CLARITY NEWSLETTER

a movement for the simplification of legal English

NO. 6 JUNE, 1986

Contributions to:— John Walton, 5 The Croft, High Street, Hillmorton, RUGBY, Warwickshire

STILL GROWING

CLARITY's membership continues to grow. The latest supplementary membership list is being included with members' copies of this newsletter. But the newsletter too is growing. Issue No.5 was expanded to six pages; this issue is a bumper-size eight pages! This is explained partly by the delay since the previous newsletter (sorry, printing problems!) but mainly by the number of contributions from members. Thanks to all contributors, including those whose letters or articles have had to be omitted owing to shortage of space. Please do keep the contributions coming in, for this exchange of views is the life-blood of CLARITY.

Special Features

After the success of the special Wills feature in Newsletter No.5, we had hoped that to have a similar success with a feature on pre-contract conveyancing. Although there were insufficient contributions on the topic to make a special feature, we have included one or two useful pieces. Nevertheless, an occasional special feature will be useful,so do let us have your ideas for suitable topics.

Working Committee

Although Richard Thomson was unable to continue in office because of other commitments, Mark Adler, Ken Bulgin, Katharine Mellor and John Walton were reappointed as members of the working committee, who were given power to co-opt additional members. We have now been joined by Justin Nelson, a solicitor from Tenterden. Justin has been an extremely supportive member since CLARITY's inception and the working committee have been delighted to have the benefit of his enthusiasm and expertise.

We have met on several occasions, discussing in the main such issues as legal education,a draft constitution, the newsletter and a proposal for transforming this newsletter into a commercial publication (still under discussion).

We have even taken a look at legal aid forms, as suggested at the annual meeting. To be honest, although some of the explanatory notes could be improved, we didn't think the forms on the whole warranted detailed examination or strong criticism. In fact, in part - particularly the Statement of Applicant's Circumstances - the format and wording are very good.

CLARITY SEMINAR

We are pleased to be able to report that the half-day seminar, about which preliminary details were given in the last newsletter, will take place on Wednesday, November 5th, 1986 at Trent Polytechnic, Nottingham commencing at about 2p.m. This will follow a course organized by Trent in the morning on Business Leases, which is part of its Compulsory Continuing Education Programme. Trevor Aldridge and Richard Castle have kindly agreed to be the CLARITY lecturers. Those of you who came to the 1985 CLARITY Annual Meeting will remember hearing Richard speak briefly on drafting and perhaps you have had your appetite whetted. Trevor Aldridge's many accomplishments include the major looseleaf work, "Practical Conveyancing Precedents", published by Oyez Longman (reviewed in newsletter No. 3).

The charge for the seminar will be around £25. Lunch will be available for around £5.00.

As soon as they are ready, application forms with full details will be sent to all members.

Katharine Mellor

THE DRAFTSMAN'S HANDBOOK

I was browsing in a legal bookshop when this book caught my eye. As the Preface says, there is no booklet on the subject of drafting, so I decided that as a member of CLARITY it was my duty to buy this one. At £14.95 it is rather expensive for a booklet but it does have 168 pages.

I was particularly attracted by the references I found to Plain English (there were, alas, none to CLARITY) and I thought that this work might help me and others translate our legal jargon into understandable prose. I have to report that I was largely disappointed.

The book is divided into four parts and of these, the first is the most helpful. It sets out the principles of drafting and even the chapter called "Modifying and Assembling; Syntactical Ambig–uities" had much in it that was interesting and useful. There are no footnotes but this part of the book is generously scattered with quotations from, and references to, authors as diverse as the Venerable Bede and Ludwig Wittgenstein. In places this part of the book reads like an essay by an undergraduate determined to impress his tutor with the breadth of his reading. The sections on style, grammar and syntax are good, although a publisher's house style book would be more detailed.

The second section of the book is called "Structure and Composition" and contains little of value. There is a short set of checklists for clauses to be included in certain commercial documents; an example of how to construct an algorithm; and a worked–out example of a lengthy termination clause in a commercial contract. I cannot resist pointing out that this clause begins: 'Either party shall be empowered to terminate this agreement...' Readers may care to redraft this phrase using a three–letter word.

The third section of the book comprises a some–what arbitrary collection of extracts from cases in which some issue of interpretation has arisen. Those who need this sort of thing would be better advised to use "Words and Phrases Judicially Defined" (Butterworths). The final section of the book simply reproduces the definition clauses from various statutes. There is a bibliography which includes the Venerable Bede and Wittgenstein but omits works useful to lawyers such as "Parker's Modern Will Precedents" which contains some of the clearest advice on drafting wills ever published.

I find it hard to decide whether I am more disappointed by this book's omissions than its inclusions. In the Preface, the author (to whose sex we are given no indication, although the book's title may give us a clue) reveals that "this book has its origins rooted ... in a talk which I was asked to give at the Barbican Conference Centre, London". I thought this an example of verbiage (which is discussed on page 59) which should have been omitted. If a work has its origins in a talk, it is unnecessary to say that the origins are "rooted". And the reader is not really interested in where the talk was given. Instead of this sort of language, I should have welcomed advice on the correct uses of tenses, gender and voice (in the grammatical sense). Some examples contrasting jargon with plain English would have been illuminating. Instead, the work has been padded out with material which is either irrelevant or can easily be found elsewhere. The first section of the book is worth reading and should be published on its own at a more reasonable price. A second edition could perhaps address itself to some of the criticisms expressed here.

Robert Zara.

The Draftsman's Handbook is published by Oyez Longman.

HELP PLEASE

Why so obscure?

ERICA (European Research Into Consumer Affairs) is a charity, based in the UK, whose object is to conduct research for the benefit of consumers in all the countries of the European Community.

One of our current projects is a study of Official Language and one aim of the study is to find out **why** such language is so often obscure. In partic–ular we should like to know why legal language is often so difficult and cumbersome? Why such hard words and complicated phrases? Why so few commas? Why the unnecessary use of words with the same meaning?

Any titles of books or documents or any accounts of oral teaching which might help us to find answers to these questions would be most gratefully received by:

ERICA,
8 Lloyd Square,
London WC1
Tel: 01 837 2492

DEAR CLIENT....

One of the trickier parts of our job is to explain difficult legal concepts to lay clients. This is an area in which we could usefully exchange ideas. You are therefore invited to submit suggested letters on topics of your own choice. Here's the first from Justin Nelson:-

Reduced or Full Deposit?

I should be grateful for your instructions to a particular clause in the Contract for your sale of X. This clause concerns the deposit which it is customary for a Purchaser to pay to the Vendor's Solicitors when Contracts are exchanged.

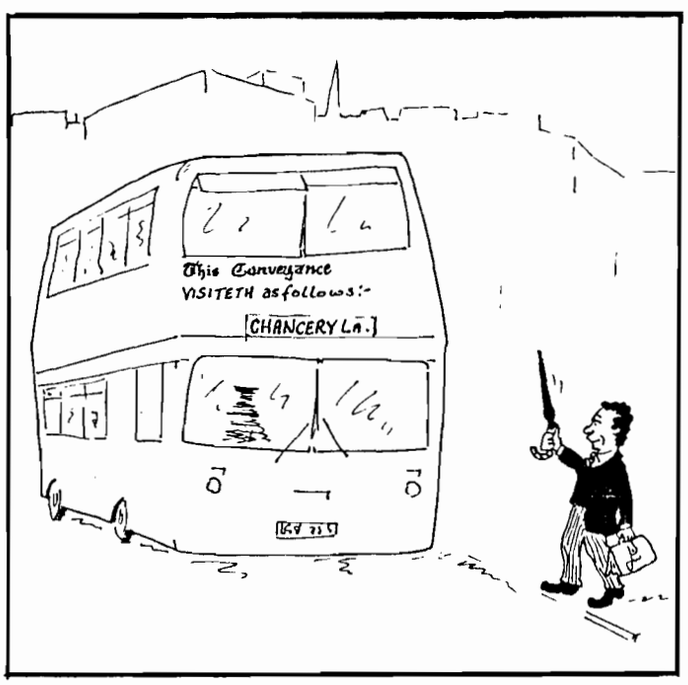
The deposit is paid as proof of the Purchaser's good faith and to provide money to compensate the Vendor if the Purchaser fails to comply with the Contract. If the Contract is completed in the normal way, then the deposit is paid to the Vendor as part of the purchase price of the property; if the Contract is broken by the Purchaser, then the Vendor would (in most circumstances) be entitled to be paid the deposit to compensate him for any financial loss, and would be entitled to sell the property to another purchaser; if the Contract is broken by the Vendor, then the Purchaser is entitled to have the deposit refunded, and is left to sue the Vendor for any financial loss caused by the Vendor's breach of the Contract.

Normally, the deposit is ten per cent of the purchase price, £Y in the case of your sale. However, your Purchaser is offering to pay a reduced deposit of £Z. Consequently, the danger in agreeing to a reduced deposit be ing paid is that it may not cover all your financial losses (wasted legal fees, possible wasted removal fees, extra interest paid on your existing mortgage and compensation payable to the Vendor of the property you wish to buy, or the cost of arranging bridging finance to complete your own purchase before this sale, etc.).

In such circumstances, you would be entitled to sue the Purchaser for any losses not covered by the deposit; bearing in mind, however, that the Purchaser apparently cannot raise any more money now, before problems arise, it is extremely unlikely that he will be able to raise any money once things have gone wrong. Even if he could pay once you sued him, you would still be put to the trouble, delay, expense and risk of taking court action against him.

On the other hand, if you refuse the Purchaser's request to let him pay a reduced deposit, you are in effect requiring him to borrow the rest of the full deposit; he may be unable or unwilling to do this, and may withdraw his offer to purchase your property as a result.

Please consider the problem, and then contact me to discuss it in more detail, and to let me know whether you are willing to allow a reduced deposit to be paid, or whether you wish to insist that a full ten per cent deposit is paid.



WILLS – TWO RESPONSES

I hope that you will accept this letter as constructive criticism and not as "hate mail" but, whilst striving for brevity, we ought not, in my opinion, to throw out the baby with the bath-water: brevity is not necessarily the same as clarity and certainty. Thus, for example, in the "all for mother" shortest will on record case mentioned by Mark Adler – it is in fact **Thorn v. Dickins** (1906) WN 54 – the Court admitted evidence to show that the testator referred to his wife as "mother" and the wife consequently took the estate.

I would personally always advocate the inclusion of an express direction for the payment of debts and expenses – at least where there is more than one residuary beneficiary – since although, as between the creditors and the estate, debts etc. are a first charge on the estate, the question of their incidence as between beneficial interests in the estate must be considered, particularly if a share of residue lapses; without an express provision one can often be left in doubt whether or not the statutory order for the application of assets in solvent estates (Part II First Schedule AEA 1925) has been varied. I am sure that most of us can recall from our student days the names, if not the actual decisions, of cases on this point, which, if they are not actually inconsistent, are at least difficult to reconcile. The same applies to the incidence of pecuniary legacies: much academic ink and, more importantly, expense to beneficiaries has been spilt over the years on this question.

I am not at all sure if a "joint" gift as opposed to a gift "equally between" such of two or more persons as survive the testator, is a good idea: a joint gift certainly deals effectively with beneficiaries who predecease the testator and avoids lapsed shares but what about substitutional provisions for issue and what of the joint beneficiary (or his estate) who survives the testator but who dies before receiving his inheritance or before effectively severing the joint gift?

One must often, if not invariably, assume that where there is more than one beneficiary, particularly persons taking in succession and not concurrently, there are likely to be disputes over the incidence of expenses such as repairs; for example, if trustees have power simply "to insure in any amount", against what risks can they insure and from where, income or capital, can they take the premiums?

I hope that I am no advocate of a blind repetition of precedents but surely, in the area of Wills, where, ex hypothesi the person who can put matters right or who can explain his intentions is no longer around to do so when the difficulties arise, clarity should be more closely allied with certainty than with brevity, at any rate brevity for its own sake.

Finally, nobody can deny that there are many aspects of the law relating to Wills and Trusts which require reform and updating but it is idle to think that they can be overcome, or circumvented, by merely being ignored: unless and until statutory reform arrives they must be recognised, accepted and expressly provided for. Thus to give executors or trustees power to "invest" as they think fit will not, as the law stands at present, allow them to "apply" trust monies in the purchase of a non income-producing asset such as a house for use as a residence by a beneficiary. Likewise one must not forget statutory – and equitable – apportionments and, for the sake of ease of administration, exclude them by a few well-chosen words.

Robin Towns, Trust Division, Lloyds Bank

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I found the items about Wills interesting but I was surprised that nobody referred to the draft Wills prepared by Edith Rudinger in the Consumer's Association Publication (Wills and Probate). Her draft Wills start as follows:

"I revoke previous Wills."

This is commendably brief although in my opinion it is better to say "I revoke all former testamentary dispositions". Mark Adler overlooks the fact that a testator may have made a disposition by virtue of Section 11 of the Wills Act (soldiers and sailors in actual service) which would not in law be a will. However for many clients this will be purely academic and it will be safe to use the clause as drafted by Edith Rudinger. She also uses an attestation clause which is even simpler than the one approved by the Principal Registry of the Family Division. It is "signed by John Smith in our presence and by us in his." The omission of the word "then" might cause the Probate Registry to have doubts as to whether Section 9 of the Wills Act has been complied with but the use of the name of the testator rather than the phrase "the above named" is certainly an improvement.

Robert Zara, Coventry.

MARK ADLER RESPONDS:

I am grateful to Mr Towns for his very helpful suggestions, which have led to some alterations in my precedent. In particular, a provision that "a lapsed gift of residue should be distributed pro rata amongst the remaining residuary legatees" (though clumsily phrased) may help in over-coming the problems in his 2nd and 3rd paragraphs.

However, I quoted Thorn v Dickens to show that everyday language is acceptable. The fact that some people misuse it does not, with respect to Mr Towns and to others who have made the same point, detract from that principle. If the testator had said "All for my wife" their criticism would not have applied.

Mr Zara's addition of "then" in the attestation clause is well-founded but I disagree with his assertion that a privileged will is not a will: the definition in section 1 of the Wills Act includes any "testamentary disposition".

We did look at the Consumers' Association draft but generally disliked it.

My thanks for the interest and for the suggestions.

Second Annual Meeting

CLARITY's second annual meeting took place in Rugby on 5th October, 1985 and notes of the meeting are included with members' copies of this Newsletter.

CLARITY RE-DRAFTING COMPETITION

How good is your drafting? Why not have a go at "claritising" the following lease clause? A small prize is offered for the clearest translation.

TO KEEP OPEN FOR RETAIL TRADE

(10) To keep the demised premises open for retail trade during the usual hours of business and the windows thereof dressed in a suitable manner in keeping with a good class parade of shops AND not to allow or suffer to be allowed any goods or wares to be displayed or exhibited otherwise than from within such windows nor from a showcase within any shop entrance of the demised premises unless the same shall be a permanent immovable showcase or window display forming an integral part of the layout of such entrance as shall have been previously approved as such by the Landlord AND at all times comply with all requirements of the Local Authority or Local Planning Authority in connection with the user of the demised premises for the purpose of the business for the time being authorised to be carried on therein PROVIDED ALWAYS and it is mutually agreed and declared that nothing in this Sub-Clause (10) shall prevent the Tenant from using the demised premises outside of the said usual business hours PROVIDED that it obtains the prior written consent of the Landlord to such opening and SUBJECT ALWAYS to the Tenant paying to the Landlord on demand the total additional costs resulting to the Landlord (as conclusively determined by the Landlords Surveyor) by virtue of any such additional or extended use.

Entries to reach John Walton by 31st July, 1986, please.

SPECIAL CONDITIONS OF SALE

I enclose a copy of some special conditions of sale recently submitted to me and should like to nominate special conditon E as a good example of obscurity in drafting.

I wonder if you agree with me that the special conditions as a whole are open to criticism for attempting to cover every possibility and therefore becoming additional general conditions rather than genuine special conditions.

"E. The purchasers acknowledge that save as such (if any) of the written statements of the vendors solicitors in answer to Preliminary Enquiries prior to the making of this agreement as were not susceptible of independent verification by inspection and survey of the property search and enquiry of the local or other public authority or inspection of the documents disclosed to the purchasers (and whether or not such inspection survey search or enquiry has been made) and have been relied upon the purchasers have not entered into this agreement in reliance wholly or partly on any statement or representations made to them."

Andrew Melling, London, SE12.

RESIDENTIAL CONVEYANCING

I am a sole practitioner, employing no secretarial staff, so brevity is essential to my business. You may be interested in the conveyancing procedures I have developed using a small business computer and printer (total cost about £550, including software and monitor). [Copies of the documents stored were enclosed with this letter.]

SALE: contract and special conditions submitted to the purchaser's solicitors with a pre contract information sheet. These should obviate the need for preliminary enquiries and requisitions (a forlorn hope in practice!).

PURCHASE: client leaflet "Your Purchase - General Information"; pre-contract enquiries, including requisitions; report to client; conveyance and assignment, often dealt with before exchange of contracts.

I have aimed to increase the overall efficiency of conveyancing procedures rather than cut time spent on individual documents. The system is still in its infancy and will hopefully be improved and updated (suggestions gratefully accepted), but it has already been a considerable help.

G.A. Atkinson, Nottingham

[Below is an extract from "Your Purchase - General Information"]

"HOW LONG WILL IT TAKE?

Neither you nor the seller are legally bound to buy or sell until 'exchange of contracts': this is the point at which a contract signed by you is exchanged for one signed by the seller. You will not be able to exchange contracts until:

(a) I have approved the contract and completed my searches and enquiries - this usually takes about two weeks, though some local authorities are particularly slow in processing searches;

(b) you receive your mortgage offer - this depends upon the demand for mortgages, but is rarely less than two weeks; your bank or building society should be able to give you a time estimate;

(c) your buyer is ready to exchange contracts on your related sale;

(d) your seller is ready to exchange contracts on his related purchase.

If (b), (c) or (d) do not apply (for example, if you are a first time buyer, or if you are paying cash, or if your seller does not have a related purchase) the transaction will proceed all the quicker. The factor which most often causes delay is the existence of a chain of dependent transactions, and you should try and establish at the outset the extent of the chain.

When exchanging contracts, a date which is convenient for all involved will be fixed for 'completion': this is the day upon which you can move into the property. The gap between exchange of contracts and completion is usually between two to four weeks, but can be considerably less if necessary."

RECITALS

When drafting a straightforward conveyance, I see no reason to include recitals; these can only be otiose verbiage. Upon numerous occasions, however, I have had vendors' solicitors insert recitals. When questioned as to why, no convincing reason other than that of precedent has been given. The old rule that a recital twenty years old could be accepted as truth is of little significance nowadays when a good root of title need not be older than fifteen years. Clearly there are occasions when recitals are required, for example when the vendors are personal representatives, but I consider that their use should be restricted to such occasions.

Julia Wakelam, Bury St. Edmunds.

NECESSARY NEOLOGISMS

What I find frustrating is that the English language does not possess the singular equivalents of the unisex 'they', 'them' and 'their', with the result that '(he)(she)' or even worse 's/he' etc. have to be resorted to.

Parliamentary draftsmen of course have it easier. They can rely on s6(a) of the Interpretation Act 1978 which modifies words of the masculine gender to include the feminine unless the contrary intention appears. Why not go one step further and use the Act to actually create the new words which are needed? A paragraph (d) could be added which could read "the words 'se', 'ser' and 'ses' mean 'he or she', 'him or her' or 'his or her' respectively." By way of a bonus the paragraph could continue "and the suffix '-sen' should be equivalent of '-man' or '-person'" (thereby providing a less unwieldy alternative to 'spokesperson, chairperson' etc.

Once planted in this way the roots of this semantic seed could become widespread provided all subsequent legislation incorporated these new words, which could also be used in HMSO publications. Other bodies, such as local authorities, the gas and electricity boards and British Rail could be enlisted to adopt the new terminology and the Government could mount a publicity campaign along similar lines to the one which preceded decimalisation. Once incorporated into English forms and dictionaries the battle would be almost won.

This initiative could also be used to strike a blow in the cause of sex equality as it would enable us to think, speak and write in a unisex singular. It would also be one in the eye for George Orwell if in the years following 1984 the Government were seen to be controlling our language by broadening it rather than restricting it.

Steve Wilton, Skipton

[unless the principle of legislative word-creation would itself be a modern equivalent of newspeak? Views anybody? Editor].

DRAFTING - LEGAL EDUCATION

I support Hugh Riddick's plea for legal education to include drafting but to include documents as well as letters.

It continues to amaze me that drafting has not been taught as a discipline, and that language manipulation skills are not taught in the first year of a law course. It is axiomatic that our written communication skills are inferior to language response skills and also inferior to language manipulation skills. If we are to achieve an improvement in the communication skills, the others must also be improved.

Unless the student or lawyer has adequate language manipulation skills, then he cannot be efficient and effective. Faced with a complex sentence of uncertain meaning and perhaps sentence structure, it is essential to understand the basic principles upon which such a sentence ought to have been constructed and separate it into those parts. Having done that the length may be halved. And length affects readability (Flesch, The Art of Readable Writing) and hence comprehension.

To be effective and efficient every student and lawyer needs to know the basic principles of sentence construction, if only to recognise them in properly drafted provisions. Freed from the problems of syntactic ambiguity, the student and lawyer can concentrate on semantic problems, if there be any.

Language response and language manipulation skills should be taught in first year and drafting provisions in the last year.

Dr. S. Robinson
Association Professor in Law,
University of Queensland.

CHANGING LEASES

In his talk at CLARITY's second Annual Meeting in October, Richard Castle pointed out the need to improve the wording of leases, and suggested two possible solutions, amongst others –

(a) a new Leases Act; an up-to-date version of the Leases Act 1845; or

(b) a similar set of short phrases with extended meanings in the form of a code backed by the Law Society along the lines of the Law Society's Conditions of Sale.

During the subsequent discussion, it was suggested that a code of phrases would have more acceptability if it were agreed jointly between the Law Society and the RICS.

I believe that neither proposal would be an effective solution. Leases generally are in their present mess because legal language changes at a slower pace than common language, and thus sounds old-fashioned and is hard for the layman to understand. This is not necessarily a bad thing, since legal language must be unambiguous – it should not be fashionable, in that its meanings should not change as fashions change.

However, codifying various phrases for use in leases would result in even slower change, due to the magnitude of the task of changing the code. Change becomes slower and more cumbersome as more and more individuals and organisations need to be consulted, especially where not all those involved have a definite commitment to the use of plain language. Varying an Act of Parliament involves an immense amount of time, energy and consultation; witness the fact that the 1845 Act has never been up-dated, despite the fact that the language used in both the phrases and the definitions is now outmoded. Agreeing a code between the Law Society and the RICS would involve a considerable amount of work; the two organisations have produced a model rent review clause, but I suspect they would find the prospect of producing a set of defined phrases a little too daunting.

Ideally, of course, no code would be needed. Each lease would be custom-drafted from scratch by an expert lawyer who was also a master of the English language. It would be clear, precise and easy to read. Such an ideal is, however, impossible to attain; practising lawyers have too little time, too little inclination and/or too little expertise.

I suggest that the best solution to the problem is for the members of CLARITY to have the courage of their own convictions – we should lead the way, not by asking others to endorse a code drafted (partly or completely) by us. Instead we should try one of the following:–

1. CLARITY could draft a series of precedent leases, which could be used and adapted for appropriate cases. These precedents would use clear, simple English, but would be rigorously examined to ensure that they were legally watertight.

2. CLARITY could draft a code of defined phrases to be used in leases. The lease would need to include this code by reference to the appropriate edition of the code and a copy could be bound up with the text of the lease itself.

3. A combination of 1 and 2 above could be used.

Whichever solution were adopted, production of the precedents and/or code would not be a once–and–for–all solution: the precedents and/or code would need to be regularly up-dated. A standing committee should be created to develop and review the wording and constructive comment should be invited from professional bodies as well as from CLARITY members.

The important factor is that CLARITY should do the work – we have the necessary expertise and enthusiasm amongst our members. We should not be simply a pressure group: we should also be a working party.

An incidental benefit would be that the production, criticism and revision of the precedents and/or code would help educate ourselves in good draftsmanship, since we could learn from each other and our own mistakes. In that way we would help to fulfil our second objective, as well as our first.

Justin Nelson, Tenterden, Kent.

AND FINALLY.....

How about these examples of legalistic tautology found in recently received letters?

"I refer to your letter of the 8th April 1986 and have noted the contents contained thereon."

"..... edged red on the annexed plan attached hereto."