towards the direct. Any pleading that started off with a two-page ten-item definition paragraph automatically set off a headache and my eyes glazed over. A definition only really made sense to the reader when it was introduced in the context of the phrase or person being defined. Otherwise it was a deluded attempt to lay a pseudo-scholarly basis for what often turned out to be rubbish. Let us start by reminding ourselves of the traditional framework of the existing rules. First, the Rules of the Supreme Court.

Facts, not evidence, to be pleaded (0.18, r.7)

18/7 7.—(1) Subject to the provisions of this rule, and rules 7A, 10, 11 and 12, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.

(2) Without prejudice to paragraph (1), the effect of any document or the purport of any conversation referred to in the pleading must, if material, be briefly stated, and the precise words of the document or conversation shall not be stated, except in so far as those words are themselves material.

(3) A party need not plead any fact if it is presumed by law to be true or the burden of disproving it lies on the other party, unless the other party has specifically denied it in his pleading.

(4) A statement that a thing has been done or that an event has occurred, being a thing or event the doing or occurrence of which, as the case may be, constitutes a condition precedent necessary for the case of a party, is to be implied in his pleading.

Second, the County Court Rules: there are no equivalent general rules of pleading - Order 6 rule 1 says that the particulars of claim must state briefly the material facts on which the plaintiff relies. Accordingly, by virtue of s. 76 County Courts Act 1984 the High Court practice will apply.

HISTORY OF RULE — Amended by SI 1969 No. 1105

18/7/1 Scope of rule — This rule lays down the requirements of the system of pleading, narnely that pleadings should be statements in a summary form, and should state, and state only, the material facts relied on, and not the evidence by which they are to be proved.

18/7/3 Need for compliance —These requirements should be strictly observed (May LJ in *Lip kin Gormon v. Karpnale Ltd* [1989 1 WLR 1340, 1352)). Pleadings play an essential part in civil actions, and their primary purpose is to define the issues and thereby to inform the parties in advance of the case which they have to meet, enabling them to take steps to deal with it; and such primary purpose remains and can still prove of vital importance, and therefore it is bad law and bad practice to shrug off a criticism as a “mere pleading point.” (Lord Edmund-Davies in *Farrell v. Secretary of State for Defence* (1980 1 WLR 172, p.180; 1980 1 All ER 166, 173)).

18/7/6 Summary form — It cannot be too often stated that the relevant matters must be stated briefly, succinctly, and in strict chronological order. Pleadings should be as brief as the nature of the case will admit. The Court has inherent jurisdiction to deal with prolix documents (*Hill v. Hart-Davies* (1884 26 ChD 470)). But no document is prolix which merely states facts that are material, however numerous. The same person or thing should be called by the same name throughout the pleading.

18/7/7 Facts, not law — The rule prohibits the old practice of pleading the law affecting the case being raised. There is a vital distinction between pleading law, which is not permitted, and raising a point of law in a pleading, which is both permitted under r.11 and is frequently necessary. Pleading law tends to complicate the pleading and obscure the facts giving rise to the case being advanced; raising a point of law may define or isolate an issue or question arising on the facts as pleaded, and indeed be essential if the case is to be advanced properly. See further r.11 below.

18/7/8 Facts, not evidence — Every pleading must contain only a statement of the material facts on which the party pleading relies, and not the evidence by which they are to be proved (Farwell LJ in *N. W. Salt Co. Ltd v. Electrolytic Alkali Co. Ltd* (1913 3 KB 422, 425)). All facts which tend to prove the fact in issue will be relevant at the trial, but they are not "material facts” for pleading purposes. “It is an elementary rule in pleading that, when a statement of facts is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of proving it, or the evidence sustaining the allegation” (Lord Denman CJ in *Williams v. Wilcox*(1838 8 A & E 314, 331); and see *Stuart v. Gladstone* (1879 10 ChD 644)). It is not always easy to draw the line between facts and evidence (see *Davy v. Garrett* (1878 7 ChD 473, CA), *Philipps v. Philipps* (1878 4

QBD 127), *Re Dependable Upholstery Ltd* (1936 3 All ER 741)).

18/7/9 Facts must be material — The words "contain only" emphasise that only facts which are material should be stated in a pleading. Accordingly, statements of immaterial and unnecessary facts may be struck out (*Davey v. Garrett* (1878 7 ChD 473), *Rassam v. Budge* (18931 QB 571), *Murray v. Epsom Local Board* [1897 1 Ch 35), and r.19). Unless, however, statements are ambiguous or otherwise embarrassing, the Court as a rule will not inquire very closely into their materiality (*Knowles v. Roberts*(1888 38 Ch 263, 271); *Tompkinson v. SE Ry Co (No.2)* (1887 57 LT 358)). The question whether a particular fact is or is not material depends mainly on the special circumstances of the particular case. Thus knowledge, notice, intention and, in a few cases, motive, are in some cases material, and if so, must be pleaded as facts and with proper particularity. The legal relation in which parties stand to one another should generally be stated.

18/7/10 All material facts — It is essential that a pleading, if it is not to be embarrassing, should state those facts which will put those against whom it is directed on their guard, and tell them what is the case which they will have to meet (Cotton LJ in *Philipps v. Philipps* (1878 4 QBD 127, p.139). "Material" means necessary for the purpose of formulating a complete cause of action; and if anyone material statement is omitted, the statement of claim is bad (Scott LJ in *Bruce v. Odhams Press Ltd* (1936 1 All ER 287, 294)). Each party must plead all the material facts on which he means to rely at the trial; otherwise he is not entitled to give any evidence of them at the trial. No averment must be omitted which is essential to success. Those facts must be alleged which must, not may, amount to a cause of action (*West Rand Co v. Rex* (1905 2 KB 399), *Ayers v. Hanson* (1912 WN 193)). A defendant may be prevented from relying at trial on a ground of defence not pleaded by him (*Davie v. New Merton Board Mills Ltd* (1956 1 WLR 233), (1956 1 All E.R. 379); but cf *Rumbold v. LCC* (1909 25 T.L.R. 541, CA) which was not cited in Davie's case; for the subsequent history of Davie's case, see 1959 AC 604, HL).

Everyone here knows that these excellent precepts are less than universally practised by pleaders. But it would be blinkered simply to accuse them of not being alive to the moral cleanliness of straightforward language. A pleader may have inadequate information and insufficient time to make good the deficiency; or may be sensitive to weaknesses in the case and deliberately attempt to blur language and complicate and elide notions so as to retain the most options while giving the fewest hostages to fortune. To do this in a way which successfully resists strike-out and other applications is an art which is highly prized.

Will a culture of pleading as an art, or perhaps a formal game, or even as a reminder of those stately and necessary procedures which precede a joust or a duel, survive the *Access to Justice* reforms? Maitland said in a famous passage that the old common law forms of action rule us from their graves. How can minds so firmly entrenched in centuries of legal practice change? This is an aspect of the reforms that has so far received little attention and CLARITY is to be congratulated for devoting its AGM to it and thanked for allowing me to make my comments.

Michael Kron, joint secretary to Lord Woolf's enquiry and architect of the draft unified rules, painted a delightful picture at a recent seminar of the district judge as a kind of literary policeman, who would use the initial scrutiny and allocation to track as an opportunity to summon the obscure or inadequate pleading to a reckoning. At p.105 of his final report Lord Woolf said:

> ... the emphasis in the future will be on the clear statement of factual issues .. The aim is to put an end to the evasive and obscure pleading which often discredits our civil procedure at present. Scrutiny of statements of case by the court for case management purposes will stimulate those drafting statements of case to achieve a better standard.

And a potentially key feature is the proposed unprecedented obligation in r. 7.6 and r. 9.7 of the draft new rules (providing for the plaintiff and defendant respectively) for the litigant or his legal adviser to certify their belief in the truth of any factual allegations made. Lord Woolf thought that this would 'reduce the distinction between statements of case, witness statements and affidavits.' How are solicitors going to interpret their obligations under these rules? The formal incantation made with so little thought in so many affidavits in support of O.14 applications for summary judgment will surely be inadequate. The prudent solicitor will be very wary of certifying his own belief in the truth of his client's case. How can he possibly know? The better practice ought to be that the lay client has to do what's necessary. This in itself should have an effect on the way in which these documents are drafted. If solicitors, as they should, emphasise the importance of the certificate, the clients will actually need to understand, without being textual scholars, what is being said on their behalf.

There is then, reason to suppose that a potent combination of factors will irrupt into the esoteric world of pleading after April 1999; the emphasis in Lord Woolf's report on a change of culture throughout the civil justice system, the real need of the lay client for straightforward language, the obligation of solicitor and counsel to supply it, and last, but not least, the interventionist case manager on the bench, who will be sloughing off the notion that it's the parties' business if they strangle or suffocate themselves with their own pleadings. A new era for clarity in pleading lies just around the corner.

Plain language in consumer contracts: Cut out the jargon, says OFT

by Robert Lowe

Introduction

A judge once described a hire-purchase agreement as an arrangement whereby a person is induced by someone he doesn't know to sign a form he doesn't understand to buy goods he doesn't want with money he hasn't got.

In the development of contract law the courts have paid little attention to the use of obscure, jargon-ridden language and it has been left to parliament, Europe and the OFT to rectify the position. The purpose of this article is to examine where we are today.

The common law

The law of contract developed in the context of negotiated bargains between businesses and the courts adopted a 'hands off' freedom-of-contract approach, leaving the parties free to make their own bargain. This was fair enough, but then came mass production and standard form contracts — largely, but not entirely, for consumers. Clearly a new approach was called for but the courts chose to place such contracts in the same''freedom of contract' straitjacket even though 'it is arguable that a customer who contracts on such standard terms has them imposed on him and does not really "agree" to them at all.' (Treitel, *The Law of Contract*, 9th edn. p.3).

The restrictive attitude of the courts can be seen by reminding ourselves of the strict rules imposed. Parties signing a contract are bound by its terms even though (1) they were unable to read *(Foreman v. GWR*(1878 38 LT 851)) or (2) the terms were written in a foreign language (*The Luna* (1922 P.22)) or (3) they read the document but were unable to understand it (*Blay v. Pollard and Morris* (1930 1 KB 628)). Incidentally, all these cases were business-to-business transactions and as such they would not be covered by the Unfair Terms in Consumer Contracts Regulations 1994 (although some might now be subject to the test of 'reasonableness' under the Unfair Contract Terms Act 1977).

Parties who have not signed a document which is alleged to be contractual will still be bound by its terms if the other party has taken reasonable steps to bring the terms to their attention (see *John Snow & Co. Ltd. v. DBG Woodcroft* (1985 BCLC 54) for a recent restatement of the rules). There appears to be no case where obscure language has led to a finding of non-incorporation. The nearest approach to such a ruling was the important case of *Interfoto Picture Library v. Stiletto Visual Programmes Ltd* (1989 QB 433), where the Court of Appeal held that special notification steps had to be taken where a term was particularly onerous. Although it was not an 'obscure language' case, the judgment of Bingham LJ (as he then was) on 'good faith' and 'fair dealing' points the way. Once again this was a commercial dispute between two limited companies so that the 1994 regulations would not apply.

The courts did make some attempts to control small-print, one-sided terms (including *contra proferentem*, fundamental breach, and the rules against penalties) but their failure to shake off the shackles of 'freedom of contract' meant that they were always fighting a losing battle.

Unfair Contract Terms Act 1977

This Act is largely concerned with exemption clauses

Before *

Date for Payment: The Client shall pay the Builder the sums set down in any Interim application or in the final account within 14 days of the date of the application or the final account as the case may be. And any sum overdue for payment ftom the Client to the Builder (whether under this agreement or otherwise) shall bear interest at the rate of 21/2 percent for each calendar month or part of a calendar month during which the sum remains unpaid.

Materials and goods supplied under this contract should be of merchantable quality and fit for their normal purpose.

After

The Client will pay the Builder interest at the rate of 1% per month compound interest on all outstanding sums from the due date until payment.

Materials and Goods supplied under this Contract will be of satisfactory quality and fit for their normal purpose.

* The boxed examples are contractual terms rewritten at the OFT's instigation. They are taken with the OFT's kind permission from its 4th *Bulletin* (December 1997). Copies of the *Bulletins* are available from the OFT at POB 172, East Molesey KT8 0XW.

and it has brought about a significant improvement in the contractual position of both private and business customers. Certain clauses are rendered void, notably:

1. a clause excluding liability for negligence resulting in death or injury and
2. a clause excluding the implied terms of fitness, quality etc. where the customer 'deals as consumer'.

In a number of other situations a party seeking to rely on a term must prove that it is 'fair and reasonable' in the light of the circumstances prevailing when the contract was made. Schedule 2 contains a non-exhaustive list of relevant matters, including 'whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties)'. The words 'existence and extent' suggest that obscure language preventing the customer from understanding the term can result in a finding that it does not satisfy the reasonableness test. This comes through strongly from the judgment of Staughton LJ in a ship-repairing dispute between two companies where he said this:

> I would be tempted to hold that all the conditions are unfair for two reasons; first, they are in such small print that one can scarcely read them; secondly, the draftsmanship is so convoluted and prolix that one almost needs an Ll.B to understand them. However, neither of these arguments was put before me so I say no more about them.
>
> *The Zinnia* (1984 2 LL.L.R. 211)

Certain types of contract are excluded from the Act, notably (as a result of lobbying) contracts of insurance.

Unfair Terms in Consumer Contracts Regulations 1994

These regulations are designed to implement Council Directive 93/13/EEC and came into force on 1 July 1995. They only apply to non-negotiated terms in consumer contracts but they go beyond the Act in three significant respects:

1. There is no exclusion for contracts of insurance.
2. The Act, as already stated, is largely concerned with exclusion clauses but the regulations control any type of unfair term.
3. While disputes in individual cases must be dealt with by the consumer seeking a remedy by negotiation, arbitration or litigation, regulation 8 gives the OFT power to take steps to prevent the continued use of particular unfair terms.

Before *

The Carrier shall have a general lien on any Consignment for its charges for the carriage or storage of that or any other Consignment for the Customer or for any other monies due from the Customer to the Carrier.

After

We may keep hold of all or some of your goods until you have paid all the charges you owe us, even if the unpaid charges do not relate to those goods...

This clause does not apply to a private consumer.

Before

If any payment shall be more than one month in arrear the Company shall have the right to withhold further deliveries of constituent components of the X System and to withdraw immediately the service provided for the System. Time for payment shall be of the essence of this Agreement. Written notice of withdrawal of the service will be given to the Customer.

After

If you are mare than a month behind with your payments to us we can withdraw the service (including emergency service) or monitoring we provide to your X system at any time. We will give you 7 days written notice before we do this.

The directive

Anyone advising on the regulations must bear their Euro-context in mind. The ostensible reason for the directive was to develop the single market by making it easier for consumers from one member state to buy goods and services in another; they should not be deterred by different laws on unfair terms in different member states. At the same time the protection of consumers from economic exploitation by suppliers was seen as an objective of the EU in its own right.

The directive contains a large number of recitals which must be borne in mind when interpreting the regulations. For present purposes the key recital reads as follows:

> Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail.

The Regulations

Four provisions are of particular importance in the present context:

1. Regulation 4 (1) defines an unfair term as 'any

term which contrary to the requirement of good faith causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer'. The words 'contrary to the requirement of good faith' are highly significant and the judgment of Bingham LJ in *Interfoto* (see above) is well worthy of study on this topic.

2. Although, in general, an unfair term is not binding on the consumer (see reg. 5(1)), regulation 3(2) makes a qualified exception for 'core'provisions. It provides that:

   In so far as it is in plain, intelligible language, no assessment shall 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, as against the goods or services sold or supplied.

3. Regulation 6 reflects the recital set out above (and article 5 of the directive) by providing that:

   A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language, and if there is doubt about the meaning of a written term, the interpretation most favourable to the consumer shall prevail.

   Although the regulation does not spell out any sanction for a breach of this requirement, it is generally accepted that it will be a strong indication of unfairness.

4. Finally, schedule 3 contains a 'grey'list of potentially unfair terms and the list includes a term which has the object or effect of 'irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract' (schedule 3 para. 1(i)).

Taken together, these provisions mark a return to something approaching 'agreement'; the terms must not be too one-sided, they must be clear, and the consumer must have a chance to consider them before it is too late.

The powers and policy of the OFT

Regulation 8 (above) requires the Director-General to consider any complaint of potential unfairness (unless frivolous or vexatious). In practice about half the complaints come from Trading Standards Departments and consumer organisations; most of the remainder come from consumers. Any complaint should specify the term alleged to be unfair and also any detriment (4th *Bulletin*, December 1997, p.7).

The OFT has set up an Unfair Contract Terms Unit which can be contacted at the OFT, Room 505, Field House, 15-25 Bream's Buildings, London EC4 1PR. They will consider the complaint in the light of the matters set out above; if they feel that further action is called for they will adopt a three-pronged strategy. They will first open a dialogue with the firm, inviting them to modify or delete the offending term. If this proves unsuccessful and unconstructive the Unit will seek an undertaking. Finally, as a last resort, they will apply for an injunction*.

> The task facing us is more one of education, rather than doing battle in the courts, and there is still a long way to go.
>
> *Bulletin* 3 March 1997 p.5).

With this in mind the OFT issues a series of bulletins which helps consumers, advisers and businesses to get a feel for the current OFT thinking and action. Each bulletin names firms which have been using potentially unfair terms; it then sets out those terms and the ways (if any) in which they have been modified or deleted.

Statistics in the first two years include the following:

Formal undertakings	5
Terms modified or deleted voluntarily	164
Discussions with supplier continuing	419
Terms excluded from control	207
Terms considered fair	170

Plain, intelligible language — the OFT approach.

It is heartening to note that from the very beginning the OFT has taken a positive and purposive approach to the issue of plain intelligible language. For example, they have filled out the Regulations by deciding that the 'plain language exclusion of core terms control will only apply if the terms are brought to the attention of the consumer' (*Bulletin* 1, p.8), Indeed,there is a strong emphasis throughout on the principle that 'before they enter into any contract, consumers must be able to read and understand all its written terms' (*Bulletin* 2 para.2.7, reproduced in *Bulletin* 4, p.13). The following points are also worthy of note:

1. Some firms are tending to use forms which were drafted with business customers in mind; the language is not appropriate for consumers.
2. The terms must be within the understanding of ordinary consumers without legal advice.

* The OFT has been strongly criticised for their reluctance to litigate: see Richard Colbey's article *Unfair terms and the OFT* in *New Law Journal* 16th January 1998 p.46.

3. Legal jargon must be avoided. There is all the difference in the world between‘all conditions and warranties are excluded’ and ‘we are not legally responsible if the machine breaks down’. Other terms to avoid include‘consequential loss’ and ‘this is without prejudice to your statutory rights’.
4. The need for ‘plain, intelligible language’ goes beyond mere vocabulary and covers such matters as short sentences, avoiding double negatives, minimising cross-references and size of print.
5. A set of terms should be user-friendly and should use ‘we’ and ‘you’. *Bulletin* 3 sets out the whole of the British Fuels (Oils) Ltd's contract for domestic natural gas supply as a model of clear and helpful drafting. Here is their ‘force majeure' clause:

   > If we cannot supply you with gas for some reason which is beyond our control, for example damage to the pipeline system, then you will not be able to claim that we are in breach of our arrangements with you but we will take all steps that are reasonably practicable to secure the supply of gas to you.

Conclusion

In an address given at the Law Society in March 1997 Pat Edwards, Legal Director of OFT, sounded a note of cautious optimism. She acknowledged that

> despite developments over the last 20 years such as the Unfair Contract Terms Act, there remains a serious problem in the United Kingdom in that the large number of consumer contracts which come under scrutiny prove to be unfair. They tend ... to be in impenetrable jargon-ridden terms which may baffle or even mislead the consumer.

However, she also stated that:

> One of the most encouraging aspects of the case has been the willingness of suppliers — in the end — to rewrite their contracts totally and in plain intelligible language... It seems likely that the use of plain language, and the dropping of substantive unfairness, tend to go hand in hand. Doubtless, once terms are seen in the cold light of ordinary language, unfairnesses which were decently veiled by jargon and complexity, stand out as the excrescences they are, and the scales fall from the suppliers' eyes
>
> *Bulletin* 4, p.26

Robert Lowe is a partner in McCombie Gordon & Lowe, solicitors; director of Lowe & Gordon seminars; co-editor of *Busy Solicitors Digest*; and co-author of *Consumer Law and Practice*, 4th edn, Sweet & Maxwell.

Europe - en clair

by Eirlys Roberts

The European Council of Ministers recently told its civil servants that legislation must be drafted clearly and simply, so that the people who had to obey the laws should understand them. There was to be:

- No Community jargon.
- No unnecessary abbreviation.
- No imprecise reference to other texts.
- No changing of terms when the same thing is meant.
- No pointless repetition of existing regulations.
- Most particularly, short words and short sentences.

Some time afterwards, I read the European directive on *the legal protection of databases*, and counted the words in the first sentence. Just over 3,000. I could not believe my eyes. Or maybe, it was my arithmetic? So I counted again. But that’s what it was: over 3,000. Of course, it was a freak. Many of the directives, and their sentences, are admirably short. And it is true that this sentence was broken up by semi-colons — all 60 of them. But not everyone takes kindly to semi-colons. And the fact remains that 3,000 words is not what the Council of Ministers meant by a “short sentence”.

There is a feeling in Europe now that plain language is a good thing. The difficulty is in achieving it.

Two European organisations have had a go.

My own, ERICA (European Research into Consumer Affairs), and CEG (Consumers in Europe Group) both started from the belief - the certainty - that consumers, who are already in a weak position when faced with producers and with governments, are still weaker when faced with government officials who write and talk in a language which they (the public) find difficult to understand. We shamelessly copied the technique of the British Plain English Campaign. In Brussels we awarded Booby Prizes for official language that was incomprehensible and later Awards when it had improved. Neither of us would claim that we had great effect on the civil servants’ drafting, but a little, perhaps.

The struggle goes on. Why?

First, one ought to know why notably intelligent, well-educated, well-intentioned people should choose to write to the public about everyday affairs (labels on food, for instance, not quantum theory) in language which much of that public will find difficult, sometimes impossible, to understand. There must be many reasons, different for different people, in different circumstances:

- The desire to impress : I know a number of long words, especially Latin ones, which most people don't.
- Not being too sure of the subject I'm dealing with, I'd better be a bit vague.
- If I don't write this regulation in official-sounding language, no-one will take any notice of it.
- This is the way the provisions have always been drafted; if I change the words, I may get the meaning wrong.
- My boss requires me to write in dignified language.
- Unless the text provides for every eventuality, something important may be left out.
- It's traditional to say "goods and chattels".

Some of the reasons are embedded in human nature: the need to feel superior, the fear of making a mistake. Others are embedded, almost as firmly, in British history and legal traditions. *Goods*, for instance, are described in the dictionary as an Old English word; *chattels*, as Old French. Immediately, after the Norman Conquest, our law courts had to accommodate people who understood only English, others who understood only French. So it was natural to use both languages. But it is nearly 1,000 years since the English talked French. Time for us to wake up and begin to fight for the public instead of against it. There are signs that we are, at least, yawning.

One of the two founders of the Plain English Campaign was a young woman from Liverpool who, until she was about 16, didn't know how to read or write. The campaign has been immensely influential. Inspired by it, the British Government simplified many of the forms sent out to the public and saved itself £15 million in eight years because a much larger proportion than before were filled in correctly.

Sir Ernest Gowers' *Complete Plain Words*, addressed to the civil service, succeeded in simplifying the language of at least its upper ranks. There is some, necessarily scattered, evidence that local authorities are trying to communicate more successfully with the people they serve.

Perhaps the most hopeful sign that the law itself is waking from its long sleep is the success of CLARITY with its membership of fresh-minded lawyers. And the simple words deliberately used by distinguished judges such as Lord Denning, as when he pointed out that he found "in actual military service" easier to understand and apply than "*ex expeditione*".

Outside the UK, It would seem that the strongest forces pushing for plain legal language are the law schools, universities and governments of Australia, Canada, New Zealand, South Africa and the USA. Most members of CLARITY will have been impressed by Joseph Kimble of Michigan, USA, Robert Eagleson from Australia, and Philip Knight of Vancouver.

The European Union has a more difficult job with plain language, but it provides the British with an opportunity. There are 15 member states in the union, and English is the mother tongue of only two — UK and Ireland. It is now the second language of all the others. This gives the UK and Ireland an unfair advantage. So it would seem simple courtesy for those whose mother tongue is English to make it plain and simple so that it is as easy as possible to understand. Those who are not interested in courtesy may prefer to think of the commercial advantages.

Don't let's worry about Shakespeare, who is not usually thought of as plain or simple*. The continental Europeans will read him anyway, keeping well ahead of most of the British.

Eirlys Roberts (now CBE) took a classics degree at Cambridge. In the second world war she served first in military, then in political, intelligence. Her subsequent career has included stints with UNRRA in Albania, with the Information Division of the Treasury, as editor of Which? magazine, as research director of the Consumers' Association, and as director of the Bureau des Unions de Consommateurs in Brussels. She has just resigned as chairman of European Research into Consumer Affairs so she can devote more time to plain language. She can be reached at:

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* A Shakespearian scholar I consulted on the point said that the language of the plays was poetic and could not be described as "plain in its day". She said that some of his audience would have understood it well but most would have found it unfamiliar. She added that the Romantics were the first poets keen on using the language of ordinary people.

A “chair” with no leg to stand on

by

Michèle M Asprey

The Australian Prime Minister, John Howard, has had a setback in his efforts to eliminate gender-neutral language from the language of government.

Some time ago, Mr Howard’s office issued a directive that the terms “chairperson” and “chair” should not be used to refer to the heads of Commonwealth bodies. Mr Howard then attempted to enshrine this directive in legislation — beginning with the *Productivity Commission Bill 1996*.

But on 2 September 1997 the Senate blocked the Prime Minister’s attempt to eliminate the gender-neutral term “chairperson.” This news was reported the next day in *The Sydney Morning Herald* newspaper, accompanied by a cartoon which showed the Prime Minister asking a woman: “Why can’t I call you chairman?” The woman replies: “It’s time we had a little talk about the birds and the bees...”

Then on 25 September the Senate struck another blow against sexist language. It passed amendments to the *Legislative Instruments Bill 1996* which ensure that delegated legislation (such as regulations) cannot be put into effect if it contains sexist, gender-specific language.

On each occasion the amendments were proposed by the Australian Democrats, as part of their policy to oppose what they call "the government's sexist agenda".

Many of you in the plain language movement will know I have strong views about gender-neutral language. I believe, along with George Orwell and many others, that language can influence thought. When I first began to practise law there were virtually no statutes or documents which on their face acknowledged that women take part in the world of law and business. I really did feel that I had somehow wandered into a boys’ club, and I didn’t feel it reflected the “real world.” I wanted to see formal recognition of the existence of women in the legal and business landscape.

Now, nearly 20 years later, I like to think that in a small way I helped influence the move to gender-neutral drafting in the law in Australia. It only took a degree of firm but friendly persuasion and a little persistence to convince people of the importance of gender in language. In the dynamic 1980s it was not such a hard argument to make. The Parliamentary Counsel’s Office of New South Wales adopted a policy of gender-neutral drafting in 1983. The Commonwealth Parliamentary Counsel did the same in 1988. Law firms began drafting even commercial documents in gender-neutral terms. I thought the battle was won.

But the position in the 1990s, under a conservative government in Australia, is different. The pendulum seems to be swinging back, and I see our government’s change in attitude to gender-neutral language as a disturbing symptom of the way the government is thinking about women more generally. The government has decided to abolish the office of the Commonwealth Sex Discrimination Commissioner. It proposes to make sex discrimination just one of the responsibilities of a deputy president of a new Human Rights and Responsibilities Commission (with a much reduced budget). The government has also slashed the budget of the Office of the Status of Women. And it has begun to strip funds from women’s groups. Even the United Nations has taken notice. A UN report published in July 1997 singled out several of these moves for strong criticism.

The Prime Minister is apparently unmoved. He has described himself as “traditionalist” and takes a personal interest in the language issue.

However, his interest in the issue seems not to have extended to reading Chapter 8 of the Australian Government Publishing Service’s *Style Manual for Authors, Editors and Printers*[1]. That chapter is entitled *Non-discriminatory language*. There are 14 pages of advice about how to avoid discriminating against women in the language we use. On page 128 (at paragraph 8.27) it says:

> Occupational nouns and job titles ending in *-man* obscure the presence of women in such professions and positions.

The *Style Manual* then goes on to list various strategies for replacing what it calls “*-man* compounds”, including the word “chairman”. The gender-neutral alternatives include “chair”, “chairperson”, “convenor”, “coordi-

[1] 1994, 5th edition, AGPS, Canberra

nator”, and “head (of)”. It also lists what it calls the “gender-specific” alternatives of “chairwoman” and “chairman”.

It seems the Prime Minister feels free to ignore this advice. He was quick enough to point out when his government was elected that it included quite a few more women than there were in the previous government. But his feminism apparently stops short of acknowledging the existence of women in the language of government documents.

Earlier this year I found myself arguing about language issues on ABC radio station 2BL. My opponent was the Minister for Defence Industry Science and Personnel, Bronwyn Bishop. She was in favour of the move away from “chair” and “chairperson.” She raised the hoary old argument that the “man” in “chairman” does not mean “man” but derives from “manus”, the Latin for “hand.”

What a load of rot! I have heard this argument time and time again. I raised the matter last year at an Australian Institute of Professional Communicators seminar[2]. Our speaker was one of Australia’s most respected linguists, Associate Professor Pam Peters of Macquarie University. She dismissed that argument out of hand. “Manus” is indeed the root of many words, like “manage,” “manacle” and “manicure.” But it has nothing to do with the suffix “man” in words like “chairman.” These words derive their suffix from the Old English word “man” or “mann,” which was the word both for "male" and for "human being" or "person". And so we are left with the same problem: today it is impossible to separate the two meanings.

But the point I made to Bronwyn Bishop was that derivation was *not* the point. The Old English meaning of a word is not the important thing in this context. The key issue is the effect of that word on the listener. I repeated my argument that language influences thought and thought dictates behaviour. Today when someone hears the word “chairman”, more often than not they visualise a man in that role. By using gender-neutral language we avoid that association and provide a neutral word which allows the listener to visualise whatever they like.

To illustrate the point I told the radio audience a story I have told in my book[3]. I think this is the “research” to which Mark Adler referred in his note ‘*Is gender-neutral drafting a plain-language issue?*’ in *Clarity* 40 (August 1997).

This point was made forcefully at a plain language conference held in Vancouver in 1992[4]. A (female) judge told the conference how for 10 years she had instructed juries that they should appoint a “foreman”. Then one day she decided to say instead that they should appoint a “foreperson”. For the first time in her 10 year experience of instructing juries, they appointed a woman.

This story deeply impressed the radio interviewer, but did not impress Mrs Bishop (she prefers “Mrs”). She replied that she’d be surprised if that was all there was to the story, and that it could have been explained by other factors.

Incidentally, this theory that language influences thought is the reason I agree with Mark Adler that gender-neutral drafting *is* a plain-language issue. Try this quick quiz:

Q What is the “prime directive” of plain language writing?

A To consider your audience.

Q What is the likely gender make-up of any random audience?

A 51-52% female, 48-49% male.

Q Is a “chairman” male or female?

A Male. Well, no.....Ummm.....Well the *word* is masculine. But if there is a woman in the chair, the chairman is female.....Errr.....Could I take a quick peek at the chair, please?

It isn’t clear. It is misleading. And unless your audience is composed exclusively of Catholic priests, or Tibetan monks, or Ayatollahs, you risk excluding (and alienating) some proportion of your audience if you do not use gender-neutral language. That’s poor communication.

Speaking of chairpersons, I’m reminded of what the former Speaker of the House of Representatives of the Australian Parliament, Mrs Joan Childs, once said on the subject. When asked in Parliament if she wished to be referred to as “chairman” or “chairperson,” she replied: ‘You can call me “chairperson.” I have no sex when I’m in this chair.’

Michèle Asprey is a lawyer, a plain language consultant, and the author of *Plain Language for Lawyers* (1996, The Federation Press, Sydney).

[2] *Where is this language going?* 24 September 1996

[3] *Plain Language for Lawyers* (2nd edition, 1996, The Federation Press, Sydney) p. 144.

[4] *Just Language*, October 22-24 1992, organised by the Plain Language Institute of British Columbia.

Armed Police! Don't Move!... Now Start Talking

by

Michèle M Asprey

There are moves afoot in Australia to review an accused's right to remain silent. Those in favour of a change are looking at the United Kingdom's new form of police caution as a model. Michèle Asprey raises some of the issues, and calls for a debate.

Some time in 1996 I was watching my favourite TV show of the year, the British police drama *Cracker*, written by the brilliant Jimmy McGovern and starring the incomparable Robbie Coltrane. A suspect was being cautioned. To my astonishment, the policeman said:

> You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.

The suspect made no reply.

A few weeks later, I was watching *The Bill*, another British police TV drama, and I saw the old bill[1] chase and catch a tea leaf [2]. When they arrested the tea leaf, the bill gave him the same police caution. Again, the villain[3] made no reply. I wouldn't have known what to say either.

I could make no sense of this caution, even the second time I'd heard it. Luckily, I had made a video tape of *Cracker* (for personal study purposes only) and I was able to dig it out, rewind, and hear the caution again. Neither of the TV suspects had that luxury.

Caution discussed in Clarity article

Then I remembered that this was the "new" police caution which was discussed in an article headed New *Police Caution is a Loser* in *Clarity* 32 (March 1995). So I was able to read it in print. But I didn't find it much easier to understand, even in written form.

Why on earth would anyone write a caution like this? I do like the first sentence:

> You do not have to say anything.

But the second sentence

> But it may harm your defence if you do not mention when questioned something which you later rely on in court

is appalling! Here are a few of the things that worry me about just the two words "when questioned".

- *When questioned* is an embedded adverbial clause. That embedded clause interrupts the main part of the sentence. It separates the verb *mention* from its object *something which you later rely on in court*, and so it throws your attention off the track of the main idea.
- It is cast in the passive, so there is no specified person doing the questioning; that is left completely open.
- It contains other unspoken words. First there is the understood *you are* (as in *when you are questioned*) and then, because the time of the questioning is not specified, there is the implied *now or later on.* When you think about it, this is a crucial point for the arrested person, who is having to work out, right then and there, what to say to whom, and when.

Already complex sentence structure

The rest of the sentence already has quite a complex structure. There's

> ...something which you later rely on in court...

which describes the *something* with what is (I think) a defining relative clause. And there's already a condition in there:

> if you do not mention...

It is almost as if someone has set out to squeeze as many complex grammatical structures as they can into a relatively short sentence. It is bad enough to write this, but why use such a stilted construction in an oral caution? Did the people who devised this caution ever say it out loud?

I find it hard enough to follow all the ideas in that second sentence, let alone to comprehend the meaning of the whole caution. I can only imagine how difficult it would be for a person who has just been placed under arrest! According to Dr Gudjonsson, a forensic psychologist from London University (as quoted in the *Clarity* item),most police suspects are below average intelligence. Surely this caution denies most suspects a proper understanding of their rights.

Why the new caution?

When I tried to redraft the caution, I found I couldn't make proper sense of the second sentence without

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[1] "police" [2] "thief" [3] "criminal"

knowing why it was there in the first place.

The article in *Clarity* said that this was a newer version of a new police caution, and that the new (but not the newer) caution had been shown to be incomprehensible, even by A-level students. The article told us that the new caution had "come as a response to a Home Office consultation by the law reform group Justice".

I made a mental note to find out more about the background to all this, by writing to *Clarity*. I half-drafted a letter, did a little research, and a year went by while I did nothing more about it.

Australian moves to reform the right to silence

But now, suddenly, this has become a hot topic in Australia. Within the last 6 months government ministers from 4 Australian jurisdictions (New South Wales, the Northern Territory, West Australia and Victoria) have announced that they want to review the accused's right to remain silent. And at least 2 of the 4 have specifically referred to the British form of police caution.

Background to the British change

Suddenly, it is important for us in Australia to focus on the British reforms and the format of the police caution now in use there. I've done a little digging, and now I know that the British reforms came after the 1993 Royal Commission on Criminal Justice, headed by a non-lawyer, recommended there be no change to the right to remain silent. Apparently the Commission decided that there was a real danger of vulnerable people making false confessions, and that this danger outweighed the benefits, if any, of changing the law. But the then Prime Minister, John Major, did not follow this recommendation and changed the law, just before he and his party were comprehensively defeated in the last election. The new caution was adopted and incorporated into the Criminal Justice and Public Order Act 1994 (in force since 10 April 1995) and into the revised Codes of Practice (1995) to the Police and Criminal Evidence Act 1994.

It seems that in Britain, as well as in Australia, the long-standing right to remain silent has been commandeered by politicians keen to push a law-and-order barrow.

Little evidence of improvement

But there appears to be little evidence that curtailing the right to remain silent results in any improvement in crime clear-up rates.

- As Terry O'Gorman has pointed out, in the US it is more than 30 years since the landmark decision of *Miranda v Arizona*[4] strengthened the right to silence in that country. Police at the time warned that it would result in more guilty people going free. But that, according to O'Gorman, did not occur.
- O'Gorman also notes that Singapore abolished the right to remain silent in 1976. There silence can be evidence of guilt[5]. But 10 years after the law was changed, research was published in the *Criminal Law Review* which showed that it had not helped the police and prosecutors in crime-fighting[6].
- In Northern Ireland, where the right to silence has been curtailed since 1988[7], a survey has shown that there has actually been a drop in the crime clear-up rates in the 5 years from 1988-1993[8].
- In 1993 in Britain the Runciman Royal Commission announced the results of research it had commissioned into the exercise of the right to remain silent during police interrogation. The research showed that:

  (1) the right to silence is exercised in only a minority of cases;

  (2) the right tends to be exercised where the potential charge is of a serious nature;

  (3) there is no evidence to suggest that the right is exercised disproportionately by professional criminals;

  (4) there is no evidence to show that silence in the police station leads to a greater chance of acquittal; and

  (5) the majority who exercise the right plead guilty at trail or are convicted following trial.[9]

4 384 US 435 (1965).

5 Terry O'Gorman, *The Sounds of Silence, The Australian* newspaper, 21 August 1997.

6 Meng Heng Yeo, *Diminishing the Right to Silence: The Singapore Experience* [1983 *Criminal Law Review*, p. 89).

7 Article 4, Criminal Evidence (Northern Ireland) Order 1988 (SI No 1987 (NI 20)).

8 Survey cited in an interview of Jeff Shaw and Patrick Fair on Australian ABC radio's *AM* program, 21 August 1997.

9 Leng, *The right to silence in police interrogation: a study of some of the issues underlying the debate*, RCCJ Research Study No 10 (1993); Allen and Cooper, *Howard's Way - A Farewell to Freedom?* (58 (1995) *Modern Law Review*, p. 364) as summarised by Lord Bingham of Cornhill in his speech to the Criminal Bar Association, London, 14 October 1997.

The practical effect of the caution

I've begun to stray into the area of criminology now, and I have no expertise there. So let' s return to the language of the current British caution.

What message does the British caution actually send? The second sentence tells the arrested person that it may harm their defence if they do not tell the whole story of their defence right then and there. A direction like this must place pressure on an arrested person to give up the right to silence — or else face unknown legal consequences.

In fact, a study conducted in 1995 by Dr Eric Shepherd, a leading British forensic psychologist, and his colleagues showed that 6 out of 10 people who listened to the caution perceived it as "pressuring" or "a threat."[10] And this was despite the fact that most of those people (109 members of the general public randomly selected in London) said they couldn't understand the caution.

When the second sentence of the caution was read to them on its own, the results were even worse: 8 out of 10 people perceived it as pressuring or threatening. In fact, 4 people said that they thought the second sentence meant that they must answer — that silence was not a real option. I'm wondering whether those 4 people might have been lawyers!

And remember, the people in this study were randomly selected members of the public responding to the questions of psychologists — not people who have just been arrested by police who accuse them of committing a crime.

I hasten to say that my knowledge of police cautions comes mostly from TV shows. I've never been arrested, I've never practised criminal law, and I only dimly remember studying subjects like *Evidence* and *Trial process* in law school. But I do love watching cop shows and courtroom dramas on TV. So I can tell you from watching The Wright Verdicts[11] (which is set in New York City) that that city's version of the police caution goes like this:

> You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him[12] present with you while you are being questioned. If you can't afford to hire a lawyer, one will be appointed to represent you, before questioning, if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand these rights as I've read them to you? *

Comparing the New York and British versions

Now this New York "caution" goes beyond a mere caution. It tells an arrested person more about their rights to get, and talk to, a lawyer. The British version merely deals with one right — the right to remain silent. It tells the arrested person they have that right, and then goes on to hint at the consequences both of keeping silent and of speaking.

Of course, you can't really compare the British and the New York versions because of the different messages in each. But looking purely at the comprehensibility of each message, I know which of the two cautions I'd prefer to hear if I was being slammed against a wall and cuffed!

Although the New York version is longer (and despite its gender-biased slip), it seems to me that this caution is much clearer. It consists mostly of short sentences. Those sentences are mostly well-structured. They are well ordered. The whole caution deals with many of the issues which would concern an accused at the time of arrest. It informs the accused of the rights which the US Supreme Court said they must be told about. In *Miranda v Arizona*[13] the Court said suspects must be informed that:

- they have the right to remain silent
- they have the right to consult counsel
- if they are indigent, they have the right to be provided with counsel
- they continue to have these rights throughout the interrogation.

Now contrast the US version's good "audience focus" with the focus of the British caution. The

[10] Shepherd E, Mortimer A, and Mobasheri R, 1995, *The police caution: comprehension and perception in the general population, Expert Evidence*, Vol 4 (2), pp. 60-67.

[11] A US TV drama starring Tom Conti as a defence attorney.

[12] Sic (!)

[*] Editor's apologetic intrusion: I've always wondered how exculpatory statements by defendants "can and will" be used against them. Isn't this more intimidation?

[13] 384 US 435 (1965).

British caution almost seems designed to trip up the suspect, not to protect them. The second sentence of the British caution ("But it may harm your defence if you do not mention when questioned something which you later rely on in court") is concerned with events taking place at a later time. Putting it bluntly, its main purpose seems to be to convince the accused to start talking as soon as possible for fear of consequences at court. It raises issues which are far too detailed and complex to explain in one sentence. It requires an understanding, then and there, of court process and the evidential consequences of silence, which might well take even a lawyer some time to comprehend.

The results of Dr Shepherd's 1995 study seem to confirm this view. His paper explains in more scientific detail just why people have difficulty in comprehending the meaning of the caution. And it concludes by saying:

> The police service has requested Gudjonsson and Clare, and Shepherd and Mortimer at Investigative Science, to conduct continuing research into police cautioning. Shepherd and Mortimer have seen a number of attempts to rephrase the 'new' caution. Our initial impression is that they all suffer from the same problems as the current caution. They are too long. They aspire to retain the same comprehensive legal content. They have too many clauses. Most of all they fail to recognise what common-sense suggests and linguistic and psychological research has demonstrated over twenty-five years. Human beings are limited in their ability to apply working memory, to recall verbatim, to analyse and to strike underlying semantic relationships in long complicated utterances. Most significantly the attempts to rephrase the caution still confront the individual with the same mixed message: you have a right to remain silent but if you do it may go against you. The circle cannot be squared. People will continue to perceive this message as pressuring or a threat.[14]

As far as I can see, people are right.

Can oral cautions work?

There's another issue here too. Both the cautions I've mentioned so far are oral ones. They are designed to be said to the suspect on arrest. As I know from TV, this can often be in the heat of the moment, after a chase, or with weapons drawn. It stands to reason that this is not the most congenial moment for comprehension.

I know that if I am agitated or worried I often "switch off" and forget to listen to instructions or information being given to me. I only "tune in" again after a short time. On occasions like that, a short preamble and a question or two would probably help me snap out of my reveries. Using that logic in the context of a police caution, if I were arrested, I'd like to be given a preamble like: "I am about to give you some information about your rights now that you've been arrested. Are you ready to listen?" At least that would give me a few moments to compose myself.

But of course that raises the whole question of when cautions should be given. Should the accused be given time to calm down? How much time? And should the caution be oral? Or exclusively oral? Cautions can also be given in writing. Perhaps there is a case to be made for an oral form of caution, which is later supplemented by a caution in written form. But how do you deal with the delay, and any discrepancies, between the oral caution and the written one?

If police were simply denied the right to use any statements made by the accused before he or she had been cautioned in writing, we may be able to do without the oral caution at the time of arrest. That may sound like a radical suggestion, and yet it should only involve a short delay, after which the accused would make the same (but perhaps more informed) decision: to speak or not to speak.

Of course if we opt for written cautions, we also need to take account of those who cannot read. There must be procedures to follow in those cases, just as there are procedures to follow for those who cannot hear, and for those who cannot understand the language.

Call for debate

In this article I've raised a great many questions, and they have gradually taken me away from the area of expertise and interest of most CLARITYmembers - simplifying legal language. Now we're in the realms of the laws of evidence, trial procedure, criminology, and psychology. But perhaps there are members of CLARITYwho do have expertise in these areas. I'd like to throw the issue open to the plain language movement to debate, and I'd like to start with CLARITY members.

Maybe we can highlight what's already known about the language and circumstances of police cautions. Maybe it will help those who have to research and report on the issues. Maybe we can come up with better forms of words for police cautions. Maybe we can even recommend changes to the current British form of caution.

[14] At p. 67.

So to start things off, I'll make a radical suggestion. One that I hope avoids the defects the current caution has in its length, complex construction, passive voice, and unspoken words. One that implies no threat or pressure. One that takes into account the criticisms made of the current caution in Dr Shepherd's 1995 article. And one that does not curtail the ancient right to remain silent. My suggestion for a new British police caution is this:

> You have the right to remain silent. You do not have to say anything.

Then of course there'd be the small matter of amending the law to prevent silence being used against the accused. But at least the words are clear. Maybe even clear enough so that we wouldn't need to preface them with the short "preamble" I mentioned earlier. You get the same message twice.

Now over to you, CLARITY members. Write to CLARITY with your ideas. Surely, as plain language lawyers, this is a law reform issue on which we should not remain silent.

Michèle Asprey is a lawyer, a plain language consultant, and the author of *Plain Language for Lawyers* (1996, The Federation Press, Sydney).

She thanks David Wolchover of Ridgeway Chambers in London. Mr Wolchover is a CLARITY member and a British barrister who has written extensively on the subject of evidence in criminal prosecutions. He was kind enough to read a previous draft of this article and he made many valuable suggestions.

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Why should lawyers be concerned about literacy?

by Cheryl Stephens

As plain language advocates we often have to defend ourselves against seeming attacks like these: "Do you want to reduce everything to the lowest level? Are we to use 'Dick and Jane' language?" We become sensitive to this and emphasize that plain language can't meet the needs of all our clients, especially those with the lowest reading skills. Yet the questions posed disclose an underlying problem and unmet client need.

A law office can be intimidating for people who seldom visit one. The legal environment is alien to most people who eventually become law clients. They are unfamiliar with the language, processes, and concepts we take for granted.

Add the problem of illiteracy, and a client can be overwhelmed. The latest statistics show that nearly half the population have difficulty reading or can only read day-to-day material that is simple and clearly laid-out. These statistics apply to people whose first language is English; the rates are even higher for others.

To tackle illiteracy's effects on delivery of legal service and public access to justice, the Canadian Bar Association produced the 1991 report: *Reading the Legal World. Literacy and Justice in Canada.* It recommends ways for all sectors of the community to improve the situation.

In British Columbia, the CBA Plain Language Section set up a Literacy Interest Group which produced an information kit for law firms. The kit suggests how to adapt office practices to meet the needs of clients with low literacy or lack of understanding of the legal environment. Specifically, clients with low literacy levels need more oral and visual information, like reminder phone calls and graphics to explain information. The kit is now available on the Internet at

http://www.cba.org/abc/LawyersForLiteracy
or http://www.cle.bc.ca/literacy.

Over the last year Janet Dean and I have been delivering training sessions based on the kit to law firms and association meetings. We raise awareness of the literacy issue and help firms figure out ways they can adapt office practices and documentation. We have made lawyers aware of the way that poor communication contributes to client complaints to the Law Society, to insurance claims, and to lawsuits — thus giving lawyers a concrete reason to improve their client communcations.

We have been able to show that clients want and need plainer language from their lawyers. With the help of information gathered in surveys and studies of the legal industry, we have shown that using plain language in the delivery of legal services improves client relations, benefits the bottom-line, and carries a marketing advantage.

Through the development of the kit and the program, we have learned how we can continue to advocate plain language while answering those taunting questions about literacy that used to cause us concern.

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Rewriting UK tax laws

a progress report by the Inland Revenue

The aim of this project is to rewrite UK direct tax legislation so that it is clearer and easier to use.

The key points of the project are:

- the use of plain language and other reader aids;
- a clearer more logical structure for tax legislation;
- no alteration of main tax policies (but will not prevent policy simplification);
- (possibly) some minor policy changes, where these enable greater simplification;
- full consultation with interested parties throughout the life of the project;
- new ways of working for Revenue and Parliamentary Counsel officials; and
- new streamlined procedures for enactment of 'rewrite bills'.

As well as full backing from the new Labour government, the project commands widespread support among tax professionals. Its first exposure draft, on trading income of individuals, published in July 1997, has been warmly welcomed. Many detailed written comments on the content of this document were received and a response paper has been sent to all those who commented.

First Technical Discussion Document - Testing Our Rewrite Techniques on Complex Legislation

Apart from publishing rewritten legislation for consultation in exposure drafts, the project will issue a series of technical discussion documents on general rewrite issues. The first of these was published in November 1997. This document - like the earlier exposure draft - contains draft clauses, in this case a rewrite of the corporation tax provisions relating to the relief for companies' trading losses. But their purpose here is for illustration rather than enactment in their present form. The document sought confirmation that the rewrite techniques work for technically complex legislation. It also invited comments on which techniques were particularly helpful, how far these techniques should be taken and whether other methods might have been useful in any given place.

The formal consultation period on this document has just closed. The rewrite team are currently considering the responses they have received. There is general agreement that the rewritten provisions are significantly simpler and more accessible than the existing law, and support for most of the techniques used.

Second Technical Discussion Document - A Purposive Approach to Rewriting Tax Legislation

In February the project published its second technical discussion document. This illustrates five different purposive approaches using the same single company trading loss provisions as were rewritten in the first technical discussion document. It invites comments on the role of purposive techniques in the rewrite. But it does not ask for a once-and-for-all choice between the purposive techniques illustrated and the approach used in the first technical discussion document. As the financial secretary makes clear in her foreword, the publication of this document does not necessarily mean that any of these techniques will be used in the rewrite.

The deadline for comments on this document is 29 May and the financial secretary hopes that as many people as possible will comment.

Progress So Far and Future Work

Progress on the rewrite in 1997 was slower than originally hoped.

This was partly because the project team found that their task was even more complex and difficult than they first thought. It has taken longer than expected to research and analyse the existing legislation, so that the drafters can rewrite it in the clearest way possible. Another factor has been that their Revenue colleagues in the specialist Subject Divisions have not always been able to vet the new rewritten legislation as quickly as they would have liked, because of the need to give priority to urgent budget and Finance Bill work. A further problem has been the need to divert some of the project's drafters to help out with the forthcoming Finance Bill, although this has only been a temporary setback.

The project team are now refining their plans for the next stage of the project and hope to publish these shortly. In brief, they are now working on further exposure drafts to be published later in the year. It is likely that the first rewrite bill (the Capital Allowances Bill) will ready for enactment in the 1998/99 Parliamentary Session.

Copies of the Tax Law Rewrite publications are available on the Internet at:

http://www.open.gov.uk/inrev/rewrite.htm

Paper copies can also be obtained free of charge by writing to:

Suzanne Hardy, Tax Law Rewrite Project, Inland Revenue, Room 652, Bush House, South West Wing, Strand, London WC2B 4RD

Rewriting UK tax laws

Extracts from the Inland Revenue's second "technical discussion document"

A purposive approach to rewriting tax legislation — relief for trading losses of companies

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The full text of this and the other consultation documents can be obtained from
Suzanne Hardy (who has taken over from Ajit Phillipose), Room 652, Bush House, Strand, London WC2B 4RD
or **http://www.open.gov.uk/inrev/rewrite.htm**

Comments can also be emailed to **nmunro.ir.bh@gtnet.gov.uk**

Company trading loss provisions rewritten according to five different purposive techniques

We have set out to illustrate five different variants of purposive legislation. We have deliberately selected these to provide a broad spectrum. This ranges from an approach already quite widely used involving regulations to one which mimics EU legislation. The five variants we have illustrated are:

* an EU style rewrite with recitals;
* statements of purpose, at a number of different levels and illustrating different sorts of "purpose", superimposed on the rewritten single company trading loss provisions which appeared in the first Technical Discussion Document;
* shorter primary legislation containing a regulation-making power, together with draft regulations;
* a more general version of the rewritten single company trading loss provisions with purpose statements and with some of the missing detail supplied by an Inland Revenue statement of practice; and
* the same general version with purpose statements, but this time combined with explanatory notes.

In each case we have provided a commentary on the rewritten legislation, drawing out the main issues raised by that particular purposive approach and raising the questions on which we would particularly welcome views. In this part we discuss some more general issues.

EU style drafting

Many people look to Europe for examples of different drafting styles, whether in the national law of those countries which adopt a civil law system (sometimes called code-style drafting) or in the approach taken by the European Union to European Community legislation. Although in practice much EC law is very detailed, some consider that EC legislation represents the paradigm of purposive drafting. We have adopted this legislative style as a model.

All EC law ultimately flows from the Treaty of Rome (as subsequently amended), which is expressed in terms of very high level principles. These include, for example, the principles of free movement of labour and capital and the principle of non discrimination on grounds of nationality. That law is then expressed through Regulations and Directives. These are prefaced by recitals setting out what they are meant to achieve, obviously at a lower conceptual level than the Treaty, but sometimes nonetheless at a high level of abstraction. Variant A on page 20 includes the recitals to the EC parent-subsidiary Directive. We include this purely as an example of the form which recitals may take, rather than as legislation from which particular inferences may be drawn.

In the case of EC law the more general, more purposive material which precedes any detailed rules flows through into the European Court's interpretation of those detailed rules. Its approach is primarily that a particular provision is interpreted on the basis of its purpose and context. What this means in practice is that the Court looks at the text of the detailed legislation in the light of its spirit, general scheme and working, as well as the overall legal context, in particular the system and objectives of the founding treaties and the instrument containing the provision.

Statements of purpose

Another approach is to superimpose statements of purpose onto the legislation itself. This can be done at a number of levels. A statement of purpose, or set of

general principles, can inform:

* the interpretation of a whole Act (see the extract from the Legal Aid Act 1988 in Appendix A);
* Part or Parts of an Act (see the extracts from the Arbitration Act 1996 and the Family Law Act 1996 in Appendix A);
* groups of sections (for example section 213(1)):

  > The provisions of this section and sections 214 to 218 have effect for facilitating certain transactions whereby trading activities carried on by a single company or group are divided so as to be carried on by two or more companies belonging to the same group or by two or more independent groups;

* an individual section (for example s.776(1)):

  > This section is enacted to prevent the avoidance of tax by persons concerned with land or the development of land; or

* parts of sections or schedules (for example paragraph 1, Schedule 12 Finance Act 1997 in Appendix A).

Even though examples at each level can be found, all are still fairly rare within existing legislation.

This issue has been the subject of two recent debates in the House of Lords. In the first debate on 11 November 1997, Lord McIntosh of Haringey for the Government said:

> ... Legislation should be as clear as possible, including statements of purpose, which may sometimes assist clarity but not always. There are dangers. If the statement has legal effect and covers the same ground as later detailed provisions, there is a risk of real or apparent inconsistency. If the statement is not intended to have legal effect, the courts may give it some effect with unintended results ...

In the second, more lengthy debate on 21 January 1998, Lord Renton asked whether the Government would instruct departments and drafters "to include purpose clauses or statements of principle whenever necessary or advantageous for making clear the intention of Parliament." In response, Lord McIntosh reiterated the Government's position that, in view of the dangers mentioned above:

> ... we will not issue the instruction for which the noble Lord, Lord Renton, asks. But, conversely, we will certainly not instruct them not to because we believe with him and all noble Lords that there are circumstances where they are appropriate.

As Lord McIntosh implied, there are some important questions on legal status to be addressed with statements of purpose at any level. First does such a provision have full operative status? One test of this is whether, if the provision were omitted, the effect of the law would be changed. If the provision is not intended to be operative, this could be made clear by including it in material outside of the statute itself, for example, in explanatory notes which accompany legislation.

Second, if the statement of purpose is meant to be operative, how does it relate to the rest of the (non-purposive) law? A statement of purpose as preamble to detailed rules could:

(a) have equal status with those rules;

(b) override those detailed rules (an option favoured by those concerned about the detailed rules always being one step behind developing commercial practice);

(c) be explicitly more extensive than the detailed rules, with phrases like "examples will include ..."; or

(d) come into play only to resolve ambiguities, doubts and difficulties in the detailed rules (the approach which we understand to be favoured at present in both Australia and New Zealand).

Even though they are thin on the ground, there have been difficulties over the interpretation of certain of the existing statements of purpose. In *Page v Lowther* (1983 57 TC 199), which related to the section 776(1) provision quoted in paragraph 4.8, the courts were willing to refer to the subsection (1) statement. But they found it ambiguous, particularly the reference to 'tax avoidance'. So the case was in the end decided on the (non-purposive) words of the rest of the section.

On a more practical note, introducing statements of purpose might make drafting more difficult and time consuming both when the legislation is first enacted and when Parliament considers amendments to it, and subsequently when amending legislation is prepared as this would require reconsideration of the statement of purpose.

Supplementary material

Another variant of purposive drafting involves stripping out the confusing mass of detail that is the hallmark of much present legislation. Briefer legislation, perhaps also in broader terms, would, it is argued, clarify the underlying purpose. In other words, with a number of trees felled, the shape of the wood would become easier to see.

These stripped down, more broadly expressed provisions could stand on their own. It would be left ultimately to the courts to decide how those provisions would apply in any particular case.

Over time the courts would build up a body of precedent to guide them (and other users).

But the brief description in Part 3 of views on a purposive approach suggests that, for many people, this would be going too far. This is perhaps particularly true in the context of tax legislation, where taxpayers and their advisers want to know their liability in advance of their actions. Such a stripped-down approach would leave taxpayers to wait until a body of tax law had evolved, uncertain how the law would operate in their particular circumstances and leaving the law fully accessible only to specialist advisers. Another argument against this approach is that it would involve transferring too much of the power over taxation which currently resides in Parliament to the courts.

So most advocates of this more general form of legislation suggest that it is supplemented by material outside the primary legislation. The supplementary material could be produced by the Inland Revenue and not be subject to Parliamentary scrutiny, such as statements of Inland Revenue practice or explanatory notes. The legal nature of such material would need to be resolved: how far could the taxpayer, and more particularly the courts, rely on it?

Just as some people have doubts about transferring power to the courts under the approach discussed earlier, others may regard relying on Inland Revenue practice or Inland Revenue explanatory notes as transferring too much of Parliament's power to the Executive. They might prefer the detail to be found in regulations (Statutory Instruments) which were subject to Parliamentary scrutiny. Although under current Parliamentary procedures the consideration given to those regulations could be fairly cursory, at least they would have to be approved by Parliament.

In either case, the briefer primary legislation could be drafted using statements of purpose (which would raise the issue of status discussed above. The question of explanatory material has recently been considered by the Select Committee on Modernisation of the House of Commons and the House of Lords Procedure Committee. Both Committees have given their support to a major improvement in the material provided alongside Bills. The Report of the Select Committee included a note from the First Parliamentary Counsel, which proposed the following:

Content

13. There would be no fixed rules governing the contents of the notes. Exactly what would be covered in them would depend on the Bill. But we envisage that they would usually contain the following:

- An *Introduction* referring to the relationship between the notes and the Bill.
- A *Summary and Background* section which briefly explains what the legislation does and its purpose. This section would also include any background information needed to understand what the Bill is about.
- A section which gives an *overview of the structure* of the Bill and a brief summary of what each part does.
- A *Notes on Clauses* section which explains what each clause or group of clauses does and how it does it. This would flag up defined expressions used in the Bill and explain cross-references to other legislation as need be. Depending on the Bill, this would also be the place to include worked examples if they would make parts of the Bill easier to understand.
- The estimates of *financial, public sector manpower and business compliance costs* which at present are included in the Explanatory Memorandum.

14. This is not a rigid list. Not all this material would be relevant to all Bills. And in the case of some Bills it might be appropriate to include material not listed above. For example, where a Bill textually amends existing legislation, it might sometimes be helpful to set out in the explanatory notes how the legislation reads now and how it will read after the changes made by the Bill.

15. The notes would be neutral in tone, as is the case for the existing explanatory memorandum. They would not try to "sell" the Bill or the policy underlying it.

Status of the explanatory notes

17. The notes will have the same status as the present explanatory memorandum. They are not intended to make law, and so it is not proposed that they should be amendable by either House. Their purpose is to help the reader to get his bearings and to ease the task of assimilating the new law.

18. If the notes are successful in the purpose of helping the reader, they will of course be read by judges as well as by others. However, they are not designed to resolve ambiguities in the legislative text - if ambiguities are identified as the Bill progresses, they should be removed by amendment. Occasionally it may be that the notes are referred to in litigation in the same way that Hansard is, under the rule in *Pepper v Hart*. So it will be important for those producing the notes to achieve a high degree of accuracy, and also to restrict the notes so that they do not seem to take the law further than the Bill or Act does.

Publication

19. We envisage that the notes would, like the present explanatory memorandum, be published by each House of Parliament, alongside the Bill to which they relate. To make them as widely accessible as possible, they would be made available on the Internet alongside the Bill and subsequently the Act.

The Leader of the House of Commons indicated that the Government would act on this proposal in a written answer on 28 January 1998. These notes will not be supplied with Finance Bills as, since 1996, the Treasury has already published very full notes on clauses, together with additional background material, for each measure in the Finance Bill.

Variant A

An EU style redraft with recitals

Relief for trading losses of company

Considering that companies carrying on a trade are taxed on the profits of that trade;

considering that in any tax period one activity may prosper and another not so that a company should be able to set losses from a trade against its overall profits of the period or in the previous twelve months if it was then carrying on the trade;

considering that the fortunes of a trade may fluctuate from one tax period to another so that a company should be able to set losses from a trade against future profits of that trade;

considering that set off against future profits of the trade is not possible if the company ceases carrying on the trade so that the company should in that case be able to carry back losses for a longer period, provided the cessation is not contrived;

considering that it is of benefit to the economy if trades can be transferred between companies, without tax disadvantage, where the trade remains in substantially the same ownership and the return to the Exchequer is not thereby artificially depressed;

considering that it is not of benefit to the economy if companies are acquired for the purpose of exploiting their trading losses or profits for tax advantage.

(1) This section provides relief for trading losses made by a company.

(2) Trading losses made in an accounting period may be set against profits of the company-

* in the same accounting period, or

* in earlier accounting periods within twelve months of the period in which the loss is made, provided the company was then carrying on the same trade.

Trading losses made in the twelve months before the company ceases carrying on the trade may be set against profits in earlier accounting periods within three years of the period in which the loss is made, provided that the company was then carrying on the same trade and that the trade is not in substantially the same ownership within two years after the company ceases carrying it on as in the twelve months before.

As the set off may not be to the company's advantage, the relief must be claimed.

(3) Unrelieved losses are not lost but are carried forward indefinitely to later accounting periods. The losses carried forward can only be set against trading profits from the same trade. No claim is required.

(4) If the trade is transferred to another company, the losses remain with the transferor unless the trade is transferred as a going concern and remains in substantially the same ownership. In that case, the losses are transferred with the trade. This also applies where the trade is carried on in partnership, provided all the partners are companies.

But if the result of the transfer is to leave the transferor with liabilities exceeding its assets, the amount of losses transferred is reduced by the amount by which its liabilities exceed its assets.

(5) No carry forward or back of losses is allowed if there is a change of ownership of a company for the purpose of using its trading losses or profits for tax advantage. It is for the taxpayer to show that the purpose was not tax advantage if the change of ownership-

* occurs when the trading activity has been reduced to a low level, or

* is associated with a major change in the way the trade is carried on.

Variant C (variant B has not been reproduced)

Shorter primary legislation containing a regulation making power supplemented by regulations

Restriction of relief on change of ownership of company carrying on trade

12.1.12 Cases where loss relief restricted on change of ownership of company

(1) Loss relief under this Chapter is restricted if there is a change of ownership of the company carrying on the trade and either-

(a) there is a major change in the nature or conduct of the trade within the period of three years before or after the change of ownership, or at the same time as the change of ownership, or

(b) the change of ownership occurs after the scale of the activities in the trade has become small or negligible and before any considerable revival of the trade.

(2) A major change in the nature or conduct of a trade includes-

(a) a major change in the type of property dealt in, or services or facilities provided, in the trade, or

(b) a major change in customers, outlets or markets of the trade.

(3) In considering whether there has been a major change within a period of three years-

(a) a comparison may be made of the circumstances at any two points in the three years, and

(b) it does not matter whether the change occurs at a particular point or is the result of a gradual process which may have begun before the beginning of the three year period.

(4) In relation to relief available to a company as transferee under section 12.1.8 (carry forward of losses on transfer of trade between companies) the references in this section to the trade include the trade as carried on by the transferor.

Defined terms: [details given]

Origin: [details given]

12.1.14A Regulations about change of ownership of a company

(1) The Treasury shall make regulations specifying rules as to when there is a change of ownership of a company for the purposes of section 12.1.12.

(2) The regulations may-

(a) provide that there is a change of ownership of a company if there is a change of ownership of a specified percentage of the ordinary share capital of the company;

(b) require a comparison to be made of the ownership of the ordinary share capital of the company at two points of time;

(c) require other property or rights to be taken into account instead of ordinary share capital in specified circumstances.

(3) The regulations may-

(a) require the acquisition of ordinary share capital or other property or rights to be disregarded in specified circumstances;

(b) contain rules as to the time when ordinary share capital or other property or rights are ....

Variant D

Shorter primary legislation supplemented by a statement of Inland Revenue practice

Restriction of relief on change of ownership of company carrying on trade

12.1.12 Cases where loss relief restricted on change of ownership of company

The purpose of this section is to specify factual circumstances in which a change of ownership of a company is treated as being for the purpose of making use of loss relief.

(1) Loss relief under this Chapter is restricted if there is a change of ownership of the company carrying on the trade and either-

(a) there is a major change in the nature or conduct of the trade within the period of three years before or after the change of ownership, or at the same time as the change of ownership, or

(b) the change of ownership occurs after the scale of the activities in the trade has become small or negligible and before any considerable revival of the trade.

(2) In relation to relief available to a company as transferee under section 12.1.8 (carry forward of losses on transfer of trade between companies) the references in this section to the trade include the trade as carried on by the transferor.

Defined terms: change of ownership of a company, s.12.1.14; company, ICTA s.832(1); trade, ICTA ss.6 (4), 832(1), 834(2); transfer, transferee, transferor, s.12.1.8.

Origin: subs.(1) - ICTA ss.768(1)(a) and (b), 768A(1)(a) and (b), FA 1991 Sch.15 para.20(1); subs.(2) - ICTA s.768(5) second branch.

12.1.13 How loss relief is restricted

The purpose of this section is to remove any tax advantage by preventing losses being carried backwards or forwards past the point at which the change of ownership occurs.

(1) In a case within section 12.1.12 (cases where loss relief restricted on change of ownership of company) the following provisions apply to prevent losses being carried backwards or forwards past the point at which the change of ownership occurs.

(2) For the purposes of relief under this Chapter-

(a) the accounting period in which the change of ownership occurs is treated as two separate accounting periods, the first ending with the change of ownership and the second consisting of the remainder of the period, and

(b) the profits or losses of the period in which the change occurs are apportioned to those two periods according to the length of the periods, unless that method of apportionment would work unjustly or unreasonably in which case such other method shall be used as appears just and reasonable.

(3) Relief under section 12.1.3 (set off against total profits of same accounting period) is available only in relation to each of those periods considered separately.

(4) A loss made in an accounting period ending after the change of ownership may not be set off under section 12.1.4 (carry back of losses against earlier total profits) against profits of an accounting period beginning before the change of ownership.

Appendix A

Examples of purposive drafting from existing United Kingdom legislation

Channel Tunnel Act 1987

Section 1

(1) The primary purpose of this Act is to provide for the construction and operation of a tunnel rail link (together with associated works, facilities and installations) under the English Channel between the United Kingdom and France, in accordance with -

(a) The Treaty between the United Kingdom of Great Britain and Northern Ireland and the French Republic ...

Section 16

The purpose of this section is to secure that the application of English law to any Concession lease does not have effect so as to prejudice the operation of the international arrangements, so far as relates to the provision for use by the Concessionaires of the land required in England for the construction and operation of the tunnel system by the grant to the Concessionaires of a Concession lease on terms determined in pursuance of those arrangements.

Legal Aid Act 1988

Section 1

The purpose of this Act is to establish a framework for the provision under Parts II, III, IV, V and VI of the advice, assistance and representation which is publicly funded with a view to helping persons who might otherwise be unable to obtain advice or representation on account of their means.

Arbitration Act 1996

Section 1

The provisions of this Part are founded on the following principles, and shall be construed accordingly -

a. the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

b. the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

c. in matters governed by this Part the court should not intervene except as provided by this Part.

Family Law Reform Act 1996

Section 1

The court and any person, in exercising functions under or in consequence of Parts II and III, shall have regard to the following general principles -

a. that the institution of marriage is to be supported;

b. that the parties to a marriage which may have broken down are to be encouraged to take all practical steps, whether by marriage counselling or otherwise, to save the marriage;

c. that a marriage which has irretrievably broken down and is being brought to an end should be brought to an end -

i. with minimum distress to the parties and to the children affected;

From the proceedings of the

tax drafting conference

hosted in Auckland in November 1996 by the New Zealand Inland Revenue Department

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The Hon Justice Sir Kenneth Keith

When, a few years ago as an innocent in these matters, I picked up the Income Tax Act 1976 I expected to find reasonably early in the text a statement of our obligation to pay tax on income. That basic obligation did not appear however until p 143 of the then current version of the old Act. It appeared not in Part I or Part Il as might have been expected, but in Part IV. Even then it was not the first provision in that Part. For some reason it appeared following the definition of the word "absentee", a word which is mainly about not paying tax.

The basic provision now appears almost at the beginning of the 1994 Act, in Section BB1. That alphanumeric style of numbering is used to emphasise the overall system of the Act.... The structure also facilitates the slotting in of new sections. No longer will it be necessary to have monstrosities such as Section 394ZZZJ. As well, the definitions have now been moved from the front and the many other places in which they appeared to the back of the statute. We followed the advice of our group of experts and departed from our original intention to place the dictionary, according to standard New Zealand practice, at the front. That dictionary also consolidates the definitions; no longer do we have seven definitions of "arrangement".

A second problem presented by the old tax statute arose from the incomprehensible length of some of its provisions. I had the misfortune in that first look, once I had found the basic taxing section, to open the statute in the middle of a section which was more than 25 pages long. It also contained very lengthy sub-sections, one extending over eight pages. As printed, the official volumes did not have running heads. You did not know which section you were in. That fact indicates a third problem with the old Act and the statute book — its format. By contrast, the new tax legislation incorporates running heads. Each section and subsection has a heading. Notes indicate the words which are defined. And there is more.

To dwell for a moment on the second problem, provisions of incomprehensible length, the new provisions in the new statute use short sentences, they omit unnecessary words, and they leave out phrases which are not needed. They give effect in many respects to the propositions which George Orwell stated in his stimulating essay on *Politics and the English Language*, published 50 years ago.

I have already moved into my fourth point — the actual wording of the provisions. At the Law Commission we were asked to have a look at two provisions of the old Act with a view to stating their essence in a more straightforward form. We were not asked to simplify the provisions in the sense of removing any of the existing detail. Our task was to present the full effect of the current provisions, but in an accessible, plain form. The first of the two provisions was long and complex. With the help of experts we ascertained what it was really saying. We produced a clearer crisper text. The new provision was a third of the length of the old and no longer included some of its obscurities and contradictions. It was much easier to understand and to operate. So far as we and our expert advisers could determine it included all the substance of the earlier provisions.

When we turned to the second, apparently more straightforward, and certainly shorter provision we found to our dismay and to the dismay of those advising us that no one could determine what the provision was about. It did not seem to make any sense at all. That highlights a fundamental point about plain drafting. Something can be plainly drafted only if there is a good understanding about what is to be said.

To highlight the importance of careful attention to the words actually used, let me mention a phrase which appears in a number of the provisions of the old Act. This phrase is: "notwithstanding any other provision of this section". In s.241 of the 1976 Act, concerning the determination of the place of residence of taxpayers, two subsections begin with the phrase "notwithstanding any other provision of this section". We appear to have two immovable objects or irresistible forces. One, presumably, must prevail over the other but on their face they do not appear to allow that possibility.

Dr Robert Eagleson

We are extensively testing every stage of our redraft of the Corporations Law. We start first by testing the organisation. We have no text, simply how we feel the material might be presented in the document. Very often we provide our test groups with two or three possible organisations. For instance, recently we were

looking at the section on Officers and one possible way of organising the material was to have: Appointment of Officers, The Duty of Officers, The Termination of Officers. Another way would be to have Duties and then Appointment and Termination. Another possibility would be Appointment, Termination and then Duties. It was interesting when we went to our test audience they all said that they would prefer Duties first and then Appointment and Termination collected together. They didn't want the chronological order - you were appointed, here's your duties, here's your termination. As they said, when we're dealing with a situation we're dealing usually with both terminating somebody and appointing somebody in their place. Or all we're looking at are their duties. And they ended up saying we don't much mind whether you have Duties first or the others, as long as you put them in clearly demarcated parts. Then we can get in and out of that material. We have found this extremely useful because there are several logical ways to approach any particular topic and it just depends on how the users want it. Sometimes they want material in a chronological order. Sometimes they want it in a segmented concept kind of situation. Having got our organisation makes it easy to go on with drafting.

Now, having drafted the text we then take it out again to bands of users. We take them through the text to see if they can understand all the sentences, all the parts, whether they can work with the headings or not. As well though, we don't just ask people whether they can comprehend but we set them problems. Because often they say, "Yes I understand that and it reads well." But if you set a particular problem they may have difficulties. So we find it essential that we set problems relating to the law to see whether they can get the solution.

We had one very interesting case where we were looking in the area of accounts and audit. We happened to have six partners from major accountancy firms in the city. Three of them saId "yes" to one problem and three said "no", which forced us to go back to look again at just what was happening. And of course, it had to do with the background and the way accountants looked at matters. So these things become extremely important.

One other area we often test is the use of tables which give an overview of the rest of the part. We set problems and we watch very closely whether people use the table or whether they just flick down through the sections. We look to see how useful or not a table or contents page is in operating; whether people are using these devices or not. Now when I'm talking about testing I'm talking about 30, 40, 50 people at most. We tend to work in groups of about 8 and we try to have a few days between each group of testing so that if one group comes up with a serious problem we can make an adjustment. Then we test our adjustment on the next group, because in the process of adjusting you may create another problem.

Testing is an essential thing. But think about testing organisation as well as the structure, because very often one of the great difficulties in reading a text is the way the material is organised in it. And we feel our view of the world is marvellous and our view may not be the way our users approach a particular topic.

Phillip Knight

First of all I would like to reiterate David (Elliott)'s comment that one of the best and easiest, certainly the cheapest, form of testing is to draft in an open, consultative atmosphere that welcomes debate. Over the last year I have been involved as an adviser to the Constitutional Assembly in South Africa drafting the Constitution. There was a team of four drafters assigned to the job of producing the final test, which was known as a refinement team. That was a constant, consultative debating process day after day after day in which ideas of drafting were tested against each other and often taken out and tested with other people in the office. It is very low level testing. But a lot of inconsistency and a lot of misunderstandings were discovered through that kind of process and I highly commend it for its efficiency and low cost. I don't think it is the only thing we can do, but I think it is the thing we should always be doing.

Testing is a science and, like almost any other science, if you don't know the question you want answered you are most unlikely to get the answer you require. You can go out and get all kinds of interesting answers but they might not be the right ones. Someone said that testing is rather like hiring an architect. It is very important you have in mind what sort of building it is you want. You really don't want a house that looks like a shopping centre. Get to know what you want to know about the legislation. If it's important to you to know whether people feel comfortable using it, do the kind of testing that gets at feelings. If it's important to you to know whether people can find their way around legislation, you want to do a very different kind of testing to determine how well they are able to use and produce answers and do searches.

You can do a broad test, but you will only find out the things that you set up the test to find out. For example, in the comparative research I have written about in the paper, we looked at how well people could find their way around one document as opposed

to another. Now the documents were radically different. The revised version had running heads. It had a table of contents with page numbers. It had side bar or marginal comments with navigational aids in them. The defined words were identified and people were told what page they could go on. It also had been reorganised. It also had sentence restructuring work done to it. I can tell you that there was an improvement of 70% in people's ability to find accurate answers. I cannot tell you whether the table of contents improved people's ability. I don't know if the running heads mattered. I don't know what the impact was of marginal notes. I haven't the foggiest idea whether identifying defined words helped. The point is, we measured these things in aggregate. What we need to do now is start to identify these things and isolate the different elements. We need to ask ourselves if the table of contents really does help. We *think* it helps. But the truth is we don't know if it helps or to what degree it helps. And when we know that a table of contents gives us maybe a 10 or 15 or 20% improvement in finding over a statute that doesn't have one, is that improvement worth the cost of producing a table of contents? There is fortunately now a growing body of literature on testing and test results in the world of legal documents. That was not true ten years ago. When I began working with the Plain Language Institute in British Columbia six years ago, there was very little significant test literature available to us, at least that had to do with testing legal documents. It's important, it seems to me, to have an awareness and to take the time to have an awareness of that literature, to know what has been learned and to know what needs to be learned.

You don't have unlimited resources in your simplification programmes. Maybe running heads produce a 50% improvement in finding and cost half as much to do. Well, if you have to choose then between running heads and table of contents it's not really a hard choice, if you have the results of testing.

Geoffrey Sellers

Do draftsmen take the rules of interpretation into account while they're drafting? The answer, by and large, is no. We just try and set the thing down as simply as we can and we hope we get it in the right order and we hope we get it right. A lot of rules of interpretation are rules the courts use to deal with cases that the draftsmen never foresaw. Some of the rules we do take into account - the presumptions against retrospection, presumptions about territoriality, that kind of thing we rely on sometimes to the extent of not making provision because the general principle already provides a limit on the proposition. The rules sometimes enunciated as rules of interpretation, about how you go about reading the statutory text, I think we don't take into account; we hope they work. We don't, at least I don't, see the rewrite as changing the rules. I see the rewrite as good drafting. I don't see it as being a radical change between the old and the new. We are doing what I think is good drafting practice. It's called plain language, but it's really what good drafting has always done. A lot of drafting which is purveyed and enacted is not good drafting for one reason or another. And when you look into it quite often there are reasons why it wasn't that good: shortage of time, and so on. So, l don't think we are looking to the courts to develop new rules. We're hoping that they will give the new provisions a fair crack of the whip and we rather hope that we don't have to enact a proposition saying that they do have to give it a fair crack of the whip. We'll rely on the courts to apply their common sense to the job until the contrary is proved. A specific provision requiring the court to take into account the arrangement and structure I would hope was unnecessary and if we can't rely on the judges to do that, we have a problem.

As regards the problem about inadvertent change of meaning through using different words, we I think will rely on the cases that Tom referred to, *Farrell v. Alexander* is the most recent case in the UK on the point. The general rule is that if there is a consolidation or codification the courts take some persuading to go back to the old law. They will give the new text full faith and credit and if the answer is clear on the current law, they won't go back. It's only if they can be persuaded that there is ambiguity in the new law, they'll go back and see what it was before. In fact, in some ways the problem is the opposite, because we do want to keep the benefit of the old case law in many areas. I mentioned yesterday the meaning of "trade" and the rules which have grown up about how you calculate trading income for tax purposes. We want to have the benefit of those in the future so I think we may be faced with possibly enactng the contrary proposition, which is that the general rule that you start again with the codification doesn't mean that we've lost the benefit of those old cases. I have faced this problem before. There is proposition to that effect in our 1988 Copyright Law, where we were rewriting with amendments the entire statute law on copyright, but there was a lot of unwritten law, such as: what is a "work" in the first place, which we wanted to retain the benefit of, and there is a provision tucked away at the end, which I can't now remember the detail of, but is directed at that point.

Letters

Australian Tax Law Improvement Project

Amanda Armstrong's article *Mission Improbable: Simplifying Commonwealth Tax Law* in *Clarity* 38 (Jan 1997) was an interesting summary of tax law simplification projects in Australia, New Zealand and the United Kingdom, but I must correct a misunderstanding.

Armstrong stated (at page 26): "Australia is only going to replace the old tax legislation with the new legislation once the rewrite has been completed, while New Zealand and the UK are both adopting an incremental approach."

In fact, three whole chunks of the replacement law have been enacted. One portion of the rewrite became law on 7 April 1995, and another two portions commenced on 1 July 1997 and apply to the 1997/98 income year. Right from the outset, the Tax Law Improvement Project had recommended that the new laws be introduced progressively, and that is in fact what happened.

But a wild card has now been dealt. The Howard government has announced that it favours a total overhaul of the tax system, including consideration of a goods and services tax. We don't know if this will affect the progress of the rest of the Tax Law Improvement Project, which is due to complete its work in June 1999. I hope not, because even if we have to start all over again with a blank sheet of paper, we will have learned a lot about how to write tax law in plain language.

Michèle M Asprey

Discrimination against the hemispherically-challenged

I am writing to complain about a disturbing change which took place in newsletter 39 (Spring).

That's the problem, right there. "Spring"? Not down here is isn't. Talk about disregard for the needs of a section of your readers!

Look, those of us from the southern hemisphere have had to put up with this kind of blatant discrimination for as long as I can remember. We have been systematically and seasonally oppressed by editors from Europe and North America, who have made no attempt at all to put themselves in the inverted shoes of their southern readers.

It is not just a matter of principle, you know. It has practical repercussions. The thought processes required to rethink "spring" into "autumn" are not unlike those required to rethink a double negative. You need to doublethink.

Another well-respected plain language journal, the Canadian journal *Rapport*, used this noxious and elitist form of indexing for a short time. Issues #11 and #12 were labelled "Spring" and "Summer" 1994. But then the practice stopped. Perhaps they realised their mistake. I hope so. Because if they had gotten around to the "Fall" issue, I might have had a heavy one.

I say it is time for this practice to stop. Right now, before summer starts.

Michèle M. Asprey
Sydney, Australia, Southern hemisphere
2nd September 1997

The editor replies

I called that issue "spring" rather than by the month (as had been the custom) to gloss over its lateness, and it is unkind of Michèle to spoil this innocent device. It is not the first time she has embarrassed me in public. Once, while we were in a crowded lift (elevator), she peered at the small print on my chestwear and exclaimed loudly and triumphantly in the antipodean dialect: "Mark! There's a misplaced apostrophe on your tee-shirt!"

Help needed

I maintain a web site for the National Council for Civil Liberties at:

http://users.ox.ac.uk/~liberty/

It features a range of information about Liberty and on-line copies of some of Liberty's legal briefings. I would appreciate comments on improvements that could be made to the content and presentation, including the language used. I would also appreciate help in maintaining the site - particularly in scanning and editing briefings to make them available on-line.

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Extracts from SEC's drafting handbook

Continued from *Clarity* 40 (Aug 1997) pp 34-6

By the Office of Investor Education and Assistance U.S. Securities and Exchange Commission 450 5th Street, N.W. Washington, D.C. 20549 January 13, 1997.

A hard copy of this document can be obtained by calling the Office of Investor Education and Assistance toll-free information service (from inside America): 1-800-SEC-0330.

Reorganize the content logically

There are a few principles of good organization that apply universally, regardless of your audience's degree of investment expertise.

First, present the big picture before the details. Prospectuses routinely start with a detailed description of the securities. You may read pages before you find out what the company produces, or why they are merging or spinning off a subsidiary. It's hard to absorb the details if you don't know why they are being given to you. Imagine trying to put together a complicated jigsaw puzzle without first seeing the picture of the completed puzzle. An individual piece of information starts meaning more to your readers if they know how it fits into the big picture. Start with the big picture.

Second, use informative headings and subheadings to break your document up into manageable sections. Prospectuses impart a lot of information. If you present the information in bite-size pieces, it's easier to digest. Make sure your headings tell the reader what the upcoming sections will cover. Headings like "general" or "background" aren't especially helpful because they don't tell the reader anything. Use descriptive headings and subheadings.

Third, always group related information together. This helps you identify and eliminate repetitious information. Group like information together.

* * * *

Before

The foregoing Fee Table is intended to assist investors in understanding the costs and expenses that a shareholder in the Fund will bear directly or indirectly.

After

This fee table shows the costs and expenses you would pay directly or indirectly if you invested in our fund.

The *before* example uses the passive with agent deleted. We don't know who "intended" to assist investors. Note how long it took to get to the meat of the sentence — the costs and expenses. Dispense with the filler words, "...to assist investors in understanding..." to move your reader more quickly to the important points.

It's not enough merely to translate existing texts — the key is to add useful information.

Find nominalizations

Before

We will provide appropriate information to shareholders concerning....

After

We will inform shareholders about....

Before

There is the possibility of prior Board approval of these investments.

After

The Board might approve these investments in advance.

Try personal pronouns

No matter how sophisticated your audience is, if you use personal pronouns the clarity of your writing will dramatically improve. Here's why.

First, personal pronouns aid your reader's comprehension because they make clear what applies to your reader and what applies to you.

Second, they allow you to "speak" directly to your reader, creating an appealing tone that will keep your reader reading.

Third, they help you to avoid abstractions and to use more concrete and everyday language.

Fourth, they keep your sentences short.

Fifth, first and second person pronouns aren't gender specific, allowing you to avoid the "he or she" dilemma. The pronouns to use are first person plural (we, us, our/ours) and second person singular (you, your/yours).

Observe the difference between these two examples:

Before

This Summary does not purport to be complete and is qualified in its entirety by the more detailed information contained in the Proxy Statement and the Appendices hereto, all of which should be carefully reviewed.

After

Because this is a summary, it does not contain all the information that may be important to you. You should read the entire Proxy Statement and its appendices carefully before you decide to vote.

"Thanks to the existence of pronouns, we are spared a soporific redundancy in literature, speech, and songs."

Karen Elizabeth Gordon *The Transitive Vampire*

Bring abstractions down to earth

Abstractions abound in the financial industry. What pictures form in your mind when you read these phrases: *mutual fund, the Dow Jones Industrial Average, zero coupon bond, call option,* or *foreign currency trading?* Most people don't have an image in their minds when they hear abstract words like these. And yet, it's far easier to comprehend a concept or a situation when your mind can form images.

In a study conducted at Carnegie-Mellon University, a cognitive psychologist and an English professor discovered that readers faced with complex written information frequently resorted to creating "scenarios" in an effort to understand the text. That is, they often made an abstract concept understandable by using it in a hypothetical situation in which people performed actions.

You can make complex information more understandable by giving your readers an example using one investor. This technique explains why "question and answer" formats often succeed when a narrative, abstract discussion fails.

Here is an example of how this principle can be used to explain an abstract concept — call options:

For example, you can buy an option from Mr. Smith that gives you the right to buy 100 shares of stock X from him at $25.00 per share any time between now and six weeks from now. You believe stock X's purchase price will go up between now and then. He believes it will stay the same or go down. If you exercise this option before it expires, Mr. Smith must sell you 100 shares of stock X at $25.00 per share, even if the purchase price has gone up. Either way, whether you exercise your option or not, he keeps the money you paid him for the option.

The following examples show how you can replace abstract terms with more concrete ones and increase your reader's comprehension:

Before

Sandyhill Basic Value Fund, Inc. (the "Fund") seeks capital appreciation and, secondarily, income by investing in securities, primarily equities, that management of the Fund believes are undervalued and therefore represent basic investment value.

After

At the Sandyhill Basic Value Fund, we will strive to increase the value of your shares (capital appreciation) and, to a lesser extent, to provide income (dividends). We will invest primarily in undervalued stocks, meaning those selling for low prices given the financial strength of the companies.

Before

No consideration or surrender of Beco Stock will be required of shareholders of Beco in return for the shares of Unis Common Stock issued pursuant to the Distribution.

After

You will not have to pay for or turn in your shares of Beco stock to receive your shares of Unis common stock from the spin-off.

Omit superfluous words

Before

The following summary is intended only to highlight certain information contained elsewhere in this Prospectus.

After

This summary highlights some information from this Prospectus.

* * * *

Positive sentences are shorter and easier to understand than their negative counterparts. For example:

Before

Persons other than the primary beneficiary may not receive these dividends.

After

Only the primary beneficiary may receive these dividends.

Use short sentences

Before

The Drake Capital Corporation (the "Company") may offer from time to time its Global Medium-Term Notes, Series A, Due from 9 months to 60 Years From Date of Issue, which are issuable in one or more series (the "Notes"), in the United States in an aggregate principal amount of up to US $6,428,598,500, or the equivalent thereof in other currencies, including composite currencies such as the European Currency Unit (the "ECU") (provided that, with respect to Original Issue Discount Notes (as defined under "Description of Notes — Original Issue Discount Notes"), the initial offering

price of such Notes shall be used in calculating the aggregate principal amount of Notes offered hereunder).

After

The Drake Capital Corporation ("we") may offer at various times up to US $6,428,598,500 worth of Global Medium-term notes. These notes will mature from 9 months to 60 years after the date they are purchased. We will offer these notes in series, starting with Series A, and in US, foreign, and composite currencies, like the European Currency Unit. If we offer original issue discount notes, we will use their initial offering prices to calculate when we reach $6,428,598,500.

* * * *

Choose the simpler synonym. Surround complex ideas with short, common words. For example, use *end* instead of *terminate*, *explain* rather than *elucidate*, and *use* instead of *utilize*. As a rule of thumb, when a shorter, simpler synonym exists, use it.

* * * *

Keep the subject, verb, and object close together. Short, simple sentences enhance the effectiveness of short, common words.

To be clear, long sentences must have a sound structure. Here are a few ways to ensure yours do.

The natural word order of English speakers is *subject-verb-object*. Your sentences will be clearer if you follow this order as closely as possible. In disclosure documents, this order is frequently interrupted by modifiers. For example:

Before

"Holders of the Class A and Class B-1 certificates will be entitled to receive on each Payment Date, to the extent monies are available therefor (but not more than the Class A Certificate Balance or Class B-1 Certificate Balance then outstanding), a distribution."

After

Class A and Class B-1 certificate holders will receive a distribution on each payment date if there is cash available on those dates for their class.

* * * *

Modifiers are words or phrases that describe or limit the subject, verb, or object.

Before

The following description of the particular terms of the Notes offered hereby (referred to in the accompanying Prospectus as the "Debt Securities") supplements, and to the extent inconsistent therewith replaces, the description of the general terms and provisions of the Debt Securities set forth in the Prospectus, to which description reference is hereby made.

After

This document describes the terms of these notes in greater detail than our Prospectus, and may provide information that differs from our Prospectus. If the information does differ from our Prospectus, please rely on the information in this document.

Write using "if-then" conditionals

Conditional statements are very common in disclosure documents — although they are rarely written that way. When we rewrote the last example as a conditional, we followed the natural English word order very closely. That's why the sentence is easier to read.

Here are four rules of thumb to help you write conditional statements effectively:

One *if*, one *then*. When there is only one *if* and one *then*, starting with the *if* may spare some of your readers from having to read the rest of the sentence. In these cases, the *if* clause defines who or what the *then* clause applies to. " If you invested in Class A shares, then....".

One *if*, multiple *thens*. When there is only one *if* and more than one *then*, start with the *if* and tabulate the *thens*.

Multiple *ifs*, one *then*. When there is only one *then* and more than one *if*, start with the *then* and tabulate the *ifs*.

Multiples *ifs* and *thens*. When there is more than one *if* and more than one *then*, you'll probably need to break it down into more than one sentence, taking care to specify which *ifs* apply to which *thens*. Or, the information may be clearer in a chart.

Keep your sentence structure parallel

A long sentence often fails without a parallel structure. *Parallelism* simply means ensuring a list or series of items is presented using parallel parts of speech, such as nouns or verbs.

Before

If you want to buy shares in Fund X by mail, fill out and sign the Account Application form, making your check payable to "The X Fund," and put your social security or taxpayer identification number on your check.

After

If you want to buy shares in Fund X by mail, fill out and sign the Account Application form, make your check payable to "The X Fund," and put your social security or taxpayer identification number on your check.

Drafting tips

1: Omitting surplus words

by

Mark Adler

Once, in my youth, I threw a dinner party. As it was a rare event I didn't want to leave anyone out. And people came a long way so I had to feed them properly. This is how I talked myself into preparing a four-course meal for fourteen people when my experience was not much wider than making myself an omelette. But I had made risotto before, and thought this a safe main course. But with so unfamiliar a scale I was unsure of the quantities. Although I stirred in as many eggs as I calculated were necessary I was worried that the mixture might be too loose. So I cracked in another couple. Then, for the avoidance of doubt, one or two more. And just in case, ex abundanti cautela, another. The resulting constipation was so memorable that a quarter of a century later my friends will not visit unless I am barred from the kitchen.

Words are like eggs. If you put too many in, however carefully, the mixture will be indigestible.

Let us look at a typical piece of legal writing and see how it can be made more digestible just by removing surplus words.

> If the rent ~~hereby reserved or any part thereof~~ [1] shall be ~~in arrear and~~ unpaid for twenty-one days after becoming due ~~and payable~~ (whether formally demanded or not [2]) or if there shall be any breach of ~~any~~ covenants [3] ~~or agreements~~ [4] on the part of the Lessee ~~herein contained then and in any such case~~ it shall be lawful for the Lessor ~~at any time thereafter~~ to re-enter ~~upon~~ the ~~demised~~ premises ~~or any part thereof in the name of the whole~~ [5] and immediately thereupon this demise shall ~~absolutely~~ cease ~~and determine~~ but without prejudice to any ~~right of action or~~ remedy of the Lessor in respect of any antecedent breach of ~~any~~ covenant ~~or agreement on the part of the Lessee herein contained~~

[1] If the drafter was worried (in my view, fancifully) that part payment would deprive the landlord of this remedy, "the rent" could be changed to "any rent".

[2] This is required by a 19th century Act (overdue for repeal, since every lease and precedent I have ever seen sidesteps it with this phrase).

[3] This careless plural allows a mischievous tenant to argue that two breaches are required.

[4] Since a lease must be a deed, all agreements in it are covenants. I prefer "tenant's duties" or "tenant's obligations" to "lessee's covenants" (and this avoids the need to amend for non-deed "agreements" of less than three years).

[5] The landlord enters the premises when he walks through the door, and the lease then ends.

Just deleting the struck-out words reduces the sentence from 126 words to 69. By tidying it as I have below we can reduce it to 45 words:

> If the rent ~~shall be~~ *is* ~~unpaid for twenty-one~~ *21* days *late* (~~whether~~ *even if not* formally demanded ~~or not~~) or if ~~there shall be any breach of~~ *the tenant breaks* any *other* covenant~~s on the part of the Lessee it shall be lawful for~~ the ~~Lessor~~ *landlord may* ~~to~~ re-enter the premises*, ending* ~~and immediately thereupon~~ this ~~demise shall cease~~ *lease,* but without prejudice to any remedy ~~of~~ the ~~Lessor~~ *landlord* ~~in respect of~~ *for* an~~y~~ ~~antecedent~~ *earlier* breach of covenant.

Would this deprive the tenant of the right to damages for any earlier breach by the landlord? If not, could delete the outline words, giving us a version 1/3rd the length of the original. It might be further improved to:

> The landlord may end the term by entering the property if:
>
> (A) any rent is 21 days late (even if not formally demanded); or
>
> (B) the tenant breaks any other obligation.

As it is the *term,* rather than the *lease,* which ends early, there is no suggestion that the right to damages for earlier breach of covenant is lost.

A defective headnote

by Nick Lear

The opening sentence of The Times Law Reports is supposed to tell you what the case is all about. In the case of *Lewisham Investment Partnership Ltd and another v. Morgan* (*The Times*, November 25 1997), it reads is follows:

> Although to apply the decision of the Court of Appeal in *Iceland Frozen Foods plc v. Starlight Investments Ltd* ([1992] 1 EGLR 126) conflicted with the presumption that the hypothesis on which rent should be fixed on a review should bear as close a resemblance to reality as possible, so that a puisne judge would be entitled to feel himself not bound by it, a professional valuer, who, on advice by a solicitor that he was bound by it, had followed it, was not negligent in so doing.

Did you catch that? It is 91 words, so you may be forgiven, if not. The grammatical check on the computer came up with:

> Sentence was too long to process for grammatical structure.

I then divided the sentence.

About the last 41 words, I got:

> Consider revising. Very long sentences can be difficult to understand.

Why do lawyers do this?

You're intrigued now, aren't you? Well here is what the law reporter might have said, if he or she had meant you to understand:

> A valuer who followed legal advice when deciding a rent review was not negligent.
>
> Rent review clauses are generally based on a hypothetical lease. Courts have tended to solve problems by presuming that the hypothetical world should be as close to reality as possible. In the case of *Iceland Frozen Foods plc v. Starlight Investments Ltd* ([1992] 1 EGLR 126), Iceland as tenant had a right to subdivide the property, and had done so. The subdivision was an improvement. The lease required the valuer to disregard improvements. But the landlord wanted the **hypothetical** improvements to count. The Court of Appeal threw out the argument.
>
> In the present case, Mr Justice Neuberger thought the Iceland decision conflicted with the "reality presumption". He would have declined to follow Iceland, if he had been the valuer. Even so, the valuer had taken proper legal advice on the meaning of Iceland and had followed it. So he was not negligent.

Now that's 3 paragraphs, 12 sentences and 157 words instead of 1, 1 and 91. I hope you understood it, though!

Before and after

Mark Adler looks at a piece of traditional writing from a book of will precedents and suggests how it might be improved.

Before

I GIVE my freehold property situate at 15 Park Road North Amberley in the County of Surrey [free of all moneys charged or otherwise secured thereon at my death (such moneys to be paid out of my residuary estate) to my trustees upon trust PROVIDED THAT during the life of my wife Juliette India Tango no sale shall take place without her consent thereto and my trustees shall hold the net rents and profits until sale and the net income from the proceeds of sale in trust for my wife during her life and after her death my trustees shall hold the said property if unsold or the net proceeds of sale or the investments representing the same together with any income therefrom for my son Romeo Mike Tango absolutely AND I DECLARE that my trustees may allow my said wife to occupy the said property during her lifetime PROVIDED THAT she shall pay and discharge all taxes and other outgoings payable in respect of the property throughout her occupation of the same and keep the said property in good repair and condition and shall pay to my trustees such sum as is required to keep the same insured to the full value thereof against such risks as my trustees shall in their absolute discretion from time to time think fit.

After

In a "definitions" clause at the beginning of the will

(A) "Juliette" is my wife, Juliette India Tango.

(B) "Romeo" is my son Romeo Mike Tango.

(C) "Park Road" is my property at 15 Park Road North, Amberley.

This clause

1. Any money secured on Park Road is to be paid from my other assets[1].
2. I give Park Road free of those debts to my trustees to hold:
   (A) For Juliette for life (which means she is entitled to use the property[2] subject to the conditions in clause 5, and to keep any net income from it); and then
   (B) For Romeo.
3. Park Road may not be sold during Juliette's lifetime without her consent.[3]
4. If Park Road is sold, the net proceeds of sale (and anything in which they are invested) will be held on the same terms as Park Road.
5. Juliette may live in Park Road (or in any property which replaces it under clause 4) if she meanwhile:
   (A) Keeps it in good condition[4]; and
   (B) Pays all the costs of occupation (including the

premiums for the insurance arranged by the trustees[5]).

Notes

1. I have tentatively preferred "from my other assets" to "from my residuary estate". I think that the legal effect would be the same, but would welcome comment. The testator might want to specify the fund from which these debts are to be paid if the residue is insufficient.
2. As life tenant, presumably she can allow someone else to live in it.
3. The original allowed the trustees to veto the widow's occupation. This seems an odd "standard" provision, since few testators would want the trustees to evict their widow (or do I have an idealised view of marriage?).
4. The testator might want major repairs paid from the trust fund.
5. The obligation on the trustees to insure would be elsewhere in the will.

Standard leases - lurking traps

A cautionary tale reprinted with kind permission from The (English) Law Society's *Gazette*

It is in there somewhere. It is a clause which, given its significance, is slipped in where you might least expect to find it.

It could be in any agreement but in this case, it is in the typical housing association lease — the lease which allows those on low incomes to step on to the property ladder by buying a share (invariably mortgage funded) in the equity of a property, with the right to buy further shares.

Well past the first 10 pages, is it clause 6 or 9? It is the mortgage protection clause, which, upon a mortgagee sale, gives the mortgagee first call on the net proceeds of sale towards satisfaction of the mortgage debt — a clause of 730 words including 27 words (in brackets, deadpan in tone, as if 'in passing'):

> ... if a mortgagee of the leaseholder (who shall have been approved and the terms of the mortgage to such mortgagee shall have been approved by the Landlord in writing prior to the mortgage) exercises the nght to acquire the freehold...

It is argued that without the protection of this approval provision, upon a mortgagee sale, the mortgagee must first account to the housing association out of the net proceeds of sale for that part of the equity still vested in the association before applying the balance to the mortgage debt.

Claims have been made by some mortgagees that they have not had the protection of the clause as their mortgages were not 'approved' and, having suffered loss are looking to their legal advisers to bear the whole loss or a share of it.

While there are a number of counter-arguments based on scope of duty, estoppel, causation, mitigation and whether de facto approval was given by the housing association, these claims could have been avoided. This clause is in a standard form lease.

Clauses of similar significance may exist in other standard documentation or in any one-off agreement. Do not just read every clause in the agreement. Read every word (including those in brackets) and appreciate their potential significance.

Provisions calling for specific action or for specific instructions to be sought may be lurking where you least expect to find them, perhaps 10 pages or more into the document in, say, Clause 6, 9 or is it 73?

Second person drafting

Vivienne Wilson of New Zealand Parliamentary Counsel's Office is researching the use of the second person in legislation. We hope this will eventually become an article for this journal? In case not, or meanwhile, several comments from members in reply to her enquiry may be of interest. Ms Wilson can be contacted at:

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Tel: 00 64 4 472 9639 (fax 499 1724)
pcrawnbt@wpof.parliament.govt.nz

I've experimented and think *you* works in some cases, but I have not been able to persuade any Canadian jurisdiction I have worked for to take the plunge.

David Elliott

When I did a rewrite of a UK tax schedule for the Special Committee of Tax Law Consultative Bodies, I used *you* all the way through because the schedule was meant to benefit individuals and *you* was definable (see http://www.open.gov.uk/inrev/rewrite.htm).

The Tax Law Rewrite team seems to have gone against second person drafting. But I think it should be another weapon in the armoury, to be used when necessary. I have said elsewhere that much of the criminal law could be written using *you* rather than all this *No person shall* and *Any person who* stuff, but I don't know enough about criminal law to know if this would work.

Martin Cutts

General readers have no difficulty with *you* and appreciate its use. It saves them translating third person forms such as *customer*, *taxpayer*; and in most language situations in which they are involved they are accustomed to being addressed directly.

Most opponents to its use are professionals, but not because they have any difficulty interpreting texts where *you* is used. Their reasons are more emotive. They go beyond conservatism to a misunderstanding of the function of language to enlighten and the rights of the audience to service. They have come to believe that to write well they have to appear erudite. This drives them to high flown language. Their opposition to *you* by and large is symptomatic of their unease with plain language. Sadly, our educated classes have come to correlate good style with convolution.

The most frequently heard protest from professionals against *you* in our Income Tax Assessment Act 1997 runs along the lines that when they are reading the Act *you* does not refer to them but to their clients. The inanity and inconsistency of this argument demonstrates that their opposition is not being driven by reason.

We contemplated using *you* in the Corporations Law. In the end we didn't because frequently we were dealing with more than 2 parties. To be switching from second to third person and back again within the one Part or Chapter could have been confusing. This is not to say that we would have had full support for *you* if the matter had come to a vote.

Robert Eagleson

Independently of this discussion, Nick Lear wrote, about "you" in private documents:

I have just received a copy of a mortgage offer from Barclays Bank plc. It reads:

> Dear Mr and Mrs [Smith] ("You")
>
> We are pleased to offer You (sic) the Loan shown below subject to the attached Standard and Special Condition.
>
> We will send the Loan to Your (sic) branch by "telegraphic transfer" and will take £20 from the Loan to cover the cost of this.

The words "You" and "Your" are only used that once each! No similar definition of the loan as ("Loan") is offered. A splendid example of plain English, wouldn't you say? Or plain gibberish.

Mark Adler comments:

I have no quarrel with the use of "we" and "you" where appropriate. They often make consumer documents more readable.

But in advising a guaranteeing wife recently I was confused first by the use of "you" to mean the lending institution and then by the use of "I" to mean variously the husband alone and the husband and wife jointly. Since we were using the lender's unamendable printed terms it was misleading to treat these as the customers' words. Moreover, in telling the client "what you have to do" I had to keep remembering that the "you" in the document was the other side.

It began with a definition of the parties:

1. THE BORROWER: (husband)
2. THE CHARGOR: (husband and wife)
3. THE ASSIGNOR: (husband)
4. THE LENDER: (insurance company)

and after other details came to the body of the document:

1. Under the terms of the Guarantee The X Life Insurance Society guaranteed to Lloyd's the payment of the Guarantee Amount which may be owed by me, the Borrower, to Lloyd's from time to time.
2. You have succeeded the X Life Insurance Society

as guarantor under the terms of the Guarantee.

3. The amount of any payment you make to Lloyd's under the terms of the Guarantee will be a loan fromyou to me, the Borrower.
4. I, the Chargor, charge the Property to you by way of legal mortgage with full title guarantee as security for the Total Loan.
5. I, the Assignor, assign the Policy to you with full title guarantee as security for the Total Loan.
6. We agree that the Schedule of Conditions forms part of this Deed.
7. I, the Chargor, apply to the Chief Land Registrar to enter on the Register the following Restriction:

   Except under an order of the Registrar no disposition by the registered proprietor of the Property shall be registered without the permission of the Lender.

This one-page agreement is signed at the foot, and there follows a several-page "Schedule of Conditions". These are plainly drafted, and represent a great improvement (in fairness as well as clarity) on the customary terms. I was particularly pleased to note the absence of the old standard clause allowing the lender to divert repayment money into a suspense account and to continue to charge interest on the whole of the fictionally unreduced debt.

But the defects in the text quoted are important:

- The misleading use of "I" and "you", and the ambiguity of "I" to mean different parties at different times, highlight the difference between plain language and simple language. Plain language is not "Jack and Jill" language, and to confuse the two is to support the apologists for legalese, who criticise us for sacrificing precision to simplicity.
- There is no need to run a two-tier system, with traditional language retained for formalities. So it is unnecessary to retain the unfamiliar expressions "chargor" and "assignor", or to lapse into the "shall be registered" style (which the Land Registry certainly does not require). It would have been more trouble, but clearer, to write, for example:

  4. Mr and Mrs Smith charge the Property to us (by way of legal mortgage with full title guarantee) as security for the Total Loan.
  5. Mr Smith assigns the Policy to us (with full title guarantee) as additional security for the Total Loan.

My own view is that "by way of legal mortgage" and "with full title guarantee" are needed for their statutory effect but are not worth translating. I have put them in parentheses to help the lay reader separate the technical detail from the main text. (Is the failure to explain them negligent? I have never found a client interested enough to listen.) Do members have other ideas?

Comment

Broadcast "thought" too often consists of fashionable phrases arbitrarily tacked together.

Last year Radio 4, which is supposed to be Britain's intelligent talking radio station, invited listeners to reprimand broadcasters for using clichés. They were flooded with replies, and dutifully mocked themselves on air each day for a week for their failings. But nothing changed, even briefly: the same mindless catchphrases were used unapologetically the following week, and have been every week since: "lessons were not learned".

"Down the road" and "down the track" are popular alternatives for "later" (as in "two years down the road"). Tracks also appear in other forms: "the successful candidate", we are told by a job advertisement, "will have a proven track record"; and quick methods are "fast track", even in the Woolf Report.

"Fast track" litigation, now being "put-in-place", is presumably "the way forward". Stirring this metaphor stew, the Lord Chancellor recently assured the nation that "the government intends to have the tracks up and running by April 1999".

* * * *

I found this on the web, under the link "legal stuff":

> "Southern Systems" makes no representations or warranties regarding the condition or functionality of this Web Page ("Page"), its suitability for use, or that this Web Page will be uninterrupted or error-free. "Southern Systems" further makes no representations about the suitability of any software or any content or information made accessible by this Web page, for any purpose.
>
> This Web Page is provided "as is" without express or implied warranty, including the implied warranty of merchantability and fitness for a particular purpose....

The throwaway heading signals to the reader that the "legal stuff" doesn't matter, and this is reinforced by the exclusionary style of the content. But if readers are discouraged from reading an exclusion clause the courts are less likely to enforce it.

Like the insurance document in the piece on *Second person drafting* opposite this is an example of pseudo-plain language, in which superficially facile expression does not convey its meaning.

MA

Drafting pleadings

These particulars were recently served in a county court small claim arbitration, in which informality is encouraged and lawyers discouraged. The style is particularly inappropriate now that the courts are anticipating the Woolf reforms, which will outlaw it. **Mark Adler** looks at how the particulars might have been better written.

Pleading

IN THE SOMEWHERE COUNTY COURT[1]

CASE NUMBER_____

B E T W E E N

ALISON ANONY
First plaintiff

and

BRIAN ANONY
Second plaintiff

-v-

CLAIRE BROWN-COOM (otherwise known as CLAIRE BROWN - nee COOM)[3]
First defendant

and

DONALD BROWN
Second defendant

PARTICULARS OF CLAIM

---

1. At all material times[4] the Plaintiffs[5] were and remain[6] co-habitees[7] and tenants in common[8] of a property known as and in situ at[9] Angus Cottage, Wolsey Road, Somewhere, Surrey, KT1 2AB.

   1.1[10] The First and/or[11] Second Defendants live at and own (subject to any mortgage and/or other security and[12] encumbrances) the neighbouring[13] property known as Henry Cottage, Wolsey Road, Somewhere, Surrey, KT1 2AB[14].

2. By an agreement entered into[15] in or about[16] November 1996, it was agreed that subject to local planning authority approval[17], the Plaintiffs and Defendants (the parties[18]) would simultaneously and in

Commentary

1. The emboldening, underlining, and capitalisation are intended to highlight the important parts, but fail. The underlined parts are not more important than the other parts of the heading; not all parts of the non-underlined bold text are equally important; and the emboldening of so large a block of text defeats its purpose. The heading is far too busy, and the line spacing in the original is erratic.
2. Jointly claiming (or jointly liable) parties should not be split into "first" and "second" plaintiff or defendant.
3. Mrs Brown-Coom *never* calls herself Claire Brown - nee (or née) Coom). And as can be seen from the pleading, her maiden name was irrelevant.
4. I doubt this traditional catch-phrase is necessary, and it will be interesting to see if it survives the reforms.
5. "Plaintiffs" and "defendants" are common nouns, and do not deserve a capital.
6. If we have established the position "at all material times" any other time must be irrelevant.
7. This was a breach of contract case between neighbours. Who cares about the plaintiffs' love-nest arrangements?
8. Or financial arrangements?
9. "Of Angus Cottage" would have done. Apart from being absurdly pompous the drafting is inaccurate: the property wasn't *in situ at* Angus Cottage; it was *called* Angus Cottage.
10. As paragraphs 1 and 1.1 are parallel they should be equivalently numbered and indented. The usual custom would have them 1 and 2, but 1(A) and (B) is better, to show them two parts of a single topic.
11. What does the stroke itself mean, if not "one or both"? So the expression becomes "and and/or or", and so on to infinity. "And/or" has been repeatedly condemned by bench and academics but continuesin use. In this case the plaintiffs were in no doubt that both defendants lived at that house, so they presumably meant (though they do not say) "the defendants live at and one or both of them own ...". Had this not been irrelevant the claim could have been struck out, since an allegation against "A or B or both of them" does not justify a claim against either.
12. "A and/or B and C" is particularly dangerous; mathematical members are invited to count the alternative possible meanings. But as all this detail was entirely irrelevant the plaintiffs' solicitors avoided a claim for negligence.
13. The dispute arose because the plaintiffs and defendants were in the two semi-detached parts of a pair of cottages. Amidst all the irrelevance, that one useful piece of information is omitted.
14. The address is useful only as background information, and need not have been repeated in all its detail. Is the postcode a material fact?

keeping[19] convert their properties from two[20] bedroomed,[21] to three bedroomed cottages with additional and matching dormer windows.

3. In part performance[22] of their respective obligations the parties submitted a joint application[23] for planning consent to the Somewhere District Council (the local authority[24]) on 8 December 1996, at a cost of £90.00,[25] plus[26] a building regulations fee of £70.50 each.

4. The requisite[27] consent was granted by the local authority on 7 February 1997 subject to *the dormer windows to Angus Cottage and Henry Cottage...* being *implemented as a joint scheme and neither element of this scheme shall be implemented independent of the other* ...in order to ... *safeguard the appearance of the premises and character of the area generally*[28].

5. As a consequence of the planning consent[29], the parties obtained and agreed a fee for the works with a builder on or about 29 May 1997 at a cost of £4,296.97 each[30]. It was agreed between the parties and the builder that the works would commence[31] on 1 September 1997

6. On or about 22 August 1997, the Defendants purportedly[32] withdrew[33] from the agreement. Despite freely entering into the agreement and being bound by it[34], they categorically[35] refused to perform[36], as a consequence of[37] which[38], the Plaintiffs have suffered loss and damage[39].

7. In an attempt to mitigate their subsequent loss[40], on 1 September 1997 the Plaintiff's[41] submitted an appeal/request[42] to[43] the local authority for permission to convert their property independently of the Defendants. The appeal/request was granted on 27 October 1997.

8. As a result of the Defendants[44] failure and/or refusal[45] to perform their obligations in accordance with[46] the agreement, the Plaintiffs have suffered loss and damage[47].

PARTICULARS

....

15. By whom? It cannot reliably be assumed that the defendants were party to it, since someone else (or one of them) might have agreed on their behalf without authority. This unnecessary "blind passive" could have founded an application to strike out the claim. And as all material facts must be pleaded (RSC 18/7/5) we should be told more about the agreement. Was it oral or in writing? What was arranged about agreeing a builder, or the time at which the work was to be done? What was to happen if one couple needed to sell their house before it could be improved? All these important matters (including the intention to create legal relations) were in issue, and a more disciplined approach to drafting would have alerted the plaintiffs' solicitor to several weaknesses in their case before they negligently incurred the cost of taking the dispute to the door of the court.
16. Only lawyers say "in or about"; in normal speech "about" includes "in". The full expression is often included out of habit when there is no doubt about the date.
17. The drafter has forgotten the first of what should have been a pair of parenthetical commas (before "subject to").
18. To the contract or this litigation? Either way, the definition is pointless.
19. With each other (in which case "matching" is otiose), the rest of the building, or the neighbourhood?
20. The necessary hyphen has been omitted.
21. This comma makes nonsense of the phrasing.
22. The doctrine of part performance was abolished in 1989 (and before then had no place here).
23. "Submitted a joint application" = "applied jointly".
24. Why intrude into the flow of the sentence with so futile a subordinate clause?
25. A comma has no place between two parts of a sum.
26. "Plus" for "and" is an abomination from the tabloid press and has no place in a professionally drafted document. In any case the last part of the sentence does not fit what comes before: the building regulation fee was not part of the cost of the planning application; the parties "applied for planning permission at a cost of £90 and *paid* a building regulation fee of £70".
27. We know that planning permission was needed, and the fancy "requisite" was gratuitous.
28. This explains - though inadequately - the unusual circumstances. The plaintiffs' own application for planning permission had been refused, the council wanting the two halves of the building to be kept the same. So the plaintiffs persuaded the defendants to join in the scheme. When the defendants had to sell before the work could be done the plaintiffs sued.
29. This pompous introductory phrase repeats what we already know.
30. This is gibberish. The parties did not "obtain... a fee ... with a builder ... at a cost of £4,296..". And the essential details of the defendants' commitment to the builder are omitted. In fact, the plaintiffs' evidence supported the defendants' denial that they had contracted with the builder, and again a proper concern for the pleading would have alerted the plaintiffs' solicitor to a fatal weakness in his case.
31. "Commence" = "start" or "begin".
32. There was nothing "purported"; they *did* withdraw. It was their *right* to do so which the plaintiffs challenge.
33. Are the plaintiffs alleging that the defendants rescinded or repudiated the agreement? Again, essential detail is omitted.
34. Theplaintiffs have already pleaded the agreement; this sentence is mere petulance, out of place in any professional writing but especially in a formal document.
35. "Categorically" is otiose.
36. "It" is missing.
37. This is the second "as a consequence of" in a few lines.

9. The Plaintiffs are entitled to[48], and hereby[49] claim[50] interest pursuant to[51] Section[52] 69 of the County Court[53] Act 1984 on the amounts deemed[54] due, at such[55] rates and for such period as the Court think[56] fit.

AND THE PLAINTIFFS CLAIM:-[57]

1. £1,029.98.
2. Interest on sums claimed[58] pursuant to the relevant[59] statute on any sum found due at such rate and for such period as the Court shall[60] think fit.

NOTE

The Plaintiffs limit their claim herein[61] to the sum claimed[62], plus interest[63], and in any event to the arbitration limit[64].

Dated this 5 day of November 1997[65]

[Formal parts followed]

For a suggested rewrite, see next page

38. This is another misplaced comma.
39. "Loss" adds nothing to "damage".
40. Is this loss subsequent to the loss pleaded in the last paragraph? Or does the pleader intend "subsequent" as a synonym for "consequent" (which it isn't)? If so, the repetition is unnecessary.
41. The apostrophe mistakenly converts an intended plural into a singular possessive.
42. The pleader seems to admit that he does not know whether the submission was an appeal. Of course it could not have been, as an appeal must go to the secretary of state, not to the council.
43. "Submitted a request to" = "asked".
44. This time an apostrophe *is* needed.
45. If it matters whether the defendants failed or refused, "and/or" is unacceptably vague. If it doesn't matter, why plead both? (In paragraph 6 the refusal was "categorical".)
46. "Obligations in accordance with" should be "obligations under".
47. Paragraph 8 repeats paragraph 6 for no apparent reason but with presumably unintentional differences.
48. If they were entitled it would be a matter of law, and so not to be pleaded. In fact they aren't entitled: under s.69 interest on damages for breach of contract is discretionary.
49. "Hereby" is otiose.
50. An essential comma (to close the parenthesis) is missing.
51. "Pursuant to" = "under".
52. "Section" does not warrant a capital.
53. It is the County Courts Act.
54. Interest will be awarded on the amount actually, not deemed, due; the abstraction is unnecessary.
55. The use — particularly the overuse — of "such" for "the", "that", or "those" is stilted.
56. Another "s" has been overlooked.
57. The colon alone is adequate.
58. It is unnecessary to claim interest twice. But if the claim is repeated the two versions should be consistent. Here the basis of calculation has switched from"the amounts deemed due" to "any sum found due".
59. If they mean the 1984 Act they should say so.Not all readers would know whether there was another "relevant statute".
60. The archaic "shall" is usually justified as being unambiguously mandatory. Here it is clearly not mandatory but indicating the future tense. That it is inappropriate can be seen by comparing this phrase with its present-tense predecessor in paragraph 9.
61. Another superfluous archaism. What other claim would they be limiting?
62. This is circular, so means nothing.
63. How can they claim only what they claim plus something else? In any case, they have already included interest in their claim.
64. Does this mean that they limit it to whichever sum is higher or to whichever is lower?
65. "Dated this" and "day of" are otiose. But if "day" is included "5" must be "5th".

In Somewhere County Court Case number_____

B e t w e e n:

(1) **Alison Anony**
and
(2) **Brian Anony** Plaintiffs

and

(1) **Claire Brown** (also known as Claire Brown-Coom)
and
(2) **Donald Brown** Defendants

Particulars of claim

1. (A) Angus Cottage and Henry Cottage are the two semi-detached parts of a building in Wolsey Road, Somewhere.

   (B) The plaintiffs are owner-occupiers of Angus Cottage and the defendants are owner-occupiers of Henry Cottage.

2. In November 1996 the parties agreed that if they could get planning permission they would each convert their property from two- to three-bedroomed cottages, with matching dormer windows, according to plans which they jointly submitted to Somewhere District Council.

3. Planning permission was granted on 7 February 1997. As anticipated it was conditional on the two cottages being converted together.

4. On (when?) the plaintiffs and (separately?) the defendants contracted with A. Builder & Son Ltd that he would do the work for £4,296.97 for each cottage. Work was to start on 1 September 1997 and be completed within (how long?).

5. On 22 August 1997 the defendants repudiated the agreement by saying (without justification) that they did not intend to convert their cottage.

6. As a result of this breach the plaintiffs could not lawfully convert their cottage and have accordingly suffered loss.

7. The plaintiffs have reduced their loss by persuading the council to permit their conversion without matching work to the defendants' cottage, but meanwhile the work was delayed (for how long?).

Particulars of paragraphs 6 and 7 ...

And the plaintiffs claim:

1. £1,029.98.
2. Interest at the rate of 8% a year under section 69 of the County Courts Act 1984 from ... to ... (at a daily rate of 22p).

5 November 1997

Plain Language Commission Awards 1997

The City of Edinburgh Council won the Golden Rhubarb Trophy for this letter from "the head of waste management direct services" to a local resident:

> **Cessation of can recycling**: Whilst expenditure reductions have been essential in recent years, and, indeed, have affected a whole range of services, the Council is still fully committed to waste minimisation and the recycling of waste and has within the last few weeks approved, in principle, a revised strategy encompassing the introduction of material recycling facilities post-refuse collection and pre-final disposal.
>
> Bank systems and house-to-house collections have, for the most part, proved to be both inflexible and expensive and certainly unlikely to permit achievement of the 25% waste recycling target being pursued by the Council. This approach will facilitate the best utilisation of current and future options.
>
> I hope you will find this information informative . . .

Martin Cutts, research director of the Commission, says: 'This kind of writing almost defies translation, but it could mean:

> **Closure of can banks**: Despite essential cuts in spending, we remain committed to reducing waste to the minimum and recycling it. We have therefore made new plans which should lead to more household waste being recycled at lower cost. The plans should also help us meet our target: to recycle 25% of household waste.'

Scottish Amicable Investment Managers Ltd of Glasgow won the Silver Rhubarb Trophy with this 164-word sentence in a special resolution at an annual general meeting:

> That in substitution for any existing power under section 95 of the Companies Act 1985 (as amended and from time to time in force) ('the Act'), but without prejudice to the exercise of any such power prior to the date hereof, the Directors be and are hereby empowered pursuant to section 95 of the Act, to allot equity securities (as defined in section 94(2) of the Act) for cash pursuant to the authority contained in the Special Resolution dated 3rd April 1995 given in accordance with section 80 of the Act as if section 89(1) of the Act did not apply to any such allotment even if shares are allotted for cash at a price below the relevant net asset value per share provided that this power shall expire on 20th September 1998, save that the Company may before such expiry make an offer or agreement which would or might require equity securities to be allotted in pursuance of such offer or agreement as if the power conferred hereby had not expired.

The Bronze Rhubarb Trophy went to Northern Electric plc of Newcastle upon Tyne for the 'incredibly small print' of its conditions of supply for domestic energy. Mr Cutts said: 'The customer is specifically asked to "agree to be bound by the terms and conditions of supply", yet without a magnifying glass nobody can read them. This goes against the spirit, if not the letter, of the Unfair Contract Terms Directive which requires consumer contracts to be "plain and intelligible".'

NatWest Bank won a special prize for a brief letter of apology with three misspellings – 'writeing', 'inconveniance' and 'unfortunetly'. It also said, 'Today, (10th May) we will be debiting your account for the sum of £843.00'; but it is actually dated 10 July.

The Commission also awarded commendations for four outstandingly good documents:

- To Halifax plc for its 'Everyday Banking' pack, which clearly explained the ins and outs of their banking services.
- To the Health Education Authority and the Health Promotion Agency (Northern Ireland) for their booklet 'Getting active, feeling fit', which combined lucid text with imaginative use of graphics.
- To Virgin Direct Personal Financial Services Ltd for its personal pension information pack, which set out the pros and cons of pensions in a lively and interesting way.
- To Norwich Union plc for its flotation booklet 'Shares at a discount', which clearly sets out the options open to members.

Training

The Public Law Center (TPLC) of Tulane and Loyola Law Schools writes:

We took our training in legislative drafting "on the road" to South Africa last summer. The Center's Executive Director David Marcello and Assistant Director Idella Wilson conducted a four-day *Workshop on legislative drafting* in Johannesburg for legislators and drafting personnel from various provincial parliaments, the Ministry of Justice, and law schools. Approximately 35 registrants participated in the August 11-14 training, which was sponsored by the United States Information Service.

The training consisted of lectures, roundtable discussions, computer demonstrations, and drafting exercises on the following subjects:

- Plain language drafting.
- Technical aspects of drafting.
- Ethics and politics of legislative drafting.
- Mutual expectations of drafters and legislators.
- Research methodologies.
- Administrative procedure Act rulemaking.
- Enhancing public participation.

We are currently discussing a possible return engagement for additional training in South Africa and elsewhere in the region.

TPLC has operated since 1988 as a joint venture between the Loyola and Tulane Law Schools. It provides a unique advocacy service to traditionally under-represented clients — typically children, the elderly, indigents, and the disabled — by using law students to draft legislative and administrative initiatives, and than presenting the initiatives before legislative and administrative bodies.

After repeated requests to train drafters from around the world, TPLC established the International Legislative Drafting Institute, a two-week drafting conference annually held in New Orleans since 1995. TPLC has also hosted individual drafters for training programs ranging in duration from one day to several months, and recently has gone on the road to conduct legislative workshops.

For further information contact TPLC at the address in the next column.

TPLC's Fourth Annual International Legislative Drafting Institute will be held June 15-26, 1998 in New Orleans.

The Institute is an excellent intermediate-length training experience in both the legislative and administrative drafting processes and will be of interest to anyone who drafts legislation or regulations.

The Institute fosters a valuable exchange of experience among Parliaments and legislative drafting personnel of all countries.

Lecture topics during the two-week Institute include the ethics of drafting, confidentiality, matters of style (plain language, gender-neutral language, grammar, and punctuation), public participation by interest groups, agency rulemaking, constitutional revision, international trade agreements, and codification agencies. Participants "learn by doing" through drafting exercises, research assignments and preparation of a formulary for use in their own drafting offices.

Afternoon roundtable discussions enable participants to share ideas and information with each other learning "how we did it" in responding to numerous common problems of interest to drafters.

If you are interested in attending the 1998 Institute or would like more information please contact Mr. David Marcello at The Public Law Center. Details are at the foot of the previous column. If you have access to the Internet please visit our homepage at:

http://www.law.tulane.edu/ildi/internet.htm

Or we can be reached at:

6329 Freret Street, Suite 351
New Orleans
Louisiana 70118, USA

Phone: 1 504 862 8850 Fax: 1 504 862 8851

Email: tplc@I=law.tulane.edu

Nick Lear found this old solicitor's letter, as admirably plain in its language as it was unhelpful and insensitive:

Dear Sir,

Your wife came in to see us about your marriage whilst she was passing through Brighton.

She feels that you no longer get on and she wishes to separate from you. She has asked us to write to you to tell you this.

Yours faithfully,

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.

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 changes; or
- reject it with a note of the reasons.

If the document is approved, or approved subject to changes 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.

Please contact:

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

CLARITY SEMINARS

on writing plain legal English

England

Mark Adler has now given some 50 seminars for CLARITY to a selection of firms of solicitors, to law societies, legal interpreters, and to the legal departments of government departments, local authorities, and other statutory bodies. Participants have ranged from students to senior partners.

The seminar has slowly evolved since we began early in 1991, with a major relaunch in 1995. But it remains a blend of lecture, drafting practice, and discussion. The handouts outline the lecture, with exercises and model answers.

The seminars are held on your premises, and you may include as many delegates as you wish, including guests from outside your organisation. The normal size ranges between 12 and 25 delegates.

The half-day version lasts 3hrs 10mins (excluding a 20-minute break) and costs £450 net.
The full-day version lasts 5hrs 10mins (excluding breaks) and costs £650 net.

Expenses and VAT are added to each fee and an extra charge is negotiated for long-distance travelling.

There is a 25% uplift under the CPD scheme.

Contact Mark Adler at the address on the inside back page

Canada

Plain Language Partners Ltd delivers the Clarity workshop in Canada.

The workshops are offered in-house. A half-day (3 1/2 hours) seminar is $1000 and a full day (6 hours) $1,500, both with up to 15 participants. Larger groups can be accommodated through team-teaching by arrangement. The longer session allows for more hands-on practice in clear drafting.

Primary instructor is Cheryl Stephens; for larger groups she is joined by Janet Dean. Cheryl is a lawyer who has been a legal communications consultant and instructor for 8 years. Janet is an adult educator and trainer who specializes in business and technical communications.

Plain Language Partners Ltd.
PO Box 48235 Bentall Centre
Vancouver, B.C.
Canada, V7X 1A1
1-604-739-0443

News from around the world

Australia

At least 15 19th century litigation forms are being replaced with plain equivalents. Chief Judge Donald Brebner of the District Court and Chief Justice John Doyle carried out the review through extensive consultation with judges and other groups.

"They (the old forms) do have a certain charm but we have to move with the times," Chief Justice Doyle said.

From AAP Newsfeed, Nov 97.

A plain English construction industry contract released by the Royal Australian Institute of Architects (RAIA) aims to improve the relationship between parties involved in the building process. The contract, to be known as the Construction Industry Contract (CIC 1), met a widely recognised need, former chief justice Sir Laurence Street said at the launch.

The new contract is intended to strike a fair balance between the parties, in contrast to many of the 50-plus existing standard-form building contracts.

From AAP Newsfeed, Oct 97

Among construction industry reforms announced by the Queensland government are new, plain-English contracts stipulating that all subcontractors had to be paid within 35 days or they have the right to suspend work.

From AAP Newsfeed, Nov 97

Britain

Geoffrey Sellers, the parliamentary counsel responsible for the Arbitration Act 1996 and now heading the tax law rewrite drafting team, has been diverted to work on the Finance Bill. He plans to use the rewrite techniques in the Finance Bill work as far as possible.

* * * *

All those who commented on the quality of the rewritten legislation in the Inland Revenue's first exposure draft approved it.

* * * *

Personal Investment Authority ombudsman (and CLARITY member) Tony Holland has warned financial advisors that they must ensure that clients understand their investments.

"Caveat emptor has no more relevance in a financial services industry than it does in the airline industry." Holland, who took over as ombudsman last May after 35 years as a solicitor, says he will take a tough stance on information clarity from insurers and is calling for a drive to use plain English...

He said: "I find it really objectionable when the insurer tries to cavil about a particular clause which is capable of more than one expression while at the same time it demands of the insured that everything conceivable is disclosed to it in order to underwrite the nature of the risk."

From *The Mirror,* 14.10.97

British Gas shareholders have been asked to approve a scheme which will give them back 30p a share tax-free. The explanatory letter says (among other things):

> Any fraction of a New Ordinary Share that arises after your Existing Ordinary Shares have been consolidated on the 15: 17 ratio will be sold free of all dealing expenses and commissions and you will be sent a cheque for the proceeds.

A stockbroker was quoted as commenting:

> It is absolutely typical of the way merchant bankers try to describe things to small investors. They could have sent out a simple accompanying expananation. We need people to have a greater financial understanding if they are not to be ripped off. This does not help at all. When British Gas sent out its first dividend statement to shareholders, it was so unclear that 10,000 thought it was a bill and sent a cheque. It is just not good enough.

From *The Independent,* 22.10.97

United States

A federal senator has introduced legislation to require any settlement notice in class litigation to be written in plain English so the clients can make informed decisions.

From *Journal of Commerce,* 29.10.97

Although Continental Casualty Co. has just lost a federal lawsuit, it says it has no plans to change the wording on its insurance policy which left the meaning of "accident" vague enough for a court to decide it included contracting a disease.

The United States District Court for the Southern District of New York last month upheld an earlier jury verdict against CNA for $1.07 million that found the undefined policy term "accident" in a business travel insurance policy ambiguous.

Judge Harold Baer, however, hoped that awarding attorneys' fees against CAN would be an incentive to insurance companies to draft policies in plain English

* * * * *

The Office of Thrift Supervision has rewritten its regulations on deposits at savings associations. Director Nicolas Retsinas said:

> Adoption of the revised deposit rule continues our concerted effort over the past two years to simplify and streamline OTS regulations, making them easier to use and reducing regulatory burden.

The final regulation contains only minor changes from the version proposed April 2, 1997 and the rule has been rewritten "in a plain English format". It became effective Jan. 1, 1998.

From *US Newswire,* 20.11.97

The Health Care Consumer Bill of Rights and Responsibilities, supported by President Clinton, gives people the right to be informed about their health plan in plain English.

From *Texas Lawyer,* 10.11.97

In an article about Clay G. Small, Senior Vice President and General Consel of Frito-Lay Inc., it is reported that he supports plain language. He is quoted as saying that the key to success is

> the ability to distill legal issues to an explainable format and to bring closure on those issues with my clients....

and that the best piece of advice for young attorneys is

> Learn to write in plain English -- 'heretofores' are absolutely unacceptable in this day and age.

From *Wisconsin State Journal,* 2.11.97

Pending legislation would require State Attorneys-General to be notified of proposed settlements in class action suits. Concern has arisen because of some highly-publicised cases in which lawyers' fees consumed the entire settlement amount. The

> legislation also would require that those involved in the suit be notified in plain English of the proposed settlement, including the source of attorneys' fees.

* * * *

In 1980 Roderick H. Frey was convicted of first-degree murder for hiring two men to kill his estranged wife, Barbara Jean, from whom he borrowed the $5,000 he paid for the service.

The judge instructed the jury:

> The verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance, and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances.

The U.S. Supreme Court later ruled that jurors must be unanimous in recognizing aggravating factors, but need not agree on finding mitigating circumstances. And in December a federal circuit court held that the jurors might have misunderstood the instructions, believing that they needed to agree unanimously on the existence of mitigating factors.

> Since only seven words separate the "unanimously finds" and "mitigating circumstances" in Judge Butcher's charge, the clause is to the ear and mind, one sound bite....
>
> It is quite possible that a juror would...believe that mitigating circumstances had to be found unanimously.

But the state disagrees. Pointing to the single word "no" in the phrase "no mitigating circumstance," they suggest that, if anything, the judge set a tougher standard than necessary:

> The judge's instruction did not tell the jury they must be unanimous to give credit to any mitigating circumstance. Indeed, it says just the exact opposite: that the jury must be unanimous as to a finding of mitigating circumstances in order to impose a death sentence.... The words of the charge are clear and reasonably simple; the phrase in question is relatively short; its syntax is not complex.

Editor's note

When I first read the report, I thought the prosecution was clearly wrong. On reflection I think that as a matter of strict grammatical logic they are right, but with the lawyers disagreeing there must be a serious risk that the jury was confused, especially if they heard the instruction only once in passing. Is the problem the difficulty of disentangling a mixture of positive and negative, akin to interpreting a multiple negative?

Some of the original jurors have been interviewed, and share a robust disinterest in the finer points of argument which I find disturbing:

> All the debate over the clarity of the judge's words is misplaced. Taking his wife's money to have her killed, there's nothing unclear about that.

The state's appeal was due to be heard in January but I have not been able to find any further reference to the case. I hesitate to sound flippant in so serious a matter, but a comment on the clarity of the web seems in order: searching "roderick h. frey" + "supreme court" I was offered 87,000 matches, the first (and so supposedly the best) of which was "Mongolian Financial Reform Seminar".

Committee news

We are sorry to announce that **Richard Castle** has stepped down from the committee, though he will continue to administer our vetting scheme. After nearly 5 years he is almost the longest-standing committee member, and he feels (though we do not) that it is time to move on.

He has been teaching plain legal drafting for many years, and was a founder member of CLARITY. He spent 4 years in the legal civil service after his call to the bar in 1965 and then qualified as a solicitor in 1971. He has specialised in property law ever since, both in private practice and during stints of teaching in the Department of Land Economy at Cambridge University. He has written a handbook on conveyancing and is the editor of *Barnsley's Land Options.* He was one of the authors of the Law Society's Standard Conditions of Sale, which since 1990 have imposed admirably plain English on a reluctant profession, and of the *Rosscastle Letting Conditions*, which anticipated the Law Society's plain commercial leases.

On 15th February he is leaving for a 3-month trip to New Zealand, where he will be preparing the 3rd edition of *Barnsley's Land Options.* He can be reached at:

9 Park Street
Thorndon
Wellington
00 64 4 499 4511 (fax 499 4548)

While he is there please address enquiries about the vetting scheme to our Dorking address.

* * * * *

In 1983 a surveyor wrote in The Law Society's *Gazette* complaining of the unnecessary opacity of the leases his profession had to interpret. **John Walton**, a solicitor in local government, replied with a letter inviting those interested in forming a legal plain language group to write to him with a £5 subscription. He was flooded with replies, and CLARITY born.

Our first annual meeting was held in 1984 at Rugby Town Hall, and a committee was formed with John in the chair and volunteers Richard Thomas, Katharine Mellor, Ken Bulgin, and Mark Adler. The committee met in John's office in Rugby about five times a year but John did all the work: organising events, recruiting, keeping the books, and preparing and distributing the newsletter which devoloped into this journal.

It was very informal. There was no constitution, but no-one missed it. Meetings were a seamless mixture of social chat and the discussion of CLARITY business from which a consensus would emerge.

But in 1987 John moved to Nuneaton & Bedworth District Council as chief executive. He felt that he could not fairly impose his commitments to CLARITY on his new employers and in any case would no longer be doing legal work. He stepped down from the committee at that year's annual meeting (at which the American plain language author Richard Wydick, the guest speaker, joined as our 400th member). His various jobs were divided among the rest of the committee: Ken Bulgin took over the chair; Justin Nelson (who had replaced Richard Thomas in 1985) became treasurer; Mark Adler became membership secretary and took over the newsletter; and Katharine Mellor hosted the committee meetings at her firm's London office.

Since then many members have served on the committee and there have been several changes of chairman. Meanwhile, the idea that lawyers should write plainly has developed from the minority view of a few eccentrics into the accepted opinion of governments and professional bodies. CLARITY has grown steadily but has changed little since its days in Rugby.

Some years ago John was appointed life president as a token of appreciation for his past work, but this was an honorary appointment. However, at the 1997 annual meeting it was reported that he had retired (though we have since discovered that he is now deputy chief executive of Homeless International). Someone suggested, and everyone agreed, that he be asked to come back on the committee, and we are delighted that he has agreed.

* * * * *

Ken Bulgin joined CLARITY's committee when it was formed in 1984, and took over the chair when John Walton vacated it in 1987. Unfortunately, his heavy work commitments forced him to stand down from the committee in 1989, though he was still often to be seen at the annual meetings.

He has now retired, and we are delighted to welcome him too back to the committee.

Apart from a couple of recent years with City solicitors, Ken spent his whole career, from 1958 until 1997, in the life insurance and pensions industry. He was called to the bar in 1980.

News about members

Jan Bowen, a plain language consultant from New South Wales, will be in Europe in May.

John Cooke has now semi-retired from practice as a solicitor.

William C. Bertrand has been appointed litigation counsel with Pharmacia & Upjohn in Kalamazoo, Michigan.

The Lord Chancellor's Department has asked the Institute of Advanced Legal Studies to research the amount of work likely to be needed for various types of "fast track" cases under the Woolf regime. This is a prelude to fixing suitable fees. The work is to be done by **Tamara Gorieli** and non-member Professor Avrom Sherr.

Lord Hoffmann has been appointed a judge of Hong Kong's Final Court of Appeal but will also continue to sit as a law lord in the UK.

Gareth Jenkins has moved from Dorset to join solicitors Brindley Twist Tafft & James in Coventry.

Phil Knight is drafting constitutions and legislation for aboriginal communities which are negotiating self-government treaties with Canada. He is also teaching legal drafting at the University of British Columbia (in the job vacated by Peg James when she moved across the Rockies).

Nick Lear, who recently retired from Debenham & Co, has been appointed consultant to Wynne Baxter Godfree in Lewes (and elsewhere).

Robert Lowe is now co-editing *Busy Solicitors Digest* with District Judge Stephen Gerlis. His first editorial (in the December issue) called for the spread of plain language. He has now retired from practice as a partner in McCombie Gordon & Lowe but remains active with Lowe & Gordon seminars.

Marilynne Morgan, until September the solicitor and legal adviser to the Department of the Environment and the Regions in London, has moved to a similar post at the Departments of Health and Social Security (which share a legal department).

Timothy Norman, a commercial property solicitor, has moved from Donne Mileham & Haddock in Brighton to Berwin Leighton in London.

Colin Read has been admitted as a solicitor, and remains with Clifford Chance.

Sir Christopher Staughton, our patron, retired from the Court of Appeal in December.

Christopher Tite, who specialises in business law, has left Stephenson Harwood and with Mark Lewis formed Lewis & Tite, employing 46 lawyers in a new firm which requires its documents to be drafted in plain language.

Robert Venables has retired from his post as charity commissioner and is now a consultant with Bircham & Co, Westminster.

Barbara Child *writes:*

I am so happy that I've managed to remain on the CLARITY mailing list.

I greatly enjoy reading news of my old legal drafting friends as well as catching up on what is going on these days in the world of plain language, so I hope you will continue to send it to me.

I moved from California to Florida in August and am now the minister of the Unitarian Universalist Church of Tampa. My home address is 8511 Fisherman's Point Drive, Temple Terrace, FL 33637. (Can you imagine me having such a politically incorrect address? I cringe every time I write it — but playing fast and loose with the U.S. postal service doesn't get very far.) ...

I have jungle rivers and woods close by....

It is clear that ministry agrees with me. I'm constantly writing -- sermons, newsletter articles, Board reports, you name it. And this year I have become the chair of the Commission on Social Witness, the body that drafts position statements for the Unitarian Universalist Association on social justice concerns. So you see, I bring forward my old life into my new one.

Of course you may share news of me in C*larity*. Maybe, with the ease of e-mail, I'll hear from somebody else too.

Well, again, best wishes to you and to all lovers of plain language.

RevBChild@aol.com

Clarity is the journal of the group CLARITY and is distributed free to members. This issue was edited by Mark Adler at:

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Email: adler@adler.demon.co.uk

Other news

Rapport, the plain language newsletter edited by Cheryl Stephens, has discontinued hard copy distribution except by special arrangement for subscribers not on the internet. Those wishing to receive it but not able to read it at

http://rapport.bc.ca

should contact Ms Stephens at

PO Box 48235, Bentall Centre, Vancouver,
British Columbia V7X 1A1, Canada
1 604 739 0443 (Fax 739 0522)
raporter@web.net

Cheryl Stephens writes:

Car leasing should now be easier to understand. New rules by the Federal Reserve and the Federal Trade Commission force car dealers and leasing agencies to spell out lease terms in plain English from January 1.

David Colenso (who heads the Brisbane Plain English Unit of national law firm, Deacons Graham & James) writes:

There have been some interesting plain language developments in north Australia.

DG&J was engaged by the Real Estate Institute of Queensland to completely overhaul the outdated standard industry land contracts used for conveyancing in that State.

The old contracts had been drafted by a committee of lawyers and probably committed every plain language drafting sin in one document. Now even non-lawyers can understand the new, clear versions.

In order to promote greater awareness of the benefits of plain English writing and raise its profile as an integral tool for lawyers, Deacons Graham & James has sponsored the Plain Language Cup, a competition which will judge and reward clear writing aimed at lawyers and law students. In conjunction with the Queensland Law Society, this will be an annual competition with the winners announced in August.

For further details contact:

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Everywhere else: Mark Adler (details at foot of page 46)

Or anywhere: http://www.adler.demon.co.uk/clarity.htm

The next full issue of *Clarity* is planned for September and will be guest-edited by Professor Joseph Kimble, whose details are in the box above. A newsletter will be published in July.

Welcome to new members

[contact names in square brackets]

Australia

Phillips Fox [Althea Ward]**,** solicitors, Melbourne, Victoria
Alf Macolino, solicitor, Scales & Partners, Adelaide, SA
Susan McKerihan, linguist, Paddington, NSW
Ian Ritchard, Registrar of Supreme Ct, Hobart, Tasmania

Canada

Susan Barylo, In Other Words, Edmonton, Alberta
Anna Fried, lawyer, Boutiliers Point, Nova Scotia
Vicki Schmolka, lawyer, Kingston, Ontario
Linda Tarras, legislative counsel, Ottawa, Ontario

England

Rebecca Bishop, law student, Preston, Lancashire
Ed Cooke, law student, Sutton Coldfield, West Midlands
William Geldart, barrister, Temple, London EC4
David Gray & Co [Mary Shaw], solrs, Newcastle on Tyne
Paul Infield, barrister, Temple, London EC4
Simon Morgans, contracts solicitor, Legal Aid Bd, WC1
Daniel Rosenberg, solicitor, Berwin Leighton, London EC4
Rushmi Sethi, law student, Northampton
Jeffrey Shaw, solicitor, Taylor & Emmet, Sheffiend
Richard Woodhouse, barrister and senior planning inspector, Reigate, Surrey

Hong Kong

Deputy judge **G.J. Lugar-Mawson**, High Court
Jack Welch, attorney, University of Texas Law School

India

V Robert Bellarmine, Madras
Professor Bibek Debroy, Project LARGE, New Delhi
R. Desikan, Plain Language Commission India, Madras
Justice R.S. Dhavan, Allahabad
R. Sudarshan, senior economist and assistant resident representative, UNDP, New Delhi

Singapore

Brady Coleman, lawyer and linguist, Nat'l Univ of S'pore
National University of Singapore Law Library [Mrs Thavamani Prem Kumar]

South Africa

Amanda Armstrong, attorney, Cheadle Thompson & Haxsom, Johannesburg
R. Gentle, Shorter Business Writing, Johannesburg

USA

Conrad C.M. Arensberg, counsel for the General Assembly of the Commonwealth of Pennsylvania, Harrisburg
Robert Baldori, Baldori & Associate, Okemos, Michigan
Stephen Barber, attorney, US Coastguard, Alexandria, VA
Leonard Berger, attorney, McKees Rocks, Pennsylvania
Bureau of Legislative Research (for Arkansas General Assembly) [Larry Holifield], Little Rock, Arkansas
Reva Daniel, Dynamic Business Writing, Clinton, MS
Duqesne University Center for Legal Information Law Library Pittsburgh, Pennsylvania
Jamie Elacqua, attorney, New York State Legislative Bill Drafting Commission, Albany, New York
Anthony Fatemi, attorney, Columbia, Maryland
Paul Fitzpatrick, attorney, Birmingham, Michigan
Tom Kleimann, Kleimann Commun'n Group, Rockville, MD
Legislative Ref Bureau of Ilinoi s [Shirley Hatchett], Springfield, Illinois
Dr William Lutz, attorney, Professor of English, William Rutgers University, Camden, New Jersey
Deputy **Paul Marinac**, Office of Revisor of Statutes, St Paul, Minnesota
Felix Martin, attorney, Martin, Batista & Lopez, Coral Gables, Florida
Marjorie Martorella, chief committee counsel, House of Delegates, Charleston, West Virginia
Sandi Milmed, attorney, Hollywood, Florida
Laurie Mitchell, Michigan Dept of Treasury, Laingsburg
Tom Murawski, The Murawski Group, Colorado Springs
Wm H. Nast jr, retired legislative drafter, Harrisburg, PA
National Marine Fisheries Service, Dept of Commerce/ NOAA, (Regulatory Services Division), Silver Spring, Md
Mark Neach, attorney, Columbia, Maryland
Notre Dame Law School Library, Notre Dame, Illinois
Office of Legal Services Legislative Library [Eddie Weeks], Nashville, Tennessee
Office of Legislative Counsel [Sewell Brumby], Atlanta, GA
Dr Karen Schriver, Doc Design &Research, Oakmont, PA
Lee Sherrill, Dept of Veteran Affairs, Arlington, Virginia
Patricia Toppings, administrator, Office of the Secretary of Defense, Washington, DC
Doletta Sue Tuck Richmond, attorney, US attorney's office (Western District, Oklahoma), Oklahoma City
Rutgers University (Camden) Law Library, Camden, NJ
Saul, Ewing, Remick & Saul, LLP, Harrisburg, PA
Texas Legislative Council [Steve Collins], Austin
David Thomas, attorney, Arizona Legis've Council, Phoenix
Donald G. Thompson, attorney, Bradley & Riley PC, Cedar Rapids, Iowa
Thormodsgard Law Library, Univ N. Dakota, Grand Forks
University of New Mexico Law Lib'y, Albuquerque
University of Oklahoma Law Lib'y, Norman, Oklahoma
University of Virginia Law Library, Charlottesville
US Dept of Labor - Mine Safety & Health Administration [Travis D. Munnerlyn], Arlington, Virginia
Division of Legislative Services, Virginia Gen Assembly [E.M. Miller jr or Cheryl Jackson], Richmond
Lois Vurow, attorney, Investor Communications Services LLC, Westfield, New Jersey
Paul Weafer, counsel, New York State Legislative Bill Drafting Commission, Albany, New York
Western New England College Law Lib, Springfield, Mass
Lily Whiteman, US Dept of Labor, Washington DC
William S. Richardson Law Library (Technical Services - Monographs), University of Hawaii, Honolulu