PLAIN ENGLISH IN BANKING DOCUMENTS

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A few years ago a plumber in the United States ran into a problem with blocked pipes and he sent off a telex to a building research agency in the government: "Is there any harm in using hydrochloric acid to clean out sewer pipes?" The agency replied: "The efficacy of hydrochloric acid is indisputable, but the corrosive residue is incompatible with metallic permanence".

The plumber was delighted with this reply and responded to the agency thanking them for confirming his procedure. The agency decided to have another try and sent this message: "We cannot assume responsibility for the production of toxic and noxious residue with hydrocholric acid and suggest you use an alternative procedure".

Again the plumber replied thanking them for supporting his idea of using hydrochloric acid and so the agency sent an urgent telex: "Don't use hydrochloric acid. It eats hell out of pipes".

Now even though the first reply of the agency might have come uncomfortably close to a number of the legal opinions that we are used to seeing, nevertheless we might want to dismiss this exchange between the plumber and the agency as simply a good joke, a parody of gobbledegook. But are the answers from the agency really imaginative contrivances? What about this extract!

> "Also interest upon all such moneys as aforesaid or on so much thereof as shall for the time being be owing or payable or remain unpaid without (Unless the Bank otherwise in writing agrees) allowing credit for any credit balance in any account or accounts of the Mortgagor and the Debtor or either of them either alone or jointly with any other person with the Bank at the rate or respective rates agreed upon in writing if any and in the absence of any such agreement then without prior or other notice to the Mortgagor or to the Debtor at such rate as the Bank from time to time determines: except as otherwise provided by the terms of any agreement in writing relating to the whole or part of such moneys such interest shall accrue from day to day and shall be computed from the day or respective days of such moneys

being paid or disbursed or becoming owing and at the end of every period of such duration as the Bank may from time to time determine and ending at the end of such day as the Bank may from time to time determine (with power in the Bank to carry from time to time the length of such period or the day or days on which such period ends), or, in the absence of any such effective determination, at the end of each period of one calendar month ending at the end of the last day thereof the interest accrued due up to and including such day upon any such moneys in respect of such period or any part thereof shall (if or to the extent to which it has not already been paid) commence and thereafter so long as the whole or any part thereof shall remain unpaid shall continue to carry interest at the rate aforesaid and such accrued but unpaid interest may at the option of the Bank be debited against the Debtor or in the case of interest upon moneys lent paid or advanced to for or on account of the Mortgagor or to for or on account of any other person as aforesaid at the request of the Mortgagor or for the payment of which the Mortgagor is liable to the Bank as thereinbefore stated then against the Mortgagor PROVIDED ALWAYS that such unpaid interest upon which interest shall have become so payable shall not be deemed thereby or by reason of any such debiting as aforesaid or by the inclusion of interest with principal in any balance carried forward or account stated or otherwise than as hereinafter provided to have become capitalised or added to principal but the Bank by express entry to that effect in its books and without the necessity of giving notice to the Debtor or the Mortgagor may at any time and from time to time and as from such date as the Bank shall determine capitalise and add to the principal all or any such unpaid interest upon which interest shall have become so payable and whether such unpaid interest shall have been debited as aforesaid or not and such debitings of interest and additions to principal may be continued and made and the provisions herein contained as to the moneys on which interest is payable shall continue to be applicable so long as any of such moneys remain unpaid notwithstanding that as between the Bank and the Debtor or was between the Bank and the Mortgagor or such other person as aforesaid the relationship of banker and customer may have ceased and notwithstanding the death or bankruptcy of the Mortgagor or such other person as aforesaid and notwithstanding any composition or compromise entered into or assented to by the Bank with or in respect of the Debtor of the Mortgagor or such other person as aforesaid and notwithstanding any judgment obtained against the Debtor or the Mortgagor or such other person as aforesaid and withstanding any other matter or thing whatsoever; in interpreting the foregoing provisions money shall be deemed to remain unpaid notwithstanding any compromise compounding or release made or assented to by the Bank with or in respect of the Debtor or the Mortgagor or such other person as aforesaid until the Bank shall have received the full amount to which it would have been entitled if it had not entered into such

> compromise compounding or release PROVIDED that the amount of moneys deemed to have remained unpaid shall not include such sums as the Bank shall have received in respect thereof."

Here we have 760 words squashed into one horrendous sentence. It strains the credulity but it is no joke. It is real and it is meant to be taken seriously. It is drawn from a mortgage document of a bank in South Australia (Noblet: 1985: 9).

It was composed by lawyers who presumably could be members of the Banking Law Association. No one could claim any sensitivity to language, any understanding of the demands of writing who would compose such a monstrosity. Yet this type of writing is all too common in legal documents.

Carl Felsenfeld recently wrote:

> "Lawyers have two common failings. One is that they do not write well and the other is that they think they do."

In the 1970s, Carl Felsenfeld was a Vice-President of Citibank and he had responsibilities for its consumer activities. Currently he is Professor of Law at Fordham University in New York. So this is not the comment of a jaundiced English teacher or of a dissatisfied client, but rather it is the observation of a member of the legal profession and not just of the legal profession generally but of a specific section, the banking section, of that profession.

He is not alone in this assessment. Legal firms both here and overseas have launched courses in writing for their staff. In the past 12 months I have been approached by two major firms in Australia with the request that I offer training programs for their junior staff. Yet these firms are major firms in the country and they can be quite discriminating in selecting staff. Lawyers and judges complain about statutes. Professor Dreidger, the renowned Canadian expert on legislative drafting, acknowledged that "some of the criticism of judges is well-founded". One of the critical judges is none other than Lord Denning, who commented to the Renton Committee during its study of legislation:

> "If you were seeking to see what different principles should be applied, the first would be to recommend simpler language and shorter sentences. The sentence which goes into ten lines is unnecessary. It could be split up into shorter ones anyway and couched in simpler language. Simplicity and clarity of languages are essential."

Here then are members of the legal profession finding fault with the quality of current legal writing, and if the anxiety of firms to introduce courses and seminars in writing is any test, the weaknesses are indisputable. So not all is perfect in the legal profession on the testimony of the profession itself.

But let a proposal be made to adopt plain language and there is immediate outcry and opposition from the same profession. It is protested that only legalese is accurate, and worse, that legalese has to be the way it is for a document to be accurate. Doom and economic ruin are predicted for any who would abandon it in favour of plain language. If an act of parliament or a commercial document is produced in plain English, lawyers will stand on their heads to find an error in it and immediately, on that flimsy basis, pronounce the failure of plain English. Yet these same critics ignore equally, if not more, glaring errors in legalese.

Let me give you just a few illustrations. When the Real Estate Institute of New South Wales was rewriting its standard residential lease, I came across the following clause with a glaring grammatical error:

> "In the event of any dispute between the landlord and the tenant as to such rent the same shall be determined by the President of the Real Estate Institute of New South Wales for the time being or his appointee, it being understood that the total rent will not be less than the total rent payable just prior to the expiration of this lease and subject to the same covenants and stipulations and restrictions and conditions as are contained in this lease except this present covenant."

The second part of the sentence beginning with those words "it being understood" is constructed faultily and it changes direction at the words "subject to", so that it really makes nonsense. The subject of the words "subject to" is the lease and not the total rent, as the sentence as it is now written would make out. Now hundreds of thousands of this lease had been issued in New South Wales before 1977 and possibly every lawyer in the State had some contact with it. Yet not one of them had ever pointed out this fault in the lease. Nor did the lawyer working with us on the project team to rewrite the lease, who favoured legal language, and felt that legal language was the only precise form of expression, even point out this error!

The Property Section of the Law Institute of Victoria prepared a lengthy critique of the Residential Tenancies Bill which was tabled in the Victorian Parliament at the end of 1985. One of the sections it objected to was 63(1):

> "When the premises need urgent repairs and the tenant, after making reasonable efforts, cannot get them done immediately by the landlord or the agent or the Body Corporate responsible for them, the tenant may either -
>
> (a) get them done himself or herself ..."

The representatives objected to those words "after making reasonable efforts". They felt it made the lease ambiguous. Distressingly for the members of this same Property Section they

completely overlooked section 123 in the same Bill. Section 123(1) reads:

> "If a landlord is unable to find the tenant or to return the goods after making reasonable efforts to do so, the landlord may sell the goods."

How could lawyers who had criticised the Residential Tenancies Bill for its failings in plain language and who had claimed for themselves linguistic acuteness miss "after making reasonable efforts" in section 123(1) when they had so roundly condemned it in section 63(1)? Were they simply clutching at a straw in their attack on section 63 to enable them to get rid of the section without appearing to be prejudiced in favour of the landlord? And how could they be so outrageously inconsistent when "reasonable" must be one of the most acceptable hedges in legalese? This particular objection to section 63(1) reveals little linguistic understanding.

Again, during an exercise to convert the AMP's Home Contents Insurance Policy into plain English we came across a paragraph in the original policy which gave us considerable trouble. When I finally produced a plain English paraphrase, the Company's representatives immediately spotted an error. The error was in the original, the plain English had simply exposed what the gobbledegook had been concealing for years. According to AMP, had any member of the public been able to unravel the legalese, the Company could have lost heavily.

On another occasion we uncovered an ambiguity in an old-style NRMA policy which could have had unpleasant consequences for the company. It too had been written by a lawyer but the error had never been spotted by other lawyers. How can we claim, and claim so dogmatically, that legalese is necessary and that it protects our interests, while plain English will lead to ruin?

I realise that I am scarcely being polite to my host, the Banking Law Association, in raising these faults of lawyers. But I am continually being disturbed by the lack of rigour in the thinking of lawyers about language. They will be meticulously accurate on points of law, but they will talk nonsense about language and often act quite irrationally. They will recoil from plain English without trying it, while all the time wallowing in the mire of legalese. The present state of legal language is so bad that it can no longer be defended. Lawyers have to be honest to their own complaints about the writing of their colleagues and be prepared then to stand against the tradition. We can no longer say it cannot be done. Change must be brought about and lawyers must be more open minded about changing their current linguistic practice.

An experiment within another profession illustrates this hold that tradition has on us. Dr. Christopher Turk took a report of an experiment in medicine and he labelled it Brown's version:

Brown's Version

"In the first experiment of the series using mice it was discovered that total removal of the adrenal glands effects reduction of aggressiveness and that aggressiveness in adrenalectomised mice is restorable to the level of intact mice by treatment with corticosterone. These results point to the indispensability of the adrenals for the full expression of aggression. Nevertheless, since adrenalectomy is followed by an increase in the release of adrenocorticotrophic hormone (ACTH), and since ACTH has been reported (P. Brian, 1972) to decrease the aggressiveness of intact mice, it is possible that the effects of adrenalectomy on aggressiveness are a function of the concurrent increased levels of ACTH. However, high levels of ACTH, in addition to causing increases in glucocorticoids (which possibly accounts for the depression of aggression in intact mice by ACTH), also results in decreased androgen levels. In view of the fact that animals with low androgen levels are characterised by decreased aggressiveness the possibility exists that adrenalectomy, rather than effecting aggression directly, has the effect of reducing aggressiveness by producing an ACTH-mediated condition of decreased androgen levels."

Dr. Turk then rewrote this version into plainer language, which he labelled Smith's version.

Smith's Version

"The first experiment in our series with mice showed that total removal of the adrenal glands reduces aggressiveness. Moreover, when treated with corticosterone mice that had their adrenals taken out became as aggressive as intact animals again. These findings suggest that the adrenals are necessary for animals to show full aggressiveness.

But removal of the adrenals raises the levels of adrenocorticotrophic hormone (ACTH), and P. Brian found that ACTH lowers the aggressiveness of intact mice. Thus the reduction of aggressiveness after this operation might be due to the higher levels of ACTH which accompany it.

However, high levels of ACTH have two effects. First, the level of glucocorticoids rise, which might account for P. Brian's results. Second, the levels of androgen fall. Since animals with low levels of androgen are less aggressive, it is possible that removal of the adrenals reduces aggressiveness only indirectly: by raising the levels of ACTH it causes androgen levels to drop."

You will notice that he has divided it into three paragraphs instead of one, he has used shorter sentences, he has removed passive voice and made other changes. He then submitted both versions to a panel of scientists, who confirmed that he had not

distorted the meaning in making the transformation. Having done that, Turk then proceeded to show the two versions to a group of scientists and put before them the following series of questions:

1.1 Which passage is more interesting?
1.2 Which passage is more difficult to read?
2.1 Which style seems more appropriate for scientific writing?
2.2 Which style is more precise?
3.1 Which writer gives the impression of being a more competent scientist?
3.2 Which writer inspires confidence?
3.3 Which passage shows a more organised mind?
3.4 Which passage seems more objective?
4.1 Which passage seems more dynamic?
4.2 Which passage seems more stimulating?
4.3 Which writer has more consideration for his readers?
5.1 Any further comments about the passages you may wish to make.

The scientists overwhelmingly favoured Smith's version for most questions. They found it easier to read, more dynamic, more indicative of a competent scientist, more stimulating and so on. But they voted in favour of Brown's version for question 1.2 (which passage is more difficult to read) and 2.1 (which style seems more appropriate for scientific writing). Their behaviour is irrational. While they would prefer to read material in one style, they are prepared to inflict on others, and have inflicted upon themselves, a style which they find difficult and tedious. They are acting in this way only because they believe they should, because they believe it is expected of them. The style has no real merit for them but simply serves to show that they can do what other members of their profession can. It is an outer, showy trimming which has nothing to do with their essential professionalism.

Could not the same situation hold in the legal profession? Are we writing in the way we do largely because of tradition and because we have not devoted time both to questioning our practice and to discovering whether there is a remedy? In Great Britain, for instance, lawyers still persist, according to John Walton, with the fatuous:

> "Signed by the above-named as his last will in the presence of us present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses."

And this is still being put at the end of wills even though the Principal Registry of the Family Division has approved of this wording "Signed by the above-named in our presence and then by us in his". And how many lawyers in this country as well respect and repeat the verbiage of "I hereby revoke all wills and testamentary dispositions heretofore made by me and declare this to be my last will".

Mark Adler in Great Britain has come up with the crisp substitute "I make this to replace all former wills". Why won't more of us display a similar initiative? Are we enmeshed by attitude and fashion rather than by principle?

As a way of encouraging a change in attitude, let us spend a little time on clarifying the nature of plain English for I have found that it is confusion about its nature in the legal profession that has been one of the obstacles to its adoption.

The contemporary plain English movement has been in existence for 12 years. One of its first products was a consumer loan note produced by Citibank in January 1975. In a sense though it is not a new development. Down the centuries there have always been those who have pleaded for clear expression and who lamented inflated language. Its emergence in the mid-seventies was encouraged by the consumer movement. The demand for fair treatment and service with goods spread to the documents which often ratified the exchange of those goods. But the movement also arose in a favourable intellectual climate. In the 1970s there was a renewed interest in the theory of writing, and renewed research led us to study writing as a process. There were also the valuable findings coming from reading research. As well we have the developments in psycholinguistics and in sociolinguistics, with its interest in the approaches of different groups to language. All these forces have come together at one time. It is a pity if we see the plain language movement as just a part of consumerism. It derives its strength from and it contributes to a wider intellectual movement.

Because the plain English documents were redrafts of older versions of gobbledegook, plain English is often described as a simplified version of the language. But "simplified" is being used here in a relative sense. Plain English is ordinary English. It uses the patterns of normal, adult English. It is not simplified in the sense of basic or simpleminded English. It is a full-blown version of the language but one in which obscurity and convolution are avoided; and it is a version that is appropriate both for the audience and for the purpose.

Moreover a plain English document contains a complete and accurate statement of the topic. It is not just a simple account of the same material. Every piece of information that is essential is present and included. It has to be if the document is to protect the rights of the readers. The integrity and the accuracy of the law is never in jeopardy wilfully or wittingly.

This does not mean that a plain language document seeks to include everything. No document ever could, nor should it try. It is a nonsense to pretend otherwise. Every document must assume some knowledge, otherwise it would suffer from information overload and be indigestible. The experience with full disclosure in credit contracts is enough to make us realise this fact. The attempt to cover all possible contingencies is simply counter-productive.

Not only is plain English an efficient use of the language in the sense that plain language documents contain only what is necessary and no more, but it is also efficient in seeking a form of expression that can be read and understood easily and quickly. One of the faults of legalese is that it places a great strain on readers. It distracts their attention from the subject matter and it delays their receipt of the message. Plain language on the other hand avoids making excessive demands on the reader's attention and effort. The more complex and abstruse the material the greater the need to be clear or plain so that the maximum attention can be given to the matter. A plain English document then, strives to be readable.

This demand for readability is connected with the central platform of the plain language movement, namely the right of the audience to understand any document that confers a benefit or imposes an obligation on it. It is sadly true that much legal writing, and especially that characterised by gobbledegook, largely ignores the needs of the audience. Plain English has brought the audience back into the sights of the writer, reminding us again of the ethical dimension of writing. Documents are not equitable if they cannot be understood by all parties who have to read them. The plain language movement has insisted that documents should be comprehensible.

As I have already indicated there is nothing linguistically abnormal or deficient about a plain English document. It can come into being simply because our language offers us choice. Choice, for example, between the inflated and the plain, the obscure and the clear. We choose those language forms which research and experience tell us will be most readily understood by our given audience even though we may be aesthetically and temperamentally drawn to some other forms of the language. This in a nutshell is essentially what is involved in writing in plain English. The selection of one set of forms from the resources of the language rather than another set.

Let me demonstrate from that initial plain English banking document.

(See Appendix 1 on page 141.)

It is a large cumbersome document in which most of the text, certainly the top half of the text, is in solid block capital letters, which makes it very difficult to read and comprehend. We might compare it with the plain language version, the version that was produced at the end of 1974; a much simpler and clearer one, with headings inserted to guide the reader and with the type in lower case.

(See Appendix 2 on page 142.)

To illustrate briefly the point we are making, we might just concentrate on the section that deals with the late charge. Here it is in the original version:

> "A FINE COMPUTED AT THE RATE OF 5 CENT PER $1 ON ANY INSTALMENT WHICH HAS BECOME DUE AND REMAINED UNPAID FOR A PERIOD IN EXCESS OF 10 DAYS, PROVIDED(A) IF THE PROCEEDS TO THE BORROWER ARE $10,000 OR LESS, NO SUCH FINE SHALL EXCEED $5 AND THE AGGREGATE OF ALL SUCH FINES SHALL NOT EXCEED THE LESSER OF 2% OF THE AMOUNT OF THIS NOTE OR $25, OR (B) IF THE ANNUAL PERCENTAGE RATE STATED ABOVE IS 7.50% OR LESS, THE LIMITATIONS PROVIDED IN (A) SHALL NOT APPLY AND NO SUCH FINE SHALL EXCEED $25 AND THE AGGREGATE OF ALL SUCH FINES SHALL NOT EXCEED 2% OF THE AMOUNT OF THIS NOTE, AND SUCH FINE(S) SHALL BE DEEMED LIQUIDATED DAMAGES OCCASIONED BY THE LATE PAYMENT(S)."

In the new version this late charge section simply becomes this:

> **"Late Charge** If I fall more than 10 days behind in paying an instalment, I promise to pay a late charge of 5% of the overdue instalment, but no more than $5. However, the sum total of late charges on all instalments can't be more than 2% of the total of payments or $25, whichever is less."

The old approach is abstract and remote. The instalment becomes due and remains unpaid. The plain language approach is more active. The agent is reinstated. Notice it is now "If I fall behind ...". The material is spread over two sentences rather than being crammed into one sentence. "In excess of" is replaced by the more common "more than". The changes then are basically substitutions. There is no distortion of content and no loss in legal force, but there has been a gain in readability by selecting different language forms.

Contributing to this increased readability is also an improvement in design. Asked about late charge, one has to search assiduously in the original document to find the section dealing with late charge. But when we turn to the newer version, then it is very easy to find because there are headings in the margin and each section is marked off clearly one from the other.

We could devote some time to exploring the differences between these two versions, but so that we can turn to other matters, let me concentrate just on a couple of principles. First, the plain English version has not involved the invention of any new grammatical structures or new words. It uses patterns and words that are already in normal use in the language. Moreover, these are the words and sentence structures that we would be likely to use if we were on the enquiry counter of a bank and we were being asked about a loan by a customer. Again there is nothing particularly original or novel about the design. What is novel is the application of these language forms and these design

techniques to a banking and to a legal document. It is a break from tradition and nothing more. This example shows that tradition can be broken, and that banking documents can be written in plain language.

Evidence that it can be written in plain language abounds. Here is another example, this time from the Bank of America. Before it was rewritten, its bank card application appeared as:

> "Each of the undersigned jointly and severally agrees: (1) To assume responsibility for credit extended by Bank of America (BANK) to any of the undersigned from the BANKAMERICARD Account or to anyone authorized by any of the undersigned to use any BANKAMERICARD issued to any of the undersigned; (2) To pay, at such place as BANK designates, obligations evidencing such credit, and finance and other charges where applicable, including reasonable attorney's fees in the event of suit, in accordance with such terms and conditions as BANK may adopt from time to time; (3) To notify BANK promptly in writing of loss of the BANKAMERICARD; (4) The BANKAMERICARD is the property of BANK and may be cancelled by BANK at any time; (5) To surrender the BANKAMERICARD on demand ..."

The plain language revision produced:

> "I promise to:
> Pay you according to the terms of your Truth in Lending Disclosure Statement for:
> 1. credit obtained by me or any person I permit to use my account, even if that person exceeds my permission, and
> 2. all finance and other charges, including reasonable attorney's fees if you sue me to collect.
>
> Let you know immediately if my credit card is lost or stolen.
> Return to you all BankAmericard/Visa credit cards issued on my account, if asked to do so."

Once more we see the interplay between language and design, and once more we see how plain English involves a selection of different linguistic forms but not the presentation of a different message.

Consider, too, the practice in contracts of placing conditional clauses first. For example in this one:

> "If the insured submits to Halleys Insurance Company a written proposal which, it is hereby agreed, shall be the basis of this contract, and if the particulars therein set forth are accurate, and if the insured pays to the Company the premium for insurance, the Company will indemnify the insured by payment."

Now it is possible to re-order the clauses, bringing the main clause to the front and moving the conditional clauses to the

end. For the purposes of this argument this is the only change I have made in rewriting this contract:

> "The Halleys Insurance Company will indemnify the insured by payment if the insured submits to the Company a written agreement which, it is hereby agreed, shall be the basis of this contract, and if the particulars therein set forth are accurate, and if the insured pays to the Company the premium for insurance."

If our audience consists only of lawyers, then we can be satisfied with the first version with the conditional clauses first because lawyers are used to this arrangement and it fits in with their approach to situations of this nature. But if we are writing for a more general audience, we should put our conditional clauses last as we have done in the second version because research has established that general readers find it easier to cope if the main clause comes first. It provides a context in which they can understand the conditional clauses. Now whether we have the conditional clauses first or last we are making no change to the substance of the law. We are simply making our text easier for a particular audience.

Although we have this evidence that plain English documents can be produced successfully and safely, many lawyers are still hesitant to break with tradition. Their fear centres on terminology. They argue that many words have had their meanings established by courts and to depart from those terms could expose their clients. We need to examine this argument rigorously.

First, not all the words which lawyers seem to delight in using but which cause trouble for general readers fall into this category. Consider this short extract from an agreement that was prepared in Australia in January 1982.

> "NOW THIS AGREEMENT WITNESSES that in consideration of the Lessor at the request of the Guarantors (which request is evidenced by their execution of this Agreement) continuing at its discretion and during its pleasure the provision of and forbearing to sue for the repayment of leasing accommodation already granted to the Debtor or presently or at any time or from time to time hereafter at its discretion and during its pleasure granting further leasing accommodation advances or financial accommodation to the Debtor the Guarantors jointly and severally HEREBY GUARANTEE to the Lessor the due and punctual payment to the Lessor of all moneys now or hereafter to become owing or payable to the Lessor by the Debtor under any written contract or arrangement now in existence between the Lessor and the Debtor and also of all other moneys now or hereafter to become owing or payable to the Lessor by the Debtor (including but not limited to interest or any sum or sums so owing and payable calculated at any specified interest rate due to the default of the Debtor) either alone or jointly with any other person on any account whatsoever including

> all moneys which the Lessor pays or becomes actually or contingently liable to pay to for or on behalf of or for the accommodation of the Debtor either alone or jointly with any other person whether or not such payment is made or liability arises by way of loans, advances or other accommodation of whatever nature by reason of the Lessor having already or hereafter become a party to any negotiable or other instrument or entered into any bond, indemnity or guarantee or, without restriction, under or by reason of any transaction or event whatsoever whereby the Lessor is or becomes or may become a creditor of the Debtor (all of which moneys and liabilities as aforesaid are intended to be secured by this Guarantee and are hereinafter referred to as 'the Moneys Hereby Secured')."

What about the words - "witnesses, execution, hereafter, severally, hereby, such, aforesaid" and "hereinafter"? How can their continuation in legal agreements possibly be justified in the 20th Century? "Witnesses" and "hereby" make no contribution to the message at all. The rest of the words are archaic and can readily be changed. "Jointly and severally" would be far more meaningful as "jointly and individually". The Federal National Mortgage Association spells out the obligation in this way in one of their Notes:

> "The Note holder may enforce its rights under this Note against each of us individually or against all of us together."

This may be longer but it is fairer on the readers than persisting to use "severally" in a sense that is no longer widely recognised. Worse still "aforesaid", that is favoured in so many documents, can be highly dangerous. Its reference is often uncertain and even misleading rather than precise. And can we really argue that a court would rule against us if we dared to update and wrote "I own this property" instead of "I am seised of this property". And can we make a distinction between "demised" premises and "rented" premises?

Again while they may cause trouble, highly technical words such as "presentment, negotiable, instrument, novation, domicile" and "mandamus", are not the major source of incomprehensibility in legal documents. Indeed the genuine technical term of art rarely is, for it constitutes only a small proportion of any document. Convoluted structures are far and away the real cause of difficulty.

Recall that extract we looked at at the beginning with its 760 words or the one that we were just looking at a few moments ago, which also consisted only of one sentence. The welter of detail in such sentences engulfs the reader and obscures the central message. It is not that the long sentence is ungrammatical or inaccurate, but how many of us can cope easily with long, meandering sentences which run on for clause after clause and which embed clauses within clauses.

The defence based on words that many lawyers advance for not adopting plain English is largely spurious. There is still so much that they can do to achieve clear writing without abandoning cherished terms of art, as these long meandering sentences loudly declare. A counsel for the Federal Home Loan Mortgage Corporation has reported that the task of translating mortgage documents into simple every day language "was not the impossibility we had initially believed it would be". It takes only a little native wit to provide explanations which will ease the task of clients. And the Corporation managed to do this quite smoothly in their real estate notes and mortgages. Compare the old version of those notes:

> "Presentment, notice of dishonour, and protest are hereby waived by all takers, sureties, guarantors, and endorsers hereof."

with the new one which runs this way:

> "I waive my right to require the Note holder to do certain things. Those things are: (1) to demand payment of amounts due (known as "presentment"); (2) to give notice that amounts due have not been paid (known as "notice of dishonour"); (3) to obtain an official certificate of non payment (known as a "protest"). Anyone else (a) who agrees to keep the promises made in this Note, or (b) who agrees to make payments to the Note holder if I fail to keep my promises under this Note, or (c) who signs this note to transfer it to someone else (known as "guarantors, sureties, and endorsers") also waives these rights."

See how the technical terms were retained, but explanations were given for each one. If we have some ingenuity we can get over the problem of technical and unusual terms. Whether we take the effort to inform our clients depends on whether we are skilful professionals concerned to be good communicators or whether we are slothful and haughty.

If we are still hesitant about abandoning terminology which has the support of precedence on our own, then we should seek collective approaches to the problem. There must be means whereby plain English variants, for example "home" instead of "residence", can be accorded acceptability in law. Acts of interpretation could offer us one method. It is a task that an association such as your own might undertake. Speakers elsewhere in the community manage to cope with change in language, and lawyers also cope with change in the English language in their daily lives. There is no warrant to argue that we cannot cope with change in our professional lives.

The examples from Citibank and the Bank of America demonstrate that legal documents can be written in plain English. More to the point they also prove that plain language works for they have now been in successful operation for over ten years. We have similar evidence from Australia - NRMA, AMP, NZI, Superannuation

Scheme for Australian Universities, Income Tax Return S which was introduced in Western Australia last year and which is to be introduced nationally this year - to show that plain English does not lead to legal catastrophe. On the contrary, it is commercially beneficial. Organizations that have adopted plain English policies have gained as a result, and not just in custom alone. There have been many other cost benefits. The NRMA has found, for instance, that it takes less time to train staff, that junior staff have to interrupt senior staff less for explanations of policy conditions, that it receives far fewer invalid claims because policy holders have a clearer understanding of what their policies permit. In the United States the Federal Communications Commission had to employ five members of staff full-time to answer queries when its regulations for citizen band radio licences were written in legalese. When the regulations were translated into plain English all five members of staff could be redeployed. In the United Kingdom the Department of Defence is saving 400,000 pounds a year for an outlay of 12,000 pounds on one project alone, while the department of Health and Social Security is saving 2.5 million pounds a year on the redesign of three forms. By revising one of its VAT forms the Department of Customs and Excise expects to save the retail industry 125,000 hours a year in completing the form.

During the past two months I have been working on court forms for the Victorian Government, concentrating on the Summons and 3 forms connected with the cancellation of driving licences. We have translated the forms into plain English, re-arranged the material into a more logical sequence, and redesigned them. In the process we have eliminated 2 of them. Not only will we be helping the public through this exercise, but we will also be saving government departments at least the equivalent of $600,000 a year, releasing 30 members of staff from unnecessary paperwork for more productive duties.

The lesson is clear. Not only should we adopt plain English to communicate successfully, but we also must adopt it to be efficient. Plain English is an economic necessity. We cannot afford the waste incurred by gobbledegook. And at a very personal level we should not put up with the sheer waste of our time which others cause us when we have to struggle to understand their obscure, entangled legalese.

Recent years have also witnessed another change which is encouraging us to think more positively about plain English. There has been a significant shift in the reaction of courts to the wording of documents. Not only are courts looking at the intention of the parties but they are also starting to accept arguments about the comprehensibility of documents. After a number of cases major banks in the United States are now diffident about taking a client to court if there is a possibility that the client can plead incomprehension. Courts are beginning to move dramatically. In 1984 not only did the Chief Justice of the US District Court in New York find in favour of a group of citizens against the US Department of Health and

Human Services on the grounds that its standard letters "defy understanding by the general populace", but the Chief Justice went further and directed the Department to rewrite these letters in plain English.

A court in the United Kingdom in 1983 imposed damages of 95,000 pounds on a legal firm because a letter to a client was "badly worded, phrased in very obscure English, and that it was not surprising that the plaintiff, who was not a lawyer, misunderstood it". Similar developments are taking place in Australia. In 1982 a court dismissed a charge of fraudulent behaviour against a citizen on the grounds that the questions on a government form required a reading capacity beyond that of his level. Some of the questions on the form demanded a university level of education, yet most of the people completing the form would have left school early.

Thomas Montgomery, the Assistant General Counsel for the Bank of America, has been led to observe that "well-written documents provide less attractive subjects for legal attack". It is advice that we will have to heed more and more, but it would be a pity if we are motivated only by self-interest. It was established by the court, for instance, that the Australian citizen whose case I have just mentioned had tried to work out the meaning of a particular question, and the answer that he had given was honest in terms of that interpretation, and not fraudulent as claimed. It is sad if we as lawyers expose fellow citizens to distress because we will not take the trouble to write appropriately.

Not that we should think that writing in plain English is necessarily more difficult than writing in legalese. We may have habits to break but it is questionable to argue, as some would, that it takes more time to write plainly. Let me give you an example from literature. This is how Dr. Samuel Johnson originally recorded an event:

> "When we were taken upstairs a dirty fellow bounced out of the bed on which we were to lie."

As you know Dr. Johnson wrote voluminous letters to a lady, a Mrs Thrale, and later on he converted those letters into his victory masterpiece "A Journey to the Hebrides". This is how the episode turns up in "A Journey to the Hebrides":

> "Out of one of the beds on which we were to repose started up, at our entrance, a man black as a Cyclops from the forge."

This piece of Johnsonese would have taken much longer to write than its plainer counterpart, the first version, that he sent to Mrs Thrale. It is also typical of what happens in many a legal and government office today. A clear original will be produced and then hours will be spent reworking it into gobbledegook. A lot of so-called revision takes passages in the direction of obscurity. Time very often gives us opportunity only to inflate.

So far I have concentrated on the clarification which we can achieve through making the right choices in language for our audience, but equally extensive simplification can come from a consideration of the substance of a document. Indeed any project to increase comprehensibility should begin with the underlying policy content. The trouble with many legal documents is that they retain conditions that are either obsolete or inapplicable. Sometimes we expect the one agreement or contract to serve all purposes when it would be better to have two or more different types of contract. The success that Citibank was able to achieve with its new consumer loan note lay largely in its recognising that it was ridiculous to ask the small borrower to enter into the same type of agreement as the large corporate borrower. By devising a separate contract for the small borrower the bank was able to drop large sections of material. But this area of simplification falls squarely in the province of lawyers for only they are expert enough to know what is necessary and what can be omitted safely.

From time to time lawyers might, and possibly should, seek help from an expert in language to take the process of simplification further, because language experts can offer important insights. I have touched on only a few language items that lead to clearer documents. There are many others, such as negation, complex noun group, the active and the passive voice, the position of adverbials, elegant variation, and so on. But even when lawyers enlist the aid of language experts, the lawyers do not surrender their responsibility. It must be, it can only be, a collaborative effort. I for instance, would never dream of writing a legal document on my own. The legal expert is essential to ensure that any chosen wording protects the rights of all the parties.

Let me emphasise this point. The thrust for plain English is concerned with communication not with the law as such. We are talking about improving the quality of that communication. Your role as expert practitioners and interpreters of the law is not in question. Plain English will never belittle the law, but it will rescue the legal profession from a disrepute for obscurantism and mumbo-jumbo in which it is held. Above all it will help us come closer to a clarity of expression and an ease of comprehension which should be the goal whenever one human being speaks to another.

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Appendix 1

PSR 668 REV 9-74

FIRST NATIONAL CITY BANK
PERSONAL FINANCE DEPARTMENT - NEW YORK
APPLICATION NUMBER _____

ANNUAL PERCENTAGE RATE _____ %

$ _____ TOTAL OF PAYMENTS (4) + (7)

PROCEEDS TO BORROWER	(1)	$
PROPERTY INS. PREMIUM	(2)	$
FILING FEE	(3)	$
AMOUNT FINANCED (1) + (2) + (3)	(4)	$
PREPAID FINANCE CHARGE	(5)	$
GROUP CREDIT LIFE INS. PREMIUM	(6)	$
FINANCE CHARGE (5) + (6)	(7)	$

FOR VALUE RECEIVED, the undersigned (jointly and severally) hereby promise(s) to pay to FIRST NATIONAL CITY BANK (the "Bank") at its office at 399 Park Avenue, New York, New York 10022 (i) THE SUM OF

_____ ($ _____) (TOTAL OF PAYMENTS) ( ) IN _____ EQUAL CONSECUTIVE MONTHLY INSTALMENTS OF $ _____ EACH ON THE SAME DAY OF EACH MONTH, COMMENCING _____ DAYS FROM THE DATE THE LOAN IS MADE; OR ( ) IN _____ EQUAL CONSECUTIVE WEEKLY INSTALMENTS OF $ _____ EACH ON THE SAME DAY OF EACH WEEK, COMMENCING NOT EARLIER THAN 5 DAYS NOR LATER THAN 45 DAYS FROM THE DATE THE LOAN IS MADE; OR ( ) IN _____ EQUAL CONSECUTIVE BI-WEEKLY INSTALMENTS OF $ _____ EACH, COMMENCING NOT EARLIER THAN 10 DAYS NOR LATER THAN 45 DAYS FROM THE DATE THE LOAN IS MADE, AND ON THE SAME DAY OF EACH SECOND WEEK THEREAFTER; OR ( ) IN _____ EQUAL CONSECUTIVE SEMI-MONTHLY INSTALMENTS OF $ _____ EACH, COMMENCING NOT EARLIER THAN 10 DAYS NOR LATER THAN 45 DAYS FROM THE DATE THE LOAN IS MADE, AND ON THE SAME DAY OF EACH SEMI-MONTHLY PERIOD THEREAFTER, (ii) A FINE COMPUTED AT THE RATE OF 5¢ PER $1 ON ANY INSTALMENT WHICH HAS BECOME DUE AND REMAINED UNPAID FOR A PERIOD IN EXCESS OF 10 DAYS, PROVIDED (A) IF THE PROCEEDS TO THE BORROWER ARE $10,000 OR LESS, NO SUCH FINE SHALL EXCEED $5 AND THE AGGREGATE OF ALL SUCH FINES SHALL NOT EXCEED THE LESSER OF 2% OF THE AMOUNT OF THIS NOTE OR $25, OR (B) IF THE ANNUAL PERCENTAGE RATE STATED ABOVE IS 7.50% OR LESS, THE LIMITATIONS PROVIDED IN (A) SHALL NOT APPLY AND NO SUCH FINE SHALL EXCEED $25 AND THE AGGREGATE OF ALL SUCH FINES SHALL NOT EXCEED 2% OF THE AMOUNT OF THIS NOTE, AND SUCH FINE(S) SHALL BE DEEMED LIQUIDATED DAMAGES OCCASIONED BY THE LATE PAYMENT(S); (iii) IN THE EVENT OF THIS NOTE MATURING, SUBJECT TO AN ALLOWANCE FOR UNEARNED INTEREST ATTRIBUTABLE TO THE MATURED AMOUNT, INTEREST AT A RATE EQUAL TO 1% PER MONTH AND (iv) IF THIS NOTE IS REFERRED TO AN ATTORNEY FOR COLLECTION, A SUM EQUAL TO ALL COSTS AND EXPENSES THEREOF, INCLUDING AN ATTORNEY'S FEE EQUAL TO 15% OF THE AMOUNT OWING ON THIS NOTE AT THE TIME OF SUCH REFERENCE, FOR NECESSARY COURT COSTS. THE ACCEPTANCE BY THE BANK OF ANY PAYMENT(S) EVEN IF MARKED PAYMENT IN FULL OR SIMILAR WORDING, OR IF MADE AFTER ANY DEFAULT HEREUNDER, SHALL NOT OPERATE TO EXTEND THE TIME OF PAYMENT OF OR TO WAIVE ANY AMOUNT(S) THEN REMAINING UNPAID OR CONSTITUTE A WAIVER OF ANY RIGHTS OF THE BANK HEREUNDER.

AND DATE LOAN MADE

P.J. NO.

IN THE EVENT THIS NOTE IS PREPAID IN FULL OR REFINANCED, THE BORROWER SHALL RECEIVE A REFUND OF THE UNEARNED PORTION OF THE PREPAID FINANCE CHARGE COMPUTED IN ACCORDANCE WITH THE RULE OF 78 (THE "SUM OF THE DIGITS" METHOD), PROVIDED THAT THE BANK MAY RETAIN A MINIMUM FINANCE CHARGE OF $10, WHETHER OR NOT EARNED, AND, EXCEPT IN THE CASE OF A REFINANCING, NO REFUND SHALL BE MADE IF IT AMOUNTS TO LESS THAN $1. IN ADDITION, UPON ANY SUCH PREPAYMENT OR REFINANCING, THE BORROWER SHALL RECEIVE A REFUND OF THE CHARGE, IF ANY, FOR GROUP CREDIT LIFE INSURANCE INCLUDED IN THE LOAN EQUAL TO THE UNEARNED PORTION OF THE PREMIUM PAID OR PAYABLE BY THE HOLDER OF THE OBLIGATION (COMPUTED IN ACCORDANCE WITH THE RULE OF 78), PROVIDED THAT NO REFUND SHALL BE MADE OF AMOUNTS LESS THAN $1.

AS COLLATERAL SECURITY FOR THE PAYMENT OF THE INDEBTEDNESS OF THE UNDERSIGNED HEREUNDER AND ALL OTHER INDEBTEDNESS OR LIABILITIES OF THE UNDERSIGNED TO THE BANK, WHETHER JOINT, SEVERAL, ABSOLUTE, CONTINGENT, SECURED, UNSECURED, MATURED OR UNMATURED, UNDER ANY PRESENT OR FUTURE NOTE OR CONTRACT OR AGREEMENT WITH THE BANK (ALL SUCH INDEBTEDNESS AND LIABILITIES BEING HEREINAFTER COLLECTIVELY CALLED THE "OBLIGATIONS"), THE BANK SHALL HAVE, AND IS HEREBY GRANTED, A SECURITY INTEREST AND/OR RIGHT OF SET-OFF IN AND TO (a) ALL MONIES, SECURITIES AND OTHER PROPERTY OF THE UNDERSIGNED NOW OR HEREAFTER ON DEPOSIT WITH OR OTHERWISE HELD BY OR COMING TO THE POSSESSION OR UNDER THE CONTROL OF THE BANK, WHETHER HELD FOR SAFEKEEPING, COLLECTION, TRANSMISSION OR OTHERWISE OR AS CUSTODIAN, INCLUDING THE PROCEEDS THEREOF, AND ANY AND ALL CLAIMS OF THE UNDERSIGNED AGAINST THE BANK, WHETHER NOW OR HEREAFTER EXISTING, AND (b) THE FOLLOWING DESCRIBED PERSONAL PROPERTY (ALL SUCH MONIES, SECURITIES, PROPERTY, PROCEEDS, CLAIMS AND PERSONAL PROPERTY BEING HEREINAFTER COLLECTIVELY CALLED THE "COLLATERAL"): ( ) Motor Vehicle ( ) Boat ( ) Stocks, ( ) Bonds, ( ) Savings, and/or _____

SEE CUSTOMER'S COPY OF SECURITY AGREEMENT(S) OR COLLATERAL RECEIPT(S) RELATIVE TO THIS LOAN FOR FULL DESCRIPTION.

IF THIS NOTE IS SECURED BY A MOTOR VEHICLE, BOAT OR AIRCRAFT, PROPERTY INSURANCE ON THE COLLATERAL IS REQUIRED, AND THE BORROWER MAY OBTAIN THE SAME THROUGH A PERSON OF HIS OWN CHOICE.

IF THIS NOTE IS NOT FULLY SECURED BY THE COLLATERAL SPECIFIED ABOVE, AS FURTHER SECURITY FOR THE PAYMENT OF THIS NOTE, THE BANK HAS TAKEN AN ASSIGNMENT OF 10% OF THE UNDERSIGNED BORROWER'S WAGES IN ACCORDANCE WITH THE WAGE ASSIGNMENT ATTACHED TO THIS NOTE.

In the event of default in the payment of this or any other Obligation or the performance or observance of any term or covenant contained herein or in any note or other contract or agreement evidencing or relating to any Obligation or any Collateral on the Borrower's part to be performed or observed; or the undersigned Borrower shall die; or any of the undersigned become insolvent or make an assignment for the benefit of creditors; or a petition shall be filed by or against any of the undersigned under any provision of the Bankruptcy Act; or any money, securities or property of the undersigned now or hereafter on deposit with or in the possession or under the control of the Bank shall be attached or become subject to distraint proceedings or any order or process of any court; or the Bank shall deem itself to be insecure, then and in any such event, the Bank shall have the right (at its option), without demand or notice of any kind, to declare all or any part of the Obligations to be immediately due and payable, whereupon such Obligations shall become and be immediately due and payable, and the Bank shall have the right to exercise all the rights and remedies available to a secured party upon default under the Uniform Commercial Code (the "Code") in effect in New York at the time, and such other rights and remedies as may otherwise be provided by law. Each of the undersigned agrees (for purposes of the "Code") that written notice of any proposed sale of, or of the Bank's election to retain, Collateral mailed to the undersigned Borrower (who is hereby appointed agent of each of the undersigned for such purpose) by first class mail, postage prepaid, at the address of the undersigned Borrower indicated below three business days prior to such sale or election shall be deemed reasonable notification thereof. The remedies of the Bank hereunder are cumulative and may be exercised concurrently or separately. If any provision of this paragraph shall conflict with any remedial provision contained in any security agreement or collateral receipt covering any Collateral, the provisions of such security agreement or collateral receipt shall control.

Appendix 2

First National City Bank

Consumer Loan Note Date_____, 19____

(In this note, the words **I, me, mine** and **my** mean each and all of those who signed it. The words **you, your** and **yours** mean First National City Bank.)

Terms of Repayment To repay my loan, I promise to pay you_____Dollars ($_____). I'll pay this sum at one of your branches in_____uninterrupted_____ installments of $_____each. Payments will be due_____, starting from the date the loan is made.

Here's the breakdown of my payments:

1. Amount of the Loan	$_____	
2. Property Insurance Premium	$_____	
3. Filing Fee for Security Interest	$_____	
4. Amount Financed (1+2+3)		$_____
5. **Finance Charge**		$_____
6. Total of Payments (4+5)		$_____

Annual Percentage Rate_____%

Prepayment of Whole Note Even though I needn't pay more than the fixed installments, I have the right to prepay the whole outstanding amount of this note at any time. If I do, or if this loan is refinanced—that is, replaced by a new note—you will refund the unearned **finance charge,** figured by the rule of 78—a commonly used formula for figuring rebates on installment loans. However, you can charge a minimum **finance charge** of $10.

Late Charge If I fall more than 10 days behind in paying an installment, I promise to pay a late charge of 5% of the overdue installment, but no more than $5. However, the sum total of late charges on all installments can't be more than 2% of the total of payments or $25, whichever is less.

Security To protect you if I default on this or any other debt to you, I give you what is known as a security interest in my ○ Motor Vehicle and/or_____(see the Security Agreement I have given you for a full description of this property), ○ Stocks, ○ Bonds, ○ Savings Account (more fully described in the receipt you gave me today) **and** any account or other property of mine coming into your possession.

Insurance I understand I must maintain property insurance on the property covered by the Security Agreement for its full insurable value, but I can buy this insurance through a person of my own choosing.

Default I'll be in default:

1. If I don't pay an installment on time; or
2. If any other creditor tries by legal process to take any money of mine in your possession.

You can then demand immediate payment of the balance of this note, minus the part of the **finance charge** which hasn't been earned figured by the rule of 78. You will also have other legal rights, for instance, the right to repossess, sell and apply security to the payments under this note and any other debts I may then owe you.

Irregular Payments You can accept late payments or partial payments, even though marked "payment in full", without losing any of your rights under this note.

Delay in Enforcement You can delay enforcing any of your rights under this note without losing them.

Collection Costs If I'm in default under this note and you demand full payment, I agree to pay you interest on the unpaid balance at the rate of 1% per month, after an allowance for the unearned **finance charge.** If you have to sue me, I also agree to pay your attorney's fees equal to 15% of the amount due, and court costs. But if I defend and the court decides I am right, I understand that you will pay my reasonable attorney's fees and the court costs.

Comakers If I'm signing this note as a comaker, I agree to be equally responsible with the borrower. You don't have to notify me that this note hasn't been paid. You can change the terms of payment and release any security without notifying or releasing me from responsibility on this note.

Copy Received The borrower acknowledges receipt of a completely filled-in copy of this note.

	Signatures	Addresses
Borrower:	_____	_____
Comaker:	_____	_____
Comaker:	_____	_____
Comaker:	_____	_____

Hot Line If something should happen and you can't pay on time, please call us immediately at (212) 559-3061.

Personal Finance Department
First National City Bank

PBR 668 Rev. 1/75