PLAIN ENGLISH IN COMMERCIAL CONTRACTS*

What is Plain English? What are its advantages in commercial contracts? What are the objections to its use? Are those objections valid? How difficult is it to draft in Plain English? Whither Plain English?

I. PROLOGUE

THE first laws that came to us were drafted in plain language. Nothing could be plainer than the Ten Commandments, possibly because of their divine authorship. However, when lawyers took over the task of drafting laws the language of the law became somewhat more complex. Hence, the call for Plain English.

The earliest exhortation to use Plain English probably came in the first epistle of St. Paul to the Corinthians where he said "except ye utter the words easy to be understood, how shall it be known what is spoken?".[1]

In 1556 the Lord Chancellor of England decided to make an example of a particularly prolix document filed in his court. First, he fined and imprisoned the litigant (not the draftsman!). Then he ordered a hole cut through the centre of the document (all 120 pages of it). Finally, he ordered the litigant to have his head stuffed through the hole, and the unfortunate fellow was then led around to be exhibited to all those attending court at Westminister Hall.[2]

In 1817 Thomas Jefferson lamented that in drafting statutes his fellow lawyers were accustomed to "making every other word a 'said' or 'aforesaid' and saying everything over two or three times, so that nobody but we of the craft can untwist the diction and find out what it means...."[3]

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[1] 1 Corinthians, 14.9 *(The Holy Bible,* King James version).

[2] *Milward* v. *Welden* (1565-6) Tothill 101; 21 E.R. 136.

[3] Letter to Joseph C. Cabell, September 9, 1817, reprinted in A. Bergh (ed.), *17 Writings of Thomas Jefferson* (1907).

II. WHAT IS PLAIN ENGLISH?

Some of the controversy about Plain English possibly stems from the fact that there is no universal agreement on what is meant by Plain English. I declare myself (with some reservations) a born-again 'Plain Englishman'. By the term "Plain English" I mean the expression of concepts in clear and direct language and in as simple a manner *as circumstances permit.* The last three words are important because simplicity is a subjective and relative term. Some contexts may permit concepts to be expressed in the simplest of language. Others will require a more complicated sentence structure that may still be properly classified as Plain English.

However, in broad terms, Plain English has the following features:-

- the omission of surplus words ("null and void", "full force and effect", "last will and testament");
- the avoidance of archaic words which serve to annoy lay readers without any gain in legal meaning ("said", "hereto", "hereinbefore");
- the use of familiar words in preference to grand-sounding synonyms or phrases ("if" instead of "in the event of", "before" instead of "prior to");
- the use of base verbs in preference to nominalizations ("object" instead of "make objection");
- the use of short sentences in preference to long ones;
- the use of simple sentence structure;
- the use of the active tense in preference to the passive;
- the use of the present tense in preference to the future;
- the use of definitions;
- the use of visual aids to comprehension such as captions, indexes, size of print, spacing, paragraphing, indentations and helpful document layout.

Above all, Plain English is reader-friendly.

My concept of Plain English differs somewhat from that of other writers. A complaint frequently made against lawyers (with some justification) is that they overwhelm the reader with clauses to cover every contingency, however unlikely. That may well be a valid criticism of drafting technique but it would not, in my view, be a criticism on Plain English grounds. You can only criticise a document on Plain English grounds when it can be re-written in simpler English *without having to go back to the client for fresh instructions.* To omit a substantive provision, however remote the contingency provided for, would require client's

instructions. Plain English is therefore about style not substance, although a simpler style often leads to simpler substance. If this concept is agreed to, then the message of Plain English should be easier to propagate and easier to accept.

III. Mandatory Plain English

The Plain English movement has developed great momentum in the United States where legislation requiring the use of Plain English has been a common feature over the last decade.[4] The first broad state Plain English legislation was New York's Sullivan Law enacted in 1977. The present version of this law prescribes that all consumer contracts must be:-

- written in a clear and coherent manner using words with common and everyday meanings; and
- appropriately divided and captioned by its various sections.

Similar laws were later enacted by many other states in the United States. In general, these laws are of three types:-

- those that prescribe subjective standards of audience understanding *(e.g.* the New York law);
- those that prescribe objective tests of the documents themselves *(e.g.* those which adopt the Flesch test or the Gunning Fog Index);[5] and
- those that prescribe subjective standards with objective guidelines (by presenting subjective general standards and then presenting objective detailed tests but only as guidelines).

[4] A landmark in the Plain English movement in the United States came in 1978 when President Jimmy Carter issued Executive Order No. 12044 directing that Federal agencies should draft regulations in Plain English. The Order was revoked by President Ronald Reagan by Executive Order 12291. It is rumoured that someone told him the Carter Order was an attempt to introduce "Plains English" into the U.S. Government.

[5] THE FLESCH TEST

Multiply the average sentence length by 1.015. Multiply the average word length by 84.6. Add the two numbers. Subtract this sum from 206.835. The balance is your readability score. The scale shows scores from 0 to 100. Zero means practically unreadable and 100 means extremely easy. The minimum score for Plain English is 60, or about 20 words per sentence and 1½ syllables per word. Conversational English for consumers should score at least 80, or about 15 words per sentence and 1 1/3 syllables per word.

THE GUNNING FOG INDEX

The scoring system of this test requires adding the average number of words per sentence and the percentage of words in the sample with three or more syllables. The resulting figure is then multiplied by 0.4. The result of that multiplication is the Fog Index (disregarding any figure to the right of the decimal). The Fog Index is supposed to correspond to the number of years of schooling someone needs to understand the tested piece of writing. Proponents of this test recommend that consumer documents have a Fog Index no higher than 10, the Fog Index of *Time Magazine.*

The Flesch Test and Fog Index have been criticised as being purely mechanical criteria that do not measure comprehensibility. These formulae have therefore lost favour recently as being of significant assistance in encouraging Plain English.

The Plain English movement has also taken root in various countries of the Commonwealth, *e.g.*:-

— Australia, where in 1987 the Law Reform Commission of Victoria presented a major report on *Plain English and the Law* which has won acclaim and support in other parts of Australia;

– the United Kingdom, where the British Government (including Mrs Margaret Thatcher personally[6]) has declared its support for the Plain English movement;

– New Zealand, where the Government (including Mr Geoffrey Palmer personally[7]) has likewise declared its support.

IV. ADVANTAGES OF PLAIN ENGLISH

The advantages of adopting a Plain English style in commercial contracts are basically the same as those from having a Plain English style for any form of documentation. They include the following:-

(a) Saving in time, certainly for the reader, and possibly for the draftsman as well.

(b) Documents drafted in Plain English should lead to greater comprehension not only by clients but by lawyers themselves. The advent of the word processor has led to unthinking reproduction of and blind reliance on traditional forms, many of which are drafted in language from a bygone generation and sometimes based on doctrines which are no longer the law. Drafting in Plain English forces the draftsman to concentrate on expressing what he wants to say. If he is reasonably successful in this, it should enable the reader to understand the document more easily. A client who understands the contract drafted for him will also be better able to remember and comply with its terms.

(c) Arising from the greater comprehension of the document, there should be greater client rapport established as a result of Plain English drafting. Those of us who are in private practice well know the situation when clients come and say that we have produced a wonderful legal document but:-

– they have difficulty in understanding what we have said; and

– what we have drafted is frightening the other side to the contract and whether we could make the document shorter and simpler.

[6] "It is no exaggeration to describe Plain English as a fundamental tool of good government" (Foreword to *Making it Plain).*

[7] Paper on "Writing and Reading the Law" presented at a seminar on *Legislation and its Interpretation,* held in Wellington, New Zealand, March 1988.

Ultimately, client rapport must lead to an enhancement of the image of the lawyer.

V. OBJECTIONS TO PLAIN ENGLISH

All of this sounds so obvious and logical. But, nonetheless, there is and will continue to be apathy or resistance to adopting a Plain English style of drafting in commercial contracts. Some of the reasons given for this are set out below:-

(a) In commercial contracts the parties involved are usually well educated businessmen who are sophisticated in legal matters. There will, therefore, be less need to use Plain English because the parties would be more familiar with the language of the law. Indeed, in a complicated commercial contract, it is often not possible to express complex commercial concepts in simple English.

(b) Contrary to theory, it actually takes more time to draft in Plain English than in traditional legal English. This is because most lawyers draft commercial contracts based on precedents. Precedents which use overly technical and legalistic language are often those which are tried and tested because they include the main legal points which should be inserted in a commercial legal document of that nature. Most lawyers know that to draft a new document from scratch would inevitably take longer than starting from a draft based on a precedent.

(c) Precedents should not be departed from except to the extent the actual terms of the deal deviate from the norm envisaged by the precedent. In other words, no change should be made except for a good reason. The reasons in favour of Plain English are not sufficiently compelling to justify abandoning or modifying established precedents.

(d) The law involves technical terms and concepts and these cannot easily be translated into Plain English.

(e) It is not safe to draft in Plain English until we know how courts react to Plain English. Words in common usage often have an open texture, and this may lead to ambiguity and uncertainty.

(f) Fear of the unknown.

Lawyers are not known for innovation; indeed, it is not usually considered a compliment to say of a lawyer that he is innovative. So the first fear factor is peer pressure. There is simply no incentive to the average lawyer to draft in Plain English when everyone around him is drafting in traditional legal English.

The second fear factor is the concept of defensive law. Why take risks and expose yourself to a possible claim for negligence? It requires a brave lawyer to express in his own language what the precedent has expressed in traditional legal language. Thus Carl Felsenfeld and Alan Siegel, in their book *Writing Contracts in Plain English,* have commented that "[f]rom early in a lawyer's training ... timidity becomes synonymous with professionalism".[8]

This leads to the third fear factor, which is the unspoken fear that the lawyer has really not understood the precedent. What is worse, he may not have understood the underlying legal reasons for the precedent. This happens when a lawyer is drafting in a specialist field with which he is not fully familiar. The prudent course is therefore to rely on a form drafted by a specialist.

VI. Are The Objections Valid?

A. Lack of Need in Commercial Contracts

It is true that the movement for the use of Plain English in contracts (particularly Plain English legislation) has primarily been directed to consumer contracts. The Plain English movement in this regard has simply been part of the general movement towards consumer protection in contracts such as personal loan documents, hire-purchase transactions and sale contracts for consumer goods. In these situations the inequality of bargaining power and the lack of time available to the consumer to seek legal advice have led to demands for the mandatory use of Plain English.

The need for Plain English is perhaps less in situations where both parties (often business corporations) are represented by solicitors. The deal itself may also be more complex than consumer transactions which follow a standard pattern. Felsenfeld and Siegel in fact concede that a drafting style in commercial contracts which provides for all contingencies (inevitably lengthening the document) can be justified.[9]

Nonetheless, I would argue that it is not helpful to draft in terms which are not readily comprehensible to the client. It is a false assumption that lawyers achieve a greater respect because they are apparently fluent in writing language which the layman cannot easily understand. The image of the profession as a whole suffers when the public (including the business community) perceives us as using bombastic, repetitive and unclear language. We do ourselves no good by the use of words which supposedly add precision or weight to drafting but in reality seldom have any real significance ("hereby", "hereunder", "said", "aforementioned", "commencing", "elect", "indebtedness"). These words could be omitted or replaced with language in more common use.

[8] (1981), p. 56.
[9] *Ibid.,* at pp. 55-7, 59.

Language can be dignified without being ponderous and simple without loss of clarity or precision.

B. Lack of Time

Again I have some sympathy with this argument. The first attempts at drafting documents in Plain English will inevitably take a longer time than the traditional style. As most lawyers charge on the basis of time, how would a lawyer justify charging a higher fee than usual for a document which is shorter than usual? The answer is that the profession will have to endure a period of transition where there will be inconvenience and possibly a certain measure of financial loss caused by the change in drafting style.

However, with the best will in the world, a lawyer will not be able to switch styles overnight. It is more likely that the change in drafting style will only be achieved gradually over a long period, with each document drafted moving closer to the desired Plain English form. The problem of time and cost should not therefore be as prohibitive as might first appear.

Also, the extra time spent on drafting in Plain English can be offset by the saving in time from not having to explain obscure language to the client.

C. Lack of Precedents

I acknowledge that, until there is a substantial body of Plain English precedents developed, wide scale adoption of Plain English in drafting commercial contracts will not be a reality. The problem is obvious and the solution clear. Publishers will have to be persuaded to commission specialist editors to draft precedents in Plain English. Given time this is certainly possible and this will solve most of the other difficulties raised.

How has the challenge of Plain English been met by legal publishers? It is interesting to note the attitudes taken by the three leading precedent books for commercial lawyers:-

(1) *Butterworths' Encyclopaedia of Forms and Precedents* (hereinafter referred to as *Butterworths' Forms)* states in its Publishers' Note:-[10]

> "More modern coverage has been complemented by a more modern approach to style and layout. The presentation of the forms and precedents themselves has been brought into line with accepted modern practice. Archaic language has been eliminated, or at

[10] (5th ed., 1985), Vol.1, p. xi.

least reduced, wherever possible so that each form and precedent may be readily understood by practitioner and client alike."

(2) *Longman's Practical Commercial Precedents* states in its Introduction that "[n]eedless verbiage such as 'hereinafter called', 'of the first part' has been avoided."[11] The precedents are concise, clear and comprehensive. This is because commercial drafting is aimed not merely at the commercial lawyer on the other side with all his training but, even more importantly, at the client himself so that he may understand his obligations and need not be compelled always to seek explication from his lawyer.

(3) *The Australian Encyclopaedia of Forms and Precedents* has a helpful Introductory Note on drafting techniques, where many of the principles of Plain English are discussed at length, but the note concludes:-[12]

"The editors realise that those who will make use of this encyclopaedia will come from different generations and hold different philosophies. Although this note on styling has perhaps tended towards favouring the style taught in the practical legal training courses of the 1980s, a mix of forms has been kept so as to have material available for those users who do not appreciate this style. Indeed, in accordance with conveyancing etiquette, the editors have not altered a contributor's draft merely because the contributor has adopted either the traditional or new style, so that the various titles in this encyclopaedia may, despite this preliminary note, from time to time defy its recommendations".

D. Technical Terms

I agree that certain technical terms are not easily translatable into Plain English. But to acknowledge this is not to admit that it is impossible to use Plain English in commercial contracts.

First of all, we must be careful to distinguish terms of art, which it would be unsafe to paraphrase, and words which are simply traditional. A term of art is a short expression that (a) conveys a fairly well-agreed meaning and (b) saves the many words that would otherwise be needed to convey that meaning.[13] For example, "hearsay" is a term of art but not "suffer or permit".

Secondly, if we leave aside conveyancing documents, the average commercial contract does not require extensive use of technical terms. I grant you that "chose in action" cannot be simply expressed, but how often does that term occur in a commercial contract? It is far more common

[11] (1986), Vol. 1, p. A1/2.
[12] (3rded., 1988), Vol. 1, p. 3063.
[13] Wydick R. C., *Plain English for Lawyers* (2nd ed., 1985), pp. 19-20.

to refer to specific choses such as debts, contractual obligations or rights of action. It is these rights which are more likely to be the specific subject of contemplation by the parties to the commercial contract rather than the more abstract concept of a chose in action.

In any event, Plain English does not mean that all contracts are to be written in schoolboy English. As Felsenfeld. and Siegel. put it:-[14]

> "The Plain English movement is not designed to revolutionize the language of the law. Terms of art, used in professional settings by those who understand them, are invaluable. In this context, the issue of communication to lay parties is generally irrelevant."

If a technical term has to be used it will be used and the result can still be Plain English, *e.g.* the "Rule of 78" in hire-purchase transactions, or the rule against perpetuities in trust deeds.

I have some difficulty in understanding the argument that to interfere with a precedent containing words which may have been judicially interpreted is to run the risk of sailing into the sea of uncertainty.

In the first place, the number of terms in contracts which have been definitively interpreted by a court (as opposed to having been interpreted for the purposes of a particular document in a particular case) is relatively small. For example, the phrase "tenant's fixtures" has been mentioned often in cases but I have yet to come across a comprehensive judicial definition.

In the second place, I wonder how many draftsmen:-

- are actually aware of the cases where the precedents they use have been judicially interpreted; and
- actually rely on that judicial *dicta* in guiding their drafting.

I suspect that many solicitors rely on precedents in the vague expectation that certain key words have been judicially interpreted without having considered (or re-visited) the authorities themselves before putting pen to paper. If therefore a draftsman adopts a precedent without knowing (or remembering) what the Courts have said about the words used in the precedent:-

- of what value is the precedent to the draftsman? and
- should the draftsman be using a precedent where judicial interpretation may in fact differ from his anticipated interpretation?

E. Judicial Approach to Plain English

I can to some extent appreciate the concern about how judges will receive contracts drafted in an unfamiliar language – Plain English. Will they find Plain English too vague or imprecise to interpret it in the way the

[14] *Op. cit. supra,* note 8, p. 173.

draftsman intended? Litigation lawyers will tell you that the test of a good contract from the Plaintiff's point of view is one which will enable the Plaintiff to obtain summary judgment. It is at this level that the businessman will judge the quality of his lawyer's drafting. The client wants drafting to be so clear in support of his intention that no opponent can advance a triable issue on the interpretation of the words used. Winning the case early is the name of the game. Failure to achieve summary judgment on a point of interpretation may to some extent demonstrate inadequate drafting. When summary judgment is not awarded, more often than not commercial considerations will require the case to be settled before the trial.

To recognise this is not to admit that Plain English will create more problems of interpretation in the Courts than traditional legal English. If a document is properly drafted in Plain English, it should, by being easier to read and understand than the traditional form, be open to fewer arguments about its meaning. Words likely to create ambiguity or uncertainty can and should be defined. Disputes over the interpretation of contracts are not usually over the meaning of words or phrases but about situations which were not foreseen by the draftsman or the parties. Those disputes have occurred even with the lengthiest and most formally drafted of commercial contracts, and will continue to occur even with Plain English contracts. Failure to anticipate a particular contingency is a matter of legal substance not drafting style.

The judiciary itself can look to the example of the former Master of the Rolls, Lord Denning. His judgments have covered practically every aspect of law, but have always been models of Plain English without ever being accused of imprecision or lack of depth. To quote his own words:-[15]

> "At one time the judges used to deliver long judgments covering many pages without a break. I was, I think, the first to introduce a new system. I divided each judgment into separate parts: first the facts; second the law. I divided each of those parts into separate headings. I gave each heading a separate title. By so doing, the reader was able to go at once to the heading in which he was interested; and then to the passage material to him."

F. *Fear Factors*

(1) *Peer pressure*

The short answer to this is that someone must take the first step. Someone already has, which is why we are having this seminar today. The Plain English movement has attained sufficient momentum for mandatory Plain English legislation and government encouragement to have taken

[15] *The Closing Chapter* (1983), p. 64. A succinct and witty section on "Plain English" appears at pp. 57-65 (Section Three).

place in countries such as the United States, the United Kingdom, Australia and New Zealand. Attitudes will need to be changed but hopefully they are changing.

(2) *Defensive law*

For the lawyer afraid to depart from the established precedent, the only solution will be for new model forms of commercial contracts to be established. When this is done the defensive lawyer can safely rely on the Plain English *Butterworths' Forms* without fear of criticism as to his language. (He may be criticised for misuse of precedents, but that is another story.)

(3) *Lack of comprehension*

This is not a problem of Plain English but a lack of legal education. However, the use of Plain English will have this advantage. A non-specialist might previously have adopted a specialist precedent without fully understanding its implications and underlying rationale. Where a Plain English precedent is used the non-specialist would have a better idea what the clause actually means.

VII. Necessary Obscurities

There are of course occasions where Plain English drafting has deliberately to be avoided by the draftsman. The commercial draftsman drafts with different objectives from a parliamentary draftsman. On the one hand, he must protect his client and, on the other, his drafting must be acceptable to the other side. There are times, regrettably, when a commercial draftsman has to clothe his true intentions with some degree of obscurity so that the other side does not appreciate the full implications of the clause. This practice is characterised by Wydick as "intentional artful vagueness". For example, a draftsman might deliberately slip into the passive voice when he wants to establish an obligation and leave his client a fighting chance to contend that the obligation is on the other side. *The Australian Encyclopaedia of Forms and Precedents,* after discussing Plain English principles of drafting in its Introductory Note, makes this comment:[16]

> "Whilst the thrust of the above has been that if a document can be made simpler without sacrificing precision that should happen, there are some cases where one cannot avoid complication without sacrificing the validity of the document or the client's interest."

On other occasions, vague words or phrases are deliberately chosen as a compromise between opposing draftsmen, the best example being

[16] (3rd ed., 1988), Vol. 1, p. 3062.

the use of the term "reasonable". There are therefore occasions where a draftsman's English has to be less than plain. But as Wydick comments:[17]

> "Vagueness is only a virtue if it is both necessary and intentional. Knowing when to be vague and when to press for more concrete terms is part of the art of lawyering".

VIII. How Difficult is it to Draft in Plain English?

In commercial transactions which do not involve a conveyancing element it is in fact relatively easy to draft in Plain English. Where few technical legal concepts are involved the translation to Plain English could be achieved almost overnight by striking out "said", "hereof" and other like words. The result should be an easily comprehensible commercial document. A good example would be a joint venture agreement, which usually sets out the terms of understanding in commercial terms with few clauses that need to be written in legalese. An agreement for the sale and purchase of shares is another example. The agreement itself is usually simple and relatively short. What makes life difficult are usually the warranties which the Purchaser's solicitors have drafted for the Vendor. Some solicitors consider it a testament to their skill and foresight to be able to draft fifty or more warranties. That may in fact be ultimately counter-productive because the vendor may walkaway from the transaction in disgust. However, from the perspective of Plain English, a document with fifty warranties can still be one that complies with the principles of Plain English. Plain English is not concerned with what you say, only with how you say it. You may criticise a document for having a multiplicity of contingencies, but the contingencies could still be expressed in Plain English.

Modern banking documents are often long but can still come within acceptable criteria of Plain English. I am excluding from discussion those clauses such as consolidation, set-off, the maintenance of security, the rule in *Clayton's Case*[18] and provisions relating to guarantors and bankruptcy, all of which involve conveyancing concepts and require separate discussion.[19] Where banking documents deal with the terms of the loan itself, they are normally expressed in reasonably Plain English. Warranties by the borrower and event of default clauses can be lengthy but again tend to be a multiplicity of contingencies rather than expressed in unclear or convoluted language.

A comparison of the same standard agency agreement in the third, fourth and fifth editions of *Butterworths' Forms* is instructive. It shows that the forms in the third edition (which were drafted in 1945) would

[17] *Op. cit., supra,* note 13, at p. 52.
[18] (1816) I Mer. 572; 35 E.R. 781.
[19] But there is no reason why conveyancing documents cannot be drafted in Plain English. See the Law Institute of Victoria's Plain English form of mortgage over business. (Appendix 5 to the Law Reform Commission of Victoria's Report on *Plain English and the Law.*)

probably not have offended modern day proponents of Plain English except in some minor aspects. The language of the 1945 precedent is reasonably straightforward, without the use of too many arcane or technical terms, except where its use cannot be avoided, such as the term *"del credere"*. The form of the agreement remains much the same in the fourth edition. Even the current form in the fifth edition (drafted in 1985) retains much of the original style. However, the substance of the precedent has been expanded to take into account the complexity of current commercial requirements. What is interesting about the current precedent is the manner in which it is set out, in its use of:-

- decimalised numbering for clauses;
- captions;
- definitions;
- tabulations and indentations;

and its avoidance of the dreaded "whereof" and "said".

While the total number of clauses has been increased, the actual clauses themselves are in general shorter than the corresponding versions in previous editions. The language is formal, as befits a commercial legal document, but not legalistic. This illustrates the point that Plain English does not necessarily mean that the document becomes shorter. What it means is that the document becomes more readable and thereby clearer without the loss of precision.

Good legal writing does not read as though it had been written by a lawyer. In short, good legal writing is Plain English.

IX. WHITHER PLAIN ENGLISH?

Plain English, as the concept is properly understood, is clearly desirable and achievable. How do we advance its cause? I have these observations:-

(a) Parliamentary draftman must set the lead. Commercial draftsmen have for centuries followed the example of legislation in drafting commercial documents because they have been taught that parliamentary drafting is the correct way to draft. Until we have Plain English statutes the climate will not be right for Plain English in commercial documents.

(b) In order for a commercial lawyer to adapt to a Plain English style of drafting he needs Plain English precedents for all the standard commercial transactions. A good start has been made by the current editions of the commercial precedent books but these modern precedents will take some time before they are widely accepted. Acceptance will be slower in those Commonwealth countries which have not yet appreciated the importance of Plain English. Even in Singapore some lawyers prefer the fourth edition of *Butterworths' Form* (or even the third) to the fifth. Firstly, they are more familiar with the drafting style of the older edition. Secondly, the newer precedents often reflect legal changes in the

United Kingdom which have not yet found their way to Singapore. So we continue to rely on relatively ancient precedents.

(c) Lawyers will need to study their existing precedents so as to understand the exact legal meaning and significance of the time-hallowed phrases and words they have been using all these years. Without such understanding they cannot adapt with confidence to Plain English. They will always be looking over their shoulders for the security blanket of the familiar precedent. They will not really know if they would lose any legal protection by adopting modern and simpler language in place of the archaic and complex.

(d) Draftsman will have to pay more attention to planning the document before commencing drafting. Documents should be built from the ground up provision by provision, not merely adapted from some other form. There must be a reason for including every item. "Because it has been there before" is not reason enough. A closer analysis of the substance of the transaction, using precedents as an aid, will make drafting in Plain English easier.

(e) All lawyers should have on their desks a framed list of drafting commandments. This will include the most basic rules of Plain English drafting and in particular the 20 or so words or phrases that Plain English draftsmen must avoid. Word processors can be programmed to reject words on the Plain English "hit list". We may therefore hope to eliminate by volition what the Maryland legislature could not (or would not) achieve by prescription.[20]

(f) With the growing use of English as the *lingua franca* for international business transactions, lawyers will be asked to draft contracts for use in countries where English is not the first language. When you work with (say) Vietnamese, Thai or Indonesian lawyers (let alone their businessmen) your language has to be pared down to Plain English or the transaction will simply not go through. So working with non-native speakers of English will help to develop Plain English.

[20] In Maryland, the Maryland House Bill 1900 (1980) actually contained a provision that every consumer contract must not contain any of the following words or phrases:-

I Aforesaid
II Forthwith
III Herewith
IV In accordance with
V Hereinafter
VI Hereinabove
VII Hereinbefore
VIII Notwithstanding
IX Pursuant to
X Whereas
XI Witnesseth

The Bill was not passed.

(g) Above all there must be a collective will within the profession throughout the Common Law world to consciously adopt Plain English at every level of legal drafting. In the commercial context this will extend beyond contracts to prospectuses, circulars to shareholders, legal opinions and letters. Law societies, legal educational institutions, even senior partners of law firms will have to send out the message that Plain English is beautiful. The profession must set Plain English as a goal and give moral support by the public acceptance of its principles. It must also give tangible assistance to practitioners by developing more and more Plain English precedents. The practitioners in turn must respond by using the new precedents and consciously adapting their style.

X. EPILOGUE

I end with the advice of the Elizabethan scholar, Roger Ascham, who wrote over 400 years ago:-[21]

> "He that will write well in any tongue, must follow this counsel of Aristotle, to speak as the common people do, to think as wise men do; and so should every man understand him, and the judgment of wise men allow him."

MICHAEL HWANG*

[21] Cited in Gowers *The Complete Plain Words* (2nd ed., 1978), p. 313.

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