GENERAL PRINCIPLES ON DRAFTING CONVEYANCING DOCUMENTS

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Under the revised law course the prescription for the subject of conveyancing has been expanded to include draftsmanship with the result that in the new course the subject "Conveyancing and Draftsmanship" will be taught as a subject for the professional qualification. This will mean that more emphasis than hitherto will be given to the art of draftsmanship. As there is no New Zealand text book on the subject of draftsmanship it is felt appropriate at this stage, and in an article such as this, to state some of the more general rules pertaining to the drafting of conveyancing documents[1].

The basis object of draftsmanship is to state accurately, clearly and concisely the intentions of the parties to the document. The main difficulty that faces the draftsman is that once the document has been executed it stands, and there is nothing the draftsman can do to rectify any mistake he has made, unless the parties agree. In some cases the mistake is not capable of rectification, even with the consent of the parties, because third parties may have acquired rights under the document, or duties and taxes may have been levied and paid. It is then essential that the draftsman takes every care to record faithfully the intentions of the parties.

> If anyone is to be held irrevocably to meaning what he says, he must be very careful to say what he means[2]

In addition, the draftsman must be careful to ensure that a meaning other than the one intended cannot be taken from the words used, in short:

> Not only should a document be understood but also it should not be misunderstood[3].

Even with a sound knowledge of conveyancing, experience is still required by the practitioner in draftsmanship, and this experience can only be obtained by actually drafting documents.

Nevertheless, it is felt that the student with a knowledge of the basic elements of draftsmanship will, in practice, reach proficiency in drafting and conveyancing at an earlier stage.

The first task which faces the practitioner after receiving comprehensive instructions from his client is to decide on the form the document is to take to record the transaction of the parties. This is dealt with under Part I below along with other matters such as: the method of approach to the problem in hand, the use of precedents and the checking of the draft. Part II is concerned with the next step and the main part of this article, that is, the rules relating to the drafting of the individual parts or clauses of the document, while Part III contains some rules, which it is hoped, will be of some aid to students and practitioners in attaining brevity in drafting their documents.

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Part I. RULES ON GENERAL OUTLINE OF DOCUMENTS

1. The practitioner on receiving instructions from a client must discuss fully with him what he wants done. At this interview the client should be advised on the law pertaining to the suggested transaction and instructions taken in the light of that advice. For example, even in a simple transaction where two persons wish to buy a land section, explanations and instructions are required on whether the purchasers are to hold the land as tenants in common or joint tenants. Every purchase of land today requires some consideration to be given to the principles of town and country planning under the provisions of the Town and Country Planning Act 1953. It may be that the client is not able to do what he wishes because there is some rule of law which forbids the transaction or that a particular transaction requires a particular treatment. Questions on liability for Estate and Gift Duty or Land and Income Tax may be involved as well as many other matters. On all these questions the client must be advised. When all this has been done comprehensive instructions can be recorded.

2. The first thing that a solicitor does, as soon as he has taken his instructions, is to consider the form the document is to take. The document can fall into one of three classes:

(1) The document may be one the form of which is prescribed by statute. For instance the Land Transfer Act 1952 prescribes the form to give effect to the transfer of an estate in fee simple of land held under that act. Many documents today are the creatures of statute or statutory regulation. In modern times with the increase in the number of complicated transactions brought about by the growth of commerce and the ease with which new legislation can be passed by parliament many new forms of documents are prescribed by statute. As in practice a great deal of the draftsman's work has to do with the use of statutory forms, his first task is always to determine whether or not there is a form of document prescribed by statute to give effect to the transaction in hand.

(2) The document may require to be in a traditional form. There is a traditional form for a deed. It is true that the courts have held that provided the language used in the deed expresses the intentions of the parties the deed will take effect at law, notwithstanding that it has not been drawn with the usual formal parts[4]. It is still necessary for the parties to comply with the formalities for a deed laid down by Section 4 of the Property Law Act. Nevertheless it is good practice to observe the traditional form for documents as such practice is the mark of the competent draftsman and also reduces the risk of having the intentions of the parties misinterpreted.

(3) A document that does not require to be in either of the forms prescribed above. However, such a document should be in a form that clearly expresses the intentions of the parties and in its preparation the draftsman should comply with the general rules of draftsmanship.

3. Once the general form of the document is determined, the solicitor will look for a precedent that he can use. The precedent

will be generally a document which he has prepared in similar circumstances or a form contained in a text book of precedents.

With practice each practitioner will collect his own precedents for his future guidance and most law offices have standard sets of precedents of the simpler types of documents for reference. However, one must be careful in the blind use of precedents as they can be good servants but bad masters. In general, the precedent can be used without a great deal of variation for the general outline of a document and, as has been said, it must be used where a statutory form is prescribed. Great care must be exercised when the precedent is required for individual clauses and in matters of detail. In these cases precedents must only be used as guides. It is easy to get into the bad habit of trying to bend the facts or the intentions of the clients to fit the precedent in mind. This is extremely risky. At all times the document and its contents must reflect the intentions of the client correctly.

4. The next step, except in the case of a simple document, is to prepare a skeleton of the form of document required for the particular transaction in hand. This form should contain the outline of the document with the headings and a brief note of the rights and duties created or to be contained in the document under each heading. This will help the draftsman to see the document as a whole and to determine whether it is in the correct form and whether it is likely to express the intentions of the client accurately. In addition, the skeleton form when seen as a whole, will be a safeguard against the omission of any essential details.

5. The practitioner is now in a position to draft the full document having full regard all the time to the general rule that he must express the intentions of the parties accurately, clearly and concisely and to the special rules referred to later. A fair copy draft should then be typed and studied. It should be read through very carefully, the practitioner checking every part of the document.

6. The final step after the draftsman is completely satisfied with the draft is to have the document engrossed and made ready for signature. In its final form the document should be checked carefully against the draft to ensure that no mistakes have occurred in the typing.

Part II. RULES ON DRAFTING

It is now necessary to deal with rules relating to the actual drafting which are to be observed when the practitioner sits down to draft the document in its full form as under Part I, 5 (supra).

The first requirement in drafting is to draft the document using plain English and having regard to the ordinary rules of grammar. No one expects a legal document to be an example of fine writing or an example of English prose composition. The object of the lawyer is different from that of the essayist. His object is to see that the document is not misunderstood. Unfortunately, in his endeavour to be accurate and to see that the expressions used are not ambiguous the draftsman, more often than not, ceases to be as clear as he would wish. The style of drafting by lawyers is:

> caused by the necessity of being unambiguous. That is by no means the same as being readily intelligible; on the contrary, the nearer you get to the one the further you are likely to get from the other[5].

Accordingly the draftsman must not hesitate to use expressions, which although repetitious, are essential to accuracy. This does not mean that the draftsman should not strive for clarity; where possible, clarity should always be kept in view. What is meant is that even with clarity the aim for accuracy must be predominant.

1. A document should not be presented as one long connected piece of narrative. In the days when documents were engrossed on parchment it was the practice to fill up each line. Older practitioners and those who have searched the old Deeds Registers will readily appreciate the difficulty in reading and understanding these documents. No doubt the cost of parchment necessitated the whole parchment being used from an economy point of view. The modern practice is to break down a document into clauses; each clause dealing with a particular aspect of the transaction. When the particular clause deals with several matters the clause will be further subdivided into subclauses, paragraphs and sub-paragraphs where the details in each subclause or paragraph require further specification. In subdividing a document into parts it is convenient to number each clause. For each subdivision of a clause a different method of indentification (for instance numbers in brackets) should be adopted and also a greater margin should be provided: for further subdivisions, different sets of numbering or lettering and greater margins depending on the degree of subordination. It is usual for paragraphs in a clause or subclause with introductory words for the letters (a), (b) etc. to be used.

It will be then found that the document so arranged is appealing to the eye and can be read and understood with the greatest of ease. The following examples taken from Table A of the Third Schedule of the Companies Act 1955 illustrate the use of numbering and lettering clauses, subclauses and paragraphs.

111. No person shall be appointed or hold office as secretary who is—

(a) The sole director of the company; or

(b) A corporation the sole director of which is the sole director of the company ;or

(c) The sole director of a corporation which is the sole director of the company.

112. A provision of the Act or these regulations requiring or authorising a thing to be done by or to a director and the secretary shall not be satisfied by its being done by or to the same person acting both as director and as, or in place of, the secretary.

135. (1) Notice of every general meeting shall be given in any manner hereinafter authorized to:—

(a) Every member except those members who (having no registered address within New Zealand) have not supplied to the company an address within New Zealand for the giving of notices to them;

(b) Every person upon whom the ownership of a share devolves by reason of his being a legal personal representative or an assignee in bankruptcy of a member where the member but for his death or bankruptcy would be entitled to receive notice of the meeting; and

(c) The auditor for the time being of the company

(2) No other person shall be entitled to receive notices of general meetings.

2. The active voice is preferred to the passive unless the use of the passive is required to express the intention of the parties more accurately. The active voice is preferred because it avoids vagueness and ambiguity and produces a positive statement by the party who, for instance, is to perform a certain covenant. "The Lessee shall pay the rates" is a great deal more positive and leaves no doubt that the lessee must pay the rates. Stated in the passive form "the rates will be paid by the Lessee" does not emphasize the fact to a sufficient degree that the lessee must pay the rates.

3. Th following words and phrases are to be used only with the greatest care and when used the paragraph in which they appear should be read over in order to ensure that no ambiguity or uncertainty has arisen.

(1) Pronouns. The use of the personal pronoun should be avoided whenever possible. In the following clause the pronoun "him" creates an ambiguity which is cured by the substitution of the words "the Owner" for the pronoun.

> The Hirer will permit the Owner and all persons authorised by *him* at all reasonable times to enter upon the premises where the machinery may for the time being be placed and set up and to inspect the state and condition thereof.

(2) Relative words. An example showing an ambiguity in the use of the relative is given by Piesse and Fox[6].

> In a factory or workshop in which young children are employed.

The ambiguity can be avoided by writing:

> Where young children are employed in a factory or in a workshop.

(3) Adjectives and Adjectival Phrases. Ambiguity and uncertainty can be caused through the use of adjectives and qualifying adjectival phrases, the question arising in each case as to whether the adjective or adjectival phrase applies to all the nouns enumerated. In its simplest form: The good boy and girl. Does the adjective "good" apply both to the boy and the girl? Piesse and Fox give a good example of the adjectival phrase:

> No pupils shall on the ground of religious belief, be excluded from or placed in an inferior position in any school, college or hostel provided by the council.

Does the phrase "provided by the council" refer only to "hostel" or does it refer also to "school" and "college"?[7]

4. *Ejusdem Generis* Rule. This rule of construction, meaning "of the same kind" deserves attention by the draftsman. It arises when the draftsman in describing property or acts enumerates a number of items which form a particular class and then follows with a general or "omnibus" description. The general words will be limited to the particular class.

For example, in the phrase, "lions, tigers, leopards and other animals". The words "lions, tigers, leopards" form a particular class. As lions, tigers and leopards are all wild animals the class will be that of wild animals. Under the *ejusdem generis* rule the general words "and other animals" will be limited to the particular class, that of wild animals, and say, domestic animals will be excluded.

Odgers gives the following example to illustrate the application of the rule.

> A ship was to be relieved from liability for not delivering cargo at a certain port or ports if it was in the opinion of the master unsafe to do so 'in consequence of war, disturbance or any other cause.' The question arose whether a port inaccessible in the opinion of the master through ice was within the exception. It was held not to be so; 'any other cause' must be construed to apply to causes ejusdem generis or similar to war or disturbance.[8]

In practice the rule is kept in mind particularly when the practitioner is drafting the objects for the memorandum of association of a company to be incorporated under the Companies Act 1955 and in drafting powers for a power of attorney.

5. A logical order must be preserved at all times. In all cases a natural order will suggest itself to the draftsman. The use of this order will make the document or the clause easy to read and understand.

6. In drafting it is always as well to make the positive statement first and then follow with the qualifications which can be conditions, exceptions or provisoes.

The elements of the most complicated legal sentence are enumerated by Piesse and Fox,[9] but it is stated by an author to which they refer:

> The arrangement of these parts must much depend on the judgment of the draftsman; the only general rule to be observed is that each part should in substance be clearly distinguishable, and should be comprised, as far as possible in a short sentence or sentences.[10]

The common legal sentence, the positive statement, is of the following class.

> The Lessee will pay the rent hereby reserved at the times and in the manner hereinbefore provided.

If there are any qualifications to the positive statement such as conditions, exceptions or provisoes they generally follow the statement.

However, it is often clearer to put a condition before the statement.

> If and whenever the rent hereby reserved shall be in arrear the same may be levied by distress.

In addition to the conditions there is one other qualification which should precede the positive statement and for that matter should also precede the condition if there is one. That is the element of the legal sentence which is referred to by Piesse and Fox as "the case", that is, the circumstances with respect to which or the occasion on which the statement is to take effect.[11] The case is not often found in documents but it occurs most frequently in statutes. An example is given in s. 68 (1) of the Estate and Gift Duties Act 1955.

> Where in pursuance of any Act any payment is made out of the estate of a deceased person without probate or letters of administration having been obtained, notice of the payment shall be given in the prescribed form to the Commissioner by the person making the payment.

7. If any words used are technical words or words which are defined by statute it is essential that the draftsman understands the meaning attached to such words. It is also necessary to use technical words whenever they apply. They have received judicial interpretation and will have in most cases, precise meanings. Certain terms have been defined by statute. Section 13 of the Property Law Act provides that in all deeds, contracts, wills, orders and other instruments unless the context otherwise requiries, the word "month" shall be deemed to mean a calendar month.

8. The draftsman must be careful not to use words or expressions which are now obsolete. At one time it was the practice to refer to freehold lands as "lands, tenements and hereditaments". The word "tenements" meant anything that could be the subject of feudal tenure. Today it adds nothing to the description of land and its use is obsolete. The word "hereditaments" is in the same position. Hereditaments were any property which at Common Law descended to the heir. In New Zealand under the Administration Act 1952 all the real property of a deceased in the case of an intesacy devolves upon the administrator for the benefit of all those entitled under the Act.[12] However, it can be said that the expression, "lands, tenements and hereditaments" is seen on few occasions in modern documents. It should be noted that by s. 37 of the Property Law Act it is provided that where in terms of any instrument property vests in the heir or heirs of any person the property shall vest in the persons who on the death of the person intestate would be beneficially entitled under the Administration Act. The section applies only if and so far as a contrary intention is not expressed in the instrument and shall have effect subject to the terms of the instrument and to the provision therein contained.

The practice of expressing that parties covenant and agree on behalf of themselves and "their executors, administrators and assigns" is more prevalent. It is better not to use these words unless in the circumstances their use is specially required. At one time the word "assigns" was required if assigns were to be bound when a covenant related to something not in existence at the time of a lease but which touched or concerned the land. Now by s. 63 and s. 64 of the Property Law Act 1952 the benefit and burden of all covenants relating to land bind assigns even though "assigns" have not been expressed.

As far as Land Transfer land is concerned s.239 provides that the description of any person as proprietor, transferor, transferee, mortgagor, mortgagee, lessor or lessee, or as trustee, or as seised of, having, or taking any estate or interest in any land, shall be deemed to include the heirs, executors, administrators and assigns of that person.

9. When a particular word or particular expression with regard to certain circumstances has been used never change the word or expression unless a change in meaning is wanted.

10. If the transaction is covered by several documents it is necessary to ensure that the terms of each document are consistent with the others. For instance the terms of collateral securities must be consistent with the terms of the principal security. Apart from the usual requirements of drafting to avoid ambiguity it is necessary to make sure that the terms of any security collateral to that of a chattels security under the Chattels Transfer Act 1924 must not be such as to defeat the operation of the chattels security.[13]

11. The use of punctuation in drafting is not wrong. If punctuation is used the courts will take no notice of it unless the words are ambiguous in which case punctuation will be used to ascertain the true intention of the parties.

12. The use of the word "and" requiries special care by the draftsman. At times it has been read in the conjunctive sense, at others in the disjunctive sense of "or". The best practice is to ensure that no doubt is caused by the use of this word and the word "or".

The practice has arisen in recent years of using the expression "and/or". There are times when the use of such expression will leave no doubt but generally,

> With its liability to doubt and absurdity, it is a phrase best left unemployed by anyone who is responsible to his client for the accuracy of what he writes. Further, the draftsman who uses it is likely to be criticsed if its meaning has to be considered by the court.[14]

Part III. AIDS TO BREVITY IN DRAFTING

In the last century in England documents, and for that matter statutes, were drafted at length to such a degree as to present to the reader a document so formidable in length and redundancy of language that not only did they take a long time to read but also took a much longer time to understand. The old form of conveyance in England was a document of considerable length. Students of land law will know that this conveyance was in the form of a lease and release. Statute law in New Zealand has made it possible as far as land not under the Land Transfer Act is concerned, to convey that land by a simple form of conveyance.

> The form is in fact what was long the common English form of release, stripped of its habendum clause, the words of limitation, the special words which came to govern the implication of covenants, and other embellishments, and with the operative word "convey" of statutory efficacy to pass 'any land and the possession thereof.'[15]

Under the old form the covenants of title had to be expressed in full but they are now implied by s. 72 of the Property Law Act 1952.

The Land Transfer Act has also helped to simplify the system of the conveyancing of land by providing forms for transactions of land held under the provisions of that Act.

In other ways statutes have helped to reduce the length of documents. Time, of course, today, compels the practitioner to draft documents in the shortest possible way and in the shortest possible time. Apart from the basic changes which have been mentioned there are a number of aids to brevity which assist the draftsman.

1. Abbreviated Expressions: It will be found most convenient when using a term or expression which is to be repeated frequently in a document to adopt a short expression for such term or expression. This can be done in one of the following ways:—

(1) An interpretation clause can be included generally at the begining of the document defining certain terms or expressions which are to be used frequently throughout the document. For an example, refer to Regulation 1 of Table A, Third Schedule, Companies Act 1955, the model set of articles of association for a public company.

(2) Schedules. The Schedule is most often used to describe land which is the subject matter of or which is referred to in the document. Descriptions of land are generally long and it is found most convenient to refer to "the land referred to in the schedule hereinafter written". Particular expressions and terms can also be defined by means of a schedule.

(3) On the first occasion that an expression is used in a document it is sometimes appropriate to state in the body of the document that the expression will be referred to thereafter by a short term. This is done most often when referring to the parties to the

document. James William Smith of Dunedin, Grocer (hereinafter called "the Vendor")

2. Implied Covenants: Several statutes provide for particular covenants powers and conditions to be implied in certain documents. Section 68 of The Property Law Act 1952 provides that where by any statute any covenant or power is implied it shall have the same force and effect as if it had been set out at length in the deed wherein it is implied provided that any such covenant or power may be varied negatived or extended. There are a number of covenants and powers of this type, some of which are:

Covenants, conditions and powers implied in mortgages—	Fourth Schedule to the Property Law Act 1952.
Covenants by lessees implied in leases	s. 106, Property Law Act 1952.
Powers of lessors implied in leases—	s. 107, Property Law Act 1952.
Covenants implied in instruments by way of security under the Chattels Transfer Act 1924—	Fourth Schedule to the Chattels Transfer Act 1924.
Covenants, powers, conditions and agreements to be implied in mortgages of life insurance policies—	Fourteenth and Fifteenth Schedules to the Life Insurance Act 1908.

In addition, certain statutes provide for particular expressions which if used in a document will have the meanings assigned to them by the statute. For example, s. 155 and the Fourth Schedule to the Land Transfer Act 1952 provide for short forms of covenants. If the covenant is expressed in its short form as provided, the covenant set forth at length in the Fourth Schedule will be implied as fully and effectually as if that covenant had been set out at length in the document. For instance, the covenant that, the Lessee "will paint and paper inside every third year" means:

> that the covenantor will in every third year during the continuance of the term mentioned in the instrument paint the inside wood, iron, and other works, then or usually painted, with two coats of proper oil colours in a workmanlike manner, and also repaper with paper of equal quality such parts of the premises as are then papered, and also wash, stop, whiten, or colour such parts of the premises as are then whitened or coloured respectively.

Reference should also be made to the abbreviated expressions defined in the Fifth Schedule to the Chattels Transfer Act 1924 and to the easements now defined in the Seventh Schedule which has been added to the Land Transfer Act 1952 by the Land Transfer Amendment Act 1961. It is now possible to create a right of way by granting a "right of way" which expression shall have the meaning assigned to it by the Seventh Schedule to the Land Transfer Act 1952, and the rights and powers stated in that Act will be implied in such grant of easement.

3. There is one final word which can be said on brevity. There was a practice to use several words where one would do. As has been said by Piesse and Fox:—

> In many of the older forms two words or often three—for draftsman used to practice a style in which trinities of expression rolled on in sonorous recurrence —are used to express varieties of ways of thinking of what might also be expressed as a single whole.[16]

This practice is not so prevalent as it once was but there are occasions today when more words are used than are absolutely necessary. One example is the use of "said". In wills reference is often made, "to my said wife". This is not necessary, "my wife" being sufficient. It is necessary sometimes to use "said" and "aforesaid" but they should be used sparingly. The draftsman should be concise and eliminate any words in his draft which are not essential to the clear understanding of the document.

However, a tendency is growing to shorten documents for general transactions in an attempt to combat the demands made on the time of the busy practitioner. This attempt to save time is made in two ways:—

First, a document is drafted in a general form in which reference to a schedule is made for the particulars of the transaction. The body of the document is the same for each transaction; the schedule being used to fill in the names of the parties, the description of the land, consideration and whatever other details are necessary. There is no doubt that this type of document is legally effective, but while being concise, on occasions the document is far from clear. It seems that on the matter of forms of this description the act of abbreviating can be taken too far. It is essential that the draftsman always presents a document which is intelligible to the reader.

Secondly, there is the practice of having readily available a compendious form to cover various aspects of a particular transaction. For instance in Dunedin a general form of mortgage is printed and includes clauses which apply whether the mortgage relates to freehold or leasehold property or city residences or farm lands. This type of form has the advantage of obviating the risk of a vital clause being omitted. There is no serious objection to this type of document, but care should always be taken to peruse the form with the transaction in mind to ensure that no ambiguity can arise. While practitioners accept forms of this type on behalf of their clients when the documents have been prepared by other practitioners the practice can be carried too far and a solicitor would be entitled to object to a document which contained numerous clauses quite unrelated to the transaction in hand.

CONCLUSION

This article has provided only some of the material on the art of draftsmanship and has been limited because of the space allocated. It has been, therefore, necessary to keep to those matters which are related strictly to the art of draftsmanship. Whatever the rules of draftsmanship are, they are, in the first instance, guides to the draftsman to draft a document which, it is hoped, will be not only clear and intelligible but also, and more essentially, accurate and free from ambiguity.

1 Reference may be made to the following texts: Piesse & Fox: *Elements of Drafting,* 3rd ed.; Burrows: *Interpretation of Documents,* 2nd ed. (Chapter VI on the Principles of Drafting); Gowers: *The Complete Plain Words.*
2 Gowers p.9.
3 Burrows p.121.
4 Halsbury's Laws of England: Third Edition, Vol. 11, para. 551.
5 Gowers p.8.
6 Elements of Drafting p.27.
7 Elements of Drafting p.25.
8 Odgers, *The Construction of Deeds and Statutes,* 4th ed. 134. Tillmanns & Co. v. S. S. Knutsford Ltd. [1908] A.C. 406.
9 Elements of Drafting p.17
10 Piesse & Fox p.20
11 Piesse & Fox p.17.
12 Sections 12 and 13.
13 Chattels Transfer Act 1924 s. 25
14 Piesse and Fox p.107
15 Garrow's Law of Real Property, 5th ed. (1961), 192
16 Elements of Drafting p.54