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Unique issues and challenges faced by culturally, ethnically and linguistically diverse parties in court

Mai Chen, Chen Palmer, on a recent report by the Superdiversity Institute

The Superdiversity Institute for Law, Policy and Business' latest report, *Culturally, Ethnically and Linguistically Diverse Parties in the Courts: A Chinese Case Study* (November 2019) (the Report) sought to identify any issues and challenges faced by the courts in New Zealand in ensuring equal access to justice for Culturally and Linguistically Diverse (CALD) parties. The focus is particularly on Chinese parties in the courts in New Zealand, given evidence that these people have the most challenges. The Report determines whether any changes are needed to ensure courts are better equipped to administer justice.

A key part of the Report is a comprehensive Case Review, featuring over 100 senior court cases since the year 2000 where one or more parties were of Chinese or Asian ethnicity. The Case Review substantiated a number of key issues and challenges identified in interviews with judges, practitioners and interpreters conducted in the course of developing the Report, and also identified through analysis of relevant research, literature, and data from New Zealand and overseas. The findings from the Case Review also led to a number of additional themes and findings being identified for inclusion in the Report.

In reviewing over 1,000 cases originally identified of relevance, we identified ten times as many relevant cases from the High Court at Auckland than in all of the other High Court registries combined.

In her foreword for the Report (at 10), former Attorney-General Professor Margaret Wilson has commented that the Case Review section of this Report shows an awareness of the relevance of cultural issues by judges and lawyers, particularly when sentencing, but that this awareness is uneven and maybe inconsistent.

The Case Review indicated that the cultural background and language limitations of many Chinese and Asian parties who come before the New Zealand senior courts affects:

- The way they present evidence;
- The way they respond to questioning of their actions and motivations;
- The way they verbally or physically express themselves or visibly show (or fail to show) emotions such as remorse, empathy or contrition;
- Their sense of what is the right thing to do when they perceive that a particular outcome could reflect adversely on their personal honour or that of their family ("*mianzi*");
- Their confidence in representing themselves without the assistance of legal counsel and their sense that this is not a disadvantage;
- Their expectation of how judges will determine the "truth" — an inquisitorial process where the truth is distilled from an active judge-led examination and evaluation of competing perspectives of what happened and why, or an adversarial process where the judge determines which of two competing versions of the truth he or she finds more credible;
- Their expectation that judges will take account of who they are, and their status and wealth, in determining credibility and the "truth". To that extent, they assume that judges are not truly independent;
- Their willingness to accept that they have been treated fairly and that the court did give them a fair opportunity to be heard; and
- The ability of New Zealand European lawyers to understand their clients' instructions and motivations for their actions.

This article summarises some of the key cases contained in the Case Review section of the Superdiversity Institute's Report, and draws out some of the key themes and findings arising from those cases.

LANGUAGE

A major challenge of the New Zealand English-speaking court system for Chinese litigants is an English-speaking judge who cannot speak the Chinese language, deciding a dispute between two Chinese-speaking parties who are not proficient in English. These issues are compounded when the parties speak different languages that require interpretation (see *R v Lot* HC Auckland CRI-2008-004-18323, 17 September 2010, at [15] and [49]).

The Case Review also demonstrates challenges where key documentary evidence requires translation from Chinese languages into English. There are currently no standards or guidelines as to who can supply translation for the courts, and the skills and experience necessary to translate documents are very different to those required to interpret orally in courts. Furthermore, there is no standard process as to funding translation of non-English documentary evidence. In the discovery process, there is no positive obligation on a party to provide translated copies of documents in a foreign language.

One Judge commented that in such cases the court should make allowances for the fact that "the full flavour of the Chinese version of the evidence may not have been captured in the English translation" (*Ming Shan Holdings Ltd v Ma* HC Auckland CIV-2000-404-1597, 31 July 2008 at [33]).

Challenges faced by the court where key documentation has been translated into English are demonstrated by the case *Lee v Lee* [2018] NZHC 3136. Lee concerned a defamation action brought by a Korean plaintiff against a Korean defendant, regarding an article written by the defendant in a Korean language newspaper, the *New Zealand Sunday Times*. In an introductory comment, van Bohemen J observed (at [2]):

> There are a number of unusual aspects about this proceeding. First, it is a case conducted in English about an article written in Korean for a Korean speaking audience. That raises a question about whether an English translation of an article in Korean can adequately capture the meaning of the original and its significance to the intended audience.

At trial, the parties had agreed to an English translation of the article as well as a list of 15 English meanings of Korean passages in the article, alleged by the plaintiff to be defamatory. The only word which the parties disputed the correct English meaning of was the Korean word "yi-myin-gye-yak", which the plaintiffs said carried negative connotations of secretiveness, but the defendants said simply meant "undisclosed or hidden". Van Bohemen J agreed with expert evidence adduced by the plaintiff that it carried the negative connotations they alleged. Accordingly, after analysing each of the 15 English meanings, the Court held that the plaintiff had been defamed in a number of the ways alleged by the plaintiff.

Challenges also arise where a prosecutor seeks leave to apply to admit transcripts of telephone discussions that occurred in a Chinese language as evidence, as those assessing the evidence are unable to determine whether they have been translated correctly, whether statements have been attributed to the correct person and whether techniques have been used to mask the true meaning of the discussion, for example, by the use of code words for drugs (see *R v Leigh* HC Auckland CRI 2006-019-008458, 27 August 2008). The court has also had to consider the admissibility of affidavits provided in English where the person swearing or affirming the affidavit did not speak or write English (see *Du Ling Trustee Limited as Trustee of the Du Ling Family Trust v C An and All in One Asset Management Limited* [2017] NZHC 1938. In this case, Ms Du resubmitted a translated affidavit that had been translated by a "freelance interpreter and translator" which was accepted by the Court).

Some cases show low English proficiency contributing to court action being taken against the Chinese party in criminal and civil proceedings. *Liu v Police* HC Auckland CRI-2008-404-00032, 3 June 2008, concerned a defendant from the People's Republic of China (PRC) who pleaded guilty to a charge of trespassing on the Waikato University Campus. He applied for a discharge without conviction which was declined by the District Court (at [2]).

The defendant had been served with a trespass order one year before the offending in question. He had noticed an irregularity with his bank account and was unable to get a satisfactory response over the phone, due to his English language difficulties. He had previously dealt with a Mandarin speaking officer at the campus branch of the bank and unsuccessfully attempted to contact that officer by phone. The defendant then attempted unsuccessfully to contact the Police officer who he had dealt with regarding the trespass matter. He then ultimately went to the campus branch of the bank to speak with the Mandarin speaking officer. He was recognised by two students whom he had had a previous disagreement with, resulting in a fight and the defendant calling the Police. When the Police arrived, the defendant was arrested for trespass. His offending, therefore, appears to have arisen simply from his desire to speak with someone in Mandarin about a banking matter.

The defendant argued that a conviction would impede his application for a work permit and work visa with New Zealand immigration, and his future plans to apply to join the New Zealand Police. However, Lang J held that the conviction would not be likely to disqualify the defendant from either of these, and declined to grant a discharge without conviction.

In another case, *Wang v R* [2016] NZCA 56, English language capability was raised as a ground of appeal. A woman who had been convicted alongside her husband had her conviction quashed by the Court of Appeal, on the grounds that there was not sufficient evidence that she had "knowledge" of her husband's tax offending, with the Court of Appeal stating that the trial Judge appeared to have overlooked Ms Liu's lack of English language capability.

Some cases also demonstrate challenges where there is a language barrier between a litigant and their counsel. In *Department of Internal Affairs v Xiao* [2018] NZHC 2599, on application to set aside a notice of bankruptcy, a Chinese applicant raised the ground that he had been significantly disadvantaged by being unable to find a Mandarin speaking lawyer who would act on civil legal aid. The High Court accepted that the applicant had difficulty finding a Mandarin speaking lawyer, but held that no issue about the safety of the underlying judgment arose from his lack of legal representation. The Court said, "[a] lawyer who speaks Mandarin would have clearly been an advantage but in the circumstances here, far from necessary" (at [36]).

Chao Ma v Police HC Auckland CRI-2005-404-396, 24 October 2006, concerned a defendant from Shanghai, PRC who had pleaded guilty to a charge of assault, and was sentenced to 80 hours community work and ordered to pay $250 in reparation. The defendant appealed his sentence on the ground that his poor understanding of English had led to a misunderstanding between himself and his counsel, resulting in him entering a guilty plea without understanding that a conviction would follow or what it meant.

The defendant's counsel had difficultly recalling having acted for him, but said that she was confident that the defendant could speak English and understood what she was saying. The defendant's counsel had acted on the defendant's instructions provided to her in writing that he wanted to enter a guilty plea.

Keane J noted that the circumstances of the case left him in "a state of disquiet", noting that English was not the defendant's first language, his understanding of the language and relevant concepts were not to be assumed, and the defendant was not familiar with the New Zealand system of justice. Keane J accepted the defendant's evidence that he did not understand what his guilty plea meant, or the consequences of it, at the time of pleading. Accordingly, the appeal was allowed and leave was granted for the defendant's guilty plea to be vacated and a plea of not guilty substituted, remitting the case to the District Court for rehearing.

ABDULA V R AND STANDARDS OF INTERPRETATION

The case of *Abdula v R* [2011] NZSC 130 is the leading case that establishes where an inadequate standard of interpretation will breach a defendant's rights under the New Zealand Bill of Rights Act 1990 in criminal proceedings. The Case Review in the Superdiversity Institute's Report includes a number of cases where defendants of Asian ethnicity had unsuccessfully argued inadequate interpretation as a ground of appeal. In one case, an interpreter was charged with contempt of court for discussing her view that the defendant was guilty with counsel and two jurors (*R v L* [2019] NZHC 308).

SELF-REPRESENTED LITIGANTS

Some cases demonstrate the challenges that arise from CALD litigants who have a low level of English language capacity representing themselves in court. The differences between the Chinese and New Zealand legal systems can lead to misapprehensions by a Chinese litigant about their legal position, which is often compounded by a lack of language skills, raising serious issues for Chinese parties representing themselves. *Kevdu Properties Ltd v Ko* HC Auckland CIV-2007-404-1006, 29 March 2007, concerned an interlocutory application by a plaintiff for an injunction requiring the Chinese defendant, Mr Ko, to sign documents replacing cross lease titles with freehold titles. In granting the application, Williams J made obiter comments by way of postscript that Mr Ko had "significant limitations" on his ability to speak English, and had refused to instruct a lawyer, resulting in significant difficulties for the Court in explaining the legal position to him, which Mr Ko had significant misapprehensions about.

THE CHINESE WAY OF DOING BUSINESS

The Case Review identified cases where Chinese parties on both sides of the matter gave widely divergent testimonies of what happened, resulting in judges finding that neither was telling the truth, and having to piece together what did in fact happen without the assistance of much (if any) documentary evidence. These cases support the perception that lawyers and judges had, as corroborated by our literature review, that people of Chinese ethnicity are more likely to conduct business by a "handshake", on the basis of a trusting relationship than to complete transactions with written agreements.

Li v Chen [2018] NZHC 2843 concerned loans between a Chinese appellant and respondent totalling $58,880. The loans were provided on oral terms; there was no formal written record of the loans and the trial Judge found the written material surrounding the loans to be unreliable. The Court held that the grounds of appeal alleging that the Judge wrongly failed to make credibility findings, consider all elements of the loan arrangement, consider the source of the cash and that the contract was not partly oral and partly written failed. The Court held that the Judge made no material errors, and consequently, denied the appeal.

Another case, *Hemu Trade Company Limited v Le* [2018] NZHC 982, concerned the beneficial ownership of a property in Avondale. The first plaintiff funded the purchase of a property, with the second plaintiff and the defendant the registered proprietors, as tenants in common. The first plaintiff argued that the funds were not advanced as a gift or a loan, and that it was therefore the beneficial owner of the property by way of a resulting trust The defendant, Mr Le, denied this, and said that it was his and his brother's (the third plaintiff) intention to jointly purchase and own the property, and that he contributed half of the purchase price of the property. The third plaintiff was unable to give evidence at the hearing, as he was hospitalised in PRC. Fitzgerald J said at [6]:

> For his reason, much of the evidence adduced by the plaintiff's comprised witnesses' understandings or beliefs as to what had happened in and around 1996 based on what they say the third plaintiff had told them. Putting aside strict issues as to admissibility, I do not find this evidence compelling or reliable in any event, given the witnesses' lack of personal involvement in the events in question. I have therefore formed my views based on evidence of events in which witnesses did have personal involvement, together with the (unfortunately limited) contemporaneous documentary evidence.

The Court of Appeal recently dismissed an appeal by the defendant, Mr Le, but allowed a cross-appeal in part, and held that Mr Le held his 50 per cent share of the property on trust for the first respondent (the first defendant in the High Court case) (*Le v Hemu Trade Co Limited* [2019] NZCA 476).

CULTURAL CONSIDERATIONS

Although it is not a defence in New Zealand that illegal conduct is acceptable in the defendant's culture, cultural considerations have sometimes been taken into account as mitigating factors in sentencing. There are cases where reports have been provided under s 27 of the Sentencing Act 2002 and civil parties have called expert evidence on culture to help the judge.

In *R v Xu & Ors* [2018] NZHC 1971, three Chinese defendants from PRC were sentenced for participation in a large scale mortgage fraud scheme. One of the defendants, the wife of the "mastermind" behind the scheme, Ms Xu, provided a cultural report to the Court from a senior law lecturer at the University of Waikato, Dr Leo Liao. The report stated that (at [44]):

> … in traditional Chinese culture the husband is the master of the household, with extensive responsibilities, but also extensive power over other family members who are expected to be obedient to the head of the household. The wife's role is subservient to that of her husband. Divorce carries a significant stigma for women in particular. Family is the most fundamental unit of society. Dr Liao suggests that it would likely have been extremely difficult for you to act contrary to your cultural norms by refusing to follow your husband's orders or instructions, even if you knew or suspected that his activities were illegal.

The Court held that Ms Xu's culpability was significantly lower than that of her co-defendants, and reduced her starting point from six years, to two years and nine months, ultimately granting her a sentence of home detention for 12 months. In doing so, Katz J noted that the Court had "given significant weight, however, to the fact that [Ms Xu was] subservient to [her husband], and largely acting on his direction" (at [52]; see also Mindy Chen-Wishart "Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding?" (2013) 62 International and Comparative Law Quarterly 1 at 7–9; 14–15 and 20).

Section 27 reports do not apply in civil cases, but expert witnesses on Chinese culture can be called to explain parties' behaviour. For example, *Department of Internal Affairs v Qian Duoduo Ltd* [2018] NZHC 1887, concerned a determination of the appropriate penalty to be applied for breaches of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. The defendant argued that language and cultural difficulties meant that she had to rely on an agent, Starfish Consulting, to meet her anti-money laundering obligations and this reduced the company's culpability when Starfish got it wrong. The defendant's counsel adduced expert evidence from a Chinese Professor as to the defendant's limited English speaking capacity; and how the defendant's Chinese cultural beliefs and expectations meant she did not understand but only gave an appearance of understanding, and did not view regulator intervention as serious. Although the Court ultimately held that these considerations were not relevant in the circumstances, given that the Court had already assessed the defendant's culpability at the lowest level, the Court did acknowledge that the respondent's "limited command of English" made it "unlikely [the defendant] could have complied with the AML-CFT Act regime without assistance", and that assistance having been wrong was a factor that substantially reduced the defendant's culpability (at [128] and [134]).

CHINESE CULTURAL CONCEPT OF "FACE"

The Chinese cultural concept of "face" or *mianzi* was relevant in a number of civil cases, which corroborated comments received from judges and lawyers as well as the literature review.

Zhou v Lou [2018] NZHC 1887 concerned an application for interim relief, pending resolution of an application for interim relief. The application arose as part of a business dispute between the parties. The plaintiff and defendant were both Chinese with family connections in PRC. The plaintiff was represented by a Chinese solicitor and a New Zealand European barrister, while the defendant was represented by a New Zealand European solicitor. The plaintiff and the defendant were joint owners of a wholesale fruit and vegetable business in Auckland. Both parties had fallen out and the defendant had initiated proceedings to liquidate the business. Both parties accused each other of mismanaging and harming the business, and intimidating the other.

However, in a display of "face–saving" behaviour, neither party was willing to agree with the other as to how the situation would be resolved. Despite both parties offering to buy or sell the business to the other, neither could agree on the price. And at trial, despite Palmer J warning that "neither may like the result of court imposed orders", both parties were unwilling to agree on the terms of the interim orders (at [22]).

Ultimately, the Court held that the dysfunctional relationship of the parties was impinging directly on the operation of the business and made orders against both parties and an alternate director appointed by the defendant, under ss 164 and 170 of the Companies Act 1993. In doing so, Palmer J commented that he had "also considered whether to make more extreme orders" (at [29]).

The case of *R v Yang* HC Auckland CRI-2005-204-519, 29 May 2007, shows the impact that *mianzi* can have in the criminal law jurisdiction. The case concerned a young defendant from PRC convicted of importing methamphetamine and possession of methamphetamine for supply. The defendant had been caught at Auckland Airport carrying a pot containing 485 grams of methamphetamine hidden under a layer of hair cream. The defendant had carried fake identification which recorded him as a 15 year old South African citizen.

Before trial, the Police sought to have photos showing the defendant's tattoos admitted as evidence. The Police sought to admit expert evidence from "an experienced interpreter who over a long time has dealt with a large number of Chinese Nationals of varying ages between 10 and 60" that it was very unusual to see tattoos on a 15 year old Chinese youth (*R v Yang* HC Auckland CRI-2005-204-519, 12 March 2007 at [3]). The defence argued that the photos were prejudicial as the jury would have an adverse reaction to people with tattoos. Asher J held that the photos were not prejudicial and admitted them as evidence (at [6]).

At sentencing, Asher J noted that the personal circumstances of the defendant were a mystery, due to the false identification. Asher J noted (*R v Yang* HC Auckland CRI-2005-204-519, 29 May 2007 at [16]):

> Your counsel says you do not wish to provide details about your background for fear of embarrassing your Chinese family. This assertion does not sit well with the fact that you have already been in custody for 18 months. If you were from a close family you would have had to have communicated the fact of your incarceration to them or presented at least some explanation for your absence. You can only be contacted in a New Zealand prison.

As such, Asher J considered that the defendant could not claim to be of good character, however he considered that the defendant's youth, expressions of remorse, and the fact that he would be imprisoned in New Zealand away from his family and those he knew well, entitled him to a one third discount. Asher J therefore sentenced him to eight years and nine months imprisonment.

Other cases demonstrated anecdotal evidence from interviews with senior prosecutors for the research that Chinese accused appear less likely to plead guilty (or plead guilty at an early stage) or demonstrate remorse for their offending, out of a desire to save face, both personally and for their family.

For example, in *Chen v R* CA476/05, 28 June 2006, the defendant appealed against sentence to the Court of Appeal, arguing that insufficient credit was given by the trial Judge for the appellant's late guilty plea, as "because of cultural and language aspects the [defendant] could not fully comprehend the strength of the Crown case until it ended" (at [5]).

Gendall J set out the defendant's argument as follows (at [9]):

> Counsel submitted that he felt cultural pressure to maintain face with his parents, or correspondingly to aid his parents, which delayed the acknowledgement of guilt. Counsel said it was not until the appellant understood the full impact of [the evidence] that he appreciated the strength of the Crown case.

However, Gendall and Harrison JJ did not "find those submissions persuasive" (at [9]). As the appellant had pleaded guilty only at the conclusion of the Crown case, the Court of Appeal held that "allowance for such a plea could be minimal at best", and dismissed the appeal (at [10]).

SENTENCING DECISIONS AND APPLICATIONS FOR ELECTRONIC-MONITORED BAIL

In sentencing decisions, some High Court judges have taken account of the greater hardship for those not born in New Zealand of being in prison far away from family back home, even though the Court of Appeal in 2007 held that the fact an offender is a foreign national, who does not reside in New Zealand and is not a native speaker, will not normally justify a greater than normal discount (*R v Ogaz* CA180/06, 6 March 2007). This consideration is particularly taken into account in sentencing those with no support networks in New Zealand and low English language capability. While the case was not within the time period of cases reviewed for the Superdiversity Institute's Report, the recent Court of Appeal decision of *Zhang v R* [2019] NZCA 507 has redefined the sentencing guidelines for methamphetamine related offences. In obiter remarks, the Court confirmed the position that an offender's foreign national status may be a relevant mitigating factor when calculating the length of the sentence, where it "makes the sentence harder than usual to bear" (at [163]).

For example, in *R v Tan* [2019] NZCA 507, the Chinese defendant pleaded guilty in the District Court to charges of kidnapping, aggravated robbery, possession of pseudoephedrine for purpose of supply and possession of methamphetamine. When the defendant appeared in the High Court for sentencing, Rodney Hansen J noted that the defendant was 23 years old and had come to New Zealand as a student five years previously.

Rodney Hansen J reduced the starting point of the sentence of kidnapping and aggravated robbery, to a final sentence of three and a half years. One of the factors his Honour took into account was the fact that "… a prison sentence in New Zealand away from your family will be harder for you [the defendant]." His Honour also took this into account when considering the final sentence for the drug offences, as he stated that he made as much allowance appropriate for a number of factors, including "… .the fact that you [the defendant] are going to suffer the additional hardship of having to serve this sentence of imprisonment away from your home country" (at [21]).

In sentencing foreign nationals, particularly for drug related offences, judges appear more likely than not to impose a minimum non-parole period, taking account of the fact that the accused will likely be deported to their home country at the end of their sentence. However, it is important to note that there are no statistics to support this perception (the Report makes a recommendation to the Ministry of Justice that it collect this data, along with a suite of other data to enable it to better analyse and assess the impact of culture in the courtroom) The majority of these drug-related cases relate to pseudoephedrine, a precursor to methamphetamine, which is legal and easily accessible in some Asian countries.

For example, in *R v Phuan* HC Auckland CRI-2006-004-013431, 17 July 2007, in sentencing the Malaysian defendant to a maximum of nine-and-a-half-years of imprisonment, Williams J decided not to impose a minimum period, noting that "you [the defendant] are going to be deported the moment you are released from prison and I can see no purpose in prolonging or postponing that date" (at [1]–[3]).

Lastly, the Case Review demonstrated that when assessing flight risk in bail applications involving immigrants, some judges take into account the extent of the applicant's connections with their originating country. In *R v Lee* HC Auckland CRI-2009-004-1792, 30 March 2010, the Court held that judges should be careful when considering bail applications for foreign nationals, and not label them "with the unfair and unreasoned 'perception' of being a flight risk," and that the particular facts of the risk of the defendant absconding should be considered (at [1]).

STEPS TAKEN BY JUDGES TO ENSURE EQUAL ACCESS TO JUSTICE FOR CALD PARTIES

The Case Review shows that some judges make considerable efforts to ensure that Chinese parties receive equal access to justice, taking more active approaches to ensuring relevant evidence is admitted, and not just choosing to accept the easier-to-comprehend submissions presented by, for example, a New Zealand European Queen's Counsel against a self-represented Chinese party needing interpreter assistance (see for example *Mao v Green Land Investment Limited* [2018] NZHC 1348).

Some cases show judges taking extra steps to ensure that the defendant understood what was happening. For example in *R v Chen* HC Auckland CRI-2005-4-2191, 11 October 2005, Williams J paused throughout the judgment to explain the meaning of legal terms to the defendant. Woodhouse J took similar steps in *R v Xu Lei* HC Auckland CRI-2009-004-13740, 7 December 2009, and made sure to explain the process of sentencing in a clear manner.

In *Kim v Police* [2015] NZHC 2543, Moore J, when deciding the self-represented defendant's appeal against the decision of the District Court, commented that the trial judge had "extended to [the defendant] a remarkable degree of tolerance and latitude" in order to ensure the defendant was able to fully explore the issues and present his defence as fast as he could (at [23]).

The interviews with judges and lawyers conducted throughout the course of the Report indicate that there are, however, additional steps being taken by counsel and judges to ensure equal access to justice for CALD parties that are not necessarily demonstrated by the judgments. For instance, in the *Singh* case, Powell J, in conjunction with Belinda Sellars QC, put in place a number of mechanisms to assist the Fijian-Indian defendant in the proceedings. These included the use of a junior counsel who spoke Hindi to converse with the defendant, allowing the defendant to review a transcript of the Crown's opening and closing statements prior to the defence presenting their statements and allowing counsel the opportunity to converse with the defendant at the close of questioning a witness, to determine whether there were any additional matters that needed to be raised (*R v Singh* [2019] NZHC 148; interview with Belinda Sellars QC, Barrister, Freyberg Chambers (Mai Chen, Auckland, 8 October 2019)).

CONCLUSION

The relevant cases analysed reveal patterns indicating that Chinese litigants do experience unique issues arising from their ethnicity, culture, or language which can make it more challenging for the court system to ensure they get equal access to justice when compared to New Zealand Europeans. These include Chinese cultural values that are potentially incompatible with common law adversarial court systems, due to the cultural perspectives about how one conducts oneself in disputes with others, for example, and the expectations shaped by the inquisitorial court system that operates

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the breach (at [405]). It seems, therefore, that Cooke J's reason for not applying the *Mason v Lewis* approach was essentially that it did not produce what he saw as the correct result. With respect, this is not a sufficient reason to depart from an approach that poses the correct question, i.e. what was the loss caused by the breach?

Cooke J's approach was to take the total loss on liquidation of $110m as his starting point for assessing the directors' contribution to that loss (at [414] and [415]) and hold that the directors were liable to contribute $36,000,000 to the loss. Critics of his approach argue that it should only be adopted where it is impossible to tally up the loss. Otherwise, the directors are not really able to see the case against them. This risk is clearly illustrated in Cooke J's judgment, as he gives no real analysis for how he got from a starting figure of $110,000,000 back to a contribution for loss of $36,000,000 (at [445]). This left him effectively having to resort to alternative tests to justify his finding of loss (at [446]–[449]). In my view, Cooke J should have started with his alternative tests built on the level of intercompany indebtedness and the deficiency in equity (at [446] and [447]), and these should have been applied to a much earlier breach date. This would have provided a more reasoned approach to a calculation of any contribution to loss required by the directors, acknowledging as Cooke J did, that any approach necessarily has to be reasonably broad brush and not amount to an attempt at spurious precision (for an excellent discussion on the correct approach to calculation of loss, see the South Square Digest, March 2017, at 18: "Wrongful Trading — Learning from the mistakes of others" Glen Davis QC, a United Kingdom publication, searchable on Google).

It seems that under any approach the total loss on liquidation will usually not be an appropriate starting point. A substantial portion of the loss on liquidation in the Mainzeal case was presumably due to assets being realised at other than book value. This is a usual consequence of most liquidations, and not something that would normally be attributed to the prior actions of directors. Also, there were presumably other substantial liquidation costs that would be typical of any liquidation, and not necessarily the product of trading based on negative equity. Therefore, rather than starting from a very theoretical maximum, I suggest that Cooke J should have started from the other end, and required loss to be proved, which was the approach that both the plaintiffs and the defence took to the case.

In my view, as indicated above, there is an alternative interpretation of what happened in the Mainzeal case. It seems that the directors were in breach from the point they engaged in insolvent trading and that there was no reasonable basis for relying on informal group support. In terms of this alternative argument, a starting point would appear to be the amount of negative equity after excluding the intercompany debts and other extractions from Mainzeal. Since the company was already insolvent, there would be added to this starting amount any trading losses incurred during the insolvency, unless the directors are able to show that, notwithstanding what transpired, trading during the relevant periods was undertaken in circumstances that were not likely to create a substantial risk of (further) loss to creditors. To this would be added any other liabilities (including contingent liabilities) incurred whilst trading in an insolvent state unless, again, the directors are able to show that it was unlikely there was a substantial risk of loss arising. It would seem, however, that the directors would not be liable for losses incurred as a consequence of Mainzeal going into liquidation and which would have been incurred irrespective of any breach by the directors of s 135.

SOME CONCLUSIONS

The result in *Mainzeal* should not have depended on the characterisation of the breach. Nor did the circumstances warrant a departure from the *Mason v Lewis* approach. Having effectively won on the important points, being when any breach occurred and whether any loss resulted from the breach Cooke J found had occurred, the defence should have succeeded. But this begs a question as to when the breach really did occur which in turn begs the question whether simply having informal group support when needed means that the group can be relied upon to provide all support that is needed to cover what is effectively a hole in the balance sheet. It would appear that this hole was caused by the directors, i.e. the directors or their delegates must have been party to the decisions needed to approve the loans and other extractions that gave rise to the substantial intercompany debt that was irrecoverable. In my view, reliance in such circumstances was not justified from as early as 2005. Therefore, in my view, the directors were in breach of section 135 from as early as 2005 and should have been held liable accordingly.

Part three of this series of articles will be published in the February 2020 issue of this journal. It will consider the decision in *Cooper v Debut Homes* and will also offer some conclusions. ❐

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in PRC where the judge is an investigator gathering evidence and not an adjudicator making a determination on the evidence presented, as in the New Zealand court system.

They evidence diverse culture and language having a real and tangible impact on an individual's engagement with the justice system, and thus being relevant factors to be taken into account by judges, lawyers and other key players in the New Zealand court system. ❐