Reproduced from *Clarity* 44 (December 1999, pp 2-6) with the author's permission

The layman's understanding of legal writing

by Richard Oerton

For years after I joined Clarity I thought myself a supporter, only to realise later that I had never really grasped its true aim: *that all kinds of legal writing should be comprehensible to all kinds of layman.* I remember asking that a book to which I had contributed will precedents should be reviewed in the Clarity journal, and being mildly offended when it was not. I should have been grateful for the editor's tact because my forms would, by this standard, have been roundly condemned. And ever since the penny dropped, I have asked myself: how close can you get to realising this aim (and how guilty should I feel for having failed to get within miles of it)?

Two questions arise. First, what can we really hope to achieve? Under the first three sub-headings below, I look at some factors which limit laymen's ability to understand legal writing. And second, how can we best achieve it? Under the final heading I consider again how best to give the layman such understanding as we can realistically hope to give.

The jewel in the crown

There is a crucial difference between understanding what a legal document says and understanding its full implications. There may even be

instances in which the more clearly people understand the document itself, the more likely they are to misunderstand their true position. Take the case of a simple lease. A tenant ought to be able to understand the document and, in doing so, to know exactly where he or she stands; but surely this is quite impossible.

Somewhere in every lease you find a forfeiture clause saying that if the tenant fails to perform his or her obligations the landlord can terminate the lease. And every lawyer knows that the landlord cannot do any such thing. The law about relief against forfeiture stretches before us, replete with complexity, involving different regimes for failure to pay rent and for other breaches, rules about breaches which can be remedied and those which can't, and all the rest of it.

My example of forfeiture is only one of many which could be given in relation to leases; and leases are only one of many kinds of legal document which may give a false — or, just as bad, an incomplete — impression if taken at face value. Any such document takes effect within a complex of legal rules deriving from different sources, and an understanding of these rules is just as essential to an understanding of the overall effect of the document as is an understanding of its terms. This effect is like that of a crown consisting of a jewel in an elaborate setting. The jewel is the document; the setting is the rules; you won't gain any appreciation of the thing as a whole unless you look at both.

I can suggest no solution to this problem. The idea of trying to incorporate a statement of the surrounding law in the document itself is almost too ludicrous to mention, and the idea of flagging up little warnings every so often is perhaps still more absurd. But even if clarity of drafting may often produce, for the layman, only the illusion of understanding, the illusion is still of some value - and, even if it were not, clarity would be desirable so as to avoid mistakes, save expense and sweep away the cobwebs which still cling to our image.

One man's meat

The next point is that, in drafting, there may be a conflict between making yourself clear to laymen and making yourself clear to fellow lawyers. Perhaps it is here, if anywhere, that I might seek excuses for some of my own past shortcomings. I drafted a lot of trust documents (and in that description I would include wills which establish continuing trusts). The land of trusts, like other bits of the legal landscape, is a foreign and almost self-contained territory. So what I did is to produce drafting which was meant to be concise, modern and clear, but which was aimed at lawyers (including, in the last resort, judges) rather than at laymen.

Take, for example, the overriding power of appointment which no self-respecting trust can afford to be without. These creatures are governed by decided cases and no one who is not a trust lawyer should try to draft one from scratch; but care, concentration and some expertise will produce a result which is comprehensive and judge-proof. Can you produce a result which is at the same time readily comprehensible to the layman? I doubt it. I did try once, and my wording became so odd, lengthy, and likely to generate actions for negligence, that I gave up. The first problem is that every power of appointment uses the word "appoint". This word has a meaning for the layman, but that meaning is not the right meaning. Can you find another word, or form of words, which convey the right message to the layman while still making it clear to the lawyers who will administer the trust that you are creating the animal known to the law as a power of appointment and so attracting all the existing law which applies to such animals?

One thing must be obvious: if there really is a conflict between producing clarity for lawyers (including judges) and producing it for laymen, you have to do the former or you go out of business.

Dr. Johnson was right

Samuel Johnson famously remarked,

> *I have found you an argument; but I am not obliged to find you an understanding.*

He had a point. No matter how simple is the language in which you try to communicate something to someone, your attempt will fail if the something is inherently too difficult for the someone to grasp.

Lawyers get a lot of undeserved stick here. Why, people say, do they "make it all so complicated"? And the answer supplied, expressly or impliedly, is: so they can foster a mystique and bump up their fees. Sometimes it is so; more often it is not. The law is complicated because civilised societies provide scope for infinitely varied activities and the law seeks to govern them all fairly.

This has implications for drafting. Many legal documents regulate the mutual rights and obligations of a number of different people; do so over a long period of time during which they may do many

different things and many different events may befall them; and do so, moreover, against a backdrop of intricate legal rules. Documents of this kind, however clearly worded, are always going to be conceptually difficult. And the more intelligent and conscientious the drafter, the more difficult they will be. Understanding such documents is a task for which very many clients are simply not equipped. It is this which curbs my own enthusiasm for such exercises as the rewriting of the tax legislation. The idea that laymen could go to the revised legislation and understand their tax position seems to me pie in the sky. The language may be beautifully simple, but the complexity of the subject matter will remain to exhaust and ensnare them.

Characteristics of clear writing

The earlier parts of this article are intended, not to question the aims of Clarity, but only to mention a few factors which impede their full realisation. It must be emphasised, too, that there is a vast amount of legal writing to which these factors do not apply. In this last section, therefore, I want to reaffirm my loyalty to the flag and put forward a few thoughts about the achievement of clear writing.

Clarity tends to espouse several rules of thumb. Three seem often to recur:

- use ordinary, everyday language;
- use short sentences;
- use the active, not the passive, voice.

Let's take a quick look at these.

I can't fault the first. **Everyday language** must be desirable when you can use it. I have suggested that you can't always use it, but I won't get started on that again.

What about **short sentences**? Well, as Lord Denning would say, take this very article. It does contain some short sentences, but also some pretty long ones. This is true of most examples of modern English prose. In the work of a good writer, the longer sentences are long for a purpose, and the shorter sentences are short for a purpose — which, incidentally, they would not achieve if they were not surrounded by the longer ones. The alternation of sentences of different lengths is meant to make writing lively and varied and so to hold the attention of the reader. Unless a piece of writing is itself very short, a constant diet of short sentences is boring. Are the long sentences in this article actually any harder to understand than the short ones?

Nor does the **passive voice** seem necessarily to militate against clarity. The first two sentences of this part of the article are in the passive voice: are they difficult, and is the third sentence easier because it is in the active voice? (I realise, of course, that the passive voice may irritate because it fails to identify the person who does the doing. But sometimes this really is desirable. When I drafted a deed putting right a series of botched appointments of trustees, one of my recitals said something like: "It is thought that the appointments may have been defective ...". Whom should I have identified as the thinker of this thought? Not the parties to the deed: they hadn't a thought in their heads. Not me, surely? Not the partner in the firm who had botched the job in the first place? No, the thought existed, but there was no need to locate it.)

I know I am being disingenuous in asking questions based on this article. We have to consider, not sophisticated and intelligent members of Clarity, but people some of whom live their lives just this side of illiteracy. And if they have problems with long sentences and the passive voice, let us by all means eschew these things in any legal writing which is directed at them (noting, however, that they don't include many of the average clients of the average legal practitioner).

But put all this on one side now, because what I really want to suggest is that, in the quest for true clarity, rules of thumb are not as helpful as they seem and may even distract attention from what really matters. You can obey all the rules of thumb and yet

> *When we come to the meaning of words, lawyers are here the most offending souls alive. They will so often stick to the letter and miss the substance. The reason is plain enough. Most of them spend their working lives drafting some kind of document or another - trying to see whether it covers this contingency or that. They dwell upon words until they become mere precisians in the use of them. They would rather be accurate than clear. They would sooner be long than short. They seek to avoid two meanings, and end - on occasion - by having no meaning.... The meaning of words, they say, is a matter of law for them and not a matter for the ordinary man. Like Humpty Dumpty, they seem to say, in rather a scornful tone: "When I use a word, it means what I choose it to mean, neither more nor less", and like Humpty Dumpty they sometimes have a great fall.*
>
> Lord Denning

produce writing which is very hard to understand. And you can disobey them and still produce writing which is admirably clear.

The Times of 16 November 1998 reproduced a letter by A.P. Herbert to the paper in 1929, which ended like this:

> *At dusk the river becomes an enchanted place, the prosy factories are mysterious and beautiful; the dull trams like fairy coaches float along the Embankment; the lights on the shore, the shadow and sparkle on the water, the fresh bite in the air - here is suddenly a different world, a new London, which the Londoner never sees.*

At 57 words, this is a pretty long sentence, but it is easy and enjoyable to follow. It isn't convoluted, the syntax is not tortuous and it makes no great demands on the reader. Turn now to this extract from a news report on the same day:

> *Charles Maude, a graphic and stage designer, discovered in 1986 that he was HIV positive, and became a passionate supporter of the London Lighthouse, the charity helping Aids sufferers find advice and treatment. In his last two years, Charles Maude moved in with his brother and his wife, Christina.*

The last sentence is bad, not because it is short, but despite its shortness. There are two separate pitfalls for the reader. It can seem, first, that Charles Maude moved into the London Lighthouse and did so with the other two people mentioned and, second, that Christina was the wife of Charles Maude, not of his brother. A few moments' thought shows that neither of these things is likely, and you then read the sentence in the right sense - but it is unforgivable for anyone who aims at clarity to force their readers to read a sentence twice over.

The crime illustrated by the last extract is dealt with in *Fowler's Modern English Usage* under the heading of "false scent":

> *The laying of false scent, i.e. causing the reader to suppose that a sentence or part of one is taking a certain course, which he afterwards finds to his confusion that it does not take, is an obvious folly ... But writers are apt to forget that, if the false scent is there, it is no excuse to say they did not intend to lay it; it is their business to see that it is not there, and this requires more care than might be supposed. The reader comes to a sentence not knowing what it is going to contain. The writer knows. Consequently what seems to the writer, owing to his private information, to bear unquestionably only one sense may present to the reader, with his open mind, a different one.*

As you might expect, each of the last two issues of the Clarity journal contains an example of false scent - but they appear, not as writings in need of clarification but as examples of clarity itself. The first one (*Clarity* 42 (September 1998, p. 5) is given by Vice-President Al Gore in his commendation of "Plain Language in Government Writing". The Veterans Benefit Administration is writing to an ex-soldier whose insurance payment has not arrived and who has presumably sent them a form about it. I have given the English spelling of "cheque":

> *We received the missing-cheque form you sent us. We asked the Treasury Department to find out what happened to it.*

Picture the ex-soldier's puzzlement. Grammatically, "it" must refer to the missing-cheque form, but why is the Treasury Department being asked about that? Eventually he may realise that "it" refers instead, and ungrammatically, to the cheque that went missing.

> *This time I had a good common lawyer sitting with me, Winn LJ; and a chancery lawyer who was endowed with unusual common-sense, Danckwerts LJ.*
>
> Lord Denning. *The Discipline of Law* published by Butterworths. Chapter 3. *The Interpretation of wills and other unilateral documents.*

The other example (*Clarity* 41 (April 1998, p. 40) is provided by the revered Martin Cutts, translating a standard letter from the City of Edinburgh Council about ... well, see what you think it's about:

> *Despite essential cuts in spending, we remain committed to reducing waste and recycling it. We have therefore made new plans which should result in more household waste being recycled at lower cost.*

In the phrase "reducing waste", the word "waste" would naturally be taken to mean waste of money or resources (so that the reader thinks the letter is about economising) but how do you recycle that? Not until you come to the phrase "household waste" in the next

sentence do you realise that the letter is really talking about waste in the sense of rubbish.

I quoted at length the extract from Fowler because it tells us, not merely about the nature of "false scent", but about the nature of clear writing and the reasons why it is so seldom produced. All writers, it is safe to say, think that they write with perfect clarity because what they write is perfectly clear to them. Only when - only if - they put themselves in the reader's place do they see that this may not be so. If the ability to write with real clarity is a skill which can be acquired, the way to its acquisition lies not so much through obeying rules of thumb as through a painful and prolonged attempt to stand in the shoes of the reader.

Richard Oerton retired in 1997 from practice as a solicitor with London firm Bircham & Co. He had previously worked at the Law Commission and is the author of *A lament for the Law Commission* and many articles. He is a member of the Clarity committee.

My thanks to Richard for some of the Denning quotations.