Drafting Practice

The work of the practising solicitor has parallels with that of the legislative draftsman. The task of drafting conveyances, wills or contracts, like that of drafting legislation, requires clear thought and deft handling of words and concepts. Only the scale is different. For that reason solicitors may find useful an analysis of the practices of draftsmen of Acts and statutory instruments; and that is the purpose of a new occasional series of articles beginning here. In this series, I intend to draw on my experience as one of the Parliamentary Counsel (draftsmen of United Kingdom Government legislation) to explain points likely to be of interest and concern to practitioners. Usually these will be points raised in current legislation. The series is intended not merely to aid the drafting technique of solicitors, but also to help in the understanding of legislation. Without knowledge of the practices of legislative draftsmen, and how they are treated by the courts, it is difficult to achieve mastery of statute law. So far as possible I shall select samples drawn from fields which are of concern in the everyday work of a solicitor's practice.

Definite article

The definite article is used only where the substantive to which it is attached is unique. This rule was broken by the draftsmen of s 146 of the Law of Property Act 1925. He defined 'lessee' as including persons deriving title under a lessee. Then he said that a right of forfeiture for breach of convenant could not be enforced until the lessor served a notice on 'the lessee'. If the breach is of a convenant against assignment of the lease without the lessor's consent there must be at least two people who fall within the definition: the assignor and the assignee. Which of them is 'the lessee'?

The Court of Appeal found little difficulty in answering this question in *Old Grovebury Manor Farm Ltd v W Seymour Plant Sales and Hire Ltd (no 2)* [1979] 3 All ER 504. They held in effect that the phrase 'the lessee' in s 146 is elliptical. Its full meaning is 'the current lessee'. This is yet one more example of the traps set by inclusive definitions, even for their own draftsmen.

Mandatory or directory?

Where an Act or statutory instrument imposes a duty, or otherwise prescribes a course of action, it should be clear what legal result (if any) follows from failure to comply. It is not always easy for draftsmen to achieve this clarity. It may lengthen the provisions unacceptably if the consequences of failure are spelt out in detail. Yet reliance on case law is rarely satisfactory, since clear rules have not emerged.

In *London and Clydesdale Estates v Aberdeen District Council* [1979] 3 All ER 876, the House of Lords held that a statutory requirement that a local planning authority should include in a development certificate a statement of the applicant's right of appeal was mandatory, while a duty to issue the certificate within two months of application was merely directory. Lord Hailsham LC gave little comfort to statute users who look to the courts to lay down clear rules in this area.

Counsel had sought toargue that thecategory of 'directory' requirements could be subdivided into two: the case where substantial if not exact compliance was required, and the case where the requirements were so purely regulatory that failure to comply could in no circumstances affect validity. After saying he 'partly' agreed with this, Lord Hailsham (obiter) went on to pour cold water on attempts to produce neat classifications. We must not, he said, try to fit varying circumstances into rigid categories or 'stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition'. The court's jurisdiction here is inherently discretionary. It is frequently concerned with differences of degree

which merge imperceptibly into differences of kind. There is a spectrum of possibilities in which one compartment or description fades gradually into another. The range of statutory duties imposed on public authorities is so varied that overall rules cannot be laid down.

So the responsibility cast on the draftsman is great. Whenever he imposes a duty he should ask himself what are to be the precise consequences of default. If practicable he should spell them out in plain language. This is an area where a good Interpretation Act could help. If it contained an explanation of what 'directory' or 'mandatory' meant, the draftsman could employ such terms with confidence that their precise meaning would be understood. Unfortunately our new Interpretation Act neglects this opportunity.

Wider than the mischief

It is curious how often in recent times the drafting of legislation dealing with dishonesty, one of the basic antisocial acts, has gone seriously wrong. In ***R v Duncalf*** [1979] 2 All ER 1116, the Court of Appeal had to come to the rescue of the draftsman over the new offence of statutory conspiracy.

Section 1(1) of the Criminal Law Act 1977 defines this by reference to a simple concept. If the agreement is carried out in accordance with the parties' intentions, will their conduct necessarily amount to or involve the commission by any of them of a criminal offence? This concept, while satisfactory so far as it goes, was regarded by Parliament as too narrow. Certain types of common law conspiracy which it was desired to preserve lay beyond it. For example, while most acts agreed on in a common law conspiracy to defraud (theft, robbery, forgery, obtaining by deception) amount to criminal offences, not all do: see ***Scott v Metropolitan Police Commissioner*** [1975] AC 819

This was the mischief the draftsman had to deal with, and one would think it straightforward enough. In relation to fraud all he had to say was that the abolition by the Act of the offence of conspiracy at common law did not apply to any conspiracy to defraud not falling within s 1(1). He did not do this however. Instead, he went much wider and disapplied s 1(1) 'in any case where the agreement in question amounts to a conspiracy to defraud at common law'.

The Court of Appeal in ***R v Duncalf*** refused to take this literally. To do so, as Roskill LJ said, would be to destroy the obvious purpose of the Act. Thus was laid to rest a question which, as he put it, had been much debated in distinguished academic circles. It was also much debated in those less rarified quarters where counsel draft indictments. It was not a question which need ever have arisen.

Long titles

The draftsman is apt to regard the long title of his bill rather differently from the way a user regards the long title of the subsequent Act (though on royal assent the one becomes the other). The draftsman is concerned to comply with parliamentary rules of order under which the long title must be wide enough to embrace the contents of the bill. At the same time he may be anxious to keep the long title as ***narrow*** as possible. This is because it is often politically desirable to restrict the range of amendments which can be moved. Under the doctrine of scope prevailing in the House of Commons an amendment is out of order if beyond the scope of the bill. While the long title does not entirely determine the scope, it influences the judgment of House officials advising on whether amendments are in order.

So for the draftsman the long title is a procedural device. For the practitioner, who knows little if anything of parliamentary procedure, the long title is what it appears to be: a description of the Act's contents and an aid to its construction. The dangers of one party not bearing the other's viewpoint in mind are obvious.

These thoughts are prompted by ***Re Coventry, deceased; Coventry v Coventry*** [1979] 3 All ER 815, in which it is true no very great dangers emerged. The case concerned a not uncommon phenomenon in statute law: the pioneering Act which after some years of successful operationn is replaced by an Act of wider scope on the same lines. When the draftsman was asked to carry out this process in respect of the

Inheritance (Family Provision) Act 1938 he naturally enough began the long title of his bill with the words 'An Act to make fresh provision for empowering the court to make orders...' I would be surprised if it crossed his mind that arguments of counsel might be founded on the commonplace phrase 'fresh provision'. Yet so it proved in the first case to reach the Court of Appeal under what became the Inheritance (Provision for Family and Dependants) Act 1975. Goff LJ (at p 821) approved the following statement made at first instance by Oliver J:

'I do not think that it can have been the intention of the legislature that the body of case law built up under the 1938 Act should be put on one side and ignored. The 1975 Act may have been one to make "fresh" provision but it forms part of a continuum...'

I regret to note, by the way, that Goff LJ (also at p821) referred to the long title as the 'preamble'. In this he repeats an error made by Lord Parker CJ in ***Ward v Holman*** [1964] 2 QB 580. In fact the two are quite different I have already explained the function of the long title. The preamble, which follows it where used, gives the reasons why it is expedient to pass the bill. Modern public Acts usually do without preambles, but they are still obligatory in an Act originating as a private bill.

Naught for their comfort

'We have been taken by counsel for the commissioners into the legislation which lies beyond this section, and we came out of it again as fast as we could because...the language is very uncomfortable and complicated': Lord Widgery CJ in ***Grice v Needs*** [1979] 3 All ER501, 503.

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