



Reverse engineering legislation

Roderick Ramage explains how George Coode's tract *On Legislative Expression* enables reverse engineering to unlock the meaning of unclear legislation

IN BRIEF

► An analysis of the underlying principles of legislation can enable a simple list of tests to be refined to assist in the interpretation of legislation (and also private documents), if the legislators' intention is not clear.

In my article 'Will or Shall?', published in *NLJ* on 20 April 1970, I mentioned the four elements of a legal expression identified by George Coode (1807–1869, of Inner Temple), but only as a background to his guidance about the use and misuse of the word 'shall'. Next, I explained the four elements more fully in my article 'Effective draftsmanship (Pt 2)' 155 *NLJ* 32 on 7 January 2005 and their relevance to the drafting of private documents as well as legislation. Now I propose the use of these elements as an aid to interpreting Parliament's intention.

Commands such as 'No smoking' on a railway carriage window are clear and effective legal expressions, but normally the requirements for a legal action are more complicated and need to be placed in their context. First, when drafting a provision in a document, one must specify the legal action to be expressed. Second, one must ask who is the subject of the legal action—ie the person who is required or permitted to do or who is forbidden from doing or is to be submitted to the legal action. Third, one must ask: in what circumstances does the legal action apply? Finally, one must ascertain what condition must be satisfied in order that the legal action can have effect. For example: the words 'if the tenant desires to determine the term hereby granted' describe the circumstance or background; 'and gives to the landlord notice ...' and 'and

up to the date of such determination pays the rent' are the conditions that must be satisfied; and 'then... the present demise... shall cease and be void' is the legal action. In this example there is no legal subject, because the legal action takes place automatically if the circumstance exists and the conditions are satisfied, and therefore the legal action can be expressed in the passive voice.

Coode identifies these elements as follows:

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

A taxing example

Recently I was instructed in a tax appeal, in one aspect of which a study of these elements might have been decisive. In the event HM Revenue & Customs (HMRC) conceded the point, so it was not argued before the tribunal. It does however illustrate my proposal that these elements can be used as an aid to interpret legislation.

The appeal arose under the Finance Act 2004, Sch 36, para 12, and reg 12 of the Registered Pension Schemes (Enhanced Lifetime Allowance) Regulations 2006, SI 2006/131. An individual, the aggregate value of whose pension rights at 6 April 2006 exceeded or were expected to exceed his or her lifetime allowance (and therefore was at risk of a lifetime allowance tax charge of 25% of the excess, or 55% if taken

a lump sum) could obtain protection from the tax by notifying HMRC on or before the closing date (5 April 2009). Regulation 12 provides for the submission of a late notification as follows.

- (1) This regulation applies if an individual—
 - (a) gives a notification to the Revenue and Customs after the Closing Date,
 - (b) had a reasonable excuse for not giving the notification on or before the closing date, and
 - (c) gives the notification without unreasonable delay after the reasonable excuse ceased.
- (2) If the Revenue and Customs are satisfied that paragraph (1) applies, they must consider the information provided in the notification.

The appellant had made his late notification on 21 September 2017, and HMRC refused to consider it on the ground that he had failed to satisfy both the reasonable excuse and the no unreasonable delay tests. HMRC's position on the no unreasonable delay test was that, if the appellant had a reasonable excuse, it ended on 20 April 2016, when he first knew that he ought to have but had failed to notify HMRC for protection before the closing date, and that the delay until 21 September 2017, about 18 months, was unreasonable. The appellant's position was that he had a reasonable excuse, it ended on 30 June 2017, when he first knew that it was possible to make a late notification, and the delay until 21 September 2017, less than three months, was not unreasonable.

One of the authorities on which HMRC relied was *Twaite v HMRC* [2017] UKFTT

0591 (TC), in which the relevant passages were these:

[48] The reasonable excuse was Close's failure to advise Mr Twaite of the need for a notification and so this reasonable excuse necessarily ended when he was told that the notification had been needed.

[49] I do not accept that the reasonable excuse can only have ceased when Mr Twaite became aware of the possibility of making a late notification. To do so would be to treat any lack of knowledge of the ability to make a late notification as a reasonable excuse in its own right. However, the relevant reasonable excuse is that of the reason for not giving the notification on or before the closing date; clearly, the absence of knowledge of the ability to make a late notification cannot be a reason for a notification not having been given on or before the closing date'.

The opposite conclusion was reached in *Gammell v Revenue and Custom Commissioners* [2021] UKFTT 49 (TC), [2021] All ER (D) 123 (Feb), in which the judge found that the reasonable excuse ended only when the appellant first knew that he could make a late application and the delay of about three months was not unreasonable.

Each of the two components of the no unreasonable delay test—namely the end of the reasonable excuse and unreasonable delay—is a 'not altogether precise legal standard', in respect of which paras [58] and [59] in *Build-A-Bear Workshop UK Holdings Ltd v Revenue and Customs Commissioners* [2021] UKUT 67 (TCC) make it clear that an appellant court should not reverse a judge's decision on an application of such a standard unless they have erred in principle, which makes it particularly important to do all that is possible to reduce the uncertainty about the interpretation and so ensure that standards are not unnecessarily treated as belonging to this category. The term 'not altogether precise legal standard' appears to have been coined by Lord Hoffmann in *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700, para [7]. It can be seen as a modern reflection of the complaint about equity, which, as John Selden (1584–1654) is recorded as saying, depends on the length of the chancellor's foot. One judge can come to a conclusion on this type of issue, while another can reach the opposite, and, to the extent that neither decision is appealable, neither can be said to be legally incorrect.

It is easy to say (a) that a law, the effect of which is that a person is barred from the

remedy offered by it if he did not know that he could avail himself of it, is absurd, as reg 12(1)(c) would be if *Twaite* is right, and (b) that it must therefore be interpreted under the so-called golden rule, which was defined by Lord Wensleydale in *Grey v Pearson* (1857) 6 HL Cas 61 as follows:

'The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no further'.

It is not easy to know with any certainty how to apply the golden and other rules of interpretation, where the absurdity or inconsistency etc themselves are also uncertain, and there is no tool (other than the chancellor's foot as a measure of reasonableness) by which the court can resolve the uncertainty of a not altogether precise legal standard.

Resolving uncertainty

My proposition is that, when faced with contradictory interpretations, an approach to resolve or reduce the inherent uncertainty is to reverse engineer the legislation. The first step is to analyse the entire provision into its elements in the order, in which Coode wrote that they should be expressed, which is to start with the case, followed by the conditions, and finally legal subject and action—ie moving from the general to the particular, even though this is not always the order in which legislation is actually expressed. If the case (the circumstances, which must exist for the legal action to be capable of having effect) does not exist, it is irrelevant whether the conditions (what must or must not be done) have been satisfied.

The next step is to ask whether there is any other circumstance, which is essential for the legal action to take effect and the absence of which would prevent it from taking effect, but which is not stated in the legal expression. The existence of an essential circumstance in the case and the absence of words expressing it provide a mechanism by which 'the words may be modified so as to avoid the absurdity and inconsistency'. If an essential circumstance is missing from the legal expression, it is because either it was so obvious that it did not need to be said or the legislature had failed to think through the details of what it intended to achieve.

An analysis of reg 12 shows how this mechanism works. There are two essential

circumstances (the case) in reg 12. One is that the appellant had failed to notify HMRC on or before the closing date, and the other is that he knows that he can notify HMRC after the closing date. To say the obvious, a person cannot do something if he or she does not know that he or she can do it. If either of these is absent, it is impossible for the legal action to take effect. The resolution of the contradiction between *Twaite* and *Gammell* is that the appellant's knowledge that late notification is possible is not part of his excuse, but is a circumstance without with the legal action in impossible.

While much legislation expressly states the necessary circumstances (case)—for example, s 170(1), Finance Act 2002 starts 'This section applies where ...'—it commonly does not. For example, nowhere in Pt 2 of the Companies Act 2006 is it stated expressly 'if a person wishes to form a company'. Neither of the circumstances constituting the case in reg 12 is stated expressly. The first, that the appellant had failed to notify HMRC on or before the closing date, is implied by sub-para (1)(a). The second, that he knows that he can notify HMRC after the closing date, is implied by necessity: it is a circumstance, like the wish of a company promotor in Pt 2 of the Companies Act 2006, which is so obvious that it does not need to be stated.

'Obviousness', when matters are not stated in private documents, is well established, from *Shirlaw v Southern Foundries* (1926) Ltd [1939] 2 KB 206, in which MacKinnon LJ observed that: 'Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying', to *Wells v Devani* [2019] UKSC 4, [2019] All ER (D) 54 (Feb), in which the contract did not identify the event on which commission would be payable, but it was held that the court may imply into a contract anything so obvious that it goes with saying. That obviousness applies also in legislation is clear from the way that legislation is often expressed.

While, in the appeal used to illustrate my proposition, it is unknown whether HMRC's skeleton argument conceded the not unreasonable delay point because of the Coode analysis or the *Gammell* decision, both in my skeleton, or for some other reason, I hope that the key, by which Coode suggested how the legislature locks its meaning into its words, can be turned in the other direction to unlock the legislature's meaning when it is not clear from the words.

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