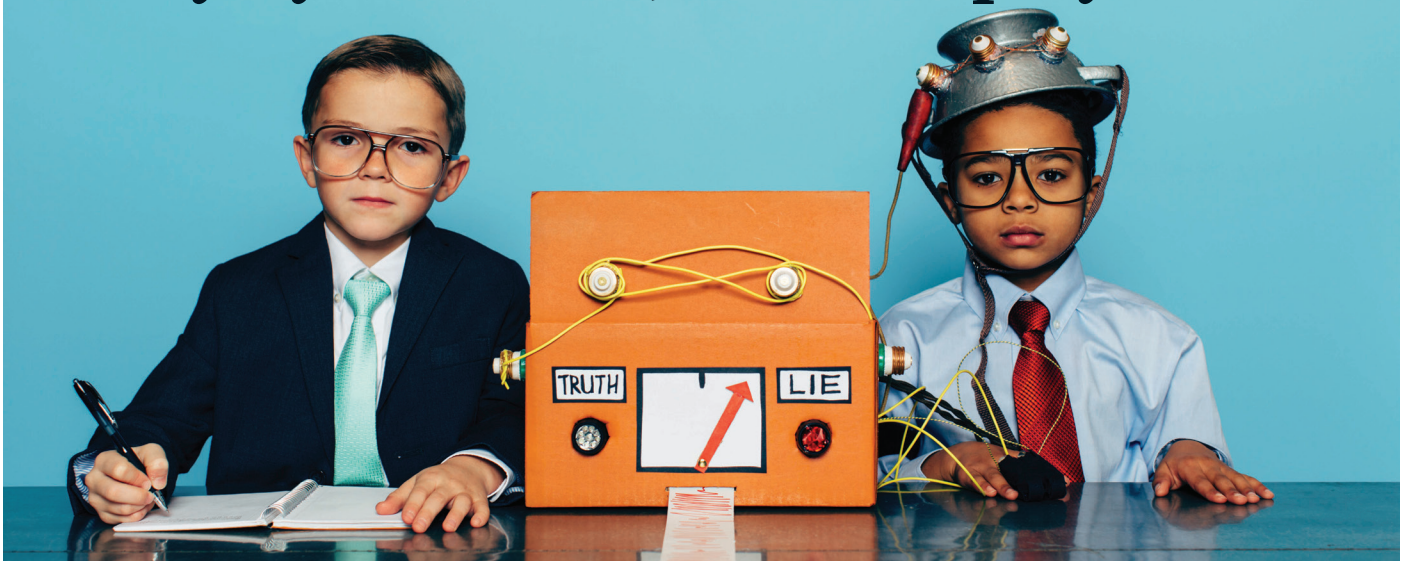
Play by the rules, or don't play at all



Dr Mike Wilkinson warns of the seriousness of suppressing documents and other evidence

IN BRIEF

- Failing to give proper disclosure can land litigants in real trouble, from adverse inferences to a prison sentence for contempt.
- Parties can apply for a range of sanctions, including strike-out and debarring orders.
- Unless orders place responsibility for triggering a sanction in the hands of the defaulting litigant.
- Failing to give relevant disclosure is serious, as demonstrated in *Gooderson v Qureshi* [2022] EWHC 2977 (KB) where a litigant in person was debarred from even participating at trial.
- Strike-out and debarring sanctions are also available for lesser breaches, such as failing to pay interim costs.

If self-interest is really what drives people, expecting litigants to give up things which might hurt their cause seems counterintuitive. Some might argue therefore that it is irrational to build a system of civil justice upon the expectation that parties will volunteer documents which not only help them, but also those which are adverse to their case. But in England and Wales, 'standard' disclosure remains a defining feature of civil procedure.

Adverse inferences

Litigants who flout this cards-on-the-table approach risk having a court presume the worst about their case, as was very publicly demonstrated in the recent case of *Vardy v Rooney* [2022] EWHC 304 (QB), [2022] All ER (D) 69 (Feb). Having rejected the explanation that WhatsApp messages were lost upon a phone being accidentally dropped into the North Sea, Mrs Justice Steyn found that this evidence was destroyed and presumed that the missing text messages must have been incriminating for Mrs Vardy and supportive of Mrs Rooney's case (see paras [70]-[71], and [114], [226], [228]).

It is not only the wanton destruction or spoiling of evidence—something Roman jurisprudence called 'exploitation'—that can land litigants in trouble. Failing to disclose any document which is relevant without a good reason can be grounds enough for a court to draw adverse inference. In *Gooderson v Qureshi* [2022] EWHC 2977 (KB), [2022] All ER (D) 20 (Dec), a defendant found himself in real difficulties when refusing to furnish a relevant document. He had been accused of setting up a large number of false profiles online to launch a malicious campaign of negative business reviews against the claimant. Having admitted to making one business review online (but not the 21 reviews complained of), he failed to disclose that admitted post. Absent such disclosure, Mrs Justice Heather Williams was willing to infer that he had 'something to hide in terms of his links to the posts' (see para [80]).

Whenever a document is 'conspicuous by its absence', a court can make adverse inferences. As clarified by Lady Justice Arden (as she was then) in *Wetton (as liquidator of Momtaz Properties Ltd) v Ahmed* [2011] EWCA Civ 610 at [14]:

> 'In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.'

The more relevant or harmful a document likely is, and the worse the explanation for its non-disclosure, the greater the scope for a court to draw adverse inferences and presume the very worst. The scope for winning or losing cases upon adverse inferences is all the greater where documents are key to unlocking disputes—which means most cases. As Mr Justice Leggatt (as he then was) put it in *Gestmin v SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [2013] All ER (D) 191 (Nov) at [22]:

> 'The best approach for a judge to adopt... is... to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.'

Drawing inferences

Inferences can be drawn not only when parties hold back on giving up relevant documents, but also when they fail to adduce relevant witness evidence. In *Vardy v Rooney*, Mrs Vardy's agent Caroline Watt, whose phone was said to have accidentally fallen in to the North Sea, was not called to affirm her own witness statement. Mrs Justice Steyn inferred that she was not made available for cross examination because her evidence would not have come up to proof (para [48]).

The scope for drawing adverse inferences from missing evidence was summarised by the Supreme Court in *Royal Mail Group Ltd v Efobi* [2021] UKSC 33, [2022] 1 All ER 401:

'… tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense; that whether any positive significance should be attached to the fact that a person had not given evidence depended entirely on the context and particular circumstances; that relevant considerations would include such matters as whether the witness was available to give evidence, what relevant evidence it was reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence and the significance of those points in the context of the case as a whole; that all those matters were interrelated and how those and any other relevant considerations should be assessed could not be encapsulated in a set of legal rules; that, where it was said that an adverse inference ought to have been drawn from a particular matter, the first step had to be to identify the precise inference(s) which allegedly should have been drawn.'

Court sanctions

The civil justice system in England and Wales thus gives the courts plenty of scope for drawing adverse inferences from parties that hold back on producing relevant evidence. It also arms the courts with a range of disciplinary sanctions. A litigant who suppresses unhelpful evidence risks not only losing their case by a judge presuming the worst, but they put their very liberty at stake. Making a false disclosure statement or giving false evidence verified by a statement of truth without an honest belief in its truth is a contempt of court for which a litigant can be committed upon application under CPR 81.3(5)(b). In addition to any crime for causing a miscarriage of justice, a party to civil proceedings who is held in contempt of court can face a fine, have their assets confiscated, or face imprisonment for a period of up to two years (see CPR 81.9 and s 14, Contempt of Court Act 1981). And between committing a litigant to prison and drawing adverse inferences, there is a range of other procedural sanctions available to the courts.

The court has the power to strike out a party's claim or defence for failing to comply with rules or orders under CPR 3.4. That is a serious sanction, but a court can resort to it when it is proportionate to do so. It must consider all of the circumstances, bearing in mind the interests of justice require rules and orders to be complied with but also the seriousness of the consequences of the strike-out (see *Byers v Samba Financial Group* [2020] EWHC 853 (Ch); *Summers v Fairclough Homes Ltd* [2012] UKSC 26, [2012] 4 All ER 317 and *Aktas v Adepta* [2010] EWCA Civ 1170, [2011] 2 All ER 536).

Parties applying to strike out an opponent's statement of case for breaching rules or orders should bear in mind the difference between absolute and peremptory strike-out orders. Persuading a court that it is proportionate to make an absolute strike-out order is generally a higher hurdle than asking the court to make an unless order. Whereas the former requires an applicant to satisfy the court that it is a proportionate sanction consistent with a litigant's art 6 rights, the latter really puts the question of compliance in the hands of that litigant themselves. It is not the court which strikes out their case but their unwillingness to take up a final chance, when given to them to comply with an order. Because of that dichotomy, Mr Justice Nicklin was perfectly willing to make an unless order debarring a defendant from adducing any evidence in defence of a claim in the case of *Gooderson v Qureshi* (unreported, 26 May 2022), but he was not willing to make an absolute strike-out order. In that case, Qureshi had failed to disclose his admitted post. When his failure still persisted, despite attempting to complete a form N265, Mrs Justice Heather Williams considered the court had the power to strike out and debar Qureshi from participating at trial in any way. However, rather than making an absolute strike-out order, Mrs Justice Heather Williams again gave Qureshi a final chance by imposing an unless order (see *Gooderson v Qureshi*, unreported, 6 October 2022).

The fact that Qureshi still failed to give disclosure of the admitted post, meant it was wholly proportionate that he be debarred from participating at trial. Such a debarring order meant he was unable to ask questions or challenge the claimant's case in cross examination or to make submissions: a debarring order means what it says: per Mr Justice Trower in *Financial Conduct Authority v London Property Investments & Ors* [2022] EWHC 1041 (Ch).

Short of strike-out

There are plenty of sanctions short of a complete strike-out which the court can also make as an alternative. Where a claim is not for a fixed or quantifiable sum of money (or for delivery up) but for some other relief such as declaratory or injunctive relief, it should be remembered that a strike-out will not automatically result in a judgment in default under CPR 12.4. Applicants should instead consider the different types of debarring orders available following a strike-out, as discussed by Trower J at paras [38], [39], [40], [41] and [47] in *FCA v London Property Investments*. Orders precluding parties from participating are a lot more severe than orders that merely preclude a party from relying on their pleaded case or adducing evidence in defence of a claim. Whereas a litigant subject to the latter can still make submissions and cross examine witnesses, a non-participation order is, in effect, tantamount to the virtual gagging of a litigant.

In summary, litigants who hold back giving relevant evidence in civil proceedings in England and Wales risk serious consequences with courts potentially presuming the worst, imposing an array of procedural sanctions upon them including strike-outs and debarring orders, and even committal proceedings.

Consequential breaches

Incidentally, applying for disclosure-related orders and sanctions often results in the courts making orders for costs. And if left unpaid, such breach of court orders can also result in grounds for making unless order applications. Post-Jackson, civil procedure tends to operate far more as a pay-as-you-go system whereby litigants who fail to pay interim costs can be subjected to sanctions. In such circumstances, it is quite common for the receiving party to apply for an unless order. And upon such application, the courts are unlikely to accept a plea that an unless order would unfairly close the door of court to them unless the defaulting party proves an inability to pay 'by detailed, cogent and proper evidence which gives full and frank disclosure of the witness's financial position including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability': see *Michael Wilson & partners limited v Sinclair* [2017] EWHC 2424 (Comm) at para [29]:

'(4) A submission by the party in default that he lacks the means to pay and that therefore a debarring order would be a denial of justice and/or in breach of Art 6 of ECHR should be supported by detailed, cogent and proper evidence which gives full and frank disclosure of the witness's financial position including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability.

'(5) Where the defaulting party appears to have no or markedly insufficient assets in the jurisdiction and has not adduced proper and sufficient evidence of impecuniosity, the court ought generally to require payment of the costs order as the price for being allowed to continue to contest the proceedings unless there are strong reasons for not so ordering.

'(6) If the court decides that a debarring order should be made, the order ought to be an unless order except where there are strong reasons for imposing an immediate order.' NLJ

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