SUPREME COURT OF VICTORIA

COURT OF APPEAL

No.8121 of 2001

BRITISH AMERICAN TOBACCO AUSTRALIA SERVICES LTD. Appellant

v.

ROXANNE JOY COWELL, as representing the estate of ROLAH ANN McCABE deceased Respondent

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JUDGES:	PHILLIPS, BATT and BUCHANAN, JJ.A.
WHERE HELD:	MELBOURNE
DATE OF HEARING:	26, 27, 28, 29 August and 2 and 3 September 2002
DATE OF JUDGMENT:	6 December 2002
MEDIUM NEUTRAL CITATION:	[2002] VSCA 197

Courts – Practice and procedure – Discovery – Destruction of documents by defendant when litigation anticipated but not yet commenced against it – Documents destroyed only after legal advice taken – Whether the advice was proper – Defects in affidavit of documents – Whether order striking out the whole of the defence justified.

Evidence – Legal professional privilege – Waiver – Actual waiver in respect of request for advice and letter of advice – Whether privilege waived by imputation in respect of documents reaching back many years – Test for imputed waiver.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr. A.J. Myers QC with Mr. D.F.R. Beach SC and Mr. S.A. O'Meara	Corrs Chambers Westgarth
For the Respondent	Hon. T.E.F. Hughes QC with Mr. J.T. Rush QC Mr. J. Gordon and Mr. B.F. Quinn	Slater & Gordon
For Brian Thomas Wilson	Mr. T.F. Bathurst QC with Mr. P.M. Wood	Freehills

THE COURT:

1 This is an appeal from judgment given in the Trial Division on 11 April 2002 in favour of the plaintiff against the defendant for the sum of $700,000 for damages plus interest and costs. Rolah Ann McCabe was plaintiff and British American Tobacco Australia Services Ltd. was defendant. Judgment was given, in substance, in consequence of an order made on 25 March 2002 striking out the defence of the defendant "save in so far as it relates to the question of damages". An assessment by a jury followed and hence the judgment given on 11 April. In the notice of appeal filed on 23 April 2002 and amended on 1 May, reference is made both to the order of 25 March and to the judgment of 11 April, but the argument on appeal focussed entirely on the order made on 25 March, striking out the defence. An earlier application by summons filed on 5 April 2002 for leave to appeal against that order was not pursued, obviously because the interlocutory order made on 25 March was overtaken by the judgment for damages given 11 April and the appeal as of right that followed.[1]

Introduction and summary

2 The plaintiff's claim was for damages, both general and exemplary, for personal injury allegedly sustained by her through smoking the cigarettes of the defendant and its predecessors. The defendant came into existence in September 1999 when W.D.& H.O. Wills (Australia) Limited (hereinafter referred to as "Wills") merged with Rothmans of Pall Mall (Australia) Limited. Wills was itself in existence between September 1958 and March 2000, being in turn the successor to the British-Australasian Tobacco Company Limited, which was in existence between 1950 and August 1958. It is convenient to follow the course adopted by the parties in argument, of referring to "the defendant" as encompassing the relevant entity

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[1] On 3 May 2002 the Court of Appeal made consent orders in relation to the application for leave to appeal which inter alia consolidated the application and the appeal as of right.

from time to time, unless there is some need to differentiate.

3 Born on 23 September 1950, the plaintiff was seriously ill with lung cancer and had only a brief life expectancy at the time this proceeding was heard and determined in the Trial Division. (Regrettably she died after the appeal was argued.) The plaintiff commenced the proceeding by filing a writ on 26 October 2001 and on 9 November, by consent, an order was made for a speedy trial. There were then numerous hearings of interlocutory applications and a number of further orders were made, including on 6 December 2001 an order for limited discovery. In late December 2001 the judge to whom the case had been allocated for pre-trial management fixed a trial date of 18 February 2002. A range of pre-trial issues being still unresolved, in particular with respect to discovery and the admissibility of documents, five days, commencing on 30 January 2002, were allocated to resolve those issues. As recorded subsequently by the judge (in his reasons for judgment of 22 March), his Honour made it clear at the time to the parties that, so far as possible, he wanted to resolve issues concerning the admissibility of documents before the jury was empanelled.

4 On 24 January 2002, counsel for the plaintiff told the judge that the plaintiff wished to make a new application in lieu of the applications which had been listed for hearing on 30 January. The judge permitted the plaintiff to substitute, for those applications, an application by summons filed on 25 January seeking an order that the defendant's defence be struck out. The summons was supported by an affidavit sworn on 25 January by Mr. Peter Gordon, of Slater & Gordon, the solicitors acting for the plaintiff. That affidavit was initially objected to on the ground that it contained matters of opinion and was argumentative, but during the argument that followed on the application the affidavit was accepted, the judge recorded, "as a reasonable summary of the contentions advanced on behalf of the plaintiff [and] as to the significance of the many exhibits which were attached to it". There were indeed many exhibits to that affidavit and they included a number of documents which had apparently been found by Mr. Gordon in depositories of documents at

Guildford, in England, and in Minnesota in the United States.[2]

5 Although the defendant was later to complain that it lacked particulars of the allegations upon which the plaintiff based its summons of 25 January, it is plain enough from Mr. Gordon's affidavit of 25 January that the plaintiff was complaining at least that the defendant had failed to comply with the order for discovery of 6 December "in that the deponent fails to identify adequately the details concerning the documents which are said to have been lost or destroyed" and had failed to depose to investigations made or the sources of knowledge, information and belief as to the fate of those documents: see para.6 of the affidavit of 25 January. The plaintiff was complaining too (according to Mr. Gordon's affidavit) about "the conduct of the defendant in relation to the destruction of documentary evidence [which] was part of a document management policy, the predominant purpose of which was the destruction of documentary evidence discoverable by and damaging to the defendant in litigation such as the present case". This was described (in paragraph 10) as opinion formed by the deponent and the rest of the affidavit set out to justify that opinion by reference to inquiries made and documents perused. Mr. Gordon relied in his affidavit upon the failure of the defendant to state plainly what documents had been destroyed to submit, argumentatively, that the plaintiff and the court had been misled by the defendant.

6 The affidavit of 25 January ran to some 19 pages and 41 paragraphs (many of them subdivided) and the defendant responded by itself filing, first, a number of affidavits sworn on 29 January 2002: an affidavit of Malcolm Nicholson, who was for a time the defendant's audit manager and who spoke about the document retention policies and procedures of the defendant; an affidavit of Michael John Brian Joseph Harrison, who was for a time the records manager of Wills; an affidavit of Graham Franklin Maher, also an employee of Wills and an in-house solicitor who

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[2] These depositories were first mentioned at the directions hearing on 14 November 2001 by Mr. Gordon: see paragraph [34] below. They were also mentioned in his affidavit of 18 December 2001 (in paragraph 3) and again in his affidavit of 25 January (in paragraphs 4(b) and 9).

had much to do with the litigation commenced earlier by Mrs. Cremona against the defendant ("the Cremona litigation") and the destruction of documents after the conclusion of that litigation; and an affidavit of Glenn David Eggleton, a member of the law firm of Clayton Utz. These affidavits were soon followed by others: a further affidavit of Mr. Maher, sworn on 31 January, and one of Mr. Harrison, sworn on 1 February. The defendant too exhibited an array of documents to meet the plaintiff's application and many of the deponents were cross-examined.

7 One of the difficulties facing both sides, and of course the judge, was the need for urgency because of the plaintiff's ill-health. As the judge said in his subsequent reasons for judgment:-

> "The hearing of this application has been conducted in the unfortunate and urgent context of the plaintiff's terminal illness. That consideration caused me to raise with counsel the possibility that the trial should proceed to verdict, with resolution of the present application being considered, if it remained relevant to do so, after verdict was delivered. Counsel for the defendant supported that suggestion, but counsel for the plaintiff urged that I not adopt that course, contending that the plaintiff's prospects of a fair trial had been irretrievably damaged. Having heard submissions, I concluded that I should deal fully and immediately with this application. However, as anticipated, it has become necessary to vacate the trial date. In the event that the plaintiff were to die before verdict then a successful verdict for damages for the benefit of the estate would not include general or exemplary damages and pecuniary loss damages would be significantly restricted[3]".

8 No doubt it was because of this urgency that the application was permitted by his Honour to evolve as it proceeded, with the result that it was not until the seventh day of the hearing (according to the defendant's present submission) that plaintiff's senior counsel articulated the grounds upon which the plaintiff put the application. They were these[4]:-

> "1. The conduct of the defendant its servants and agents, including its solicitors, in the destruction of documents relevant or potentially relevant to apprehended litigation has created

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3 See s.29(2) Administration and Probate Act 1958. An exception to these limitations, but only with respect to dust-related conditions, was introduced by the insertion of sub-s.(2A) in 2000.

4 AB5 1737-8 incorporating later oral corrections: and see the Appellant's Summary para.48.

circumstances where this plaintiff is unable to obtain a fair or proper trial.

2. The defendant by the conduct of its servants and agents in the course of this proceeding –

   (i) by statements of counsel to the court

   (ii) by correspondence from the defendant's solicitors to the plaintiff's solicitors

   (iii) by affidavits filed on its behalf in court –

   has misled the plaintiff and the court as to the true position concerning the existence of documents relevant to this claim.

3. The failure of the defendant to comply with orders of the court made 6/12/01 in relation to discovery and the failure of the defendant to comply with Rule 24.04 of the Rules of Procedure.

4. The failure of the defendant having regard to the conduct referred to in paragraphs 1, 2 and 3 to respond positively to the request for further [categories] contained in the letter of Slater & Gordon to Clayton Utz dated 4 January 2002[5]."

All this, claimed the plaintiff's counsel, had caused "severe prejudice to the plaintiff". The plaintiff relied upon what was "comprehensively detailed in the affidavit of Peter Gordon sworn 25 January 2002".

9 In the end, the hearing of the application, which had earlier been estimated to last for one or two days[6], occupied some 15 sitting days, during which even more documents went into evidence. In the course of the hearing, on 6 February, the judge ruled that the defendant, by exhibiting to an affidavit upon which it relied two letters of advice from firms of solicitors[7], had waived privilege as to legal advice received by it from "early in 1990" concerning the handling and destruction of documents. This was after argument by the parties over a notice to produce served by the plaintiff on 31 January 2002[8] on the defendant and two subpoenas duces

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5 AB3 766, PG10 tab 36.

6 AB10 3629 line 11.

7 The affidavit in question was that sworn by Mr. Maher sworn on 29 January 2002 and the exhibits were GFM 3 and GFM 4: AB 4 1191, 1226, 1251. The topic is dealt with later in detail under the heading "The rejection of the claim to privilege".

8 AB5 1460-1, 1644.

tecum served upon the defendant's solicitors Clayton Utz and upon Mallesons Stephen Jaques ("Mallesons") who had been helping the defendant with discovery. As a result of his Honour's ruling, many letters and memoranda of advice from solicitors, which otherwise would not have gone into evidence, became exhibits on the application. [9]

10 The hearing of the application to strike out the defence began on 30 January and ended on 1 March 2002. On 22 March, his Honour announced his decision, delivering comprehensive and detailed reasons for judgment. His Honour concluded, *inter alia*, that there had been non-compliance by the defendant, in many respects, with the order for discovery made on 6 December 2001 and that, through the implementation of its "document retention policy", the process of discovery in the case had been subverted by the defendant and its solicitors with the deliberate intention of denying a fair trial to the plaintiff, a strategy which had been successful. Accordingly, an order was made striking out the defence, leaving the proceeding undefended save on the issue of damages. By appealing, the defendant challenged the judge's findings and his conclusions, claiming that the order striking out the defence should never have been made and in consequence the judgment for damages should be set aside and the matter remitted for trial. For her part the plaintiff contended[10] that there were two bases for the order made below and that, although overlapping, each was independently capable of sustaining the order striking out the defence: that is to say, non-compliance with the order for discovery as found by his Honour and, secondly, the destruction of documents deliberately with the view to denying a fair trial to any plaintiff in litigation like the present against the defendant.

11 Before us, the oral argument on this appeal (and we distinguish the second appeal which was heard immediately afterwards) occupied six sitting days. We

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9 On 13 February 2002, another ruling was made that the defendant had waived legal professional privilege, this time in relation to what was called the Stowe memorandum: see paragraph [133] below.

10 Respondent's Outline of Submissions paras.3, 4, and 5.

heard not only argument from the parties (to whom we shall continue to refer as plaintiff and defendant), but also (in support of the appeal) argument on behalf of Brian Thomas Wilson, a solicitor whose conduct was much criticised by the trial judge. Leave to Mr. Wilson to make submissions had been granted on 26 July last. In addition to the oral argument, we had from both plaintiff and defendant comprehensive summaries and from them and Mr. Wilson very lengthy and detailed submissions[11] and then, near the conclusion of oral argument and as Mr. Myers rose to reply, we were handed yet a further 29-page document containing the defendant's submissions in reply. Coupled with the eleven A4 folders which constitute the appeal book, this vast array of paper makes a daunting task for an appellate court.

12 His Honour's reasons for judgment alone occupy more than 130 pages and they explore in great detail the issues that fell for determination and the evidence concerning them. There were, however, four main areas of disputation and it is convenient to identify them now: (1) the order for discovery, being in the main that which was made on 6 December 2001, and whether and to what extent there had been default by the defendant in compliance (including whether such compliance as there was had been misleading); (2) the defendant's document retention policy, as it was called, and the destruction of documents by the defendant from time to time under that policy (according to the defendant); (3) prejudice to the plaintiff in consequence of the defendant's actions; and (4) the appropriate order in all of the circumstances.

13 It is appropriate at the outset to acknowledge that the task facing his Honour was considerable, given the complexity and the novelty of the application as it evolved during argument and the pressure for a speedy determination which was met by his Honour's delivering judgment with great expedition. With great respect, however, we think that his Honour fell into significant error in relation to the first

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[11] In the Appellant's Outline of Submissions the reference to later paragraphs (after 348) of the reasons for judgment used numbers which were different by one from those appearing in the reasons for judgment as reproduced in the Appeal Book, volume 11. In this judgment the paragraph numbers are as they appear in the Appeal Book.

and second of the four issues just identified, and as well on the waiver of legal professional privilege, and for reasons to be explained it follows that the order striking out the defence was not justified and the appeal should be allowed.

Preliminary application

14 When the appeal was called on for hearing, and as foreshadowed in correspondence during the previous week, counsel for the respondent made immediate application for access to certain documents the existence of which had recently been disclosed to it. According to an affidavit of Mr. Gordon, sworn on 23 August 2002, the finding of these documents had been notified to the respondent's solicitors because of the subpoenas that had been served on 31 January 2002 on the two firms, Clayton Utz and Mallesons[12] (both of which were by 23 August the *former* legal advisers of the defendant).

15 According to Mr. Gordon's affidavit, it was on 14 August 2002, and by letter from Minter Ellison (the firm now acting on behalf of Clayton Utz), that the plaintiff's solicitors were informed that Clayton Utz had recently found certain documents believed to fall within the ambit of the subpoena served on 31 January 2002. At the same time, said Minter Ellison, the defendant was claiming legal professional privilege over the documents. On 15 August, Mr. Gordon was told by Minter Ellison that Clayton Utz had found the subject documents during July and that, in view of the claim to privilege, the rest was a matter for the defendant. When Mr. Gordon wrote to the defendant's present solicitors on 16 August, seeking access to the documents, they replied that the subpoena was "no longer a current order of the Court" and repeated that the defendant claimed privilege.

16 Again according to Mr. Gordon's affidavit, on 22 August 2002 the plaintiff's solicitors were informed by Mallesons that certain documents had been found recently - in May last - which that firm had failed to produce in answer to the subpoena served on 31 January 2002. Enquiry of the defendant did not advance the

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12 As mentioned already in paragraph [9].

matter; for when asked it said, through its solicitors, that, while Mallesons had told it of the position in early June, it considered the matter of compliance with the subpoena to be a matter for Mallesons. On 23 August Mallesons sent the documents to the Court in a sealed envelope marked "privilege", under cover of a letter informing the Court that the defendant claimed legal professional privilege in respect of the documents.

17 In relation to both sets of documents, Mr. Rush, who had carriage of the argument for the plaintiff on this aspect before us, sought an order that the plaintiff be given access to these two sets of documents forthwith, and notwithstanding the claim to legal professional privilege. As foreshadowed by Mr. Gordon in his affidavit, the plaintiff relied upon the trial judge's ruling on 6 February 2002 that privilege had been waived in respect of the period from "early 1990 to late 1998". But this was the subject of challenge on the appeal and it seemed to us altogether inappropriate that we should make an order giving effect to his Honour's ruling when the correctness of the ruling had yet to be determined. Moreover, Mr. Rush sought access to the documents, he told us, for the purpose of learning whether these documents, too, supported the conclusions of the trial judge - and again that approach seemed to us inappropriate when the first question for us on this appeal was whether, on the material before him, his Honour had fallen into error as claimed by the defendant. Indeed, Mr. Rush conceded that, if these further documents tended to support his Honour's conclusions, they would only serve to reinforce the plaintiff's arguments on the appeal, yet Mr. Rush was unable to cite any authority in which the respondent had been permitted to rely upon "fresh evidence" to support a judgment under appeal. Finally, it may well be, as the defendant's solicitors contended in correspondence, that each subpoena was anyway "no longer a current order of the Court". After all, the subpoena was an order of the Court for the production of documents at trial and the trial was well and truly over. We mention the point, but there is no need to decide it.

18 In all the circumstances, we simply dismissed the application made by

Mr. Rush when it was made to us at the outset of the hearing, our reasons being apparent in the course of our discussion with counsel at the time. We dismissed the application without prejudice to its being renewed if and when the plaintiff might think it appropriate thereafter. So far as we could see then, unless and until we decided that there was error below, the question of further documents could only be an unnecessary complication. Whether such documents would be relevant in considering what orders should be made in substitution for the orders made below *if and when* we decided that those orders should be set aside, was another matter and one upon which we were not prepared to embark before the hearing of the appeal. There is therefore no need to say any more at this stage about the preliminary application, save to record this: that the application was not thereafter renewed.

The context

19 Turning then to the matters debated on appeal, we say something first about the issues raised by the proceeding itself and about the defendant's document retention policy and its implementation generally, for the purpose of giving context to the complaints made by the plaintiff about the defendant's compliance, or non-compliance, with its obligations to discover and about the destruction of documents.

20 The plaintiff filed and served her statement of claim with the writ on 26 October 2001 and it suffices for present purposes to adopt the description of that pleading in the judge's reasons for judgment (paragraph 7):-

> "The plaintiff's statement of claim alleges that from her early teens (having commenced smoking at age 12) she became addicted to cigarettes manufactured by the defendant, and that as a result of that addiction and the properties of the cigarettes, she contracted lung cancer. The plaintiff alleges that the defendant, itself or through its predecessor and affiliated companies, knew that cigarettes were addictive and dangerous to health, and by its advertising targeted children to become consumers. The plaintiff alleges that the defendant, knowing the dangers of addiction and to health of consumers, took no reasonable steps to reduce or eliminate the risk of addiction or the health risks, and ignored or publicly disparaged research results which indicated the dangers to health of smoking."

21 The defence was filed on 21 November 2001 and again we draw on the reasons for judgment (paragraph 10) for this description of the defence:-

> "In broad terms, the defence denies that the plaintiff's illness is causally related to cigarettes, asserting that the majority of smokers do not contract lung cancer. As to the plaintiff's allegation that the defendants' cigarettes were addictive, the defendant, whilst acknowledging that some persons may find it difficult to quit smoking, denies the allegation, and asserts that smoking is a behaviour of choice, and does not impair the ability of a smoker to assess the risks of smoking and to make an informed decision. As to the plaintiff's allegation that the defendant between 23 September 1950 and 1992 knew or ought to have known about the risk of lung cancer and the addictive effect of nicotine, the defendant joins issue and expressly pleads, by par 5(d), that:
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> > 'the defendant did not have any knowledge about the risk of lung cancer or any difficulty associated with quitting smoking which was not in the public domain.'"

The allegations about the plaintiff's own smoking were not admitted and the allegations of duty and breach were denied. Nor did the defendant admit that the plaintiff first became aware of injury when she was diagnosed with lung cancer on 31 July 1991. Loss and damage were put in issue.

22 After dealing with the plaintiff's allegations, the defence continued by alleging that before commencing to smoke and throughout the period during which she smoked (which was alleged by the plaintiff to be from about 1962 when she was 12 years old until 1992), the plaintiff was aware that smoking could cause lung cancer and other fatal diseases and undertook the risk voluntarily. As the judge put it (in paragraph 11):-

> "The defendant pleads that from a time prior to 1962 the Australian community was informed that smoking could cause lung cancer, and other diseases, and that it could be difficult to quit smoking, and that there was extensive legislative regulation of tobacco advertising and health warnings - among other matters - and there was legislation prohibiting the sale of tobacco to minors. The defendant pleads that it had entered into agreements with governments relating to such matters, including tar and nicotine levels. The defence asserts that the plaintiff voluntarily assumed the known risks of contracting cancer, those risks having been the subject of warnings over many years."

23 After so describing the pleadings, the judge summed up in relation to the issues in this way (paragraph 12):-

> "It is clear that the plaintiff's case against the defendant will direct attention to the question of what was known to the defendant as to the risks of smoking, the addictive properties of cigarettes, the considerations and knowledge which bore upon the defendant's decisions as to the manufacturing process, and advertising campaigns concerning its products, and, in particular, its knowledge as to the consumption of cigarettes by children. It is also clear that contemporaneous and historical documents held by the defendant relating to scientific research, not only that held in the public domain but also research conducted by scientists acting on its behalf, on behalf of other tobacco producers, and also research conducted by outside agencies on behalf of the defendant or the tobacco industry, would be of very great importance to the plaintiff's case. Equally important might be any internal memoranda reflecting the defendant's response to such research and its knowledge and actions as to relevant issues."

So much may be accepted for the purposes of this appeal. As we apprehend it, it was not in dispute before us that what might be relevant at trial, depending upon the way in which the plaintiff put her case, went beyond such scientific research as was in the public domain and extended also to research within the bosom of the defendant and its associated tobacco producers. At all events, we are prepared to accept that for present purposes.

24 The defendant was, of course, a large organisation, under whatever name it endured for the time being. As such it generated many documents and it cannot be surprising that for many years there was in place a policy, of one sort or another, with respect to the retention or destruction of documents generated or coming to hand in the course of business and much of the dispute before his Honour over discovery, and particularly the cross-examination of deponents, focused on the defendant's so-called document retention policy and its implementation. It is important, however, to stress at the outset that while the allegation made was that the defendant had destroyed documents with the intent of defeating the claims of the plaintiff (or, more accurately, litigants like the plaintiff), it was *not* claimed that there was any relevant destruction of documents *after the commencement of* this proceeding on 26 October 2001. Rather, the complaint was that documents had

been destroyed at a time when litigation was plainly anticipated and deliberately so, with the intent of defeating prospective litigants who, like the plaintiff, would seek damages from the defendant for personal injury occasioned by the smoking of the defendant's cigarettes.

25 The plaintiff's claim that the defendant had wrongly destroyed documents to her prejudice reached back many years to well before the commencement of the instant litigation, and indeed to well before any such litigation against the defendant in Australia. The first such proceeding was instituted in October 1990 against Wills, when Wills was joined as third party in a proceeding brought against C.S.R. Ltd by one Gallagher in the Supreme Court of Western Australia. Mr. Gallagher claimed to have suffered chest disease as a result of inhaling asbestos and the third party proceeding raised the question whether cigarettes had caused or contributed to the plaintiff's condition. That litigation ended in November 1991[13]. In December 1990, one Harrison commenced a proceeding against Wills in the Supreme Court of New South Wales ("the Harrison litigation") and in February 1996, Phyllis Cremona commenced her proceeding in the Supreme Court of Victoria (the Cremona litigation). The latter was resolved in February 1998[14] and the Harrison litigation was formally discontinued on 8 April 1998[15]. In March 1999, one Durkin commenced a proceeding in the Federal Court which was later to become the Nixon class action[16]. The class action was dismissed before trial on procedural grounds on 18 December 2000[17] As already noted, the present proceeding was commenced in October 2001.

26 According to the evidence, once litigation began in 1990, a "hold order" was

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13 Appellant's Chronology p.5, Respondents' Chronology p.7.

14 The proceeding was discontinued, according to the Respondent's Outline of Submissions, para. 59: see also Respondent's chronology p.12.

15 When notice of discontinuance was filed: AB9 2736. According to the Respondent's Outline, para. 59, that was preceded by an application (at least initiated) by the defendant to have the proceeding dismissed for want of prosecution, notice of motion to that effect being filed on 11 February 1998: AB9 2738.

16 Respondent's chronology p.14.

17 Respondent's chronology p.15.

put in place by the defendant 's management, requiring "that all records subject to it be kept until further notice", and "overriding the retention periods which would otherwise apply"[18]. Thus, a hold order prevented for the time being the implementation of the document retention policy, lest thereby documents relevant to the litigation be destroyed. Hold orders were reviewed annually but, as the litigation continued, so the hold orders were renewed. The first was imposed on 23 November 1990 and thereafter there was always one in place until the last of these was revoked with effect from 6 March 1998, Mr. Harrison having agreed on 5 March to discontinue his litigation in the Supreme Court of New South Wales[19].

27 With the ending of litigation (at least for the time being), the defendant saw a "window of opportunity" (as the judge characterised it) with the result that, when the last of the hold orders was revoked in March 1998, a direction went out to implement the document retention policy which, for so many years, had been on hold. At that point it is probable that many documents were destroyed, including many discovered in the Cremona litigation, something of which the judge was particularly critical. The judge found[20] that "the destruction was performed as a matter of urgency" and although it occurred at the time when no litigation was on foot and "after advice had been received from Mallesons that it was lawful to do so", his Honour found it probable that the defendant "considered that further proceedings were not merely likely, but a near certainty, although it did not know the identity of any proposed litigant". Indeed, the Nixon class action (in which it appears that Mrs. McCabe herself registered as a group member through Slater & Gordon in September 1999[21]) commenced in March 1999, which led to a new hold order being put in place, on 12 April 1999[22].

28 In broad terms the judge accepted the plaintiff's contention that the

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18 Affidavit of Nicholson 29 January 2002 para.26.

19 Affidavit of Nicholson, 29 January 2002, paras.29-35; affidavit of Maher, 31 January 2002.

20 Reasons for judgment, paragraph 289 finding 15 (AB11 4043).

21 Respondent's Chronology p.15, AB10 3370.

22 That hold order is Exhibit GFM 15 to the affidavit of Mr. Maher of 31 January 2002.

destruction of documents, both before 1998 and during 1998, had been undertaken by the defendant deliberately for the purpose of defeating prospective litigants, including the plaintiff, and, holding that the defendant had acted improperly in so destroying documents (albeit, as his Honour found, with the advice of its lawyers) and that the plaintiff had thereby suffered irreparable prejudice, he ordered that the defence be struck out. In view of the contrasting submissions made by the parties below on the issue of document retention and destruction (submissions which we shall describe in more detail later on), it is scarcely surprising that the judge's conclusion on that aspect, once drawn adversely to the defendant, served to colour his consideration of the other questions falling for determination. Indeed, in our opinion the 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. None the less it is convenient to turn first to those questions of non-compliance and to consider them separately, the more particularly as the plaintiff contends that, given its nature and extent, non-compliance by the defendant in respect of discovery was sufficient, in itself and without more, to justify the order striking out the defence.

The order for discovery of 6 December

29 Under Rule 29.04 of Chapter I of the Rules, when a party makes discovery in a proceeding commenced by writ, the affidavit of documents shall identify the documents which are or have been in "possession" (meaning possession, custody or power); enumerate the documents or describe them sufficiently to enable the documents to be identified; and distinguish those which are in possession from those which were but are no longer in possession, the deponent stating when the party "parted with the document and his [or her] belief as to what has become of it". Any claim to privilege from production should be stated, with the grounds of the privilege. Under Rule 29.05, the court is empowered to make an order for limited discovery "in order to prevent unnecessary discovery", and, as will be seen, that was

the course that in this instance was followed by consent on 6 December.

30 Before the trial judge the plaintiff set out to establish non-compliance by the defendant with its obligations to make discovery, and in particular to make discovery as ordered on 6 December. No doubt the plaintiff relied upon Rule 24.02 under which, in a case of non-compliance, the court may order, if the party is a defendant, "that his defence, if any, be struck out", whereupon the defendant is to be taken to be "a defendant who, being required to serve a defence, does not do so within the time limited for that purpose". In this instance, the judge having found inter alia non-compliance in a number of respects, the defence was struck out save as to loss and damage which in turn led his Honour to give judgment in default of defence under Rule 21.02. We accept the defendant 's submission that, because the order of 6 December 2001 was critical to the plaintiff's application, it is important to understand how that order came about, and so we say something of that now.

31 As already recounted, an order for a speedy trial was made by consent on 9 November 2001 and the parties were told then that the trial judge would conduct interlocutory steps preliminary to trial. The first directions hearing was on 14 November, but in the meantime there had been correspondence. After pointing to the apparent delay since instructions had been given "as early as August", the defendant's solicitors said that it would be "physically impossible for the defendant to give general discovery" by 19 November and further "without knowing what is alleged about safe or safer cigarettes, conduct and causation" they could not say "how many man hours are likely to be required to provide general discovery". That was by letter dated 5 November and further particulars of the plaintiff's allegations in the statement of claim were sought by letter of 6 November. These were directed particularly to the allegations about relevant "knowledge" of the risk of lung cancer and the addictive effect of nicotine. Such knowledge, it was claimed in the letter, "evolved during the period from September 1950 onwards" and in the light of that, and certain reports in the public domain, further and better particulars were sought in 46 specific paragraphs.

32 This prompted a response, by letter of 7 November, asking whether the letter was to be taken for a formal request for further and better particulars. Issue was taken also with what had been stated by the defendant's solicitors about the evolutionary nature of knowledge concerning the health risks of smoking and the addictive effect of nicotine. In language which seems to have been stronger than was warranted, the plaintiff's solicitors wrote thus (referring to British American Tobacco as BAT):-

> "Whilst there may have been development of knowledge incrementally in the scientific and medical community about smoking and lung cancer between the 1950's and the 1990's, no such development was necessary within the headquarters of your client. It knew of the causal relationship between smoking and cancer to a level of certainty. We hold documents authored by senior employees/directors of the company, including Sir Noel Foley, and Mr W.W. Reid which attest to this fact. ... It is offensive and inappropriate for your client to be making these specious points when its position with respect to knowledge and the connection between smoking and lung cancer from the 1950's is quite clear.
>
> Likewise with addiction. It is a nonsense for your client to instruct you to refer to the 1964 Surgeon General's Report when it had secretly acquired details of the results of Project HIPPO from the Batelle laboratories from its associated English company, British American Tobacco Company Limited; which research not only proved the addictive effect of nicotine but the scientific methodology by which such process took place.
>
> Moreover, your client was well aware that prior to publishing the 1964 Surgeon General's Report, the US Surgeon General sought advice from the BAT Group as to whether it had evidence of the addictive effect of nicotine and the said research was deliberately concealed from the US Surgeon General."

The letter of 7 November also referred to the Cremona litigation which had come to an end in 1998, concluding with a request for copies "of the following documents, which were listed in your client's Affidavit of Documents in *Cremona* and which are clearly discoverable" - and 15 child smoking studies (as they were dubbed in argument before us) were then identified specifically by reference to their respective numbers in the affidavit of documents in the Cremona litigation. The solicitors writing the letter, now acting for the plaintiff in this litigation, had been directly

involved as solicitors for Mrs. Cremona in the aftermath of that litigation[23].

33 Included within this letter of 7 November was a demand made bluntly by the plaintiff's solicitors that the defendant's solicitors obtain instructions from their client by way of response to seven questions which were then set out, the solicitors warning that that they would "further insist on any hearing of this matter, that you disclose to the court that you have obtained your client's instructions in relation to the substantive matters of fact raised in this letter". They warned too that they would place reliance upon the response "in advising our client as to whether to amend her pleading to make a claim of aggravated damages against the defendant with respect to the fraudulent and/or disingenuous defence of this action". This was strong language at an early stage, and presumably the letter was not drafted with a view to obtaining co-operation. What is significant for present purposes is that the letter of 7 November displays very considerable awareness on the part of the plaintiff's solicitors in relation to the issue of the defendant's alleged knowledge both of the dangers of smoking and of the addictive properties of nicotine - an awareness that was confirmed in the course of the directions hearing that followed.

34 At the directions hearing on 14 November, Mr. Gordon urged that the trial commence as soon as possible. The further and better particulars being sought by the defendant would be served that day, he said. The discoverable documents of the plaintiff and the particulars were all ready and, as to the further and better particulars otherwise being sought by the defendant, he said, according to the transcript:[24]

> "Your Honour, can I also indicate that the further and better particulars sought by the defendant seek particulars of documents in certain categories. One category, for example, the studies which the plaintiff says the defendant ought to have had regard to, which ought to have put it on notice and did put it on notice that smoking caused cancer, for example – and I will be indicating and do indicate to my learned friend that we also have copies of all of those documents, and in so far

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23 In fact they had been instructed on behalf of Mrs. Cremona to sue the solicitors who had been acting for her in that litigation.

24 AB10 3378-80.

> as the defendant does not already have them we would be happy to provide copies. But we have reason to believe that the defendant does already have them, so we hope to achieve some economies in that regard.
>
> Likewise, the other compendious documents referred to in the further and better particulars, media comment by the defendant casting doubt or disparaging smoking and health experts over the years, for example, or independent studies on addiction, all of those documents, as well as being referred to in the further and better particulars which will be served today, we have in our office and can supply copies upon reasonable request."

To avoid the burden of discovery in respect of the period of 40 years referred to in the pleading (that is, from 1950 to 1992), Mr. Gordon said that it would be "useful for there to be some discussion in relation to that discovery issue". But the following factors were relevant, he suggested. First, that the defendant had made discovery in the Supreme Court of Victoria in the Cremona litigation "so the general discovery has been supplied before". Moreover, continued Mr. Gordon, "There has been extensive tobacco litigation in the United States, health care cost recovery litigation" and in one of those cases, against Phillip Morris and others, the terms of settlement required the defendants, including companies associated with the defendant, to "deposit into document depositories the documents which they hold historically". One of those document depositories, he said, was in Minnesota and the other in Guildford. He added:-

> "We have, in the course of conducting a previous case, a representative proceeding called Nixon, visited the Guildford depository and have collected a large number of documents. Some of those documents are patently documents of the defendant, and we believe it would be valuable, and indeed may relieve the defendant of its obligation of general discovery in this matter, if we were to serve upon the defendant copies of those documents which we say are patently defendant's documents ... to ascertain the status regarding admissibility and authenticity ..."

Accordingly Mr. Gordon said he would serve a letter enclosing the documents and seeking admissions and in default, would seek to have the judge determine admissibility at a pre-trial stage. And finally, with respect to discovery, Mr. Gordon said he could "negotiate with the defendant a position whereby their obligation of general discovery is replaced by an obligation to provide discovery in discrete

categories." He concluded in this regard:

> "Just to place it on record, we would want documents that they are going to rely upon at the trial. ... We would want the Guildford documents to which I have referred. There are certain documents in the Cremona affidavit of documents, particularly the [15 child smoking studies] which we have already asked the defendant for ... and there may be some other categories. If we could reach an agreement with respect to that, your Honour, that would probably do from the plaintiff's point of view with respect to discovery."

Nothing could have been plainer but that the plaintiff's solicitors were content with a limited form of discovery[25] by reference to categories, if agreement could be reached.

35 Consistently with what Mr. Gordon said at the directions hearing on 14 November, a letter was sent on 20 November enclosing "a selection of documents obtained from the document depositories at Guildford and/or Minnesota". The letter continued[26]:-

> "We re-iterate that the plaintiff may be prepared to waive her right to general discovery in this matter if an acceptable arrangement can be made with respect to discovery regarding discrete categories of documents. In this regard we refer to our letter of 7 November and the documents listed therein which were listed in your client's affidavit of documents in Cremona. Please let us have copies of these documents prior to the next directions hearing in this matter."

A notice to admit was enclosed with the letter, identifying some 34 documents obtained from the document depositories and seeking admissions from the defendant with a view to the documents going into evidence. These were dubbed "the 34 notice to admit documents".

36 By a separate letter dated 20 November the plaintiff identified ten categories of documents in respect of which the plaintiff sought discovery. Although reserving the right to add to or subtract from the categories, it was stated:-

> "We re-iterate that if an appropriate agreement can be made regarding these categories, the plaintiff may be prepared to waive her entitlement of general discovery from the defendant".

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25 Pursuant to R.S.C. Chapter I Rule 29.05.

26 AB3 699.

Further, when no admissions were forthcoming as sought in the notice to admit, the plaintiff added, by letter dated 23 November, the 34 notice to admit documents as a further category in respect of which discovery was specifically sought. By letter dated 26 November the defendant's solicitors responded, indicating substantial agreement with the proposal that there be discovery by categories as suggested, but warning that there was still some searching to be done on its part among the some 2,000 or so documents held and which were only partially reviewed at the time of the Nixon class action (that being the class action in the Federal Court which had been dismissed in December 2000[27]). There were also about 900 boxes of documents not so far reviewed, said the defendant's solicitors, and they suggested that there be "tranches of discovery as soon as we are able, the first tranche to be by 17 December."

37 By letter dated 26 November the plaintiff's solicitors added some documents to the existing categories. By letter dated 27 November they responded with some irritation to the proposal of discovery by tranches. They rejected as unacceptable the date 17 December. In the circumstances, it was said, "we seek very limited discovery" and it was surprising (the writer commented) "if your client could not provide discovery within a much shorter time". The review of the documents, it was suggested, must have occurred for the Cremona litigation and specifically, the writer asked:-

> "Why have the documents avoided the processes of the defendant's internal document handling processes?".

38 The response from the defendant 's solicitors was by letter of 28 November, insisting that discovery could only be done by taking a systematic approach. The writer of this letter took umbrage at the suggestion that everything discovered in the Cremona litigation was necessarily discoverable in this litigation, pointing out that the issues were quite different. Mrs. Cremona claimed to have suffered from emphysema and to have smoked different brands of cigarettes from those smoked

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[27] As recounted above, in paragraph [25].

by the plaintiff in this case. Importantly it was said:

> "The documents of which discovery was given were not retained as a discrete group, but were dealt with in accordance with the defendant's internal document handling processes".

It was Mr. Travers who wrote this letter for Clayton Utz, and the judge was very critical of the passage just quoted; but if the emphasis in what we have quoted was on the second word "were", then what is said would appear to be neither more nor less than a reflection of the terms in which the plaintiff's solicitors couched the question being answered (and which is quoted above[28]). None the less, much was to be made of this wording (which turned up elsewhere too) on the application to strike out the defence.

39 Meanwhile, on 21 November, the defendant had filed and served its defence denying the duty of care, denying negligence and denying any causal connection between the alleged breach and the plaintiff's smoking; and pleading voluntary assumption of risk, the absence of causation and the discharge by the defendant of any duty of care owed. On 22 November there had been a directions hearing before the trial judge and the issue of discovery by the defendant was raised again. Plaintiff's counsel had emphasised that one of the documents obtained by the plaintiff's solicitors from the document depositories was a letter from Clayton Utz dated 13 October 1989 indicating involvement in this type of litigation at the time. This, said counsel, indicated "the strong involvement of this firm in relation to the preparation of these cases" and that unreasonable delay "should not be tolerated"[29]. On 6 December 2001, Robyn Ann Chalmers, of the firm of Mallesons, swore an affidavit filed on behalf of the defendant, in which she explained that Mallesons had been retained as agents to assist the defendant in making discovery in this proceeding, and she deposed to the steps so far taken, and the steps to be taken, in order to make discovery. That affidavit was relied upon by the defendant at the directions hearing on 6 December, when the judge made the order for discovery[30]

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28 In paragraph [37]

29 AB10 3412.

30 AB1 33-37.

now at the heart of this dispute.

40 The particular order presently relevant was for discovery according to categories suggested by the plaintiff, but a number of other orders were made at the same time. Thus, an order was made that by 7 December the defendant make available for inspection its annual reports for the years 1957 to 1966 (inclusive)[31] and that by 10 December the defendant file its response to the plaintiff 's notice to admit of 20 November[32]; that by 10 December the defendant make discovery in respect of[33] (and make available for inspection, if still in possession[34]) the 34 notice to admit documents[35]; and that by 17 December the defendant make discovery in respect of[36] (and make available for inspection, if still in possession[37]) the 15 child smoking studies[38]. By paragraph 6 it was ordered that by 17 December "the Defendant make discovery of each of the following categories of documents which it has then identified"[39] and there followed these eight[40] categories of documents, reflecting the earlier correspondence:

> "1. All documents upon which the Defendant will rely at the trial and which the Defendant will seek to tender at the trial;
>
> 2. All documents of the Defendant or of the other tobacco companies sent to or received by the Defendant, dealing with health advertising, and/or any agreement or course of conduct entered into by the Defendant to refrain from advertising or promoting its cigarettes by reference to the comparative health risk of its cigarettes compared to other manufacturers' cigarettes;

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31 Paragraph 3 of the order of 6 December 2001.

32 Paragraph 7.

33 Paragraph 4.

34 Paragraph 5.

35 See paragraph [35] above.

36 Paragraph 1 of the order of 6 December 2001.

37 Paragraph 2.

38 See paragraph [32] above.

39 This was apparently understood as meaning "documents which it has then identified in each of the following categories".

40 There was no category numbered 7.

3. All documents and records relating to the advertising of the Defendant's cigarettes of the brands 'Capstan' and 'Escort' between 1958 and 1992, whether or not such documents also relate to the advertising of other brands of cigarettes produced or sold by the Defendant;

4. All advertisements for Capstan and Escort cigarettes displayed, published and/or aired in Victoria between 1958 and 1992;

5. All correspondence between the Defendant and the NHMRC between 1957 and 1965;

6. All correspondence and other documents of or between the Defendant, Brown and Williamson, and/or British American Tobacco, between 1958 and 1969 relating to;

   (a) Project Hippo;

   (b) research conducted by the Batelle Laboratories;

   (c) the pharmacological effect of nicotine on the human body;

   (d) the US Surgeon-General;

8. All correspondence between the Defendant and the Tobacco Journal of Victoria and/or the Australian Retail Tobacconist between 1955 and 1965.

9. Any document previously held by the Defendant in categories 2, 3, 5, 6, and 7 above which has been destroyed or otherwise removed from the possession, custody or control of the Defendant."

And by paragraph 8, it was ordered that by 14 January "the Defendant make discovery of each of [the] categories of discovery in paragraph 6"[41]. The whole of the order made on 6 December 2001 was made by consent. It was categories 2, 6 and 9 in paragraph 6 which were later to give rise to difficulty - although the wording of the order was the plaintiff's, not his Honour's[42]. By a separate order made on 6 December, directions were given, inter alia, for the trial to commence on 18 February 2002.

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41 Apparently thereby drawing a distinction between what the defendant might be able to identify by 17 December (as described in paragraph 6 of the order) and the totality, as described in paragraph 8.

42 AB10 3497, 3499.

The mounting of the application to strike out

41 What happened after 6 December must now be described. On 7 December the defendant's solicitors made available the defendant's annual reports for the years 1957 to 1966 for inspection, as ordered. On 10 December, they notified the plaintiff's solicitors that the defendant had none of the 34 notice to admit documents but had "nine documents which are similar although not identical to nine of the documents referred to in the notice to admit", and copies were provided. On the same day, formal notice was given, in response to the notice to admit, that the defendant disputed each of the facts in the notice to admit and disputed the authenticity of each of the documents identified.

42 On 10 December John Lancelot Namey, the secretary of the defendant, swore an affidavit for the defendant, deposing on information and belief to the defendant's discovery process and referring to the identification of the nine similar documents just mentioned and the handling of documents at the conclusion of the Cremona proceeding. He said (in paragraph 11[43]):-

> "At the conclusion of the Cremona Proceedings employees from whom original documents had been taken were asked whether they wanted their original documents returned to them. Original documents were returned to those employees who wanted them. Documents that were not returned should have been dealt with in accordance with the then current document retention policy."

On 17 December Mr. Namey swore another affidavit deposing, on information and belief, to the fact that Mallesons had not been able to locate the 15 child smoking studies and describing, again, the handling of documents discovered in the Cremona proceeding in like terms as before.

43 Also on 17 December, the defendant's solicitors served on the plaintiff's solicitors the defendant's list of documents which was headed "list of documents within agreed categories for discovery identified as at 17 December 2001" and declaring that such was discovery "in accordance with paragraph 6" of the order made on 6 December. The next day, the plaintiff's solicitors complained about the

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[43] AB 1 42.

adequacy of the discovery and proposed that the matter be listed again for further orders. On 18 December Mr. Gordon swore a further affidavit in support of an application for further orders, including an order that the defendant file a further affidavit, that there be cross-examination of the deponents Namey and Chalmers and that the question of the admissibility of the 34 notice to admit documents be determined as a separate question. It was said in this affidavit that "the defendant has employed over many years the policy of destroying its past corporate records", and a document was exhibited, entitled "Wills Records Management Manual" (Exhibit PG 6).

44 On 20 December, the defendant's solicitors agreed to add to the categories of documents in respect of which it would provide discovery the three further categories identified by letter from the plaintiff's solicitors on 14 December, being copies of the defendant's in-house magazine "Smoke Signals" between January 1958 and December 1966; copies of the standard sale agreements between the defendant and its distributors and/or retailers between January 1958 and December 1966; and all correspondence, memoranda and other documentation relating to a survey of the smoking habits of schoolboys conducted at Newcastle Boys High School in 1958. Thus the plaintiff's solicitors were maintaining the thrust of their request for discovery in specific categories only.

45 On 21 December there was a further directions hearing at which Mr. Gordon alleged that there had been "what we believe is fundamentally an abuse of processes of this court by the defendant, with respect to matters of discovery"[44]. When detailed, the complaint was that in the first tranche of discovered documents, that supplied on 17 December, there were only "some annual reports and a box of advertisements"; beyond that and the "9 documents which were said to be similar documents to the notice to admit, we say the defendant has effectively discovered nothing"[45]. Nothing, it was said, had been discovered as in the Cremona litigation,

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[44] AB10 3537-8.

[45] AB10 3538.

notwithstanding, said Mr. Gordon, that he had correspondence from the solicitors once acting for Mrs. Cremona "showing that they actually sent back copies of the discovered documents to this defendant on 2 March 1998"[46]. It was then alleged that "it may well be that the reason that we've seen nothing has to do with the Wills Record Management Manual [i.e., Exhibit PG 6 to Mr. Gordon's affidavit of 18 December] which mandates the destruction or suggests the destruction of documents which might [be] of use to an opponent in court"[47] – an allegation which the defendant disputed, and still disputes. The complaint seemed essentially to be that documents discovered in the Cremona litigation were not being discovered in this proceeding (and the difference between the two proceedings was simply not adverted to). By mischance, it seems[48], senior counsel for the defendant had not been shown the affidavit of 18 December, and he was taken by surprise by the attack and, perhaps, its vehemence. The judge warned, however, that "were it to be established that there was a deliberate tactic being adopted of getting rid of all documents as quickly as possible in case someone else asks for them, that would be a pretty alarming situation"[49]. Thus the seeds were sown of the application to strike out.

46 In the end, on 21 December, the trial judge made orders by consent[50], including an order that the defendant file a further affidavit relating to the 15 child smoking studies and the 34 notice to admit documents, and Mr. Namey swore an affidavit accordingly later on that same day. The judge also adjourned until 30 January the plaintiff's application for an order that the admissibility of the 34 notice to admit documents be determined separately, before trial.

47 On 4 January 2002 the plaintiff's solicitors wrote again, seeking to add to the categories of discovery a further three categories, the third of which was "the further

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46 AB10 3538.

47 AB10 3539.

48 Compare AB10 3543.

49 AB10 3547.

50 AB1 145-6; see also AB 10 3600-01, Respondent's Summary para.23.

documents discovered in Cremona, contained in the list of documents provided to you in court on 21/12/01; and the documents discovered in Cremona listed in the Schedule attached hereto". That schedule[51] listed 27 documents identified by their respective discovery numbers, it appears, in the Cremona litigation. As for the list of documents said to have been provided in court on 21 December, the defendant's solicitors denied having this and, upon request, the list was sent on 9 January[52]. This time, by letter dated 14 January the defendant's solicitors declined to add any of the further categories to its task on discovery, claiming that there would otherwise be "significant extra work" and that there was "no legitimate need" for the further documents. The letter of 14 January harked back to the history of discovery and the agreement that there should be consent orders for limited discovery in order to permit of a timetable for the trial to commence on 18 February.

48 On 14 January, the defendant's affidavit of documents was served, again sworn by Mr. Namey on information and belief. The affidavit provoked an immediate response by letter dated 15 January, in which the plaintiff's solicitors said[53]:-

> "Yesterday afternoon we received your client's affidavit of documents which makes clear that virtually all of the documents requested by the plaintiff, and which were discovered by the defendant in the Cremona proceedings, have been destroyed in the last three years."

In contrast, by letter dated 16 January the defendant's solicitors pointed out that as to the 15 child study documents, listed in the Cremona affidavit of documents, all have been found to be "readily accessible in the public domain" and a list was attached specifying publication dates. But also on 16 January the plaintiff's solicitors asserted again "serious concerns" about the defendant's discovery and stating[54]:-

> "Your client's affidavit of documents can only be interpreted as deposing that there has been a widespread destruction of at least the vast majority (and on one view, all) of documents which were

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51 Now found in AB3 768-769.

52 AB3 772-774.

53 AB3 857, PG10 tab 44.

54 AB3 865, PG10 tab 48.

discovered in the Cremona proceeding."

The response from the defendant's solicitors, also by letter of 16 January, was that documents which were discovered in the Cremona litigation were returned to employees or they were dealt with "in accordance with the records management policy, which, in practice, means that they were either retained or destroyed" and that there was no way now of knowing "which documents from the Cremona discovery were retained and which were destroyed, except by elaborate enquiry"[55].

49 On 18 January, the plaintiff's solicitors continued to press for discovery in relation to the three further categories first mentioned on 4 January[56] and for a further affidavit of documents. Again that request to include further categories was rejected and the defendant's position about the "records retention policy" was stated more fully, the defendant disputing that its policy had ever been according to the document exhibited to Mr. Gordon's affidavit of 18 December, Exhibit PG 6[57]. By letter dated 21 January, the plaintiff's solicitors responded to an earlier letter of the defendant's by declaring that two conclusions were now "unavoidable":-

> "1. The defendant has deliberately destroyed evidence, amounting to thousands of documents relating to various issues relevant to its liability in this case, and dating back many years; with the specific intention of preventing litigants against it, and the courts, from access to and/or knowledge of that evidence; and
>
> 2 the defendant has misled the plaintiff and the Court both in relation to the fact of such destruction of evidence; and in relation to its document handling and document search processes".

Accordingly, it was said, the plaintiff would make application to the trial judge to have the defendant's defence struck out.

50 On 24 January the trial judge was informed by plaintiff's senior counsel of the proposed application and on 25 January the summons to strike out the defence[58]

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55 AB3 866, PG10 tab 49.

56 AB3 766-7, PG10 tab 36.

57 AB3 890-1, PG10 tab 56.

58 AB 1 180.

was filed. Contrary to the usual practice in this State, the summons did not state the ground or grounds on which relief of that nature was sought[59]; it simply claimed an order striking out the defence, an order for the costs of the application and of the proceeding to date on an indemnity basis and such further or other relief as to the Court might seem meet. Mr. Gordon's affidavit of 25 January was filed on the same day and on 29 January the defendant filed its principal affidavits in answer, being the affidavits of Mr. Nicholson, Mr. Eggleton, Mr. Harris and Mr. Maher[60].

The determination of non-compliance

51 What followed was the hearing which commenced on 30 January and extended over some 15 sitting days. There was cross-examination of the defendant's deponents in this order: Mr. Maher, Mr. Namey, Mr. Nicholson, Ms Chalmers (whose evidence extended over three days, 7, 8 and 11 February) and Mr. Eggleton. Counsel addressed on 25, 26 and 27 February and then there was discussion on 1 March over a further affidavit. As already stated, his Honour announced his decision and gave reasons for judgment on 22 March.

52 The defendant's first complaint to us - and it is a real one - was that the plaintiff's application was allowed to evolve, shifting from a complaint in which the emphasis was on the failure of the defendant to give the limited discovery ordered on 6 December to a complaint in which the emphasis was rather on the destruction of documents per se, by the implementation in particular of the defendant's document retention policy which (it was alleged by the plaintiff) existed to provide a cloak of "innocent purpose". It was submitted by defendant's counsel on the appeal that the allegation made by the plaintiff that the defendant had not disclosed that documents discovered in the Cremona litigation might since have been destroyed was subsequently abandoned in favour of an allegation that, while the possibility of destruction had been referred to, there was not full and frank disclosure of the

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59 Compare Chitty's Queen Bench Forms (18th ed.) 383-4, Atkin's Court Forms and Precedents (2nd ed.) vol.15 p.153-6.

60 See paragraph [6] above.

nature and extent of that destruction. Mr. Myers also submitted to us that no allegation that legal advice had been given to show the defendant how to hide documents (by "warehousing" and the like) was made on behalf of the plaintiff before the cross-examination of Ms Chalmers and that no allegation in relation to the severing of the computer link to the relevant document database offshore and the like, was made before the cross-examination of Mr. Eggleton.

53 There is some force in these criticisms. For example, the complaint that the defendant had been "warehousing" documents to put them beyond the reach of discovery was not mentioned in the particulars belatedly provided by the plaintiff on day 7 of the hearing. But the plaintiff, relying upon the fact that "warehousing" was raised in the cross-examination of Mr. Eggleton and Ms. Chalmers", submitted to us[61] that "the parties [thereafter] proceeded in the application with a fuller understanding of the issue of warehousing and awareness of its relevance to the strike out application", a submission which surely mirrors the very complaint now made by the defendant. To some extent at least, then, the application was defined "on the run", as it were, with the result that, despite its efforts to obtain particulars, the defendant was not able, at all events in advance of the hearing itself, to ascertain with any reasonable precision the issues to be determined or the allegations being made against it. This was important because the judge was ultimately critical of the defendant's failure to call witnesses, a criticism which the defendant now argues was without justification having regard to the basis of the application as first foreshadowed and the material both in support and in answer. The defendant's complaint that the application shifted as the argument developed through cross-examination is germane to another point taken by it (and to which we shall return later): namely, that the plaintiff did not seek to advance its case by reference to contempt of court or interfering with the course of justice[62]. For the moment, however, we deal with the defects in the defendant's discovery as identified by the trial judge.

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61 Respondent's Outline of Submissions para. 216.

62 Reasons for judgment para.338.

54 First and foremost, there was the failure of Mr. Namey in his affidavit of documents, of 14 January 2002, to make any express reference to the destruction of relevant documents. This, said the judge, was a significant omission. His Honour said (in paragraph 172, BATCO being shorthand for the American parent company):-

> "It was likely, [counsel] submitted, that all of the scientific reports which emanated from BATCO research, and which had been the subject of the Notice to Admit in this case, had been destroyed well before 1998. The fact of such destruction of documents was not disclosed to Chalmers by Clayton Utz and Wills; thus when she prepared the Affidavit of Documents for Namey to swear it made no reference to the destruction of relevant documents, as it should have. The Affidavit of Documents was seriously deficient in that respect."

A number of things may be said of this. First, the comment of the judge was made specifically with reference to the 34 notice to admit documents. All of them, it was supposed, were probably destroyed well before 1998, and thus well before the commencement of this litigation. The destruction of the documents (but not the policy) was relevant and the obligation of the deponent was no doubt to identify when documents, if destroyed, were last in the possession of the defendant and what became of them, to the best of his or her knowledge, information and belief[63]. Plainly the affidavit was silent in that regard. But given the probability, relied upon by plaintiff's counsel, that the documents had been destroyed, and destroyed well before 1998, it is difficult to see what prejudice was suffered by the plaintiff. The plaintiff's solicitors were well aware, it is clear beyond a peradventure, of a document retention policy under which documents were either destroyed or retained and the failure to refer to the policy in relation to the 34 notice to admit documents scarcely advanced the case of the plaintiff, or damaged it. Anyway, with regard to the destruction of documents itself the obvious remedy was to order a further affidavit to make plain what otherwise, it seems, appeared to plaintiff's legal advisers to be the high probability.

55 Next, Mr. Namey's affidavit of 14 January, said the judge (in paragraph 177), "presented an incomplete and misleading picture of what had occurred after

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[63] See for example in Chapter I of the Rules, Form 29B para. 5.

Cremona". In his Honour's opinion, the way in which the affidavit had been prepared for Mr. Namey by Ms Chalmers, and in particular the way in which the topics were addressed and emphasised and the use of words, reflected "a very careful attempt to disguise or understate what had occurred to documents after Cremona but without using words which were blatantly untrue". His Honour called the affidavit "coy", conveying different meanings to different readers. Again, a number of comments can be made. First, there was no obligation upon the defendant to discover the documents discovered in the Cremona litigation: as was submitted in the correspondence exchanged between solicitors, the issues in the Cremona litigation were different from those in the current litigation and that difference was never really addressed by the plaintiff's solicitors. Next, the judge's criticism was of the failure of the deponent to deal properly with documents no longer in possession (as expressly required by paragraph 9 of the order made on 6 December) and plainly that criticism was well founded. As the judge said[64], all of the 15 child smoking studies and many of the 34 notice to admit documents "were known to have been destroyed in 1998" and surely the deponent should have been able to state a belief that that was so. But again, the failure to identify with more particularity what had happened to documents no longer in possession would not have done much to advance the plaintiff's case or to prejudice it, and the obvious remedy was to require a further affidavit making plain what appeared to be the case.

56 It should be remembered, too, that as deponent Mr. Namey was required to speak only to the best of his knowledge, information and belief: the suggestion made at times that Mr. Namey should have undertaken further investigation and made further inquiry is perhaps of doubtful weight. The affidavit was prepared for him by a solicitor apparently familiar with the task in hand. The obligation to "search for and disclose" any missing documents was asserted by reference to *Rockwell Machine Tool v. E.P. Barrus (Concessionaires) Ltd.*[65] but in that case what led to the remarks of Megarry, J. was this:-

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64 Reasons for judgment, para. 180, AB11 4007.

65 [1968] 1 W.L.R. 693, [1968] 2 All E.R. 98 at 99.

> "Secondly, it appeared from evidence for the defendants that between the issue of one of the writs in 1963 and the hearing, one of the defendants had been carrying on with its routine process of destroying documents seven years old, even though these probably included documents which ought to have been disclosed on discovery."

This prompted his Lordship to emphasise that in preparing for trials solicitors bore a great responsibility and heavy burden, not the least of which was discovery. There was a need for solicitors to tell their clients of the scope of discovery, including the requirement that they "search for and disclose to their adversary any document" leading to a train of enquiry that might advance the party's own case or damage the adversary's. Accordingly (continued his Lordship):–

> " ... it seems to me necessary for solicitors to take positive steps to ensure that their clients appreciate at an early stage of the litigation, *promptly after writ issued*, not only the duty of discovery and its width but also the importance of not destroying documents which might by possibility have to be disclosed."[66]

On its face, this admonition did not apply to documents destroyed *before the commencement of* the proceeding: the question of the obligation of Mr. Namey to "search for and disclose" documents which, as it happened, had long since been destroyed was a different matter. His obligation, as the judge recognised, was to describe documents no longer in possession and to say what had become of them, and to that end, no doubt, to mention their destruction, if such it was.[67]

57 In dealing with the complaint, made by Mr. Gordon in his affidavit of 25 January 2002, that "the defendant had failed to discover documents which it had held at the time of Cremona, and which had been discovered in that case", counsel for the defendant raised a problem of interpretation of the order of 6 December. Of course, the documents discovered in the Cremona proceeding were not necessarily relevant to the categories of discovery ordered in this action. In Exhibit PG 2 to his affidavit of 25 January, Mr. Gordon listed the documents from the Cremona discovery which, according to him, were relevant to categories of discovery in this

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66 Emphasis added.

67 See also reasons for judgment para. 183.

case with the result that they should have been discovered; and by way of illustration, he listed 17 reports which appeared, by their titles, to be relevant to the category 6(c) of paragraph 6 of the order for discovery, they being documents of the defendant (it was argued) relating to the pharmacological effect of nicotine on the human body. Defendant's counsel, however, joined issue with this, submitting to the judge that none of those documents were discoverable because they were not documents "of" the defendant, having been written by people who were not employees or agents of the defendant. In short, the defendant submitted that category 6 dealt only with documents "created by" the defendant or passing "between" it and the other two entities named.

58 It is true that the judge was quick to reject this construction of his order, but, with respect, the problem was not so easily dismissed. A number of considerations support the defendant's position. The expression "documents of and between" itself suggests a meaning of "of" other than simply "held by or belonging to", for not only are documents "held" (whether now or formerly) at the heart of discovery anyway, it is difficult to see what work could then be done by the word "between" - as Mr. Hughes felt constrained, very properly we think, to concede in his submissions to us. Certainly the context afforded by category 2 in paragraph 6 of the order would appear to support the defendant's interpretation of category 6 (for in category 2 the word "of" plainly means "created by"); while in category 9, the expression used is "held by" indicating that that was used when that was meant. On any view it is at the very least difficult to parse the wording of category 6, and so it is relevant that the drafting of these categories was that of the plaintiff's advisers in the first place; for, given the penalties for disobedience to a court order, that must in itself militate against preferring a construction which differs from that adopted by the party from whom compliance is required - provided always of course that that construction is not beyond argument (as is the case here). And there must be a problem in reading category 6 as dealing with documents formerly held, but no longer held, by the defendant when category 9 deals with that very thing. In short, with respect, it is difficult to see why the expression "of" does *not* have the meaning attributed to it by

Mr. Middleton for the defendant, or at least a meaning like that attributed by him.

59 The judge was much taken, it seems, by a note of conference between the legal representatives of a number of tobacco companies in which consideration was given, it would appear, to the proper course to follow where discovery is required in terms that are perhaps ambiguous: and it may be, as the judge indicated, that the better view is that the defendant, if it takes a particular stance in relation to the interpretation of the order, ought, in all fairness, to make that stance known to the other party. However that may be, it was certainly not done in this case, the defendant simply adhering to its own construction of category 6, but that does not per se make its discovery defective. In our opinion the construction adopted by the defendant was one that was reasonably open and in those circumstances, its failure to adopt the construction preferred by the plaintiff cannot lead to the conclusion that discovery was therefore defective. Anyway if it was defective, again the obvious course was to order a further and better affidavit of discovery on the basis of the construction preferred by the plaintiff, if indeed the judge found that to be the proper construction. Mr. Myers submitted to us that the trial judge did not, in the end, express any final view as to the proper meaning of paragraph 6(6) of the order, but his Honour did say that in his opinion its meaning "was, and remains, quite clear"[68] and during argument he was pretty dismissive[69] of the construction suggested by Mr. Middleton - and we think that by implication his Honour did embrace the construction preferred by the plaintiff.

60 Then there was the judge's conclusion that Mr. Namey's affidavit was simply misleading. When set against the background of the correspondence between the solicitors, the discussion over answers to interrogatories, the discussion at the various directions hearings and the concern expressed by the judge on 21 December to know just what happened to the documents discovered in the Cremona litigation - when set against that background, said the judge in his reasons for judgment

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68 Reasons for judgment para. 190.

69 AB7 2440.

(paragraph 197), "the Affidavit of Documents was an inadequate and misleading document". After considering the correspondence between the solicitors, his Honour concluded that the suspicion and disbelief evidenced in the letters sent by the plaintiff's solicitor, Mr. Gordon, "was largely justified", adding (in paragraph 199):-

> "I have concluded that not only was he misled as to material matters by the correspondence from the defendant's solicitor, so too was I. It must have been intended that Mr. Gordon be misled in that manner. Having regard to the fact that almost all of the correspondence was being presented to me in the course of directions hearings, it should have been anticipated that I, too, might be misled."

61 Although his Honour went on then to deal in more detail with the terms of the correspondence, it is difficult to see how Mr. Gordon was misled, given his complaint at an early stage about the destruction of documents through the implementation of a policy adopted by the defendant. In his affidavit sworn on 18 December Mr. Gordon exhibited the document headed "Wills Records Management Manual" (Exhibit PG 6) and he was obviously aware of the contents of this document by then, at the very least. He was familiar, too, with documents obtained, apparently by him, from the Minnesota and Guildford depositories, the latter of which had been visited (according to what he told the judge on 14 November) in the course of the Nixon proceeding[70]. He had been alert to the possibility of destruction of documents, it seems, from the very commencement of the proceeding; for his letter of 20 November 2001, in setting out potential categories for discovery, mentioned specifically the details of any document previously held "which has been destroyed ...". In the letter of 27 November, Mr. Gordon asked why some 900 boxes of unreviewed documents had "avoided the processes of the defendant's internal document handling processes"; to which the defendant's solicitors responded, in Mr. Travers' letter of 28 November, by saying that the documents discovered in the Cremona litigation "were not retained as a discrete group, but were dealt with in accordance with the defendant's internal document handling processes" (and the

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70 See paragraph [34] above.

possible justification for the use of that expression in that letter has been already given[71]).

62 With great respect, we cannot agree in the judge's criticism of "the phrases used" as "attempts to skirt around and to avoid highlighting the truth"[72]. In open court on 6 December, defendant's counsel 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 the Namey affidavit of 14 January was "coy", or indeed the Chalmers' affidavit of 6 December 2001 of which also the judge was critical[73], Mr. Gordon's claim to have been misled was perhaps opportunistic. In criticising the several Namey affidavits the judge repeated his criticism of the wording we have taken (at the end of the preceding paragraph) from the letter of 28 November, for like wording appeared in Mr. Namey's affidavit of 14 January - in paragraph 4 which (as his Honour pointed out[74]) was in contrast with paragraph 5. Ms Chalmers was cross-examined about the wording of these affidavits which she had prepared, wording which the judge concluded was "objectively ... misleading and less than frank"[75] (although at the same time he expressly absolved Ms Chalmers of any intention to deceive[76]). The affidavits were intended to mask, his Honour said, "the reality that even if documents had escaped the shredder and been returned to employees, the Document Retention Policy required that they then be returned for destruction"[77]. The judge was critical of the failure to state, outright, what was known, namely that many of the documents discovered in the Cremona litigation had probably been destroyed and that led him in turn to conclude that "the objective purpose and effect

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71 In paragraph [38] above.

72 Reasons for judgment para.215.

73 Para.210.

74 Para.227.

75 Para.229.

76 Paras.229, 235.

77 Para.230.

of the approach [taken by the defendant in these affidavits] was to mislead"[78].

63 It is here that 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[79], 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.

64 Perhaps the point can be made by reference to Mr. Namey's position, of which the judge was separately critical. Mr. Namey, said the judge, was "a very reluctant witness, who approached his task with an air of petulance", having "little knowledge to draw upon concerning the matters in his affidavits" and "obviously unhappy to be required to explain their contents". The judge continued (in paragraph 222):

> "It seems to me that the true situation was that whilst Namey was probably told generally of his obligations to refer to lost and destroyed documents it was a general discussion in the context of what was drafted for him on that topic and the Affidavit of Documents. Namey had been given no information about the destruction of documents under the 1985 policy, which Clayton Utz knew had occurred. Indeed, Ms Chalmers said she did not know about that, either, and the documents produced to me which demonstrated that such a process had taken place had never been conveyed to her by Clayton Utz, the solicitors on the record and for whom Mallesons was performing the discovery role."

Mr. Namey's failure to state expressly in his affidavits that documents from the Cremona litigation had been "destroyed" was deliberate, said the judge[80], because that was what Ms Chalmers' said in evidence. She explained that, as drafted, the

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78 Para.235.

79 Para.289, finding 20 (AB11 4044-5).

80 Para.227

affidavit had said the Cremona documents had indeed been destroyed but that that was removed when Namey refused to swear up to it, as he did not know whether the documents in question had been destroyed in accordance with the then current records management policy or destroyed not in accordance with that policy. In later evidence, said the judge, Ms Chalmers gave a "significantly different account of what Namey's concern was". None the less, Mr. Namey's concern was surely understandable, given that he knew nothing of the document retention policy and was relying upon others for the content of his affidavits. Moreover, be that as it may, if the affidavits were defective (as they were) in failing to state just when documents were last in possession and what had become of them, the remedy was surely, as already stated, to require the defendant to address the matter in a further affidavit of documents.

65 There were other defects in the affidavits of discovery which it seems unnecessary to canvass now; for those 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[81] - 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 - an approach quite possibly supported, in his Honour's opinion, by what he saw as the "narrow and pedantic" approach taken by the defendant's advisers to the interpretation of the order made on 6 December.

66 Shortly before the hearing concluded a problem emerged which needs mention, if only because it served, we think, to reinforce his Honour's conclusions

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[81] Para.289, finding 20 (AB11 4044-5).

about the approach taken by the defendant to discovery generally. Dealt with late in the reasons for judgment, it concerned an Order 44 statement of one Seiden which had been but lately served by the defendant on the plaintiff and the problem emerged as follows. Category 1 in paragraph 6 of the order made on 6 December 2001 required the defendant to disclose all documents on which it would rely at trial and would seek to tender. In the course of the argument over discovery, a suggestion was made that the defendant had deliberately been "warehousing" documents (meaning, putting documents relevant to issues at trial beyond the scope of discovery but in some way none the less keeping them available, through third parties, if called for by the defence) - and so much was shown, said the judge, "by events that occurred on 1 March 2002".

67 His Honour described those events in this fashion (in paragraph 325):-

> "Just before the hearing of this application ended plaintiff's counsel complained that they had been served with an Order 44 witness statement which annexed to it important research documents, dated 1963, concerning 'Project Hippo', one of which, as asserted on its face, had been commissioned by BATCO, and neither of which had been discovered. I required the defendant to file an affidavit to explain the circumstances of those documents being produced, and an affidavit of Mr Namey of 1 March 2002 duly disclosed that in 1997 one of the documents had been received by Mallesons from Holding Redlich, solicitors for Mrs Cremona. The second document was obtained by Mallesons, at an unstated time, 'for the purposes of preparing for trial, from Chadbourne & Parke lawyers'. Namey deposed that there was no record of either document having been given to the defendant or being in its possession, custody or control. Neither document was found on the Nixon data base created by Mallesons. Clayton Utz received copies of both documents, one from Mallesons (in January 2002) and one from Chadbourne & Parke (in February 2002), for purposes of preparing the defence, and obtained further copies when the expert witness supplied them to the solicitors with his statement."

68 In argument before the judge, counsel for the defendant "accepted that documents held by the defendant's solicitors would be in the possession, custody and power of the defendant"- and about that there could be no question. What he contended, however, was that documents were required to be discovered within category 1 of paragraph 6 only when the defendant decided that it would rely upon

them at trial – and that was done only as and when the Order 44 statement was served[82]. His Honour was obviously troubled by what he saw to be the ready production of documents not previously discovered[83] - and not discovered until the defendant sought to make use of them; but no answer was forthcoming to the question from whence these documents had come[84] and, as counsel said to his Honour, there may have been a sufficient explanation which did not involve any breach of the defendant's obligations to discover as ordered. At all events a breach was not positively established and again we doubt that his Honour would have been so critical of the Order 44 statement, had he not first reached his earlier conclusions about the defendant's "strategy" with respect to documents and discovery.

69 There were other criticisms, too, by the judge of "warehousing" and of the defendant's failing to discover a computer database set up on behalf of the Tobacco Institute of Australia and three defendant companies who, it was said by Mallesons in giving advice to Wills, had "paid substantial sums of money to Clayton Utz for the establishment and maintenance of the database"[85]. Mr. Angus of Mallesons, it appears, "took the view that the database was discoverable", and the judge agreed; but, he said, "it has not been discovered in this case". Mr. Eggleton told the judge that the Clayton Utz database had been established in about 1986 or 1987 and had developed since. To the judge, it was further evidence of "warehousing", putting documents beyond the reach of discovery while at the same time keeping them available should the defendant require their production to aid its position. He concluded (in paragraph 336):-

> "The warehousing arrangements demonstrate, too, that the strategy devised and modified from time to time by Clayton Utz continues to be applied. That strengthens my conclusion that the purpose behind the destruction of documents under the post-1985 Document Retention Policy was to deny a fair trial to any plaintiff who later brought proceedings, and that the innocent purposes advanced by the

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82 This was the point repeated in paragraph 62 of the notice of appeal.

83 Particularly as Project Hippo was a matter expressly mentioned in subparagraph (a) of category 6 in paragraph 6 of the order of 6 December 2001.

84 Respondent's Outline of Submissions para.69.

85 Reasons for judgment para.334.

company are merely employed in an attempt to hide that reality."

It is plain, then, that the judge used the complaint about "warehousing" to reinforce his conclusions on the wider strategy, devised (as he saw it) by the lawyers, to allow for the destruction of documents in order to deny a fair trial to the plaintiff. That is a matter which we deal with later[86]. If treated as a defect in discovery[87], non-discovery of the database was in our opinion a defect which could have been met by an order for further affidavit or affidavits. As a defect in discovery, it did not warrant the extreme remedy of striking out the defence on all issues save as to damages.

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. Accordingly we turn now to the evidence concerning the defendant's document retention policy and its implementation.

Document retention policy

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86 Under the heading "Destruction of documents before litigation commences".

87 We say "if" because the defendant submitted that the failure to discover the database was no defect in discovery because it did not fall within the order of 6 December. The plaintiff submitted that while the judge had agreed with Mr. Angus that the database was discoverable his Honour did not say that it should have been discovered in this instance: Respondent's Outline of Submissions para.130.5.

71 As noted earlier, the defendant was obviously a very large business organisation, under whatever name it endured for the time being, and as such many documents were doubtless created by it or received by it in the course of its business activity. Thus, Mr. Nicholson, who joined the defendant's predecessor in 1967, said this, in paragraph 6 of his affidavit of 29 January 2002:-

> "The defendant generates a large number of documents each year. The organisation's storage of such records for long periods is costly because of the floor space required to store them and the staff required to collate, organise and review them. For this reason, the defendant has, since at least the early 1970's, had some form of document retention policy in place which required the retention of documents and records taking into account statutory requirements and the importance to the business. A number of essential documents, such as the defendant's board minutes, are required to be kept indefinitely. Some categories of documents are subject to statutory requirements requiring that they be kept for particular periods. Otherwise, all documents are expected to be destroyed after a retention period varying from 1 month to 7 or more years."

72 Mr. Harrison, who joined Wills in 1959 (when Wills was a subsidiary of what became known as Coca-Cola Amatil Ltd.) was able to cast further back, beyond 1970. He said in paragraphs 7 and 8 of his affidavit of 29 January 2002:-

> "In about 1964 my duties involved assisting the Solicitor and Company Secretary of Associated Products & Distribution Pty Limited which was a subsidiary of CCA [i.e., Coca-Cola Amatil Ltd.]. In this capacity I became aware of the CCA Records Retention Procedure ('**CCA RRP**') which I understood to operate in all of the companies within the CCA Group. I cannot now be sure that it had this title but it was called something like it.
>
> From 1964 I applied the CCA RRP in my various administrative positions. I was given the responsibility of ensuring compliance with the CCA RRP in my area of operations of CCA. I recall that the CCA RRP was a written document and I believe it came into existence many years before 1964. It was amended on a number of occasions after 1964 to take into account changing statutory requirements. I also recall that it became more and more comprehensive both in terms of the number and types of documents it covered. I cannot now recall the precise terms of the CCA RRP. However, I can recall that it applied to documents in company secretarial administration, share registry documents, company minutes and accounting records. The CCA RRP regulated the storage, archiving and destruction of these records."

73 Clearly, then, there was in place for many years, and well before 1985, some form of document management strategy, to take account inter alia of statutory requirements for document retention (a consideration which, it may be noted, 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). By whatever name, the strategy was surely in those days 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 such a policy, of one sort or another, did exist seems clear; that it underwent a measure of review in 1985 is also clear.

74 As to the competing submissions of counsel before his Honour, it is convenient to draw again on the reasons for judgment. As to the plaintiff his Honour said this (in paragraph 13):-

> "It is the contention of the plaintiff, in this application, that the defendant and its predecessor, Wills, since 1985, have followed a strategy designed to deny to any litigant access to documents to which the litigant would have been entitled and which would be of importance to the outcome of such proceedings. It is contended that the strategy employed in Australia was devised and overseen by Australian, British and American lawyers employed by or engaged by the respective BAT companies in each country. The strategy was designed to confine any plaintiff's case to documents in the public domain and to destroy or hide the existence of documents of which the defendant had knowledge which were damaging to the defendant's interests but which were not in the public domain. The plaintiff contends that the strategy involved the destruction of thousands of documents and, so it was submitted, required that the fact of such destruction, and its extent, not be disclosed. In the event that the process and extent of destruction became public knowledge, the strategy envisaged that an innocent motive for its occurrence would be advanced, and be plausible, but the true and primary motive for the destruction would be denied. The strategy, so it was submitted, contemplated the inappropriate application of privilege to many documents which had not been destroyed and the establishment and location of data bases of documents, controlled by lawyers, for the purpose of litigation but contrived to not be in the possession, custody or power of the defendant for the purpose of discovery.

75 So far as the defendant's submissions were concerned, his Honour said (in paragraph 15):-

> "The defendant denies each of [the] accusations [made by the plaintiff], and whilst admitting that many documents have been destroyed which may have been relevant to the plaintiff's case, contends that documents were destroyed at a time when no litigation was before the court or was anticipated. The defendant contends that it was perfectly lawful and proper for it to have destroyed those documents in those circumstances, and it did so in accordance with legal advice and pursuant to an appropriate document management policy, the purposes of which were both innocent and appropriate, and which had not been implemented for some eight years while proceedings were on foot. The defendant contends that the destruction of documents was by series only, no attempt being made to identify and preserve individual documents which might have been helpful to the company in the defence of any proceedings. The defendant contends that far from implementing the policy for purposes of harming the case of later litigants it retained a large volume of research and scientific reports which were more likely to be harmful to the cause of the defendant than to be favourable."

76 His Honour's finding on the topic was early expressed in the judgment when (in paragraph 19) he said this:-

> "I have no doubt that the Document Retention Policy which was put in place did have some quite legitimate management and administrative purposes and benefits, and the documents contained much material relevant to such functions. I am, however, 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."[88]

That served, we think, to colour much that followed. On this appeal the defendant challenges this finding of purpose and, with respect to his Honour, we think that the challenge was made good.

77 The learned judge proceeded in the following pages of his reasons for judgment to consider in detail the evidence about the existence of the so-called "document retention policy", about the advice (which he saw as so important) given to the defendant by its lawyers, and about the implementation of the policy. He

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[88] Emphasis added.

considered the policy in three stages: first as to the 1985 policy, then as to the review that occurred in 1990 arising as a result of litigation thought likely in Australia (and which did commence in October 1990 and continued in the years following) and finally the destruction of documents in March or April 1998 at the conclusion of the Cremona litigation and when, for the first time since November 1990, there was no longer any litigation on foot against the defendant. After surveying the evidence, the judge set out in summary form (in paragraph 289 of his reasons for judgment) some 21 findings of fact, and nearly all of these were challenged on this appeal, either in whole or in part. It is convenient to address them in groups (and for that purpose we have numbered them).

78 Findings 1, 2 and 3 dealt with the 1985 document retention policy. There was in evidence 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. (It was tab 5 within Exhibit PG5 to Mr. Gordon's affidavit of 25 January 2002.[89]) In form, it was simply a request from the managing director (presumably of Wills) 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", some time having passed, it was said, "since the last review of the Company's Record Retention Policy". Apart from correspondence or data covered by statutory regulations, the writer of the memorandum said that he required "a thorough examination of all other correspondence held to ensure that our document retention policy is maintained at the most efficient level". Thus, the document appears to refer to the company's document retention policy as if it were found elsewhere, rather than contained within this document - and it was the submission of Mr. Bathurst, on behalf of Mr. Wilson, that this document was not itself the policy, but only a reflection of it. Mr. Myers submitted that this was the policy, but in the end we do not think it matters.

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89 AB2 385. It is relevant for other purposes that this document was a document exhibited to Mr. Gordon's affidavit of 25 January 2002; for it could not be said to be something of which the plaintiff was by then unaware.

79 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. By way of suggested criteria, a "valuable business document" should be retained, it was said, "after you have carefully considered the need for its retention i.e. 'Is it valuable or can the organisation do without it?'"; "as a rule of thumb", it was said, "general" correspondence should not be retained for longer than two years; but records pertinent to personnel were to be retained indefinitely. A summary of "relevant statutory requirements" (presumably relating to retention of business records) was said to be attached.[90]

80 Of the so-called 1985 document retention policy the judge said this in his findings in paragraph 289:-

> "1. The 1985 Documentation Retention Policy was created under the auspices of AMATIL in the anticipation that there would be litigation brought against WD & HO Wills with respect to smoking and health issues.
>
> 2. 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.
>
> 3. 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 defendant did not challenge the first of these three findings (though it preferred "expectation" or "belief" to "anticipation"), but it certainly challenged the second and third. Indeed it will be recalled that the judge was even more direct in his

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[90] This is consistent with Mr. Eggleton's evidence during cross-examination, that Clayton Utz gave advice in 1985 on the statutory requirements for document retention (AB6 2074) . As to 1990, see AB6 2099.

criticism in paragraph 19 of the reasons for judgment[91], and the defendant challenged the finding that "the primary purpose of the development of the new policy ... was to provide a means of destroying damaging documents under cover of an apparently innocent house-keeping arrangement". It was the third of the three findings just quoted that was the most damaging for the defendant and yet this finding, submitted Mr. Myers, could in no way be justified.

81 First, it is by no means clear that Clayton Utz "advised Wills on the wording of the policy". In early November 1985, and at a time when the Australian tobacco companies were anticipating a wave of litigation , it appears that Wilson and Eggleton, in company with a Sydney Queen's Counsel, did visit Brown and Williamson's lawyers in the United States, Shook Hardie and Bacon, and were briefed by them on smoking and health issues[92]. In itself this was scarcely surprising if, as was more than likely, the local lawyers were concerned about the possible implications of continuing with the standard strategy on document retention, should litigation be commenced against the tobacco companies in Australia as apprehended. That concern was surely perfectly proper if the intent was to see that the law was adhered to, not flouted[93]. Subsequently the memorandum of 30 December 1985 concerning the record (or document) retention policy was circulated to Wills' staff and Mr. Eggleton did visit at least some of the offices of Wills in Australia in that connection. In the course of his oral evidence, Mr. Eggleton denied that any advice was given by Clayton Utz as to the wording of the policy, although he accepted that Clayton Utz at some stage reviewed the policy and made recommendations.[94] Mr. Eggleton agreed, too, that by 1987, Clayton Utz were preparing the firm to act in anticipated litigation, but that is a far cry from advising on the wording of the document retention policy itself.

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91 Set out in paragraph [76] above.

92 Respondent's Outline of Submissions, para.89. See affidavit of Mr. Gordon's affidavit of 25 January 2002, Exhibit PG5 tab 4 (AB2 384).

93 The later "hold orders" themselves suggest an earnest endeavour to see that proper procedure was followed, and not ignored or circumvented.

94 Respondent's Outline of Submissions para.16. Refer AB6 2075, 2100, 2109.

82 The defendant's main objection to finding number 3 lay in his Honour's referring to *the insertion of* certain words into the policy on the advice of Clayton Utz. This finding reflected a much earlier paragraph in the reasons for judgment - paragraph 21 - which read thus[95]:-

> "I have not been shown a document which is agreed to comprise the 1985 written policy, but in legal advice written by Brian Wilson, a partner of Clayton Utz, dated 29 March 1990 (to which I shall shortly refer) he noted that at page one there were a series of statements inserted into the document which asserted innocent purposes for the destruction of documents, under broad headings of cost efficiency, litigation support and sabotage prevention."

Here his Honour plainly concludes 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; and indeed his Honour was to say later in his reasons (in paragraph 270) that it was Mr. Wilson himself who had caused the words to be inserted by which such innocent intention might be claimed. We agree, however, with the submission made in this respect by both Mr. Myers and Mr. Bathurst: 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.

83 The legal advice of Mr. Wilson, dated 29 March 1990, was part of the general review of the 1985 policy undertaken when the risk of litigation being commenced in Australia began to grow. In paragraph 289 of the reasons for judgment, his Honour made two findings about this which were not challenged before us. They were these:-

> "4. After Wills was taken over by the present defendant concern arose in 1990 within the parent BAT Group as to the dangers of litigation in Australia causing the exposure of research reports which would be harmful to BAT companies worldwide. It was resolved to review the Document Retention Policy for fear that

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95 AB11 3955.

the 1985 wording, and the timing of its introduction, and of the destruction of sensitive documents which had already taken place, might lead to adverse inferences being drawn against the company, or more serious consequences, in future litigation, and might facilitate the release worldwide of BATCO research.

5. In March 1990 Wills, through its in house counsel, Gulson, sought updated advice from Clayton Utz as to how the Document Retention Policy could be handled with least risk of adverse consequences in litigation. Accompanying that request for advice was a memorandum written by an English lawyer, Mr Andrew Foyle of Lovell, White Durrant, which was unambiguous as to the true purpose of the policy."

84 There is no doubt but that those seeking 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. That was never an issue, nor was it in issue; it was simply accepted. 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. Hence the approach to Clayton Utz in March 1990 by Mr. Gulson for advice on how to handle the document retention policy - meaning, of course, the destruction of documents under it. That 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". The Foyle memorandum, as it was referred to, was one of the documents made available to the plaintiff in the course of the hearing in consequence of the judge overruling the defendant's claim to legal professional privilege; it became exhibit P30.

85 The Foyle memorandum, which appears to be undated, contained four parts: Part A, headed Factual Background; Part B, Problems Arising from Wills' Retention Policy; Part C, Advice Requested from Clayton Utz and Part D, Particular Questions to be Addressed in the Advice. The "factual background" in Part A commenced thus[96]:-

"Wills current document retention policy was introduced on the 30th

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[96] AB9 3100.

> December 1985 at a time when the tobacco companies in Australia anticipated the possibility of product liability litigation, although no case had actually been brought against any company. Clayton Utz had previously been instructed to take steps to prepare the Industry, and Wills in particular, for litigation. One of their first actions was to review the document retention policy of the Company, hence the new policy."

This was the introduction to a memorandum which was plainly written for the purpose of seeking advice from Clayton Utz in 1990, advice which was detailed in Parts C and D. In that first and introductory paragraph Mr. Foyle was no doubt speaking to the best of his knowledge, information and belief, but the precise basis for his assertions, as matters of fact, was not explored or established in evidence, so far as we are aware.

86 Part A of the Foyle memorandum then referred to implementation of the document retention policy, the type of research undertaken by Wills as described elsewhere, documents received by Wills from BATCO and the access that Wills had to the BATCO computer. BATCO, it was said, was currently reviewing its policy towards the dissemination of research reports and other confidential information and was also reviewing "the Group's current document retention policies and practice". In that context, Mr. Foyle wrote[97]:-

> "For the purpose of this exercise it can be assumed that, over the years, Wills has received copies of most of the sensitive documents generated by BATCO but that most of these (with the exception of the research reports) will have been destroyed as a result of the new retention policy. It should also be assumed that a number of Wills employees have a detailed knowledge of the subjects to which many of the sensitive documents referred."

The judge found that these were no mere assumptions to be made; the first of them represented what had indeed been occurring over time in consequence of the policy developed by Clayton Utz[98]. Whether or not that was so, they were none the less the assumptions on which Mr. Wilson was being instructed to proceed for the giving of advice; and, whether or not those assumptions reflected past implementation of policy, they said nothing of the advice that Wilson was being asked to give. Of

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97 AB9 3101.

98 Reasons for judgment para.100.

course even if they did reflect past implementation of policy, the assumptions said nothing of the purpose behind that policy or that implementation; they stated, or perhaps even overstated, its result - given that, if true, the destruction of sensitive documents was becoming a legitimate source of concern in the light of anticipated litigation. So viewed, these assumptions become no more than a proper means of directing the attention of the lawyers to what was in issue. It cannot be concluded that per se they disclosed the "real purpose" behind the policy and its implementation and, if the judge thought that they did, then, with respect, he erred.

87 In Part B, the Foyle memorandum outlined problems that were perceived as arising from Wills' retention policy, problems that might arise for Wills in product liability litigation. Thus, it was said, the wording of the policy, coupled with its timing, "might lead to the inference that the real purpose of the policy was to destroy sensitive smoking and health documents": the retention of research reports might mean that a plaintiff would have access to much sensitive BATCO research; and the retention of the BATCO reports might encourage a plaintiff to seek discovery. Moreover, in addition to any problems that Wills might face in litigation in Australia, "BATCO has a more general concern that any disclosures in Australia could be used by plaintiffs who are interested in bringing product liability actions against any member of the BAT Group", even in the United States.

88 The Foyle memorandum is instructive because, in prefacing in Part C the advice actually requested, two things were stated: first, that it was understood that "the destruction of documents now or in the past by Wills contravenes no law or rule in Australia" in the sense that Wills could do what it liked with its own documents, although "if a court disapproved strongly of the destruction of the documents ... it might draw adverse inferences from that fact"; and secondly, that it should be assumed that Wills documents will be a matter of great interest to a plaintiff's lawyer in a product liability action. How Wills responded, it was said, would require careful thought. In that context, it was said, "what is needed is a strategy for handling the documents issue in litigation".

89 All of that struck the judge as somewhat sinister, yet the Foyle memorandum appears to us 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. The risk of adverse inferences was to be explored, and its consequences; and Clayton Utz was asked what changes should be made to the way in which the policy was currently being applied. 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.

90 The judge saw the reference to "strategy" as itself bespeaking wrong motive. He returned to it more than once, including this as finding 6 in paragraph 289:-

> "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".

In our opinion, that finding was not justified. The basis for the conclusion that

Clayton Utz, through Mr. Wilson in particular, did "devise a strategy" of that sort, stemmed largely from a letter signed by Mr. Wilson for Clayton Utz and dated 29 March 1990[99], and which furnished the advice sought in the Foyle memorandum. According to paragraph 34 of the reasons for judgment, the "strategy" then "devised" by Mr. Wilson had been followed "with modifications and additions, since 1990 and was being followed at the time of the hearings" before the judge. Yet the letter dated 29 March 1990 did not, we think, justify the conclusion either that Mr. Wilson had "proposed the strategy"[100], 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.

91 The letter dated 29 March 1990 was Exhibit P17 (another of the documents disclosed to the plaintiff in consequence of his Honour's overruling of the defendant's claim to legal professional privilege). It is set out in full in paragraph 38 of the reasons for judgment[101] and we do not set it out again. As the judge noted[102], counsel for the defendant submitted "that the advice contained in the letter was not only legally correct but was entirely appropriate", and we agree with that submission. The judge agreed only that it was "carefully written". He said (in paragraph 39):-

> "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,

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99 AB9 3064.

100 Reasons for judgment para.37 (AB 11 3960).

101 AB11 3960

102 AB11 3965.

and thus be in contempt of court."

With respect, his Honour read more into the letter of advice than we can discern. As we read it, Mr. Wilson did no more than respond to the questions asked of him through the Foyle memorandum. For example, question 1 asked about the extent to which there was a risk that the destruction of documents might cause a court "to apply the adverse inference principle" and Mr. Wilson gave his response very properly by reference to what was said by the High Court in *Lane v. Registrar of Supreme Court of New South Wales*[103]. He warned that destruction must not "fall foul of the law laid down in *Lane's* case" and he referred too to the case at first instance, *Registrar of Supreme Court of New South Wales v. McPherson*[104]. If that law applied, he added, "destruction per se is likely to have the effect of interfering with the administration of justice". But that, he continued, was "subject ... to the test of intention" and to the fact that in *Lane's* case the High Court was "dealing with a situation where litigation was in esse and not merely contemplated". 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. No useful purpose would be served in going through the advice, point by point; nor is it necessary to analyse its correctness. Suffice it to say that we 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 to which we have referred in paragraph [82] above.

92 That brings us to what the judge described as "supplementary oral advice in 1990" and advice in further "private conversation in April 1990" given by Mr. Wilson. In this regard, the judge made these findings[105]:-

> "7. In supplementary oral advice in 1990, Wilson 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. That strategy has been pursued since that advice was

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103 (1981) 148 C.L.R. 245. The letter itself referred to the report in 35 A.L.R. 322 at 332.

104 [1980] 1 N.S.W.L.R. 688.

105 AB11 4042.

given.

8. 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."

The basis for these findings can be found in paragraphs 41, 42 and 43 of the reasons for judgment. His Honour said there:-

"41. 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.

42. 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.'

43. 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)'".

93 These paragraphs all refer to notes 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[106], 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

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106 In cross-examination Mr. Eggleton was disposed to accept that the notes were so made: AB 6 2217.

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. Moreover, these notes were yet another document made available to the plaintiff only in consequence of the judge's overruling the claim by the defendant to legal professional privilege. The notes upon which the judge relied form part of what became Exhibit P32[107], a number of sheets of paper the relationship of one to another being altogether unclear.

94 The words quoted by the judge in paragraph 42 of his Honour's reasons were on a sheet of paper[108] containing handwritten notes and commencing with the names Gulson, Cannar, Wilson and Oxland and the time "3.45pm – 5.15pm (1 1/2 hours)". The next line reads "See para 4(c) in our advice" and (although not this was not put to the judge[109]) this surely directed the reader to paragraph 4(c) of the letter of advice from Clayton Utz dated 29 March 1990 (Exhibit P17). Paragraph 4 commences[110] with the question what should be done about the copies of the BATCO research reports held by Wills and sub-paragraph (c) asks whether the termination or restriction of Wills' access to the reports database on the BATCO computer causes any problems; and if indeed the sheet of paper does record advice proffered by Mr. Wilson[111], that advice was surely given in relation only to copies of the BATCO research reports held by Wills and the computer access thereto. Of course the advice to keep the research documents which had become part of the public domain but to get rid of the others, was advice which, it might be, could be justified only by the absence of any relevant litigation at the time, but that was made plain by the written advice upon which it was apparently elaborating. To the extent that such research documents might reasonably be supposed to be relevant to

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107 AB 9 3111.

108 AB 9 3116.

109 Respondent's Outline of Submissions para.43.

110 AB 9 3069.

111 Again the contrary was not put to the judge: Respondent's Outline, para.42. Defendant's counsel submitted to his Honour that the advice was correct legal advice: AB7 2480.

litigation which was not then on foot but anticipated, the question whether such advice was appropriate or not depended upon the principle governing any party's handling of its own documents, and that is something to which we turn later. However that may be, again the advice in the handwritten note was in elaboration of the written advice where the matter was dealt with more fully. It is true that Mr. Eggleton, when questioned by his Honour after being taxed in cross-examination for a second time with the handwritten note - and in isolation - agreed that "if the note accurately reflected the oral advice which Wilson had given then it was not proper advice for a solicitor to give a client", but that, we think, was no more than obvious caution on the witness's part, given the circumstances attaching to the cross-examination. Nor, we think, was the admission correct.

95 In paragraph 43 of the reasons for judgment his Honour made reference to another handwritten note of Oxland's, found on the following sheet of paper in exhibit P32. It is by no means clear that the note was "apparently written at the 2 April 1990 meeting": there is nothing to indicate that it was, save for its juxtaposition with the preceding page and its recent inclusion by Clayton Utz among notes of the meeting on 2 April, that being the description given of document 60 in its list of documents under subpoena. The note, the terms of which have been set out[112], was taken by the judge as meaning "all sensitive documents", but it is not apparent why that should be so. Perhaps "all docs" included what the judge would have regarded as "sensitive" documents, perhaps not: the note is bland in that respect and the provenance of the document is too uncertain to justify inferences adverse to Mr. Wilson. The judge used the note to confirm Mr. Wilson's intention in writing the letter of 29 March 1990 but, with respect, it cannot be so used. It is Oxland's note and what it notes was never made plain[113].

96 Finally in connection with the policy evolving in 1990, the judge made this

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112 In paragraph [92], where para.43 of the reasons for judgment is quoted.

113 There is yet another handwritten sheet, Exhibit P31, which according to Mr. Eggleton in evidence (AB6 2140) is a note of the meeting on 2 April made by Mr. Wilson himself. Save, however, to record his attending with Cannar and Gulson, it is a very uninformative note.

finding in paragraph 289:-

> "9. In pursuit of the defence strategy [devised by Wilson], 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."

Suffice it to say that there was no basis for this if, as we have concluded, there was no basis for the preceding findings about Mr. Wilson's intention, his true intention, in the advice he offered by letter for Clayton Utz in March 1990. We are not aware of any other evidence of "amendment" in 1990, let alone amendment at the direction of the lawyers; none was drawn to our attention.

97 Indeed, on 16 May 1990 Mr. Gulson, as legal counsel and secretary of Wills, wrote to Allen, Allen & Hemsley ("Allens") seeking advice from that firm also as to the document retention policy. Again a number of issues were set out on which advice was sought and, as the judge commented in paragraph 48, in its reply dated 9 July 1990 "[Allens] generally confirmed the advice given two months earlier by Wilson of Clayton Utz". It follows, we think, that too much significance ought not to be attached to the notes of oral advice supposedly given at the meeting on 2 April 1990 in the meantime (between, that is, the advice given by Mr. Wilson by letter of 29 March 1990 and Mr. Gulson's seeking of further advice from Allens on 16 May 1990), when those notes appear to have had no particular influence on the defendant's conduct[114]. Further, it is worth noting that his Honour concluded as follows in relation to the advice obtained in July 1990:-

> "The advice of Allen Allen & Hemsley was not produced until after all witnesses had completed their evidence in this case. It was not suggested however by any witness who was called that the advice of Allen Allen & Hemsley played any significant role in decisions taken by Wills concerning document destruction".

Yet, if as is apparent even from the extracts quoted by his Honour from the Allens' letter of advice (in paragraphs 48 to 54 of the reasons for judgment) the advice was

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[114] Indeed, when asked in the course of argument what was the point of the defendant's going to Allens if the Oxland note meant what was now alleged, counsel (Mr. Rush) said: "I can't say".

not much different from that given earlier by Clayton Utz, on what basis can the one be condemned if the other is not? Why should the one attract criticism and the other not? With respect, both firms 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?

98 Thus, for the reasons given we think that his Honour 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. In particular we consider that 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. The judge was critical of the wholesale destruction of documents both before 1998 and during it, and we shall turn to that in due course. But 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. That is because in 1992 the document retention policy was subjected to a complete review by Mr. Harrison, who rewrote the policy after attending a 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.

99 Mr. Harrison became the Records Manager of Wills in 1991 or early 1992. At the time, he was company secretary and planning early retirement and it was only on that basis that he accepted the job at all. In March 1992 he was sent to a training conference in Kuala Lumpur[115] and at this conference, he said in his affidavit, he undertook a comprehensive training and education program on the subject of records management, it being made plain to him that it would be his responsibility

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115 Harrison affidavit 29 January 2002, paras.10, 11 (AB4 1071-2).

upon returning to Australia to devise, draft and then implement a records management program for the Wills group of companies "to replace the records retention procedure of Coco-Cola Amatil Ltd." - the procedure, as he understood it, which had been operating within the group since the company reorganisation in August 1989.

100 The reference source book from which he was taught at the conference was a document entitled "Records Management Programme – Records Managers' Training and Education Workbook March 1992". (This was Exhibit MH-1 to Mr. Harrison's affidavit.) Upon his return to Australia, Mr. Harrison prepared an action plan, a training manual, a general retention schedule, workgroup record surveys, workgroup retention schedules and finally, a staff handbook which dealt with records management. He recognised the document at Tab 31 of Exhibit PG5 to Mr. Gordon's affidavit of 25 January 2002 as being a copy of the Wills' Staff Handbook which he, Mr. Harrison, had drafted in about June 1992 and used in staff training. The document at Tab 32 of Exhibit PG5 was said by Mr. Harrison to be "a later version of the same document". On the other hand, the document at Tab 30 of Exhibit PG5 he was unable to identify.

101 In paragraph 78 of his reasons for judgment, the judge quotes from the booklet in use at the Kuala Lumpur conference. His Honour quotes, from page 8, paragraph G:

> "**Purpose of records retention program.** It should be emphasised that the retention of the records management program is aimed at ensuring that the company retains those records needed for business, legal, tax and audit reasons for the correct time period. That program is **not** a way of ensuring destruction of 'damaging' records or retention of 'helpful' records. Records will be treated as series, in large blocks. It is not the intention to 'spring clean' the files to remove or retain records on a selective basis. Any such action would prevent the Program from passing judicial scrutiny."

This passage, though in the training manual, was not included by Mr. Harrison in the final document which he prepared for the Wills Group - and quoting it was seized upon by Mr. Myers as error, but we do not agree. Although not copied by

Mr. Harrison into the manual he prepared for use in the Wills Group, it was adopted by Mr. Harrison in paragraph 22 of his affidavit as setting out the purpose and aim of the Wills Record Management Policy. Indeed he relied upon it in answer to the claim made by Mr. Gordon in his affidavit that the defendant deliberately destroyed documents "with the predominant purpose of destroying evidence discoverable by damaging to the defendant litigation", an assertion which he labelled "false".

102 In the passage just quoted, and of which the judge was critical, the possibility was certainly mentioned of selective destruction of documents being criticised, if the policy fell under "judicial scrutiny"; but so much can be readily accepted. 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.

103 It is convenient at this point to mention the warning noted by the judge (in paragraph 82) in an appendix to the manual in use at the conference in Kuala Lumpur: a warning 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 ...". 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.

104 Mr. Harrison effectively ended his job as records manager in November

1993[116], by which time the tasks he had begun were complete. When he finished his duties a hold order was still in place due to the currency of litigation[117], so that destruction of documents was not taking place. (That did not resume until the last current hold order was revoked in March 1998.) From 1992, however, it appears that what might be called the Harrison policy was in place, making it the 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. Indeed the difficulty just mentioned 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. (His approach to Mallesons and the advice he obtained are dealt with in the next section of this judgment.)

105 Anyway, and quite apart from the difficulty of attributing to Mr. Wilson's advice the defendant's implementation of the document retention policy after 1992 and *a fortiori* in 1998, the 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 and we shall turn shortly to examine that ruling; for 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.

106 Before doing so, however, we say something briefly of the remaining findings made by the judge in paragraph 289 of his reasons for judgment. The findings numbered 10 and 14 dealt with the destruction of documents "pursuant to the

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116 Harrison affidavit para.19 (AB4 1073).

117 Para.26.

Document Retention Policy of 1985" when, as the judge saw it, litigation was either on foot or considered inevitable. In finding number 10, his Honour said that "no record was kept, and deliberately so, as to what documents had been destroyed"; but such conduct was surely no more than a reflection of the warning given in the manual in use at the conference at Kuala Lumpur, and to which reference has already been made in paragraph [103].

107 Findings 11, 12 and 13 dealt with a larger problem: what the judge called "a broader strategy" which "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 was examined by the judge, but emerged only late in the piece as one of the complaints of the plaintiff[118]. Questions about the database maintained by Clayton Utz for the Tobacco Institute of Australia were also canvassed, but whether that database was or was not discoverable, the problem is peripheral to this present judgment. To his Honour, such steps simply confirmed (as noted above[119]) the "defence strategy", otherwise existing, of dealing with documents in such a fashion as to prejudice plaintiffs, while at the same time seeking to gain advantage for the defendant.

108 As to those findings numbered 15 to 18 (inclusive), these dealt almost wholly with the destruction of documents at the conclusion of the Cremona litigation. Thousands of documents were then destroyed, said the judge, and destroyed "as a matter of urgency". This was at a time when, although proceedings were not on foot, they were "not merely likely but a near certainty". Thus far, we have suggested that by this time, March 1998, 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 – but the destruction of documents in

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118 As already explained in paragraph [53] above.

119 In paragraph [69].

March 1998 is best dealt with, for present purposes, when considering later[120] the propriety of any litigant destroying documents before the litigation is on foot. That will catch up, too, findings 20 and 21, which deal with the purpose behind the document retention policy and its implementation, and its non-disclosure in the affidavit of documents. (Finding 19 was not challenged.)

109 Perhaps this, however, should be noted. In so far as his Honour, in findings 15 to 18, refers 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 paragraph [103], 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. As will be seen shortly, the Cremona litigation had demonstrated the difficulties[121] 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.

The rejection of the claim to privilege.

110 We turn now to the ruling which, as it turned out, was pivotal to the criticism of Clayton Utz and of Mr. Wilson in particular: that is, the ruling given on 6 February 2002 rejecting the defendant's claim to legal professional privilege in relation to a great mass of documents.

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120 See below, under the heading "Destruction of documents before litigation commenced".

121 See paragraph [115] below.

111 The ruling on 6 February[122] was given on the morning after argument had been heard on the plaintiff's recent notice to produce directed to the defendant and two subpoenas to produce documents, directed to the defendant's solicitors Clayton Utz and to Mallesons, who had been engaged by the defendant to assist in discovery[123]. As the judge described it in his ruling, there were five categories of documents in question, all coming into existence in or after 1985 and including, but not limited to, correspondence between the defendant and its solicitors, internal memoranda and internal notes, relating to (1) the defendant's obligation in relation to discovery of documents in litigation concerning ill health caused by smoking of cigarettes; (2) the destruction of documents which might be the subject of discovery in litigation concerning ill health caused by the smoke of cigarettes; (3) the destruction of documents discovered or obtained by the defendant in the course of the Cremona litigation; (4) the destruction of computer discs containing images of documents compiled during or after the Cremona litigation; and (5) the creation and maintenance of such computer discs.

112 This division reflected the concern of the plaintiff over two things: the destruction of documents (and associated imaging) immediately after the end of the Cremona litigation in March 1998, and the much earlier destruction of documents generally which, it was alleged, were destroyed because they might be the subject of discovery in personal injury litigation over smoking. In response to the plaintiff's demands for the production of documents, the defendant produced a range of documents to which no claim of privilege was made, but for the rest it claimed legal professional privilege. It was contended by the plaintiff, however, that such privilege had been waived, impliedly, by the conduct of the defendant.

113 The argument in relation to the production of documents took place immediately after the conclusion of the cross-examination and re-examination of Mr. Namey, the deponent of the affidavits relating to discovery, including that sworn on

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122 AB5 1446.

123 As mentioned at the outset, in paragraph [9] above.

14 January 2002. Mr. Namey had followed Mr. Maher into the witness box. Mr. Maher gave sworn evidence in chief to supplement his affidavits of 29 and 31 January 2002[124] and then was extensively cross-examined on 31 January and 1 February[125]; and he was asked a number of questions by the judge himself at the conclusion of re-examination. That was the context in which the plaintiff chose to pursue the notice to produce and the two subpoenas which had been served on 31 January, and it was in that context that his Honour gave his ruling on the morning of 6 February.

114 His Honour accepted the arguments of plaintiff's counsel that privilege had indeed been waived and waived in relation to documents going back to 1990. At one stage in the argument it was suggested by plaintiff's counsel that the proper "cut-off" point was November 1990 but in the end his Honour ruled that privilege had been waived going back to "early 1990"[126]. He ordered that documents which he then identified by reference to the lists of documents provided by the defendant and by the two firms of solicitors should be produced "from early 1990 to late 1998", documents outside those dates being ruled "too remote from the specific issues on which there is waiver for them to be produced"[127].

115 The basis for the plaintiff's argument that privilege had been waived lay in the affidavit of Mr. Maher of 29 January 2002[128] and more particularly Exhibits GFM 3 and GFM 4. Mr. Maher had in 1996 been employed by Mallesons, when he was involved in reviewing documents of the defendant which might become relevant to future litigation. He was there when the Cremona litigation commenced, whereupon "the review was restructured", he said in his affidavit[129], "to take

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124 AB5 1476-2.

125 AB5 1482-1561.

126 AB5 1453, 1454. In fact when ruling orally, his Honour did say "November 1990" or "late 1990", but he subsequently corrected that to read "early 1990": see the discussion at transcript AB5 1703-4.

127 AB5 1454.

128 AB4 1188.

129 Para.3.

account of the issues raised in that litigation in anticipation" of discovery. In July 1996, however, he commenced working for the defendant itself, then known as Wills, and from about March 1997 he began to assist with the management of the defence of the Cremona litigation[130]. General discovery was sought and the defendant discovered some 11,600 documents, said Mr. Maher. This was "a huge task, taking more than 6 months" at a cost in the order of $2 million; yet at the end of the day, as he recollected it, the plaintiff's solicitors sought copies of less than 200 of the discovered documents[131]. The defendant, he said, was concerned at the cost, the length of time taken, and the disruption which discovery had occasioned and "wished to avoid needlessly repeating the exercise in future".

116 According to Mr. Maher's affidavit[132], there were two principal reasons why the discovery exercise had been so time-consuming, expensive and disruptive. First, a large number of documents which might possibly be discoverable had accumulated because of directions given not to destroy documents because of earlier litigation involving the defendant. Such directions had been in place since November 1990 (when the defendant was joined as third party to proceedings in Western Australia brought by Gallagher). Secondly, said Mr. Maher, many employees "were lax in their compliance with the records management policy, and had kept documents for longer than the policy specified." Then, in the first few months of 1998, it became apparent that both the Cremona litigation and the Harrison litigation were going to be resolved. At that point, it was anticipated, "there would no longer be any product liability litigation current against the defendant, with the result that the directions then in force could be lifted."

117 By that time, Mr. Maher was a member of the defendant's records management review committee. According to his affidavit he was concerned "to confirm that lifting the directions [that is, the hold orders] would not lead to adverse

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130 Para.6.

131 Paras.9-13.

132 Para.15.

consequences for the defendant." He was particularly concerned about the reports from the defendant and other companies within the same group on research, development and related issues. These were the documents which, in his opinion, "were likely to be most contentious in future litigation such as *Cremona*" and so he sought advice from the defendant's solicitors after the Harrison proceeding was discontinued. A copy of his letter to Mallesons, dated 9 March 1998 (together with its enclosures - an annotated copy of a letter dated 7 July 1992 from Clayton Utz to the defendant with "annexed schedules" and "some handwritten comments") and a copy of the letter of advice, dated 19 March 1998, sent by Mallesons in response to the letter of 9 March, were then exhibited as GFM3[133] and GFM4[134] respectively. Mr. Maher added[135]: -

> "Following the receipt of the advice from Mallesons Stephen Jaques, it was determined to apply the records management policy in accordance with the approach outlined in my letter to Mallesons Stephen Jaques and confirmed in their advice. The reports from the defendant and other companies within the BAT group on research, development and related issues were retained. ..."

After settlement of the Cremona litigation, Mallesons returned to the defendant's premises the original discovery documents and the compact discs containing images of those documents. Following the settlement, a circular was distributed advising that documents given over for the purposes of discovery would be returned to employees on request but if no request was made, they would be dealt with in accordance with the defendant's policy. Some documents were returned to employees, he continued, but for the rest, he said[136]:-

> "The balance of the documents were destroyed. The compact discs were also destroyed, in accordance with the requirements of the records management policy that computerised records be reviewed and treated as documents subject to the policy.
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> In summary, many of the documents discovered in *Cremona* were destroyed. ...."

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133 AB 4 1225-49.

134 AB 4 1250-2.

135 Para.20.

136 Paras.23 and 24.

118 The detail of Mr. Maher's affidavit has been set out because it forms the context in which the waiver of legal professional privilege is alleged to have occurred. There is no doubt, of course, but that the defendant, through the affidavit of Mr. Maher, waived any claim to such privilege in relation to Exhibits GFM3 and GFM4, being the request for advice (with enclosures, including the letter from Clayton Utz) and the response from Mallesons. But the question argued by counsel and upon which the judge ruled was whether by waiving legal professional privilege in respect of those two exhibits, the defendant had waived privilege in relation to the other documents production of which was being sought by means of the notice to produce and the two subpoenas and in respect of which the defendant was asserting privilege. The question is whether there was a more general waiver to be implied or imputed from what might be termed the express waiver in relation to the two exhibits GFM3 and GFM4. Of course, the affidavit said nothing in relation to legal professional privilege, even in relation to the two exhibits: but it is convenient to describe the actual waiver which was necessarily imported by exhibiting the two letters (and enclosures) as express and that is how we use the term. But however it be called, the essential question is whether the waiver of privilege in relation to the documents that were made exhibits imported waiver of the privilege in relation to other documents, being those more specifically identified by the judge within the period from early 1990 to late 1998.

119 On the face of it, there is nothing in Exhibits GFM3 and GFM4 that carries with it the waiver of privilege in relation to other documents. The first, the letter dated 9 March 1998 from Mr. Maher as corporate counsel for the defendant[137], expressly sought "advice and assistance" on the following: -

> "As you are aware, our Records Management Policy provides for the retention of various categories or "Series" of documents according to defined time limits or "Retention Period". These retention periods were originally specified (at least with respect to certain categories of documents) on the basis of legal advice as to the Company's statutory obligations. In this regard I enclose a copy advice and annexed schedules from Clayton Utz dated 7 July 1992 and some handwritten

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137 AB 4 1225.

comments made in respect of that advice.

Given the time that has elapsed, I would be grateful if you would undertake a review of the advice and let me know whether it is still accurate and complete."

There was a second matter on which advice and assistance was sought. The letter continued: -

"Secondly, subsequent to our discussion on 5 March and the resolution of the Harrison proceedings, the Hold Order previously in place in one form or another since November 1990 and covering all documents which might in any way be related to issues raised in such proceedings, has been revoked with effect from 6 March. In accordance with the Retention Periods otherwise applying to these documents a large portion of them will require destruction. This will not apply to the Company's patents and product specifications (which are required to be archived) and may not apply to "External Reports", being reports from other BATCo companies on research, development and related issues. The Retention Period specified is 5Y+C[138], but this is subject to further retention of documents "of fundamental and ongoing scientific significance" to be reviewed annually.

Previous legal advice received some time ago was to the effect that there was no legal obligation on the Company or its officers to retain documentation which may be related to issues arising in legal proceedings where no such proceedings were on foot, although a Court may draw adverse inferences from the destruction of such documents depending on the circumstances."

The letter then recorded advice already given by Mr. Maher to the review committee that the defendant retain "all External Reports irrespective of their date and all like Reports created by the company" among other documents. That was said to be "subject to your advice". The letter concluded on this aspect:-

"In the circumstances would you please advise whether there is any legal obligation on the Company to retain documents which might possibly be relevant in legal proceedings where no such proceedings are in existence and provide any further comments you may wish to make with respect to my recommendations."

120 We say immediately that in our opinion Mr. Maher's exhibiting this letter of 9 March 1998 to his affidavit did not serve to waive legal professional privilege in relation to any other document mentioned in it, save the "copy advice and annexed

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138 C denotes the creation of the document.

schedules from Clayton Utz dated 7 July 1992" and the handwritten comments, they being the documents which were sent as enclosures with the letter of 9 March. The defendant did not seek to maintain privilege in relation to the enclosures: they were marked as part of Exhibit GFM3. The letter from Clayton Utz dated 7 July 1992 was advice "on the statutory requirements for document retention in all Australian States and Territories" and that letter dealt with the relevant legislation, statute by statute.

121 The letter from Clayton Utz itself made reference to earlier advice – "an advice ... previously provided in December 1985", which "you requested ... be updated and amended where required" - and hence the letter of 7 July 1992, updating and amending as requested. Again let us say immediately that Mr. Maher's including the letter of 7 July 1992 within Exhibit GFM3 did not serve to waive legal professional privilege in relation to the "advice ... previously provided in December 1985", supposing, as is likely, that that advice was in writing. A reference in one letter of advice to an earlier letter of advice does not expose the latter to scrutiny by the other party to litigation merely because legal professional privilege is waived in relation to the former: implied waiver is not so generous a doctrine. As we apprehend it, where legal professional privilege is waived in relation to one piece (or part) of advice, the privilege is impliedly waived in relation to another if - and only if - that other is necessary to a proper understanding of the first. As established by the High Court (at least since *Mann v. Carnell* [139]) the test in such cases[140] is whether it would be "inconsistent" for a party to rely upon, and so to waive legal professional privilege in respect of, the one without also being taken to have waived privilege in respect of the other[141]. For example, there is no such

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139 (1999) 201 C.L.R. 1 at 13, following upon *Attorney General (N.T.) v. Maurice* (1986) 161 C.L.R. 475 per Gibbs, C.J. at 482, 484, Mason and Brennan, JJ. at 488 and Dawson, J. at 497.

140 These cases concern waiver in respect of "associated material"; that is, material associated with material in respect of which there has already been intentional waiver so that the question is whether in the circumstances that intentional waiver must be taken by operation of law to extend also to the associated material.

141 Contrast *Goldberg v. Ng* (1995) 185 C.L.R. 83 at 95, where the very different question was considered of limited purpose waiver. A solicitor who had waived privilege intentionally for the purpose of inquiry by a disciplinary body into the propriety of his conduct was held (by a majority of 3 to 2) to have waived it also for the purpose of inquiry by a court into his conduct in the course of litigation over its consequences. The question of related purpose

inconsistency in waiving privilege in relation to the Clayton Utz letter of 7 July 1992 and maintaining privilege in relation to the "advice ... previously provided in December 1985"[142]: it may be a matter for adverse comment, but it is not a matter of implied waiver. The letter of 7 July 1992 was complete in itself and there was no need to make reference to the earlier advice in order to properly understand the letter of 7 July 1992.

122 So it is, too, in relation to Mr. Maher's own letter of 9 March 1998, seeking advice from Mallesons. His request for advice can be readily understood without recourse to any previous legal advice beyond the enclosures. Mallesons were plainly being asked to undertake a review of the advice given by Clayton Utz on 7 July 1992: they were asked whether that advice was "still accurate and complete". But as for other previous legal advice, as mentioned by Mr. Maher, "to the effect that there was no legal obligation on the Company or its officers to retain documentation which may be related to issues arising in legal proceedings where no such proceedings were on foot", there was no need, simply to understand the letter of 9 March 1998, to expose to scrutiny the terms of that previous legal advice. Mallesons were being asked to advise in the context of the previous legal advice described in the letter of 9 March, and whether that description of it was accurate or not was of no immediate concern. Their brief was to advise on it as described, and mere reference to it did not amount to implied waiver of privilege in respect of the earlier advice itself.

123 Much the same can be said about the letter of advice from Mallesons dated 19 March 1998, Exhibit GFM4[143]. First, under cover of that letter Mallesons enclosed an "updated table of statutory requirements with regard to the retention of documents". Certain points were then made in relation to the legislation, including advice that, generally speaking, documents relating to the company's business activities should

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waiver is to be distinguished from the question of associated material waiver.

142 This advice did not have to be produced and it did not, we think, go into evidence. Quite probably it was the letter of 13 December 1985 mentioned on page 2 of the Clayton Utz advice of 29 March 1990, Exhibit P17 (AB9 3065).

143 AB4 1250.

be retained for 7 years. It was prudent, too, it was agreed, "to retain both internal and external reports of fundamental and ongoing scientific significance", as Mr. Maher had already recommended. As for the second matter on which advice and assistance had been sought, the letter concluded: -

> "I confirm that there is no specific obligation on you to retain documents for the purposes of legal proceedings where no proceedings have been commenced. You are entitled to destroy any documents subject to the legislative requirements but, *as you have been advised previously,* the Court may draw an adverse inference from the destruction of such documents, depending on the circumstances of the destruction. Moreover, you may be required to produce any copies retained where originals are destroyed or to give oral evidence giving the nature and content of the original documents. Arguments in your defence where records have been destroyed would include compliance with the legislative retention periods and a necessity to maintain your archives within responsible limits, given the administrative and storage costs of keeping a large quantity of data."[144]

124 The drawing of adverse inferences from the destruction of documents was always to mind: Mr. Maher referred to it in his letter of instructions of 9 March 1998, and now Mallesons, by letter of 19 March 1998, were confirming the possibility. But that was not the matter upon which advice was being sought. The question put to Mallesons was whether there was any legal obligation of a company such as the defendant not to destroy documents even though no litigation was presently on foot. The advice was explicit: there was no specific obligation to retain documents in such a case and that was advice tendered by the solicitors in direct response to Mr. Maher's letter of request. Again, the mere reference by Mallesons to the defendant's having "been advised previously" to like effect was no more than a reiteration of Mr. Maher's own letter of instructions (at least in the absence of evidence that Mallesons had that advice). The exhibiting by Mr. Maher of Mallesons' letter to his affidavit and the reference in that letter to previous advice did not serve to waive, by implication or otherwise, legal professional privilege in respect of that earlier advice.

125 Thus far, we see nothing in Mr. Maher's exhibiting of the letters of 9 March

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144 Emphasis added.

1998 (with enclosures) and of 19 March 1998 to justify the conclusion that, by waiving privilege in relation to those letters, privilege was waived in relation to other and earlier advice beyond that which was included by the deponent himself within the exhibits. His Honour's ruling extended to other and earlier legal advice but went beyond it, embracing documents "from early 1990 until late 1998". What then was the basis for the ruling, a ruling that led, as a result of the tender of the letters, Exhibits GFM3 and GFM4, to the admission into evidence of a substantial number of documents extending over a period of more than eight years, effectively setting at nought this fundamental principle of our judicial system[145] for that period? The judge's concern was the use to which the two exhibits were being put; for his Honour said, in ruling[146]: -

> "In my view the affidavit and oral evidence of Mr Maher made use of the advices in order to establish or advance the following propositions: first, that the defendant had a document retention policy which was longstanding and which pre-dated the instigation of the Hold Order of November 1990 and that the defendant acted upon legal advice as to the propriety of cancelling the Hold Order and applying such a policy after the Cremona and Harrison proceedings had come to an end.
>
> Secondly, that the destruction of documents which occurred upon the completion of the proceedings in Cremona and Harrison, was performed as a routine application of an appropriate commercial document handling process and was not conducted with the primary intention of destroying all documents which might prove damaging to the defendant in later litigation."

126 It is a nice point, of course, whether the oral evidence of Mr. Maher was properly relied upon in this context, given that most of that evidence came in cross-examination. After all, what should be relevant is surely the use to which the party waiving privilege is seeking to put the documents, rather than the use sought to be made of them by the other side. Be that as it may, the description of the purpose to which the documents were being put, which we have quoted from His Honour's ruling, does not seem to us to advance the case for implied waiver. That

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145 *Attorney-General (NT) v. Maurice* (1986) 161 C.L.R. 475 at 490-1.

146 AB5 1448.

Mr. Maher was relying upon the policy as “longstanding” or as "[pre-dating] the instigation of the Hold Order of November 1990” does not impliedly waive privilege in respect of advice given at that earlier point, whether to establish the document retention policy in the first place, or in review of it, or indeed to change it. The defendant's claim was to have been acting upon legal advice when it came to destroy documents at the conclusion of the Cremona litigation and the Harrison proceeding, a claim patently substantiated by Exhibits GFM3 and GFM4. If the plaintiff wished to challenge that claim, putting in issue whether, for instance, the legal advice had been obtained bona fide or whether it was, perhaps, mere window dressing in an effort to justify what otherwise was known to be unjustifiable, then that was a matter for the plaintiff to pursue, and to pursue as she wished. If the plaintiff sought to establish such contentions out of the documents of the defendant, then she would have to do so from such documents as were already in her possession or of which she could compel production (whether by notice to produce to the defendant or by subpoena duces tecum to others, such as the solicitors). And, for the reasons already advanced, in seeking to compel production the plaintiff could not establish implied waiver of privilege by means of the letters which were Exhibits GFM3 or GFM4 to Mr. Maher's affidavit.

127 Indeed, as His Honour recognised early in his ruling[147]:-

> "Privileged documents are not available for inspection merely because they might throw light on the strength or weakness of the case as to specific issues or generally.”

In ruling[148], his Honour went on to describe Mr. Maher as having asserted in his evidence “that [before destroying documents] legal advice had been first sought and given” and that the legal advice received from Mallesons in 1998 “was consistent with legal advice that had previously been received”; but, as already indicated, that evidence carried the question of implied waiver no further. The judge mentioned also that Mr. Maher had "rejected any suggestion that the decision to destroy

147 AB5 1447.

148 AB5 1448-9.

documents had been taken for the purpose of prejudicing later proceedings" and that "that purpose was sought to be masked by the receipt of legal advice which was received to support a contention of innocent intention". That the legal advice had been sought to dress up, as it were, the destruction of the documents and to conceal by an overlay of so-called innocent intention what otherwise had been done quite deliberately for the purpose of prejudicing later proceedings, was the contention of the plaintiff, but obviously it was not a contention with which Mr. Maher agreed. Even if expressly rejected by him (and the cross-examination does not appear to have been so specific), we cannot see how his rejection of the contention could serve to expose to scrutiny documents for which otherwise legal professional privilege was claimed. If the plaintiff's contention had any basis, then the defendant's claim to privilege in respect of earlier advice upon which the plaintiff was seeking to rely might redound to the disadvantage of the defendant by way of adverse inference, but that was not how the matter was being put. The question of adverse inferences was always a possibility: what was at stake here was the claim to legal professional privilege, and for the reasons given, it seems to us that the production of the correspondence which became Exhibits GFM3 and GFM4 did not expose to scrutiny the "many other instances of the defendant seeking and receiving legal advice as to its document retention policy".

128 In ruling, His Honour said[149]:-

> "The documents to which waiver might apply are not confined to those of precisely the same character as the documents which create the waiver – in this case letters formally requesting advice and letters of advice – but would extend to such related documents as might be indirectly relevant, in that they might provide insight into the content, circumstances and consistency of the advice which was requested and received at other times on those topics: see *R v.Young* (1999) 46 N.S.W.L.R. 681, at 696."

Young was a case on relevance, rather than on waiver; and anyway the July 1992 advice, it will be recalled, was only about the statutory requirements relating to document retention. But those points aside, what his Honour said here was, with

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149 AB5 1450.

respect, to depart from the earlier statement of principle, that privileged documents are not available "merely because they might throw light on the strength or weakness of the case as to specific issues or generally". It was the plaintiff who sought to explore "the content, circumstances and consistency of the advice" and, in the defendant's exposing to scrutiny the advice obtained in 1998 from Mallesons, there was nothing to justify the conclusion that the defendant had waived privilege with respect to any earlier advice.

129 His Honour continued the ruling so:-

> "In my view, there has been waiver as to the issues which I have identified and as a matter of fairness the plaintiff should have access to other advices and documents relevant to advice which the defendant obtained, or relating to advice sought from its solicitors, and other documents as may bear upon such other advice.
>
> The question arises whether production of documents should be limited to those issues which originated only in a time frame related to the decision to cancel the hold order in 1998. In my view, it should not be so limited."

This shows how very wide was the concept of "fairness" which the judge applied to resolve the question of waiver. It is true that fairness is not uncommonly referred to in this context, but it is fairness as informing curial ascertainment of consistency. As was said in *Mann v Carnell*[150] by Gleeson, C.J., Gaudron, Gummow and Callinan, JJ:-

> "What brings about the waiver is the inconsistency which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality, not some overriding principle of fairness operating at large."

And as Mason and Brennan, JJ. had said earlier in *Attorney General (NT) v Maurice*[151]:-

> "An implied waiver occurs when, by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege. The holder of the privilege should not be able to abuse it by using it to create an inaccurate perception of the protected communication. Professor Wigmore explains: '...He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder.[152]' In order to

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150 (1999) 201 C.L.R. 1 at 13.

151 (1986) 161 C.L.R. 475 at 487-8.

152 In the larger extract from Wigmore which is to be found in the judgment of Gibbs, C.J. (at

> ensure that the opposing litigant is not misled by an inaccurate perception of the disclosed communication, fairness will usually require that waiver as to one part of a protected communication should result in waiver as to the rest of the communication on that subject matter: see *Great Atlantic Insurance Co. v. Home Insurance Co*. [1981] 1 W.L.R.529."

The letters which are Exhibits GFM3 and GFM4 did not, in any relevant sense, themselves create "an inaccurate perception of the protected communication". By use of the enclosures, full disclosure was made of those two exhibits and nothing more was needed to correct what otherwise would have been "inaccurate perception".

130 In seeking to support the ruling below, the plaintiff submitted that the question of waiver in the present circumstances depended, not at all upon the material exhibited to Mr. Maher's affidavit, but simply upon the matters put in issue. The defendant, it was said, had put in issue the legitimacy of its purpose in implementing its document management strategy and the fact that such strategy was based upon legal advice. So much may be accepted, but it does not follow, as the plaintiff then submitted, that "considerations of fairness require that a party putting in issue in a proceeding a matter which cannot be fairly assessed by the Court without examination of material over which that party claims privilege must be taken to have either consented to the use of the relevant privileged material or to have waived reliance on the privilege"[153]. As already indicated, the mere reference to legal advice may make that legal advice relevant, but it says nothing as to the waiver of privilege. No doubt if a party claiming to have acted upon legal advice then relies upon privilege to protect that advice from scrutiny, the claim will be less than persuasive: but that does not mean that the privilege has been waived, by implication. Hence the error, in our opinion, in his Honour's referring to the insight that the documents in question might provide "into the content, circumstances and consistency of the advice which was requested and received". That may have been

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> 481), the learned author concludes: "He may elect to withhold or to disclose, but after a certain point his election must remain final." That certain point, it is suggested, depends more upon inconsistency than it does upon fairness writ large. Election itself suggests a choice between inconsistent courses.

153 Respondent's Outline of Submissions para. 251, see also para.252.

so, but it did not mean that therefore privilege had been waived.

131 It is for these reasons that we think his Honour was led by plaintiff's counsel into significant error, in ordering production of the documents identified by the judge and in respect of which legal professional privilege was properly claimed. We add the word "properly" because in ruling his Honour did not look at the documents, but left aside for further consideration whether legal professional privilege was properly claimed or not. It was expected that the parties would, in the main at least, be agreed on that question and, as we follow it, so it turned out. At all events, among 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. Privilege was claimed but overruled at least in respect of Exhibits P16, P17, P28, P29, P30, P31, P32, P44 and P50, and of those the following were critical to the judge's findings in relation to the legal advice given, its purpose and effect: Exhibits P16 (the Foyle memorandum), P17 (the letter of advice dated 29 March 1990 from Mr. Wilson for Clayton Utz), P28 (letter dated 16 May 1990 from the defendant to Allen, Allen & Hemsley seeking advice), P29 (letter dated 23 March 1990 from the defendant to Wilson of Clayton Utz requesting advice), P30 (another copy of the Foyle memorandum), P32 (letter dated 3 April 1990 from Clayton Utz to Gulson (enclosing Stowe advice) plus the Oxland notes of conference and the like) and P50 (letter from Allen, Allen & Hemsley to Mr. Gulson containing the requested advice). These were all important to the judge's findings that were summarised in paragraph 289 of the reasons for judgment, 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"[154]. 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

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154 In para.263 of the reasons for judgment, his Honour recognised how important to his findings was the order made requiring production of legal advice given to the defendant.

withdrawn.

132 Before leaving the question of legal professional privilege, it is convenient to deal with a like ruling made by the trial judge on 13 February. This related to an advice provided by John M. Stowe, Q.C. ("the Stowe advice"), which was attached to one of the disputed documents – Exhibit P32, a letter dated 3 April 1990 to the defendant from Clayton Utz, as solicitors for the Tobacco Institute of Australia Limited ("the Institute"). On 6 February 2002, the judge ruled that privilege had been waived in relation to, inter alia, the letter dated 3 April 1990, under cover of which Clayton Utz had sent the Stowe advice to Mr. Gulson, then the defendant's legal counsel and secretary. Mr. Gulson himself referred to the Stowe advice in his letter to Allen, Allen & Hemsley in May 1990, when he wrote to that firm seeking legal advice[155]. There were also earlier references to the Stowe advice in some of the documents the subject of the judge's ruling on 6 February: for example, in Exhibit P35, a letter dated 30 January 1995 from Clayton Utz to the Institute[156], and in Exhibit P33, a letter dated 22 May 1997 from Mallesons to Messrs. Cannar and Maher of the defendant[157].

133 On 13 February 2002 and upon the application of the plaintiff, the judge ruled that legal professional privilege had been waived in relation to the Stowe advice. On the assumption that that privilege belonged to the Institute to which the advice had first been supplied, the privilege was held to have been waived by the voluntary provision of the advice by the Institute's solicitors to the defendant by medium of the letter dated 3 April 1990. Subsequent references to the Stowe advice in Exhibits P33 and P35 only served to demonstrate, the plaintiff argued before us[158], the "uninhibited manner in which the Stowe advice and the content of it had been shared by the [Institute] with the [defendant]", but such sharing of the advice does not, we think, amount to a waiver of legal professional privilege. If, as assumed, the

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155 As mentioned above, in paragraph [97].

156 AB9 3126-8.

157 AB9 3118-23.

158 Respondent's Outline of Submissions para.257.

privilege belonged to the Institute, it is difficult to see how reference to that advice, or indeed the supply of that advice, by the Institute through communications which the Institute and its solicitors no doubt regarded as privileged (and properly so) can have amounted to a waiver.

134 Alternatively, if the Institute had not voluntarily waived its claim to legal professional privilege over the Stowe advice, it was held that the privilege had been waived by implication. In seeking to support the ruling, the plaintiff argued that that was on the basis, as found by the judge, that "there was a common interest between the [Institute] to whom the Stowe advice was provided, the [defendant] and possibly other tobacco companies associated with the [Institute] with respect to sharing information about and developing an effective and consistent approach towards document retention". But the notion of "common interest" does not appear to us to support an argument of implied waiver. Such a common interest between the defendant, the Institute and perhaps others, might support the inference that those, sharing the common interest, were concerned to maintain the privilege, but it is difficult to see how the existence of their common interest in that regard can be used to support its loss. The plaintiff relied upon *Newcrest Mining (W.A.) Ltd. v. Commonwealth*[159] but that was a very different case. In *Newcrest* the relevant "common interest" was in the joint venture and in the proceeding which was brought in relation to it for the benefit of all, so that waiver of privilege by one was taken to be waiver by all. That is not this case, where the "common interest", if such it was, was not in this proceeding but only in claiming and preserving privilege.

135 In our opinion, his Honour's ruling in relation to the Stowe advice falls with the ruling made on 6 February 2002 about the waiver of privilege generally in relation to the documents sought by the plaintiff through the notice to produce served upon the defendant and the two subpoenas served on the solicitors, on 31 January 2002.

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159 (1993) 40 F.C.R. 507 at 509

Destruction of documents before litigation commenced

136 Next, we turn to 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. It was not in dispute before us 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, 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. The plaintiff's submission was that the defendant was bound not to destroy documents that were (or might be) relevant in litigation of the type that was anticipated, though not yet on foot. The defendant contended that there was no such principle, and no inhibition on a prospective party doing what it wanted to with its own before the commencement of the proceeding against it.

137 As earlier recounted, once litigation was commenced in 1990 against the defendant as third party to a proceeding in Western Australia, "hold orders" were put in place by the defendant in order to prevent the untoward destruction of documents which might be relevant in that litigation. (A hold order is in writing, issued by or with the approval of the defendant's chief executive and it is reviewed annually[160].) The first of the hold orders, which was dated 23 November 1990[161], stated, after referring to the litigation which had been commenced against Wills on 26 October 1990, continued:-

> "There are two points which need to be made.
>
> > **Firstly**, it is confirmed that the Document Retention Policy is to cease operation until advised otherwise in writing.
> >
> > **Secondly**, in order that Company communications can be properly protected and to assist in the orderly flow of management information, it would be appreciated if all staff be

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160 Mr. Nicholson's affidavit of 29 January 2002, para. 27 (AB4 904).

161 Exhibit GFM 1 to the further affidavit of Mr. Maher of 31 January 2002 (AB4 1256). See also Exhibit MNN6 to the affidavit of Mr. Nicholson, 29 January 2002 (AB4 1044)

aware of the existence of this litigation and that in some cases particular attention will need to be addressed to the correct mode of communication (whether oral or written).

It is not the intention of this memo to list exhaustively every possible or conceivable situation in which a 'communication' issue may arise. Some typical examples will be communications from Directors to staff, communications to various Board members and communications with SMT. The communications most likely to be affected by this embargo are ones relating to the smoking and health issue at large, particularly aspects of the smoking and health debate and public awareness issues including brand marketing."

This appears to be unexceptionable; if anything it erred on the side of caution. Indeed, the next "hold order" (that dated 9 January 1991[162]), after referring to "suspension of the document retention policy" according to the previous memorandum of 23 November 1990, was even more explicit:-

"To ensure that **no documents or papers of any description** are destroyed which may **in any sense** be relevant to these proceedings all materials which would be otherwise be shredded or discarded in the course of operations should be collected in one area each day. I suggest that a shredding bin be located in each area. A solicitor from Robinson Cox will review the material in the bin at the end of each day and subject to their approval, the material may thereafter be shredded. *Unless the material has been specifically approved by Robinson Cox, no material is to be shredded under any circumstances*."[163]

A much later hold order (which was put in place on 12 April 1999[164]) was distributed to staff upon the commencement of the relevant litigation, even though (as it declared) "Wills has not been served with this statement of claim and may never be served". None of this bespeaks any recklessness on the part of the defendant in relation to the destruction of documents once litigation was commenced against it.

138 It was on 9 March 1998 that Mr. Nicholson, as records manager, issued a memorandum revoking the then latest hold order "with effect from 6 March 1998"[165]. That document continued:-

" For those of you affected Revised Retention Schedules will be

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162 Exhibit GFM 2 to that affidavit (AB4 1260).

163 Emphasis added to last sentence only.

164 Exhibit GFM 15 to that affidavit (AB4 1297).

165 Exhibit MNN 10 to Mr. Nicholson's affidavit of 29 January 2002 (AB4 1065). See also Exhibits GFM 13 and GFM 14 to Mr. Maher's affidavit of 31 January 2002 (AB4 1293, 1295).

> prepared and forwarded to you as soon as possible. Those not affected should continue to action the Records Management Policy as normal. Please remember that Department managers are required to confirm compliance by 15 April 1998[166]."

It was at about this time that Mr. Nicholson assumed the role of records manager. He occupied that position for about three months during which he took steps "to reactivate the process for the assessment and destruction of documents which fell outside their retention periods". Mallesons were engaged to conduct a review of boxes of documents that had been separated out for the purposes of the Cremona proceedings, a process which took about two or three weeks. This was done, Mr. Nicholson said in his affidavit[167], "to determine whether there was any legal reason why the documents should be retained". Some were returned for retention, but the rest went "to a disposal organisation for destruction".

139 With the revocation in March 1998 of the last of the hold orders which had been first put in place in 1990, the judge was satisfied that those in charge of the defendant's documents saw a "window of opportunity" to destroy documents which had been retained while the hold orders had been in place and he concluded (in paragraph 105):-

> "In a period of frantic activity I consider it very likely that some relevant documents were destroyed. In any event, no record was kept of what was destroyed."

So much may be assumed, for present purposes.

140 Perhaps the best example of what happened in March-April 1998 was the destruction of documents which had been discovered in the Cremona litigation, a step which obviously impressed itself upon the judge. In that litigation, general discovery had been required and, as already described by reference to Mr. Maher's

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166 The date was perhaps taken from the Wills' Records Management Program, Staff Handbook (Exhibit PG5 tab 31) or some such; for, at p.14, that handbook sets the time "for the annual records review and disposal process" at the "first quarter of each year by 15th April of that year": AB2 562.

167 Affidavit of 29 January 2002, para.36 (AB4 906).

affidavit[168], the task of discovery for the defendant was enormous, very costly and in the end not very productive for the plaintiff. Save for a small minority, an image of some 30,000 documents was placed on computer discs and, in addition, documents were indexed and in most instances summarised for easier retrieval. Ms. Chalmers said in her evidence that the documents had also been rated on the scale of 1 to 5, according to how damaging each was likely to be to the defendant in any litigation, or how beneficial. All records of the summaries and rating of the documents had, however, been destroyed before the commencement of the present litigation[169] and it was this which impressed the judge. (His Honour also referred specifically in his reasons for judgment[170] to the review of these documents as set out in Exhibit P14, a document which Ms. Chalmers sent to Mr. Maher on 17 April 1997 and which was produced to the plaintiff in this case only after the judge overruled the defendant's claim to legal professional privilege.) Not only were the documents discovered in the Cremona litigation destroyed, at least in the main, so too was the database, denying the defendant the ability to describe the documents in question[171].

141 One of the curiosities of this case, arising perhaps from the speed with which the litigation was conducted, is the whereabouts of the affidavit of documents in the Cremona litigation. There is no doubt but that the plaintiff's solicitors were aware of much that went on in the Cremona litigation. Their complaint to the judge was loud, that the defendant had failed to make discovery even along the lines followed in the Cremona litigation – a submission which passed by the fact that the issues were not the same and the fact that in that case general discovery had been required, as distinct from the discovery by categories ordered in this case. If what was wanted in this case was discovery like that made in the Cremona litigation, it is difficult to see why an order could not have produced that result by reference to the

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168 In paragraph [115] above.

169 As the judge noted in para.115 of the reasons for judgment.

170 In para.121.

171 See para.289, findings 15 to 18.

affidavit filed in the earlier proceeding, but that was not sought.[172] But that is not the point with which we are now dealing: for the moment we are dealing only with whether a company, in the position of the defendant, is obliged to retain documents when litigation is not on foot but can be anticipated.

142 It is important that Mr. Maher sought advice from solicitors before the destruction of documents commenced in March-April 1998[173]. As already seen[174], Mr. Maher asked Mallesons whether there was any legal obligation on the company to retain documents "which might possibly be relevant in legal proceedings where no such proceedings are in existence" and he was told, in the response which was drafted by Ms Chalmers, that "there is no specific obligation on you to retain documents for the purpose of legal proceedings when no such proceedings had been commenced". As the judge said[175], destruction of the documents discovered in the Cremona litigation commenced only after Mr. Maher had received the advice from Ms Chalmers. Ms. Chalmers' written advice made no reference to any question of "anticipated proceedings"[176]; but in evidence she said that in conference with Mr. Maher and Mr. Cannar on 11 March 1998, she had asked about whether further proceedings were anticipated, although by oversight she omitted to include any advice about anticipated proceedings in the letter to Mr. Maher. The judge found, then, that Ms. Chalmers herself had some anxiety about the destruction of documents if proceedings were anticipated, anxiety which his Honour said did not surprise him. It is plain enough, too, that Mr. Maher was concerned about destroying documents when proceedings might be anticipated; hence his letter seeking advice in the first place - and that provides the context in which we turn to the critical question, whether there is any obligation on the defendant, before the commencement of proceedings, not to destroy documents which might well be

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172 Perhaps that was because the plaintiff's solicitors already had the earlier affidavit of discovery, which is likely given the detailed references they made to it from time to time.

173 As found by the judge in para.135. See also para.289, finding 16.

174 In paragraph [119] above.

175 In para.139 of the reasons for judgment.

176 As the judge mentioned, in para.141.

relevant in future litigation when such litigation can reasonably be anticipated.

143 The application to strike out the defence was advanced on the basis that there had been a failure to give proper discovery to such a degree and in circumstances so serious as gravely to prejudice the plaintiff in the conduct of the litigation. It was submitted that the court in its discretion should conclude that the only appropriate sanction was to strike out the defence. As the judge noted specifically in his reasons for judgment[177], the plaintiff did not put her case on the basis of contempt of court or interference with the course of justice; nor indeed was it expressed to be based upon abuse of process although, in his Honour's view, in effect that principle was being drawn upon inasmuch as the court was said to be exercising its inherent jurisdiction to control the conduct of the parties to ensure full and frank compliance with its rules. It was submitted that the court should strike out a defence where the defendant, by its conduct, denies the plaintiff a fair trial, and particularly so where that result was deliberate on the part of the defendant. Thus, the application made by the plaintiff rested pretty plainly on what was said to have been the wholesale destruction of documents, before the commencement of the proceeding, to the prejudice of the plaintiff. The criterion, according to the plaintiff, was denying the plaintiff a fair trial.

144 In contrast, the defendant submitted that any party was free, in an adversarial system, to do what it liked with its own documents before the commencement of litigation. There was no authority, said the defendant, for the proposition that a company was not entitled to destroy documents before proceedings were on foot against it. The plaintiff, it submitted, had to rest content with the drawing of inferences adverse to the defendant, if the destruction of documents by the defendant proved relevant. No principle existed, Mr. Myers argued, that prior to the commencement of proceedings a possible opponent had "to assist the other side in potential litigation". Even in the course of the trial, the system being adversarial, the trial was to be conducted in accordance with the rules of court and any

177 Para.338.

obligations owed to the court, but beyond that the litigation had to be conducted on the basis that the court should determine the issues *as presented by the parties*. Any notion otherwise of what was a "fair trial" must prove no criterion at all - or at all events prove to be merely subjective, putting at risk the rule of law.

145 In our opinion, both parties adopted a position which was too extreme. On the one hand 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, a continuing dispute between neighbours over a fence line - or perhaps, as in one of the cases to be mentioned, a continuing dispute between employer and employee over the dangers and risks involved in repetitive work of a certain type. 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. On the other hand, if it be supposed, for the sake of argument, that 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. It must remembered that a hold order, precluding the implementation of the document retention policy, was put in place in November 1990 once litigation commenced against the defendant in Australia, and that the last of those hold orders was revoked only in March 1998. 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"[178], was not clear made clear on appeal).

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178 The date back to which the judge ordered the production of documents after overruling the defendant's claim to legal professional privilege.

146 The common ground was that there was no authority directly governing the problem raised for decision in this instance. In order to establish that the court had the power to act if a "fair trial" was denied, the judge referred to four English decisions, but on examination they do not go so far. In *Coleman v Dunlop Ltd.*[179] in the course of a retrial in the County Court after a successful appeal by the plaintiff, the plaintiff obtained an order striking out the defence as to liability and entering judgment for the plaintiff with damages to be assessed. The order was based upon the failure of the defendants to provide adequate or proper discovery of documents relevant to liability in the context of what had become quite protracted litigation. The decision was affirmed by the Court of Appeal.

147 In *Coleman* the plaintiff was suing for damages for personal injury sustained in the course of employment by the defendants and the essential question was whether the nature and extent of the work required of the plaintiff by his employer made injury foreseeable. A critical issue was the speed at which the plaintiff was required to work and the weight of the work he performed as an assembler in the carbon brake department. It was established, on the hearing of the application to strike out which was made in the course of the retrial, that relevant records had been kept but that these records had been destroyed in a fire, or in the efforts to extinguish the fire, which had occurred in 1995 - *after* the commencement of the commencement of the present proceedings and *after* discovery had apparently been completed. In the end, the defendants accepted that documents that had been available and discoverable were no longer available and that they should have been disclosed at an earlier stage.

148 The application to strike out the defence as to liability was based upon two grounds: first, non-compliance with requirements for discovery and, secondly, abuse of process making a fair trial impossible. The trial judge rejected the second ground, but concluded the first was established. The defendants appealed against

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179 Court of Appeal, England, 20 October 1999, unreported. The defendant supplied us with the transcript of the judgments as delivered.

her conclusion and the plaintiff sought, if necessary, to uphold the decision on the second ground as well as the first. The Court of Appeal, speaking through Judge, L.J., upheld the judge's decision in so far as it rested upon non-compliance with the provisions for discovery, and found it unnecessary to consider the second ground.[180] The trial judge had held that the missing documents went to the core of the plaintiff's case and that the deficiencies in discovery could no longer be made good so that a fair trial was not possible. Judge, L.J. said that he found himself "entirely persuaded without the slightest difficulty, by the judge's approach and analysis of the submissions made to her".

149 Thus *Coleman* said nothing at all about the alternative ground, of abuse of process making a fair trial impossible; it rested simply upon the failure of a party to comply with the requirements for discovery, where compliance had been possible at the commencement of the proceeding but was no longer possible because the relevant records had in the meantime been destroyed in a fire or as the result of the fire (which may be supposed to have been an accident). The case says nothing about documents destroyed prior to the commencement of the proceeding, let alone the deliberate destruction of documents with a view to prejudicing a prospective plaintiff. None the less *Coleman* was the only case to which we were referred dealing with default by a defendant.

150 In *Logicrose Ltd v Southend United Football Company Ltd*.[181] it was alleged that Harris, the principal director and shareholder of the plaintiff (and its principal witness) had not merely failed to disclose the existence of a crucial document in his possession or power, but, having obtained it during the course of the trial (and indeed during the course of his cross-examination) had deliberately suppressed it, and for a time had successfully concealed its existence from the court. Millett, J., however, was not satisfied that that allegation was established. In rejecting the

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180 This contrasts with what was said about *Coleman* in the reasons for judgment below.

181 Chancery Division, 5 February 1988, unreported save in the Times newspaper of 5 March 1988. The defendant supplied us with a print of an electronic version of the judgments delivered.

submission that the relevant standard was the criminal one, his Lordship drew a contrast between punishing an offender for the crime of contempt and responding when a party disregards his or her obligations even in the absence of contempt, saying: -

> "Deliberate disobedience of a peremptory order for discovery is no doubt a contempt and, if proved in accordance with the criminal standard of proof, may, in theory at least, be visited with a fine or imprisonment. *But to debar the offender from all further part in the proceedings and to give judgment against him accordingly is not an appropriate response by the Court to contempt*.[182]
>
> It may, however, be an appropriate response to a failure to comply with the rules relating to discovery, even in the absence of a specific order of the Court, and so in the absence of any contempt, not because that conduct is deserving of punishment but because the failure has rendered it impossible to conduct a fair trial or would make any judgment in favour of the offender unsafe.
>
> In my view a litigant is not to be deprived of his right to a proper trial as a penalty for his contempt or his defiance of the Court, but only if his conduct had amounted to an abuse of the process of the Court which would render any further proceedings unsatisfactory and prevent the Court from doing justice. Before the Court takes that serious step, it needs to be satisfied that there is a real risk of this happening."

In the end, after considering the evidence, his Lordship concluded that is was "quite impossible for me to be satisfied on the evidence before me at this stage that Mr. Harrison deliberately attempted to suppress [the document in question]" and for that reason the application was dismissed. But his Lordship added that he "would in any event, have refused to accede to this application once the missing document had been produced", because the object of Order 24 Rule 16 is "not to punish the offender for his conduct but to secure the fair trial of the action in accordance with the due process of the Court". Millett, J. was satisfied that there was no risk of injustice if the trial was allowed to continue. He said:-

> "The deliberate and successful suppression of the material document is a serious abuse of the process of the court and may well merit the exclusion of the offender from all other participation in the trial. The reason is that it makes the fair trial of the action impossible to achieve

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182 Emphasis added.

> and any judgment in favour of the offender unsafe. But if the threat of such exclusion produces the missing document, then the object of Order 24 Rule 16 is achieved."

151 The plaintiff relies on this, pointing to the inability now of the defendant to repair the wholesale destruction of documents that took place in March 1998 and earlier pursuant to the document retention policy; but again Millett, J. was speaking in the context of a document allegedly coming to hand in the course of the trial, and, indeed, during cross examination. That is not this case. *Logicrose* says nothing, it seems to us, about the suppression of documents before the commencement of the proceeding. Interestingly, in view of the complaint in this case made by the defendant that the judge had never ordered the plaintiff to give particulars of precisely what was being alleged against the defendant in support of the application made on 25 January, Millett, J. recorded (on page 4 of 10) that he had directed a pro forma notice of motion be served on the plaintiff "so that they might know exactly what was alleged".

152 For its part, the defendant relied upon this passage in the judgment of Millett, J:-

> "This might well be the case [i.e., exceptional circumstances requiring action by the court] if it was no longer possible to remedy the consequences of the document's suppression despite its production, perhaps because a material witness who could have dealt with the document had died in the meantime or where, despite the production of the document, there was reason to believe that other documents have been destroyed or remain concealed. But I do not think that it would be right to drive a litigant from the judgment seat without a determination of the issues as a punishment for his conduct, however deplorable, unless there was a real risk that that conduct would render the further conduct of proceedings unsatisfactory. *The court must always guard itself against the temptation of allowing its indignation to lead to a miscarriage of justice.*"[183]

With some force, counsel for the defendant submitted to us that at first instance on this occasion the judge had indeed allowed his indignation to carry the day. His Honour expressly accepted that this was not a case for punishment for misconduct: his Honour addressed the question whether there was a real risk that the further

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183 Emphasis added.

conduct of proceedings must be unsatisfactory, but in the context of misconduct allegedly occurring before the commencement of the proceeding, not during it.

153 In *Landauer Ltd. v. Comins & Co.*[184], it was again the plaintiffs who were in breach of their discovery obligations under the rules. A number of relevant documents which were not at first listed by the plaintiffs as part of discovery had since been destroyed. Reliance was placed upon Order 24 rule 16(1) which, upon default in compliance with the requirements for discovery, authorised the court to make such order as it thought just, including an order that the action be dismissed or the defence struck out and judgment entered accordingly. The County Court judge had struck out the plaintiffs' claim for failure to comply with a requirement as to discovery and, as Lloyd, L.J. said in the Court of Appeal, there was no doubt that the judge had had jurisdiction to make the order which he did. The plaintiffs contended, however, that the exercise of the discretion had miscarried in the particular circumstances of the case. The appeal was dismissed.

154 According to the judgment of Lloyd, L.J:-

> "The writ was issued on 2nd August 1986. On 11 September 1987 the plaintiffs furnished their first list of documents. The list was defective, since a number of relevant documents were omitted altogether, some of these documents had already been destroyed. Others were destroyed later. The destruction took place in three phases. The first phase was as a result of a policy of destruction initiated in October 1986, a few months after the writ was issued. Further destruction took place in February 1989, when the plaintiffs moved their offices. The final phase was in June 1990, when Mr. Axford retired.
>
> There is an issue between the parties as to the plaintiffs' state of mind when carrying out their policy of destruction. The defendants do not say that the plaintiffs deliberately destroyed documents which they knew to be relevant to these proceedings in order to prevent them coming to the eyes of the defendants. But they do say, or at any rate did say in the court below, that the plaintiffs carried out their policy of destruction in knowing disregard of their discovery obligations. In other words, they destroyed these files without first checking the files

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184 Court of Appeal, England, 14 May 1991, unreported save in the Times Law Reports of 7 August 1991. The defendant supplied us also with a print of an electronic version of the judgments.

> to see whether they contained any relevant documents. That applied particularly to documents destroyed by Mr. Axford in June 1990, despite advice which the plaintiffs had received from their solicitors.
>
> Mr Axford on the other hand, in his affidavit, says that the destruction of the documents was inadvertent."

155 It is plain then that in *Landauer*, as in *Coleman*, the destruction of documents occurred after the commencement of proceedings - and in the end it did not matter whether the destruction had been deliberate or inadvertent. It was held that the County Court judge had been "fully entitled to find that there was a serious risk that essential documents may have been destroyed in this case as a result of which a fair trial of the action is no longer possible, that being the test which he had been invited to apply", and it could not be said, in the view of the Court of Appeal, that the judge was "plainly wrong" in his application of it, even assuming in the plaintiffs' favour that the destruction of documents was merely inadvertent.

156 About this last, however, Lloyd, L.J. went on to say this[185]:-

> "There was, however, some discussion in argument before us as to what would have been the position if the documents had been destroyed in knowing disregard of the plaintiffs' obligation as to discovery. I find some difficulty in seeing how, if the sole question is whether a fair trial can still be held, the conduct of the plaintiffs in destroying the documents, whether it was merely inadvertent or whether it was in knowing disregard of their obligation as to discovery and therefore more blameworthy, can be fitted into the equation. But the question does not arise in the present case. It will need careful consideration when it does arise."

His Lordship adopted the view of Millett, J. in *Logicrose* "that it was not part of the function of the court in exercising its discretion under Order 24 rule 16 to punish the party in default". He reserved, for further consideration, however, cases of contumacious conduct[186] "such as the deliberate suppression of a document" which,

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185 This is taken from the electronic version of the judgment. As the defendant demonstrated, the passage quoted by his Honour at para.348 of the reasons for judgment is not to be found in the judgment; rather it is in the summary of the case provided at the commencement of The Times Law Report of 7 August 1991 as quoted (not altogether accurately) in the plaintiff's submissions to the judge (AB11, 3802).

186 Lloyd, L.J. said that he used the word "contumacious" because it expressed the required meaning more accurately than "contumelious". According to the Oxford English Dictionary (2nd edn.) "contumacious", in the law, means "wilfully disobedient to the summons or order

his Lordship said, might justify the striking out "even if a fair trial was still possible". Such cases "must necessarily be extremely rare", he added.

157 Thus again, the case says nothing about the destruction of documents *before* the commencement of proceedings. It raises an interesting question about the proper test where essential documents are destroyed in consequence of which a fair trial may no longer be possible, particularly if that conduct is not deliberate but inadvertent (or as in *Coleman* accidental) and it suggests that the test of fair trial may not always be helpful. But it says nothing, we emphasise, about the destruction of documents before the commencement of the proceeding. Even the first phase of destruction occurred a few months after the writ was issued and, whatever might be said of that, there was further destruction of documents after the provision of the first list of documents.

158 *Arrow Nominees Inc. v. Blackledge*[187], another case referred to in his Honour's reasons for judgment, concerned forgery. An application was made by certain of the respondents to strike out a petition for relief under s.459 of the Companies Act 1985 on the basis of unfair conduct in relation to the affairs of the company. Their application was made because of an attempt by one Tobias "to pervert the course of justice by the production in the course of standard discovery of documents which he knew to be forged", thereby making (it was alleged) a fair trial of the petition impossible. In the Chancery Division, a judge held that he was not satisfied on the material before him that a fair trial was impossible, but he reserved to the applicants the right to renew the application should evidence emerge of other breaches of the disclosure obligations. The applicant-respondents appealed and the appeal was allowed, the Court of Appeal ordering that the petition be struck out. That was because the judge had concluded that, on one of the issues raised by the petition, "there was a substantial risk that the allegations ... were incapable of a fair trial" and,

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of a court". It is important, then, that the case was concerned with the destruction of documents after the commencement of proceedings.

187 Court of Appeal, England, 22 June 2000, reported only in [2000] All E.R. (D) 854, [2000] 2 B.C.L.C. 167 and the Times Law Reports of 7 July 2000. The defendant supplied us with the transcript of the judgments as delivered.

on the analysis adopted by the Court of Appeal of the other issues in the case, the judge's conclusion meant in truth that there was "no case for relief which remained to be tried" (para 53). It was very much a decision on the facts.

159 Of more immediate interest to the present proceeding is the further proposition of Chadwick, L.J. (in para 54); for his Lordship adopted, as a general principle, the observations of Millett, J. in *Logicrose* -

> "... that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the Court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules – even if such disobedience amounts to contempt for or defiance of the court – if that object if ultimately secured, by (for example) the late production of a document which has been withheld".

His Lordship continued:-

> "But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled – indeed I would hold bound – to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke."

A little later, his Lordship added this:-

> "In my view, having heard and disbelieved the evidence of Nigel Tobias as to the extent of his fraudulent conduct, and having reached the conclusion (as he did) that Nigel Tobias was persisting in his object of frustrating a fair trial, the judge ought to have considered whether it was fair to the respondents – and in the interests of the administration of justice generally - to allow the trial to continue. If he had considered that question, then – as it seems to me - he should have come to the conclusion that it must be answered in the negative."

160 Two things may be said of this. First, this was a case in which, after the

commencement of the proceeding, Tobias had deliberately indulged in fraudulent conduct designed to mislead the court by the production in the course of discovery of documents which he knew to be forged and, secondly, he had persisted in that fraudulent conduct during the proceeding. The case therefore says nothing directly about conduct, such as the destruction of documents, before the commencement of the proceeding[188]. It was anyway, quite plainly, a case of one party attempting to pervert the course of justice.

161 In the course of his Honour's reasons, reference was made also to the position in the United States where, his Honour said, "the extension of the court's regulatory power to contemplated litigation is well recognised" and, he added, "predates the tort of spoliation which has applied in many States since 1984", citing *Smith v. Superior Court*[189]. In *Smith* the defendant had agreed with the plaintiff's counsel to maintain certain automotive parts which were physical evidence in the case, pending further investigation; yet the defendant later destroyed, lost or transferred the physical evidence, making it impossible for the plaintiff's experts to inspect and test those parts in order to pin-point the cause of failure of a wheel assembly on a van. Though the tort of spoliation was indeed recognised in *Smith,* the defendant submitted before us that reference to the tort was unhelpful, if not error, inasmuch as *Smith* was the first case to recognise the tort; that only eight states had since recognised it[190]; and that both California and Texas no longer recognise the tort as between parties[191]. Nor was it a tort recognised in Australia.

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188 Although in para.353 of the reasons for judgment his Honour spoke of the English decisions as "concerned with the equivalent English provisions" – equivalent, that is, to Rule 24.02 of our Chapter I – *Arrow Nominees* was concerned with C.P.R. Rules 3.4 and 24.2 (see the judgment of Ward, L.J. para.68). C.P.R. Rule 3.4 (set out by Ward, L.J. in para.71) has no direct equivalent in Victoria.

189 151 Cal. App. 3d 491 (Court of Appeals of California, Second Appellate District, Division 3, 31 January 1984).

190 Sommers & Siebert "Intentional Destruction of Evidence: Why Procedural Remedies are Insufficient" (1999) 78 Canadian Bar Review 38 (an article relied upon by his Honour in his reasons for judgment: see para.361 footnote 51).

191 Further defendant's counsel submitted that what was said in *Smith* about recognising a new tort was in stark contrast to the approach taken by the High Court in *Northern Territory v. Mengel* (1996) 185 C.L.R. 307 when overruling *Beaudesert Shire Council v. Smith* (1966) 120 C.L.R. 145 at 156 and in *A.B.C. v Lenah Game Meats Pty Ltd.* (2002) 76 A.L.J.R. 1, where the

162 The trial judge referred also to *Willard v. Caterpillar Inc.*[192] In that case the tort of spoliation was invoked for the destruction of evidence *before the injury* giving rise to the underlying prospective claim for damages, but (as Mr. Myers pointed out) the court there concluded that the claim should not have been submitted to the jury. Further *Willard* was itself disapproved by the Supreme Court of California in *Cedars-Sinai Medical Center v. Superior Court of Los Angeles County*[193], the court expressing the opinion that relying upon existing non-tort remedies was preferable to creating a tort remedy[194]. And much the same was said in Canada, in *Spasic v. Imperial Tobacco Ltd.*[195].

163 In *Spasic*, which was another claim by a smoker against a tobacco company for damages for personal injury, Cameron, J. said this of the tort of spoliation:-

> "There is in Canada a rebuttable rule of evidence *omnia praesumuntur contra spoliatorem*. In appropriate circumstances, where a party destroys a document the court may presume that the document was detrimental to that party's case: *St. Louis v. The Queen* (1895), 25 S.C.R. 649.
>
> The tort of spoliation by a party to a lawsuit is recognized in some states of the United States but not in others. It originated in California in the 1970's or early 1980s. It is based on the intentional, or sometimes negligent, destruction of important evidence which disrupts the plaintiff's case in forthcoming litigation. This raises a duty to preserve the evidence. Some courts say the duty arises only when the prospect of litigation is certain while others suggest the duty can arise when litigation is reasonably anticipated or probable. Some courts require the existence of a special duty to preserve the evidence created by statute or contract.
>
> The tort is regarded as a clandestine form of obstruction of justice which can have a devastating effect on a potential plaintiff and its ability to obtain justice. The U.S. courts regard a prospective civil

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High Court refused to recognise invasion of privacy as a specific tort.

192 48 Cal. Rptr 2d 607 (Cal.App.5 Dist. 1995).

193 954 P 2d 248 (1998).

194 It was also held in *Cedars-Sinai* that there was no tort remedy for intentional spoliation of evidence by a party to the cause of action to which the evidence was relevant when the spoliation "is or reasonably should have been discovered before the trial or other decision on the merits of the underlying cause of action", because it was unsettling to re-open a decision on the merits of the underlying cause of action to speculative reconsideration regarding how the presence of the spoliated evidence might have changed the outcome, and that course was to be avoided where unnecessary.

195 (1998) 42 O.R. (3d) 391.

> action in a product liability case as a valuable probable expectancy or a property interest which the court must protect from such interference, even though the plaintiff's damages cannot be stated with any certainty. The courts which recognize the tort consider that the traditional procedural and non-procedural remedies are inadequate to prevent the spoliation. See *Smith v. Superior Court*, 151 Cal.App.3d 191, 198 Cal.Rptr. 829 (1984); *Foster v. Lawrence Memorial Hospital*, 809 F.Supp. 831 (D. Kan. 1992); *Hazen v. Municipality of Anchorage*, 718 P.2d 456 (Alaska 1986) (Supreme Court); *Smith v. Howard Johnson Company Inc.*, 615 N.E.2d 1037 (Ohio 1993); *St. Mary's Hospital, Inc. v. Brinson*, 685 So.2d 33 (Fla. App. 4 Dist. 1996); *Viviano v. CBS Inc.*, 597 A.2d 543 (N.J. Super A.D. 1991) at pp.549-50; *Henry v. Deen*, 310 S.E. 2d 326 (N.C.) 1984)."

In Canada, said Cameron, J., the law relies rather upon procedural sanctions remedies. And so it is in Australia. The question on this appeal is the sufficiency (and applicability) of the procedural remedies available, not the invocation of a new tort.

164 In one sense, therefore, this discussion of the tort of spoliation is a diversion; as the judge himself recognised, the tort forms no part of our law. What he said, however, was this:-

> "Although that tort [of spoliation] does not exist in this country the underlying rationale for the principle applied by the American courts could as readily be applied with respect to the rules relating to discovery in this country, in my opinion."

It was in that context that his Honour referred to *Willard* and also to *Bowmar Instrument Corp v. Texas Instruments Inc.* [196] (a case of failing to produce documents under subpoena), quoting from each, in relation to the conduct of a party prior to the commencement of the proceedings, this same passage[197]:-

> "The proper inquiry is whether the defendant, with knowledge that this lawsuit would be filed, wilfully destroyed documents which it knew or should have known would constitute evidence relevant to this [or the] case".

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196 Cited in Sommers & Siebert *supra* at 42-43 footnote 17. The Appellant's Outline of Submissions para.73(c)(i) asserts that *Bowmar* was not cited at all in *Willard* (contrary to what the judge said in para.364 of the reasons for judgment). But in *Willard* at 625 (as appears from the quotation from *Willard* set out by his Honour in para.364) the court quoted a passage from *General Atomic Co. v. Exxon Nuclear Co. Ltd* at 304 and in that passgae the court (in *General Atomic)* was in fact approving an earlier passage in *Bowmar* at 10-11 (according to Sommers & Siebert at 43, footnote 17 and at 60, footnote 76).

197 The full quotations from these two cases are in paras.363 and 364 of the reasons for judgment.

Plainly that was the principle which his Honour drew from the American cases to support the order to strike out the defence in this instance for destruction of documents, though it occurred before the commencement of this proceeding (and if in 1998 at a time when no proceedings at all were on foot against the defendant).

165 There is no doubt that in America the courts do inquire into conduct before the commencement of the litigation when considering spoliation, and in particular the destruction of documents. But much care is needed when seeking to apply that learning to the position in Australia. That is because the topic is approached in the United States somewhat differently. Even where the tort of spoliation is not at issue (either because it is not recognised or because it is not relied upon) the destruction of documents before suit commenced is not explored simply in the context of the question whether to strike out the offender's pleading; it is explored in the wider context of imposing "sanctions" for that conduct and those sanctions, although they include striking out the whole or part of a pleading, include also the drawing of adverse inferences, the exclusion of particular evidence and the exaction of pecuniary penalties by way of costs or additional costs. Hence the inquiry into whether the conduct was deliberate, whether it was done after notice that litigation was likely, and so on. Obviously adverse inferences, or indeed penalty costs, would ordinarily not be justified if documents, however relevant, were destroyed by sheer accident; *aliter*, if destroyed deliberately by a prospective defendant, either after the commencement of the litigation against it or in full knowledge that suit was about to be instituted. That explains why the "proper inquiry" was described as it was in *Bowmar* and *Willard*.

166 In this connection reference may be made to a number of cases in federal District Courts by way of illustration. In *Turner v. Hudson Transit Lines*[198] a passenger injured in a bus accident sued the owner-operator alleging improper equipment and negligence. He applied to have sanctions imposed on the defendant for destroying the bus maintenance records, after the commencement of the

198 142 F.R.D. 68 (S.D.N.Y. 1991)

litigation. What the plaintiff sought was a direction to the jury that they might infer that the records would have demonstrated that the bus had bad brakes. It was held that the obligation to preserve evidence arose even before the commencement of litigation, at least if a defendant was on notice; but in this case an adverse-inference direction was refused for want of sufficient evidence that the documents had been destroyed in order to prevent discovery. That did not preclude all relief, however, as sanctions wore two aspects (said the judge), remedial and punitive. Though an adverse inference was inappropriate, penalty costs were to be paid for the defendant's "unjustifiably destroying documents after litigation had been commenced".

167 In *Shaffer v. RWP Group Inc*.[199] adverse inferences did constitute the sanction imposed by the court on the defendants for the destruction of evidence "relevant to pending, imminent or reasonably foreseeable litigation". In *Dillon v. Nissan Motor Co. Ltd*.[200] it was the plaintiff whose conduct was under scrutiny. Before commencing his proceeding for injury he sustained allegedly through a defect in a motor vehicle, the plaintiff had had the vehicle inspected by an expert and had then arranged for it to be destroyed, and in consequence he was denied the right to lead evidence of the inspection at trial - a sanction akin to an adverse inference about what further inspection would have revealed. In *Donarto v. Fitzgibbons*[201] one of the defendants had destroyed the headlights of one of the cars involved in the accident that caused the plaintiff's injuries, though the defendant was (it seems) on notice "prior to the filing of this case"[202] that the vehicles were to be preserved. In *Millsap v. McConnell Douglas Corporation*[203], evidence was destroyed after the commencement of litigation, but, as appears common in the American cases, it was accepted by the court that the obligation to preserve evidence attached as soon as a party was on

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199 169 F.R.D. 19 (E.D.N.Y. 1996).

200 986 F.2d 263 (8th Cir. 1993).

201 172 F.R.D. 75 (S.D.N.Y. 1997).

202 At 79.

203 162 F.Supp. 2d 1262 (N.D. Okla. 2001).

notice that litigation was imminent and the evidence material.[204]

168 The effect of the American cases was put pithily in *Turner*: when the court is asked to draw adverse inferences, two important factors to be weighed are intent and content: intent of the offending party and content of the evidence. In respect of the first, the commencement of litigation can scarcely be determinative; it is surely enough that the offending party is on notice that the evidence in question will shortly be needed[205]. Yet none of that is in issue on this appeal; as already noticed, all of the advice given the defendant was that, if documents were destroyed, adverse inferences might be drawn against it, should circumstances so warrant. That was never questioned. What is now in issue was whether the court could properly strike out the defendant 's pleading for destroying documents at a time when litigation was not on foot, and on that issue cases on the drawing of adverse inferences are not directly relevant.

169 If the American cases are to be regarded at all, cases in which the defence was struck out, or application to strike out was explicitly refused, will be more helpful than those in which the sanction sought and imposed was the drawing of adverse inferences. In *Carlucci v. Piper Aircraft Corporation*[206], default judgment was entered against the defendant, an aircraft corporation, in an action for damages arising out of a plane crash in which three people died. There was an extensive history of misconduct by the defendant, including a practice of destroying engineering documents with the intention of preventing them from being produced in law suits. On that issue alone, District Judge Campbell held it appropriate to enter a default judgment, saying:-

"I conclude that the defendant engaged in a practice of destroying

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204 In *Helmac Products Corporation v. Roth (Plastics) Corporation* 150 F.R.D. 563 (E.D. Mich. 1993) it was held that the power to impose sanctions extended to the principal shareholder and chief executive officer of the corporate defendant, after the commencement of the litigation but before that individual became a party.

205 Compare *Allen v. Tobias* (1958) 98 C.L.R. 367 at 375, approving what was said by the Judicial Committee in *The Ophelia* [1916] 2 A.C. 206. See also *Armory v. Delamirie* 1 Stra. 504, 93 E.R. 664, Smith's Leading Cases (13th edn.) vol.1, 404-5, Broom's Legal Maxims (10th edn) 637-640.

206 102 F.R.D. 472 (1984).

> engineering documents with the intention of preventing them from being produced in law suits. Furthermore, I find that this practice continued after the commencement of this law suit and that documents relevant to this law suit were intentionally destroyed.
>
> I am not holding that *the good faith disposal of documents pursuant to a bona fide, consistent and reasonable document retention policy* cannot be a valid justification for a failure to produce documents in discovery. That issue never crystallised in this case because [the defendant] has utterly failed to provide credible evidence that such a policy or practice existed.
>
> Having determined that [the defendant] intentionally destroyed documents to prevent their production, the entry of a default is the appropriate sanction. *Deliberate, wilful and contumacious disregard of judicial process and the rights of opposing parties justifies the most severe sanction.* ... The policy of resolving lawsuits on their merits must yield when a party has intentionally prevented the fair adjudication of the case. By deliberately destroying documents, the defendant has eliminated the plaintiffs' right to have their cases decided on the merits. Accordingly, entry of a default is the only means of effectively sanctioning the defendant and remedying the wrong."[207]

The judge went on to hold that the entry of a default judgment was also warranted in respect of other misconduct on the part of the defendant. It is interesting, however, that the destruction of documents "continued after the commencement of this law suit", which brings this case closer to the English cases already rehearsed, where conduct, committed during the course of the proceeding, could be regarded as contumacious.

170 *Carlucci* may be contrasted with *Capellupo v. FMC Corporation*[208]. In that case one of three co-plaintiffs suing their employer advised her employer's equal opportunity manager, "during the summer of 1983", that she was "fed up with" the company's gender-based treatment and that she was contemplating bringing a class action against it accordingly. In October 1983, the company's solicitors "systematically destroyed [the company's] documents relating to ... employment practices and the employee relations department's personally held records relating to equal opportunity and employee complaints of discrimination". In November

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207 Emphasis added.

208 126 F.R.D. 545 (D. Minn. 1989).

1983, the company received the plaintiff's equal opportunity claim. The three plaintiffs sought sanctions against their employer for the alleged intentional destruction of evidence and sanctions were imposed, although summary judgment was refused. District Judge Rosenbaum considered that there was other evidence concerning the company's liability, if any, and so he ordered the defendant to pay to the plaintiffs an amount equal to twice their costs of the application.

171 In the course of his judgment, the judge said:-

> "Sanctions are appropriately levied against a party responsible for causing prejudice when the party knew or should have known that the destroyed documents were relevant to pending or potential litigation. ... This tenet is particularly applicable when a party is on notice that documents in its possession are relevant to existing or future litigation, but still abrogates its duty of preservation.
>
> The Court finds sanctions to be absolutely appropriate in this case. *The conduct of the defendant's officers and employees, both in the destruction of documents and in their efforts to disguise their wrongful acts, are charitably described as 'outrageous'. ... They have demonstrated a 'deliberate, wilful and contumacious disregard of the judicial process and the rights of [the] opposing party'*:[209] *Carlucci*, 102 F.R.D. at 486. ...
>
> The Court holds that the defendant's senior officials and senior employees were on notice of this potential lawsuit and were acutely aware of its subject. Those individuals reacted by instituting a broad program of document destruction. Given these facts, sanctions are more than appropriate."

As to which sanction should be imposed, his Honour said of striking out:-

> "The most severe sanction available to the Court is default and dismissal. This is an extreme measure, reserved only for the most egregious offenses against an opposing party or a court. The Court must consider default and dismissal as a last resort if no alternative remedy by way of a lesser, but equally efficient, sanction is available. See *Perkinson,* 821 F.2d at 691; *Adolph Coors Co. v. Movement Against Racism and the Klan*, 777 F.2d 1538, 1542-43 (11th Cir.1985); *Alexander*, 687 F.2d at 1205-06; *Fox*, 516 F.2d at 993; *EEOC*, 690 F.Supp. at 998; *Carlucci,* 102 F.R.D. at 486."

172 The foregoing is sufficient to demonstrate how limited is the nature of the authority available. Nothing governs directly, and there are many questions raised

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209 Emphasis added.

(especially by the cases in England) even where the destruction of documents occurs after the commencement of a proceeding, let alone before it. The judge here was disposed to accept a "fair trial" as constituting the relevant criterion, but when documents are destroyed before the commencement of a proceeding, that test is less than helpful. After all, what is a "fair trial"? According to the defendant, there is a fair trial if, according to the rules of court and the obligations of the parties to the court, the court adjudicates upon the documents put in evidence and the oral testimony of the witnesses during the hearing. Of course what is a "fair trial" must inform any test which is adopted, but it cannot stand in place of one.[210]

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[211] 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. (For instance, in *James v. Robinson*[212], which did not involve disobedience of a court order, it was said that that there can be no contempt of court before there is any litigation actually on foot, but,

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210 McHugh, J. has been very critical, more than once, of the concept of "fairness" standing as a criterion: *Perre v. Apand Pty. Ltd.* (1999) 198 C.L.R. 180 especially at 211-2, *Mann v. Carnell* (1999) 201 C.L.R. 1 at 40-41 (dissenting). The concept of "fair trial", particularly when divorced from the way in which a current proceeding is being conducted, is surely capable of attracting like criticism.

211 See for example Miller on Contempt (2nd edn) 2-3, *Australasian Meat Industry Employees' Union v. Mudginberri Station Pty. Ltd.* (1986) 161 C.L.R. 98 at 106, *B.H.P. v. Dagi* [1996] 2 V.R. 117 at 169-173.

212 (1963) 109 C.L.R. 593.

as the majority in the High Court pointed out[213], that case concerned only the narrower type of contempt, namely interference with the fair trial of a particular cause.[214]) Certainly, there can be an attempt to pervert the course of justice before a proceeding is on foot, as *R. v. Rogerson*[215] 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*[216] (as modified or explained in *Neat Holdings Pty. Ltd. v. Karajan Holdings Pty. Ltd*[217]). 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*[218] and *Rejfek v. McElroy*[219], compare *Logicrose* per Millett, J.[220] There is considerable force, we think, in Mr. Myers' 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.

174 In the present case, 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 (as the judge specifically noted[221]) and accordingly, as that was not the case put and considered below, it would not be appropriate to consider it on this appeal. No notice of contention was filed and, although during argument Mr. Hughes made a belated attempt[222] to put the case on the basis of the former, that should not be permitted at

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213 At 602.

214 See and compare *Television New Zealand Ltd. v. Solicitor General* [1989] 1 N.Z.L.R. 1, where *James v. Robinson* was not followed.

215 (1992) 174 C.L.R. 268. See also *Meissner v. R.* (1995) 184 C.L.R. 132 especially at 144.

216 (1938) 60 C.L.R. 336 at 361-2.

217 (1992) 67 A.L.J.R. 170.

218 (1940) 63 C.L.R. 691.

219 (1965) 112 C.L.R. 517.

220 See paragraph [150] above.

221 Reasons for judgment, para.338.

222 On Thursday 29 August 2002, Mr. Hughes said, in answer to a question from the Bench, that while the destruction of documents before the commencement of litigation could be an

this late stage[223]. As defendant's counsel pointed out, had there been such a serious allegation made below, of a criminal offence, the course of the plaintiff's application must have been very different. Those accused (other than the company itself[224]) 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.

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. We say nothing about the drawing of adverse inferences because that is not raised for consideration on this appeal. Nor, for the reason already given, do we express any 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

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attempt to pervert the course of justice, "I don't need to go so far". It was not until the next day of hearing (Monday 2 September) that Mr. Hughes said, in relation to the destruction of documents before litigation, that, although the trial judge had not made such a finding, it was open on the evidence to find that what the defendant had done amounted to an attempt to pervert the course of justice, and that we should so find.

223 In a late submission dated 19 September 2002, made after the conclusion of argument and without leave, the plaintiff referred us to two references to perverting the course of justice, found in the parties' written submissions below - plaintiff's submissions para.375 (AB11 3809) and defendant's submissions para.97 (AB11 3886) - references which were obviously regarded by the judge as of no great significance. See also the exchange with counsel at AB7 2262-3.

224 *The Daniels Corporation International Pty. Ltd. v. A.C.C.C.* [2002] HCA 49 at [32].

attempt to pervert the course of justice. That it did was not the case raised and considered below and so 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. More particularly it must follow too, contrary to his Honour's conclusion, that the destruction of documents by the defendant in March-April 1998, and before, was not shown to be in breach of any rules relating to discovery in this proceeding.

Prejudice

176 It was immediately after setting out his more significant findings of fact (in paragraph 289 of the reasons for judgment) that the judge turned to the question of prejudice to the plaintiff, which he subtitled "Denial of a fair trial". The treatment of prejudice wore two aspects: prejudice by reason of non-compliance by the defendant with its obligations to discover according to the order made on 6 December 2001 and, secondly, 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. Obviously the two aspects could overlap. As the judge observed at the outset (in paragraph 290 itself):-

> "It is impossible to precisely access what documents may have been destroyed in 1998, and earlier, and to what extent there has been a failure to give full and complete discovery as to documents in the categories for which I ordered discovery."

177 None the less it is necessary to consider each of the two aspects of prejudice separately, not least because the plaintiff submitted that his Honour saw each as entitling the plaintiff to the relief which was ultimately granted[225]. In fact his Honour put it somewhat differently, saying that, as he saw it, the defendant's failure to comply with the order for discovery was such as to empower him to make an order granting the plaintiff relief under the rules "even if the destruction of

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225 Respondent's Outline of Submissions para.5.

documents, of itself, was not open to be regarded as constituting a breach of the rules relating to discovery by virtue of the fact that it occurred before the proceedings were issued"[226]. At the end of the day the judge made the order striking out the defence for all of the reasons given, including both non-compliance with the order for discovery and the wholesale destruction of documents, but (as the plaintiff contended) as his Honour saw it the order could rest upon the former alone[227]. The defendant submits that was error and we agree.

178 Of course, non-compliance with an order for discovery is the very thing which enlivens the court's power under Rule 24.05 to strike out the defendant's pleading[228]: see also the alternative procedure to like effect in Rule 29.12.1. But whichever route be followed, the granting of the relief prescribed by rule obviously depends upon the nature and extent of the prejudice suffered by the plaintiff in consequence of the defendant's default. As Millett, J. observed in *Logicrose*, supra, the rules do not exist to punish. Yet in this instance, submitted the defendant, the judge found no prejudice - or no significant prejudice - *arising from the defendant's defaults*, as found, in complying with the order of 6 December 2001.

179 The 15 child smoking studies provide an example. These were clearly the subject of one paragraph of the order for discovery made on 6 December. According to the judge (in paragraph 291), these studies were "destroyed by the defendant in 1998", though all of them were "available in the public domain and the defendant has now admitted that it had the documents in its possession at or about the dates they were published". Accordingly, said the judge, the prejudice to the plaintiff, caused by the destruction of those documents –

> ".... must now be confined to the fact that if there were any notations made by servants or agents of the defendant on the copies of the documents such records have been lost. There is no reason to assume that the copies of the documents would have had such notations. There is no evidence before me of such a practice

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226 Reasons for judgment para.353, Appellant's Outline of Submissions para.54(c).

227 See also para.354.

228 Which his Honour no doubt had in mind in considering his options, in para.373.

> occurring with respect to any documents which have been discovered by the defendant. The prejudice of the loss of those 15 child smoking studies has been substantially eliminated."

As his Honour then added, the destruction of "any internal documents recording comments or responses to the reports" was a separate issue.

180 The judge then dealt (in paragraphs 292 and 293) with documents which, it was said by the plaintiff, fell within categories of which discovery had been ordered "and which had been disclosed in the Cremona discovery but were not discovered in this case". His Honour referred in particular to the documents listed by Mr. Gordon in Exhibits PG2 and PG3 to his affidavit of 25 January 2002, but many of the documents so listed were identified as now in the public domain and some fell outside the categories described by the order of 6 December. In part, this was because of the interpretation placed by the defendant on the word "of" in category 6 in paragraph 6 of the order, an interpretation which the judge was prepared to reject - although, as we have said, we are not prepared to join in that rejection. Complaint was made, too, about documents relating to "youth smoking" but, as the judge observed, that was a category not included in the order of 6 December 2001 and "not otherwise agreed to by the defendant".

181 The judge dealt next (in paragraph 296) with the document entitled "Interpretation of Leaf Analysis". This, it was said by the plaintiff, was a report produced by the defendant which, though discovered in the Cremona litigation, had not been discovered on this occasion. A document obtained by the plaintiff's advisers, dated 1959, suggested that this report was a product of many years' research by a large team of people employed by the defendant; it was a document of importance, contended Mr. Gordon, "because it reflects a knowledge by the defendant of the pharmacological and addictive effects of nicotine in years before the plaintiff commenced smoking". The defendant conceded that the document had been destroyed, but it was a document of which, according to Mr. Gordon's affidavit, he had obtained a copy, and so it is difficult to see what prejudice flowed, unless it be the general prejudice occasioned by the failure of the defendant to refer to the manner of and reason for its destruction.

182 As to the 34 notice to admit documents, these were considered next (in paragraphs 297ff). The defendant had produced nine similar documents, but none other. Three of the documents had been discovered in the Cremona litigation, but all of them were already in the possession of the plaintiff's solicitors. As his Honour observed (in paragraph 300), the mere fact that the plaintiff had or could obtain copies of the missing documents "does not eliminate all prejudice which flows from destruction of the defendant's copies". In the absence of admissions from the defendant, it must be the harder for the plaintiff to prove the state of knowledge of the defendant. Yet as the judge readily acknowledged, the problems were not insurmountable.

183 The foregoing is sufficient to indicate the way in which his Honour approached the question of prejudice flowing from non-compliance by the defendant with the order for discovery made on 6 December. We think it fair to conclude that in the end he 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. After dealing with the latter in detail, the judge returned to the former (in paragraph 353), before concluding, as already mentioned[229], that such non-compliance was sufficient in itself to support the order to strike out the defence.

184 In paragraph 353, the judge 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". These were all complaints of the plaintiff and, having already considered them to a greater or lesser extent earlier in this judgment, we do not repeat what we said then. Suffice it to say now that, as indicated there, none of the matters

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229 See paragraph [177].

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. 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 It was this last, it seems to us, 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 (in paragraph 309):-

> "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."

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. 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

186 There is little more to be said about the remedy employed by the judge in this instance to grant relief to the plaintiff. It should be mentioned, however, that his Honour gave consideration, as might be expected in such a thorough judgment, to alternative remedies. He said (in paragraph 373):

> "I have considered whether the appropriate course might be not to strike out the defence but to permit the trial to proceed, after appropriate orders had been made for further discovery and interrogatories, and such other directions as may be appropriate. That might enable me to assess during the running of the trial whether the prejudice to the plaintiff by the destruction of documents had been reduced or exacerbated. I considered, too, whether I could make orders restricting or denying the defendant the right to contest certain issues on which it was shown that documents had been destroyed. Quite apart from the fact that I doubt that I have power to make such orders for issues-based sanctions in the face of objection by the defendant (and the defendant has given no indication that it would make any evidentiary concessions in this case), it would be impossible, in my view, 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."

187 First, we do not share his Honour's hesitation about the power to make what he called "orders for issues-based sanctions", whether or not "in the face of objection by the defendant". Rule 24.02 empowers the court specifically to strike out a defence for default in complying with an order to give particulars, for discovery or inspection or for answers to interrogatories, and in our opinion the power to strike out the whole includes power to strike out part only. With respect, we see 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.

188 In the cases to which reference has already been made[230], we have seen that, 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. There was no such attempt made in this instance. But surely 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. All of these were 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. It is true that when it came time to assess damages an offer was made on behalf of the plaintiff to prove that she had been smoking for 40 years and defendant's counsel said that that would not be necessary; but of course it was not necessary because the allegation in the statement of claim was already admitted by virtue of the order for striking out. 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[231] 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.

189 In not dissimilar vein, the defendant submitted that, while the judge did not

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230 In paragraphs [146]ff.

231 As described by the Full Court in *Exell v. Exell* [1984] V.R. 1 at 9, striking out a defence is a "Draconian result" and should not be ordered "save in the most exceptional circumstances, or, as a last resort".

identify the issue or issues in the case in respect of which the plaintiff was prejudiced, the arguments of the plaintiff below were put in relation to the defendant's knowledge between 1950 and 1992 about the risk of lung cancer and the addictive effect of nicotine and in relation to the defence of volenti. As for the second, the defendant contended that the plaintiff had failed to establish any prejudice resulting from the destruction of the defendant's documents; for ultimately the issue of volenti would depend upon the knowledge of the plaintiff as to the risks and consequences of smoking and whether she had accepted such risks or consequences. Documents that the defendant might have had prior to destruction could not be directly relevant to the plaintiff's actual knowledge and belief which she would have to prove. Documents in the public domain were one thing; documents in the private possession of the defendant were altogether different.

190 As for the defendant's knowledge between 1950 and 1992 about the risks of lung cancer and the addictive effect of nicotine, we return to the initial proposition that the plaintiff sought only discovery which was limited to certain categories, the contents of which were framed by the plaintiff's own legal advisers. The history of the application for the order made on 6 December has been earlier rehearsed, from which it can be seen that questions of knowledge on the part of the defendant were put to one side. It was said by the plaintiff's solicitors that they already had the documents upon which they relied to show the relevant knowledge[232]. That was the context in which his Honour should have weighed the consequences for the plaintiff of the destruction of documents if, as the defendant contends, prejudice was asserted by reference to the issue of knowledge; yet that was not the approach taken in the reasons for judgment. There is no need, however, to pursue that further: the 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

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232 See paragraph [34] above.

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.

Conclusion

191 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.

192 In all the circumstances, we are clear that the appeal should be allowed, the order striking out the defence set aside and the judgment given for damages set aside in consequence. In addition, we would as matter of form (though both have already been carried into effect) set aside the two orders for production of documents made on 6 and 13 February 2002, the first being the direct consequence of his Honour's overruling the defendant's claim to legal professional privilege that was made in response to the notice to produce served on it on 31 January 2002 and the subpoenas served on the two firms of solicitors on the same day. We would order that the plaintiff do deliver up forthwith to the defendant the documents so produced and any copies made by the plaintiff. Despite the misfortune for the defendant that the contents of some of these documents have now been published to the world at large by means of the internet and the international media, it should be declared, we think, that privilege in relation to such documents, if otherwise properly claimed, has not been waived either expressly or by implication as held by the judge on 6 February. The like is true in relation to the Stowe advice, the object of the ruling on 13 February. The filing of any further affidavits could serve no useful purpose now, for they could scarcely tell the plaintiff anything beyond that which has been so fully canvassed in relation to discovery. Accordingly we think that the proper exercise of discretion by this Court dictates that the plaintiff's application by summons on 25 January 2002 be simply dismissed and the proceeding as a whole remitted to the Trial Division for a new trial. That will, of course, be in the light of any change of parties needed since the death of Mrs. McCabe herself. Immediately before delivering these reasons for judgment, we ordered that one of the two persons named as executors in her will be appointed to represent the estate of the deceased plaintiff and that the appointee be made respondent accordingly, but that was for the purposes of the appeal only.
