MR RICHARD BATES:
CAN WE CURE LAWYERS OF LEGALESE?

So thank you very much for inviting me today. I feel very honoured amongst all these luminaries.

So I think one of the reasons that I first became interested in trying to promote clear, plain English legal writing is because when I joined Kennedys, as you'll see our tag line – our advertising slogan – whatever you want to call it, is 'Legal advice in black and white.' So we set ourselves up as doing that, providing clear, concise advice. And in fact, we follow that by saying we don't use jargon, and we don't use caveats, and we don't sit on the fence, and we provide advice. And so if we're going to say that in our marketing materials, then we'd better deliver.

So just an overview here. I thought I'd talk a little bit about why legal language is so complicated. I don't profess to be any sort of an expert on that, and I know Christoph has already sort of touched on it. But for my perspective as a practitioner, I wanted to try and understand that, so I could then go on and talk to the lawyers within my firm, particularly more junior lawyers, and say, 'Look, this is the hill that we've got to climb. This is the problem.' I then wanted to go on and talk a little about why is it that lawyers do – and they do – draft documents that are so difficult to read? What is it that is resulted in that? And particularly, we've already referred to legalese which we see all the time. And then rather ambitiously, I just wanted to think about, you know, whether we could change things for the better and some of the problems, some of the impediments there are to doing so.

So language, again, I think it's so much to sublanguage, isn't it? It's not the normal language that we use every day. There are reasons for that. And these are some of the hallmarks of how we recognize legalese. Terms of art – although I would suggest it, there aren't many, really. People always use that as a defense and say, 'Well, you know, it's the tools of our trade as lawyers. You know you have to use these things.' I don't think there are actually very many. We go the other way. We give ordinary words unusual meanings and I think that definitely doesn't aid comprehension. Lack of punctuation is something which I find amazing that anyone could have thought that the absence of punctuation, the purpose of which is to aid comprehension. The absence of that is in some way meant to mean that the thing is more comprehensible. I used to work for a partner who, reading his letters, was like a stream of consciousness, you know, was like reading Jane Austin. There were so many things, so

many ideas packed into one sentence, into one paragraph. And heaven forbid he should ever put a heading in it.

Okay. So, again, we've all seen these as words, these examples of these doublets and triplets. You know, we do like to use two words where one would do. We like to use three words if at all possible. So there're reasons for that in terms of how law developed. Won't bore you with it, but essentially trying to cover both English and French terms, Latin terms, and historically, that's the reason for that, but those reasons have long ceased to apply.

This wonderful passive archaic word order that we seem to love as lawyers, and then the pronouns that we use – the same, the said, the sometimes – somehow thinking that these make what we write easier to understand and they certainly don't.

So, definitely, people do hate legal writing, I mean I think there's so much anecdotal evidence of that. Just put up a study here which I managed to find, which definitely, you know, the results of that study are absolutely, you know, it is not easy to understand traditional legal writing. So there's a problem and I would ask how we fix it. Not an easy question.

I don't know where to point this thing.

So, again, we're supposed to be problem solvers, so I don't understand why we haven't tried to address this as practitioners, why we haven't recognized it. Given this symposium is about audience, we certainly need to understand that audience is key here, and that we aren't writing for lawyers, we're writing for the user, the reader of that document. The second point there, in terms of lawyers just have that obsession with making things, comprehensive at the expense of comprehensible. We think we have to cover every single eventuality. Maybe it's the way we were taught for, historically we were taught. I hope it's not the case now. And we have to understand that, you know, bespoke legal writing is very different from precedent, and we can do a lot with precedent, but that takes time and it takes effort. And sometimes we just don't have the luxury.

And we need to remember the context. Again, this was touched on before in terms of one of the things I always discuss with the junior lawyers in our firm is, what is it that you're writing? You know, you have to have a different approach depending upon what it is. So, you know, we're not writing academic journals. So many times, young lawyers will come to me and it will have, you know, footnotes in it. What? It's a letter to a client, you know? It's a letter to a lay client. And they just can't understand that that's different from when they were at university or law school. Even then I'd query the use of those sorts of things.

I wouldn't profess to talk about judicial writing. That's for other people to talk about. I wouldn't profess to be any sort of a statutory draftsman, but what I do do is I draft contracts. And I always try to remember that I'm recording the agreement between the parties. I'm not just taking things from other contracts. I had a very, very, very good assistant who produced the absolutely fantastic, fantastic land agreement and it had a brilliant guarantee clause in it, but there wasn't a guarantor. So, again, I think it's got to make sense within the context of what it is that you're doing.

Advisory as well, communicating with clients. There's a very different style, I think, from writing to the other side if you're in litigation, writing to your client, writing to a general counsel, writing to the finance director or chairman of the board or whoever it is. We need to understand that.

So, again, little touched on why it's so complicated. I just believe, you know, it is complicated. We have to recognize that. I don't profess to know the depth of that, but, you know, we're trying to deal with difficult legal concepts, difficult life concepts. And again, why do we need to spend so much time at law school learning to think and write like a lawyer? Is that because we're special case? Do we really communicate in different ways to other people? I don't think so. I don't think we should. And again, I would hope that we can simplify some legal language, so that it does, as I say, mean what it says and says what it means.

We get the blame, don't we? Lawyers definitely get the blame. And I think the primary reason we get the blame is people say, 'Well, you're just creating work for yourself, you know? So I have to pay a lawyer to understand this. So a job creation idea.' And I think most people would say, 'Yes, yes. I

think that's probably some truth in that.' I don't believe there is. I don't believe it is as targeted as that. I believe it's much more the second one here. You're writing almost for the wrong audience. You're writing for other lawyers. You're not writing for the audience. You're drafting, as I say here, for some mythical judge who may one day pour over your contract, pour over your advice, if we're talking about professional liability. And so you write for that person, you don't write for the person you should be.

Complexity, again, is another reason that people put forth. 'So this is really complex stuff, you know? I can't make it simple. It's really difficult. And there's exceptions and is this and is that and the other.' And yes, of course, there often are, but learning some techniques, which increasingly I'm saying the law schools teach, as to how to structure those sorts of things, I think that I am seeing an improvement in that.

And I think it is because the universities, the law schools are working on that. And again, as I say, we shouldn't really have to have a flowchart to understand, particularly, legal advice.

This is a unit of truth problem. Again, this is looking at why it is that this is the case. This is something that I came up with, which is that lawyers think that they have to cram everything. The whole concept that they're trying to get across has to go into one sentence. And I spend a lot of time talking to my junior lawyers, saying, 'One idea, one sentence. Okay. Use two sentences. Why is that somehow felt to be less lawyerly to use two sentences, less lawyerly, less erudite, less forceful?'

Fear and laziness – something lawyers, of course, never suffer from. Use of precedents again. We get this all the time as I used that example of the one where there was a beautiful guarantee but no guarantor. And also this inability to change things in a precedent because it's in there, it's written in stone, it must be right for all eventualities. And so we see a lot of that and that's difficult to counter, I think.

Pride – I do think lawyers do like to sound lawyerly. We like to sound like, you know, we know what

we're talking about. We like to sound like some judge, maybe? I don't think we should, but I think that pride is a real reason for why we produce the sort of written work that we do.

Convention and habit – again, it's just always the way we've done it. Lawyers are, as I say, very good at bad drafting. You know, we are good at this stuff. You know, we can understand it, other people can't, but you know, who cares, right? No, I don't think that is going to work in the commercial environment that we have today as a law firm. The pressures that we have – no one is crying for lawyers, of course – but the commercial pressures that we have, mean that we have to differentiate our advice from other advice. And I think, you know, making sure it's clear, understandable, that's something that we can do.

This is a quote from Justice Rix: You cannot rely on the old for ever; you cannot keep on patching; from time to time you have a proper overhaul. And that is what this plain English movement has been about from sometime now. If you do not carry out that overhaul, then the risk of simply carrying on in the old way is greater than the risk of undertaking the new. That's a quote from Justice Rix in Clarity. And there's another article by Christoph Hafner, and that very article, there you go, I found that as well, Christoph. So there you go. And Clarity, a very laudable organization promoting plain legal language, and there's a reference there.

Again, just quickly go through these. Too many cooks – certainly with contracts, we get this batting between two lawyers. We get my style. We get the other side's style. We get the client's style. It's a bit of a mishmash. We often find contracts have been taken from two or three different precedents, two or three different contracts, no one's gone through them, made sure all the defined terms are the same. They're just very, very difficult to understand.

One of my absolute bugbears is people that define terms in a contract. The reason you define the term in a contract is so you put somewhere the definition to aid in the understanding of it, but there isn't. You look for a definition and there isn't one there because it's been taken from the different contract or somebody's forgotten it. And that's just… I hate that because it just creates so much ambiguity.

I mentioned before, I think expense is one of the reasons why we haven't got the luxury of doing this. There're commercial pressures on lawyers and it's very rare to have the luxury, as I say, of being able to say, 'I'm going to start with a clean piece of paper. I'm going to start and draft the best plain English contract.' We don't really often have that.

Lawyers love the legalese. Some quotes here about what it is, but I think we all recognize it when we see it. I like the very sexist term for the last one there 'in conversation with his wife.' Of course, these are old quotes. We wouldn't be allowed to say such things now.

So it is the traditional way of writing. Legalese is it, and we've got to counter that. It's cluttered. It's wordy. It's indirect. We all know those things. Very complicated sentence structures. Impersonal. Wordy, as I say. Outdated grammar – 'perusal.' Passive voice. Double negatives – 'We don't need no double negatives' is what I always say to my students. Jargon – lawyers love it. I'm an insurance lawyer. Insurers love jargon. I've got a double whammy here, you know?

Okay, I won't go through these.

Yes, I was thinking that if legalese was so good, you know, we would be out of a job, but we're not. Can we cure it? Yes, I'm showing you all of the plain English stuff again. I won't go through it to any detail, but there's an interesting bullet point there – second: a legal writing style that does not vary from task to task or audience to audience. I'm not sure… One of the things we're considering in this symposium is it should vary from audience to audience, so I certainly don't agree with that statement, but it is one that I found when looking at what is meant by plain legal English. I like the third bullet point more there in terms of clear, correct, concise, complete. You have to have the Cs, don't you? If you have one that didn't have a C, you'd have to make it sort of fit in with those.

Again, I won't do very much on these because I think we all know it. I wanted to get on to talk a little bit about insurance. Yes, very exciting subject. So, again, if law is seen as difficult to understand, complicated, insurance is equally seen as something which is, you know, opaque, impenetrable. In terms of insurance contracts, I think the other thing people think about insurance

contracts is all that stuff in an insurance contract is there, so your insurer doesn't have to pay. Yes? I mean I think that's the general perception of what insurance contracts do. What insurance lawyers do? They are going to draft these contracts, so there're so many exceptions, so many caveats in them that you know you'll never get your money at the end of the day. That's something that we really have to counter against.

And so I think those sorts of contracts are ones where people have said, 'Okay, well, let's try and make sure these are drafted in a more easily understandable way.' So forty-four of fifty states – some form of requirement for insurance contracts is in the US to be written in plain English. In Hong Kong, there's less of a statement about that, but there's a statement in terms of we should produce sales materials in plain language, and we should use plain language when asking questions in the proposal form. And that's important for insurance because insurance contracts are contracts of utmost good faith and that works both ways, so there is this obligation on an insurer to actually make their contracts understandable because they do owe duties to the policyholder. And if you've got some insurance contracts recently, or if you've been an insomniac and wanted to send yourself to sleep and have read them, that's the reason why we now start to see this use of the first person pronouns in insurance contracts – 'we' and 'you' and 'us' – and we do this all the time. And they're supposed to make the contract easier to understand because the first person viewpoint is supposed to aid the comprehension of them. And we also use some other tactics to try and aid understandability. Shorter sentences. We group the exceptions together in a big thing that says… We use things like: 'We will cover X.' 'We won't cover Y.' 'If you want to make a claim, this is what you've got to do. We need this documents, you need to send them by then.' And there's a real move to try and do that. The main commercial terms, how much the cover is, who the insurers are, we put that in a schedule, and we try to avoid use of technical terms. So we're really trying to, you know, do some things adopt these techniques to make those sorts of contracts more understandable.

Okay. Again, I'll just sort of finish on these sorts of points. It's not just for altruistic reasons. I mean it's good business as far as we're concerned. We have clients who come back to us and say, 'Do you know what? I was really surprised. I understood your advice.' And they are surprised then, you

know, that says a lot I think.

Judges certainly prefer it. You know one of my fears is the judge complains about my contract wording and says it was bad and he didn't understand it. And you know, I'm at fault because I've created the dispute. Creates work for my litigation partners, of course, but that's not the idea. So plain language, we would say, definitely leads to less disputes.

There are some slides here, which I think, in the pack-on consumer contracts, again, there's a big move to ensure that consumer contracts, because they help consumers, are drafted in plain English. And there's a recent case here in the European Case to say not only did this stuff apply to insurance contracts, but that to satisfy the requirement of the Unfair Terms in Consumer Contracts European Regulation, the contract had to be drafted in 'plain, intelligible language' to comply with that. And I think it goes even further to say, 'What does "intelligible" mean?' It means that whoever is reading it can understand the consequences of it. And I think that's a very important point.

There's a couple of slides here on LawAccess in Australia, which I think is a very good example of something where people are trying to promote the use of plain English. And I like the quote at the end, which is effectively, it's a website telling people how they can draft their own legal documents but does conclude with this 'no need to write like a lawyer.' And it fact, it was one of the things you put up on your slide, you know, how to write like a lawyer. I, actually, when I lecture to the trainees, say, 'This is how not to write like a lawyer because so many people think that writing like a lawyer means using all that jargon.'

So, in summary, no right or wrong. I think it's a matter of style. Certainly what we teach. We have a firm style. We make sure that the junior lawyers understand our approach to those sorts of things. But I always finish off when I'm talking to those students, saying, 'Understand what it is that you're trying to say because until you do that, you have no hope whatsoever of distilling that down into advice for a client, so you've got to focus on that first. If you understand, then you have a hope of making sure that the client understands.'

Audience, again, I always say to them, 'Who you're writing to? Understand where you fit in in terms of our business, you might be producing a memo for me, but I've got to take that memo, turn it into a letter of advice for the client. The client then takes that, maybe I send it to the general counsel. He's got a board of member he's got to take it to. Understand the context that what we're doing is part of that chain. You know, the advice that we produce doesn't just disappear into the ether. It's used for some purposes. So understand that, and then you understand your audience all the way up.'

And again, I think you've touched on some of these, Christoph, in terms of you're trying to identify facts, concepts, answers. The last two. Lawyers just love to put stuff in to prove that they understand it or that they're interested in it. You know, a lot of the juniors: 'Well, I was really interested in that bit, so I thought that I'd put it in.' You know, it's like they go out for a little run for their own and then come back to the main thing, you know? And I like that in a way because I like lawyers who are interested in the law. There're few of us. So it's good, but it's useless within the context of what it is that you're trying to do for the client.

And finally, you know, we repeat this all the time: use plain English, avoid jargon and legalese, but we've a lot of work to do to ensure that they do that. Thank you.