

Effective draftsmanship—part 2

In the second part of a series on the use of plain English in legal documents, **Roderick Ramage** grapples with the broad subject of draftsmanship

- the four principal elements in a legal sentence
- proper usage of “shall” and “will”

AUTHOR: IN THE INTERESTS OF PROMOTING GENDER NEUTRALITY, CAN WE CHANGE EXAMPLE TO READ:

“Where the Buyer is in breach of the Contract and the Seller has served on him **or her** a notice requiring ~~him~~ to remedy ~~of~~ the breach the Buyer shall comply with the notice.”

The first part of this series (“Effective draftsmanship—part 1”, *NLJ*, 17 December 2004, p 1900) focused on the risks of an enthusiastic but careless adoption of plain English. This second part focuses on draftsmanship—fundamental to the work of a lawyer, yet an almost untaught skill.

Regretfully, there is no embracing third person singular pronoun. If used excessively, “he or she” can overload the text and “one” tends to pomposity. Many dislike the use of “their” as a singular pronoun, so it remains necessary to sometimes write “he”, “his” and “him” to mean “he or she”, and so on. **[AUTHOR: NLJ AIMS TO BE GENDER-NEUTRAL. OK TO INSERT: However, a gender-neutral term, such as “the client”, is preferable where possible; when referring to an entity rather than an individual, such as “the employer”, “it” is an acceptable pronoun.]**

The lawyer’s job is either putting into words what people wish or intend, or interpreting other people’s words to ascertain what they mean. Words are a lawyer’s tools, used with the objective of certainty and clarity, except on the occasions when clients wish to use obfuscatory language to conceal their true purpose. The draftsman’s method is first to ascertain the subject matter, what is to be achieved, and the relevant law, then to express the client’s intention in words. This is as true in the public sector (in which legislation or other public regulations affect the whole population, or at least part of it) as it is in the private sector (in which an agreement may affect as few as one or two persons). There are just three actions that the law can perform:

- (i) to command (to impose an obligation on someone to do something);
- (ii) to permit (to give a discretion or power to someone to do or refrain from doing something); and
- (iii) to forbid (to prohibit somebody from doing something).

These three on their own are, however, insufficient to express the legal action 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 is the subject of the legal action (ie the person to whom the legal action is intended to apply)? Second,

one must ask when and in what circumstances the legal action applies. This involves two elements: the general circumstances in which it applies; and any conditions that are to be satisfied before it applies. Thus, we have four principal elements in any legal sentence:

- (i) the legal subject (the person to whom the legal action applies);
- (ii) legal action (the obligation, discretion or prohibition);
- (iii) the case (or the circumstance in which the legal action applies); and
- (iv) the condition (what must be done for the legal action to arise).

The parts of a legal sentence

Example 1a

“Where the Buyer is in breach of the Contract and the Seller has served on him a notice requiring him to remedy the breach the Buyer shall comply with the notice.”

Example 1b

In which my explanation of the parts is in parenthesis and italics:

“Where the Buyer is in breach of the Contract (the circumstances in which the condition can apply) and the Seller has served on him a notice requiring him to remedy the breach (the condition has been satisfied before the legal action takes effect) the Buyer (the legal subject) shall comply with the notice (the legal action).”

The case, ie the circumstances in which the condition can apply, is that the buyer is in breach. This must be so when the legal action applies, and therefore is expressed in the present. If this case applies, the condition (that notice has been served) must, however, be satisfied before the legal action, and therefore is expressed in the past.

Example 2a

In which an additional condition is added:

“Where the Buyer is in breach of the Contract, and the Seller has served on him notice requiring him to remedy the breach, and the Buyer has failed to comply with the notice within fourteen days from the date of its service, the Seller may terminate the Contract.”

Here there are three differences from example 1: there is an extra condition (“and the Buyer has failed to comply with the notice within fourteen days from the date of its service”); the legal subject is a different person; and the legal action, using the word “may” instead of “shall”, is a right or discretion and not an obligation. Although by the standards of much traditional drafting this is

still a relatively simple sentence, it is already long enough and sufficiently complex that its structure is not immediately apparent through the words, so I restate it as example 2b, altering not the words but the layout.

Example 2b

In which the legal subject and action stand out from the case and conditions

“Where:

- the Buyer is in breach of the Contract,
 - the Seller has served on him notice requiring him to remedy the breach, and
 - the Buyer has failed to comply with the notice within fourteen days from the date of its service,
- the Seller may terminate the Contract.”

“Shall” and “may”

The terminology and the analysis of the legal sentence that I have used above to describe the legal sentence is taken from George Coode’s *On Legislative Expression* (House of Commons Papers (1843) vol xx [AUTHOR: IS THIS VOL 20, OR NEED TO SUPPLY VOL NUMBER?]), which remains the basis of modern parliamentary draftsmanship, but the private sector is, in places, still slow to adopt (my earlier article in *NLJ* on 30 April 1970 clearly had little effect). In the same paper, Coode analysed the word “shall”, misused by lawyers now as then. I now use the structure of a legal sentence to explain the proper use of “shall” and other expressions, which in turn give due emphasis to that structure.

In formal English usage “shall”, when used in the second and third persons, expresses obligation and “will” futurity. If I say, “You shall be at my office at 2 o’clock this afternoon,” I am giving a command to you, expressing an obligation on you. However, if I say, “The train will arrive at Euston at 2 o’clock this afternoon,” I am making a forecast, expressing something that will (I hope) happen in the future. They are two very different things, and the meaning is apt to be confused if they are misused.

English being the difficult language it is, the meanings of these words are reversed in the first person, so that “will” in the first person expresses intention, ie corresponding to a command, while “shall” is the expression of futurity. Hence, when I say, “I shall arrive at 2,” all that I am doing is making a forecast of my time of arrival. If I wish to express my intention to arrive at 2, a command to myself, I say, “I will arrive at 2.”

Most legal documents are written in the third person, so for most purposes “shall” is

the appropriate word to express obligation or prohibition. Some people might find that “must” is less formal, while meaning the same. Only exceptionally, eg wills and deeds poll, are documents written in the first person, reversing the “will” and “shall”. These words deal two of the three legal actions mentioned above. The third, discretion, is easier and is provided by “may”. The common misuse of these words is the overuse of “shall”, which is twice mistaken: first, by using it in the mistaken belief that what the document intends to express is futurity; and second, in the mistaken belief that it is an expression of futurity. To illustrate the risks of misusing these words and the advantages of adhering to their formal use, let us return to example 1 above.

Horrible “shall” example

“Where the Buyer shall be in breach of the Contract, and the Seller shall have served on him notice requiring him to remedy the breach, the Buyer shall comply with the notice.”

Correct “shall” example

“Where the Buyer is in breach of the contract, and the Seller has served on him notice requiring him to remedy the breach, the Buyer shall comply with the notice.”

In the first example, there are three “shalls”, of which only one is used to express the legal obligation. The other two “shalls” are as commonly used, presumably to express what might happen in the future, viewed from the time when the clause was drafted. This is unnecessary and incorrect, and in some cases leads the draftsman, realising that something is amiss, to express the legal obligation as “will”, thereby wholly losing any expression of obligation in the legal action.

Modern statutes are written on the assumption that they are “constantly speaking”, so they apply and are to be construed at the time when they are applied, and the case and condition are expressed in the present if they apply at the time of the legal action, or in the past if they precede it. Although there has been at least one case of a will (*re Walker* [1930] All ER Rep 391) in which a contrary view has been taken, it cannot be doubted that the assumption that applies to legislation applies equally to private documents. Therefore, the legal expression is expressed using words of obligation or discretion, while the case and condition are expressed in the present if applicable up to the time of the legal actions, or the past if to have applied or been done before the legal action.