JUDGMENT OF THE COURT OF APPEAL IN

BRITISH AMERICAN TOBACCO AUSTRALIA SERVICES LIMITED v COWELL (as representing the estate of ROLAH ANN McCABE, DECEASED)

BRIEF ANALYSIS[1],[2]

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. 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 Eames, http://www.austlii.edu.au/au/cases/vic/VSC/2002/73.html]

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.

---

[1] Jonathan Liberman BA/LL.B(Hons), Barrister and Solicitor of the Supreme Court of Victoria, legal advisor to the VicHealth Centre for Tobacco Control and Quit Victoria, 8 December 2002. The author is grateful for the insights and assistance of Benn McGrady.

[2] A more detailed analysis of the judgment can be found at www.vctc.org.au

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 re-produced here.

The main findings of the Court of Appeal were these:

(a) The Court of Appeal overturned Justice Eames' findings about the purpose behind BAT's document retention policy.

(b) The Court of Appeal found that BAT's breaches of orders for discovery of documents did not justify the striking out of its defence.

(c) The Court of Appeal held that destruction of documents before litigation commences can only attract a sanction other than the drawing of adverse inferences if it amounts to the criminal offence of an attempt to pervert the course of justice or contempt of court (and, in the case of the latter, it was not clear whether it did apply before proceedings had been commenced). Because the plaintiff had not presented her case in this way before Justice Eames, the Court of Appeal found it would not be appropriate to consider that matter on appeal.

(d) Any prejudice suffered by the plaintiff as a result of the non-compliance with orders for discovery was insufficient to justify the striking out of the defence. Prejudice suffered as a result of the destruction of documents was of no significance because the defendant was not shown to have been in breach of any obligation, as the case was argued, in destroying documents before the commencement of this proceeding.

(e) The remedy adopted by Justice Eames 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.

(f) Justice Eames erred in ordering production of certain documents in respect of which legal professional privilege was claimed, and, even if some of his main findings were correct, the foundations for these conclusions must be taken as withdrawn.

Each of these findings is discussed sequentially in more detail below.

(a) The Court of Appeal overturned Justice Eames' findings about the purpose behind BAT's document retention policy.

Justice Eames 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 disagreed. That incorrect finding "served … to colour much of what followed". [76]

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] 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. It 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].

BAT's document retention policy was reviewed in 1990. 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 litigation – 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 of advice written by Mr Wilson, dated 29 March 1990. 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].

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 BAT's 1992 conference in Kuala Lumpur, attended by Mr Harrison, Wills' Record Manager: 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.[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.*

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 as long as the purpose is to avoid the burden of having to discover*

them, and not to keep them from prospective plaintiffs.

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 …" [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 where 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.

(b) The Court of Appeal found that BAT's breaches of orders for discovery of documents did not justify the striking out of its defence.

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."

(c) The Court of Appeal held that destruction of documents before litigation commences can only attract a sanction other than the drawing of adverse inferences if it amounts to the criminal offence of an attempt to pervert the course of justice or contempt of court (and, in the case of the latter, it was not clear whether it did apply before proceedings had been commenced). Because the plaintiff had not presented her case in this way before Justice Eames, the Court of Appeal found it would not be appropriate to consider that matter on appeal.

The Court addressed 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, 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 [136].

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 *Rejfek 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 …" [174]

This paragraph eloquently explains why criminal offences of attempting to pervert the course of justice and contempt of court <u>*cannot*</u> *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?*

(d) Any prejudice suffered by the plaintiff as a result of the non-compliance with orders for discovery was insufficient to justify the striking out of the defence. Prejudice suffered as a result of the destruction of documents was of no significance because the defendant was not shown to have been in breach of any obligation, as the case was argued, in destroying documents before the commencement of this proceeding.

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 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] None of the matters mentioned by Justice Eames with respect to non-compliance with discovery orders, "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. [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."

(e) The remedy adopted by Justice Eames 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.

The Court of Appeal noted that, in the cases to which it had referred in its judgment, "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. [189]

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]

(f) Justice Eames erred in ordering production of certain documents in respect of which legal professional privilege was claimed, and, even if some of his main findings were correct, the foundations for these conclusions must be taken as

withdrawn.

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]

(g) Court of Appeal’s 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.”