

JUDGMENT OF THE COURT OF APPEAL IN
BRITISH AMERICAN TOBACCO AUSTRALIA SERVICES
LIMITED v COWELL (as representing the estate of ROLAH ANN
McCABE, DECEASED)

ANALYSIS¹

1. Background

On 22 March 2002, Justice Geoffrey Eames of the Supreme Court of Victoria made orders striking out the defence of British American Tobacco to a claim by 51 year-old lung cancer sufferer Rolah McCabe, and ordering judgment for the plaintiff. After a 16 day hearing, during which much evidence was led and five individuals who had deposed on behalf of BAT were cross-examined, Justice Eames concluded:

“In my opinion, the process of discovery in this case was subverted by the defendant and its solicitor Clayton Utz, with the deliberate intention of denying a fair trial to the plaintiff, and the strategy to achieve that outcome was successful. It is not a strategy which the court should countenance, and it is not an outcome which, in the circumstances of this case, can now be cured so as to permit the trial to proceed on the question of liability. In my opinion, the only appropriate order is that the defence should be struck out and judgment be entered for the plaintiff, with damages to be assessed.”[para 384, judgment of Justice Eames²]

The conduct to which Justice Eames referred included:

- the deliberate destruction of thousands of relevant documents to keep them from prospective plaintiffs such as Mrs McCabe;
- misleading the Court about what had become of the missing documents; and
- the ongoing “warehousing” of documents, to keep them from the Court.

A 6-member jury was empanelled to determine the amount of compensation to be awarded to Mrs McCabe. On 11 April 2002, it awarded her \$700,000.

BAT appealed against Justice Eames’ decision. On 26 July, the Court of Appeal granted leave to Mr Brian Wilson, a solicitor at Clayton Utz, of whom Justice Eames had been critical, to make submissions on the hearing of the appeal. The appeal was heard by the Victorian Court of Appeal over six days in late August and early September. On 26 October, Mrs McCabe died. On 6 December 2002, the Court of Appeal gave judgment, allowing BAT’s appeal, and ordering that the case be sent for re-trial.

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² <http://www.austlii.edu.au/au/cases/vic/VSC/2002/73.html>

2. Analysis of the Court of Appeal's decision

The following is an analysis of the Court of Appeal's decision, which can be found at <http://www.austlii.edu.au/au/cases/vic/VSCA/2002/197.html> . Where views are expressed by the author, these are placed in italics, so as to clearly differentiate between the author's views and the Court of Appeal's judgment. WD & HO Wills was the predecessor to BAT. For the purposes of the judgment, and this analysis, no distinction is made between them.

All paragraph numbers are paragraph numbers in the Court of Appeal's decision, unless otherwise indicated. Footnotes in the Court of Appeal's decision have not been reproduced here.

The Court of Appeal identified four main areas of dispute on the appeal [12]:

1. Whether and to what extent BAT had defaulted in complying with an order for discovery "including whether such compliance as there was had been misleading";
2. BAT's document retention policy, as it was called, and the destruction of documents by BAT
3. Prejudice to the plaintiff in consequence of BAT's actions; and
4. The appropriate order in all of the circumstances.

The Court of Appeal held that Justice Eames "fell into significant error" in relation to the first and second of those issues just identified, and also on a question of waiver of legal professional privilege, and the order striking out the defence "was not justified" and the appeal should be allowed. [para 13]

Document Retention Policies

The best place to start an analysis of the Court of Appeal's judgment is in its overturning of Justice Eames' findings about the purpose behind BAT's destruction of relevant, or potentially relevant, documents. This is in part because that is, in any case, one of the central issues of the case; but also because the Court of Appeal found that Justice Eames' imagining of a "sinister" purpose "served to colour his consideration of the other questions falling for determination". [28]

The Court of Appeal began by noting that "the defendant was obviously a very large business organisation ... and as such many documents were doubtless created by it or received by it in the course of its business activity". [71] It clearly had in place "some sort of document management strategy" for "many years, and well before 1985". It was a strategy to "take account inter alia of statutory requirements for document retention" – this, said the Court, "tended to support the policy's being called a "document retention policy" rather than, as the plaintiff was apt to suggest - somewhat unfairly, we think - a document destruction policy". "[T]he strategy was surely in those days [ie in 1985] a matter of simple housekeeping. In other words it existed for an "innocent" purpose, meaning for a purpose with no thought to deliberately disadvantaging prospective

litigants in future litigation against the defendant or other tobacco companies. That policy “underwent a measure of review” in 1985. [73]

Justice Eames found “that the Document Retention Policy which was put in place did have some quite legitimate management and administrative purposes and benefits” – but he was “entirely satisfied that the primary purpose of the development of the new policy in 1985 and subsequently was to provide a means of destroying damaging documents under the cover of an apparently innocent house-keeping arrangement.” [para 19, Justice Eames’ judgment] The Court of Appeal agreed with BAT’s challenge to this finding of purpose. That incorrect finding “served ... to colour much of what followed”. [76]

The 1985 Document Retention Policy

Justice Eames found that the 1985 Document Retention Policy was created “in the anticipation that there would be litigation brought against WD & HO Wills with respect to smoking and health issues”. [para 289, Justice Eames’ judgment] BAT did not challenge this finding “though it preferred "expectation" or "belief" to "anticipation"”. [80] Justice Eames also found that :[para 289, Justice Eames’ judgment]:

“The primary purpose of the policy, as then formulated, was to ensure the destruction of material which would be harmful to the defence of any such litigation.

Clayton Utz advised Wills on the wording of the policy, and ensured that words were inserted into the written policy document to which reference could be made in order to assert innocent intention and to disguise the true purpose of the policy.”

The Court of Appeal disagreed. They found that “it is by no means clear that Clayton Utz “advised Wills on the wording of the policy””[81]; and that “there was no evidence, whether documentary or oral, to support the conclusion that Clayton Utz, or Brian Wilson in particular, ensured that any words at all were "inserted" in the policy, let alone inserted in order to enable innocent purpose to be asserted and thereby, as the judge considered, to disguise the true purpose of the policy” [82].

It appears that the Court of Appeal did not explain why the first of those findings set out above was to be rejected, though they said that the latter “was the most damaging for the defendant” [80]. In particular, no explanation was given of the Court’s reference [78-79]to “an inter-office memorandum dated 30 December 1985, addressed to all Wills directors, to the general manager, corporate affairs, Amatil and to the secretary of Wills”, which was a request from the managing director that the addressees “undertake an examination of all records in all areas under your control to ensure that our previous good management practices are maintained”. “In terms the memorandum of 30 December 1985 was directed to the increase in the “pressure for production of information in government inquiries, litigation and otherwise” and reasons were listed why unnecessary data should not be retained if not required: for example, the time to sift through the documents to find what was required and what was not, the possibility that

documents may be required on short notice under order for discovery or subpoena, and so on”. [79] Clearly, the Court of Appeal thought that a desire not to retain “unnecessary data” for reasons such as the time it would take to sift through them to find out “what was required and what was not”, and “the possibility that documents may be required on short notice under order for discovery or subpoena, and so on” was unrelated to the question whether the “primary purpose of the policy, as then formulated, was to ensure the destruction of material which would be harmful to the defence of any such litigation”, as Justice Eames had found. In other words, it may be inconvenient or burdensome to be required to give discovery of relevant documents, but to destroy them to avoid that inconvenience or burden is quite different from destroying them to keep them from being used against the company in litigation.

The 1990 Review of the Document Retention Policy

According to the Court of Appeal, those at BAT who sought to have the document retention policy reviewed in 1990 were “fully alive to the possibility that, if sensitive documents were destroyed, adverse inferences might be drawn against the company in the course of litigation. ... What seems to us to have been the concern was whether the defendant would be acting illegally if it destroyed documents, whether sensitive or not, once litigation could be anticipated.” [84] Hence, Mr Gulson, in-house counsel at BAT, approached Clayton Utz in March 1990 “for advice on how to handle the document retention policy - meaning, of course, the destruction of documents under it”. [84] The request for advice “proceeded upon a memorandum written by Mr. Foyle, an English lawyer, which, the judge said, “was unambiguous as to the true purpose of the policy”.” [84]

The Court of Appeal disagreed with Justice Eames. Mr Foyle’s memorandum had, in the words of the Court of Appeal, “struck the judge as somewhat sinister”. Yet it appeared to the Court of Appeal “to be no more and no less than a document fully and frankly setting out the difficulties facing the tobacco industry given that a wave of litigation was by then anticipated”. “Clayton Utz was asked to advise specifically on the extent to which the current retention policy and the manner of its implementation created problems for Wills in product liability litigation, what steps could be taken to improve the position, and what strategy should be adopted by Wills for handling the documents issue in such litigation. ... All the questions upon which Clayton Utz was asked to advise were to be answered in the context of the facts or assumptions set forth in the memorandum and that seems to be perfectly proper and correct; indeed, we cannot imagine what else the defendant might have done, in order to make it clearer that the conclusions now drawn against it were not justified. Of course the defendant was concerned to know what it might do to protect its sensitive documents in subsequent litigation: but how else could that advice have been sought without the defendant first disclosing the difficulties as it saw them and then seeking, from professional persons, proper advice on the issues? That, it seems to us, was the whole purpose of the Foyle memorandum. That it was “unambiguous as to the true purpose of the policy” is correct, if by that was meant that the policy was there in order that documents, generated in the course of the defendant’s business, might properly be destroyed or not.” [89]

Justice Eames found [para 289, Justice Eames' judgment]:

"Clayton Utz, through one of its partners, Mr. Brian Wilson, devised a strategy in 1990 in which the defendant was advised that – provided it asserted that its intention was not the destruction of material for the purpose of suppressing evidence which would be relevant in anticipated legislation – the defendant should destroy documents and the only likely consequence would be the drawing of adverse inferences in later proceedings”.

According to the Court of Appeal, that finding “was not justified”. [90] The basis for Justice Eames' conclusion that Clayton Utz, through Mr Wilson, did “devise a strategy” stemmed from a letter written by Mr Wilson, dated 29 March 1990, which gave the advice sought in the Foyle memorandum. However, that letter did not, according to the Court of Appeal, “justify the conclusion either that Mr. Wilson had “proposed the strategy”, as the judge found, or that he was proposing the destruction of documents, relevant to anticipated litigation, under the misleading guise of “innocent intention”, meaning that destruction was to be asserted for purposes other than the prejudice of prospective plaintiffs.” [90] Rather, the advice contained in the letter “was not only legally correct but was entirely appropriate” [91]. Justice Eames found [para 39, Justice Eames' judgment]:

"The letter of advice is couched in terms that suggest that Wilson was very conscious of the fact that he could not guarantee that the Clayton Utz letter might not subsequently be disclosed. Whilst exercising caution for that reason, Wilson was telling Wills that the dire consequences could be avoided if they asserted innocent intention and employed statements of such innocent intention that he was now feeding to them or had previously, by the terms employed in the policy documents. As the advice makes clear, Wills was given express warning that a program for the destruction of documents relevant to anticipated litigation, even if no litigation was on foot, could be held to be an interference with the administration of justice, and thus be in contempt of court.”

But, according to the Court of Appeal, “his Honour read more into the letter of advice than we can discern”. “Mr. Wilson did no more than respond to the questions asked of him through the Foyle memorandum”. “It seems to us that all of this was proper advice: it was not advice as the judge described it, to seize upon innocent intention to justify what was not at all innocent in order to deflect adverse consequences. ... [W]e do not read the letter as justifying the very significant conclusions drawn by the judge about it; and importantly we do not read it as justifying the findings [that Clayton Utz had not merely advised Wills on the wording of the policy but had ensured that words "were inserted into" the written policy to justify the claim of innocent intention]. [91]

The thrust of Mr Wilson's letter of advice is set out in para 38 of Justice Eames' judgment. Mr Wilson advised BAT about the “critical question” of whether an act is likely to have the effect of interfering with the administration of justice. He said that “the intention with which the act was done is relevant and sometimes important”. He referred

to destruction of document by BAT that had occurred “in a situation where litigation has been, and still is, contemplated”. But, he said “it can be said that it has not occurred only because of that fact and in order adversely to affect the litigation”. Mr Wilson said that this was where “the wording of the 1985 retention policy statement becomes important”. He said: “The following quotes from page 1 serve to explain the motivation for destruction”: "to ensure that our previous good management practices are maintained"; "to ensure that our document retention policy is maintained at the most efficient level"; "indiscriminate and unnecessary retention of documents involves ever increasing and costly space requirements"; "enormous man-hours and other overheads involved in sifting through superfluous documents in order to locate records actually required in ... litigation"; "under our legal system documents may be required ... on short notice under order for discovery or subpoena. Therefore the objective is to retain only necessary material"; and "the more unnecessary documents are retained the less control there is over secure storage of necessary records and hence the greater the potential risk of industrial sabotage.”

Mr Wilson said that the “above quotes show the motivation for destruction to be threefold: cost efficiency, litigation support, and sabotage prevention. In our view, they are clear evidence of an intention which is the complete opposite of an intention "to do something likely to interfere with the course of justice". This positive intention cancels out the negative impression created by destruction per se.”

So, said Mr Wilson, the statements in the 1985 retention policy statement showed the motivation of destruction of documents, while litigation was contemplated, to be cost efficiency, litigation support and sabotage prevention. These were “clear evidence of an intention which is the complete opposite of an intention "to do something likely to interfere with the course of justice””. This advice, said the Court of Appeal, “was not only legally correct but was entirely appropriate” [91].

Justice Eames found that, in supplementary oral advice in 1990, Wilson had “proposed a strategy whereby the defendant should destroy any damaging documents which were not in the public domain and retain and discover only those documents which were in the public domain”, a strategy which had been pursued since that advice was given; and that, in a further private conversation in April 1990, “Wilson proposed, and it was agreed on behalf of the company, that all documents over five years old (meaning all sensitive documents) should be destroyed but that copies should be held ‘off shore’ for access as required in support of the defence of any action.”” [para 289, Justice Eames’ judgment]

Justice Eames explained as follows [paras 41-43, Justice Eames’ judgment]:

"Any doubts as to what was the real message which Wilson was imparting to his client, on behalf of Clayton Utz, is dispelled by notes of a meeting which he attended soon after he wrote his letter and which notes he might have thought were never likely to see the light of day. ... On 2 April 1990 a conference was held between Gulson of Wills, Cannar of BATCO, and both Wilson and Oxland of Clayton Utz. Oxland's notes of the meeting record that the discussion concerned the contents of the written advice dated 29 March 1990. Wilson is recorded as having proffered the following advice: ‘Keep all research docs which became part of public domain and discover them. As to other documents, get

rid of them, and let other side rely on verbal evidence of people who used to handle such documents.' ... Another handwritten note made by Oxland - also apparently written at the 2 April 1990 meeting - noted the relationship between BATCO, Wills Holdings ('subsidiary') and WD & HO Wills (Aust) ('Wholly owned') and records an apparent decision, as follows:- 'To shred all docs in Aust more than 5 yrs old (docs will still be available off-shore, though)''.

The Court of Appeal noted that these notes were all written by Mr. Oxland of Clayton Utz, not by Mr. Wilson. "It may be, as was recorded, that they were made in consequence of a conference held on 2 April 1990 at which Mr. Wilson was in attendance, but even if they were [and the Court of Appeal noted that Mr Eggleton, a partner at Clayton Utz, "was disposed to accept that the notes were so made"] it was, with respect, unjustified to describe the notes as notes which Mr. Wilson "might have thought were never likely to see the light of day"; for there was nothing to indicate that Mr. Wilson ever saw the notes or indeed approved them, let alone concurred in them. They were and they remained no more than Mr. Oxland's notes, even if of a meeting at which Mr. Wilson was in attendance." [93] *It was not, said, the Court of Appeal justified to say that Mr Wilson "might have thought [the notes] were never likely to see the light of day" because, even if they were notes of a meeting at which he was in attendance (and, presumably, even if he knew his partner, Oxland, was taking notes of the meeting) he had not written them himself, nor approved of them, or concurred in them.*

According to the Court of Appeal, both Clayton Utz and Allen, Allen & Hemsley, who had also given advice on document destruction issues, "were doing their best to grapple with the like problem which was put very fairly and fully to them by the client, the defendant: what to do with documents which were otherwise due for destruction when there could be criticism if it later emerged during subsequent litigation that some documents had been destroyed which were - or even might be - relevant to the issues raised for determination, especially those raised by a plaintiff?" [97]

Thus, said the Court of Appeal, Justice Eames "erred in the findings he made with respect to the part played by Clayton Utz in the formulation of policy in 1985 and in 1990", and, in particular, "there was no evidence to justify the finding that, in giving advice as requested by the defendant, Mr. Wilson "devised a strategy" by which the defendant might destroy damaging documents while pretending to innocent intention, the crux of his Honour's criticism". Further, Justice Eames was "critical of the wholesale destruction of documents both before 1998 and during it". In so far as that criticism depended upon advice from Clayton Utz in 1985 and 1990, "there was a further difficulty in his Honour's criticism", because, in 1992, the document retention policy "was subjected to a complete review by Mr. Harrison [Records Manager of Wills], who rewrote the policy after attending a BAT conference for the purpose in Kuala Lumpur. The conduct of Mr. Harrison as explained in evidence was surely a break in any chain of responsibility going back to earlier years." [98]

Mr. Harrison became the Records Manager of Wills in 1991 or early 1992. At the training conference in Kuala Lumpur, he said, he "undertook a comprehensive training and education program on the subject of records management". It would be "his

responsibility upon returning to Australia to devise, draft and then implement a records management program for the Wills group of companies”. [99] According to the Court of Appeal: “The concern seems to have been at all times to devise a policy which was appropriate – but that is not to say that it was to devise a strategy for the destruction of documents under cover of an innocent intention falsely claimed. There is a big difference between the two and, while the first may be acknowledged, we cannot see that there was sufficient justification for finding the second.” [102] *Thus, said the Court of Appeal, there was a “big difference” between an “appropriate” policy, under which documents relevant, or likely to be relevant, to contemplated litigation were destroyed, and, of course, under which BAT would enjoy all the benefits in that litigation of the documents having been destroyed, and a “strategy for the destruction of documents under cover of an innocent intention falsely claimed”. The Court of Appeal’s emphasis is on carefully chosen words and clever intellectual distinctions, not the reality of what is being done, and what it achieves for the company.*

Justice Eames noted a warning in an appendix to a manual in use at the BAT Kuala Lumpur conference attended by Mr Harrison: that there was “no point in disposing of a paper record only to find that the same record is still being kept on a computer file or word processing disc ...”. According to the Court of Appeal: “So much was surely self-evident and unexceptionable. The sting, for the judge, lay in the tail: “... especially if you have a discovery order served on your Company by a court”. But given that the discovery for any large business organisation was likely to be a most onerous task and one not lightly to be encouraged, the sting is no sting at all. It is self evident. It does not bespeak illegitimate purpose, although it plainly demonstrates an awareness of the problem. It was in line, we think, with the approach taken in the Foyle memorandum and in the request for advice made of Clayton Utz in 1990. It was no more than that.” [103] *Apparently, in the Court of Appeal’s view, it is quite legitimate to destroy documents likely to be relevant to anticipated litigation, and their electronic records, on the basis that discovery for a “large business organisation” is likely to be “an onerous task and one not lightly to be encouraged” – that “does not bespeak illegitimate purpose”. Clearly, in the Court’s view, it is quite different from destroying them for the purpose of keeping them from prospective plaintiffs.*

Mr. Harrison effectively ended his job as records manager in November 1993, “by which time the tasks he had begun were complete”. When he finished his duties a hold order was in place “due to the currency of litigation, so that destruction of documents was not taking place”. [BAT had implemented “hold orders” under which documents were not to be destroyed while litigation was actually on foot. *Such hold orders had been in place between 1990 and March 1998. Justice Eames, however, “did not accept that no documents covered by the Hold Orders were destroyed between 1990 and 1998”. In his view, “the probability is otherwise”. The Court of Appeal did not refer to this finding.*]

According to the Court of Appeal, destruction of documents did not re-commence until the last current hold order was revoked in 1998. As Mr Harrison’s policy had been in place since 1992, it was “more difficult to attribute what followed, and particularly in 1998, to “a strategy devised” by Mr. Wilson in 1985 and confirmed in 1990 to destroy documents under cover of an innocent intention falsely claimed – even if there had been

evidence of such a strategy, which in our opinion there was not". That difficulty became even greater when, in 1998, "following the revocation of the last of the hold orders, the destruction of documents was undertaken by the defendant, but only after Mr. Maher consulted with Mallesons and had their advice on what was proper."

Justice Eames made findings about documents destroyed pursuant to the Document Retention Policy of 1985, when, according to the Court of Appeal, "as the judge saw it, litigation was either on foot or considered inevitable". Justice Eames said that "no record was kept, and deliberately so, as to what documents had been destroyed". According to the Court of Appeal, though, "such conduct was surely no more than a reflection of the warning given in the manual in use at the conference at Kuala Lumpur [that there was "no point in disposing of a paper record only to find that the same record is still being kept on a computer file or word processing disc especially if you have a discovery order served on your Company by a court"]". [107] *Again, it is, according to the Court of Appeal, perfectly legitimate to destroy documents and all trace of them, in anticipation of litigation to which they will, or may, be relevant, so as not to have to give discovery of them in such litigation where the purpose is to avoid the burden of having to discover them, and not to keep them from prospective plaintiffs.*

Justice Eames also made findings dealing with "a broader strategy" which, as the Court of Appeal said, "'was developed to ensure that where possible relevant documents" would be held by others, in order to render them not discoverable by the defendant in any litigation against it". This was the notion of "warehousing", which, according to the Court of Appeal, "emerged only late in the piece as one of the complaints of the plaintiff". Questions about a database maintained by Clayton Utz for the Tobacco Institute of Australia were also canvassed before Justice Eames, but, as the Court of Appeal said, "whether that database was or was not discoverable, the problem is peripheral to this present judgment". [107]

Justice Eames found that, "in a letter to the Tobacco Institute of Australia dated 30 January 1995, Travers [of Clayton Utz] proposed a means whereby the Institute (which was funded by Wills and two other tobacco companies) could go on-line to gain access to "a number of tobacco data bases" under an arrangement where it would have no power over the data bases and therefore could avoid discovering the data bases if it became involved in litigation. "From as early as 11 December 1985 Clayton Utz had proposed to Wills that it would establish its own data base of scientific and other relevant material. Such a data base was created, and was later the subject of disagreement between Mallesons and Clayton Utz, in May 1997, as to whether it was discoverable. Mr Eggleton of Clayton Utz asserted at that time that the data base was the sole property of Clayton Utz and was not within the power of either the Tobacco Institute or any of its members, and therefore was not discoverable. As Mr Angus, of Mallesons, pointed out in his letter of 22 May 1997 to Cannar and Maher, Clayton Utz had been engaged by Wills to defend what it described, as at 11 December 1985, as a threatened "wave of litigation" and Clayton Utz had proposed at that date the creation of a computerised data base of scientific and other relevant material for which it was funded by the Tobacco Institute of Australia." *Thus, whether Clayton Utz, solicitors for BAT, had established a database of relevant scientific and other material, to which its client had access, but in*

relation to which it would not have to give discovery on the basis that its solicitors held the database rather than the company itself holding the database, is “peripheral to this present judgment” and the subject of no comment by the Court of Appeal.

Justice Eames also made findings about the destruction of documents after the Cremona litigation [litigation against BAT by Phyllis Cremona, shortly after which Hold Orders were lifted] ended in March 1998. Justice Eames found that thousands of documents were destroyed “as a matter of urgency”, at a time when although proceedings were not on foot, they were “not merely likely but a near certainty”. By that time, said the Court of Appeal, “it was difficult to ascribe the defendant’s conduct in any event to any “strategy devised” by Mr. Wilson in 1985 and confirmed in 1990 – even if there had been such a strategy”. That issue was, in any case, “best dealt with” later in the judgment when considering “the propriety of any litigant destroying documents before the litigation is on foot”. [108]

One more thing “should be noted”, said the Court of Appeal. In so far as Justice Eames referred to “the destruction, too, of the CD Roms on which some 30,000 documents were imaged before destruction, this may be seen to reflect, yet again, the warning mentioned [in the Kuala Lumpur manual], that there is not much point in destroying the hard document only to keep a record on computer if, as we think was the case, one at least of the problems facing the defendant in litigation was the magnitude, expense and complexity of meeting any notice for general discovery”. “[T]he Cremona litigation had demonstrated the difficulties and it was surely not surprising that, given that experience, the defendant, when destroying documents in March 1998, was at pains to destroy also the computer imaging of the documents being destroyed. But again the point is peripheral on this appeal; for while it is a question whether the destruction of documents generally constitutes a breach of a defendant’s obligations though litigation is yet to be commenced, the answer to that question is not affected by the failure to keep a record of what is destroyed. It adds nothing save emphasis to the breach, if such it be; and if it be not a breach it adds nothing at all.” [109]

Again, says the Court of Appeal, it is perfectly legitimate to destroy documents and all trace of them, in anticipation of litigation to which they will, or may, be relevant, so as to not have to discover them in such litigation as long as the purpose is to avoid the burden of having to discover them – here the “magnitude, expense and complexity of meeting any notice for general discovery” - and not to keep them from prospective plaintiffs. To repeat, in the words of the Court of Appeal, “it was surely not surprising that, given [the experience of burdensome discovery in the Cremona case] that experience, the defendant, when destroying documents in March 1998, was at pains to destroy also the computer imaging of the documents being destroyed”. (emphasis added) Again, the Court of Appeal’s emphasis is on carefully chosen words and clever intellectual distinctions, not the reality of what is being done, and what it achieves for the company.

Breach of orders for discovery

Justice Eames did not strike BAT’s defence out only because of the destruction of documents. He also took into account its failure to comply with orders for discovery and

its misleading of the court in relation to documents. However, said the Court of Appeal, Justice Eames' conclusion relating to the improper destruction of documents "intruded inappropriately when his Honour considered how far the defendant had complied with the order for discovery and whether, in complying, its conduct had been misleading". [28]

The Court of Appeal acknowledged a number of ways in which affidavits were deficient, but concluded [70]:

"To sum up, it seems to us that the defects or deficiencies identified by his Honour in the discovery of the defendant were not such as would ordinarily have drawn anything more than an order for a further affidavit to make plain what otherwise had not been stated expressly. In failing to mention when documents had been destroyed the defendant was not occasioning prejudice to the plaintiff, certainly if the omission was duly rectified. What motivated the judge to strike out the defence was, we have no doubt, his Honour's conclusion that there had been in place for some years a policy on the part of the defendant deliberately to destroy documents that would, or might, disadvantage the defendant and assist a plaintiff in future litigation which, although not yet on foot, could reasonably be anticipated. The judge saw such deliberate destruction of documents with a view to defeating a plaintiff as altogether improper for any prospective litigant, even before litigation was on foot - and it was that which drew the major criticism."

The Court of Appeal did not agree with Justice Eames' criticism of certain phrases used by BAT as "attempts to skirt around and to avoid highlighting the truth" about destroyed documents. BAT's counsel had, in open court, "referred to the document retention policy "that any major company has" and conceded that it remained possible that some of the documents discovered in the Cremona litigation "have been destroyed as a result of the application of the usual document retention policy"". If affidavits sworn by Mr Namey, BAT's company secretary, and Ms Chalmers, a solicitor at Mallesons Stephen Jaques acting for BAT on discovery issues, were "coy", a word used by Justice Eames, "Mr. Gordon's claim to have been misled was perhaps opportunistic". [62] Again, said the Court of Appeal, here "the judge's conclusions about the document retention policy, its purpose and its implementation, infected (if we may use the word) the reasoning about the failure of the affidavits to state, plainly and expressly, that documents had in fact been destroyed - and indeed destroyed in pursuance of the document retention policy, although it is worth reiterating that, on the question of discovery, it was the destruction of documents that was relevant rather than the policy behind it. Without the primary conclusion that there lay behind the destruction of documents a sinister purpose, what was said in the affidavits would, we feel sure, have attracted less criticism." [63]

After referring to various deficiencies in affidavits of discovery, the Court of Appeal said there were "other defects in the affidavits of discovery" but that these seemed "unnecessary to canvass now". For the defects, "such as they were, were not the main problem by the time the strike-out application had been heard and fell to be determined. By then the problem had become what the judge saw to be the sinister purpose behind the destruction of the documents and the attempts, as he saw it, by the legal advisers to ensure that the destruction of documents, before the commencement of proceedings, did not become known - and doubtless that coloured his Honour's thinking about the defects in the affidavits. Had the purpose not been seen as sinister, the defects in the affidavits,

and in particular the failure to refer expressly therein to destruction of documents, would not, we think, have been seen as part and parcel of a deliberate approach to mislead ...” [65]

Destruction of documents before litigation commenced

The Court then came to the fundamental issue of principle in the case: “the vexed question of the obligation, if any, imposed upon a company in the position of the defendant with respect to the retention of documents before the proceeding to which it is made party has been commenced but at a time when such a proceeding can reasonably be anticipated” [83].

It was not in dispute that, “in March 1998, when the last of the hold orders was revoked in consequence of the end of the then current litigation in Australia [and when, according to Justice Eames, thousands of documents, and records of them, were destroyed], litigation could still be anticipated of the sort now brought by the plaintiff in this instance, litigation, that is, by a smoker complaining that her ill health was a direct result of misconduct on the part of one tobacco company or another”. [136] It was then, according to Justice Eames, that BAT saw a “window of opportunity” to destroy documents. [139]

The Court of Appeal thought “it was troubling that the defendant seemed to be claiming *carte blanche* to destroy documents, however imminent the proceeding against it and however relevant, and obviously relevant, the documents would be”. Suppose, for the sake of argument, it said, two parties were in continuing dispute: “It surely cannot be the case that the prospective defendant, learning that litigation was about to be commenced against it, could simply destroy all relevant records bearing upon the principal issue, for the purpose only of defeating the claim when brought against it.” [145]

On the other hand, it said, if there is “some impediment to such conduct by a person apprehensive of litigation against him or her, how far back does the obligation to preserve documents reach? It surely cannot be, as suggested by the plaintiff in argument, that the defendant was in this instance at fault in destroying documents in 1985 because those documents might well be (or perhaps were) relevant in this proceeding which the plaintiff commenced against the defendant in 2001.” Yet the plaintiff’s claim to have the defence struck out “relied not only on the destruction of documents in 1998; it went back much further than that (although to what precise, or even approximate, date if not “early 1990”, was not clear made clear on appeal).” There had been hold orders in place between 1990 and 1998, so the pre-1998 destruction was presumed by the Court of Appeal to have taken take place before 1990. (emphasis added)

Emphasis is added in the paragraph above to highlight this inexplicable statement by the Court of Appeal. If a party injects another party with a poison, for example, that it knows will take 16 years to take effect, and it destroys evidence of what it has done, why could it not be at fault only on the basis that 16 years pass before a claim is brought against it – where it knows that it will take 16 years for the poison to take effect? Surely, how long it takes for conduct to cause harm cannot be the criterion according to which a defendant is relieved of “fault” for destroying evidence. In this case, it was documents destroyed in

1985 and before that would inevitably have been relevant to a claim brought many years later, give the long onset of conditions such as lung cancer. Conduct of tobacco companies inevitably has its effect many years later.

The Court of Appeal noted that “there was no authority directly governing the problem raised for decision in this instance”, [146] and observed “how limited is the nature of the authority available” [172]. Its statement of principle is set out in the following paragraph [173]:

“As indicated at the outset, it seems to us that there must be some balance struck between the right of any company to manage its own documents, whether by retaining them or destroying them, and the right of the litigant to have resort to the documents of the other side. The balance can be struck, we think, if it be accepted that the destruction of documents, before the commencement of litigation, may attract a sanction (other than the drawing of adverse inferences) if that conduct amounts to an attempt to pervert the course of justice or (if open) contempt of court, meaning criminal contempt (inasmuch as civil contempt comprises wilful disobedience of a court order and will ordinarily be irrelevant prior to the commencement of proceedings). Such a test seems to sit well with what has been said in the United States as well as what has been said in England. Whether contempt, even criminal contempt, is possible before any proceeding has been instituted need not be examined on this occasion. ... Certainly, there can be an attempt to pervert the course of justice before a proceeding is on foot, as *R. v. Rogerson* demonstrates, and that, we think, provides a satisfactory criterion in the present instance. The standard of proof is the civil rather than the criminal standard, bearing in mind also the seriousness of the allegation as required by Dixon, J. in *Briginshaw v. Briginshaw* (as modified or explained in *Neat Holdings Pty. Ltd. v. Karajan Holdings Pty. Ltd.*). Both attempting to pervert the course of justice and contempt of court (in the relevant sense) are criminal offences, but where a civil sanction is sought a civil standard of proof suffices: *Helton v. Allen and Rejtek v. McElroy*, compare *Logicrose* per Millett, J. There is considerable force, we think, in Mr. Myers' [counsel for BAT] submission that the rule of law is endangered if intervention by the court, for conduct occurring before the commencement of litigation, were to be grounded otherwise than on illegality, albeit illegality proved to the civil standard.” (emphasis added to highlight the test)

Thus the Court of Appeal finds that the test for determining whether sanctions in a civil trial against a defendant who has destroyed documents in anticipation of litigation in which they will, or may, be relevant is that of the criminal law offences of attempting to pervert the course of justice or contempt of court, albeit to be proved to the civil standard of proof. Just why this should be so is not explained. Why the Court's power to do justice between parties to civil litigation – one of whom has destroyed documents in anticipation of litigation in which they will, or may, be relevant – should depend on criminal law offences, which exist for a different purpose, and have been developed with significantly different considerations in mind, is not explained.

The Court of Appeal continues that because “the plaintiff did not seek to put her case on the basis either of attempting to pervert the course of justice or contempt of court ... and accordingly, as that was not the case put and considered below, it would not be appropriate to consider it on this appeal.” If such a serious allegation had been made, “the course of the plaintiff's application must have been very different. Those accused (other

than the company itself) would have had available to them the protection against self-incrimination and against exposure to penalties; all would have enjoyed the right to silence; the filing of affidavits must have attracted different or at least additional considerations on the defendant's part; and no doubt the judge would not have allowed the application to evolve as it did, over the days of hearing. The application made at the outset by Mr. Middleton for the defendant, that the plaintiff be required to furnish proper particulars of what was being alleged against the defendant, must surely have met with a more favourable response from the judge, and well before day 7." [174]

This paragraph eloquently explains why criminal offences of attempting to pervert the course of justice and contempt of court cannot be the relevant criterion for sanctions against a party in civil litigation in the circumstances being here discussed. How can a plaintiff denied relevant evidence by the defendant's destruction prior to, but in anticipation of, litigation be made to overcome the difficulties that would arise from the raising of allegations of criminal conduct, procedures in place for wholly different reasons, in order to obtain what may be the most just outcome in the case?

The Court of Appeal repeated its statement of principle [175]:

“Accordingly, there being no authority directly in point, we consider that this court should state plainly that where one party alleges against the other the destruction of documents *before the commencement* of the proceeding to the prejudice of the party complaining, the criterion for the court's intervention (otherwise than by the drawing of adverse inferences, and particularly if the sanction sought is the striking out of the pleading) is whether that conduct of the other party amounted to an attempt to pervert the course of justice or, if open, contempt of court occurring before the litigation was on foot.” (emphasis in original)

And again, the Court of Appeal expressed no “opinion at all on whether the conduct which was under challenge in this instance, and which the defendant sought to justify by reference to its document retention policy, did or did not amount to an attempt to pervert the course of justice”. As that case had not been argued before Justice Eames, “for the purpose of this appeal it must be taken that at first instance the court was not entitled to impose any sanction on that ground”. [175]

Prejudice

A sanction as severe as the striking out a defence requires the plaintiff to be facing a significant degree of prejudice if that step is not taken. A defence is not to be struck out to punish the defendant, but to do justice between the parties.

The Court of Appeal divided prejudice into two elements: “prejudice by reason of non-compliance by the defendant with its obligations to discover”; and “prejudice through the deliberate destruction of documents by the defendant over many years (not only in 1998 after the end of the Cremona litigation) for the purpose of prejudicing those who, like the plaintiff, might thereafter commence litigation against the defendant alleging personal injury through smoking”. [176] The Court of Appeal thought it necessary to consider

each of the two aspects of prejudice separately, as Justice Eames had seen each “as entitling the plaintiff to the relief which was ultimately granted”, ie the striking out of BAT’s defence. BAT submitted that Justice Eames erred in holding that he could strike the defence out on the basis of non-compliance with the order for discovery alone, without relying on the wholesale destruction of documents. The Court of Appeal agreed. [178]

The striking out of a defence for non-compliance with an order for discovery “obviously depends upon the nature and extent of the prejudice suffered by the plaintiff in consequence of the defendant's default”. The rules “do not exist to punish”. [178]

Again, the Court, inadvertently, eloquently explains why criminal offences of attempting to pervert the course of justice and contempt of court cannot be the relevant criterion for sanctions against a party in civil litigation in the circumstances being here discussed. Though the Court is here speaking of the striking out of a defence for non-compliance with discovery orders, its observation that the striking out a defence is not about punishment must be equally true to its striking out for destruction of documents. How can criminal offences then be the criterion for exercise of the power?

The Court of Appeal found that “in the end [Justice Eames] found little, if any, prejudice as a consequence of non-compliance considered independently of the more general problem of the destruction of documents before the commencement of the litigation.” [183]

Justice Eames “referred expressly (and apparently by way of summation) to these faults and omissions: the “failure [of the defendant] to comply with the requirement of the order to depose to what had become of documents which had been destroyed”; that the affidavit of documents was “deceptive or misleading in a number of ways”; and that documents had been omitted from discovery “by virtue of what was an unreasonable interpretation of the terms of the order”.” The Court of Appeal found that “none of the matters mentioned here, whether taken separately or together, justified an order striking out the defendant's pleading; the prejudice, such as it was, was simply not so severe as to require, or indeed to warrant, that step.” Other lesser orders were appropriate, according to the Court: “A further order for discovery, a further affidavit of documents, a further affidavit in explanation, any of these might have been justified in order to make express that which, in his Honour’s opinion, had not yet been stated, even if the failure to state it was (as he suggested) “more than an oversight” and rather the result of a “very deliberate strategy” - an opinion which flowed, not simply from the failure to state that documents had been destroyed but from the implementation of the policy which his Honour found (without justification) had been put in place with a view to masking what was happening, on the advice of the solicitors.” [185]

The Court of Appeal held that it was the implementation of the policy of destruction “which led the judge to make the order striking out the defence”. “The prejudice from the destruction of documents was seen as very considerable, as his Honour made plain in the following...: [185]”

"It is, of course, to be kept in mind that whilst I am satisfied that thousands of documents were destroyed in 1998, an untold number was destroyed before that date, and for the same purpose. I have no doubt that many BATCO documents which the defendant held were destroyed after 1985, and there seems little doubt (as Foyle's 'note' would have confirmed) that many research documents of Wills' own Research Unit were destroyed, too. Furthermore, the prejudice to the plaintiff might be immense by virtue of the deliberate destruction of just one document, which might have been decisive in her case. It would be interesting to know, for example, how many of the Cremona documents had been rated 5 (a 'knockout' blow for the plaintiff) and how many of those had been discovered in this case. The dilemma, stressed by counsel for the plaintiff, is that they can not now know, at least not by virtue of cross examination of any of the witnesses who were called on this application, whether they have been denied such documents. The people who would be likely to know whether such documents were destroyed might be thought to be people such as Wilson, Cannar, Schechter, Northrip, Travers and Kinross. Whilst their unexplained absence leads to the inference that their evidence would not have been helpful to the defendant, that does not relieve the plaintiff's anxiety that she may have been denied at least one 'knockout' document, if not many." (emphasis added)

The Court of Appeal waved all of this prejudice away in one sentence: "These comments lose significance if, as already concluded, the defendant was not shown to have been in breach of any obligation in destroying documents before the commencement of this proceeding – or, more accurately, any relevant obligation as the matter was argued." According to the Court of Appeal, none of this prejudice counted for anything – it could only count for something if it were shown to be a criminal offence (to the civil standard), and, as the plaintiff had not made that argument, it could be simply waved away. Again, the Court, inadvertently, eloquently underlines why its test is wholly inappropriate. How can prejudice this severe count for something, in a civil trial, in which the Court is supposed to do justice between two parties, only if the conduct is shown, on the allegation of the plaintiff, with all the procedural safeguards to protect the defendant because of the seriousness of the allegation of criminal conduct in play, to be criminal?

Having concluded that the prejudice flowing from destruction of documents was of no significance at all, the Court of Appeal comfortably concludes:

"With relevant prejudice then limited to the consequences, such as they were, of non-compliance with the order of 6 December, there was not sufficient ground for striking out the defence."

Remedy

The Court of Appeal finally came to the issue of remedy. What would an appropriate order or sanction be for the conduct alleged in this case? Justice Eames considered whether he could make orders "restricting or denying the defendant the right to contest certain issues on which it was shown that documents had been destroyed". He doubted his power to make such orders for "issues-based sanctions" in the face of objection by the defendant. Further, he said, it would be impossible "to differentiate between the issues in this trial so as to determine which issues should be subject to such an issues-based order

and which would not. Indeed, the plaintiff's contentions as to all of the liability issues in the case are likely to have been prejudiced by the destruction of documents." [para 373 Justice Eames' judgment]

The Court of Appeal saw no reason "in the wording of the rules at least, why the judge might not have made an order restricting or denying the defendant's right to contest certain issues if in relation to those issues there was prejudice of such a type as to require that remedy". [187] The Court of Appeal noted that, in the cases to which it had referred, "in considering the remedy to be applied, efforts were made to relate the destruction of the documents in question to the issues raised in the case". But "[t]here was no such attempt made in this instance". Surely, said the Court of Appeal, "the defaults of the defendant in making discovery, such as they were, and the destruction of documents more generally, were not relevant to the allegations that the plaintiff smoked cigarettes, that she had done so for 40 years, that she had lung cancer and that the cancer was, in her case, related to the smoking". The Court of Appeal held that these were all matters "upon which she should have been required to make proof and yet the judge simply made an order by which the plaintiff was relieved of that need". "By striking out the defence in all respects save loss and damage, all other allegations in the statement of claim were taken to be admitted and so it became unnecessary for her to prove even that she had smoked, let alone smoked the defendant's cigarettes. ... In our opinion, there was no justification, even if the judge's criticisms of the defendant were accepted, for relieving the plaintiff from the need to prove anything in respect of her claim save damage. The remedy should have been related more directly to the prejudice seen to have been suffered. With respect, the remedy adopted was out of proportion to the wrong, even if the judge's criticisms of the defendant's conduct, both in relation to the order for discovery and the destruction of documents more generally, were to be accepted." [188]

Similar considerations, suggested the Court of Appeal, applied to the issue of *volenti*, or voluntary assumption of risk. Further, said the Court, the context in which Justice Eames should have weighed the consequences for the plaintiff of the destruction of documents was one in which her solicitors sought only limited discovery from BAT. [189-190]

And finally, "[t]he point to be emphasised is the need, in a case like the present, to weigh the effect of the alleged destruction of documents in respect of the issues in the proceeding, in order that the remedy be not out of proportion to the prejudice occasioned. However understandable it may have been, given the considerable pressure under which the judge was proceeding, the order his Honour made was not sufficiently related to the deficiencies, such as they were, in the defendant's discovery." [190]

Privilege

In addition to the above, the Court of Appeal held that Justice Eames has erred in ordering production of certain documents in respect of which legal professional privilege was claimed. "[A]mong the documents affected directly by his Honour's ruling, were several which were critical to his Honour's reasons for judgment, including earlier legal advice to the defendant from its solicitors, and in particular Mr. Wilson." [131] A number

of the documents over which privilege was claimed but overruled [including the Foyle memorandum, Mr Wilson's letter of 29 March 1990, and Mr Oxland's notes of the 2 April 1990 meeting] were important to many of Justice Eames' findings, "including the findings about the part played by Clayton Utz, and in particular by Mr. Wilson, in "devising a strategy" to permit the destruction of damaging documents under the cloak of "innocent purpose". Given that the defendant's claim to legal professional privilege ought not to have been overruled, the documents were not properly admitted into evidence and the foundation for his Honour's conclusions, even if they were correct, must be taken as withdrawn." [132]

"[T]he conclusions reached by the judge about the so-called strategy "devised" by Mr. Wilson in 1985 and confirmed in 1990, to destroy documents under cover of an innocent intention falsely claimed, rested in large part upon documents disclosed only after his Honour had overruled the defendant's claim to legal professional privilege ... if it was error (as we think it was) then the whole substratum for his Honour's criticisms in that regard of Clayton Utz, and of Mr. Wilson in particular, is withdrawn." [105]

Conclusion

The conclusion of the Court of Appeal was this:

"For these reasons, we consider that the order made on 25 March 2002 was erroneous - and we say that notwithstanding that the order was made in the exercise of discretion. In so far as it rested upon non-compliance by the defendant with the order for discovery made on 6 December 2001, such prejudice as was occasioned by the defendant's neglects or defaults did not warrant or require an order which left the defendant without any defence save as to quantum. In so far as the order rested upon the destruction of documents both before 1998 and in March-April 1998 after the end of the Cremona litigation and the Harrison litigation, his Honour's findings were, we think, flawed in relation to the criticism he levelled at legal advisers and what he saw to be the "devising" of a "strategy" to enable the defendant deliberately to destroy disadvantageous documents while at the same time claiming "innocent" purpose. Those findings were flawed, with respect, not merely in the construction placed by his Honour upon the documents to which he referred, but also in allowing reference to those documents by over-ruling the defendant's claim to legal professional privilege. Nor, in our view, was the defendant shown to be in breach of any relevant obligation not to destroy documents before the commencement of the proceeding, given that the plaintiff did not rest her case on either an attempt to pervert the course of justice or contempt of court. We do not say what the result would have been had such an allegation been made, because that was not the case put below and it was not the case considered by his Honour. Furthermore, if the defendant had been in breach of some obligation by destroying documents, the remedy imposed in this instance was, we think, out of proportion to the ill, in the sense that it was not related to the issues affected by the destruction of documents. Had it been so related, it could have led to no more than an order striking out certain paragraphs of the defence; it would not have led to an order striking out the defence altogether save only as to loss and damage."