

INDUSTRY WATCH

The shredding of BAT's defence: McCabe v British American Tobacco Australia

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On 11 April 2002, a Victorian supreme court jury ordered British American Tobacco Australia to pay Rolah McCabe \$A700 000 in damages. Rolah McCabe is a 51 year old woman dying of lung cancer. She is the first smoker ever in Australia to obtain a damages verdict against the tobacco industry

lawyers went about denying Mrs McCabe, and plaintiffs like her, a fair trial. It is part Grisham novel, part Orwell. No summary can do full justice to the judgment, which runs to 133 pages, and forms a wonderful public record of years of extraordinary and disturbing conduct. Justice Eames' decision to strike BAT's defence out was based on his finding that BAT and its solicitors had subverted the discovery process through three interrelated strategies:

The case of McCabe v British American Tobacco (BAT) Australia has attracted international attention not only because of the verdict itself, but also for the sensational circumstances in which the verdict was reached. After a 16 day pre-trial hearing, Justice Geoffrey Eames struck out BAT's defence, and entered judgment for Mrs McCabe without proceeding to a trial on liability, on the ground that BAT and its solicitor, Clayton Utz, had "subverted" the process of discovery* "with the deliberate intention of denying a fair trial to the plaintiff"; and that "the strategy to achieve that outcome was successful"†. Justice Eames held that "[i]t is not a strategy which the court should countenance" and that, "in the circumstances of this case", the outcome (that is, the denial of a fair trial) could not "now be cured so as to permit the trial to proceed on the question of liability".

Justice Eames then empanelled a jury to decide solely the amount of compensation Mrs McCabe should receive for loss of past income and future earning capacity, medical expenses, care and assistance expenses, loss of amenity of life, and pain and suffering. The trial lasted just over three days. Mrs McCabe, her husband, her daughter, and two treating oncologists gave evidence. BAT called no witnesses. After retiring for approximately four hours, the six member jury returned with its verdict. In Australia, the jury gives one overall figure, and does not explain how it has reached that figure, nor identify its individual components.

The striking out of a defendant's defence to a claim is a truly exceptional step taken only in the most extreme circumstances—circumstances such as those exposed in the McCabe case. Justice Eames' judgment‡ makes for some riveting reading. It sets out in florid detail just how BAT and its

- the deliberate destruction of thousands of documents and of records of the documents destroyed, beginning in 1985
- misleading the court as to what had happened to missing documents
- the ongoing "warehousing" of documents—that is, having relevant documents held by third parties so as to keep them from discovery, but having access to them should they be necessary to the defence of a claim.

SUBVERTING THE DISCOVERY PROCESS

The story told in the McCabe judgment begins in 1985 when WD & HO Wills Aust Ltd (predecessor to BAT Australia) anticipated a "wave of litigation". "In response to that threat vast resources were allocated to readying the defence of any such claims. Clayton Utz, as the defendant's solicitors, took steps to devise a legal strategy, and did so with very close assistance of lawyers from the United Kingdom and USA who had performed a similar advisory role for tobacco companies in those countries. From the outset, the vital importance of documents in any litigation, and the danger which discovery of documents posed for the defendant, were fully appreciated by senior employees and officers of the defendant, and by its lawyers." [17]§

Wills developed what it called a "Document Retention Policy", which came into effect on 31 December 1985. Though called a document "retention" policy, it was, in reality, anything but. According to Justice Eames, "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". [19] The draft of the policy "was considered and approved by Clayton Utz prior to its implementation". Justice Eames referred to a

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*The process of "discovery" is the process by which relevant documents are brought before the court to enable a fair and informed decision to be reached.

†Justice Eames also made a number of findings about the role of BAT's other solicitors, Mallesons Stephen Jaques, in this strategy.

‡<http://www.austlii.edu.au/cases/vic/VSC/2002/73.html>
§Bracketed numbers refer to paragraph numbers in the judgement.

memorandum written by Andrew Foyle, a solicitor from the English firm Lovell White Durrant, engaged by BATCO (British-American Tobacco Company Limited, the defendant's parent company based in England) "which expressed the clear understanding that it was Clayton Utz that was responsible for the critical terms of the policy formulation".[20]

DOCUMENT RETENTION POLICY REVIEWED IN 1990: BATCO (UK) LAWYERS INVOLVED

By 1990, Wills was questioning the adequacy of the Document Retention Policy. In a letter dated 23 March 1990 from FT Gulson, legal counsel and secretary of Wills, to Brian Wilson, a partner at Clayton Utz, "Gulson said it was opportune to review and amend the policy".[22] Gulson noted that BATCO was conducting a similar review as to its own Document Retention Policy. Gulson enclosed a memorandum written by Andrew Foyle, acting for BATCO, whom Gulson said had been retained to advise generally on product liability litigation "and, in particular, in relation to the current Document Retention Policy". Gulson noted that Nick Cannar, legal counsel of BATCO, would be visiting Australia with respect to the policy review, and sought Wilson's advice on specific questions which Foyle had raised in his memorandum. Foyle's memorandum said that what was required from Clayton Utz was "a strategy for handling the documents issue in litigation", and posed a series of questions on which specific advice was required. "Foyle expressed concern that because Wills had had access to sensitive BATCO research documents, through a computer link to England, that might lead to the discovery of the BATCO documents in any Australian proceedings, and also documents of other group companies."

"GET RID OF THE DOCUMENTS BUT CLAIM AN INNOCENT INTENTION"

Brian Wilson did not respond to every specific question posed by Foyle, but he "did suggest a strategy". It was a strategy which was followed from 1990, all the way through to the time of the hearing before Justice Eames.

Wilson wrote a letter dated 29 March 1990.[37] It was couched in terms "which 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 [of document destruction] 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." Justice Eames found that: "The advice was, in effect, get rid of the documents but claim an innocent intention." [40] In Wilson's letter, he listed the "following quotes from page 1 [of the 1985 retention policy statement]" which "serve to explain the motivation for the 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"

"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."

Wilson continued: "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" [the test for contempt of court]. This positive intention cancels out the negative impression created by destruction per se." [38]

Justice Eames' reading of Wilson's letter was supported by a devastating piece of evidence produced at trial. "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." [41] "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." [42]

Another handwritten note made by Oxland—also apparently written at the 2 April 1990 meeting . . . 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)." [43]

The wording of the Document Retention Policy was amended "so that it more firmly asserted innocent intention and denied the true intention, which was to prejudice the prospects of success of any plaintiff in later proceedings." [289]

It seems that the Wilson letter and Oxland note would never have come to light had BAT not made what now appears to have been a huge tactical blunder. Both the letter and the note would ordinarily have been subject to legal professional privilege. However, Justice Eames held that BAT had waived its privilege over the letter and note by seeking to rely on other privileged and related material as evidence. Such a waiver is imputed by law as a matter of fairness—it is unfair to allow a party to waive privilege over some material, but to claim it over related material, so that a self-serving and misleading account of relevant matters is put before the court. For all its high paid, high powered legal advice, BAT made an extraordinarily costly decision that will forever haunt it.

AN "ARMY OF LITIGATION LAWYERS, FROM SEVERAL COUNTRIES"

Justice Eames noted the role played by lawyers, from both Australia and overseas, in BAT's destruction of documents. "One outstanding feature of this case is the extent to which, after 1985, the terms of the Document Retention Policy, and

the implementation of a program of destruction of documents, were the product of advice, decision and supervision by an army of litigation lawyers, from several countries, and being both retained private practitioners and in-house lawyers. The relationship between the defendant and its retained solicitors was so close that solicitors employed by private firms sometimes became employees of Wills and then continued to work alongside members of their former firm, and employees of one of the legal firms sometimes spent months working on the premises of Wills. Private practitioners and in-house lawyers travelled together to conferences of litigation lawyers, organised by companies in the BAT group, to discuss litigation tactics.”[62]

Justice Eames found that David Schechter, in-house counsel for BATUS, the USA affiliate, played a very significant role with respect to the Document Retention Policy. He visited Australia at least four or five times between 1990 and 1995. He and Bob Northrip, of the Kansas City firm, Shook Hardy & Bacon, which had represented Philip Morris, were both copied in on correspondence between Wills and its solicitors, and were both involved in a 4 June 1991 conference call in which document destruction was discussed with Robyn Chalmers, a partner at solicitors Mallesons Stephen Jaques, who had also been retained by Wills. Again, on 21 February 1992, Schechter and Northrip participated in a phone hook up with Chalmers at which the issues were discussed—this time, they were joined by Foyle and Stuart Charfon, a solicitor with BATCO. Chalmers recorded the discussion under the heading “Dispose of Documents”.

DESTRUCTION OF THE “CREMONA” DOCUMENTS IN 1998

In February 1996, a personal injury case was commenced against Wills in the Supreme Court of Victoria by Ms Phyllis Cremona, a smoker with emphysema. The case was discontinued in March 1998.[59] The law firm, Mallesons Stephen Jaques, had been engaged to work on the discovery process.

For the Cremona litigation, Wills identified some 30 000 documents as being possibly relevant in the proceeding. “Save for a very small minority of documents, all 30 000 documents were imaged on computer discs.” They were indexed, and, in most instances, summarised, “for the very purpose that they could be readily retrieved and searched if required.”[112] “[T]he process of reviewing so many documents must have given many employees or consultants with the defendant a very clear appreciation of the potential for damage which the documents created.”[114]

Justice Eames concluded that at the conclusion of the Cremona proceedings, and another proceeding brought by David Harrison against Wills in the Supreme Court of New South Wales, which did not progress as far as Cremona, “a window of opportunity” to destroy documents was perceived by Wills’ senior counsel, Nick Cannar (who is now CEO of Imperial Tobacco Australia). The memorandum to department managers and work group managers which, in effect, advised that destruction could begin was issued “by the Authority of the Chief Executive, Mr Stuart Watterton”. And the destruction began: “In March 1998, at the conclusion of the Cremona litigation, thousands of documents which had been discovered as relevant in Cremona were destroyed by the defendant. The destruction was performed as a matter of urgency.” “No record was kept by the defendant as to the documents which were destroyed . . .”[167]

Destruction of documents by Wills included destruction of CD Roms on which they were imaged. As Justice Eames observed: “There was no factor of storage space which caused that.” As Graham Maher, a senior lawyer at Wills, conceded, the effect of the policy was to obliterate knowledge of the fact of the existence of documents. By the time of the hearing

before Justice Eames, “[a]ll record of the summaries and rating [that is, how damaging or useful to the defendant] of the Cremona documents [had] been destroyed . . .”[115]

What were the documents that were destroyed? Of course, we will now never know, but Justice Eames’ decision gives some indication. One of the categories of discovery in the McCabe case related to the “pharmacological effect of nicotine”. Justice Eames found: “. . . given the fact that not a single document was in fact discovered in that category the implication seems overwhelming that discovery has been fundamentally thwarted under this category by virtue of the 1998 destruction program.”[124] One category of discovery was “all documents relating to the advertising of the defendant’s cigarettes of the brands “*Capstan*” and “*Escort*” between 1958 and 1992, whether or not such advertising also refers to other of the defendants’ brands”. No documents were produced under discovery in this category.”[125] Justice Eames also commented that Graham Maher, senior lawyer at Wills, appreciated that “what would be destroyed (and was) included, at least, all internal documents reflecting discussion within the company about research, advertising, addiction, and other critical issues. He knew at the time how important such material would have been to the case of a future plaintiff.”[146]

OTHER WRONG DOING BY BAT AND ITS LAWYERS

But the wrongdoing exposed in the McCabe case went even further, and had it not been so overshadowed by the document destruction, would surely have been a huge story of its own. This broader wrongdoing included: the swearing of a misleading Affidavit of Documents by BAT’s company secretary; Clayton Utz partner, Richard Travers, intentionally misleading Mrs McCabe’s solicitor in correspondence; the use of careful language in an affidavit deposed by Robyn Chalmers which failed to give any hint of the post-Cremona destruction of documents; the making of “apparently incomplete and less than frank statements” to Justice Eames at pre-trial hearings; and the ongoing warehousing of documents.

IMPLICATIONS OF THE CASE

Justice Eames reached his decision after considering the entirety of BAT and Clayton Utz’s conduct (and also that of BAT’s other firm of solicitors, Mallesons Stephen Jaques) which denied the plaintiff a fair trial. Though each of these strategies alone gave Justice Eames power to strike out BAT’s defence, he had a discretion as to whether to take that step, or to allow the trial on liability to proceed with orders designed to ameliorate the prejudice to the plaintiff. It was the entirety of the conduct of BAT, Clayton Utz and Mallesons which led Justice Eames to conclude that the trial could not “now be cured”.

Judges only ever decide the cases before them. Unlike legislation, judgments are not prescriptive. Future cases are assessed against the principles or guidelines set by earlier cases, but the facts are different in each case; different judges give different weight to different facts, and ultimately reach conclusions based on their view of the particular circumstances of the case before them. Thus, whether judges in future cases against BAT will reach the same conclusion as Justice Eames (that BAT’s defence should be struck out and the case proceed immediately to an assessment of damages) remains to be seen. Each future case will be decided on its merits. Presumably BAT will have learned that it ought to be frank with the court about its destruction of documents and that it should reconsider its ongoing document warehousing arrangements. If it does learn these lessons and comes to the court with a different approach from the approach it decided to take in Mrs McCabe’s case, the results may be different.

Nevertheless, that is not in any way to underestimate the significance of document destruction. Throughout his judgment, Justice Eames made findings about the intent behind

BAT's document destruction policy, and the effect on the plaintiff of that conduct. On the question of the *intent* behind BAT's document destruction, Justice Eames found:

"The defendant intended that by the destruction of documents any plaintiff in the position of the present plaintiff would be prejudiced in the conduct of their action, both generally and, in particular, in the ability to lead relevant evidence or to cross examine witnesses. It was intended by the defendant that any such plaintiff would be denied a fair trial." [289]

On the *effects* of BAT's document and records destruction, Justice Eames noted a number of ways in which the plaintiff had been prejudiced. These included:

- It was impossible to assess precisely what documents may have been destroyed, and the extent to which BAT had failed to provide full and complete discovery, though it was clear that "significant numbers of important documents have been denied to the plaintiff by the strategy adopted by the defendant". [290]
- Even if the plaintiff could obtain copies of missing documents, it would still face "serious difficulty" in making use of the documents to prove BAT's state of knowledge of relevant matters. [300] It is one thing to have a defendant admit it possesses or has possessed a document. It is quite another for a plaintiff to have possession of a document and to seek to prove that the defendant possesses or once possessed it.
- A former legal counsel for BAT said that there were "internal documents, memos, and commentaries on research" (which would clearly have been important to the plaintiff's case). "None has been produced in this case." [303]
- 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". The plaintiff may have been denied "at least one "knockout" document, if not many." [309]
- The "real difficulty" for the plaintiff is that she cannot know if internal research was conducted and reported upon by the defendant. She will be confronted with "difficulties of proof which may well not have arisen had the destruction not occurred". [310]
- In cross examining witnesses in the defendant's camp, especially those with a "scientific or research background", the plaintiff's counsel would be "potentially handicapped by a lack of knowledge of research with which those witnesses are familiar but where documents relating to which have been destroyed". [316]

Accordingly, Justice Eames concluded that "the prejudice to the plaintiff by the destruction of documents is considerable". He considered this conclusion in light of his further conclusions that this was always the intention of the defendant, and that "the belief held by the defendant in 1998 (as it

was for the whole period from 1985) was that future proceedings were not merely likely, but were virtually certain, as indeed, proved to be the case." [288]

The arguments made by the plaintiff about document and record destruction in this case will undoubtedly be made by plaintiffs in future cases against BAT. And of course, BAT's intention in destroying documents and their records was not to deny Mrs McCabe in particular a fair trial, but to deny "any plaintiff in the position of the present plaintiff" a fair trial. Unless BAT does an about-face such as by discovering that it has not actually destroyed documents and their records, there is every reason to think that the matters that weighed heavily on Justice Eames in relation to document destruction will weigh similarly on future judges. BAT faces the serious possibility that the effects of its decisions and conduct in relation to the destruction of documents will include the repeated striking out of its defence in future cases, with countless plaintiffs able to proceed directly to an assessment of damages, just as Justice Eames ordered for Mrs McCabe. The "nightmare scenario" may have arrived—or what ASH UK's Clive Bates eloquently called "litigation Armageddon".

IMPLICATIONS BEYOND AUSTRALIA

BAT Australia was not acting in isolation from its international brothers and sisters. The clear implication is that document destruction was not unique to Australia. Nor would be the measures available to courts in other jurisdictions to protect the administration of justice.

Once the trail of document destruction is uncovered in other countries, similar results might be expected to follow. The US Department of Justice, which is currently suing the tobacco industry, has made contact with Mrs McCabe's solicitors, Slater and Gordon, to assist it in its case. Canadian and UK lawyers have also been in touch with the firm.

WHERE TO FROM HERE?

BAT has commenced an appeal against Justice Eames' decision. BAT and Clayton Utz have parted company—it being untenable for Clayton Utz to keep acting for BAT, given that their futures are now inextricably enmeshed. It is hard to imagine a defendant taking a less meritorious case to appeal. Nevertheless, an appeal buys time, stalling the investigations that were announced the day after the verdict by the law society bodies of Victoria and New South Wales, the Australian Competition and Consumer Commission, and the Victorian Government Solicitor. It also sends a warning to future plaintiffs that litigation will not be easy. But if BAT is facing "litigation Armageddon" now, one can only imagine how things will look if it takes its case all the way to the High Court of Australia, and the highest court in the land, the ultimate protector of the administration of justice and the sanctity of the courts, takes the view one would expect it to take. A nationwide precedent would be firmly in place.

Contrary to the rhetoric of lawyers, legal commentators, and tobacco control advocates, in truth, the legal "floodgates" rarely open. But this case might be the big exception. The chairs in the boardroom of BAT may be about to get very wet indeed.