

PUTTING A SOCIAL AND CULTURAL FRAMEWORK ON THE EVIDENCE ACT: RECENT NEW ZEALAND SUPREME COURT GUIDANCE

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Abstract

What follows are presentations to a seminar on the Supreme Court decision in *Deng v Zheng* (2022): guidance on bringing relevant social and cultural information to the court's attention. The case concerned whether, despite a lack of formal documentation, the parties had entered into a legal partnership, of which they would be jointly responsible for the debts of the partnership. Two issues arose relating to the culture of the parties: namely, whether the meaning to be ascribed to 公司 (*gongsì*) went beyond 'company' and could extend to 'firm' or 'enterprise' and the significance of 关系 (*guanxi*). Both parties are Chinese and their business relationship appeared to have been conducted in Mandarin. Justice Goddard was the presiding judge in *Zheng v Deng* (2020), the Court of Appeal judgment appealed to the Supreme Court. Mai Chen appeared with two other lawyers on behalf of the intervenor, the New Zealand Law Society.

Keywords: social and cultural framework; Evidence Act; expert evidence; translations; interpreters; adjudicative facts; social facts; legislative facts; stereotyping; subconscious bias; judicial notice; reliable published documents.

[A] CASE SUMMARY

This case summary¹ provides context for the article below, which encapsulates a seminar in August 2022 where the authors spoke and reflected on the Supreme Court's recent decision.

Mr Lu Zheng and Mr Donglin Deng are first generation Mainland Chinese immigrants who first met in Auckland, New Zealand in 1998

¹ This is a summary of extracts from the decisions in the High Court, Court of Appeal and the leave decision in the Supreme Court.

and began working together. Mr Deng was initially Mr Zheng's employee (along with several others). In 2004, Mr Zheng, Mr Deng and another incorporated a company, which developed property and built houses. Business grew and many more participants joined. Mr Zheng, Mr Deng and those others later incorporated more companies under 'the Orient Group' banner. The group conducted local business projects, sometimes in conjunction with others outside the group. Members of Mr Zheng's and Mr Deng's families were also involved in the running of the business and the keeping of accounts. The business of the group was conducted predominantly in Mandarin Chinese.

By 2015, the business relationship between Mr Zheng and Mr Deng was under strain. Accounts differ as to what went wrong. Mr Deng decided, with his wife's encouragement, that he and Mr Zheng should separate their Orient Group interests. Mr Deng told Mr Zheng he wanted to end their business relationship in May 2015, and it was common ground that separation occurred on 31 May 2015.

Negotiations followed about the financial consequences of this separation, and how it should be implemented. The parties had a number of discussions in June 2015 and exchanged correspondence including an annotated document headed 'principles in separation'. This document was not signed. Mr Deng contended that most of the terms in this document have since been implemented. Mr Zheng disagreed.

By December 2017, Mr Zheng and his company sued Mr Deng and other defendants in the High Court of New Zealand. No fewer than eight causes of action were pursued. The primary actions alleged the existence of partnerships between the two men; alternatively, joint ventures attracting fiduciary duties. A final account was sought as the main remedy.

The High Court

The High Court heard the trial over 10 days in November 2019 (*Zheng v Deng* 2019). A total of nine witnesses gave evidence including two forensic accounting experts. Seven of the nine witnesses were native Mandarin speakers and gave their oral evidence with the assistance of an interpreter. This included individuals who had a business and/or family relationship with Mr Zheng and/or Mr Deng.

The evidence traversed an array of factual disputes including a dispute over the parties' internal business accounts. Much time was spent on what the accounts meant, how the figures were calculated, and whom the accounts revealed as overall debtor to the other: Mr Zheng or Mr Deng?

The parties' records and correspondence were largely in Mandarin Chinese, and much of this material was translated into English by registered translators commissioned by each party prior to trial. The terminology and business structures the parties adopted reflected linguistic and cultural frameworks that do not always align neatly with English language terminology, or with New Zealand legal concepts and accounting conventions. However, this was not raised as an issue during trial, as no cultural or linguistic expert evidence was adduced, and the trial judge received no assistance from the parties or counsel on these matters.

The High Court was confronted with a case in which the familiar language and trappings of partnership—for example, a written partnership agreement, partnership financial statements prepared in accordance with relevant accounting standards and conventions, and a partnership bank account—were absent. That absence, coupled with the existence of a number of corporate vehicles through which their projects were carried out, led the trial judge to the conclusion that there was no partnership (*Zheng v Deng* 2019: 89). In December 2019 the High Court dismissed all eight causes of action (*ibid* 146).

The Court of Appeal

The Court of Appeal (consisting of three judges) was unanimous in the view that there was in this case an overarching business carried on by the two men in common with a view to profit: that is, a partnership (*Zheng v Deng* 2020: 136). The court held Mr Zheng and Mr Deng were equal partners in that partnership, and the assets of that partnership included shares held by one or both of them in a number of the companies that undertook particular projects (*ibid*: 4). The projects were, as the trial judge found, carried out through those companies. Relevant assets were held by those companies, by one or other of the partners and (at times) by friends and relatives acting as nominees.

Notwithstanding the disparate shareholdings in the relevant companies, and the other asset-holding arrangements, the court considered that it was clear from the parties' dealings that they carried on a joint business in relation to which they had agreed to share equal responsibility for providing capital, and to share profits and losses equally. The 'principles in separation' document was in the court's view an important guide to drawing this conclusion on the nature of the parties' relationship (*Zheng v Deng* 2020: 18).

The Court of Appeal raised a note of caution about the absence of any evidence that would assist in interpreting the cultural and linguistic dimension of the parties' dealings. It identified that almost all primary records and parties' correspondence were in Mandarin, and the English translations relied upon were prepared by different translators, at different times, putting forward different translations of the same terms. In particular, different translators used different terms in their English translations of the term 公司 (*gongsi*), which could be translated as either 'firm', 'company' or 'enterprise' (*Zheng v Deng* 2020: 64). Furthermore, none of the translators gave evidence about why they used certain terms rather than others in particular documents. Accordingly, there was a real risk of nuances in expression and context being lost in translation (*ibid*: 86).

In reaching its decision, the court was conscious that language is used in a broader linguistic and cultural setting, by reference to background assumptions about personal and business relationships and the ways in which dealings are normally structured, that were shared by the parties, but which the court may not be aware of or understand. The court referred to the need to be sensitive to the social and cultural context and to be cautious about drawing inferences based on preconceptions about business dealings (*Zheng v Deng* 2020: 88).

The appeal was allowed in December 2020. A declaratory order was made that there was a partnership. On the basis of this finding, an account should be taken of the partners' mutual dealings, and any balance payable by one partner to the other should be ascertained and paid. The proceeding was remitted to the High Court to enable this to take place (*Zheng v Deng* 2020: 5).

Supreme Court

Mr Deng sought leave to appeal to the Supreme Court of New Zealand. In his application, Mr Deng expressed concern over the Court of Appeal's approach and emphasis on the linguistic and cultural matters in its decision. None of these issues had been addressed at all during the High Court trial, nor in the written and oral submissions before the Court of Appeal.

The Supreme Court granted leave to appeal in June 2021 (*Deng v Zheng* 2021). In its leave decision, the Supreme Court held it may be necessary to explore these cultural and linguistic matters to resolve the appeal and invited the New Zealand Law Society (NZLS) to consider intervening in the appeal, after consultation with New Zealand Asian Lawyers (*ibid*: 2).

The NZLS duly intervened and the appeal was heard in August 2021 before five judges, which culminated in the Supreme Court’s decision of 20 June 2022 discussed in this article (*Deng v Zheng* 2022). The Supreme Court found that it was clear that a partnership between the parties existed. The Supreme Court reached this conclusion by reference to contemporaneous documents that reflected a shared understanding as to the nature of the business relationship (ibid: 68). While the court found that the cultural considerations were not of critical importance to the matter at hand, the court offered brief comments as to how the social and cultural framework within which one or more of the protagonists may operate can be brought to the attention of the court when it is of significance. The court said that ‘[t]hese comments were influenced and in part derived from the very helpful submissions made to us by the Law Society’ (ibid: 77).

[B] THE HONOURABLE JUSTICE GODDARD

E ngā mana, e ngā reo, e rau rangatira mā (The powers and the languages of the hundred leaders)

Tēnā koutou, tēnā koutou, tēnā tatou katoa (Thank you, thank you, thank you all).

I’m flattered, and slightly surprised, to be asked to speak this evening. I don’t claim any particular expertise in relation to the cultural dimension of judging. Rather, I’m just a new-ish judge trying to do the work as well as I can. I had been in the role a little over one year at the time the Court of Appeal heard *Zheng v Deng*. My judicial colleagues and I tried to determine it in a manner consistent with the oath every judge takes when they first become a judge: to do right to *all manner of people* after the laws and usages of New Zealand, without fear or favour, affection or ill will.

Fortunately, Mai Chen—who is an expert in this space—has helpfully identified a number of questions that she says she is curious to hear the answer to. Here are my attempts to satisfy that curiosity.

a. In the Court of Appeal Judgment, you write ‘[a] note of caution.’ What led you to write that? Was it more awkward as those issues hadn’t been raised at first instance and were being raised for the first time at the appellate level?

This was one of ten or so cases heard over four very full days in Auckland in a pretty typical Divisional Court list.² I had read the High Court decision

² Where the Court of Appeal sits with one permanent court member and two High Court Judges. See Senior Courts Act 2016, section 48(2).

a few weeks earlier in preparation for the week's hearings. I elected to write this judgment myself for a number of reasons. First, because it was a longer hearing (a full day) and it was a civil case in a field where I had some expertise. Second, after reading the High Court judgment, I was left uneasy about the picture it painted of the parties' dealings and the framework through which those dealings had been analysed. Third, I suspected that quite a bit of work would be required to understand the relevant background material for whoever was writing the judgment.

As I reread the High Court judgment the weekend before the hearing and the submissions for the hearing, my concerns intensified. I spent some time reading into the evidence, particularly the documentary evidence.

The hearing was somewhat helpful—it was a chance to explore some issues with counsel, and with my colleagues in the court. But there were many red herrings. For example, the question of whether a document entitled 'Principles in Separation'—which shed pretty clear light on the nature of the parties' relationship—had been discovered. That was the subject of an application to adduce further evidence and separate submissions from each party, an issue that should have been, and ultimately was, capable of being resolved direct by discussion between counsel. Both counsel spent a lot of time on details, which in essence re-litigated most aspects of the (ten-day) High Court case. Less time than desirable was spent on the central issues in the case. (Incidentally, I find that it is a common problem in my court: too many counsel do not appreciate the key difference between trials and appeals, and do not reframe their cases appropriately for the appellate context.)

Of particular concern during the hearing was that counsel said little about language issues, and nothing about cultural context.

Afterwards, I spent quite a bit of time worrying away at the case and trying to find the best way to think about it—to bring the issues into focus. What became ever clearer is that two, maybe three, things had gone wrong at first instance.

First, the evidence had been assessed through the lens of usual New Zealand (Anglophone) commercial practices. The oral evidence and the documentary record had been tested against expectations about a typical New Zealand English-speaking business partnership. For example, the Judge saw as counting against the existence of a partnership the absence of: a written partnership agreement; a partnership bank account; a GST number; and partnership accounts prepared in accordance with generally accepted accounting practice.

The law is actually pretty clear that partnerships can take many forms, and the presence or absence of particular factual patterns is not decisive. But here there were additional reasons why an assumption should not be made that an absence of incidental trappings and other formalities, systems, and terminology that are familiar to New Zealand-English speaking lawyers did not show that the parties did not intend to embark on a business venture in which profits would be shared.

Second, there was every reason to think that two men with a different shared language and different shared cultural background might ‘carry on a business in common with a view to profit’ (the test in the Partnership Act 1908) using *different* formalities, *fewer* formalities or *different* systems and *different* terminology to describe their agreement.

This meant it was especially important to look beyond those superficial trappings to the substance of their agreement, and to remain open to the possibility that important clues to the substance of their agreement would come in unfamiliar forms. Those unfamiliar records could not be put to one side on the basis that they were ‘idiosyncratic’, ‘enigmatic’, or unreliable. The courts needed to ask: ‘Why were these accounts prepared? What did the parties intend to achieve when they put all this time and effort into this exercise? What can we learn from this about their relationship?’

The third point, relevant to both of the points above, is that all the relevant communications and all the contemporaneous documents were in Mandarin Chinese. What the High Court had read and analysed, and what we were reading and analysing, were merely translations. As anyone who speaks more than one language knows, and as anyone who has studied languages and prepared translations knows, translation is an art that requires careful attention to context. Literal translations are often unsatisfactory. More nuanced translations require a deep understanding of context, and the exercise of judgement — it is not a mechanical task.

We don’t need to go as far as Umberto Eco, to say that ‘translation is the art of failure’. It’s enough to say, as the great French writer and philosopher Voltaire is reported to have said: ‘Woe to the makers of literal translations, who by rendering every word weaken the meaning!’

The key point for tonight’s purposes was well made by the British writer Anthony Burgess, who said: ‘Translation is not a matter of words only: it is a matter of making intelligible a whole culture.’

In this case, none of the translators gave evidence. None of them explained why they had chosen one English version of certain key words

rather than another. We didn't know if the translators understood the context of the work they were doing, or the potential legal significance of different choices about how to render the original Mandarin into English. We did not have the benefit of any commentary from the translators on their translation choices, or submissions from counsel on these important issues.

There was, however, a helpful reference during the hearing by counsel for Mr Zheng to the term translated as 'company' not being what the original documents really meant. That sent me off after the hearing to dictionaries and discussions with my then clerk, Xin Lau Yee. It became apparent that, where the English translations of some documents described the parties' business as a 'company', with all the legal baggage that term entails, the originals used the term *gongsi* (公司). Our research confirmed that this term does not necessarily imply separate legal personality. Instead, it could simply mean business, firm, enterprise or company, depending on context. As we said in our judgment, 'It would be wrong to attribute any legal significance to translations of this term without evidence specifically addressed to whether the term has, in its original language and original context, a corresponding significance' (*Zheng v Deng* 2020: 87).

We went on to say that we were also conscious that language is used in a broader linguistic and cultural setting. This meant the court may not be aware of or understand the background assumptions about personal and business relationships and the ways in which dealings are normally structured that the parties will have shared.

I referred in the judgment to Mai Chen's recent, excellent, report on *Culturally and Linguistically Diverse Parties in the Courts: A Chinese Case Study* (Chen 2019). The report explains, among other things, that *guanxi* often governs the Chinese way of doing business and is one reason why Chinese people are less likely to conduct business by using a formal contract and more likely to do so via a 'handshake'. Mai refers in that paper to another helpful source—a recent article by Dr Ruiping Ye (2019) on 'Chinese in New Zealand: Contract, Property and Litigation'. That article made similar points about high trust dealings taking place without detailed written agreements, or any formal record of agreement.

Why, then, my 'note of caution'? Because we had looked at the case through a rather different lens, and I felt the need to explain why we had done so in order to be transparent in our reasoning. It also seemed helpful to be explicit about this given the increasing frequency with which issues of this kind arise before New Zealand courts.

I acknowledge that it was much harder to do this on appeal rather than at first instance. It was also much harder without the benefit of evidence directed to the issue or submissions that squarely addressed this issue—it was a subtext, but was not tackled head on.

b. Justice Emilios Kyrou of the Court of Appeal, Supreme Court of Victoria, Australia observed that ‘to conduct a fair trial’ whose outcome depends on an assessment of the evidence that is impartial and free from prejudgment, judges need to develop ‘a mental red flag cultural alert system, which gives them a sense of when a cultural dimension may be present so they can consider what, if anything, is to be done about it’ (Kyrou 2015: 226). How did you develop your mental red flag cultural alert system?

It helps, I think, to be a child of a culturally and linguistically diverse family. My father was born in Poland; he and his parents came to Australia, then to New Zealand, after the war in the 1940s. They didn’t speak English when they arrived. At my grandparents’ house Polish was spoken as well as English. The books were different, the food was different, world views were different. Other languages and cultures were also in evidence in my own home. My mother was a language teacher, and my father had studied languages before turning to law. Our bookshelves contained books in half a dozen different languages. Understanding the existence and importance of cultural diversity was easy for me, because it was the water in which I swam as a child.

I went on to study French language and literature, to speak French reasonably fluently, and to spend time in France. Again, this brings home—literally—the need to be conscious of the cultural and linguistic framework that applies as you move between households, between contexts.

I am inclined to think my professional background also helped to underscore the need for cultural and linguistic awareness.

While in practice, my work included representing New Zealand in multilateral treaty negotiations and, most recently, chairing meetings in The Hague working in English and French, with more than 80 states in attendance. Doing this work required me to be sensitive to the very different approaches of delegations from different countries and different cultures.

My research on how legislation fails to achieve its policy goals—summarized in my book *Making Laws that Work: How Laws Fail, and How We Can Do Better* recently published by Hart Publishing—also drove

this home (Goddard 2022). In the book, I look at some of the flaws in human decision-making that affect legislative design, including the many rules of thumb or heuristics that we use to make quick decisions. In his book *Thinking, Fast and Slow* the brilliant psychologist Daniel Kahneman describes ‘system 1’ and ‘system 2’ modes of thinking—system 1 is quick and intuitive, system 2 slow and effortful (Kahneman 2011). His book explains that we often answer complex questions by substituting easier questions and using system 1 to answer those questions, or to provide the starting point for system 2—which then tends not to go much beyond that. We are very bad at paying proper attention to what we don’t know. Instead, we find it much easier to assume that others think more or less as we do, live more or less as we do, and behave more or less as we do. We draw inferences on that basis. We dismiss the unfamiliar as irrelevant noise, rather than putting in the work to try to understand it.

For the way in which these heuristics operate in the context of racial and cultural stereotypes, I strongly recommend the superb book *Biased* by Jennifer Eberhardt, a Stanford professor and MacArthur ‘Genius’ grant recipient (Eberhardt 2019).

Our reliance on system 1 repeatedly leads to design errors when it comes to law-making. And it can lead to errors in judicial decision-making also.

In all of these contexts, it seems to me that there are two basic things you need to do. First, to put aside your own preconceptions about ‘how things are done’. And second, to have the curiosity and patience to put in the time and effort to gain some level of understanding of how others do those same things. Or why they don’t do those things at all!

We need to think slowly and deliberately, and question the answers delivered by our system 1 heuristics. We need to pay attention to the unfamiliar. To what we do not know.

c. How could counsel have assisted the court to determine what the two Chinese parties were really saying and doing, to reach the correct legal decision?

Evidence from the parties and the translators would have been enormously helpful.

And submissions, of course! The kind which made reference to the underlying culture, and reference to alternative translations. If counsel had been alive to the need to help the court to see the case through a

culturally and linguistically sensitive lens, we would have been much better placed to do our work.

d. Have you seen counsel handle cases well when, as the Supreme Court said at paragraph 77 of its judgment, ‘the social and cultural framework within which one or more of the protagonists operated’ was of significance, and what did good look like in that context?

Not as a judge, no. And I have heard other cases that also called for this.

One significant exception has been where the relevant framework is *te Ao Māori*. I have seen excellent evidence about the Māori world view, and the implications of that worldview, for how people act and what people do. I saw this as counsel in *Proprietors of Wakatū v Attorney-General* (2017, 2015, 2012). I have also benefited from it in some cases before the Court of Appeal where Māori counsel appeared who understood that cultural context, and understood the need to explain it. It makes a big difference, and judges are always grateful for this assistance.

e. Are you experiencing an increase in social and cultural issues at your judicial coalface as the superdiversity of NZ grows? Māori, Pasifika and Asian ethnicities comprising 39.7% of New Zealand’s population. (StatsNZ 2020). Presently, individuals of Asian ethnicity make up 15.1% of the New Zealand population. However, this group is projected to grow to 26% by 2043 (StatsNZ 2022).

Yes. Especially, but not only, in Auckland.

*f. What do you think the impact will be on courts and on counsel of the Supreme Court’s guidance in *Deng v Zheng* ‘as to how the relevant information [on social and cultural framework] can be brought to the attention of the Court’?*

It will be very helpful. The Court of Appeal went out on a bit of a limb, in circumstances where we didn’t have much help from the parties or the lawyers. The Supreme Court had the opportunity to hear argument squarely directed to this practical question, and did an excellent job (if I may say so) of providing practical guidance on how this can be done without increasing the cost and length of proceedings, and thus without creating additional barriers to access to justice for culturally and linguistically diverse parties.

g. What is needed to better equip courts and counsel to know when ‘the social and cultural framework within which one or more of the protagonists operated’ is of significance and to know what to do about it?

Awareness that this matters—a lot. Attention. Curiosity. And a willingness to slow down, question our initial reactions, do the additional work required to understand a world view different from your own. To see the world through a different lens.

The judiciary are firmly committed to working to ensure widespread awareness of cultural and linguistic diversity, and to reflect this in the work of judges. Te Kura Kaiwhakawā/Institute of Judicial Studies has run a number of seminars on diversity, including seminars in 2020 and 2021. The Bench Book now includes a diversity handbook, added just last year, entitled ‘*Kia Mana te Tangata—Judging in Context*’. The handbook includes general material about barriers to participation in the courtroom, the importance of good communication, implicit or unconscious bias, and ways to disrupt that bias.

Counsel can also assist by alerting judges to the relevance of cultural and language issues—and should do so wherever possible. This is an essential part of their role.

And it is then up to us—up to the judges—to pay close attention, and do the necessary work to make sure that every participant is seen, heard and understood, and that the parties know they have been seen and heard and understood, and to ensure they know that they had a fair and unbiased hearing.

That is not always an easy thing to do—it requires constant effort. But it is what we promise to do when we take office. It is what we must strive to do, in each and every case, in order to keep that promise.

[C] MAI CHEN

Courts are an adversarial and not an inquisitorial process, so it is for counsel to raise issues of social and cultural framework where they consider them to be relevant. As a last resort, the Supreme Court in *Deng v Zheng* said (2022: para 84) that:

judges can, of course, inquire of the parties if they consider that they would be assisted by additional information as to social and cultural context. In many instances, such information will be able to be supplied by submission, relying, if necessary, on s 129 [of the Evidence Act 2006].

In *Deng*, the social and cultural framework issues were raised at appellate level, as no social and cultural framework issues were raised by counsel. The Court of Appeal said:

One important feature of the case is that almost all the primary records, and the parties' correspondence, are in Mandarin. Mr Deng and a number of other witnesses gave their evidence in Mandarin, with the assistance of an interpreter. We are conscious that when referring to relevant documents, it is necessary to bear in mind that the Court is referring to English translations prepared by different people at different times, who may or may not have understood and taken into account the legal nuances of particular words and phrases that they have used. In some cases—for example, the Bella Vista Agreement referred to above—*different translators used different terms in their English translations of the same Mandarin terms. None of the translators gave evidence about why they used certain terms rather than others in particular documents. In these circumstances, a high degree of caution is required before attributing any significance to the precise terms that appear in the various English translations. There is a real risk of nuances in expression and context being lost in translation (Zheng v Deng 2020: para 86, emphasis added).*

The Supreme Court found that the Court of Appeal was right to reverse the High Court decision, saying that:

At trial there was very little, if any, evidence about *guanxi* and it was not referred to by the High Court Judge in his judgment. In terms of what we must determine, this is not of critical importance as we consider that the nature of the relationship between Messrs Zheng and Deng emerges with sufficient clarity from the contemporaneous documents. In other cases, however, the social and cultural framework within which one or more of the protagonists operated may be of greater significance. For this reason, we offer brief comments as to how the relevant information can be brought to the attention of the court. (*Deng v Zheng 2022: para 77*)

Failure to call such evidence when the social and cultural framework is 'of greater significance' can be fatal to a party's case (*Mian Shan Holdings Ltd v Ma and Zhang 2008; Zhang v Li 2017; Li v Wu 2019; Zeng v Cai 2018*). As Toogood J stated in *Tian v Zhang*:

[The plaintiff provided] no independent evidence that there was any customary practice in Chinese culture for the payment of a dowry by an internet husband to his intended wife or family ... The dispute about the existence of such a custom as is alleged might have been easily resolved by evidence from an independent expert, but there was none. Ms Tian suggested in evidence that evidence of the custom would be found on the internet, but the court is not disposed to 'Google' its way past the inadequacies of the plaintiff's proof to find the answer (2019: para 56).

Being able to put a social and cultural framework on the Evidence Act 2006 (the Evidence Act) is increasingly relevant for counsel acting for culturally and linguistically diverse parties as New Zealand's population becomes more superdiverse; there are more parties from very distant

cultures on both sides of a case, speaking little or no English and dealing with each other orally and in documentation in their home language.³ A recent example is the case of *Huang v Huang*, where the High Court said:

All of the witnesses to these matters speak Mandarin; it seems only one or two also speak English. Quite apart from language, an appreciation of Chinese family and business culture will be important to understanding what people said, wrote and did (2021: para 99).

That is why the Supreme Court's systematic guidance in *Deng* is so valuable, as was their previous guidance in *Abdula v R* (2012), concerning when a litigant requires interpretation assistance. The guidance on how relevant information on the social and cultural framework within which one or more of the protagonists operated should be brought to the court's attention will ensure that a fair trial is conducted where the outcome depends on an assessment of the evidence that is impartial and free from prejudice to reach the correct decision.

The Supreme Court expressly stated (*Deng v Zheng* 2022: para 77) that their comments did not address *tikanga* (Māori customary practices and behaviours) which they saw as raising special historical and legal issues.

Where the meaning of words written or said is in dispute, any translation or interpretation of those words must be proven by expert evidence.⁴ In the absence of a reasoned opinion, it may not be open to the court to determine the meaning of the disputed words based only on the technically available translations or interpretations. Linguistic evidence is not a simple translation or interpretation of foreign words *per se*, but assistance with determining the meaning/s of the words as they would be understood in context.⁵ A cultural dimension may also

³ The 2018 Census showed that 27.4% of people counted were not born in New Zealand, up from 25.2% in 2013. The People's Republic of China was the third most common birthplace for those usually resident in New Zealand. The Asian ethnic group (707,598) remained third largest, with 15.1% identifying with at least one Asian ethnicity, up from 11.8% in 2013. The largest Asian ethnic groups were Chinese not further defined (231,387). Over 1 in 5 who identified with at least one Asian ethnic group were born in New Zealand. Statistics NZ predict that by 2043, the Asian ethnic group will make up around 26% of the New Zealand population, while the Māori ethnic group will make up 21% and the Pasifika ethnic group 11%: see StatsNZ 2021.

⁴ *Sobrinho v Impresa Publishing* (2015: para 24) (libel action): 'The issue, whether it is described as one of fact or opinion, is one the court is not equipped to decide without help from a person skilled in the process of translation, that is to say, in both languages and the way in which they interrelate.' In *Tang v The Queen* (2017) TCC 168; *XY Inv v International Newtech Development* (2015: para 55), it was also held expert evidence was required in order to challenge translations. Section 135 of the Evidence Act provides that the translation of documents offered by a party where the requirements of the section are met is 'presumed to be an accurate translation, in the absence of evidence to the contrary'.

⁵ See, for example, *Lee v Lee* (2018: para 83). Van Bohemen J accepted expert evidence that a particular phrase carried the negative connotations alleged after analysing each of 15 English meanings.

inform the intended meaning of the *English* words used by culturally and linguistically diverse (CALD) parties.

There is a lack of consistency as to when expert evidence is required on the cultural dimension and how culture may have affected the nature of transactions in issue.⁶ The cases I analysed, together with Jane Anderson QC and Yvonne Mortimer-Wang, on behalf of the NZLS, for legal submissions for the Supreme Court in *Deng* (2022) in New Zealand and other Commonwealth countries are inconsistent on when expert evidence on the cultural dimension is required. The approach on adjudicative facts is consistent, but not on legislative or social facts.⁷

Adjudicative facts are the facts in issue. They concern the immediate parties—who did what, where, when, how and with what motive or intent. They have a ‘tendency to prove or disprove anything that is of consequence to the determination of the proceeding’. Legislative facts are material going to the determination of law and policy. Social facts are material relevant to social, economic and cultural context. The boundaries between these different types of facts (adjudicative/legislative/social) are not always precise. There is generally more flexibility to take judicial notice of legislative and social facts.

On adjudicative facts, evidence from an expert is required and the relevant threshold for admissibility must be met.⁸ For legislative and social facts, it appears that, in Canada, these either need to be sufficiently uncontroversial for judicial notice to be taken or require an evidential basis, with the court applying a stricter approach to proof by evidence as the facts get progressively closer to the dispositive issues (*R v Spence* 2005: 61). In Australia, there appears to be a clear division between legislative facts and adjudicative facts,⁹ with legislative facts often being accepted as

⁶ The court is asked to determine the character of funds advanced as a gift, loan or resulting trust, compare: *Speller v Chong* (2003: para 8); *Zhang v Li* (2017); *Zhou v Ling Yu* (2016); *Chang v Lee* (2016), reversed on appeal *Chang v Lee* [2017] NZCA 30. See also NZLS (2021).

⁷ The source of this distinction is Davis (1955: 948) cited in Paciocco (2005). See *Comptroller of Customs v Gordon & Gotch (NZ) Ltd* (1987).

⁸ In Australia (as in New Zealand), expert anthropological evidence is particularly used in litigation concerning aboriginal rights and customs. This is also the case in Canada, see, for example, *Vautour v R* (2015).

⁹ For the leading approach for the admission of general facts (in a non-cultural context), see *Aytugrul v R* (2012). The majority of the High Court found that articles on the impact of statistical DNA evidence on a jury were inadmissible under section 144 of the Evidence Act 1995 (NSW) as they were neither ‘common knowledge’ nor ‘not reasonably open to question’. See also the analysis of Heydon J at paras 71-72.

a matter of judicial notice (although this is not fully settled).¹⁰ In the UK, it appears evidence of a general social (which includes cultural) nature can be admitted through the use of official reports and articles (Malek & Howard 2018). In New Zealand, the cases in which expert evidence is needed are variable.¹¹

Applying the social and cultural framework to the Evidence Act

The Evidence Act applies unless other specific legislative provisions override.¹² The Supreme Court recently emphasized the centrality of the Evidence Act framework in *Bathurst Resources Ltd v L&M Coal Holdings Ltd* (2021: para 60) in the context of contractual interpretation. The issues raised by CALD parties do not create a section 12 Evidence Act situation, which regulates the admission of evidence where no provision is made. Although cultural and linguistic evidence presents unique challenges, it does not form a separate category and should not be analysed in a silo. Challenges include, for example, the need for interpreters usually making it more difficult for the court to assess the quality of *viva voce* evidence and the weight to be given to witness demeanour (*Jinhong Design and Constructions Pty Ltd v Xu* 2010: para 10; France 2021).

Sections 10 and 6(c) and (e) of the Evidence Act require access to justice concerns to be balanced against the need to ensure the other party is aware of, and can test, material upon which the court makes a decision, its reliability, and its application or otherwise to their particular circumstances. This is about enhancing access to justice for all parties and not advantaging a CALD party at the expense of the other.

¹⁰ See, for example, Burns (2012: 317).

¹¹ See note 6 above and NZLS (2021).

¹² See for example, sections 26 and 27 of the Sentencing Act 2002, which explicitly permit consideration of the cultural background of the offender at sentencing, not analysed under the Evidence Act. Cultural reports are made by writers who are not formally qualified as experts in the traditional sense. Some first instance tribunals, such as the Immigration and Protection Tribunal, are authorized to seek information from any source, and 'receive as evidence any statement, document, information, or matter': Immigration Act 2009, section 228 and clause 8 of schedule 2.

Striking the right balance

On the one hand, is, as the Supreme Court said (*Deng v Zheng* 2022: para 78(b)):

[Justice] Emiliios Kyrou, writing extra-judicially, in his advice to judges [is] to develop:

... a mental red-flag cultural alert system¹³ which gives them a sense of when a cultural dimension may be present so that they may actively consider what, if anything, is to be done about it.

On the other hand, the Supreme Court also said (*Deng v Zheng* 2022: para 78(d)) that:

It is critical that judges and counsel maintain a sense of proportionality and recognise that many, perhaps most, cases, in which the parties operate within a social and cultural framework that differs from that of the judge, can be dealt with in the manner just outlined. As Emiliios Kyrou has put it: '[i]n many cases, managing a cultural dimension in evidence may require no more than the most basic of all tools in a judge's toolkit, namely, context and common sense.' For this reason, we do not wish to be taken as suggesting that in all cases with a 'cultural dimension', the parties should feel obliged to call social and cultural framework evidence (and incur the costs of doing so).

Such cost (in providing the necessary evidential basis as well as funding their own interpreter in civil proceedings) could create a barrier to equal access to justice for all regardless of culture and language.

Where judicial common sense can be exercised, counsel would only introduce evidence of cultural and linguistic context to inform the court why the implicit or explicit assumptions a judge might make about behaviour do not apply in the court's assessment of the evidence. There is writing about the need for caution and awareness of subconscious bias coming through judicial common sense (Burns 2012).

The NZLC's discussion paper on *Evidence Law: Documentary Evidence and Judicial Notice* (1994) decided that the introduction of expert evidence was a better way of controlling the use of unreliable or questionable common sense, including challenging changes in thinking over time, rather than 'including any provision in the code regulating the use of common sense and experience to assess the evidence in a proceeding' (1994).

¹³ In referring to such a mental red flag cultural alert system, one writer has noted the reality that 'just as it is important to be aware of how culture might have an impact on the way in which somebody behaves or communicates, it is equally important to be aware that culture may not have any impact at all' Godwin: (2020: 199).

The Supreme Court said (*Deng v Zheng* 2022: para 78(c)):

A key to dealing with such cases successfully is for the judge to recognise that some of the usual rules of thumb they use for assessing credibility may have no or limited utility. For instance, assessing credibility and plausibility on the basis of judicial assumptions as to normal practice will be unsafe, if that practice is specific to a culture that is not shared by the parties.

This underscores the importance of cultural capability (CQ) for judges and the priority that the Chief Justice, the Rt Hon Helen Winkelmann, gave to legal education for judges, including in CQ, in her recent address to NZ Asian Lawyers (Chen 2022). This also underscores why the Superdiversity Institute and New Zealand Asian Lawyers have elected to hold this seminar in conjunction with the New Zealand Law Society and the New Zealand Bar Association (with grateful thanks to both), to explain to practitioners why CQ is critical and what the Supreme Court's guidance means for their advocacy for CALD clients.

When do you need expert evidence under sections 23-25 of the Evidence Act?

Expert evidence is required to introduce a social and cultural framework to explain the conduct of another party to establish an adjudicative fact. Even then, expert or other evidence that is too general (essentially stereotyping) will not be admissible as it is not relevant. As the Supreme Court said (*Deng v Zheng* 2022: paras 80-81, footnotes excluded):

In all of this, judges need to take care to employ general evidence about social and cultural framework to assist in, rather than replace, a careful assessment of the case specific evidence. Assuming, without case-specific evidence that the parties have behaved in ways said to be characteristic of that ethnicity or culture is as inappropriate as assuming that they will behave according to Western norms of behaviour.

When a witness explains their own or joint conduct by reference to their cultural background, there will be little risk of stereotyping; this is because the evidence is necessarily specific to that witness. Where, however, the evidence comes from an expert or there is reliance on s 129, some care is required. There are two aspects to this:

- (a) First, people who share a particular ethnic or cultural background should not be treated as a homogeneous group. By way of example, that *guānxi* is important for some people of Chinese ethnicity does not mean that it is important for everyone of Chinese ethnicity and, still less, that it was necessarily of controlling significance to the conduct of the parties in relation to the issue in dispute. The more generalised

the evidence or information, and the less it is tied to the details of what happened, the greater the risk of stereotyping.

- (b) Secondly, and with particular reference to *guānxi*, it will not be safe to conclude that its importance to litigants means that a relationship between them was necessarily one of partnership or a joint venture or had fiduciary elements. For instance, *guānxi* may have been a factor in two people engaging together in a business, but if they have chosen to do so through a company, *guanxi* is not in itself a reason for concluding that they were in fact partners. Still less should *guanxi* be treated as imposing a fiduciary or similar overlay in relation to arms-length transactions such as contracts for the supply of goods and services.

As the NZLS submitted to the Supreme Court:¹⁴

attributing tendencies to a very broad class of persons ('Chinese') may have little evidential value (or as a tool to evaluate adjudicative facts) in determining whether a partnership was more probable or less probable between the parties in this appeal. Of more 'substantial help', but not adduced in the High Court, is expert evidence that a particular custom of verbal agreements existed in the culture of the parties, and that it was likely that both parties were aware of the existence of that custom due to their cultural background. Such evidence, together with witness cross examination, could assist the Court in assessing whether these particular parties may have adopted a mutual assumption based on those customs, and/or how plausible it is that a reasonable person in the party's shoes, with knowledge of those customs, acted in a certain way in a given situation.

Furthermore, as Judge Dr Victoria McCloud said in a presentation to the Superdiversity Institute in 2021:¹⁵

It is also important not to stigmatize communities, by stereotyping all members of that group as 'other' from the outside looking in, as if they need help. Some members of these communities, such as myself, will themselves be (or should be) judges. To presume them to be outsiders is both unreliable and excluding.

Judicial notice and reliable published documents

The starting point should be, as the Supreme Court said (*Deng v Zheng* 2022: paras 79(a) and (b)) that parties can explain their own actions

¹⁴ NZLS Submissions (2021) n 6 above, para 55.

¹⁵ Judge Victoria McCloud is one of the judges on the committee in the UK who produced the most recent substantive edition of the *Equal Treatment Bench Book*, which the judiciary publishes in an effort to set out best practice on any aspect of a judge's running of the court so as to ensure as far as possible that justice is felt to be fair, not merely legally correct. A guiding principle is that 'Treating people fairly requires awareness and understanding of their different circumstances, so that there can be effective communication, and so that steps can be taken, where appropriate, to redress any inequality arising from difference or disadvantage' (2021: para 4).

and how they relate to the other party. Such cultural and linguistic evidence is more likely to be *prima facie* admissible under section 7 of the Evidence Act—it has ‘a tendency to prove or disprove anything that is of consequence to the determination of the proceeding’. And the probative value of such evidence is likely to outweigh the risk that the evidence will have an unfairly prejudicial effect on the proceeding or needlessly prolong the proceeding, thereby avoiding the general exclusion factor in section 8 of the Evidence Act.

Such evidence can then be supported by expert evidence or by resort to sections 128 and 129 of the Evidence Act. Section 128 of the Evidence Act concerns judicial notice of uncontroverted facts. To be introduced under section 128(1), cultural and linguistic facts must be ‘facts so known and accepted either generally or in the locality’, or under section 128(2) ‘facts capable of accurate and ready determination by reference to sources whose accuracy cannot reasonably be questioned’. Specific cultural material relied upon to displace the fact-finder’s assumption of commonly accepted social and cultural norms is unlikely to meet the test in section 128(1). The premise for submitting such material is that the fact is *not* generally known or understood (Downs 2020).

As New Zealand becomes a culturally pluralistic society (beyond Pakeha and Māori culture), what are commonly accepted social and cultural facts in New Zealand will increasingly be defined by the practices of those first and subsequent generations of ethnic groups in New Zealand. Accordingly, increased scope for judicial notice to be taken of such facts may emerge over time.

Judicial notice has been taken of the meaning of text in a foreign language (Downs 2020). In *Fothergill v Monarch Airlines Ltd* (1981), Lord Wilberforce emphasised that: ‘the process of ascertaining the meaning [of a word or expression in a foreign language] must vary according to the subject matter’ but could include reference to a dictionary. Lord Wilberforce goes on to say:

An English court will construe the word damage as it will construe any other word which it is required to interpret according to the context in which the word is used but it’s likely that the Court will require extrinsic help in construing the French word, like my noble and learned friend Lord Wilberforce I decline to lay down any precise rules whence that help should come. If the Judge concerned is possessed of some knowledge of the French language it will be pedantic and perhaps also intellectually impossible to deny him or her the right to use that which he knows perfectly well. Once both French and Latin were languages in current use in our courts. Latin phrases still make a frequent appearance in our jurisprudence and a judge is

perfectly free to use such knowledge of Latin as he may still possess in order to interpret and apply such a phrase. Why then should a different rule be applied in the case of a modern as opposed to an ancient language? Of course the same problem could arise hereafter with authentic texts of conventions in languages in less frequent use and therefore less well known in Western Europe than for example French or German. In such a case a judge will be likely to require more help than in the case of those two languages. But a judge will usually be unlikely to be willing to rely solely on his own knowledge of the relevant language even if he be so well versed in that language as the learned trial Judge concerned in the present case. Such a judge can always have recourse to dictionaries. He can have regard to the writings of learned writers on the relevant topic. He can have regard to judicial decisions of the courts of other countries concerned with the same problem. Such sources are clearly not exhaustive. I doubt whether in a case such as the present the evidence of an ordinary interpreter would greatly assist *though such evidence might be essential if the language were unknown or little known to the Judge* (1981: 277 emphasis added).

An expansive interpretation of section 128(2) could enable the court to inform itself of cultural material from reference books, to ensure that judges are not deprived of authoritative and mainstream research and insights, but subject to the considerations in section 6 of the Evidence Act (Gobbo 1999) and the fresh evidence rule if received on appeal. Otherwise, sections 144 to 146 of the Evidence Act govern the admission of evidence relating to foreign law.

Section 129 of the Evidence Act concerns the admission of reliable published documents. Sections 128 and 129 were found to be relevant in *Deng* (2022), the Supreme Court saying at paragraph 82 that:

It is well-known that guanxi often governs the way Chinese people do business and that there is an associated tendency for Chinese people to rely on personal relationships, mutual trust and honour more than on written contracts. There is for example much literature as to Chinese communication in negotiations, almost all of which refer to guanxi. We have no doubt that the Court of Appeal was entitled to refer to guanxi in the way in which it did.

There is relatively little case law on section 129, which may indicate the admission of material without explicit reference to the section. In *Ye v Minister of Immigration* (2009: 262-263), Glazebrook J referred to several reports and articles as to the general effect of the one-child policy in China. It is unclear whether this material had been admitted at first instance. The court also considered evidence on different Chinese dialects and the impact it may have on the children if they were forced to be formally educated in another Chinese dialect (2009: 249-255). There was no explicit reference to sections 128 and 129 of the Evidence Act

or (if necessary) fresh evidence rules on appeal. Nonetheless, reference to the reports may well have been justified pursuant to section 129. Separately, the reference to the different types of dialects in China, and the phonological difference (2009: 250) between them, may be a suitable subject for judicial notice under section 128.

Court-appointed experts

The Supreme Court said in *Deng* (2022: para 83) that:

We note the ability of courts to appoint an expert under r 9.36 of the High Court Rules 2016 and r 9.27 of the District Court Rules 2014, a mechanism which may, in some circumstances, be helpful in relation to cultural context.

The Superdiversity Institute will be running a symposium, entitled ‘Global Cultural Experts in Courts, at the Sorbonne from 6-7 April 2023 in conjunction with the Institute of Advanced Legal Studies, London University, and Professor Livia Holden’s EUROEXPERT EU-funded research project (about the use of cultural expertise in courts). Professor Holden defines cultural expertise as:¹⁶

the special knowledge of experts in laws and cultures, who provide evidence in court and out-of-court dispute resolution and the claim of rights, for the use of the decision-making authority. Cultural expertise must be independent and procedurally neutral: experts must not advocate explicitly or implicitly for a specific legal outcome but can critically affirm their expert opinions.

Recommendation (j)(vi) of the High Court Rules Committee report on ‘Improving Access to Civil Justice’ refers to ‘greater controls being imposed on court evidence’. The report elaborates that this includes ‘making greater use of single Court appointed experts paid for by both parties (the appointment of which would be addressed at the issues conference or conferences)’ (High Court Rules Committee 2021: 25).

Using the mechanism of a court-appointed expert to assist the judge is not, however, a silver bullet. Judges may not have enough information to select the right expert, if the parties are unable to agree,¹⁷ even if an expert with the requisite expertise is available. Often very little factual detail about the parties’ backgrounds, culture and dialects is provided by the parties’ counsel, or the parties, if self-represented. It is very seldom

¹⁶ Holden (2022). Professor Holden also has the following forthcoming publication with Taylor & Francis: ‘Cultural Expertise, Law, and Rights: A Comprehensive Guide’ which introduces readers to the theory and practice of cultural expertise in the resolution of conflicts and the claim of rights in diverse societies and cross-cultural disputes.

¹⁷ See High Court Rules, rule 9.36.

that you see the degree of detail about different types of dialect and phonology, as in *Ye v Minister of Immigration* (2009) (and see High Court Rules Committee 2021: 646, paras 249-250).

There may be very rare dialects and cultures where it would be difficult to source an expert in New Zealand. Also if both sides call experts, it still leaves the judge having to decide which expert is right—through a cultural lens—which underscores the need again for judges to have a certain level of CQ.

About the authors

Justice Goddard was the presiding judge in *Zheng v Deng* (2020) NZCA 614, the Court of Appeal judgment appealed to the Supreme Court.

Mai Chen appeared with two other lawyers on behalf of the intervenor, the NZLS, after the Supreme Court invited the NZLS to intervene after consultation with New Zealand Asian Lawyers. She is the President of New Zealand Asian Lawyers.

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