THIRTY YEARS OF CHANGE

A paper presented to CLARITY on 11 March 2014
Sir Kim Lewison

1. I begin with one of my favourite quotations although it is a little older than 30 years:

> "From the Spectator
>
> My attention has been called to Statutory Rules and Orders 1943 No 1216 issued by the Ministry of Supply. You can buy it from the Stationery Office for a penny. Its operative clause runs thus:
>
> The Control of Tins Cans Kegs Drums and Packaging Pails (No 5) Order 1942 as varied by the Control of Tins Cans Kegs Drums and Packaging Pails (No 6) Order 1942, the Control of Tins Cans Drums and Packaging Pails (No 7) Order 1942, the Control of Tins Cans Drums and Packaging Pails (No 8) Order 1942 and the Control of Tins Cans Drums and Packaging Pails (No 9) Order 1942, is hereby further varied in the Third Schedule thereto (which is printed at p 2 of the printed (No 6) Order in Part II Commodities other than Food by substituting for the reference "2A" therein, the reference "2A(1)", and by deleting therefrom the reference "2B".
>
> This is excellent news that will gladden the heart of every public spirited citizen. Why the Ministry of Supply could not leave it there is unimaginable. Jettisoning gratuitously the sound and time-honoured principle that a Government Department never explains, it adds – quite incredibly – an Explanatory Note, which reads:
>
> "The above order enables tinplate to be used for tobacco and snuff tin other than cutter-lid tobacco tins"
>
> What is to be said of this unwarrantable insult to the national intelligence? What kind of people do they think we are? Do they suppose we can't read plain English?"

2. This is, perhaps, an extreme example, but there are some aspects to the writing of legal English that differ from the ordinary use of language, namely:

   - The need to be precise
   - The need to avoid ambiguity and

- The need to be proof against misinterpretation.

3. When I started in the law in the mid-1970s my work was dealing with leases and conveyancing documents. The prevailing drafting style was verbose, obscure, repetitive and unpunctuated. In 1977 I wrote a book on drafting leases, one of whose aims was to encourage clearer legal writing. It was part of a growing trend towards clearer legal writing. For instance a typical repairing covenant of the time went like this:

> When where and so often as occasion shall require well and sufficiently to repair renew rebuild uphold support sustain maintain pave purge scour cleanse glaze empty amend and keep the premises and every part thereof (including all fixtures and additions thereto) and all floors walls columns roofs canopies lifts and escalators (including all motors and machinery therefor) 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 "

4. I replaced it with a covenant to "keep the property in repair". I still can't see any substantial difference between them.

5. In the second edition, published in 1986, I set myself the challenge of drafting a complete lease, including a rent review clause, that was in plain English and took up no more than two pages. I think I succeeded.

6. In the case of consumer contracts the trend towards simpler drafting has been boosted by European Directives and implementing domestic regulations, notably the Unfair Terms in Consumer Contracts Regulations 1999. Regulation 7 (1) provides that:

> A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language.

7. OFT guidance OFT 311 explains how the OFT view that requirement. The advice that it offers includes:

- Use ordinary words and avoid legal or technical language as much as possible.

- Consider whether the meaning of your terms are clear and not open to a number of interpretations.
- Make written terms legible (for example, consider whether font size and print quality is easily readable).
- Consider whether your written contract is reader-friendly (for example, use short sentences and subheadings).
- Check terms don't have the potential to be misleading.
- Consider whether the price and main subject matter terms are highlighted as well as intelligible.

8. Although this advice relates to consumer contracts it is good advice for the drafting of contracts generally or, indeed, for the use of language. It bears, to my mind, a very striking resemblance to George Orwell's strictures at the end of his wonderful essay, *Politics and the English Language*. My own experience tells me that this kind of drafting is becoming more common and not just in consumer contracts.

9. In consumer contracts there is also a growing trend towards the use of the first and second person: us and you rather than the seller and the buyer or the insurer and the insured. That style does not, however, seem to have made its way into more formal documents, although you do see it from time to time in tenancy agreements for social housing, and residential mortgage conditions. But they, I suppose, are themselves a form of consumer contract. One exception is the Land Securities Clearlet lease which does use the first and second person. But that, too, is essentially designed to be read by the company executives (or shop managers) rather than by the lawyers. Another attempt at a plain English lease was a pair of standard forms promulgated by the Law Society about fifteen years ago. But I don't recall ever having seen it in actual use.

10. It is, I think, easier to produce clear legal writing in documents which are intended to be read (or signed) without alteration. That, I think, is one reason why consumer contracts lead the way. Once a document is there to be passed backwards and forwards as a travelling draft, no lawyer worth his salt will restrain the urge to reach for the red pen, or whatever the current electronic

equivalent is. Once a document starts to be amended by others it will almost inevitably lose some of its clarity. And indeed, where the parties are opposing different interests, there may be studied ambiguity in agreeing a compromise form of words which perhaps satisfies neither person, but which everybody hopes won't actually lead to trouble along the line. Frequency of amendment is one reason, although I think there are others, why pension fund deeds and rules are among the most impenetrable documents known to humankind. They I think will be the last bastions to fall.

11. In parallel with these changes in drafting, there has also been a change in the way in which the courts approach the interpretation of contracts. The interpretation of the contract is, of course, the other side of the coin from drafting it in the first place. The latest word on the subject, at least for the time being, is the decision of the Supreme Court in *Marley v Rawlings*, a will case, in which Lord Neuberger said:

> "During the past forty years, the House of Lords and Supreme Court have laid down the correct approach to the interpretation, or construction, of commercial contracts in a number of cases starting with *Prenn v Simmonds* and culminating in *Rainy Sky SA v Kookmin Bank.*
>
> When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words,
>
> (a) in the light of
>
> (i) the natural and ordinary meaning of those words,
>
> (ii) the overall purpose of the document,
>
> (iii) any other provisions of the document,
>
> (iv) the facts known or assumed by the parties at the time that the document was executed, and
>
> (v) common sense, but
>
> (b) ignoring subjective evidence of any party's intentions."

12. For me, however, the most important development came in 1998 with Lord Hoffmann's speech in the *Investors Compensation Scheme* case. I would like to pick out two points:

    - First, Lord Hoffmann's statement that the result of the modern approach to interpretation of contracts has been to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life.
    - Second, his statement that a contract is to be interpreted in the light of the background which can include absolutely anything relevant which would have affected the way in which the language of the document would have been understood by a reasonable person.

13. Lord Hoffmann is a master of the English language and the beauty of his prose sometimes obscures difficulties of concept behind what he is saying so eloquently. Is it, for instance, true that we interpret contracts (or should interpret them) in the same way as any serious utterance in ordinary life? In previous cases Lord Hoffmann illustrated his points with examples drawn largely from fictitious conversations. The first difficulty is that in ordinary life remarks made in conversation do not normally carry legal consequences. People are not normally bound by what they say. Second, in ordinary life we try to understand what the speaker intended to say. An utterance in ordinary life is made by a single person whose personality may provide part of the context for interpreting it. We do not apply an objective standard or (necessarily) assume that the speaker is a reasonable person. In the case of a contract, there is no real flesh and blood person who is making the utterance, and the parties themselves are depersonalised. We adopt an objective approach to the interpretation of the contract and therefore we lose a lot of the context in which we actually interpret utterances in real life.

14. In everyday life, a listener may ask for clarification in cases of ambiguity, whereas it is in precisely those cases that the court is called upon to interpret the contract, with no possibility of seeking clarification. If the contract is unambiguous there is nothing to interpret and it is very unlikely that a dispute

will arise before the court, except where a contract uses words that are themselves inherently uncertain, such as something to be done to a reasonable standard or consent not to be unreasonably withheld and so forth. In addition, in everyday life, a speaker, whose words are interpreted in a way he did not intend, may legitimately say that he has been misunderstood. It would be a churlish response to say that he has not been misunderstood, simply because his words conveyed a different meaning to a reasonable listener.

15. As I have said, in ordinary life an utterance is made in a specific context by a specific person for a specific purpose. A written contract is often designed to be read by a third party in circumstances which the contracting parties have not predicted or have not wholly anticipated. In addition, in ordinary life the act of communicating relies on a mutual expectation of co-operation between speaker and listener. A contract, on the other hand, is in part designed to deal with the situation when co-operation breaks down and legal rights are all that remain.

16. In addition, in the case of conversation much of a speaker's meaning can be deduced from tone of voice and body language. In contract disputes, however, most of the contract disputes that come before the courts are contracts made by corporations. A theory of interpretation that relies on communications between individuals overlooks that central fact. Anyone who deals with corporations knows that the human beings who implement contracts are not necessarily the same as those who negotiated the contracts in the first place. Not only may different departments be involved in the implementation and negotiation of contracts, but people are promoted, retire or move on.

17. So far as background is concerned, no one doubts that, where appropriate, a contract must be interpreted in the light of the surrounding circumstances. But there is a danger in paying too much attention to surrounding circumstances. In cases that have come before the courts, attention has focussed on evidence and trial costs. In reality, however, trial costs are not what this objection is principally about. Only a tiny fraction of cases that involve disagreements about what contracts mean come to court. What the objection is really about is transaction costs. Efficiency in the conduct of business affairs requires that parties should be able to decide what their obligations are quickly and cheaply;

and preferably without recourse to lawyers. When they do consult lawyers they want their lawyers to be able to give firm advice quickly. That is why practitioners who are involved in the daily business of interpreting contracts view with dismay the push towards the expansion of the material that must be considered before a contract can be validly interpreted. We ignore the views of the legal and business community that the law is meant to serve at our peril. We must also not forget that the English law of contract is a significant export commodity. Many international contracts positively choose English law as the governing law, and our domestic courts as the forum for dispute resolution.

18. The job of a lawyer called upon to draft a contract is, among other things, to achieve as much certainty as possible. As Alan Berg has pointed out [1]:

> "A lawyer does not do the job he is retained to do if he drafts the contract so that it is intelligible only to the original parties, and then only for as long as they can recall all the background knowledge that they had at the time of the signing."

19. Contracting parties employ lawyers to record their bargains partly because they want the resulting documents to be self-contained; or at least capable of being interpreted by an outsider who has no detailed knowledge of how the contract came into being. The very fact that contracting parties do this could be said to be a tacit agreement between them that background has a limited role to play. Indeed one of the central commercial purposes of a written contract is to minimise the potential for dispute. JJ Spigelman, the former Chief Justice of New South Wales has pointed out [2] that:

> "… it remains pertinent, not least as a precedent, to approach the task of interpretation on the basis that a significant commercial purpose of the written agreement was to state the obligations of the parties with sufficient certainty to avoid the very dispute that has eventuated. The further one travels beyond the text, the less likely it is that that commercial purpose will be served."

20. There are some signs that, at least in some cases, the courts are beginning to row back from Lord Hoffmann's extreme position. In *Cherry Tree v Landmain*

[1] Alan Berg: "*Thrashing Through the Undergrowth*" (2006) 122 LQR 354
[2] *Extrinsic material and the interpretation of insurance contracts* (2011) 22 Insurance Law Journal 143

[3] the question was whether a charge, intended to be registered at the Land Registry, could be interpreted by reference to a facility letter that preceded it and which contained a clause extending the mortgagee's power of sale which had been omitted from the charge as registered. By a majority the Court of Appeal said no. I gave the main judgment for the majority and I said this:

> The reasonable reader's background knowledge would, of course, include the knowledge that the charge would be registered in a publicly accessible register upon which third parties might be expected to rely. In other words a publicly registered document is addressed to anyone who wishes to inspect it. His knowledge would include the knowledge that in so far as documents or copy documents were retained by the registrar they were to be taken as containing all material terms, and that a person inspecting the register could not call for originals. The reasonable reader would also understand that the parties had a choice about what they put into the public domain and what they kept private. He would conclude that matters which the parties chose to keep private should not influence the parts of the bargain that they chose to make public.

21. We will have to see the extent to which this approach is taken up in later cases.

22. I would not presume to give advice on how to draft a contract, having stopped doing so myself over ten years ago. But I would like to leave you with two quotations. The first is from the philosopher, Wittgenstein:

> Everything that can be thought can be thought clearly. Everything that can be put into words can be put clearly.

23. But the final word goes to the American linguist Fred Householder:

> Nothing can be so clearly and carefully expressed that it cannot be utterly misinterpreted.

[3] [2013] Ch 305

Questions and discussion

Q: In the same way we as commercial lawyers include entire agreement clauses in our agreements, should we now include entire background clauses?

A: I think there is no harm if you wish to exclude background. Traditionally in an old-style conveyancing document, recitals provided agreed background, and sometimes you still see recitals. But, if you wish to exclude background, I think that contractually you can do it and I rather think the courts will say that, if you wish to do that, you have done it.

Q: You said you wouldn't presume to give advice on how to draft a contract. What could lawyers do when they are drafting contracts, to make your work as a judge easier?

A: I would echo Einstein: simplify as much as possible, but no further. I think that breaking up contracts into short sentences – it's really going back to George Orwell's *Politics and the English Language*: use the active rather than the passive, use the Anglo Saxon rather than the Latin, always use a short word if you can, make the sentence structure simpler, use punctuation, use layout, all those things. And read it through very carefully, make sure it's consistent. I think, as I said in the talk, the real problem comes where a contract is being negotiated and where changes in wording are being proposed by parties with opposing interests. The integrity of the original draft can get skewed in that process.

Q: I'm in the energy business and we tend to stray into doing recitals pretty frequently. It sounds as though you think they are rather a two-edged sword. Are you generally against recitals?

A: No, I'm not against recitals. I think that an agreed set of background facts is often very useful, setting the context in which a document has been negotiated. Sometimes a recital will explain the general commercial purpose of the document one is about to read. I'm not against them at all.

Q: One of my former colleagues had a great ambition that an agreement might be 20 pages of definitions and 2 pages of text. How do you regard the world of definitions?

A: I'm not a huge fan of over-definition, because I think it makes a document very hard to read if you keep having to track back to clause one or Schedule 1 or wherever the definitions are, to understand what is being

said. Definitions obviously have a place. You can't keep repeating things; they help to shorten documents, but I think they need to be kept in check.

Q: My background is in international commercial arbitration. Are contracts interpreted differently – would a tribunal interpret a contract with international parties in a different way to an English contract between English parties? For instance, things like the obligation of good faith and how that is looked at …

A: Are you assuming a contract which is governed by English law?

Q: English law. And also how the interpretation of this has developed over the years, interpretation of the obligation of good faith?

A: Well, an obligation of good faith exists, of course, in many civilian systems. So far, attempts to introduce it into English law have fallen on rather stony ground. If you had an international tribunal, the composition of which was made up of or included civil lawyers then it may well be that they would be receptive to interpreting a contract in the light of good faith. But it is not (yet, anyway) part of English law to have that general obligation of good faith. I suppose the answer to your question is that, in theory (I stress in theory) an arbitral tribunal should be interpreting a contract governed by English law the same way as a court would.

Q: Is that the experience, in practice, of people in this room? Is there any experience on that point? Do arbitrators interpret English-law contracts just as an English court would? (*Pause*.) Maybe we have an audience of the drafters rather than the litigators.

Q: They claim that they do.

Q: If you incorporate English law, then you're stuck with it, aren't you?

Q: There are moves, as you probably know, as part of the longstanding project on European contract law – one of the aspects that's caused the most aggro for the common lawyer is the idea of good faith being incorporated into some sort of European code. That's a very active subject.

A: Yes, there are significant differences in a number of areas between common lawyers and their civilian counterparts.

Q: The *Investors Compensation Scheme* case seemed to me to be a great turning point. Why do you think that is? It seemed to be tremendously well received and subsequently it's been hugely cited, the most cited case I've seen.

A: Part of it, I think, is because it simplified and at the same time expanded the way in which courts approached the interpretation of contracts. It was a synthesis of what had gone before plus Lord Hoffmann's own reflections on what was relevant. It reflected, I think, his own increasing interest in the philosophy of language which comes across in some of his earlier decisions. But its impact, I think, was very largely attributable to the elegance of his writing. He is the most wonderful writer and it's very easy to be swept along by the elegance of his words without stopping to think quite what he is actually saying.

Q: Following that, I remember a couple of years later Christopher Staughton wrote an article saying nothing seemed more likely to hugely increase the already huge costs of commercial litigation. Do you think that has been borne out?

A: Yes, I think it has. Trial costs are much greater in the post-*Investors Compensation Scheme* era when there is much more, in terms of disclosure. Costs of litigation, and of disclosure in particular, have risen exponentially. That's partly from changes in communication habits. Where before you would pick up the phone and not leave a trace, now you send an email, so you get endless email chains that have to be disclosed and everything is recorded somewhere in writing. Before a chap would call you on the phone and that was that. Maybe you kept a note, maybe you didn't. And because background, whatever that is, is now routinely looked at by everybody, even if it doesn't get as far as court, lawyers in the course of their trial preparations trying to find some wonderful piece of evidence, it increases costs enormously. As I said in the talk, I think the real cost is not so much litigation costs as transaction costs. If you've got to trawl through all this stuff before you can interpret a contract, you wouldn't give confident advice just looking at a piece of paper.

Q: Can I ask about the restriction of background material you mentioned? Particularly where documents are intended to bind future persons, for example restrictive covenants of freehold land. There might be a trend that documents related to the material available at the Land Registry, which is available to anyone – whereas sometimes, in private archives, somebody might dig up something saying "this is actually the land intended to be bound". Do you think that it should be restricted to what is publicly available in cases where it's different persons involved than the original persons? Or do you open up the way to investigation of what isn't in the public domain?

A: I think the policy of the Land Registration Act 2002 was to make the register of titles complete and as accurate a picture of title as possible. The more you allow extraneous material to influence the question of title, the more you undermine that policy. Quite where the line is going to be drawn I don't know. It has been the law for a very long time that, in the case of a restrictive covenant, the identification of the land intended to be benefited

by the covenant has been capable of proof by extrinsic evidence. Whether that will change, I don't know. I tried to row back a bit in the *Cherrytree* case from the idea that registration documents had no effect on the way in which they would be interpreted. Where Parliament has produced a scheme which is intended to have a comprehensive publicly accessible register then the integrity of the register is something the courts ought to bear in mind in deciding either what's admissible, or, if admissible, what weight to give it.

Q: Then there's the question of which public domain documents you look at. You can trawl in London metropolitan archives for things which are registered in the Middlesex Deeds Registry. Do you have different types of public domain things? In practice not many people look at the Middlesex Deeds Registry.

A: The theory is that a publicly registered document is there to be looked at by anybody who wishes to look at it.

Q: Is it not that case that, when the courts decided that in certain circumstances extrinsic evidence could be looked at to interpret contracts, the primary intention was that you could look at background to understand the meaning of words but the intention of the parties still had to be ascertained from the document itself? Has that drifted too far the other way?

A: The ultimate objective is still to discover the meaning that the words would convey to a reasonable reader with the background knowledge of the parties. That's the stock phrase. The difficulty comes, I suppose, because the meaning of words is flexible. You only have to look at a dictionary to see how many meanings there are for almost any word you care to mention. So the courts are using background in order to explain the meaning of the words. I don't think we have yet abandoned what we describe as the objective theory of interpretation: that is to say, we are not necessarily concerned with what individual parties subjectively thought they were agreeing. It's not what the parties intended to agree but what's the meaning of what they did agree. They are different questions. I think the answer to your question is No, we're not yet engaged in the search for the subjective intention of the contracting parties.

Q: But if the background circumstances are really only investigated to ascertain what meaning the parties gave to words and phrases that appear in the contract, surely there shouldn't be much need to do an awful lot of investigation into the background?

A: In theory, I agree with you. But, in practice, it's "trawl through".

Q: Can I ask again about the practice of drafting contracts? Those who were in practice in 1998, when *ICS v West Bromwich* made this big change, did you notice a difference in how you went about drafting contracts? I am appealing here to the older members of the audience. Everyone who was drafting contracts in 1998, stand up now, please. Thank you. (*About 15 people stand up.*) Now, stay standing if you changed your approach to drafting and negotiating contracts, when you saw what the courts had done. (*All sat down. Laughter.*) I'm sorry. You didn't investigate the background any more than you already were?

Q: I think the reality was, there are so many factors when you come to draft any individual contract, that that would be so small, you might not have clocked it at the time. Insofar as it had an impact, it would have been by osmosis, as you saw other contracts and borrowed other terminology you come across. I think it would be quite hard to say there was a lightbulb moment.

Q: Thank you very much. Same people up again, please. Now that time has passed since 1998 and, by osmosis, we have absorbed the changes, is there anything you can now identify that you do differently today, that you think is tied to the courts' willingness to look at everything for background. If the answer's yes, stay standing. (*All sat down again. Laughter.*)

Q: A wonderful example of group behaviour.

A: If the practice of drafting hasn't changed, and I'm not entirely surprised to see that it hasn't, what about when you are asked to advise on what a contract means? Do you then investigate the background or do you simply look at a piece of paper?

Q: I was a litigator at the time of ICS and I would say yes, we did change and investigate the background more. Not necessarily when you're actually going to court, but when we were trying to work out what the answer was and give advice on merits.

A: That's what I rather thought might happen. That, I think, is where the costs lie, when you are asked to advise on what a contract means.

Q: If I could just add to that, also as a litigator. When a client comes with a contract with an uncertain meaning, where the parties have a different opinion, your client invariably is telling you "Their view makes no commercial sense". Of course, the other client is telling its lawyer the same thing. I think one implication of the courts' approach is that the lawyer will say "this is what I think it means, but we have an opportunity to expand our view, based upon the commercial sense of it, given the *Rainy Sky* decision amongst others". I think it leads to less clear advice to clients, because it gives them an opportunity to expand their arguments and therefore encourages disputes. Which is in my own interest, but …

Q: From a commercial rather than a litigator's perspective, I think you often advise on what the contract says and then apply a caveat that you don't know the background circumstances that could affect the interpretation of the contract. Because commercially you just can't investigate the background to the contract before telling the client what it means. No client would be prepared to pay for that other than in situations where it's actually come into a dispute or it's a hugely critical point.

A: So the advice is less confident?

Q: I think the advice is confident but the caveat is stronger (*laughter*).

Q: I'm a non-contentious lawyer and I was one of the people who stood up. I would say over the last decade there has definitely been a change in the way contracts are drafted: shorter clauses, numbering, headings, sub-clauses. They look totally different from what I remember first starting out, that you'd have a whole page of one clause, a very long sentence. I would say, as a contract drafter, that you do draft with headings, you have contents pages, cross-referencing, and the benefits of electronic documents help with that. People say that they are much much clearer. If anyone disagrees with me will they say?

A: Do you draft in the first and second person or do you still use the third person?

Q: The third person.

Q: My feeling is that Lord Hoffmann was not ahead of his time, but he was actually articulating what a lot of people had been thinking for a long time, not least members of Clarity. Therefore, his judgment in the *Investors* case wasn't that revolutionary to those who were of that cast of mind and had already been drafting contracts in the way that he indicated might be appropriate. Therefore, there was no change in drafting. I agree with the former speaker who said that contracts have improved over the last 30 years. I don't think there is any doubt that they are more absorbable by the reader. But that wasn't the result of what the judges have been saying, necessarily, or at least of what one judge had said. It was the accumulation of knowledge, practice, information exchange, which had been going on for some time.

A: I think the changes in contract drafting certainly didn't come out of what the judges said. I think a lot of it came out of European regulation. But it preceded that. There had been movements, right back into the seventies, perhaps even earlier, to encourage clearer legal writing. That was a long time before anything Lord Hoffmann said. He was not actually concerned about the way contracts were written, but the way in which

they were interpreted. I have some problems with the theory that underpins his theory of interpretation.

Q: On the other hand, in practice there is significantly more pressure which, to my mind, indicates lack of confidence in the specific terms of the document. We have mentioned good faith and that seems increasingly prevalent as a request to have it in. And recitals that "these are the overriding objectives of the parties". You then think, "Well, if the document's entirely clear in the terms, why would you need any of that?" That's been a change we've noticed; I'm not quite sure if it's good or bad.

A: Anything that helps a third party understand what the contract is about is going to be helpful.

Q: It does seem to open the door to more "What's the commerciality?".

Q: I'm interested in commercial contracts and what you said about transaction costs. From your perspective as a judge looking at these cases, is one of the issues of interpretation to do with who drafted the contract? One of the issues we see for our clients is that they quite often have big companies impose their terms on them though they have no real reflection of the nature of the contract that's in process and what's actually happening. The big companies see this as a way of minimising their transaction costs but it's actually making ambiguity because it doesn't reflect the detail of the deal.

A: It's very rare for the identity of the drafter of the contract to play much of a role. I did have a case – last year, I think it was – in which it did. It was the case of a software licence. You know: "I accept the terms and conditions" but you can't even open the thing. So you had to click on a button to accept the terms and then you got access to the software. There was an ambiguity. I used the fact that the software house not only drafted the terms but imposed them. So there was absolutely no opportunity to negotiate these terms at all; it was take it or leave it. Therefore I said the ambiguity should be interpreted against the software house. But that's rare.

Q: I was standing up already but I was drafting contracts in 1998. One thing that we did post the *Chartwell* case was recognising that in commercial contracts sometimes parties agree something which looks a bit odd in the context of the contract, but they've agreed it. We certainly asked ourselves the question – I don't know how extensively we implemented it – whether we should actually say somehow "This looks a bit strange in the context of the contract but the parties really mean it". Or

something which stands out as a sore thumb, is that likely to obviate an argument that, because it didn't look right …

A: Well, "It looks a bit odd" is certainly an argument that one hears again and again, usually as a means of trying to persuade the court that it can't mean that.

Q: A year or so ago we had a very interesting presentation at a Clarity breakfast by a speaker who introduced us to a single-page commercial contract. It set out only the basics and left the rest to the common law. He told us he had had some success with that, in use. Do you think drafters should put more faith in the common law, rather than trying to supersede the common law with complex terms?

A: I don't think I can answer that question in a blanket way. It depends on what it is the contract is doing. For instance, there is a very well developed common law relating to the supply of goods. You could probably leave quite a lot to the common law. In other areas, there isn't much common law. You're licking your finger and sticking it in the wind and seeing what happens. I don't think that I would recommend leaving a serious transaction simply to the common law and to implied terms, which is effectively what you would be doing. Plainly, when you walk into a shop, hand over your money, and have some goods in exchange, nothing is said, so everything is common law, it's all about whether it's fit for purpose, merchantable quality etc etc. That works perfectly well for everyday transactions. But for doing things more seriously, I think you need to formulate the terms.

Q: I wasn't suggesting it should be universally applied.

Q: The example we were shown was in the supply of goods. They were using it for large transactions, but where there was a continuing relationship. So not only did they have the common law, they also had commercial pressures and the desirability of keeping the relationship sweet. The two together, our speaker suggested, would work as long as there was something in it for both parties.

Q: Another point. Statutory drafting seems to have undergone a great change. Look at the Companies Act 1985 and the 2006 Act, for example; the use of typography, numbering etc. Has that followed or led the changes in contract drafting.

A: I think it's been evolving in parallel. Parliamentary Counsel has been instrumental in simplifying and, in some cases, clarifying legislation. I think, in a way, legislation is almost the paradigm example of the kind of communication whose integrity gets distorted, as it gets amended as it is

going through Parliament and the amendments sometimes defeat the integrity of the original draft. There is no doubt that legislation has become much more user friendly in the last 20 or 30 years. The tax rewrite project, for instance, made a huge difference.

Q: How can the courts encourage a simpler style of drafting? Should they do so?

A: I'm not sure the courts are really evangelical. We are there to resolve people's disputes. We are quick to criticise poor drafting. But I suppose when there is clear, good drafting, it doesn't get as far as the courts. So we are probably only ever going to see the poor examples.

Q: In your experience is there difference in attitude in drafting from the civil lawyer's perspective and the common lawyer's perspective?

A: I don't know enough about the way civil lawyers draft contracts to be able to answer your question.

Q: Can I return to the good faith discussion – is a trend towards that being introduced?

A: I think it's going to be a long time coming. If I had to bet on it, I think eventually we probably will adopt something like good faith. Yes, I think we probably will, if we stay in the EU.

Q: If we do that, we will blow a hole in the arguments we've been running about the European contract law. That is one of the areas where that's a very active subject.

On that note of controversy, we must end. Thanks to the City Remembrancer's office for hosting this meeting. Thanks to everyone who has attended and contributed. Thanks to our speaker, and for fielding such a range of questions. Please join me in giving him the thanks he deserves. (*Applause*).