

The insider

When evidence goes AWOL. **Dominic Regan** takes a dive into key cases featuring conspicuous absences of evidence, from misplaced gems to mobile phones in the sea...



Rebekah Vardy: evidence lost at sea

Evidence is everything. Witness statements and expert reports are the foundation stones of litigation. Contemporaneous material can be decisive. It records what was said or done at a time when proceedings were never in contemplation and exchanges were in all probability unguarded. The oft-cited judgment in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [2013] All ER (D) 191 (Nov) counselled against the fallacy of reliance upon memory, photographic or otherwise.

What then when evidence disappears? The recent *Vardy v Rooney* action saw tracts of material go missing. It will be for Mrs Justice Steyn to adjudicate upon how this came about. It is agreed that shortly after a request to inspect material held on a mobile phone was made, the device unfortunately dropped into the depths of the North Sea (Davy Jones's locker) and the contents were lost forever.

A bad case of amnesia...?

The loss or destruction of evidence can of course be innocent. Fire or flood can wipe it out. At the opposite end of the spectrum, a party or witness might intentionally see off material which is incriminating. There is nothing new in litigation about this.

Surely the best example this century was *Tullett Prebon plc v BGC Brokers LP*

[2010] EWHC 484 (QB), [2010] All ER (D) 186 (Mar). A whole paragraph of the transcript ([65]) was devoted to telephones and Blackberry devices. In the space of a year, the third defendant, Mr Verrier, was unfortunate enough to lose or dispose of a trifling *eight* Blackberries. I assume he won Customer of the Year award from his supplier. The good news was that he retained possession of his latest device. The bad news was that it was locked by a password which he did not know. Hmm.

Amnesia was rampant within the defendant camp. Mr Justice Jack observed that: 'When Ms Howell was ordered on 27 August 2008 to deliver up her Blackberry, it disappeared. Her explanation as to how this had happened provided by her in witness statements was simply not credible.'

Earlier this year judgment was handed down in *ED & F Man Capital Markets Ltd v Come Harvest Holdings Ltd and others* [2022] EWHC 229 (Comm), [2022] All ER (D) 94 (Feb). Calver J devoted an entire section to the topic of the wilful destruction of documents, during which he doubted an explanation that the two-year-old son of a witness had eradicated potentially critical evidence from her phone.

Armory v Delamirie (1721) 1 Stra 505, 93 ER 664 must be the oldest authority in regular current usage, and is potentially relevant to the losses described above. The essence of the case is that where potentially illuminating material was lost or destroyed by the defendant, then the claimant should get the benefit of the doubt. 300 years ago, a sweep found a gem lodged in a chimney piece. He gave it to the defendant and asked him to value it. The defendant 'lost' the stone. How was the court to quantify the loss given that the evidence had disappeared? Why, give the claimant as much as one could reasonably stretch to! The court is entitled to draw adverse inferences where evidential gaps have been created.

Preserve or else

In the intellectual property dispute that was *Infabrics Ltd v Jaytex* [1985] FSR 75, the defendant destroyed documents which would have determined the extent of infringement. The judge held that, since the defendant had undermined an accurate assessment of quantum, the claimant should be treated benevolently. Indeed, to do otherwise would mean that the defendant could be better off as a result of callous misconduct. Today, electronic material supposedly deleted can often be resurrected by disclosure experts, so the risk may be reduced—but never necessarily eliminated.

This was subtly extended by the Court of Appeal in *Keefe v The Isle of Man Steam Packet Co Ltd* [2010] EWCA Civ 683, [2010] All ER (D) 137 (Jun) to catch an injury case where the defendant, rather than deleting documents, had failed to create them in the first place. Noise level readings which the employer had never bothered to take would have resolved the issue of whether the claimant was exposed to excessive noise at work. The claimant lost at first instance, for he had the burden of proof and absent records had no means of satisfying it. A creative Court of Appeal observed that this dilemma was attributable to the defendant and accordingly gave judgment to the claimant.

The ongoing disclosure pilot scheme spells out a duty owed by both client and legal representative to preserve documentation. The 2021 Business and Property Court trial witness statement direction obliges the solicitor to preserve a record of interviews.

Given the dire consequences that might flow from loss and destruction of evidence, it is more important today than ever that custodians are given clear, early notice of their duty to preserve... or else.

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