SUPREME COURT OF QUEENSLAND

CITATION:	*Fuji Xerox Australia Pty Ltd v Lee & Anor* [2003] QSC 303
PARTIES:	**FUJI XEROX AUSTRALIA PTY LIMITED** **ACN 000 341 819** (plaintiff) **v** **GEORGE LEE and DENNIS MACREADY** (defendant)
FILE NO:	S1018 of 2002
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	15 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	27 August 2003
JUDGE:	Chesterman J
ORDER:	**1. Application dismissed** **2. Costs are costs in the cause**
CATCHWORDS:	COURTS – PRACTICE AND PROCEDURE – CONTEMPT OF COURT - whether destruction of critical evidence prior to trial amounts to an attempt to pervert the course of justice – whether there can be a fair trial of the action without the evidence which the plaintiff has destroyed – consideration of the intention of a person who destroys evidence or puts it beyond the reach of an opponent – whether destruction of such evidence amounts to an abuse of process *Arrow Nominees Inc v Blackledge* (2000) EWCA Civ. 200 *British American Tobacco Australia Services Ltd v Cowell* (2002) VSCA 197 *R v Rogerson* (1991-1992) 174 CLR 268 *Lane v The Registrar of the Supreme Court of New South Wales* (1981) 148 CLR 245
COUNSEL:	Mr A J H Morris QC with Mr G.I. Thomson for the applicant Mr S L Doyle SC for the respondent
SOLICITORS:	Dibbs Barker Gosling for the applicant McCullough Robertson for the respondent

[1] The defendant, George Lee, ("the defendant") has applied for orders that the plaintiff's claim be struck out, or dismissed as an abuse of process, or stayed permanently. As well the defendant seeks judgment on his counter-claim against the plaintiff for damages to be assessed.

[2] The grounds which the defendant advances in support of his application is that the plaintiff has destroyed critical evidence and thereby deprived him of the means of proving his counter-claim. This conduct is said to amount to an attempt to pervert the course of justice and/or contempt of court. The defendant submits that there cannot be a fair trial of the action without the evidence which the plaintiff has destroyed.

[3] In November 1998 the plaintiff made an agreement with Third Millennium Group Pty Ltd ("TMG") by which it rented a colour photocopier together with related equipment for a period of six years. The defendant guaranteed TMG's performance of the agreement. In July 1999 the plaintiff terminated the agreement on the ground that TMG had defaulted in paying rent. There seems no dispute as to the fact that rent was not paid by TMG. The plaintiff claims arrears of rent and damages for lost rent for the unexpired term of the agreement. The defendant is defending the plaintiff's claim brought against him pursuant to the guarantee. As well he is prosecuting a counter-claim having taken an assignment of TMG's rights under the agreement. Essentially his case is that the photocopier was defective and never performed as required by TMG or as promised by the plaintiff. TMG conducted a printing business and the machine was used to produce large numbers of coloured photocopies.

[4] Following the termination of the agreement the plaintiff took possession of the photocopier. The following year, 2000, the plaintiff rented the photocopier to Australia Post for a period coinciding with the Olympic Games in Sydney. It was apparently used to print commemorative stamps. Following the termination of the agreement with Australia Post the machine was returned to the plaintiff. It was destroyed in June 2001 along with several other machines of identical type. The fact that the machine had been destroyed was not revealed until June this year.

[5] The plaintiff commenced its proceedings on 1 February 2002. There have been a number of defences and counter-claims filed, the most recent of which on 4 July 2003. The action has been made a commercial cause and is set down for trial commencing 6 October next.

[6] According to the second further amended defence and counter-claim the photocopier did not 'substantially conform to the performance defined in the documentation provided by the plaintiff because:

> '(a) The (photocopier) did not consistently produce double sided copies in any volume so as to make (it) commercially viable.
>
> Particulars
>
> (i) Colour on copies was blotchy and faded out in block colours.
> (ii) The (photocopier) did not produce satisfactory copies at a volume to make production commercially viable.

(iii) The (photocopier) did not operate satisfactorily because on average there were two hours of down time per day.

(b) The (photocopier) caused significant wastage.

(c) The (photocopier) was labour intensive to operate because a staff member was required to individually check copies … to ensure the double sided copies were free from errors.

(d) The (photocopier) prevented TMG from meeting its obligations to customers … which resulted in a loss of clients and … profits …'

[7] The plaintiff has retained an expert mechanical engineer to advise him and to give evidence concerning the photocopier's 'functionality and reliability.' He cannot inspect the machine for the purpose of giving evidence because of its destruction. This, submits the defendant, has prejudiced his defence and counter-claim and deprived him of critical evidence to support his case.

[8] I accept the defendant's submission that if it be shown that the photocopier was destroyed in order to deprive him of critical evidence and prevent him advancing a good arguable the case the court would intervene to ensure that the attempt to distort the course of justice did not succeed. The particular order to achieve that end would depend on the circumstances. In *British American Tobacco Australia Services Ltd v Cowell* [2002[VSCA 197 the court drew attention to the limited authority on the point but concluded (in a case involving the destruction of relevant documents before proceedings were commenced):

'173. … 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 … if it be accepted that the destruction … 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 (of) contempt of court, meaning criminal contempt …

175. Accordingly, there being no authority being 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 … contempt of court occurring before the litigation was on foot.'

[9] According to Brennan and Toohey JJ in *R v Rogerson* (1991-1992) 174 CLR 268-279:

> 'The course of justice is perverted … by impairing … the capacity of a court … to do justice. The ways in which a court … may be impaired in … its capacity to do justice are various. Those ways comprehend … erosion of the integrity of the court … hindering of access to it, deflecting applications that would be made to it, denying it knowledge of the relevant law or of the true circumstances of the case, and impeding the free exercise of its jurisdiction and powers …'

[10] This would seem to be a case of denying the court knowledge of the true circumstances relevant to the determination the court is called upon to make.

[11] An example of the jurisdiction may be found in *Arrow Nominees Inc v Blackledge* (2000) EWCA Civ. 200 which involved an application under the English equivalent of the *Corporations Act* for what is commonly called oppression. A principle witness and one associated with the interests of the applicant obtained access to a solicitor's file given for the purposes of disclosure and preparation for trial and inserted a number of forged documents. Some of the forgeries were detected and the witness eventually admitted to his deceit. The trial judge found that he had not completed confessed to the extent of his deception and forgery but nevertheless refused an application to dismiss the proceedings on the basis that there could not be a fair trial. An appeal was successful and the proceedings were struck out. Chadwick LJ said (para 54):

> '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 … 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 … 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 … 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.'

[12] The defendant submits that:

> '26. The Court may be satisfied on the balance of probabilities that the Plaintiff destroyed the Printer on 27 June 2001 with the intention of preventing Mr Lee from causing an expert to inspect the Printer and thereafter give evidence about the defects in the Printer. The following facts favour this inference:
>
> (a) The Printer was admittedly destroyed on or about 27 June 2001.
>
> (b) Mr Lee's solicitors had placed the Plaintiff on notice of Mr Lee's claims concerning the Printer by

correspondence of 15 March 2000, 8 December 2000 and 18 June 2001.

(c) The Printer was destroyed only nine days after a letter from Mr Lee's solicitors to the solicitors for the Plaintiff proposed a "without prejudice" meeting and questioned those solicitors as to the current whereabouts of the Printer.

(d) The fact of the destruction of the Printer was not revealed by the Plaintiff until a letter of 8 July 2003, more than two years after the destruction.

(e) Various employees and officers of the Plaintiff deposed that the destruction of the Printer was carried out in accordance with a procedure described as a "work instruction", a version of which is reproduced as Exhibit "EC1" to the affidavit of Eugene Crowe sworn on 22 August 2003.

(f) The "work instruction" provides as follows under the heading "Authorisation for write-off":

> *"Having set the broad parameters for categorisation, the day to day exceptions are:*
>
> - *When an individual carcass value is over $10,000;*
> - *When the product is subject to an unresolved issue, such as a quality problem or a liability claim.*
>
> *In these cased a pre-approval will be required using the Equipment Disposal Request (EDR)".*

(g) Despite the specific reference in the "work instruction" to the procedure which is to apply when equipment is subject to "a quality problem or a liability claim", none of the witnesses who have sworn affidavits for the Plaintiff have deposed as to any consideration which may have been given to this part of the procedure, or to the question whether the Printer was the subject of litigation.'

[13] The letters referred to, of 15 March 2000, 8 December 2000 and 18 June 2001 do not, in fact, request or require the plaintiff to preserve the photocopier or make it available for inspection. The first letter reads relevantly:

> 'In any event could you please ensure that all documents on your various files including those of your sales staff and maintenance staff in Queensland and Sydney are retained pending legal advice and possible proceeding. We are particularly concerned that the

> engineer's log attached to the machine recording breakdown visits is available to the court. Kindly confirm all documents will be held.'

The next letter says merely:

> 'Your client has this machine and is fully aware of our client's claims. Our client reserves all his rights and will respond with proceedings if necessary.'

The third letter said relevantly:

> 'In the meantime … could you kindly confirm to us that the machine in question has been sold and the price paid for it.'

[14] It is not the case that a trial will only be fair if all possible evidence relevant to the issues in dispute is available to the parties. It is common experience that witnesses die or cannot be found, or that documents are lost or that objects or scenes which may help to determine a disputed course of events change or are obliterated. The parties must do the best they can with what is available. A trial in which a witness, even a critical witness cannot be called can still be fair.

[15] The remedy sought by the defendant's application is drastic. It is to preclude the plaintiff from pursuing what is an arguable right to recover a substantial sum of money. I apprehend that a court would only accede to such an application where it is clear that there cannot be a fair trial and that that consequence is a result of the deliberate action of a party to the litigation.

[16] In this regard the intention of the person who destroys evidence or puts it beyond the reach of his opponent is critical. Actions which are themselves lawful may amount to a contempt of court if done with the intention to interfere with the course of justice. This was pointed out by the High Court in *Lane v The Registrar of the Supreme Court of New South Wales* (1981) 148 CLR 245 at 258 at which the court (Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ) said:

> 'Thus it may be lawful for one man to advise another to take a holiday in Brazil, but the giving of the advice may constitute a contempt of court if the advice is given for the purpose of keeping the witness out of the way to avoid service of a subpoena. It may be lawful to dismiss a servant … but if this is done for the purpose of punishing him for having given evidence it is a contempt of court.'

[17] The material filed by the plaintiff in resistance to the application indicates that the state of the photocopier at the date it was destroyed may well not be material to the litigation so that the defendant's inability to inspect it will not matter. This is for the reason that there are indications in the evidence that the photocopier had been repaired prior to its repossession by the plaintiff. It had been defective, thus causing TMG loss of business, but the defect had been identified and rectified. If this should turn out to be the fact then the defendant will have lost nothing by the photocopier's destruction. It cannot be relevant to the trial to prove that at the date of inspection, after repair, the photocopier was working satisfactorily.

[18] The second consideration is that the plaintiff has led evidence by affidavit to prove that those who were responsible for the destruction of the photocopier did not know

of the defendant's impending claim against the plaintiff for defects in the photocopier and their purpose in destroying it was not to deprive the defendant of critical evidence to support his case. The plaintiff's material indicates that the photocopier was one of a number of identical machines for which there was no market and which were destroyed in the ordinary course of the plaintiff's business.

[19] The application was determined on the papers. There was no cross-examination of deponents so that the affidavits must be taken at face value. Accepting their contents the defendant's principal submission, that the plaintiff destroyed the photocopier with the intention of preventing the defendant from causing an expert to inspect it and give evidence about its defects, is not made out. If, however, at trial the evidence falls out differently the defendant may be able to renew its application. I deal with it only on the basis of the material presently available.

[20] I will summarise the plaintiff's evidence which supports the two points I have mentioned.

[21] By letter of 25 January 2000 from the defendant's solicitors to the plaintiff it was said:

> 'We are instructed that in late 1998 Fuji on a number of occasions misrepresented this machine to TMG … as a profitable and reliable machine. … Fuji's claims for the machine proved to be incorrect and your records will show that the machine did not function properly for months after delivery. … By the time the service staff had effected sufficient repairs TMG was in a serious loss situation from which it could not recover and a month later the company was insolvent. … Our instructions are that the first three months of the agreement were rent-free, the machine didn't work properly for six months, most of the supplies were wasted and the machine has been accepted as returned in good order. Our client believes the machine has been re-rented or sold and no attempts have been made by Fuji to factor that mitigation into its claim.'

[22] An internal memorandum to the administration manager of the plaintiff of 9 December 1999 records that TMG had complained about the photocopier's performance. As a result a technician attended TMG's premises and 'uncovered a problem with the machine which first showed as paper issues but it was eventually a machine fault. We had it fixed within two weeks …'

[23] There are other internal memoranda to the same effect that TMG experienced problems for a few months after which the problem was repaired and the photocopier worked satisfactorily. There is an affidavit from Mr Harris, a technical specialist employed by the plaintiff, which shows that there were complaints about the photocopier between 13 January 1999 and 18 May 1999 but not subsequently. There is also evidence that subsequent to 18 May 1999 the photocopier was used extensively to produce large volumes of copies without apparent difficulty. Mr Harris also deposes to the fact that the earlier problems with the quality of photocopy were not all related to the defects in the machine itself. A number related to the conditions under which TMG operated it and stored the copying paper. Apparently if care is not taken to control the degree of humidity in which paper is stored it can absorb moisture with affects the quality of the colour imparted onto the paper. For present purposes this observation does not matter. The point is

that if the photocopier was repaired by the replacement of a defective solanoid on 18 May 1999 an inspection of its subsequently would be of no real utility in the defendant's case. Its unavailability for inspection would not have deprived the defendant of any forensic advantage.

[24] The plaintiff's submissions accurately summarise the affidavits which explain how the photocopier came to be destroyed. For convenience, I adopt the submissions as an adequate précis. The photocopier in question was a "4040".

[25] The 'Production Manager' of Fuji was a Mr Crowe. His duties included managing the storage of used equipment. This involved, inter alia, minimising storage and processing costs.

[26] On average each year Fuji has some 6,000 used machines returned to it. It scraps between 4,000 and 4,500 of those machines each year and re-processes the rest. In earlier years it used to store more of its returned machines though has found that uneconomical. Accordingly a system was established for the writing off of machines which were returned.

[27] The 15 machines which had been rent to Australia Post were returned in either late 2000 or early 2001.

[28] By May 2001 Fuji had 28 used 4040 machines in storage. Those machines were 'near obsolete'. Indeed in September 2000 a new machine, called the model 2060, was released which partially superceded the 4040. Fuji's experience is that customers want the latest and best machine (the 2060 printing a wider range of stock and faster with better registration than the 4040).

[29] On 4 May 2001, due to the build-up of the near obsolete machines, a meeting was held involving three Fuji employees: Messrs Wilson, Balmer and Lambert. At that meeting it was resolved to scrap 24 of the model 4040's in storage and to keep the four best carcasses for reprocessing.

[30] There was no discussion at that meeting of any possible litigation involving the TMG 4040 or indeed any of the other 28 machines. The persons present were not aware that the TMG 4040 may have been the subject of any liability claim or relevant to any such claim.

[31] After that meeting a document (called the Equipment Disposal Request Form) was signed by a series of people authorising the implementation of that decision.

[32] The form was signed by each of Messrs Skeels, Denton, Stone, Lambert and Cavanagh-Downes.

[33] Affidavits have been obtained from each of the people who signed that form who are contactable. Mr Skeels is currently on annual leave and unable to be contacted. Mr Denton has left Australia to reside in New Zealand and his contact details are not yet known.

[34] Each of those who signed the form (and who have sworn affidavits) swear that they were not aware when they signed the Equipment Disposal Request Form (or indeed at any time up to shortly prior to searing their Affidavit), that one of the 28 used 4040's which Fuji had in stock may have been the subject of a liability claim or relevant to any such claim. Indeed they say that had they been aware of a dispute

with TMG which may have involved a claim that the TMG 4040 was defective and had they been aware that that piece of equipment was one of the 28 Fuji had in stock, they would not have signed the Equipment Disposal Request Form in relation to that machine.

[35] Mr Crowe made the decision as to which of the four of the 28 used 4040's would be retained. He made that decision he swears, solely on the basis of the appearance of the machines and their respective meter readings. He kept the four best looking machines with the lowest meter readings. No machine was plugged into to determine its functionality.

[36] The machines which were to be scrapped had parts removed from them with the remainder being crushed. The parts recovered were worth on average $4,260.22 per machine.

[37] In making the decision to strip and scrap the TMG 4040 Mr Crowe says that he was wholly uninfluenced by and indeed was unaware of possible litigation or the possible relevance of the TMG 4040 to litigation.

[38] The attempts to recover from TMG and ultimately the defendants the sums claimed by Fuji to be owed to it were conducted essentially by Ms Bloomfield. She did so under the supervision initially of Mr Woodland and more recently Ms Fogg.

[39] Affidavits have been obtained from each of these people. None of them was aware until no earlier than June this year that the TMG 4040 had been decommissioned in June 2001.

[40] Fuji commenced proceedings in February 2002 for the purpose of recovering the debt owed under the Guarantee and Indemnity signed by the defendants.

[41] It will be remember that the photocopier was destroyed before the action was commenced. I have already drawn attention to the terms of the correspondence from the defendant's solicitors which did not request that the photocopier be retained for the purposes of an inspection.

[42] There being evidence that the photocopier was not destroyed in order to defeat the defendant's case and there being some evidence that an inspection would not produce anything of relevance it is not an appropriate case to enter judgment for the defendant. The application will be dismissed. The costs will be costs in the cause.