

Chapter 1

What's wrong with traditional legal writing?

Introduction

Lawyers with keyboards or dictating machines forget they are people; however amiable and unpretentious they are at other times, when they compose the written word a strange personality emerges. Where a human being would say

The house is ready

a solicitor employs a large staff to say

We hereby give you notice in accordance with clause 11 of the Contract dated 6th November 2016 the made between Miranda Homes Limited of 157 Bracknell Road South Farnham Hampshire (1) and East Hill Residents Association Limited of 157 Bracknell Road, South Farnham, Hampshire SF4 5GR (2) and James Edward Brownlow & Katherine Elizabeth Brownlow of 81 Landfall Road South Farnham Hampshire (3) that the above property is now constructionally complete.

What persuades solicitors that all this is necessary? The belief that careful drafting will avoid ambiguity? There would have been none; with the address given (as usual) in the heading of the letter, the four-word alternative could not have been misunderstood by the solicitor-recipient. But a more helpful writer could have added:

You should therefore arrange to complete the purchase by 1st September[, please].

What is wrong with the longer form?

- *Hereby* adds nothing. Could the recipients have argued that *We give you notice ...* did not constitute notice?
- *We give you notice that* is similarly redundant.
- *In accordance with* is wordy; *under* would be neater.
- Nothing is gained by reciting the contract, since it had already been identified by the reference to the house in the heading of the letter.

PART A: WHAT'S WRONG WITH LEGAL WRITING?

- So keen was the writer to reproduce the entire contents of the dictionary that he (or she) did not notice the mistaken use of *the* instead of *and* in the second line. This error turns the supposedly precise text into gibberish.
- *Dated 6th November 2016 and made ...* could be expressed more economically: *dated 6 November 2016 ...*
- *Contract* is a common noun, not a proper one, and does not deserve a capital letter.
- If the names of the parties must be spelled out, the usual *Ltd* would serve.
- Commas are omitted from the first incidence of the Bracknell Road address. This creates ambiguity: is it *157 Bracknell Road, South Farnham* or *157 Bracknell Road South, Farnham*? And if there is a good reason for abandoning punctuation (and the postcode), why are they both restored on the following line?
- The postcode (which the recipient would have checked before exchange of contracts) is no help here.
- The repetition of the address is clumsy and gives the impression that the writer was not aware that it had already been given: *of the same address* could replace the second recital; or (with slight rearrangement) the first could be omitted in favour of *both of ...*
- The use of the numbers (1) and (2) might be appropriate if it is not otherwise clear who is who (though it always should be – see, for example, the revision on p.86), but it is an affectation in a letter.
- The use of *and* between each of three items in a list is clumsy.
- On the third reference to South Farnham (where both solicitors had their offices) the writer is still assuring the recipient that it is in Hampshire.
- *The above ...* is no more precise than *the ...*; there is no property mentioned below.
- *Constructionally complete* is not a term of art and has no clear meaning. We suspect that it was a slip, perhaps copied from the contract, and that the writer meant practical completion.

Few people read more legal writing than they have to, especially if it's badly written. So it's worth bearing in mind Armstrong and Terrell's warning (2015):

Our starting point has been a painful psychological fact about how readers, especially readers who are habitually skeptical, approach a document. At every level, from its very beginning all the way down into the innards of its paragraphs, they are constantly asking annoying questions: Why am I reading this? Where are we going? Why are we going there?

But even if the reader perseveres, and is able to unravel the language, the message itself may well be flawed. Justice Samuel Alito of the US Supreme Court thinks that (Garner, 2011):

WHAT'S WRONG WITH TRADITIONAL LEGAL WRITING?

there is a clear relationship between good, clear writing and good, clear thinking. And if you don't have one, it's very hard to have the other.

Throughout this book we suggest clearer, more concise, and, we hope, more effective alternatives to pieces of traditional drafting. You might find that we – like everyone else – make mistakes. But that does not mean it is wrong to write more clearly; any error can (and is more likely to) be corrected within the guidelines we are proposing. If you spot one, or have any other criticism, please post it on the book's website at www.clarityforlawyers.com.

So what is wrong with traditional legal writing? In summary:

- It wastes everyone's time.
- It wastes everyone's money.
- It reduces lawyers' earnings.
- It holds up commerce and people's lives.
- It is imprecise.
- It causes unnecessary and sometimes expensive mistakes.
- It often fails to achieve the writer's purpose.
- It alienates clients, their advisers, and the public.
- It alienates many judges.
- It sounds archaic.
- It shuts people out of their own business.
- It undermines the rule of law.
- It is often itself unlawful.
- It can be unprofessional.
- It is inhuman.
- And it's as dull as lead (and almost as indigestible).

If you are convinced, you might want to go straight to Part C where we start to discuss the writing habits that can make legal writing more effective. Or, for argument and examples in support of the bulleted assertions and an explanation of what we are trying to do, please read straight on.

Legalese wastes time

Legalese takes longer to read. This is partly because there is more of it, but there are other reasons; several factors make it more time-consuming, word for word. These are the:

- unbroken layout;
- long and convoluted sentences;
- more difficult words; and
- absence of punctuation.