

THE NEIL BURNARD TRIAL NOTES..

Introduction.

NB. These notes should be recognised for what they are: a transcription of the hand written scribble I took at the trial. They are virtually unedited.

I attended every day of Neil Burnard's trial. I do not have the skills to catch and record every spoken word. People speaking in low voices in a room with poor acoustics exacerbated the problem. Nor am I responsible for the misspellings of people's names. I simply did my best, and it is certain my record of the trial contains minor errors. I can only hope they are not of major consequence.

The trial has been a very complex matter, perhaps unnecessarily so because of the wording of the indictment. I had intended to portray the details of the trial as best I could, and leave you to make up your own minds on certain matters. However I now believe explaining a number of items that arose throughout the trial will facilitate understanding. They are as follows.

1. The wording of the indictment gave the Crown an almost impossible task of gaining a conviction. The judge on several occasions drew the Crown's attention to this fact.

One of the difficulties lay in having to prove Keibel Investment Bank did not exist was not limited to the existence of the name Keibel Investment Bank. The prosecutor had to prove Keibel Investment Bank did not exist. Forgetting about the registration of the name under law, do the Beatles exist? Of course, the individual members of the band do, but that is not the question. The registration of the name makes little difference to the existence of the name. Another example given was, do the Rabbits exist? It was the judge's contention that such names/labels show existence.

This somewhat esoteric argument arose because Richard Beck had the bright idea of promoting the Keibel companies under the unregistered trading name/banner Keibel Investment Bank. Throughout Australia, Keibel companies uniformly had stationery, business cards and signage carrying the words Keibel Investment Bank. Although Keibel used the trading name illegally because of the usage of the restricted word *bank*, it is immaterial to the existence of Keibel Investment Bank.

2. The prosecution used the word *entity* in the framing of the charges. There is no legal definition of the word entity under law. However many dictionaries say an entity has to exist. Naturally, this was another item the legal parties seized upon in their war of overly precise semantic meanings. The legal fraternity spent many happy hours on this matter. Eventually the judge decided on an acceptable "common-sense" meaning of the word. I don't altogether agree with any of the parties in this matter. In use, the word has meaning beyond its dictionary definition.
3. It came out in the pre-trial exchanges a Keibel website promoted itself as a "boutique bank" prior to June 2002. The reserve Bank complained to APRA, and a MS. Hoare rang someone she believes was Neil Burnard. She claims he blamed the web designer, and said he would see it was removed. However, the judge disallowed this evidence because it was prior to the date of the first indictment.

4. In a private conversation, Felice claimed Neil Burnard had used the word *like Macquarie* in reference to Kebbel Investment Bank. This evidence was not allowed because it was judged prejudicial to Neil Burnard.
 5. Although a Commonwealth prosecution, the charges fell under NSW state law. The charges are not for violations of Section 66 of the banking act. [I learned later that breaches of Section 66 are not as serious as those with which Neil Burnard had been charged] .
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PRE-TRIAL.

21/04/2008

The jury, which had not been created at that point in time, was not present for the legal arguments.

- * The prosecution did not charge Neil Burnard under Section 66 of the Banking ACT of 1959 for his use of the word *bank*.
- * A rough description of the charge is that he used the word *bank* to gain financial advantage knowing that Kebbel Investment Bank did not exist as a bank, and claimed he was a Director of the said non-existent entity. Kebbel Investment Bank was not even a registered trading name. As there was no banking entity called Kebbel Investment Bank, the charges were false pretences.
- * There were 9 counts (charges) involving 6 investors. Six of the charges involved oral statements, and the other three involved published statements.
- * The alleged offence took place at seminars, and on letters.
- * Certain evidence was inadmissible on the basis it would be prejudicial to the interests of the defendant. E.G. Felice's statement that he thought Kebbel Investment Bank was a bank in the sense as Macquarie Bank, etc.
- * Only a restricted set of corporate identities can describe themselves as a bank. The exceptions are clearly defined.
- * A surprise to the Judge, prosecution, and defence is that Section 66. does not define what a bank is. Rather, it describes a process. A bank must be a registered ADI - Approved Deposit Institution. However, even if an organisation has met the requirements of the process, an organisation cannot call itself a bank without the approval of APRA.
- * The following relates to APRA's knowledge of Kebbel Investment Bank.
 - 1). The Reserve Bank complained to APRA about the use of the word bank in 2002. Later evidence showed that the words "Boutique Bank" had appeared on a Kebbel website.

- 2). In 2002 a Ms. Hoare, from APRA, had reason to contact Keibel. She believes she spoke to Neil Bernard concerning the use of the word *bank*. There is no direct confirmation she spoke to the accused. It is reputed Bernard said he would have the matter looked at. Unfortunately, her notes were for her personal use. They contain the word *spiel* (an ASIC internal term used for the unimportant banter at the beginning of telephone conversations.). Ms. Hoare sent her information on to her superior.
- 3). APRA contacted Simon Bell, who apologised and said he would have the offending words removed. This occurred in June 2002.
- 4). APRA did not contact Keibel again until August 2005.

The lawyers then went through the proposed case, arguing points of law as to what would be admissible evidence.

Tuesday 22-04-2008.

The preliminary discussions continued throughout the day.

Wednesday, 23-04-2008.

The morning began with a continuation of the process from Tuesday.

With the lawyer exchanges completed, the Judge outlined everything on which both parties had agreed, and on those points on which he had ruled. The judge spoke in a low voice and I had great difficulty in following every word. It made accurate note taking impossible.

THE TRIAL

Wednesday, 23-04-2008..

The Jury was empanelled around 2 PM, and the trial began

The Judge made his opening address to the jury, and explained that in due course many items that would receive mention, including APRA, Bell, Beck, the 2002 incident, and the collapse of Westpoint. The judge pointed out Bernard was not responsible for the collapse of Westpoint.

Both parties were given the opportunity to give an opening address to the jury. The defence chose not to. The prosecution then outlined what it would show/prove during the course of the trial.

Note : The prosecution calls each of the “investor” witnesses in turn.

Joseph Felice in the witness box.

The prosecution questioned Felice on his investments in Westpoint, and how the accused introduced himself at particular Online Super workshops. Felice said Bernard had used the words *Director of Keibel Investment Bank*. This also occurred at other specified workshops. The prosecution submitted promotional material containing the heading *Keibel Investment Bank*. In addition, the prosecution submitted letters Keibel sent to Felice in which Bernard signed himself as *Director of Keibel Investment Bank*.

In the defence's questioning of Felice, he tried to establish that Felice had acted solely on the advice of the Online Super advisor, Terry Stone, to purchase Westpoint Products. Felice strenuously denied that Terry Stone was the sole person on whom he relied, and said that there were numerous people upon whom he had relied.

The other point the defence tried to establish without gaining an admission to the contrary was that Neil Burnard had introduced himself at the given seminars as from Keibel NSW, a distributor of financial products.

One major point arose from this exchange: the defence asked Felice if the signatures on two of the letters signed by Burnard as a Director of Keibel Investment Bank were the same, and Felice answered no!

The day finished with Felice still in the witness box.

Thursday, 24-04-2008

The defence continued trying to break Felice's memory of Burnard describing himself publicly with the words a *Director of Keibel Investment Bank* without avail.

Brian Bayliss in the witness box.

An almost identical repeat performance of the exchange involving Felice followed. Again the defence could not get any major admissions to the contrary from the witness.

Mrs. M. Eribe in the witness box.

An identical pattern to the earlier witnesses occurred.

Monday 28-04-2008.

Mrs. C. Roscoe in the witness box.

Again the defence iterated the same pattern of questioning as for other witnesses.

Howard Spence in the witness box.

The Prosecution and defence followed the same pattern as above.

While the line of questioning was similar, Mr. Spence did not attend an Online Workshop. He had attended a meeting at the Keibel Offices on the recommendation of his adviser, who came from Solutions 1.

Further Spence, concerned about the safety of an investment, rang Burnard, who assured him of the safety of the product. Burnard advised him to split his money over two products if he was concerned.

Mr. J. Roach was unable to attend as witness because of illness.

The prosecutor read his statement into the record.

ASIDE. In all of the above cases the defence attempted to destroy the witnesses credibility of Burnard introducing himself as a "Director of Keibel Bank". He failed dismally on each and every occasion.

That ended the calling of "investor" witnesses.

OTHER WITNESSES.

Irine Klar in the witness box.

Ms.Klar was an ex-Kebbel employee.

The defence immediately raised an objection. It claimed the period of her employment, 19/01/2004 - 25/12/2005, fell outside the date of the events in the charges, which all occurred in 2003. The judge sent the jury out of the court. A long period followed with Ms. Klar in the box answering questions. Eventually, with all legal points covered, the judge ruled that the trial should continue with Ms. Klar in the witness box, and the jury returned.

She stated under questioning that Kebbel NSW and Kebbel Investment Bank were two names by which she knew the company. When asked why, she said it was from the work she performed as part of her duties. She saw logos, business cards, letterheads, and the presentation slides.

The master set contained the common elements for all presentations. Kebbel selected appropriate slides from the master for a particular presentation. Under the direction of Neil Burnard, she prepared, and customised, the Power Point presentations from the master set.

The prosecution queried the witness about the words Kebbel Investment Bank on slide 1 of presentations. She stated that Online Super presentations always carried them, but not presentations for Prime products. The latter carried the words Kebbel Managed Investments.

On occasions she signed for Neil Burnard (using the standard per format). When questioned on the Felice evidence of two Burnard signatures not being the same, she agreed they were different. She recognised one as Burnard's, but could not identify who had signed the other.

On two occasions she did presentations in the absence of Neil Burnard.

The defence queried her on who had the power to change the content and format of slides. She agreed the presentations were in continual development, and WA often made changes. However, the first page stayed the same until late 2005.

Tuesday 29-04-2008.

Klar still in witness box

Much was said about the business cards, with many people in the organisation possessing cards with the Kebbel Investment Bank logo on the left hand side of the cards. The logo also was on stationery. It was also the case for Kebbel Victoria, KebbelWA, and Kebbel head office. There was Australia-wide uniformity in presentation.

A Mr. Eric Lim, employed in WA, looked after the website and was also responsible for the common format of documents around Australia.

In relation to Keibel Investment Bank, Klar considered it to be a trading name.

In relation to a Neil Burnard signature on a document she couldn't say if it was written or scanned.

She was shown two Burnard Business cards. Both contained a Bachelor of Business qualification, but one had the additional qualification, ANZ fellow

Ms. Klar could not identify how one set of cards was ordered, and which card was the older.

Ms. Saran Martin in witness box.

She was employed at Keibel during the period 05/2005 to 11/2005 as a marketing coordinator, but much of her time was spent in administration work.

She had worked for Westpoint before joining Keibel, and knew of Keibel Investment Bank. At a meeting in late 04/2005. The matter was raised that Keibel Investment bank could be a hindrance. She said Burnard rang Beck immediately the use of the word bank was raised, He said it was ok to use Keibel Investment Bank by the Directors, who she took to mean Beck and Bell.

She worked in the same office as Ms. Klar and two other people. She observed Neil Burnard approved the presentations prepared by Klar.

An important point arose when she spoke of the Keibel Logo. She said that it had largely been the work of Richard Beck who told her during her employment at Westpoint it had a Yin-Yang design. From her evidence it is fairly certain Beck created the concept of Keibel Investment Bank.

In 05/2008 the name Keibel Head Office changed the trading name *Keibel Investment Bank* to *Keibel Funds Management*.

NB Burnard told Klar to change the name throughout documents to Keibel Funds Management, and to change the name on the Foyer door. The orders for this came through Perth.

Wayne Bailey in witness box.

He started with Keibel on 9-06-2004.

He gave presentations to clients and planners, but not to Online Super.

He had no opportunity to alter the presentations, as he had no access to the master, which was on Klar's computer. Klar prepared the material, and Burnard approved it. That was office procedure,

He described the Power Point presentations as standard/generic.

Although the presentations varied slightly, the first slide was always the same - it contained a reference to Keibel Investment Bank. This slide was changed in mid 2005 to read Keibel Funds Management.

He had spent 13 years in general banking and ten years in currency trading.

Disturbed by the use of the word bank, he printed a copy of a portion of the Banking Act and gave it to Neil Burnard. Burnard immediately rang Beck. Bailey could only hear one side of the conversation, but at the end of it Burnard told him “We have a legal opinion we can use it”.

On more than one of the occasions he attended Monday morning meetings, he heard someone else raise concern at the use of Keibel Investment Bank. On each occasion Burnard replied, “We have a legal opinion on the matter”.

While he had no access to the company structure, he knew Keibel NSW Pty Ltd, Keibel Victoria Pty, and Keibel WA Pty Ltd existed with Keibel Ltd being the head office. He knew Bell and Beck were the Directors of Keibel and Burnard reported to Beck.

He understood the Keibel group of companies used Keibel Investment Bank as a trading name for brand image purposes, and it appeared on the doors of Keibel offices.

Ian Lanser in witness box.

Joined Keibel in July 2003 as Product Development Manager.

Lanser raised the problem of Keibel Investment Bank, which he understood was a trading name/ brand image for the Keibel group of companies with Neil Burnard.

Once again he knew of the Keibel companies and their relationship to Keibel Ltd. He understood Beck was the MD.

Lanser claimed the use of Keibel Investment Bank was a distraction to his job performance at a “kickstart meeting” in January 2004. On ringing clients for the first time, they immediately asked, “Who is Keibel Investment Bank? I’ve never heard of them. Tell me about them” Keibel performed no banking functions. Their business was the promotion and distribution of business products. Burnard replied, “We have legal opinion we can use it”. He was to raise the matter at meetings again during the period of his employment, which ended in December 2005. Burnard gave the same answer on each occasion.

On completion of Lanser’s evidence, the judge dismissed the jury in order to carry out a legal discussion. The fact the word entity has no defined meaning under law concerned him greatly. Its importance lay in that formed part of the charge. The prosecution gave an explanation of how he understood the meaning in this context. The defence did not agree, and the day was adjourned. The judge said he would make a decision on the matter overnight.

Wednesday 30-04-2008.

The day began with the judge discharging a juror because of a death in the family. The trial continued with 11 “good men and true”.

Brian Milmore in the witness box.

He said he was a Director of Anstead, also known as Compliance Alliance.

Keibel contracted him as compliance officer in 2001. He reported to Beck.

He came to Keibel through his contact with Beck. Milmore had also contracted to Westpoint.

His duties included obtaining licences for various Keibel companies, and the production of procedure manuals for all Keibel companies on how they conducted business.

He says he understood Keibel NSW, Keibel Victoria, and Keibel WA were independent companies.

He attended part of a Keibel conference, which contained representatives from all Keibel companies, at Keibel House in WA

In answer to business arising from a previous meeting, held on 30/04/2004, Beck and Bell had ordered the use of Keibel Investment Bank on all stationery, and the signage on Keibel company doors. He said Beck stated they must use the term Keibel Investment Bank with discretion.

He believed, during his time with Keibel, that Keibel NSW, Keibel Victoria, and Keibel WA were independent companies.

Under questioning by the defence, he claimed he thought that Keibel Investment Bank was an internal branding. He understood Beck was the “boss”, and did not know Beck had an interest in the “state” Keibel companies.

Defence brought up the question of business cards with the words on it, and he said he was unfamiliar with what was on the cards. In a confused period of interviewing, he said in evidence given a lower court he had stated the wrong year.

Among his duties, he monitored the state Keibel companies for compliance in accordance with the procedure manuals he distributed. He had the power to issue breach notices if they did not comply.

He said Beck had led a discussion on trading names and national operations. He and Cooper, the Keibel Financial Officer, had a discussion on the use of the words Keibel Investment Bank and the implications under the Banking Act prior to the national conference. He had not brought the matter up at that conference because he felt Beck was not inclined to change his mind. Again he thought the matter was internal branding, and did not find out until much later that was not the case. He understood the need for a national branding/image.

He believed Beck created the name Keibel Investment Bank, and Beck had said “keep it low key at the 2004 conference”.

He again claimed he thought the name would not be used externally because of his previous discussion with Beck.

The defence said there was no evidence of the offending words being used externally. Nor was there any about the matter of the business cards.

On 02-06-2004 Kebbel extended Milmore's contract. The confidentiality agreement he signed was entered into evidence. He said two other people worked at Anstead under the branding of Compliance Alliance.

The defence asked Gilmore if he knew of Beck's background, including his period with KPMG in compliance, and he replied in the affirmative.

Milmore stated he had not seen Beck for some time, and had last seen Bell in January of 2008.

He said at the Conference of 08/2004 Beck and Bell made a commercial decision, and he knew the group as Kebbel Investment Bank after that.

In a decision in June of 2005 saw the trading name changed from Kebbel Investment Bank to Kebbel Group. . Gilmore maintained his belief in the independence of the state companies. Beck asked Gilmore when he was going to the bank again. On asking what he meant, Beck replied Kebbel Investment Bank. Gilmore said that he could not use the reserved word bank in a name, and Beck replied what about the Property Bank? The Property Bank was a registered WA company.

Gilmore now knew Kebbel changed the name because APRA told them to do so.

David Lewis in the witness box.

He is General Manager of the APRA Supervisory Support Division. The Reserve Bank employed him prior to his time with APRA.

He said a bank must be an Approved Deposit Institution. The definition of an ADI has been extended to include building societies and credit unions. It is possible to gain exemption for the word bank to appear in a business name, but only when it cannot be confused with a bank.

He repeated the only institutions that can become ADI are banks, building societies and credit unions.

Merchant banks cannot use the word bank in their title, and must make it clear at the time of signing (above the signature box) that they do not give any priority in the event of liquidation. A merchant bank deals in wholesale, and does not in the normal sense deal with the public. They are required by law to produce figures that are used by APRA.

It is possible for a non ADI organisation to be engaged in banking. In such cases it cannot use bank in the name of the organisation. E.G. J. P. Morgan, Friends Bank

APRA searches of the APRA database found no application from Kebbel to use the word bank.

Patrick Horan in witness box.

ASIC Representative.

Searches of the ASIC database found no entity by the name of Kebbel Investment Bank. I.E. it was not a registered corporation, nor did it appear on the National Register of Business names.

That ended the witnesses for the prosecution.

Neil Burnard's academic record from University of Technology was entered into the record. He obtained a Bachelor of Business in 1995 with at least one high distinction.

He was paid on commission for the distribution of Westpoint products.

A legal argument then ensued.

A download of the Keibel website in 2002 (before June) gave a description of Burnard's experience. It listed among other things, his vast experience in the commerce world over twenty years, and he as the principal of Keibel NSW, which he had co-founded.

It was stated that a company owned by Burnard had owned 100 shares in Keibel NSW, and Beck had owned 20.

There was evidence that Ms. Hoare from APRA had contacted Neil Burnard concerning the word bank

It was also alleged, on 01-05-2002, the term *boutique bank* appeared on the website in addition to Neil Burnard's qualifications and experience.

The APRA evidence was excluded by the judge on appeal because it fell outside the period of the charges.

Thursday 01-05-2008.

With the jury not in the box, the defence called for a "no trial".

The argument centred on the Keibel Investment Bank logo on Burnard's (and others) business card(s). The claim was that it should be taken in context, as all of the Keibel Employees across Australia knew Keibel Investment Bank was only a trading name, and it was not a bank.

The defence cited the card given to Felice also had the name Keibel NSW Pty Ltd and its ACN number.

It was also claimed as Gilmore had not raised his objection to the word bank in the October meeting of 2004, how could Burnard have known the use of the word bank was illegal?

We were then treated to another argument on the existence of Keibel Investment Bank.

It was argued that director is a general word, and not restricted to business.

Finally, the judge ruled Burnard had a case to answer.

THE CROWN'S ADDRESS TO THE JURY.

The judge explained to the jury the precise meanings of the words in the counts, their nature, and the particular counts involving each witness. He spoke about the use of the words I am a Director of Kebbel Investment Bank in terms of how they were to make a judgement. He stressed a decision could only be made on the evidence in relation to counts in the indictments.

He mentioned the ASIC searches which did not find anything relating to Kebbel Investment Bank and APRA's restrictions on the use of the word bank. Kebbel Investment Bank was not an ADI, and had never applied to become one.

He explained to the jury that inference meant was the same as in everyday English. However, there could be no competing possibilities.

On the matter of the word *entity*, he asked the jury to use everyday commonsense in its use.

He pointed out how Burnard had sought to sway the investors, and that the words I am a Director of Kebbel Investment Bank were very persuasive in a commercial context to a mum and dad audience.

He drew out how Burnard's claimed experience might sway an audience. He also pointed out Burnard had assured Felice and Spence of the safety of the product.

He stated it was the job of the jury to determine if there was inference in Burnard's use of the word.

The Crown stated Burnard had no prior convictions.

THE DEFENCE'S ADDRESS TO THE JURY.

The defence called two character witnesses. Both had known Burnard for some time socially, and had limited financial dealings with him, but most of their evidence centred on social exchanges. They were respectively Mrs Sandra Spencer (a real estate agent), and a Mr. Lazlo Korlaki (self employed share trader).

The defence began by stating what the prosecution had to prove

The defence said the prosecution was in error on every count, and he would demonstrate this during his address

The defence then attacked the credibility of the witnesses based on the length of time since Burnard uttered the alleged words I am a Director of Kebbel Bank. He illustrated this with how Roach had claimed he found the name Kebbel Investment Bank on the ASIC website when ASIC claimed it had never appeared.

He tore into Milmore's credibility on the basis here was a man who knew it was wrong to use the word bank, but had not brought it up at the National conference. He claimed it destroyed any credibility of Milmore's evidence.

He rightly pointed out that much of the prosecution's evidence lay outside the indictment, and was therefore irrelevant.

As Beck, a man of great experience who had spent three years in Corporate Governance with KPMG, had told Burnard they had a legal opinion, Burnard would have bowed to his superior knowledge..

He again raised the question of existence and the use of trading names.

Note : Although his address was overlong and repetitive he brought up many things that troubled me in the prosecution's case to date. Had I been a juror, not knowing what I know, and having knowledge of the material excluded in the case, I might not have brought in a verdict of guilty beyond reasonable doubt.

THE JUDGE'S ADDRESS.

The judge began addressing the jury with an outline summary of various pieces of evidence, and the case as outlined by both sides.

Once again, the Crown came in for heavy criticism of the wording of the account.

Monday 05-05-2008.

The Judge's advice to the jury was excellent. It laid out the case for the prosecution and defence in simple, easily understood terms. He quoted both sides of the argument for several witnesses.

The jury retired to decide their verdict.

They made two requests throughout the day. The first of these was for a copy of Bayliss's evidence.

Late in the afternoon they requested from the judge if they could use the evidence of one witness to corroborate another witness. They also requested the transcripts of the evidence of Bayliss, Roach, and Spence. They also noted two witnesses attended the same seminar.

The judge granted the latter, and explained the 9 counts constituted 9 different trials. He told them they could use the tendency of the alleged *Kebbel Investment Bank* words of witnesses if they so desired.

The jury then opted to begin again at 9.30 on Tuesday 6/05/2208

Tuesday 06-05-2008.

The Jury returned their verdict just before lunch.

They found Burnard guilty on all nine counts.

Sentencing will hopefully take place in six week's time. This is not a matter of slackness on the judge, who has shown an impeccable attention to his duties through the trial. The problem lies in that there are documents and statements of evidence not admissible during the trial, and other matters, that he must take into account in handing down a sentence. If there are any delays, Burnard will be sentenced when the judge gets back from overseas. Meanwhile, the authorities have confiscated Burnard's passport, and he must report to the police at the prescribed interval.

I found the following matter of great interest.

The judge stated he never looks at any material to do with those involved in a case he will preside over. However, in this case, the evidence showed that senior people, including directors of Keibel companies, seemed to have used Keibel Investment Bank in the same manner as Burnard. He asked the Crown prosecutor if this was the first of a series of court cases, and the Crown prosecutor said no.