the purposes of a defence to an offence of strict liability. See *R v Banchard* [1984] 15 CCC 3d 282 and *R v McDougall* [1982] 14 2 DLR (3d) 216. That has been held to be so even though the mistake of law came from advice received from a highly qualified legal advisor. It may be that Holland J's view finds support in *R v Simpson* [1978] 2 NZLR 221 at 226 where their Honours hold that a mistake of law is capable of going to the existence of intent. However it is with respect contrary to what the Court of Appeal said in *Waaka v Police* [1987] 1 NZLR 754 at 759. That is a post *Miller* case where His Honour Cooke J held:

> "the defence of total absence of fault cannot extend to pure matters of law."

Finally I should note the provisions of s 25 of the Crimes Act:

> "the fact that an offender is ignorant of the law is not an excuse for any offence committed by him."

See *Johnson v Youdon* [1950] 1 KB 544 compared with *Lim Chin Aik* [1963] AC 160 171 and *Maintenance Officer v Stark* [1977] 1 NZLR 78, 83.

In my respectful view, the dicta in *Waaka* although possibly obiter, is clear and having regard to the earlier authorities and overseas trend on the matter of mistakes of law, I must prefer it to the decision in *Booth*.

This is a case where the defence rests on what in my view is a pure error of law. That is not available to her and the prosecution must succeed.

As to penalty however I am not restricted in any way by the failure of the defence on this narrow ground. There is in my view no need for a penalty. On the view I have taken the prosecution has vindicated its approach to the statute and succeeded on the facts. That is sufficient and the defendant is discharged pursuant to s 19 of the Criminal Justice Act 1985.

Charge proved based on facts
Defendant discharged pursuant to s 19 of the Criminal Justice Act 1985

Department of Internal Affairs v The Poverty Bay Club Inc

District Court, Gisborne
9 February, 21, 23 March; 14 April 1989
Judge I B Thomas

Criminal law — Offences — Removal of antiquity, namely a letter referred to as the "Cook Instruction", from Captain James Cook to Captain Charles Clerke — Removal from New Zealand without reasonable excuse and without the written permission of the Secretary of Internal Affairs.

Statutes — Interpretation — Meaning of "relates" — Whether the letter was an antiquity — Whether the offence was of a regulatory nature and proof of the deliberate act of removing the letter made the defendant liable unless it proved on the balance of probabilities it was without fault or in other words acted with reasonable excuse — Whether the defendant acted with reasonable excuse — Antiquities Act 1975, ss 2 and 5.

On or about 8 April 1988 the defendant removed from New Zealand a letter dated 10 July 1776 written by Captain James Cook to Captain Charles Clerke, and sent it to Sothebys in London for auction. The removal occurred without the necessary written certificate of permission from the Secretary of Internal Affairs. Evidence was given by various experts which established the authenticity of the letter. Evidence was also given supporting the importance of Captain Cook in New Zealand's history and in respect of whether or not the letter related to New Zealand and was of national or historical importance.

The defendant was unaware of the Antiquities Act 1975. Sothebys had advised the defendant that there were no export restrictions in New Zealand for material such as the letter. Other enquiries were made, but no advice, particularly legal advice, was sought by the defendant as to its right to export the letter for sale.

Held: (1) The word "relates" contained in s 2(c) of the Antiquities Act 1975 in reference to New Zealand, carried its ordinary or natural neaning of "to have connection with or establish a relationship with". There was no specification in the Act as to the degree of relationship required with New Zealand. There was no doubt that Captain James Cook was the pre-eminent European figure in New Zealand history, its development, exploration and discovery. The Cook Instruction was a rarity in New Zealand, the letter containing the Instruction having been held in the Poverty Bay area for a considerable period of time. Poverty Bay had a particular affinity with

Cook and all things related to Cook, since it was in Poverty Bay that the first landing was made. The Cook Instruction was a letter which related to New Zealand and was an antiquity within the meaning of s 2(c) of the Antiquities Act, because it related to New Zealand; was of national and historical importance and was more than 60 years old.

(2) The offence appeared to be one of a regulatory nature where the defendant was liable, once proved of the deliberate act of removing the letter from New Zealand, unless it proved on the balance of probabilities that it was without fault or in other words that it acted with reasonable excuse.

Civil Aviation Department v McKenzie [1982] 1 NZLR 238, *Millar v Ministry of Transport* (1986) 2 CRNZ 216 considered and followed.

(3) What occurred was a mistake of fact on the part of the defendant as to whether the Cook Instruction was an antiquity. That was occasioned by a total lack of knowledge of the existence of the Antiquities Act and its provisions. It was a well established principle of criminal law that there was no defence of ignorance or mistake. The only amelioration was offered by s 5 of the Act itself which afforded the defendant the potential defence of establishing a reasonable excuse. The existence or otherwise of reasonable excuse was a question of fact. However, the difficulty with the defendant's position was that it did not seek advice as to the legal position of exporting the letter because it did not know, nor was it ever aware, that there could be restrictions on removing the letter from New Zealand. It was plain that the defendant never sought advice from a lawyer on that issue. It followed therefore that none of the actions taken by the defendant amounted to reasonable excuse either in terms of what a reasonable man would regard as an excuse ". . . consistent with a reasonable standard of conduct . . ." or that the acts of the defendant were ones that a reasonable man would carry out in all the circumstances.

Pascoe v Nominal Defendant (Queensland No 2) [1964] QDR 373, *Martindale v Jaychem Industries Ltd* (1987) 3 DCR 561 applied.

Observation

There was sufficient evidence to have justified a finding that the Instruction was an antiquity within the meaning of s 2(a) of the Act.

Information

This was an information pursuant to s 5 of the Antiquities Act 1975 alleging that the defendant without reasonable excuse and without the written certificate of permission of the Secretary of Internal Affairs removed an antiquity from New Zealand, namely a letter from Captain James Cook to Captain Charles Clerke dated 10 July 1776.

Cases mentioned

Auckland City Council v Jefferies (High Court, Auckland, 13 December 1988 (M 1614/88) Wylie J)
Calder v Wellington City Council [1951] NZLR 191

Maintenance Officer v Stark [1977] NZLR 78
Thorne v Motor Trade Association [1937] AC 793
Wellington City Council v Laming [1933] NZLR 1435

P W Cooper for informant
T D Caley and *N M Mackie* for defendant

Reserved decision

(Editor's note: See addendum to judgment for the Cook Instruction.)

JUDGE I B THOMAS. This is a prosecution by the Department of Internal Affairs against the Poverty Bay Club Incorporated pursuant to s 5 of the Antiquities Act 1975. The charge is that without reasonable excuse and without the written certificate of permission of the Secretary of Internal Affairs, the club removed an antiquity from New Zealand, namely a letter from Captain James Cook to Captain Charles Clerke dated 10 July 1776 [referred to as the "Cook Instruction"].

The hearing commenced on 9 February 1989. At that time, Mr Cooper, counsel for the Department, opened his case and called Mrs Eileen Martin, the secretary of the defendant club, as his first witness. A witness summons had been issued against Mrs Martin requiring her to attend and to bring with her the original of the letter which is the subject of this charge together with copies of correspondence between the defendant and Sothebys in London, postal receipts and documents, and the minutes of the club. Mrs Martin, after some examination, confirmed that none of these items had been brought by her. There was an inference that the Cook Instruction letter may have been sent out of the country and her evidence was that the other items requested were with the club solicitor. Mrs Martin then refused to answer further questions and claimed privilege against responding on the basis of self incrimination. She also claimed such privilege on behalf of the club from answering questions or producing documents. There then ensued a legal argument as to this privilege and its extent. This was resolved when counsel for the informant conceded that Mrs Martin was able to claim privilege not only for herself but also for the defendant club against answering any incriminating questions or producing any incriminating documents. I made a ruling accordingly.

Mr Cooper then indicated that, as a result of this development, he would still be able to continue and establish his case by way of the production of secondary evidence of the documentation. He was not however, at that stage, in a position to proceed in that manner and accordingly sought an adjournment. That application was opposed by Mr Caley for the defendant club but the result was that the hearing was adjourned to 21 March 1989.

On the resumption of the hearing on that date, Mr Cooper for the informant, indicated that he did not require Mrs Martin any further and that he intended continuing with his case by calling the witnesses he had indicated who included three experts on Captain Cook and his voyages and the documents and material associated with Captain Cook, an officer of the Department of Internal Affairs and also the historian from the local Gisborne Museum.

Since this is a prosecution by the Department of Internal Affairs then the onus is on the informant to establish its case to the criminal standard of proof, namely to prove all elements of the offence beyond reasonable doubt. Mr Caley in his closing submissions indicated that his view was that the reasonable excuse defence had to be established by the defendant on the balance of probabilities but Mr Cooper for the informant demurred from that position and conceded that the onus remained on the prosecution on the totality of the evidence both for the informant and for the defendant to establish beyond reasonable doubt whether the letter had been removed without reasonable excuse. I will return to the questions of intention and onus later in this judgment.

The issues that arose in the charge were four in number. Firstly, was the Cook Instruction an antiquity within the meaning of s 2 of the Antiquities Act. It was submitted by the defence counsel that that issue also included a determination of the authenticity of the letter. Secondly, had the club removed the antiquity from New Zealand. Thirdly, had the Secretary for Internal Affairs given a written certificate of permission for the removal of an antiquity by the Poverty Bay Club. Fourthly, if it was determined that the club had removed an antiquity from New Zealand then did the club have a reasonable excuse for so removing the antiquity. Issues two and three were never really disputed and it was plain that the Captain Cook Instruction had been removed from New Zealand by the Poverty Bay Club on or about 8 April 1988 and that such removal had occurred without the necessary written certificate of permission given by the Secretary of Internal Affairs. This left as the major two issues whether the letter fell within the definition of antiquity and if so, was the club able to rely on the defence of reasonable excuse.

I turn now to review the evidence. As previously indicated, Mrs Martin was the first witness called by the informant, but having failed to produce the necessary documents and having thereby established the ground for the informant to rely on the production of secondary evidence, her evidence is therefore of no additional relevance. The first witness called on the resumed date was a Mrs Sheila Robinson who is the curator at the Gisborne Museum and Art Centre. Mrs Robinson's evidence was that in November of 1987, she was consulted by Mr Peter Franks from the Poverty Bay Club who brought to her the Cook letter which at that stage was between sheets of glass in a wooden case. She was advised that it was going to be offered for sale and she therefore encapsulated it for him. This consisted of putting it between sheets of mylar. Mr Franks delivered the letter to her on 20 November 1987 and collected it on 8 December 1987. Whilst the letter was in the Museum's possession at this time and with the permission of the Poverty Bay Club, the Museum arranged for photographs of the letter and also a photocopy of the letter. These were produced as exhibits 3 and 4. The photocopy of the letter indicated that it was a letter dated 10 July 1776 written by Captain James Cook to Captain Charles Clerke. The letter appeared to be signed by Captain James Cook. On 6 March 1988, the letter was again delivered to the museum for packaging to be sent overseas. The museum placed the letter between two large sheets of polystyrene and sealed this on the basis that it was being packaged to be sent to England. Mrs Robinson confirmed that she was aware that it was going overseas but could not say at what stage she became aware of that fact. Mrs Robinson

confirmed in cross-examination that she had asked Mr Franks if he considered selling it in New Zealand and confirmed that her understanding was that a recommendation from the Alexander Turnbull Library in Wellington was that it should be sold through Sothebys in London. She agreed that she expressed disappointment at the letter going out of New Zealand and although she acknowledged she had some awareness of the Antiquities Act at that time, she thought it related to Maori artefacts and was surprised to find that the Act could also relate to the letter. She confirmed her view that she did not feel the Act related to the letter but also confirmed that the club representatives never, at any stage, sought from her an opinion as to the letter in relation to the Antiquities Act. In other words, her brief never went beyond the preservation and packaging of the letter.

The second witness called for the informant was a Miss Jane Kominik who is the Acting Chief Executive Officer of the Arts and Cultural Division of the Department of Internal Affairs whose responsibility was for the file relating to the Poverty Bay Club and the Captain Cook Instruction.

Miss Kominik confirmed that the defendant club had never applied for or obtained the necessary written certificate of permission from the Secretary of Internal Affairs to remove an antiquity from New Zealand. She confirmed that the Department had been alerted to the fact that the letter had been sent to London on either 13 or 14 April 1988. She made immediate contact with Mr Peter Franks, the committee member of the Poverty Bay Club who had been dealing with the export of the letter, who confirmed the Cook Instruction was not in New Zealand. At that stage, Mr Franks advised her that following advice from the Alexander Turnbull Library, a decision had been made to sell the letter through Sothebys because it would realise a better price in England. Miss Kominik produced various letters to the club indicating the Department's view that the club had committed an offence, advising them with particularity of the provisions of the Antiquities Act. The club's response had been to advise Sothebys to refrain from selling the letter until such time as a clearance had been obtained for the sale. The club co-operated and produced to the Department letters from the club to a Dr Beale at Sothebys asking him to defer the sale meantime and a letter responding from Dr Beale confirmed such deferment. Miss Kominik confirmed that at a meeting on 9 June 1988, she was present when the Secretary for the Department and herself met a Mr Cave from the Poverty Bay Club, together with a solicitor Mr Robinson. At that meeting, indications were given by the Club that their view was that the letter was not an antiquity and that in any event, they had a reasonable excuse because they had been given erroneous information by the Alexander Turnbull Library. Miss Kominik then produced a series of letters between the solicitors and the Department which eventually resulted in a formal opinion being given to the club on 2 September indicating the Department's view again that the letter was an antiquity and that its removal breached the Antiquities Act. Miss Kominik made it plain that the object of the Department's interest was to persuade the club to have the letter returned to New Zealand and that certainly the threat of prosecution had been used in an effort to persuade the club accordingly. The club did not return the letter and the prosecution was therefore laid. Miss Kominik was cross-examined at some length concerning the telephone

calls and correspondence between members of the club and herself, and there was some weight laid on the suggestion that the Secretary would get back to the club within two weeks of the meeting in June and although that may well have been the case, nonetheless, it had little bearing on the alleged commission of the offence itself, other than to illustrate that in this area, determination of such issues can take some time.

The next witness was a Dr David Mackay, who is a reader in History at Victoria University in Wellington. Dr Mackay is a learned Cook scholar and has published numerous articles on Captain Cook. He assisted in the completion of the late Professor Beaglehole's Life of Captain James Cook. Dr Mackay had never seen the original of the Captain Cook Instruction but having seen a photocopy was in no doubt that the signature on the letter was a genuine one by Captain James Cook. Dr Mackay gave historical background to Captain Cook's voyages and the fact that this letter, the Captain Cook Instruction, related to the third voyage. Although the letter did not mention New Zealand, Dr Mackay was quite certain that it was always clear that Cook would stop at New Zealand. His evidence was that there were two reasons for that, firstly, to investigate a massacre which occurred to the second ship on the second voyage at Queen Charlotte's Sound, and secondly, as a point of succour and refreshment. In addition, Queen Charlotte's Sound was a known point in terms of exact latitude and longitude and the visit would therefore be a valuable reference point to adjust chronometers. Dr Mackay confirmed that this was only the fifth occasion of a European visiting New Zealand and from that point of view, it had some importance even though the visit was for a period of 12 or so days only. Dr Mackay confirmed that although the Instruction did not mention New Zealand, there was no question that in Cook's mind he would be visiting New Zealand for the reasons previously indicated. Dr Mackay's evidence was that Captain Cook is one of the best known historical and political figures relating to the early history of European New Zealand and that plainly his name and the associated names of Cook have been applied commercially and officially throughout New Zealand and of course particularly in this area of Poverty Bay. So far as Dr Mackay was concerned, the importance of the instruction lay in the point that it was a signpost to New Zealand in Cook's voyage to the Pacific northwest because it reinforced New Zealand as a rendezvous point in the voyage. He confirmed that there are no other letters in New Zealand relating to the third voyage and although it does not mention New Zealand, in his view the Cook Instruction related indirectly to New Zealand as a staging point of the voyage. In answer to questions from me he confirmed that the letter was potentially a holograph letter that is to say a letter actually written by Captain Cook and he also confirmed that so far as he was concerned, the photocopy he had seen was the photocopy of an orginal letter.

The next expert witness called by the informant was Dr T H Beaglehole who is also a reader in History at Victoria University in Wellington. Dr Beaglehole had published in all fields of British and New Zealand history. He is the son of the renowned J C Beaglehole who was the editor of the Journals of Cook. He was also plainly a learned Cook scholar and indeed had a great knowledge of the amount of material relating to Cook held in New Zealand. He confirmed that he had not seen the original of the letter but had no doubt the signature on the letter was a genuine one of

Captain Cook.

It was his view that the Cook Instruction related to New Zealand because it was a part of the written record of the third voyage. It could be viewed as part of the overall pattern of the voyages, New Zealand being a pivotal point, in particular, the use of Ships Cove in Queen Charlotte's Sound as a stopping off point. Dr Beaglehole referred to the importance of the European contact with New Zealand and the importance of Cook in that regard in his various visits to New Zealand. This had an important effect in respect of race relations and the increasing of the Maori knowledge of Europeans. In addition, he was of the view that Cook was firmly determined to try and find out what happened to the crew of the second vessel on the second voyage which had been the subject of a massacre by the local Maori tribes.

So far as the amount of Cook material held in New Zealand is concerned, Dr Beaglehole confirmed that there was very little held in New Zealand concerning the third voyage and indeed apart from the Cook Instruction, there was the log of a Mr Bailey and those two documents are the only two documents held here. The Cook Instruction itself is the only document relating to the voyage actually signed by Captain Cook which had been held in New Zealand. So far as the other voyages are concerned, he also confirmed that there are only a handful of documents held in New Zealand and indeed confirmed the items held that were actually signed by Cook are the Cook Instruction, two other letters and the Eagle Log. Under cross-examination, Dr Beaglehole confirmed that he would have been very concerned if an employee of the Alexander Turnbull Library had not advised any lay-person approaching the Library concerning the operation of the Antiquities Act and indeed he regretted that a person who may have given advice to the Poverty Bay Club would have overlooked such an Act. He agreed with the suggestion that the letter could also relate to England because it was written by an Englishman for delivery to another Englishman in England but his view was that it related to the Cook voyages and in that sense it was more important to the European History of New Zealand rather than to English Maritime History. He confirmed that Cook was historically much more important for New Zealand than for England. He saw no difficulty in the Cook Instruction relating to both countries.

The last expert witness called by the informant was Dr M E Hoare who again was a noted Cook scholar and currently the curator of the New Zealand Police College Museum but who had published works on Cook and Cook related matters. He confirmed that he had not seen the original Cook Instruction and only viewed what purported to be a photocopy of the letter. He had no doubt that it was a James Cook signature and agreed that the letter in fact was potentially a holograph letter. So far as he was concerned, the letter related to New Zealand because of the importance of Cook to New Zealand. In addition, the letter related to New Zealand because of Cook's intention to always come and spend some time in New Zealand for succour and refreshment because again, Ship's Cove in Queen Charlotte's Sound was a known stopping-off point. So far as he was concerned, although this third voyage saw Cook spend the least time in New Zealand, nonetheless, he felt the time still contributed to the understanding and building of relationships with Maori people and the gaining of further knowledge of anthropology and geography. He saw it

as important for the Maoris to give them a further understanding of the European minds. He saw it as of great importance in New Zealand because of the paucity of such letters in New Zealand with a direct association to Cook and because of the importance of Cook in New Zealand. In cross-examination, he agreed that because the central object of the voyage was to head for the northwest coast of Canada, the document could relate to Canada but that if Cook had not discovered Hawaii then he would have had to use New Zealand as a base even more than the 12 days for which it was actually used.

As a previous head of the Manuscript Division of the Alexander Turnbull Library, he also was concerned that lay-persons approaching the Library for advice should have been advised of the implications of the Antiquities Act in respect to this Cook Instruction. He confirmed that although the letter could relate to Canada, it could still relate to New Zealand. In answer to a question from me, he advised the secret instructions referred to in the Cook Instruction, certainly referred to New Zealand. Such a stopping-off point would always be in the discretion of the Captain and he had no doubts that Cook always intended to use New Zealand as the safe stopping-off point that it had become for him after the earlier voyages. That concluded the evidence for the informant.

Evidence was called for the defence and the first witness was a Dr W Orchiston who is the Museum Director of the local Gisborne Museum and Art Centre. Dr Orchiston had a training more directed to Anthropology but had been involved with Cook collections at the Australian National University and was patently a Cook scholar in his own right but perhaps not at the same expert level historically, as the three witnesses called for the informant. Dr Orchiston did not commence at the Gisborne Museum until 14 or 16 March 1988, that is to say after Mrs Robinson had encapsulated the document in November 1987. The letter was then brought in for packaging but Dr Orchiston had no direct knowledge of it since it was handled by Mrs Robinson and the technicians. There was discussion between Mrs Robinson and Dr Orchiston about the letter but all he knew about the matter was that the Museum was assisting in packaging and the inference that there was no problem about selling it overseas because of advice from the club. He then produced further letters between the Department of Internal Affairs and the club where he confirmed his view that he did not believe the Cook Instruction was an antiquity in terms of the definition of the Act and his view had not been changed. His later letter produced as exhibit B indicated that he had accepted the informant's decision on the matter and this was more for the sake of preserving the museum's reputation. He confirmed his view however that the document should not have left Gisborne and he felt that the document should be returned to New Zealand so that it could be kept and exhibited in the museum. So far as he is concerned, he felt that it was part of the historical association with Gisborne and Captain Cook's contact here. He confirmed in cross-examination that he had had no occasion at all to look at the Antiquities Act prior to April 1988 and had not considered the Act in relation to the matter and indeed confirmed that the museum had not been asked its views on the letter vis-a-vis the Antiquities Act at any stage of the proceedings. He confirmed that the 12 days stay would still have been a significant period of time because any contact at that time was significant

for New Zealand. His view was that it was in relation to the voyage but not necessarily in relation to the document which did not refer to New Zealand. In his view, if the letter had referred directly to New Zealand, then it would be an antiquity, although he did confirm that the secret instructions referred to New Zealand and that therefore this document, the Cook Instruction, referred only in an indirect way to New Zealand. When the other experts' opinions were put to him, he said that he respected their opinions but preferred to retain his own view that the document did not relate to New Zealand although he agreed that it could relate indirectly to New Zealand.

The next witness called for the defendant was Mr Peter Franks, a member of the Poverty Bay Club Committee, and obviously an experienced and respected farmer who had been involved for a number of years with the Gisborne Harbour Board and now the new Port Gisborne Ltd. His evidence was that the letter had been donated to the club by a local family in 1935. The club was facing financial difficulties in 1987 and there had been discussions and suggestions from time to time about selling the letter as a means of raising funds. The letter used to hang in the reading room of the club but at some stage the letter was transferred to the club safe and then later to the safe at the Australia and New Zealand Bank. Eventually, after some discussion, the committee, which had no knowledge of the selling of these items, decided to seek advice. They looked for a national institution and decided to visit the Alexander Turnbull Library. Mr Franks went to Wellington and spoke to a Mr Retter on 9 September 1987. Mr Franks took with him the letter and showed it to Mr Retter. The purpose of this visit, according to Mr Franks, was to firstly, ascertain if it was a genuine letter and secondly, to enquire as to the best method of disposing of the letter. The advice was that the letter appeared to be genuine and further that the best place to sell this letter would be through Sothebys or Christies in England. His evidence was that he had seen a book with a large number of these items and this was the impression he gained from Mr Retter that indeed there were a number of these items held in the library and the library would not be particularly interested in purchasing the letter. There was an indication that a similar letter had been sold by the Peter Webb Gallery in Auckland for the sum of $35,000 a year or two previously. Mr Frank's evidence was that Mr Retter volunteered to investigate the letter further and get back to the club but he never did do so. Mr Franks confirmed that the Antiquities Act was never raised with him and the requirement of an export licence was never mentioned. Mr Franks then said following his meeting in Wellington, a committee meeting, having heard his report, decided to sell the letter. Mr Franks confirmed his approach to the museum and their encapsulating the same and his then making enquiries with Sothebys. He produced a letter dated 11 January 1988 from Sothebys indicating their interest in selling the Cook Instruction and in that letter which was produced as exhibit E, there is the statement that:

> We understand that there are no export restrictions from New Zealand for such material as this.

Mr Franks confirmed that in March-April 1988, he commissioned the museum to package the Cook Instruction for postage overseas and he

confirmed that on 8 April 1988, he uplifted the letter which had been packed in polystyrene by the Museum, wrapped it in paper, registered it and posted it to Sothebys. He confirmed that shortly thereafter he was contacted by Miss Kominik concerning a complaint about a letter having been sent overseas and the request that it be returned. He confirmed in cross-examination that the first time he had heard of the Antiquities Act was when he was contacted by Miss Kominik from the Department. He agreed that the letter was a genuine letter as this was the advice he had had from Mr Retter at the Alexander Turnball Library and there had been nothing to the contrary from Sothebys. He confirmed that the membership of the committee had been essentially farmers although there was always at least one solicitor member on the committee over the period of the discussions concerning sale and that the club never sought advice as to whether they were able to sell overseas or whether that would infringe any government or legislative requirements. He confirmed that when he approached the Alexander Turnbull Library, there was a need to authenticate the letter and to seek advice as to how to sell because the Club's problem was how to choose a reputable agent. He confirmed that as well as looking for a reputable agent, the club was certainly looking for the best price and he confirmed that he did no approach the Alexander Turnbull Library for advice as to the club's right or ability to sell the Cook Instruction. He said he would have expected the Library to tell the club if there had been any restrictions in dealing with Sothebys or Christies in England. He agreed that the discussions with the department were on the basis of an attempt to get the club to return the letter but he confirmed that the club has declined to bring the letter back to New Zealand as suggested.

The last witness was a Mr Cave who also was a farmer and the President of the Poverty Bay Club. He was also a past President of the Federated Farmers and had been involved in the restructuring of the rural community after the Cyclone Bola disaster and worked closely with the Internal Affairs Department. He said that when the selling of the letter first came up for discussion, the first enquiry was to the club solicitor Mr Robinson to see if the club could sell the letter in accordance with the objects and powers of the club. He produced an opinion from Mr Robinson which confirmed that the Committee could make such a decision on behalf of the club for the benefit of the club. He confirms the first time there was a firm decision to sell and to sell overseas was after Mr Franks returned from his discussion in Wellington at the Alexander Turnbull Library. He also confirmed that the whole of the matter had essentially been left with Mr Franks on behalf of the committee. He confirmed that he had spoken with Miss Kominik from the Department and also attended the meeting at the department's offices in June 1988. He agreed that the club did not seek legal advice as to whether it could sell the letter or not and that the club was certainly interested in getting the best price possible which was why the sale at Sothebys was so attractive to them. He agreed that the club did not approach the Alexander Turnbull Library to seek advice about the legal rights to sell, merely the best place and the appropriate agent to sell the letter. His view was that although they did not seek it, he would have expected the Library to advise the club if there was any legal impediment to selling the letter. He confirmed that he never asked on behalf of the club if any legal consents were required or if there were any legal restrictions nor did the club take legal advice in that regard. That completed the evidence for the defence.

I turn now to the first issue to be resolved, namely, whether the Cook Instruction comes within the definition of an antiquity as set out in s 2 of the Antiquities Act 1975. A preliminary matter raised by the defence was the question of the authenticity of the Cook Instruction. The actual letter was not produced because of course it remains at Sothebys in London. Mr Caley submitted that the informant had a duty to establish beyond reasonable doubt that the letter at Sothebys was authentic. The photocopy produced as exhibit 4 was not examined by any of the experts called by either the informant or the defendant. However, the letter is sufficiently well documented in a number of published works for comparisons to be available.

The original letter was examined by the Alexander Turnbull Library and this apparently satisfied the club that it had a genuine Captain Cook letter. That letter was the letter photocopied and photographed by Mrs Robinson and indeed packaged by the museum. There is a clear chain of evidence to that effect.

Mr Cooper for the informant relied firstly on the failure of the defendant to comply with his notice to produce and referred me to *Cross on Evidence* (3rd ed) at p 580: "proof of due execution is dispensed with when the document is in the possession of the opponent who refuses to produce it on notice". He submitted that the authenticity had been established by the experts, none of whom had been challenged in their firm opinion that the Cook Instruction had been signed by Captain Cook. He relied on ss 5 and 6 of the Evidence Amendment Act 1945 as to presumptions of validity and execution, the document patently being more than 20 years old and executed outside New Zealand. Coupled with the evidence from the experts that the photocopy of the letter that they had seen was signed by Captain Cook, I was left in no doubt that the letter owned by the Club and sent by them to Sothebys was the genuine and authentic article.

Antiquity is defined in s 2 of the Antiquities Act. The informant relied firstly on the definition in s 2(c) and secondly on the definition in s 2(a).

In brief, s 2(c) provides that a letter . . . (is an antiquity)

i which relates to New Zealand and is of national, [or] historical importance; and
ii which is more than 60 years old

Alternatively, s 2(c) provides that a chattel of any kind whatsoever, not being a chattel to which any of paragraphs (a) to (h) applies, which:

i is of a national or historical importance
ii relates to the European discovery settlement or development of New Zealand
iii is or appears to be more than 60 years old

Mr Caley for the defendant submitted that this was a penal statute and the Act should therefore be strictly construed. He said if there were any ambiguities then it should be resolved in favour of the defendant. Mr Cooper for the informant, accepted the submission that the statute should

be strictly construed though he submitted that a strict interpretation would require the Court to imply the ordinary natural meaning to the words of the section.

Turning then to the s 2(c) definition, there was no contest that the document was of national and historical importance and indeed that on the face of it, it was more than 60 years old. The evidence I have referred to plainly establishes these elements of the definition.

The issue then was does the letter "relate to New Zealand". Mr Cooper conceded that the letter did not refer to or specifically mention New Zealand but his submission was that the word "relates" has a wide meaning and the Cook Instruction both relates to New Zealand in terms of s 2(c) and to the European discovery, settlement or development of New Zealand in terms of s 2(a). He relied on the dictionary definition of the word and referred me to the *Shorter Oxford English Dictionary* which inter alia, defines "relate" as "to connect or establish a relationship between". Mr Caley for the defendant strongly submitted that the degree of relationship must go beyond the mere dictionary definition of "to connect or establish a relationship". He submitted that the *letter itself* must relate to New Zealand and that the proper interpretation was that the letter must *directly* relate to New Zealand. He referred me to a definition in *Words and Phrases*, (2nd Series), Volume 4 p 245 which related to revenue as relating directly to revenue and also to an unreported decision in *Auckland City Council v Jefferies*, (High Court, Auckland, 13 December 1988, (M1614/88), Wylie J). That case related to the Port Companies Act 1988 and required an interpretation of the phrase "Port related commercial undertakings". That decision upheld the submission of a *direct* relationship. Having been provided with a copy of the decision by Mr Caley, I am satisfied that it does not have any particular relevance here and must be regarded as a decision in respect to the Port Companies Act 1988 where indeed there was a specific definition in s 2 as to the meaning of "Port related commercial undertaking". It is not, therefore, of assistance to me in determining the meaning of "relates to" under the Antiquities Act. Mr Cooper for the informant submitted that to say that s 2 requires the document itself to relate *directly* to New Zealand, is an unnecessarily restrictive definition and there was no reason why the ordinary meaning should not apply. He submitted that the Court is entitled to look at all the circumstances surrounding the letter, including the author, the context, and background that involved the letter. He submitted that there was a relationship or connection between the Cook Instruction and New Zealand because of the special significance of the author to New Zealand, the fact that the Instruction was part of the official documents on the third voyage to New Zealand, the fact that from the outset, New Zealand was an intended stop of the third voyage and the instruction to Clerke to put to sea is in effect an instruction put to sea for New Zealand, the fact that the Instruction refers to Admiralty secret instructions regarding the prosecution of the voyage and those secret instructions refer to New Zealand specifically and finally, the importance of New Zealand in the context of all of Cook's voyages to the Pacific. Those submissions were plainly supported by the evidence of the experts called to which I have earlier referred.

The question is therefore, does the letter have to *specifically* refer to New Zealand, as Mr Caley submitted, or is the Court entitled to look at

the ordinary definition of "relates", namely, "to have a connection with or establish a relationship with". Having considered the evidence and the submissions, and being mindful of the fact that this is a penal statute and must be construed strictly, nonetheless, I am satisfied that there is no reason to depart from the ordinary or natural meaning of the word "relates". Having come to that view, I must now consider whether the evidence supports the submission of the informant that the Cook Instruction "relates to New Zealand".

I have the opinions of Doctors Mackay, Beaglehole and Hoare that in their view the Cook Instruction relates to New Zealand and they are supported to a degree by the defence witness Dr Orchiston who agreed that the Instruction indirectly related to New Zealand. I cannot simply substitute their opinions for my determination but must consider on the totality of the evidence whether in fact the Cook Instruction does so relate. It is plain the letter has some connection with a number of places from England through New Zealand to Tahiti, Hawaii and the Northwest Coast of Canada. There is no specification in the Antiquities Act as to the degree of relationship that there is required to be with New Zealand. There is no doubt that Captain James Cook is the pre-eminent European figure in New Zealand history, its development, exploration, and discovery. The Cook Instruction was a rarity in this country and the letter had been held in the Poverty Bay area for a considerable period of time. Poverty Bay has a particular and peculiar affinity to Cook and all things relating to Cook since it was here the first landing was made. I therefore rule that the Cook Instruction is a letter which relates to New Zealand and is an antiquity within the meaning of s 2(c) of the Antiquities Act 1975. Although I do not need to consider it, it would appear to me that had I not reached that conclusion, there would be sufficient evidence to justify a finding that the instruction was an antiquity within the meaning of s 2(a) of the Antiquities Act 1975, but I take that point no further.

Having ruled in this manner, it is apparent that all the elements of the offence have been established save for the consideration of whether the defendant club had a reasonable excuse for removing the Cook Instruction from New Zealand as it did. This offence appears to fall into the second category of offences defined in *Civil Aviation Department v McKenzie* [1982], 1 NZLR 238 and further defined in *Millar v Ministry of Transport* (1986), 2 CRNZ 216, that is to say it is an offence of a regulatory nature where the defendant is liable on proof of the deliberate act of removing the letter from the country, unless he proves on the balance of probabilities that he was without fault or in other words that he acted with reasonable excuse. There is a fine line perhaps between that definition of the necessary intention and the position adopted by the counsel for the informant, namely, that the onus remains on him to establish beyond reasonable doubt that the club removed the letter without permission and without reasonable excuse.

Reasonable excuse is not defined in the Antiquities Act 1975. It was defined by Manfield CJ in *Pascoe v Nominal Defendant [Queensland No 2]* [1964] QD R 373 at 378, as what a reasonable man would regard as an excuse, ". . . consistent with a reasonable standard of conduct . . .". Reasonable cause and reasonable excuse were held to be synonymous in two decisions interpreting the then current Municipal Corporation Acts,

namely, *Wellington CC v Laming* [1933] NZLR 1435 and *Calder v Wellington CC* [1951], NZLR 191, but those decision were not particularly helpful here. Counsel for both parties referred me to *Maintenance Officer v Stark* [1977], NZLR 78, and *Thorne v Motor Trade Association* [1937] AC 793, which were both decisions on reasonable cause and both were of some assistance to me. Finally, Mr Cooper referred me to a decision of Hall DJ in *Martindale v Jaychem Industries Ltd* (1987) 3 DCR 561, where it was held that a reasonable excuse would exist if the acts of the defendant were ones that a reasonable man would carry out in all the circumstances.

What occurred in this instance was a mistake of fact on the part of the defendant that the Cook Instruction was an antiquity. This was occasioned by a total lack of knowledge of the existence of the Antiquities Act and its provisions. It is a well established principle of criminal law that there is no defence of ignorance or mistake. The only amelioration is offered by s 5 itself which affords the club the potential defence of establishing a reasonable excuse. The existence or otherwise of reasonable excuse is a question of fact. The problems of ignorance of the law and mistake are discussed in Ashworth's, "Excusable Mistake of Law" [1974] Crim L Rev 652, and this article was referred to by Beattie J in the *Stark* decision. It has been a most helpful article and I will refer to it later.

Mr Caley for the defendant submitted strongly that the Club's actions amounted to a reasonable excuse. The four factual matters relied upon were the visit to the Alexander Turnbull Library in Wellington by Mr Franks in September 1987, the dealings with the Gisborne Museum in November 1987, the letter from Sothebys dated 11 January 1988 (exhibit E) which contained the sentence:

> We understand there are no export restrictions from New Zealand for such material as this.

and the dealings with the museum in April 1988. Mr Caley submitted that the club acted at all times with good intention and I have no difficulty in accepting that submission. However, it is plain that the club's main motive was to obtain the best price for the Cook Instruction through the most reputable agent. Mr Caley referred me to the Ashworth Article at p 660:

> The conduct of an individual who takes the trouble to ascertain the legal position by consulting an official agency is certainly reasonable

He submitted that the club's consultation with the Alexander Turnbull Library certainly fell into this category. He submitted that the actions of the club throughout in obtaining the advice and taking the steps it did, amounted to a reasonable excuse. Mr Cooper for the informant submitted that the club had not in fact consulted an official agency like the Department of Internal Affairs. He said that at no stage did the Club take the trouble to obtain legal advice as to the legal position regarding the export of the Cook Instruction. He suggested that the sentence in the Sothebys letter (exhibit E) ought if anything to have alerted the club to the possiblity of restrictions. He refuted the suggestion that either the Alexander Turnbull Library or the Gisborne Museum could be considered offical agencies. He submitted that the brief for the Museum was simply to preserve and package

for export and not to offer advice. So far as the Alexander Turnbull Library was concerned, advice was sought as to the authenticity of the Cook Instruction and as to the identity of the reputable agent for disposing of the document. He submitted that the actions of the club did not amount to a reasonable excuse and ignorance of the law did not provide a defence.

I must therefore consider the reasonableness of the actions of the club bearing in mind the submissions of both parties and the evidence. On the face of it, the acts carried out by the club were reasonable ones in the circumstances. However, the difficulty with the club's position is that it did not seek advice as to the legal position of exporting the letter because it did not know nor was it ever aware that there could be restrictions on removing the letter from the country. In other words, if it did not know, how could its officers seek the proper advice. Ashworth in his article (Op. Cit) goes on to say at p 661 that:

> And to take legal or official advice before embarking on a course of conduct is both reasonable and socially desirable. It is therefore submitted that, if an individual reasonably acts in reliance on a firm statement by a lawyer or a public official as to the legality of the course of conduct, his reasonable reliance on that advice which suggests a determination to avoid criminal liability, should furnish a defence.

It is plain that the club never sought advice from a lawyer on that issue although it did on the issue of power to sell on behalf of the club. It had lawyers on its committee who obviously never raised the issue. It relies principally on the omission of the Alexander Turnbull Library and the Gisborne Museum to advise Mr Franks of any possibility that the export of the Cook Instruction might infringe the Antiquities Act. That is somewhat removed from obtaining a firm statement as to the legality of a course of action.

The Club's officer went to the museum to seek assistance in preserving and packaging the Cook Instruction. Neither party in either November 1987 or March/April 1988 raised the issue of the Antiquities Act and indeed the evidence of Mrs Robinson for the museum is that she did not think it applied. The club relies on a single sentence of hearsay opinion in the letter from Sothebys (exhibit E), which indicated that there were no restrictions on export, as an excuse, but I do not regard that as assisting them for indeed as Mr Cooper says perhaps it should have put them on their guard. However, since the club and its officers were concerned with Sothebys being the proper agent for obtaining the best price for the Cook Instruction, I have serious doubts whether this particular sentence had any impact at all on receipt of that letter in January 1988 but at this stage, with hindsight, it is something that they can rely on as establishing the excuse that they are trying to do. In my view, none of these matters assist the club.

The strongest factual matter in support of the club's argument as to reasonable excuse is the visit to the Alexander Turnbull Library by Mr Franks in September 1987. Mr Caley for the club says that this is an official agency. I can accept that it is an authoritative body and obviously Government funded but technically it is not the official agency that administers the Antiquities Act. Mr Franks made it plain in his evidence

for the defendant that he went to the Alexander Turnbull Library to obtain advice as to the authenticity of the Cook Instruction and advice as to the most reputable agent through whom the Club could sell the instruction. The evidence was that the Antiquities Act and its potential restrictions were never mentioned and I must accept that evidence. The club and its officers, as I have said, did not seek such advice because they did not know they might have to. The club believed it was consulting an expert in the field and indeed the evidence of Miss Kominik that the Alexander Turnbull Library would be one of the places where advice on matters such as antiquities could be obtained, supports that view together with the evidence of Dr Hoare that the Alexander Turnbull Library should have been fully aware of the Antiquities Act and its effect on such documents as the Cook Instruction and would have been so when he was head of the Manuscript Department there between 1978 and 1984. However, there was no positive advice from the officer consulted, a Mr Retter, that the Antiquities Act did not apply and the complaint is that he should have so advised the club and that because he omitted to do so, then this amounts to a reasonable excuse. The difficulty with the evidence on this point is that Mr Retter did not give evidence. Mr Franks said in evidence that he was told that the Library had plenty of documents like the Cook Instruction, yet plainly the unchallenged evidence for the informant is that the Cook Instruction is a rarity in New Zealand because it was actually signed by Captain Cook. There were therefore unsatisfactory elements about the evidence concerning this discussion, its effect and its parameters and although I do not question Mr Franks' evidence for one moment, because of the way the club seeks to establish a reasonable excuse, I would have thought that Mr Retter ought to have been called to give evidence as to his knowledge of the Antiquities Act, whether he thought it ought to have applied or might have applied in this situation, and whether he assumed the club had the necessary authority and any other relevant matters. The club says it received erroneous advice. That is not the case. It did not receive any advice because it did not seek it. It is a situation where one would have expected an officer at the Alexander Turnbull Library to be conversant with the Antiquities Act and to have alerted Mr Franks as to its implications. That he did not do. I cannot find however that the club can rely on that omission as a reasonable excuse.

It follows therefore that none of the actions taken by the club amount to a reasonable excuse in terms of the definitions to which I have directed myself and the club has failed on the balance of probabilities to establish a reasonable excuse.

Having ruled in that manner, I find therefore that all the elements of the offence have been established beyond reasonable doubt. I have no doubt the offence was an unwitting one but nonetheless, the legislation is in the nature of public welfare regulation and illustrates the determination of the Legislature to retain national treasures (if I may use the more neutral term) in the country. This is indicated by the reduction of the period of Antiquity which qualifies articles as Antiquities from 90 years to 60 years in the current Antiquities Act as compared to its predecessor the Historical Articles Act 1962. For the completeness of the decision, I annexe a copy of the "Cook Instruction" together with a transcript of same.

The defendant is therefore convicted of the charge.

Charge proved

Addendum:

COOK INSTRUCTION

10 July. ***Cook to Clerke.** Plymouth Sound. "Whereas my Lords Commissioners of the Admiralty have directed me to proceed with the Sloop under my Command to the Cape of Good Hope without delay, and to leave directions for you to follow with the Discovery Sloop under your Command; In pursuance thereof, You are hereby required and directed to put to Sea with the said Sloop and to follow me to the Cape of Good Hope without a moments loss of time, and if you should happen to arrive there before me, You are to refresh your Company, and to cause the Sloop to be supplied with as much Provisions and Water as she can conveniently Stow; and if I should not arrive before the expiration of Thirty days after you, you are to conclude that some accident has happened to me, and are to prosecute the Voyage alone and carry their Lordships secret Instructions, (which will be delivered to you, sealed up, before you sail from Plymouth) into execution." –
Poverty Bay Club, Gisborne, NZ (imperfect); CLB

Richardson Drilling Company Ltd v New Zealand Railways Corporation

District Court, Wanganui
10; 20 March 1989
Judge E W Unwin

Small Claims Tribunal — Appeal — Statutes — Interpretation — Whether a fundamental error in the interpretation of an insurance policy gave rise to an appeal against an order of a Small Claims Tribunal Referee — Small Claims Tribunals Act 1976, ss 9, 15, 16, 22, 34 and 35 — Disputes Tribunals Act 1988, s 50 — Acts Interpretation Act 1924, s 5(j).

On 3 November 1987 a drilling rig owned by the appellant was travelling downhill. The driver went to apply the brakes, there was no response and eventually the rig hit a kerb, rolled and ended upside down on a railway line. The rig caused damage to the line owned by the respondent which cost $1,032.81 to repair. The appellant declined to pay for the repairs and a claim was made for their cost in the Small Claims Tribunal.