Falling foul of "normal" business practice: are arrangements based on "cultural factors" really that unusual in New Zealand today?

By Maria Cole

What is "normal" business practice?

"My word is my bond" is a phrase familiar to many. Historically, breaking your word carried significant consequences at both a personal and societal level. For many of us, that remains true. However, the ability for people to be less "visible" and more mobile has meant that damage to one's reputation often no longer carries the same consequences. Social ostracism either doesn't matter or can be avoided. And Hollywood has created legends of "smooth operators" who are to be admired. They are portrayed as clever people who are sharp enough to take advantage of business opportunities presented to them on a platter by those seen as "gullible", with not an ethical or moral qualm in sight.

Over time societal changes have seen people protecting their contractual rights when conducting business, leading to another familiar saying: "get it in writing". Written agreements documenting business arrangements are intended to safeguard the parties by providing certainty and enabling contracts to be enforced. But having business contracts recorded in writing isn't a requirement for them to be legal, other than a select few.[1] Most of us will have either been involved in or heard of business deals sealed with a handshake. Warren Buffett is apparently famous for them!

Two drivers behind informal arrangements are personal honour and trust, and not wanting to cause offence and consequential damage to relationships by asking for agreements to be documented. Whether this is called "old fashioned" business practice, or behaviour based on "cultural factors", nothing about it sounds out of keeping with everyday business in New Zealand.

According to MBIE, *New Zealand is a nation of small and micro-business… [T]here are approximately 546,000 small businesses representing 97% of all firms... Small businesses are represented in every industry, have many different operating models and interact with government and the economy in a range of ways*.[2]

Cultural considerations and a caution about preconceptions of normal business practice

A recent Supreme Court decision has looked at what have been described as Chinese *cultural considerations* at play in the context of two businessmen who had a working relationship for over 15 years.[3] Their relationships with each other and third parties were conducted under two quite different "operating models". When their relationship went sour, they went to court and the loser ended up being granted leave to appeal to the Supreme Court. Leave was granted because:

> *…The appeal raise[d] potential issues about the interpretation of documents translated from Mandarin and the cultural setting in an arrangement between two Chinese parties whose business relationship appears to have been conducted in Mandarin. The Court of Appeal noted that it was conscious that language is used in a broader linguistic and cultural setting, by reference to background assumptions about personal and*

1 The exceptions in New Zealand relate to consumer contracts, such as door-to-door sales contracts, guarantees, and agreements for the sale and purchase of property.

2 Ministry of Business, Innovation & Employment website, *Small business*: https://www.mbie.govt.nz/business-and-employment/business/support-for-business/small-business/

3 *Deng v Zheng* [2022] NZSC 76.

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.

In the High Court, the Judge had found the internal accounts kept by the parties did not accord with normal business or accounting practices. He placed significant weight upon inconsistencies between these internal accounts and the signed-off external accounts. One side argued that the discrepancies were evidence that the two men operated internally as partners, while to the outside world they carried out particular projects through particular companies. The other maintained the existence and content of the internal accounts confirmed that there was an additional relationship between the two men that operated as an overlay for the various corporate vehicles they used. The Judge found there was no partnership arrangement. He considered that the parties had presented themselves to the world as operating through incorporated companies, including to the Inland Revenue Department, and that was the true situation.

The Court of Appeal disagreed. It found that the rules under which the protagonists were operating were well established between themselves. One set applied to their internal relationship (their partnership – based on Chinese cultural factors called guānxi) and another applied to their external relationships with third parties (the incorporated companies each had established to do business with the outside world – based on an understood western business model). The Court stated:[4]

In this case there was no expert evidence about relevant cultural factors to assist the Court. We have done the best we can to be sensitive to the importance of social and cultural context and, in particular, to be cautious about drawing inferences based on our preconceptions about "normal" or "appropriate" ways of structuring and recording business dealings. Rather, we focus on the substance of the parties' arrangements as revealed by their conduct over time.

The Supreme Court found that the case actually turned on inferences to be drawn from the contemporaneous written material, which meant that the cultural issues it had heard submissions on

4 *Zheng v Deng* [2020] NZCA 614 at [89].

weren't determinative. However, it noted that in other cases the social and cultural framework within which one or more of the parties operate may be of greater significance. It observed that in cases where it is appropriate that a judge receive information as to social and cultural framework:[5]

a. *It is open to witnesses to explain their own conduct by reference to their own social and cultural background. It would thus have been open to either of Messrs Zheng or Deng to have referred to guānxi by way of explanation for their own actions…*

b. *Where parties have been in a relationship (business or otherwise), they may explain the way in which the relationship played out by reference to the social and cultural framework in which they operated. By way of example, and coming back to this case, Mr Zheng could have referred to guānxi by way of explanation for the way in which his relationship with Mr Deng operated.*

c. *In the circumstances just mentioned, there can be no objection to such evidence being supported by expert evidence or by resort to ss 128 and 129 of the Evidence Act. These sections published documents in relation to matters of public history, literature, science or art.*

d. *Rather more difficulty may arise where a litigant wishes to introduce social and cultural framework information to explain not their own or joint conduct but rather that of another party. In this situation, the information as to cultural background is likely to be best provided by an expert or under ss 128 and/or 129.*

Final thoughts

New Zealand is a multi-cultural society with all cultures influencing the way life is conducted here. The decision in *Deng v Zheng* has sent a clear message to the dispute resolution world that cultural factors are alive and well in the New Zealand business landscape and need to be given due consideration when parties' behaviour is being scrutinised. If expert assistance to understand those factors is required, it should be sought using the Supreme Court's guidance. But given that the basis of these cultural factors is rooted in a common history of being bound by one's word and the importance of maintaining relationships, the essence of those factors does not really seem to be that foreign a concept to come to grips with.

5 *Deng v Zheng* [2022] NZSC 76 at [79] citations omitted.

About the author

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She was previously a civil litigation barrister for over a decade, where she gained experience in arbitration and mediation.