Case Notes

McCabe v Goliath: The Case Against British American Tobacco Australia Services Ltd

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Pending the outcome of appeal in the Victorian Court of Appeal, the case of *McCabe v British American Tobacco Australia Services Ltd*[1] has significance across a range of issues. Since Mrs McCabe is the first Australian,[2] and first person outside the US,[3] to successfully sue a major cigarette manufacturer, the case has important ramifications for the possibilities for success of future litigation of this nature in Australia and overseas. This is significant owing to the great number of potential litigants in this area. Moreover, the case raises important ethical and public policy issues regarding the duties of lawyers to the courts and to their clients.

I. The Facts

By writ issued on 26 October 2001 Rolah Anne McCabe commenced a negligence claim against British American Tobacco Australia Services Ltd (BATAS) for compensatory, general and exemplary damages for personal injuries. McCabe, aged fifty-two, was seriously ill at the time of trial with lung cancer. The plaintiff alleged that as a result of an addiction to cigarettes manufactured by the defendant, which began in her early teens, and the properties of the cigarettes, she developed lung cancer. The plaintiff alleged that the defendant, itself or through its predecessor or affiliated companies, knew cigarettes were addictive and dangerous to health. Despite this alleged knowledge by the defendant, the plaintiff claimed that the defendant did not take reasonable steps to reduce or eliminate the risk to consumers of addiction and harm to their health. Moreover, it was alleged that the defendant encouraged children to become smokers through targeted advertising. The defendant denied that the plaintiff's illness could be causally related to cigarettes. The defendant also denied that smoking was addictive and argued that it does not impair the ability of a smoker to assess the risks of smoking and to make an informed decision. The defendant argued that it did not have any knowledge regarding the health risks of smoking cigarettes that was not in the public domain.

II. Grounds for the Application

As part of the hearing of pre-trial matters, the plaintiffs made an application for an order that the defendant's defence be struck out and that supplementary or alternative orders be given. Eames J summarised the grounds for the application as follows:[4]

(i) The destruction of potentially relevant documents by the defendant, at a time when litigation was apprehended, has rendered it impossible for the plaintiff to have a fair trial;

1 [2002] VSC 73.
2 Keenan A, 'Cancer Files Destroyed — Judge Condemns Tobacco Giant in Historic Payout' *The Australian*, 12 April 2002 at 1.
3 Liberman J, Loff B, 'Australian Court Rules Against Tobacco Company in Lung-Cancer Case' (2002) 359(9317) *The Lancet* 1586.
4 Note 1 at para 2.

(ii) The defendant, through counsel, solicitors and deponents to affidavits, has misled the court and the plaintiff as to the true situation concerning documents discoverable in the trial;
(iii) Failure, contrary to rule 20.02 of the *Rules of the Supreme Court* (Vic), to comply with an order of discovery made 6 December 2001;
(iv) Failure to agree to further discovery sought by the plaintiff by letter dated 4 January 2002;
(v) The conduct in items (i) to (iv) caused severe prejudice to the plaintiff;
(vi) The plaintiff relies on the material advanced in the affidavit of Mr Gordon.

The plaintiff alleged that the defendant and its predecessor WD & HO Wills (Australia) Ltd ('Wills'), as well as lawyers engaged or employed by them, deliberately used a strategy to restrict the plaintiff's case to documents in the public domain and to destroy or hide documents not in the public domain that were damaging to the defendant's case. The plaintiff further alleged that the defendant would falsely defend the document policy as having an innocent purpose if the extent of destruction became public knowledge and that the defendant established and located databases, to be useful for litigation, outside the possession, custody or power of the defendant for the purpose of discovery.

The defendant claimed that the destruction of documents was lawful and no litigation was anticipated at the time documents were destroyed. The defendant contended that the destruction of documents was in accordance with legal advice and part of an appropriate document management policy. The policy motivations were innocent and appropriate.

III. The 'Document Retention Policy'

After extensive analysis of evidence regarding a Document Retention Policy created under the auspices of AMATIL in 1985 and the possible misleading conduct by the defendant in pre-trial directions hearings, Eames J reached a number of conclusions.[5] A brief outline follows:

(1) The policy was created in anticipation of litigation brought against Wills with respect to smoking and health issues. Since 1985 litigation was at all times either on foot or considered inevitable.
(2) The primary purpose of the policy was to ensure destruction of material harmful to the defence of such litigation.
(3) Clayton Utz advised Wills to word the policy in such a manner as to assert innocent intention and disguise the true intention of the policy.
(4) In 1990 the policy was reviewed, with the advice of Clayton Utz, to address concerns that the policy would lead to adverse inferences being drawn against the company in future litigation and might facilitate the release worldwide of BATCO research. It was proposed that only documents damaging to the defendant that were already in the public domain should be retained. Sensitive documents were to be held offshore for defence of any action brought against BATAS. Where possible relevant documents would not be held under the possession, custody or power of the defendant but would be held by Clayton Utz or by other bodies or organizations so that such documents would not be discovered in any proceedings.
(5) The policy was reviewed from time to time but the general strategy was ongoing.
(6) The defendant was advised as early as 1990 that, in the event that documents were destroyed at a time when litigation was anticipated, there was a risk that the court might strike out the defence of the defendant or take other actions against the defendant.

5 Note 1 at para 289.

(7) The strategy either did or was likely to have denied the plaintiff access to documents relevant to categories of discovery. The defendant intended that its conduct would prejudice the position of the present plaintiff and deny the plaintiff a fair trial.
(8) In 1998, at the conclusion of an action brought against BATAS by Phyllis Cremona, thousands of documents discovered as relevant in the Cremona litigation were destroyed by the defendant as a matter of urgency.
(9) BATAS received advice from Mallesons that the destruction of Cremona documents was lawful. The Mallesons advice was given in light of comments by representatives of BATAS who claimed the intention of destruction was innocent and there was no anticipation of any further proceedings being commenced against the company. Moreover, in giving the advice, some important information was denied to the Mallesons solicitor by her client and Clayton Utz, although this should have caused her to doubt the truth of what she had been told.
(10) Cremona documents destroyed included CD Roms containing documents that had been summarised and given ratings according to their potential to damage or assist the defence of any action.
(11) It was a deliberate tactic of the defendant not to disclose the existence or adoption of its Document Retention Policy unless compelled to do so, and not to volunteer details of its implementation unless compelled to do so. The defendant misled the Court and the plaintiff's advisors, by correspondence tendered in court, by affidavits filed at court and in submissions made to the Court.
(12) The prejudice to the plaintiff by the destruction of documents was considerable.[6]

IV. Decision: Defence Struck Out

Eames J noted at the outset of his consideration of the relevant law that although the application to strike out the defence was advanced on the basis of a failure to give proper discovery, to such a degree and in circumstances so serious as to gravely prejudice the plaintiff, abuse of process principles were also applicable to his decision.[7]

The defendant argued that there was no authority for the proposition that a company is not entitled to destroy documents when there are no proceedings on foot against it.[8] The plaintiff conceded that there was no authority for the proposition but considered this to be due to the situation being unprecedented.[9]

Eames J examined two decisions of the Court of appeal in England,[10] which, according to the plaintiff, supported the reasoning that where the requirements of discovery are so significantly disregarded as to prevent a fair trial the court has the inherent power to strike out the defence. The plaintiff also relied on a more recent decision of the Court of Appeal in England, *Arrow Nominees Inc v Blackledge*[11] which Eames J considered had particular application to the case under consideration. In that case Chadwick LJ claimed that when a litigant demonstrates conduct intended to prevent a fair trial the right to take part in the trial is forfeited.[12] Moreover, the fairness of the trial will be impaired if undue time and money is expended in determining the extent to which one party has had effect on the overall fairness of the trial itself.[13] The English cases were concerned with the equivalent

6 Note 1 at para 322.
7 Note 1 at para 338.
8 Note 1 at para 340.
9 Note 1 at para 346.
10 *Coleman v Dunlop (No 2)* unreported 20 October 1999, Court of Appeal; *Landauer Ltd v Comins & Co (A Firm)* Times Law Reports 7 August 1991, 382.
11 [2000] All ER (D) 854.
12 Note 11 at para 53–54.
13 Note 11 at para 53–54.

English provisions regarding court powers to deal with non-compliance with orders for discovery.

Eames J held that the equivalent Supreme Court rules provide the power to strike out the defence in the circumstances of the present case.[14] The defendant had failed to comply with the requirement of the order to depose what had become of the destroyed documents. The rule would give power to strike out the defence for this purpose alone. In the current case the failure to explain what had happened to the documents was a very deliberate strategy to avoid exposure of the significant level of destruction of the documents and, consequently, part of a strategy to deny a fair trial to the plaintiff. The failure of disclosure was important in a case where the documents were central to the plaintiff's action. Failure to comply with the rules of discovery would still empower the court to make an order under the rules if the destruction of documents, of itself, could not be regarded as a breach of the rules because the destruction occurred before proceedings were issued.

Eames J then addressed whether these principles governing the obligations of discovery could also apply to the situation where the prospects of a fair trial for the plaintiff had been diminished as the result of the destruction of documents when no proceedings were on foot[15]. Eames J found analogous situations where the law imposes obligations on people before proceedings are issued.[16] For instance, where a person acted with an intention to interfere with the course of justice, otherwise lawful conduct becomes conduct constituting contempt of court.[17] Eames J also found that the rationale for legal professional privilege, the promotion of the public interest in the facilitation of justice by ensuring a client makes full and frank disclosure to his solicitor, could apply with respect to discovery.[18] That is, public interest also provides the reason why privilege should not extend to protecting a party from making full and frank acknowledgement to the court as to relevant issues (such as what became of documents) that occur at a time when proceedings are merely apprehended.[19] Eames J also made reference to the overriding concerns of the courts to protect the administration of justice, legal commentary and American authorities on the tort of spoliation.[20] Eames J held that the rules relating to discovery and the powers of the court can remove the unfairness of the destruction of documents in anticipation of litigation by striking out the defence.[21]

Eames J held that the defendant's actions caused prejudice to the plaintiff and denied her a fair trial.[22] Eames J examined whether that could be corrected by means other than striking out the defence. It was noted that the destruction of a document by anyone raises the presumption that the documents would have adversely affected that party's case.[23] Nevertheless, adverse inferences and other possible remedies were held not to be able to redress the unfairness.[24] Moreover, consideration was made of the need for a quick trial due to the plaintiff's ill health and such a consideration was held not to be unjust to the defendant in the circumstances.[25]

In conclusion, Eames J considered that the process of discovery, central to the conduct of a fair trial in civil litigation, was subverted by the defendant and its solicitors, Clayton

14 Note 1 at para 354.
15 Note 1 at para 355.
16 Note 1 at para 356.
17 Note 1 at para 356.
18 Note 1 at para 358.
19 Note 1 at para 358.
20 Note 1 paras 360–366.
21 Note 1 at para 367.
22 Note 1 at para 372.
23 Note 1 at para 368.
24 Note 1 at para 377.
25 Note 1 at para 383.

Utz, with the deliberate intention of denying a fair trial to the plaintiff.[26] This outcome was achieved. It was held that the strategy should not be countenanced by the court and that the outcome, in the circumstances of the case, could not be cured so as to allow a trial to determine the question of liability. The defence was struck out and judgement was entered for the plaintiff.

V. Implications

The case creates the potential for a great number of claimants to succeed against tobacco companies, or at least against BATAS, since the circumstances of this case are likely to be applicable to a great number of other litigants. The need to determine liability as a precursor to awarding damages in such claims has apparently been avoided. The case also raises important questions of the extent to which lawyers can attempt to gain tactical and strategic advantage for their client in the adversarial process at the expense of their duty to the court. To this end, Eames J made reference to outdated notions of 'litigation as warfare ... (where) the adversarial system requires little or no commitment by the combatants to notions of a fair trial'.[27]

The case has important links overseas. While interest shown in the case overseas is largely with respect to the possible precedent for successful claims against tobacco companies, as in the interest of the US Justice Department,[28] the overseas link is also pertinent with regards to the possibility of the prevalence of similar Document Retention Policies. The collapse of Enron in the US exposed a similar destruction of documents by Arthur Anderson. Whilst a lawyer's implication in the destruction of documents to prevent a fair trial ultimately involves stricter duties, the Enron case exposes a similar need for vigilance against the possibilities for corporations to act outside the public interest, if not the justice system. It will be interesting to note the outcome of the appeal of the *McCabe* case in the Victorian Court of Appeal.

26 Note 1 at para 385.
27 Note 1 at para 366.
28 Note 3.