

On Legislative Expression by George Coode,

An explanation by Roderick Ramage.

For shorter and simpler explanations of the main principles of Coode's tract, see my "other law articles" in my website, articles 1 (*Will or Shall*) and 17 (*Effective Draftsmanship*, part 2).

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The lawyer's job is either (a) putting into words what people wish or intend or (b) interpreting other people's words to ascertain what they mean. The lawyer's words are his tools and his objectives are certainty and clarity, except on the occasions when the client wishes to use obfuscatory language to conceal its true purpose. It is the same in the public sector, in which legislation or other public regulations affects whole population or part of it. The aim of the lawyer when drafting a document, in legislation as well as private documents, should be to satisfy Stephen J's stricture in *Re Castioni*, [1991] 1QB 149, which at 167 is that,

it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand.

There are two stages to the execution of this work, first to ascertain the subject matter, what is to be achieved and the relevant law, and secondly to express the client's intention in words, and it is in the second stage that we apply the principles described by George Coode.

In the preface to the second edition of his tract *On Legislative Expression*, George Coode wrote on 1 March 1852,

A hope may now be fairly entertained, that a good method once successfully adopted will be henceforth extended by the best practical means— by the example, imitation, and tradition of professional draftsmen; and although this may render unnecessary the further appearance of this Tract, its author will be very well satisfied that his project shall be forgotten in its own realisation.

So obvious are the main principles of drafting that he described that we, lawyers, use them automatically. What he wrote is used, but that he wrote it has, as he expected, been forgotten.

The three principles that George Coode described in *On Legislative Expression*, which he suggested are applied in the composition of legislation, are:

- 1 the structure of a legal expression;
- 2 the words of legal action; and
- 3 the use (and misuse) of provisos.

The three types of legal action that he identified and are the only types of legal action are:

- 1 to command (to impose an obligation on someone to do something);
- 2 to permit (to give a discretion or power to someone to do or refrain from doing something); and

- 3 to forbid (to prohibit somebody from doing something).

1 the structure of a legal expression

These three legal actions on their own are insufficient in any but the simplest cases. "No Smoking" in a railway carriage window or "No Fishing" on a post by a river or lakeside are clear and effective legal expressions, but mostly the requirements for the legal action are more complex and need to be placed in their context. First one must ask "Who?", who is the subject of the legal action (ie the person who is required or permitted for forbidden from the legal action)? Secondly one must ask when and in what circumstances does the legal action apply? This involves two elements, which are, first, the general circumstances in which it applies, unless the legal action applies universally and, secondly, any conditions which are to be satisfied before it applies. Thus there are four principle elements, two essential and two occasional, in any legal sentence or longer expression, which Coode describes as follows:

essential elements

- 1 the legal subject (the person to whom the legal action applies);
 - 2 the legal action (the obligation, discretion or prohibition);
- occasional elements
- 3 the case (or the circumstance in which the legal action applies); and
 - 4 the condition (what must be done for the legal action to arise).

How, particularly the order, in which Coode advised that these elements are incorporated into a sentence is that, if the legal action is not universal and is to operate only in certain circumstances, they (the case) should be described before any other part of the expression, followed by the conditions to be satisfied, and only then should the legal subject and action appear, for example (my and not his illustration): (case) "if the tenant desires to determine the term hereby granted"; (conditions) "and gives to the landlord notice ..." and "and up to the date of such determination pays the rent"; and (legal action) "then ... the present demise ... shall cease and be void".

This illustration shows, contrary to Coode's illustrations in his tract, that that there can be expressions in which the legal action is written in the passive voice and takes effect with no legal subject. In the following examples, which I have taken from modern legislation, which is often composed in short sentences and several levels of sub- and sub-sub-paragraphs, the expression of the case and conditions frequently does not precede the legal action, but is often in different paragraphs or even different sections and can be identified and distinguished from the legal action with only as a result of careful reading.

example 1 (in two parts) – legislation (simple - passive)

Employment Rights Act 1996, s111 (Complaints to employment tribunal)

- (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

- (2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—
 - (a) before the end of the period of three months beginning with the effective date of termination, or
 - (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

The case here is that a person has a complaint that he or she has been unfairly dismissed. This does not appear on the face of it to be the case, but it is obvious that it is the case, because the legal action cannot take place unless a person has a complaint. The legal subject is the person who has the complaint and the legal action is he or she may present the complaint to a tribunal: in contrast with my illustration in the previous paragraph, in which the legal action, expressed in the passive voice applies to a legal subject which is not a person. A complaint is incapable of presenting itself to a tribunal, but needs a person to do it.

There is one condition to be satisfied, which is that the legal subject, presents the complaint within the specified time limit. However sub-s (2) states the condition by the device of the tribunal being prohibited from considering the complaint, but, for the purposes of this section, neither is the tribunal a legal subject nor is the prohibition of considering the complaint a legal action.

Employment Rights Act 1996, s112 (The remedies: orders and compensation)

- (1) This section applies where, on a complaint under section 111, an employment tribunal finds that the grounds of the complaint are well-founded.
- (2) The tribunal shall—
 - (a) explain to the complainant what orders may be made under section 113 and in what circumstances they may be made, and
 - (b) ask him whether he wishes the tribunal to make such an order.
- (3) If the complainant expresses such a wish, the tribunal may make an order under section 113.
- (4) If no order is made under section 113, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126 to be paid by the employer to the employee.

Sub-section (1) does start with the case, as do other sections starting with the formula "This section applies ...", which here is that the grounds of the complaint are well founded. There are then three legal actions in respect of each of which the tribunal is the subject. In the first, sub-s(2) the tribunal must (a) explain ... and (b) ask In the sub-s(3) there are an additional case (the complainant's wish) and the legal action, which is a discretion to make an order. Sub-section (4) also has an additional case, which is that there is an order under s113, and the legal obligation

is to make an award of compensation. Nobody is required to do or refrain from doing anything for any of the legal actions to take effect and so there are no conditions.

example 2 – legislation (simple - passive)

Landlord and Tenant Act 1954, s5 (Termination of tenancy by the tenant)

- (1) A tenancy to which section one of this Act applies may be brought to an end at the term date thereof by not less than one month's notice in writing given by the tenant to the immediate landlord.

The legal subject is the tenant. There is no express statement who is the legal subject, ie who may terminate the tenancy, but in this section it is obvious from the condition that must be performed by the tenant, that the legal subject is the tenant.

The legal action is that the tenant may bring the tenancy to an end. The legal action is expressed in the passive voice, which is generally discouraged because passive sentences often fail to make it clear to whom the legal action applies: more recently Peter Butt in *Modern Legal Drafting* (CUP, 2013) gave the heading 'Leaving the "doer" unstated' to a paragraph discussing the use of the passive.

The case is the existence of a tenancy to which section 1 applies. The case needs to be stated, because the legal action is not of universal application and the circumstance in which the legal action applies are not so obvious that they may be omitted.

The condition is that the tenant gives not less than one month's written notice to the landlord.

example 3 – legislation (complex)

Companies Act 2001 Part 2 (Company formation)

Typically the use of Coode's analysis is to draft a single section or even a single sentence, but the analysis of a legal expression can also be over several sections. One can treat Part 2 (sections 7 to 16) as a single expression on the formation of a company. It is too long to be included verbatim in this article.

This expression contains three legal actions, which are in sections 7, 14 and 15. In the way that the clause "tribunal shall not consider" in the Employment Rights Act 1996, s111(2) above looks like a legal subject and action but is a condition, several sections and sub-sections in this Part could, on a superficial reading, be read as legal actions, but are parts of the conditions for the three legal actions

By s7 any person or persons (the legal subject) may form a company (the legal action). This legal action is of universal application. The only circumstances (in Coode's terms "cases") in which the legal action can apply, ie that a person or persons wish to form a company (and even knows or know that it can be done) and that the person or persons have legal capacity, and these circumstances are so obvious that they go without saying (*Devani v*

Wells [2019] UKSC 4), and therefore there is no need for the or a case to be stated.

The registrar is the legal subject of two legal actions. The first is that, under s14 the registrar shall register the documents delivered to him and the second, under s15, is that the registrar shall give a certificate that the company is incorporated.

In this expression, the whole of Part 2, s14 is the main legal action, because this is the action which creates the company. This legal action is not of universal application, because the registrar cannot form a company on her own initiative. This legal action is possible in the specified case and if the specified conditions are satisfied. The only case in which this legal action is possible is that a person or persons takes the steps required by s7. In other words action under s7 is the case for section 14.

The conditions which must be satisfied before the registrar is required to register the documents delivered by person or persons wishing to form a company, are that the person or those persons have

- (a) subscribed their names to a memorandum of association (see section 8), and
- (b) complied with the requirements of this Act as to registration (see sections 9 to 13).

The last section in Part 2 is s16 (Effect of registration), which has no legal action or legal subject, but states the consequences of the registrar's action under s14.

2 the words of legal action

Coode uses "copula" in the linguistic sense of a word or words joining the legal subject to the legal action and not in its probability theory or mathematical meaning. These are the auxiliaries to the relevant enacting verb. In the composition of a legal expression there are only two copulas (Coode of course wrote copulae), which are:

- "shall" if the legal action is a command or some other obligation;
- "may" if the legal action is to give a discretion to do or refrain from doing something; and
- their negative form if the legal action is a prohibition.

Coode also warned against the use of the word "shall" in cases and conditions, which I explained in my articles mentioned above.

3 use and misuse of provisos

I explained this topic too, by analysing a particularly confusing example, in part 3 of my article 17 also mentioned above.

END