

Introductory Note by Francis Bennion It is intended to publish the following article in one of the law journals. Until this can be arranged it is placed on the website for convenience of access. It may be referred to by its document number 2009.016. For a general account of my writings on NESSSI see 'Practical Statutory Interpretation: Bennion's NESSSI Method', www.francisbennion.com/2009/017.htm.

How to Use NESSSI

Francis Bennion

Correct NESSSI procedure

The correct NESSSI procedure for an advocate is:

1. State the facts in outline.
2. State the terms of the relevant doubtful enactment.
3. Briefly state what the interpretative point is.
4. State the terms of the relevant enactment using (a) selective comminution and/or (b) interstitial articulation (using the latter to state expressly what you contend is implied so as to present a version of the law which favours your client).
5. Repeat 4 giving the opposing construction favouring your opponent.
6. List interpretative factors supporting and undermining 4 in a way that favours your case while still arguing legitimately.
7. Repeat 6 listing factors supporting and undermining 5 in a way that favours your case (not unscrupulously).
8. Explain any necessary weighing and balancing.
9. Sum up the argument.

The procedure for a judge deciding a case is slightly different.

1. State the facts in outline.
2. State the terms of the relevant doubtful enactment.
3. Briefly state what the interpretative point is.
4. State, in relation to one party, the terms of the relevant enactment using (a) selective comminution and/or (b) interstitial articulation (using the latter to state expressly what is said to be implied).
5. Repeat 4 in relation to the opposing party.
6. If you as judge favour neither, repeat 4 in your own terms as judge.
7. List relevant interpretative criteria and interpretative factors.
8. Perform any necessary weighing and balancing.
9. Sum up the argument and give your conclusion.

Medical Council Case (Hong Kong)

In *The Medical Council of Hong Kong v David Chow Siu Shek* [2000] 2 HKLRD 674 (*Medical Council*), www.francisbennion.com/hkmedicalcouncil2000.htm, the Court of Final Appeal of Hong Kong (CFA) used NESSSI in resolving a problem of statutory interpretation. Oliver Jones, Assistant Professor, Faculty of Law, University of Hong Kong, says that in this case the CFA grasped and endorsed NESSSI as the required approach to statutory interpretation in Hong Kong¹.

In the remainder of this article I set out in outline what I consider to be the method that a judge should use in applying NESSSI to a case. There was a single judgment in *Medical Council*, delivered by Bokhary PJ. I draw on that in this article, but in the main use my own way of describing the method required.

The facts in outline

Removal from General Register The name of the Respondent (Dr Chow) was entered on the General Register maintained by the Appellant, the Medical Council of Hong Kong (the Council), under the Medical Registration Ordinance, Cap. 161 (the Ordinance). In November 1990 Dr Chow was convicted in the High Court on two counts of conspiracy to defraud and was sentenced to two years' imprisonment. In May 1994 he came out of prison and resumed his medical practice. On 23 August 1994 the Council, acting under s. 21(1)(ii) of the Ordinance, and citing the said convictions, made an order taking effect on 16 June 1995 that Dr Chow's name be removed from the General Register for a period of three years.

Subsequent offences On 22 September 1995 Dr Chow pleaded guilty in the Magistrate's Court to 19 charges of failing to keep proper records of dangerous drugs, contrary to regulation 5(1) as read with regulation 5(7) of the Dangerous Drugs Regulations, Cap. 134, and was fined \$3,000 on each charge, the maximum penalty being a fine of \$450,000 and imprisonment for two years.

Failed application for restoration On 3 September 1998 Dr Chow made a written application to the Council for the restoration of his name to the General Register. On 3 February 1999 the Council held a hearing of the application, having warned Dr Chow that his 1995 Magistrate's Court convictions were regarded as relevant to his application. The application was refused, the chairman stating that the 1995 convictions were regarded as being particularly serious from a professional point of view. The chairman noted that after Dr Chow came out of prison he

. . . was warned after an inspection conducted by the Department of Health on 7 June 1994. Despite proper advice given, no improvement was observed during searches conducted on 22 August 1994. The quantity and the variety of dangerous drugs kept without proper record poses a serious threat to society.

The terms of the relevant enactments

In so far as is material, s. 21(1) of the Ordinance reads:

If . . . the Council is satisfied that any registered medical practitioner-

- (a) has been convicted in Hong Kong or elsewhere of any offence punishable with imprisonment;
- (b) has been guilty of misconduct in any professional respect;

. . . the Council may, in its discretion-

- (i) order the name of the registered medical practitioner to be removed from the General Register; or
- (ii) order the name of the registered medical practitioner to be removed from the General Register for such period as it may think fit . . .

¹ Forthcoming article.

As to restoration to the General Register, s. 25(3) of the Ordinance provides so far as relevant that:

Any person whose name has been removed from the General Register under the provisions of this Ordinance . . . may apply to the Council for the restoration of his name to the General Register and the Council in its absolute discretion and after such inquiry and subject to the submission of evidence that he has not been convicted in Hong Kong or elsewhere of any offence punishable with imprisonment and has not been guilty of misconduct in a professional respect while practising in Hong Kong or elsewhere and to such conditions, as it may consider desirable, may either allow or refuse the application, and if it allows the same, shall order the Registrar on payment by the applicant of the prescribed fee to restore the name of the applicant to the General Register, and thereupon the Registrar shall restore the name accordingly.

The interpretative point

In the words of Bokhary PJ the interpretative point at issue was:

Take a registered medical practitioner whose name has been ordered to be removed from the Register for a specified period. Is he automatically entitled to have his name restored to the Register once that period has elapsed or is he covered by s.25(3)? That is the issue before the Court.

Selective comminution and interstitial articulation (finding for Council)

To justify finding for the Council, s. 25(3) of the Ordinance needs to be applied as if it read as follows (the added words in italics being taken as implied):

1. Any person whose name has been removed from the General Register under the provisions of *s. 21(1)(i) or (ii)* of this Ordinance
2. may apply to the Council for the restoration of his name to the General Register
3. and the Council in its absolute discretion and after such inquiry and
4. subject to the submission of evidence that he has not *since the occurrence of the event, or last event, in respect of which his name was so removed* been convicted in Hong Kong or elsewhere of any offence punishable with imprisonment and has not *since the occurrence of the event, or last event, in respect of which his name was so removed* been guilty of misconduct in a professional respect while practising in Hong Kong or elsewhere
5. and *subject* to such conditions, as it may consider desirable,
6. may either allow or refuse the application,
7. and if it allows the same, shall order the Registrar on payment by the applicant of the prescribed fee to restore the name of the applicant to the General Register, and thereupon the Registrar shall restore the name accordingly.

Notes on the above The added words in italics in paragraph 1 make it clear that s. 25(3) applies to a practitioner removed from the General Register for a specified period only, and therefore that it applies to Dr Chow.

The added words in italics in paragraph 4 are needed to correct a drafting error in s. 25(3). Without them s. 25(3) could not apply to Dr Chow because he has been convicted in Hong Kong or elsewhere of an offence punishable with imprisonment and has been guilty of misconduct in a professional respect while practising in Hong Kong or elsewhere. Those were the reasons why his name was ordered to be removed from the General Register in the first place. The added words still allow notice to be taken of the 1995 offences, which prevent the Council from allowing the application under s. 25(3).

Selective comminution and interstitial articulation (finding for Dr Chow)

A finding for Dr Chow would require both enactments to be treated as having implied terms.

At the end of s. 21(1) add the following (taken as being implied):

Where under sub-paragraph (ii) above the name of a registered medical practitioner has been ordered to be removed from the General Register for a specified period the Registrar shall restore the name at the end of that period without further application, but without prejudice to the bringing of further proceedings against the practitioner under this section in respect of any matter whether arising before or after the restoration of his name to the General Register.

In s. 25(3) add the words in italics (taken as being implied):

Any person whose name has been removed from the General Register under the provisions of s. 21(1)(i) of this Ordinance . . .

Interpretative criteria and interpretative factors

Bokhary PJ did not refer to the drafting error in s. 25(3). Nor did he proceed by identifying the implied words at the beginning of s. 25(3). He found for the Council without going into detail. He said:

There arise, in my view, five considerations which determine the result of the present case. It makes no difference to such result whether such considerations are (to use the expressions in ‘Bennion’) viewed as ‘general guides to legislative intention laid down by law’ or as ‘interpretative factors’.

There is however a difference between interpretative criteria and interpretative factors. It is described in Code Pt X (ss. 180-191). In particular s. 183 (Nature of an interpretative factor) says:

The term ‘interpretative factor’, in relation to an enactment, is used in this Code to denote a specific legal consideration which—

- (a) derives from the way a general interpretative criterion applies to the text of the enactment and the facts of the instant case (and to other factual situations within the relevant factual outline), and
- (b) serves as a guide to the construction of the enactment in its application to those facts.

Earlier Bokhary PJ had indicated that he was using NESSSI by saying:

I think that there is much to be said for the statement in ‘Francis Bennion: Statutory Interpretation’, 3rd ed. (1997) at p. 424 that:

‘the basic rule of statutory interpretation is that it is taken to be the legislator’s intention that the enactment shall be construed in accordance with the general guides to legislative intention laid down by law; and that where these conflict the problem shall be resolved by weighing and balancing the interpretative factors concerned’.

This was a reference to Code s. 193 (Basic rule of statutory interpretation), the wording of which is unchanged in the latest (fifth) edition. Before considering Bokhary PJ’s five considerations, I will set out the factors under NESSSI which in my view are relevant in relation either to the above selective comminution and interstitial articulation (finding for Council) or to the above selective comminution and interstitial articulation (finding for Dr Chow), or to both these. I suggest that the factors in question are those arising from the following twelve interpretative criteria when applied to the facts of the case, though other interpretative criteria may have a marginal application as well.

Basic rule of statutory interpretation
Informed interpretation rule

Plain meaning rule
Commonsense construction rule
The rule *ut magis valeat quam pereat*
Principle against doubtful penalisation
Principle that law should serve the public interest
Principle that law should not be subject to casual change²
Presumption relating to the mischief
Presumption relating to purposive construction
Presumption that absurd result not intended
Linguistic canon that every word to be given meaning³

The first two of these always apply. The others have varying weights, which will fall to be assessed in the necessary weighing and balancing exercise. The plain meaning rule and the commonsense construction rule favour Dr Chow because if a person's name is removed for a specified period that literally means the removal should not continue for any time after the expiry of that period. The principle against doubtful penalisation also favours Dr Chow. The other criteria may be said to favour the Council, the presumption relating to purposive construction carrying most weight.

Bokhary PJ's five considerations

Before going through Bokhary PJ's five considerations I should mention that before stating them he said:

When the true position under a statute is to be ascertained by interpretation, it is necessary to read all of the relevant provisions together and in the context of the whole statute as a purposive unity in its appropriate legal and social setting. Furthermore it is necessary to identify the interpretative considerations involved and then, if they conflict, to weigh and balance them.

The inclusion of the word purposive may be taken to denote an intention to apply the presumption relating to purposive construction. Bokhary PJ also referred to the modern tendency to give statutes a purposive construction.

Bokhary PJ also said it is of course to be remembered that no law should be construed so as to inflict a hardship on anyone unless that is eventually found to be the clear effect of the law in question.

The first of Bokhary PJ's five considerations was the need to strike a balance. Under NESSSI this is not one of the interpretative criteria or interpretative factors but the process which follows the identifying of the relevant factors. Perhaps it was this that the learned judge had in mind.

Bokhary PJ's second consideration was interpretation in the context of other statutes *in pari materia*. This is a limited application of the informed interpretation rule. The conclusion from a comparison with disciplinary codes applying in other professions was:

Where someone is merely suspended from something for a specified period, it follows from the very nature of suspension that the mere expiry of that period automatically puts him back where he used to be before he was suspended therefrom. Removal, even if only for a specified period, is of different nature. Where something, here someone's name, has been removed from somewhere, here a register, it naturally takes some positive act to restore it to that place.

The third consideration was the law's tendency to avoid circularity. The judge said:

² Code s. 269.

³ Code s. 355.

For a doctor to be propelled back on to the Register despite a fresh or freshly discovered blot on his suitability to be on it only to be taken off it again by reason of that very blot is obviously circular.

This may be brought under the rubric of the commonsense construction rule. Alternatively it partakes of the sort of convenience and workability which is upheld by the presumption against absurdity.

For his fourth consideration the learned judge applied the linguistic canon mentioned above that every word is to be given meaning.

The fifth consideration was very interesting. Bokhary PJ referred to the wording of the Ordinance prior to the making of the 1996 amendments which led to its present form, then said:

Since removal for a specified period was the only type of removal there was (the alternative being erasure), s.25(3) (which covered both removal and erasure) necessarily covered persons whose names had been removed from the Register for a specified period. So there could not have been any such thing as automatic entitlement to restoration before the 1996 amendments.

In the view of Bokhary PJ this led to the position that applying a literal meaning to s. 25(3) in a way favouring Dr Chow would mean attributing to the legislature an intention to make a radical change by way of a sidewind. He held that the courts are reluctant to make such an attribution.⁴

Conclusion

As often happens, the CFA in the above case, while purporting to apply NESSSI, did so in an incomplete way. Of the twelve interpretative criteria I have identified above, only around half were examined by the CFA. Some were mentioned but not gone into. This applied to the vital principle against doubtful penalisation. None were connected in the judgment to the detailed passages concerning them in my multifarious writings on the subject. It may be surmised that the CFA did not have the benefit of well-informed submissions on NESSSI by counsel concerned in the case. This often happens, even though NESSSI has been in the public domain for over a quarter of a century.

⁴ See Code s. 269.