

Chapter One

INTRODUCTION**Traditional legal language**

The English language of today is still recognisably the language of Chaucer [1.1] and Shakespeare, of Abraham Lincoln and Winston Churchill, of the Book of Common Prayer and the Authorised Version of the Bible. It is also the language of lawyers in many countries: the United Kingdom, Ireland, the United States of America, Canada, India, Australia, New Zealand and Singapore, to name but a few. In English, lawyers draft documents and compose letters, formulate statutes and propagate regulations, prepare pleadings and argue their cases.

Legal English, however, has traditionally been a special variety of English. [1.2] Mysterious in form and expression, it is larded with law-Latin and Norman-French, heavily dependent on the past, and unashamedly archaic. Antiquated words flourish – words such as *aforementioned*, *herein*, *therein* and *whereas*, which are rarely now heard in everyday language. Habitual jargon and stilted formalism conjure a spurious sense of precision – *the said*, *the aforesaid*, *the same*. Oddities abound: oath-swearers do not believe something, they *verily* believe it; parties do not wish something, they are *desirous* of it; the clearest photocopy only *purports* to be a copy; and so on. All this, and much more, from a profession that regards itself as learned.

Some infelicities of expression, some overlooked nuances, some gram- [1.3] matical slips, can be forgiven. Lawyers are only human, and in the day-to-day practice of law they face an overwhelming weight of words. What cannot be

2 Modern Legal Drafting

forgiven, however, is the legal profession's systematic mangling of the English language, perpetrated in the name of tradition and precision. Nothing in the principles or practice of law requires this distortion of language. Nor, increasingly, do clients accept it, showing a mounting dissatisfaction with vague excuses such as 'That's the way we always put it', or 'That's how we say it in legal jargon'.

- [1.4] Speaking generally, today's legal English evolved over the 300-year period between the setting up of the first printing press in England (in 1476) and the American Declaration of Independence. Its terminology and style remain largely frozen in the form they had reached by the early years of the nineteenth century.¹ In more recent times, typewriters, word processors and computers have brought changes in the format, layout and length of legal documents. The language, however, has remained largely unchanged.

How odd it must seem to non-lawyers that the law's antique language lingers on, harking back to another age, so numbing and relentless that even lawyers themselves sometimes fail to read it (or fail to understand it if they do). How odd that legal gobbledegook lies dormant in office files, precedent books, computers and word processors, ready to be recycled at a moment's notice in documents of the early twenty-first century.

Pressures for reform

- [1.5] All areas of human endeavour have their advocates for reform; but reformers, including legal reformers, are often disappointed.² Radical thinkers such as Jeremy Bentham, Lord Brougham and Lord Denning – all of whom urged reforms not only in the substance of the law but also in its language – in the end have had relatively little impact. Lawyers have a vested interest in preserving their mystique, and part of that mystique is enshrined in traditional legal language.
- [1.6] Today, however, the need for traditional legal language is being questioned. This questioning has been fuelled largely by the consumer

¹ This is particularly noticeable in the language of international treaties, which are beyond the scope of this book. See Anthony Aust, *Modern Treaty Law and Practice* (2nd ed, 2007) ch 23 for suggestions for improving the drafting style of treaties.

² See, eg, the hopelessly optimistic predictions following the 1845 English land law reforms, in 'Conveyancing Reform' (1845) 2 *Law Review* 405.

movement of the latter decades of the twentieth century. Non-lawyers now expect to be able to understand what they sign. Consumer groups urge customers to seek answers and explanations. Some lawyers see this as a threat. Others see it as a challenge – they recognise that a clearer, crisper style relieves them from the drudgery of acting as interpreter, of having to translate the antique into the contemporary. They also perceive the advertising advantage their documents provide for marketing their expertise. Even those lawyers whose prime concern is to avoid negligence claims can see that ‘plainness’ might prove an advantage over gobbledegook; for when a document is drawn in straightforward, up-to-date, no-nonsense English, clients are hard pressed to assert afterwards that they did not understand it.

Yet the advocates of standard, modern English – or, to use the term now [1.7] becoming widespread, ‘plain English’ – should not be complacent. Many lawyers still have difficulty in accepting anything other than traditional legal terminology; the ancient sonorous language of the law embodies all they stand for. But improvements are appearing, notably in statutes and commercial documents. Statutory drafters and commercial lawyers appear more likely than (for example) conveyancing lawyers to use standard, modern English. Perhaps this is because statutory drafting and commercial work often involve putting new ideas and new methods into a legal setting; in contrast, conveyancing often harks back to the Middle Ages.

Change in legal English will come, but it will be slow. There will be no [1.8] storming of the citadel, no victory parade, no triumphal march through the streets. Traditional legal language will be a long time dying.³ But die it will, under the weight of twin realities: first, that a modern, direct style of writing is as precise and legally effective as traditional styles of legal writing; and second, that citizens of modern societies have the right to read and understand for themselves the documents they sign and the laws that bind them. As Justice Michael Kirby (from Australia) put it: at stake in the plain language movement is not merely the theoretical goal of improving lawyers’

³ See the comments of the respected author and drafter, Francis Bennion, in ‘Confusion over Plain Language Law’ (2007) 16 *Commonwealth Lawyer* 61 at 63: ‘[The plain language movement] was always a misconceived and hopeless project, and it has failed . . .’. Cf the riposte by Mark Adler, ‘In Support of Plain Law: An Answer to Francis Bennion’ [2008] (August) *Loophole* (Journal of the Commonwealth Association of Legislative Counsel) 15. Cf also Ruth Sullivan, ‘The Promise of Plain Language Drafting’ (2001) *McGill Law Journal* 97 [35], which concludes from several studies of users’ reactions that in communication, ‘plain language drafting has a long way to go’.

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[More information](#)

4 Modern Legal Drafting

understanding of the law, but rather the ‘noble objective of making the law speak with a clearer voice’ to those who are bound by it.⁴ And this objective is achievable. Wittgenstein once wrote of language, ‘Everything that can be put into words can be put clearly.’⁵ Legal language is no different.

What this book tries to do

[1.9] Our purpose in this book is to encourage legal drafters to write in modern, standard English. We do so by illustrating why modern, standard English is preferable to traditional legal English. We start in chapter 2 by considering the influences that affect today’s legal drafter. We also examine the factors that help perpetuate traditional styles of legal drafting – factors such as the fear of negligence claims and the familiarity that comes from using a conventional style. Chapter 3 deals with the interpretation of legal documents, and explains why drafters in the modern style can be assured that their efforts will not fall foul of the so-called rules of interpretation. In chapter 4 we consider some of the benefits of drafting in plain language, showing how it can improve the image of lawyers and help avoid negligence claims. This leads us, in chapters 5, 6 and 7 to explore how to draft documents in modern, standard English, covering not only obvious points such as language and punctuation but other important factors such as structure and layout. Lastly, chapter 8 puts the principles of plain-English drafting to the test by analysing some traditional legal provisions and rewriting them in modern, standard English.

⁴ M D Kirby, ‘Ten Commandments for Plain Language in Law’ (2010) 33 *Australian Bar Review* 10 at 16.

⁵ Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (D F Pears and B F McGuinness trans, 1961) 51.

Chapter Two

**WHAT INFLUENCES THE
LEGAL DRAFTER?**

Introduction

The traditional style of legal writing is the product of many influences. Some [2.1] influences are constant, some are sporadic. They rarely exist in isolation; usually, many operate together. This chapter reviews the main influences on traditional legal drafting, namely:

- familiarity and habit – the security that comes from adopting forms and words that have been used before and seem to be effective
- conservatism in the legal profession, allied to the common law tradition of precedent
- fear of negligence claims
- the means of production
- pressures to conform to professional norms
- the desire to avoid ambiguity
- the mixture of languages from which the law derives its vocabulary
- payment by length of document
- payment by time
- the litigious environment of legal practice.

Some of these influences, such as the mixture of languages and payment by length of document, are largely historical, with little direct effect today. Others, however, remain pervasive.

6 Modern Legal Drafting

- [2.2] The stylistic hallmarks of traditional legal drafting are apparent in many types of document. Some of the best (or worst) examples are leases – their dense prose and ‘torrential’ style intimidate even the hardiest reader.¹ Other documents exhibiting a similar style include conveyances, wills, trust deeds, insurance policies, mortgages and shipping documents. The common thread pervading them all is tradition, going back hundreds of years. This tradition is so powerful that it has been impervious to reform through the centuries and continues to resist reform even today, when change might be thought an easy option. A tradition so persistent merits detailed scrutiny.

Familiarity and habit

- [2.3] Lawyers prefer to use documents that have been tested in operation. They prefer the established to the novel, the familiar to the new. In a sense, this should not be surprising – all human beings share the same trait. But this trait creates particular problems for lawyers, because eventually lawyers come to write legal documents in a style that is peculiarly time-warped. The style is traditional; it is inculcated in law schools; it is used by judges and legislators; it is how lawyers always write. Knowing no other style, lawyers rarely pause to question it. What incentive is there to do so? All the pressures are in the other direction.
- [2.4] To illustrate, consider the following extract from a contemporary conveyance of land in a residential subdivision. The drafter’s aim is to create a right (technically, an easement) to permit owners of other lots in the subdivision to tap into the drains under the land being conveyed. The document comes from England, but it could have come from any country where English is the language of the law.

AND excepting and reserving also in fee simple unto the Company their successors in title owners or owner for the time being of the parts not herein

¹ Law Com No 162, *Landlord and Tenant: Reform of the Law* (1987) paras 3.6, 3.7. Hoffmann J, in *Norwich Union Life Insurance Society v British Railways Board* [1987] 2 EGLR 137 at 138, found the flood of words in a lease so ‘torrential’ that he thought there might be ‘some justification’ in counsel’s argument that he should depart from the normal principle of construction that requires effect to be given to every word in a clause.

comprised of the said Building Estate the right to connect with any drain or drains made or to be made in through or under the said pieces or parcels of land thereby conveyed any drain or drains belonging to any adjoining or adjacent site or sites on the said Building Estate for the purpose of forming one or more general drain or drains or otherwise.

This drafting is the product of habit, not design. Written from scratch, it [2.5] could have looked more like this:

Reserving in fee simple the right to connect any drain in any part of the rest of the estate with any drain in the conveyed land.

Compared to the earlier version, this reduced version seems disarmingly simple. In fact, its drafting requires a high degree of expertise – so high that few lawyers would be bold enough to attempt it. Let us explore some of the technical knowledge required for the reduced version.

First, since new rights are created (whether to use existing drains or [2.6] drains to be built), it is sufficient to use *reserving* in place of *excepting and reserving*. Most drafters, however, would instinctively play safe with the arcane distinctions between exceptions and reservations² and would retain the conventional *excepting and reserving*.

Second, what of the phrase *in fee simple*? This term has come down [2.7] from medieval times. It harks back to the distinctions that English law draws between ownership of land and ownership of rights in land. In many jurisdictions that have inherited the English common law, a person cannot in legal theory ‘own’ land in any absolute sense. Only the Crown (now, the state) owns the land; land ‘owners’ in fact merely ‘hold’ the land ‘of [that is, from] the Crown’. But, under the same legal theory, a person can own an interest in the land, and the largest possible of these interests is the fee simple. The word *fee* denotes an interest that can be sold or passed on to descendants; the word *simple* denotes that the interest is not curtailed in the way that some other interests are.

But the medieval theory is just that – theory. For all practical purposes we can safely describe a person who owns the fee simple as ‘owning’ the land or (if we wish to retain an echo of the medieval theory) owning the ‘freehold’. No misunderstanding or ambiguity arises from calling a person

² See [2.47].

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[More information](#)

8 Modern Legal Drafting

the ‘owner of the land’ or the ‘owner of the freehold’. So *fee simple* could be discarded in favour of a more modern term.

Indeed, this change has statutory blessing. We have seen that the drafter of the conveyance intended to create a right in the nature of an easement. In England and Wales, s 1(2) of the *Law of Property Act 1925* provides:

The only interests or charges in or over land which are capable of subsisting or of being conveyed or created at law are—

- (a) an easement, right, or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute . . .

In the light of this provision, it would be possible to say:

Reserving for the equivalent of a freehold the right to connect . . .

[2.8] Indeed, it would be possible to go further, and simply say:

Reserving the right to connect . . .

This is because, given its context in the conveyance, the parties must have intended the easement to be a perpetual right (as distinct from one intended to last for a specified number of years). This intention is implemented without the need for formalistic phrases, because under s 60 of the English *Law of Property Act 1925* a ‘conveyance’ of land passes the fee simple, while s 205 of the same Act defines ‘conveyance’ to include every assurance of property ‘or of an interest therein’. In practice, however, simplified usage of this kind is rarely seen. Lawyers retain the technical *in fee simple* on the illusory justification that it is legally essential. They ignore as irrelevant its impenetrability to non-lawyers.

[2.9] The point of this example is that drafting a reservation of an easement requires expertise. (The case law on easements demonstrates how often that expertise is lacking.³) So, too, does drafting many other legal documents.

³ See, eg, *Eccleston v O’Keefe* [2007] NSWSC 159 at [4] (Windeyer J), lamenting the drafting of an easement to draw water from a dam: ‘somewhat extraordinary and obviously ill-thought out gobbledegook . . . cobbled together [from several precedents]’.

Few lawyers risk changes in terminology, for it puts their expertise on the line.

Conservatism

The doctrine of precedent

The common law traditionally looks backwards, seeking authority from [2.10] things past. A clear example is the principle of *stare decisis* (to stand by things decided) – lawyers defer to past judicial decisions, moving from them only reluctantly.

However, reliance on past judicial decisions – ‘precedents’, as lawyers call them – can curb innovation. The past controls the present, creating a reluctance to alter the law in general to deal with a problem in particular. The dependence on traditional phraseology and conventional forms of documents overwhelms the need to consider each transaction as specific and unique, with its own purposes and parties.⁴

Of course, some lawyers do not allow themselves to be fettered by prece- [2.11] dent. Among judges, perhaps the best-known example in modern times is Lord Denning. For him, rigid adherence to principle can inhibit justice. His 1979 book, *The Discipline of Law*, contains a chapter on ‘The doctrine of precedent’, which he concludes in his customary clear and forthright style:

Let it not be thought from this discourse that I am against the doctrine of precedent. I am not. It is the foundation of our system of case law. This has evolved by broadening down from precedent to precedent. By standing by previous decisions, we have kept the common law on a good course. All that I am against is its too rigid application – a rigidity which insists that a bad precedent must necessarily be followed. I would treat it as you would a path through the woods. You must follow it certainly so as to reach your end. But you must not let the path become too overgrown. You must cut out the dead wood and trim off the side branches, else you will find yourself lost in

⁴ *Rees v Peters* [2011] EWCA Civ 836 at [27], [28], [30] (Sir Stephen Sedley); discussed by Paul Clark, ‘The Benefit of Freehold Covenants’ [2012] *Conveyancer and Property Lawyer* 145.

10 Modern Legal Drafting

thickets and brambles. My plea is simply to keep the path to justice clear of obstructions which would impede it.⁵

Lord Denning had earlier dealt with a similar theme, but with particular emphasis on lawyers' language. In his Romanes Lecture at Oxford in 1959, entitled 'From Precedent to Precedent', he said:

You will have noticed how progressive the House of Lords has been when the lay peers have had their say, or at any rate, their vote on the decisions. They have insisted on the true principles and have not allowed the conservatism of lawyers to be carried too far. Even more so 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 be clear. They would sooner be long than short. They seek to avoid two meanings, and end – on occasions – by having no meaning. And the worst of it all is that they claim to be the masters of the subject. The meaning of words, they say, is a matter of law for them and not a matter for the ordinary man.⁶

- [2.12] These criticisms are hardly new. Getting on for 300 years ago, Jonathan Swift had expressed similar views. In *Gulliver's Travels* (1726) his hero describes a society of men in England bred from youth to prove 'by words multiplied for the purpose' that black is white and white is black 'according as they are paid':

It is a Maxim among these Lawyers, that whatever hath been done before, may legally be done again: And therefore they take special Care to record all the Decisions formerly made against common Justice and the general Reason of Mankind. These, under the name of Precedents, they produce as Authorities to justify the most iniquitous Opinions; and the Judges never fail of decreeing accordingly. . .

It is likewise to be observed, that this Society hath a peculiar Cant and Jargon of their own, that no other Mortal can understand, and wherein all their Laws are written, which they take special Care to multiply; whereby they have

⁵ Lord Denning, *The Discipline of Law* (1979) p 314. ⁶ Quoted in *ibid* p 293.