BRIGINSHAW IN LAND AND ENVIRONMENT COURT PROCEEDINGS – INTRODUCTORY OBSERVATIONS FROM THE JUDICIAL PERSPECTIVE[1]

What is the *Briginshaw* Principle?

1. The common law recognises two standards of proof, first, the civil – the balance of probabilities, and second, the criminal – beyond reasonable doubt.

2. But questions have sometimes been raised about the standard or burden of proof to be applied in serious civil matters, for example, where an allegation of misfeasance or fraud is alleged. It is said that in these instances the more serious the matter in issue, the stricter the proof. However, the courts have consistently stated that there is no third standard of proof between civil and criminal standards.

3. In the context of serious civil matters what does the phrase 'on the balance of probabilities' actually mean?

4. Logically, it demands that the party on whom the burden falls must establish that it is more likely than not that the fact or facts relied upon by him or her existed at the relevant time. Other formulations include that the civil standard is met when the tribunal of fact is 'satisfied' or 'reasonably satisfied' as to the existence of the facts in issue.

5. The seminal statement or explanation derives from Dixon J in *Briginshaw v Briginshaw*[2], where his Honour stated that "when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence ... It cannot be found as a result of a mere mechanical comparison of probabilities." His Honour went on to explain that the standard is one of "reasonable satisfaction":

> …but reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer.... In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

[1] Introductory remarks presented to Twilight Seminar, 20 November 2013, Judicial Commission of New South Wales. The invaluable assistance of my tipstaff, Ms Emma McKibbin, in preparing these introductory notes must be acknowledged. All errors are, however, my own.
[2] [1938] HCA 34; (1938) 60 CLR 336 at 361–362.

6. While this statement seems beguiling simple, it creates practical challenges that judges and other triers of fact must grapple with in its application.

7. The *Briginshaw* principle so-called is understood as requiring care in cases where serious allegations have been made or a finding is likely to produce grave consequences. Importantly, and despite some confusion on this point, *Briginshaw* does not alter the *standard of proof*, that is, on the balance of probabilities, as the High Court emphasised in its authoritative re-statement of the *Briginshaw* principle in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*.[3] In other words, there remain only the civil and the criminal standards of proof: there is, to reiterate, no third standard of proof.[4] For this reason, references to the *Briginshaw* principle as the '*Briginshaw* standard' or 'test' are probably unwise and may lead to error.[5]

8. But *Briginshaw* does import some flexibility to the civil standard by directing attention to the strength of the evidence required in attaining the civil standard of proof, focusing on the probative value of such evidence. Essentially, it goes to the degree of persuasion of the mind.[6] Thus the High Court in *Neat* stated that: "the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove".[7] In short, the more serious the allegation, the more probative or stronger the evidence needs to be.

9. Having said this, in *Neat* the High Court cautioned against generalisations about the need for 'clear' or 'cogent' evidence, even where the standard of proof was correctly understood. These were 'likely to be unhelpful and even misleading'.[8]

Briginshaw and the *Evidence Act*

10. Has the common law position been varied by statute?

11. The introduction of the Uniform Evidence Acts, or, specifically in New South Wales, the *Evidence Act 1995*, did not alter the common law position and it is

[3] [1992] HCA 66; (1992) 110 ALR 449 at 449–50.
[4] *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362; *Australian Financial Services and Leasing Pty Limited v All Up Finance Pty Limited* [2012] NSWSC 1004 at [59]–[60] per Macready AsJ; *Qantas Airways Limited v Gama* [2008] FCAFC 69; (2008) 167 FCR 537 at [123]–[139].
[5] *Qantas Airways Limited v Gama* [2008] FCAFC 69; (2008) 167 FCR 537 at [139].
[6] *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 110 ALR 449 at 449; *Dutt v Central Coast Area Health Service* [2002] NSWADT 133 (Judicial Member Rice, Members Alt and McDonald) at [47].
[7] *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 110 ALR 449 at 449–50; see also *R v Petroulias (No 8)* [2007] NSWSC 82; (2007) 175 A Crim R 417 at [16]–[17].
[8] *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 110 ALR 449 at 450; see also John Dyson Heydon, *Cross on Evidence* (9th ed, 2012) at 313–4 and 326.

accepted that the *Briginshaw* principle was imported into ss 140 and 142(2) of that Act.[9]

12. So, for example, the standard of proof required by s 140 of the *Evidence Act* is simply a statutory restatement of the common law position.[10] That provision requires, in subsection (1), that: "in a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities."

13. It goes on in subsection (2) to assert:

> Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
>
> (a) the nature of the cause of action or defence, and
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> (b) the nature of the subject-matter of the proceeding, and
>
> (c) the gravity of the matters alleged.

14. This is a classic statement of *Briginshaw* and directs the Court's attention on the nature of the cause of action, the subject-matter and the gravity of the allegations.

15. It is worth noting that subsection (2) contains a discretion with respect to the matters relevant to the Court's attainment of the relevant state of satisfaction.[11] This highlights the earlier point that the application of *Briginshaw* is highly specific to the facts and circumstances or nature of the matter at issue.

16. In addition, s 142 of the *Evidence Act*[12] establishes the standard of proof for the admissibility of evidence as being satisfaction on the balance of probabilities. Subsection (2) of s 142 again requires the Court to consider the gravity of the

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[9] *Australian Financial Services and Leasing Pty Limited v All Up Finance Pty Limited* [2012] NSWSC 1004 at [59]–[60] per Macready AsJ, applying the statements of principle in *Gianoutsos v Glykis* [2006] NSWCCA 137; (2006) 65 NSWLR 539 at [45]–[49]; John Dyson Heydon, *Cross on Evidence* (LexisNexis Butterworths, 9th ed, 2012) at 340–1; *Qantas Airways Limited v Gama* [2008] FCAFC 69; (2008) 167 FCR 537 at [123]–[139].

[10] *Qantas Airways Limited v Gama* [2008] FCAFC 69; (2008) 167 FCR 537 at [123]–[139] (per Branson J, French and Jacobsen JJ agreeing).

[11] See, for example, *Geyer v Redeland Pty Ltd* [2013] NSWCA 338 at [51]–[54] (per Beazley P and Ward and Emmett JJA); *Qantas Airways Limited v Gama* [2008] FCAFC 69; (2008) 167 FCR 537 at [138].

[12] The section provides in full:

> **142 Admissibility of evidence: standard of proof**
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> (1) Except as otherwise provided by this Act, in any proceeding the court is to find that the facts necessary for deciding:
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> (a) a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not, or
>
> (b) any other question arising under this Act,
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> have been proved if it is satisfied that they have been proved on the balance of probabilities.
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> (2) In determining whether it is so satisfied, the matters that the court must take into account include:
>
> (a) the importance of the evidence in the proceeding, and
>
> (b) the gravity of the matters alleged in relation to the question.

allegation and the importance of the evidence in the proceeding in determining whether it has attained the requisite state of satisfaction.[13]

The Application of *Briginshaw* in the Land and Environment Court

17. No doubt because of the nature of the jurisdiction of the Court, explicit discussion of *Briginshaw* does not arise frequently in its judicial decisions. The application of s 140 of the *Evidence Act* and the *Briginshaw* principle tends not to be a matter of controversy.

18. However, it is worth referring to three illustrations of the principle's application.

19. The first is Biscoe J's decision in *Shellharbour City Council v Stewart*.[14] In that case his Honour undertook a comprehensive summation of authorities and principle with respect to s 140 of the *Evidence Act* and its importation of the *Briginshaw* principle. I would commend it as the starting point for any detailed consideration of the principles concerned.

20. *Shellharbour v Stewart* concerned alleged breaches of s 664(1) and (1A) of the *Local Government Act 1983* (that section deals with disclosures, or misuse, of information obtained in connection with the administration or execution of that Act). His Honour made reference in particular to the authoritative statements of the Court of Criminal Appeal in *Gianoutsos v Glykis*[15] and of the Court of Appeal in *Vines v Australian Securities and Investments Commission*.[16] These authorities highlight, in essence, that the question for the Court is one of "reasonable satisfaction" and that the standard remains always the civil standard, namely, whether an allegation has been proved on the balance of probabilities, even while the seriousness, gravity and subject-matter are taken into account by virtue of s 140(2). In *Shellharbour v Stewart* it became common ground that the alleged breaches were of a serious nature.

21. Second, is the decision of Pain J in *NA & J Investments Pty Ltd v Minister Administering the Water Management Act 2000 (No 2)*,[17] referred to *Briginshaw*, as reflected in s 140(2) of the *Evidence Act*, on a costs application pursuant to s 99 of the *Civil Procedure Act 2005* on the ground of serious neglect or serious incompetence (s 99 relates to the liability of legal practitioners for unnecessary costs incurred).

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[13] *R v Petroulias (No 8)* [2007] NSWSC 82; (2007) 175 A Crim R 417 at [16]–[17] (per Johnson J); Judicial Commission of NSW, *Civil Trials Bench Book*, at [4-1640]; *B v Medical Superintendent of Macquarie Hospital* (1987) 10 NSWLR 440 at 460-461 (per McHugh JA).
[14] [2008] NSWLEC 151 at [8]–[10].
[15] [2006] NSWCCA 137; (2006) 65 NSWLR 539 at [45]–[49] McClellan CJ at CL (with whom Sully and Hislop JJ agreed).
[16] (2007) 62 ACSR 1; [2007] NSWCA 75 at [808] – [813] (per Ipp JA).
[17] [2011] NSWLEC 98 at [262].

22. Her Honour accepted that the onus of proof to justify a costs order being made under s 99 lay on an applicant, and further, she accepted the submission that the gravity of the allegations and the serious nature of the proceedings and subject-matter must be taken into account in determining whether she had attained the requisite state of reasonable satisfaction, referring to the real evidentiary hurdles involved and the need for more than "inexact proofs, indefinite testimony, or indirect references", a phrase drawn originaly from statements of Dixon J in *Briginshaw* itself[18] and much cited since.

23. Third, in *Maule v Liporoni*,[19] Lloyd J was dealing with a claim of mala fides in the granting of a development consent. He stated that: "the onus is on the applicant to establish that the determination is made with mal fides on the part of the council in granting the development consent". He observed that the applicant accepted that, having regard to the seriousness of the allegation, the *Briginshaw* principle was applicable. He reiterated that this required something more than "inexact proofs, indefinite testimony, or indirect references" (again citing *Briginshaw* itself).

24. His Honour emphasised that "the Court should proceed with much care and caution before finding that such a serious allegation as *mala fides* is established" and went on to refer to the matters required to be considered under s 140(2) of the *Evidence Act.* He noted that the strength of the evidence necessary to establish the matters alleged may vary according to the nature of what is sought to be proved. In this case the evidence did not allow him to form the relevant state of satisfaction and the application was dismissed.

Conclusion

25. Put simply for the purposes of these introductory remarks, *Briginshaw* should be seen as not as a standard of proof, but as a standard of *satisfaction*. That is to say, that the more serious the allegation, the more serious or anxious should be the consideration given by the decision maker that he or she has attained the necessary state of reasonable satisfaction or persuasion that the facts in dispute are more likely than not to exist.

Justice Rachel Pepper

[18] *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361–362.
[19] [2002] NSWLEC 25; (2002) 122 LGERA 140 at [104]–[106].