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Plain Language: Drafting and Property Law

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A. Introduction

My topic is "Plain language: drafting and property law". In it, I want to say something about plain language in law generally. But I want to look specifically at property law – for that is an area of law replete with complex language and arcane terminology. Perhaps these characteristics should not surprise, given that it is also one of the oldest areas of law, and one in which the legal profession has long had a professional monopoly.

Let me begin with a quote from Lord Justice Saville, in a 1994 English case, *Trafalgar House Construction Ltd v General Surety and Guarantee Co.*[1] At issue was the construction of a contractor's performance bond. Lord Justice Saville said:

> But those who seek and those who provide securities for the performance of commercial obligations … would save much time and money if in future they … set out their bargain in plain modern English without resorting to ancient forms which were doubtless designed for legal reasons which no longer exist.

That case went on appeal to the House of Lords.[2] Lord Jauncey of Tullichettle said he found

> great difficulty in understanding the desire of commercial men to embody so simple an obligation in a document which is quite unnecessarily lengthy, which obfuscates its true purpose, and which is likely to give rise to unnecessary argument and litigation as to its meaning.

Well, of course, commercial men do not normally desire to embody their obligations in documents that are lengthy or obfuscatory, or that are likely to give rise to litigation over meaning. It is the lawyers who do this.

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[1] (1994) 10 Const LR 240.

[2] [1996] AC 199.

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B. Why Use Plain Language in Law?

To answer this question, we should begin by defining 'plain language' in law, or (as it is usually called) 'plain legal language'. By 'plain language', I mean language that is clear and idiomatic. For those who write in the English language, it is modern, standard English. It is language whose chief aim is to communicate, not impress. It may use technical words and phrases where its intended audience can be expected to understand them; but it avoids using jargon for its own sake, and generally uses language that can be understood on a first reading by persons of average reading ability.

Contrary to some opinions, 'plain language' in this sense does not connote 'dumbing down' the language – as if it were a kind of Janet-and-John (or as the Americans say, Dick-and-Jane) style of writing that panders to the lowest common denominator. Quite the contrary: in skilled hands, plain language employs the techniques of the very best writers, to produce prose that communicates directly and effectively with its intended audience. In the legal context, plain language uses the same techniques to produce prose that communicates precisely and efficiently to those who are affected by statutes, documents, advices, letters, and other kinds of legal writing.

In many countries, the plain language 'movement' in law is well-established. In its modern phase, it has been going for over 25 years. In countries such as Australia, New Zealand, and Canada, legal practitioners and parliamentary drafters now feel no compunction in boasting about the 'plainness' of their drafting. My impression from working in England for a number of years now, has led me to two conclusions. One is that English barristers and solicitors are, on the whole, quite some way behind their counterparts in some other countries, but that change is on its way. The second conclusion, in contrast to the first, is that Parliamentary drafters here are, on the whole, a long way ahead of their colleagues in the private legal profession. Last month I was privileged to attend a lecture given by Sir Geoffrey Bowman, First Parliamentary Counsel, at Magdalen College, Cambridge. It was clear from what he said that legislative drafters are very much alive to the need for clear, direct, simple drafting. If I recollect his words, he defined his aim as a drafter to produce legislation that is "as clear, direct and simple as the subject matter will allow."

That leads easily into my topic: plain language and property law. In order to consider the appropriateness or otherwise of plain language in law, I will start by contrasting the 'plain' style to the 'traditional' style of legal drafting. This will show up the contrasts between the two styles; it will also (in my view) show up deficiencies in the 'traditional' style. Then, I will consider the assumptions that lie behind the use of plain language in legal drafting. This will help test the suitability of plain language to property law.

By way of background, let me make an obvious point: when the modern plain language movement was in its infancy, many of the assumptions behind the use of plain language were untested. Its supporters simply assumed that plain language was a 'good thing'. There was very little empirical evidence to support their

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assumptions. Now, however, I think we have the evidence. I want to say a little about that evidence – but first, let us look briefly at traditional legal drafting.

C. Traditional Legal Language

For the purpose of this lecture, I will take my examples from the area of property law; but we can find similar examples in any area of law. I think we will see that the examples illustrate a number of regular features – verbosity, archaic language, eccentric word order, complex grammatical structures, and sentences of excruciating length.

I. Private Legal Documents

Leases often provide 'good' examples of traditional legal drafting. Let me illustrate by means of a 'repairing covenant'. Suppose you want to impose on a tenant the obligation to repair the leased premises. You could write: "The tenant shall repair the premises" (or, preferably, "The tenant must repair the premises"). There is no doubt that, legally, this would suffice. 'The premises' would be defined elsewhere in the lease. There would be no need to list the various parts of the premises, because the term 'the premises' would include all parts of the premises. And there would be no need to expand on the term 'repair', as it is an ordinary English word, whose meaning when used in leases has been elucidated by many judicial decisions. Yet compare that wording – "The tenant must repair the premises" – with the verbal excesses that appeared in the 'repairing' covenant that gave rise to litigation in *Ravenseft Properties Ltd v Davstone (Holdings) Ltd*:[3]

> [The tenant shall] when where and so often as occasion requires well and sufficiently ... repair renew rebuild uphold support sustain maintain pave purge scour cleanse glaze empty amend and keep the premises and every part thereof ... and all floors walls columns roofs canopies lifts and escalators ... shafts stairways fences pavements forecourts drains sewers ducts flues conduits wires cables gutters soil and other pipes tanks cisterns pumps and other water and sanitary apparatus thereon with all needful and necessary amendments whatsoever ...

This is rampant verbosity. It makes the clause far more difficult to read than its subject matter requires. Probably, the verbosity was prompted by a desire to be legally precise. If so, it failed, because the clause still ended up in court in a dispute over meaning. This demonstrates one of the great misconceptions of traditional legal drafting – that somehow a complex, traditional style is more precise than modern, plain language.

Lord Hoffmann once called this style of legal drafting 'torrential'.[4] In leases it is nothing short of endemic. Commercial leases commonly run to 50 or 60 pages – even more sometimes – making them impossible for lay readers to comprehend

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3 [1979] 1 All ER 929.

4 *Norwich Union Life Insurance Society v. British Railways Board*, [1987] 2 EGLR 137, at 138.

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and forcing lawyers to trawl through reams of turgid prose to advise clients about the obligations the documents contain.

Of course, the problem is not confined to leases. Mortgages are just as bad – perhaps worse. One of Australia's leading banks used until recently a standard mortgage that contained a sense-defying clause of 763 words; the clause contained two commas, one semi-colon, three sets of brackets, but no other punctuation.[5] Not to be outdone by this Australian leviathan, a New Zealand bank's former standard guarantee featured an entirely punctuation-less sentence of 1299 words; and the same document had an average clause-length of 330 words. As the great English conveyancer, Davidson, once wrote: the legal profession prefers "to seek safety in verbosity rather than in discrimination of language".[6]

To some, these drafting feats may evoke admiration: after all, it takes skill to write a grammatically-perfect sentence of 1299 words. But for most readers the drafting serves only to bewilder. Sometimes it bewilders even the drafters themselves. In a 1992 Australian case, a bank tried to enforce a guarantee against a customer. The customer had signed the guarantee, in the bank's standard form. One of the customer's defences was that some clauses in the guarantee were meaningless. In the end, the defence failed; but not before the bank suffered great embarrassment. The guarantee form was so tortuous that even the bank manager, when challenged in the witness box, had to admit that he could not understand some of the clauses; and matter got worse – for, when challenged by the judge, nor could the bank's counsel.[7]

II. Statutes

Many statutes – particularly older statutes – are drafted with an egregious verbosity. When coupled with archaic language, the result is a heady mix that tests both concentration and knowledge. The result is incomprehensible to all except hardened lawyers. You will all have come across plentiful examples. To me they call to mind Lord Justice Harman's experience on reading the English Housing Act 1957:

> To reach a conclusion on this matter involved the court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a Slough of Despond through which the court would never drag its feet, but I have by leaping from tussock to tussock as best I might, eventually, pale and exhausted, reached the other side.[8]

If you will indulge me, let me take two examples. Consider, for example, s 141 of your Law of Property Act 1925 (UK):

> 141(1) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the

[5] Memorandum filed in New South Wales Registrar-General's Office No V581852, clause 1(g).
[6] Davidson's Conveyancing Precedents, Vol. 1, at 67 (1860).
[7] *Houlahan v. Australian and New Zealand Banking Group Ltd*, (1992) 110 FLR 259.
[8] *Davy v. Leeds Corporation*, [1964] 3 All ER 390, at 394.

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> lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and without prejudice to any liability affecting a covenantor or his estate.

This provision has a long and distinguished history. It can be traced back to the 'grantees of reversion' legislation in the reign of Henry VIII, proceeding through various transmogrifications, and reaching its current form in mid-Victorian times. From there it spread, usually verbatim, to all parts of the common law world. Yet its meaning is by no means obvious, even on repeated reading. To a purchaser of tenanted property, wanting a simple answer to a simple question "can I enforce the covenants the tenant made with the original landlord?", the provision must be utterly incomprehensible. I suspect that it is incomprehensible to many lawyers also, who will simply act on the received knowledge that a tenant's covenants "run with the land" if they "touch and concern" the land.[9] In fact, as some courts have pointed out, this provision quite likely goes beyond the common law, and makes all tenants' covenants run with the land, regardless of whether they touch and concern the land.[10] The section's dense and technical verbiage hides that potential consequence.

Another example is the four so-called 'covenants for title', implied into old system conveyances, mortgages and other deeds in a statutorily-enshrined formulation. Here in England you have had the good sense to reform both the formulae and the concepts. Back in Australia we still use the original version. Let me remind you of the terms of the traditional covenant for "further assurance":

> And further, that *the person therein expressed to convey as beneficial owner*, and any person therein expressed to be conveying by his direction, and every other person having or rightfully claiming any estate or interest in the subject-matter of the conveyance, other than an estate or interest subject whereto the conveyance is expressly made, by, through, under, or in trust for the person therein expressed to convey as beneficial owner, or by, through, or under any person therein expressed to be conveying by his direction, or by, through, or under any one through whom the person therein expressed to convey as beneficial owner derives title, otherwise than by purchase for value, *will from time to time* and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, *execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is expressed to be made*, and to those deriving title under him, subject as, if so expressed, and in the manner in which, the conveyance is expressed to be made, as by him or them, or any of them, shall be reasonably required. (One sentence, 223 words)

I have added italics to indicate the key elements in this sesquipedalian monstrosity. They seem scattered at will, separated by embedded clauses and sub-clauses. Without putting too fine a point upon it, the drafter has broken all the rules of good writing. In fact, all four of the covenants for title are exceptionally contorted. One

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[9] *Spencer's* case, (1583) 5 Co Rep 16a; 77 ER 72.

[10] *Dalegrove Pty Ltd v. Isles Parking Station Pty Ltd*, (1988) 12 NSWLR 546, at 555. *See also Panizza v. Auscott Ltd*, (1990) NSW Conv R 55-511, at 58,816-7 (leaving the question open).

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even lacks a key verb – a grammatical infelicity obscured by the sheer weight of words. The English Court of Appeal has castigated the covenants as a "jungle of verbiage".[11] They are caricatures of legal language, defying understanding. Yet they have spread to all parts of the common law world, like legal algae bloom, and survive wherever 'old system' (or 'unregistered') title survives. Perhaps their verbal eccentricity can be put down to their antiquity: they were drafted by Sir Orlando Bridgman in the 1660s and have come down to us virtually unaltered.[12] This illustrates how precedents are apt to preserve not only yesterday's legal concepts but also yesterday's legal language.

D. The Assumptions Behind Plain Legal Language

I hope I have said enough to persuade you that traditional legal language is not all that its proponents make it out to be. This brings me, then, to consider the assumptions that lie behind drafting legal documents in plain language. I think there are four key assumptions. Let me consider them one by one.

I. Assumption 1: That It Is Possible Effectively To Express Legal Concepts In Plain Language

This first assumption is a central one: that it is possible to express legal concepts in plain language, without loss of certainty and precision, even in areas of law that are complex.

1. Statutes

The validity of this assumption is, I think, borne out by evidence from several different – and difficult – areas of law. One is corporate law. In Australia, much of our corporate law (Corporations Act, 2001) is now drafted in plain language – with no avalanche of litigation over meaning. This gives the lie, I think, to those who would say "complex law requires complex drafting". Another example is taxation law. In a study back in 1991, the Victorian Law Reform Commission tested the comprehensibility of part of the then-current Australian income tax legislation. The result? To understand the legislation required 12 years of schooling plus 15 years of university – 27 years' education in all.[13] But this is now changing. Australia now has tax statutes drafted in language that is brutally plain; New Zealand is following suit; and the UK government has established a tax rewrite program to introduce plain language taxation laws.

[11] Slade LJ in *Meek v. Clarke* (unreported, 7 July 1982).
[12] C. Harpum, (1995) *Clarity 33*, at 24.
[13] *See Australian Financial Review*, 27 September 1991, at 19.

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2. Private legal documents

The validity of this first assumption – that it is possible effectively to express legal concepts in plain language – is also borne out by experience with private legal documents. We are seeing more and more private legal documents drafted in 'plain language'; examples are insurance policies, mortgages, and contracts for the sale of land. There is simply no evidence that plain language documents like these are more prone to litigation than conventionally-drafted documents. Indeed, the reverse seems to be the case. To illustrate: for almost 30 years, Australia's largest car insurer (the NRMA) has been using insurance policies that are exceedingly plain. Some time ago the company's managing director went into print to say that their policies had been largely free of litigation;[14] and a search of the court lists indicates that this remains the position. Now, a cynic might put this down more to good luck than good management – for eventually some plain language documents will end up in court; drafters are only human. But at least the evidence to date gives the lie to the argument that plain language documents are inherently prone to litigation.

II. Assumption 2: That Plain Legal Language Saves Money

Here the evidence is unequivocal and overwhelming. Many studies show that plain language is more 'efficient' and therefore saves money.

By 'efficient', I mean that plain language documents are easier to read and comprehend. Numerous organisations attest to saving substantial amounts of money by converting their documents into plain language. Insurance companies are a prime illustration: by rewriting policies and other documents into plain language, enquiries from customers about meaning are reduced; this allows the company to redeploy enquiry staff to other tasks. And by redrafting claim forms in plain language, error rates are reduced; this saves time and money for the company, and helps cut down frustration for the customer. Studies of other organizations – including government bodies – show similar results. To take a stark example: some years ago, Royal Mail redrafted its redirection-of-mail forms. Before the re-draft, there was an 87% error rate when customers filled out the form. Royal Mail was spending over £10,000 a week to deal with complaints and to reprocess the incorrect forms. The new form reduced the error rate dramatically – so much so that Royal Mail saved £500,000 in just the next nine months.[15]

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[14] N. King, *An Experience with Plain English,* 61 Current Affairs Bulletin 21 (1985). To similar effect, in its submissions to the Australian Parliamentary Inquiry into Commonwealth Legislative and Legal Drafting (18 September 1992), the same company (the NRMA) stated: "The NRMA has not experienced any adverse court decisions by reason of the 'Plain English' and subsequent 'user friendly' documents."

[15] This and similar examples are given in J. Kimble, *Writing for Dollars, Writing to Please*, 6 Scribes Journal of Legal Writing 1 (1996-1997). For other studies, *see* J. Kimble, *Plain English: A Charter for Clear Writing*, 9 Thomas M Cooley Law Rev 1, at 25-26 (1992); G. Mills & M. Duckworth, The Gains from Clarity, Centre for Microeconomic Policy Analysis and Centre for Plain Legal Language, University of Sydney (1996).

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These efficiencies are not unique to lay readers. Lawyers, too, save time and money when documents are in plain language. Lawyers find plain language easier to read and digest than traditional legalese. This saves time and effort for them as much as for their clients. This has been documented in a study by the Law Reform Commission of Victoria (Australia). In the study, lawyers read counterpart versions of the same statute, one version written in plain legal language and the other in traditional legal language. They were asked to answer questions based on the version in front of them. The time taken to understand the plain language version was between one-third to one-half less than the time taken to understand the traditional version.[16]

III. Assumption 3: That Judges Prefer Plain Language

This assumption is perhaps not as important as the others. Nevertheless, for what it is worth, studies have borne it out. Opponents of plain language might argue that the ultimate audience for our documents is the judge; and so (the argument would run) documents must be drafted to be litigation-proof; and as judges prefer traditional styles of drafting, it is safer to keep to traditional styles of drafting. This argument seems rather facile, for (in my view) we should not be writing our documents or drafting our statutes with judges as our ultimate audience. But even if we take the argument seriously, the evidence is that, given a preference, judges would choose plain language. Studies in the United States show that something like 80% of judges surveyed prefer pleadings to be in plain language rather than in the traditional, convoluted American style.[17] Interestingly, the same judges also thought that lawyers who drafted pleadings in plain language were better lawyers than those who kept to traditional drafting. I do not know of any similar studies outside of the USA, but I would imagine that similar results would follow in most jurisdictions.

In recent years, some English and Australian judges have been quite ready to condemn from the bench legal drafting that is convoluted and unclear. Epithets directed at offending clauses have included "botched",[18] "half-baked",[19] "cobbled-together",[20] "doubtful",[21] "tortuous",[22] "archaic",[23] "incomprehensible

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[16] R. Eagleson, *Plain English - A Boon for Lawyers*, *in* Legal Writing Institute, The Second Draft, at 12 (1991).

[17] S. Harrington & J. Kimble, *Survey: Plain English Wins Every Which Way*, 66 Michigan Bar Journal 1024 (1987); J. Kimble & J. Prokop, *Strike Three for Legalese*, 69 *Michigan Bar Journal* 418 (1990); B. Child, *Language Preferences of Judges and Lawyers: A Florida Survey*, 64 *Florida Bar Journal* 32 (1990). For articles by judges themselves, *see* F. Mester, *Plain English for Judges*, 62 Michigan Bar Journal 978 (1983); A. Cohn, *Effective Brief Writing: One Judge's Observations*, 62 Michigan Bar Journal 987 (1983).

[18] *Re Gulbenkian's Settlement*, [1970] AC 508, at 517 (Lord Reid).

[19] *Alghussein Establishment v Eton College*, [1988] 1 WLR 587, HL.

[20] *The Alexion Hope*, [1988] 1 Lloyd's Rep 311, at 320, CA (Purchas LJ).

[21] *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd*, [1988] 2 Lloyd's Rep 63, at 69 (Evans J).

[22] *London Regional Transport v Wimpey Group Services Ltd*, (1987) 2 EGLR 41 (Hoffmann J).

[23] *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd, [1995] 3*

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legal gobbledegook”,[24] and “singularly inelegant”.[25]

To be even-handed here, some judges have also been less than enthusiastic about plain language in law. For example, an appeal court judge from Victoria (Australia) recently described certain provisions of the Corporations Law as exhibiting “the language of the pop songs.”[26] In this judge’s view, the quest for simplicity “pays the price of vulgarity and ends in obscurity.”[27] (A prime concern of this judge seemed to be the drafting technique of starting a section with “However, …”.) Another Australian appellate judge decried the use of “must” in statutes, especially the phrase “must not”, as “grotesque”.[28] Yet another appellate judge, when criticising a clause in a plain language insurance policy, caricatured “plain English” as meaning “confused thought and split infinitives”,[29] as if it served no useful purpose at all. And another described a plain language insurance policy as “one of those new fangled plain English policies which is, accordingly, a little hard to construe.”[30] But these are isolated voices. I suspect that most judges would accept that the modern ‘plainer’ style improves the readability of statutes and documents. Indeed, some appellate judges clearly have accepted the change to plain language as inevitable, and have moved on to wrestle with the very real issue of the extent to which settled case law can be applied in interpreting plain English revisions of statutes and standard documents.[31]

IV. Assumption 4: That Clients Prefer Plain Legal Language

This last assumption is also borne out by evidence – not just anecdotal evidence, but empirical evidence from large-scale research. Non-lawyers prefer legal documents and statutes to be in plain language. Amongst the research is a Canadian survey[32] which showed a widely-held public perception that lawyers

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WLR 204, at 212 (Lord Jauncey of Tullichettle).

[24] *Houlahan v Australian and New Zealand Banking Group Ltd,* (1992) 110 FLR 259.

[25] *NSW Rifle Association v Commonwealth of Australia*, unreported, New South Wales Court of Appeal, 15 August 1997, Powell JA; *See* these and other examples *in* P. Butt & R. Castle, Modern Legal Drafting, chapter 2 (2001).

[26] *GM & AM Pearce and Co Pty Ltd v RGM Australia Pty Ltd,* (1998) 116 ACLC 429, at 432 (Callaway JA).

[27] *Id.*

[28] *Hallwood Corporation Ltd v Roads Corporation,* [1998] 2 VR 439, at 445-446 (Tadgell JA). For criticisms of the judge’s comments, *see* R. Eagleson, *Plain English: Changing the Lawyer’s Image and Goals*, a paper delivered to Literature and the Law Seminar, Perth, Australia, 16 May 1998; extracts published in (1998) Clarity 42, at 34.

[29] *NRMA Insurance Ltd v Collier*, (1996) 9 ANZ Insurance Cases 76,717, at 76,721 (Meagher JA).

[30] *Re Network Welding Pty Ltd (in liquidation) (No 2)*, [2001] NSWSC 809, at para. 3 (unreported, 28 August 2001).

[31] *See, for example*, Justice G Hill, *A Judicial Perspective on Tax Law Reform*, 72 Australian Law Journal 685 (1998); Justice K Lindgren, *Interpretation of the Income Tax Assessment Act 1997*, 73 Australian Law Journal 425 (1999); Justice D Mahoney, *A Judge’s Attitude to Plain Language*, (1996) New South Wales Law Society Journal (September) 52.

[32] Survey carried out by the Plain Language Institute of British Columbia: *see* the Institute’s Preliminary Report, Critical Opinions: The Public’s View of Legal Documents (1992).

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care little about whether they communicate effectively to their clients. The public thinks that lawyers are pre-occupied with legal jargon at the expense of clear communication, indifferent to whether their clients understand the documents they are asked to sign. We lawyers may think that we do care about whether we communicate – but the public perception seems to be otherwise.

E. What About 'Terms of Art' and Judicially-Defined Terms?

I hope I have said enough to persuade you that plain language has an important role to play in legal documents and statutes. But of course, this is not to say that writing legal documents in plain language is easy. Legal writing poses problems not usually found in other forms of writing. A leading issue is, what do we do with legal 'terms of art', particularly those terms whose meanings have been judicially-defined?

Here there are some differences of approach. Some plain language proponents do their best to eliminate terms of art altogether – they find some other way of expressing the legal ideas inherent in the hallowed word or phrase. The danger with this, of course, is that legal precision can be lost unless the new formulation accurately captures the legal nuances of the original. This may require real skill, and a great deal of research. And so other plain language proponents retain terms of art but then add an explanation of what the legal word or phrase means – a sort of 'best of both worlds' approach.

But whichever approach we adopt, we should not exaggerate the 'terms of art' issue. The problem is not nearly as great as many opponents of plain legal language seem to imagine. Research shows that, in any given area of law, the number of legal terms that have been judicially-defined, is likely to be quite small. For example, studies in the United States of America show that the proportion of judicially-defined terms in standard form contracts for the sale of land may be as low as three percent.[33] And some of that three per cent required judicial exposition for the very reason that the terms were inherently uncertain – those terms would be best avoided altogether.

But of course, there are yet further problems for legal drafters. We must be concerned not only with words or phrases, but with larger legal concepts. A document must be effective to embody the concept or create the legal entity the client requires. This may take great care and skill. For example, consider the lease/licence distinction. To create a lease, the tenant must be given the right to exclusive possession; otherwise a mere licence results. This is not to suggest that the drafter must use the exact phrase "exclusive possession"; but it might well be prudent to do so. Again, in the area of securities law, failure to use the word "mortgage" could result in some lesser kind of security being created – such as a charge – with a consequent diminution in the lender's remedies. And yet

[33] B. Barr, G. Hathaway, N. Omichinski & D. Pratt, *Legalese and the Myth of Case Precedent*, 64 Michigan Bar Journal 1136 (1985).

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again, when creating a servitude (or in my jurisdiction, an easement or restrictive covenant), it is important to use language which shows that what is created is a proprietary right that runs with the land, not a mere contractual right that binds only the parties.

That said, none of these matters justifies using jargon for its own sake. None justifies perpetuating linguistic eccentricities that serve only to enhance mystique, not legal effect. And yet we lawyers still introduce documents with “whereas”. We “execute” documents rather than sign them. We “demise” rather than lease. We require a tenant to “well and sufficiently repair” when “repair” will do. We declare something “null and void”, when “void” will do. We insist on “shall” when the rest of the community uses “must”.[34] And so on. None of these hallowed words and phrases is a true term of art. All can be simplified, and some can be discarded completely.

F. Conclusion

The plain language movement is now reasonably well-established. In its early days, it made the assumptions I have listed – assumptions about the benefits of plain legal language – without at that stage having verified the assumptions by empirical research. But now, about 25 years on, research has proved the assumptions to be correct. The evidence is overwhelming. Plain legal language brings substantial benefits to lawyers, to clients, and to citizens at large. Used carefully, it is legally safe; it saves time and money; clients and citizens have a better chance of understanding it; and most judges prefer it. The evidence is all one way. I would suggest that there is no substantial reason to resist it in property law.

[34] On the use of ‘must’ instead of ‘shall’, *see* correspondence in the Australian Law Journal: 63 ALJ 75-78, 522-525, 726-728 (1989); 64 ALJ 168-169 (1990). For a more detailed survey, *see* J. Kimble, *The Many Misuses of ‘Shall’,* 3 Scribes Journal of Legal Writing 61-77(1992). At least one Australian case has expressly recognised that ‘must’ is quite sufficient to impose an obligation: *South Australian Housing Trust v Development Assessment Commission,* (1994) 63 SASR 35, at 38.