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# DESTRUCTION OF EVIDENCE PRIOR TO THE COMMENCEMENT OF CIVIL PROCEEDINGS: HOW IS A COURT TO RESPOND?

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The Singapore courts have yet to consider the situation in which documents relevant to a legal action have been destroyed prior to its commencement to the detriment of the party who would otherwise have relied upon them. Recently, the Australian courts have approached the issue by limiting the range of sanctions which a civil court might ordinarily impose (for breach of disclosure obligations) in circumstances which give rise to the common law offences of criminal contempt or "attempting to pervert the course of justice". These developments and the statutory and case-law position in Singapore will be examined with a view to suggesting how the courts here should respond to the pre-action destruction of evidence.

## I. INTRODUCTION

What is the position when a person or entity ("the culpable party") destroys incriminating evidence in anticipation of future legal proceedings against him? Such conduct may constitute a criminal offence.[1] However, the extent to which the court might be willing to redress the position of the innocent party in civil proceedings, whose case may be compromised by the absence of evidence which he would have otherwise relied upon, is the subject of developing case law. The issue arose with considerable significance in *McCabe v. British American Tobacco Australia Services Ltd.*,[2] a case decided by the Supreme Court of Victoria. The plaintiff claimed damages for personal injury (she alleged that she had contracted lung cancer as a result of smoking since the age of 12) against the defendant (which was alleged to have acted unreasonably in failing to take necessary steps to reduce or eliminate the risk of addiction or the health risks involved in smoking, and that it ignored and even disparaged research results which indicated the dangers of smoking). The case itself involved an application by the plaintiff to strike out the defence, *inter alia*, on the

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1 Such conduct may constitute an offence pursuant to s. 204 of the *Penal Code* and/or criminal contempt. These offences are considered in the course of this article. Note that specific statutes may mandate the retention of documents in the interest of official regulatory efficacy. See, for example, s. 199(2) of the *Companies Act* (Cap. 50, 2004 Rev. Ed. Sing.), which requires accounting and other records to be retained for seven years after the completion of the transactions or operations to which they respectively relate; s. 67 of the *Income Tax Act* (Cap. 134, 2004 Rev. Ed. Sing.), which imposes a retention period of seven years; s. 46 of the *Goods and Services Tax Act* (Cap. 117A, 2001 Rev. Ed. Sing.), which also imposes a seven-year retention period; and ss. 36 and 37 of the *Corruption, Drug Trafficking & Other Serious Crimes (Confiscation of Benefits) Act* (Cap. 65A, 2000 Rev. Ed. Sing.), which impose a six-year retention period.

2 [2002] V.S.C. 73.

ground that the defendant had deliberately destroyed potentially relevant documents at a time when litigation was anticipated[3] and, as a result of the defendant's conduct, the plaintiff had been deprived of her right to a fair trial. Eames J. ruled in favour of the plaintiff, holding that the injustice suffered by the loss of this evidence could not be cured and, therefore, "the only appropriate order is that the defence should be struck out and judgment be entered for the plaintiff".[4] On appeal, in *British American Tobacco Australia Services v. Cowell (representing the estate of Rolah Ann McCabe, deceased)*,[5] the Court of Appeal disagreed with Eames J., concluding that the defendant had not been shown to be in breach of any relevant obligation not to destroy documents before the commencement of proceedings. According to the Court of Appeal, apart from drawing an adverse inference, the court may not intervene (to make an order) in response to pre-action destruction of potentially relevant evidence unless (1) the conduct is unlawful in the context of an attempt to pervert the course of justice or criminal contempt; and (2) the party seeking relief actually presents his case on this basis. As these elements were missing, Eames J.'s order striking out the defence was set aside.[6]

## II. Position Under Singapore's Rules of Court

The Rules of Court do not apply to the conduct of persons prior to the commencement of legal proceedings. Order 1, r. 2(3) of the *Rules of Court* ("R.C.") states: "… these rules shall have effect in relation to all proceedings in the Supreme Court and Subordinate Courts …".[7] Paragraph 12 of the First Schedule to the *Supreme Court of Judicature Act* empowers the court to order discovery "before or after any proceedings are commenced … as may be prescribed by Rules of Court". Although the Rules do provide for discovery of documentary or oral information prior to the commencement of proceedings,[8] these are no less court proceedings despite their incidence before the commencement of the substantive action.[9] More specifically, the court's power to impose sanctions for non-compliance with a rule of discovery or order of court (the court may make any order which the court "thinks just" including the power to dismiss the action or strike out the defence) pursuant to O. 24, r. 16 R.C. is limited to conduct of the party in the course of proceedings.[10] The cases on O. 24,

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3 Essentially, research results which indicated the dangers to health of smoking. Thousands of documents had been destroyed by the defendants at the conclusion of other actions against them: see Eames J.'s judgment at paras. 289 and 309 and the Court of Appeal's judgment at para. 140.

4 *Ibid.* at para. 385. The court also found that the destruction "… had been carried out with the deliberate intention of denying the plaintiff a fair trial".

5 [2002] V.S.C.A. 197. After the plaintiff died (as a result of her illness), her estate (represented by Mrs. Cowell, her daughter) continued with the action.

6 *Ibid.* at 191. The plaintiff made a subsequent application for leave to appeal to the High Court of Australia. This was dismissed.

7 Also see s. 80(1) of the *Supreme Court of Judicature Act* (Cap. 322, 1999 Rev. Ed. Sing.) [S.C.J.A.] which empowers the Rules Committee to make rules in the context of proceedings before the courts. Unless otherwise stated, further references to orders and rules refer to orders and rules in the *Rules of Court*.

8 See O. 24, r. 6(1), (5) and O. 26A, r. 1(1) and (5).

9 *I.e.*, an application has to be made to the court by originating summons and the procedure has to be followed (see O. 24, r. 6(3)(a) and (b); O. 26A, r. 1(3)(a) and (b)).

10 Order 24, r. 16(1) is concerned with the obligation of a "*party* who is required by any rule … or [court] order … to make discovery …". [Emphasis added.] See, below, "Termination of the culpable party's case" (under "If the Court Does Have the Power to Intervene, What Might It Do?").

r. 16 R.C. establish that the court may dismiss an action or strike out a defence where there has been contumacious conduct (including non-compliance with court orders[11] and suppression of evidence[12] in the course of proceedings) or where non-disclosure in the course of proceedings renders a fair trial impossible.[13]

Certainly, pre-action conduct may be pertinent as when a party does not disclose in his list of documents and verifying affidavit relevant documents formerly in his possession which he has since destroyed. This would constitute non-compliance with O. 24, r. 1(1) which requires the party to disclose documents which "have been in his possession, custody and power"[14] and O. 24, r. 5(1) which requires disclosure of particular documents which have "at any time been, in [the respondent's] possession, custody or power, and if not then in his possession, custody or power, when he parted with it and what has become of it".[15] A court would be fully entitled to apply O. 24, r. 16 in such a situation because of the failure to disclose what happened to the documents.[16] However, as the court would not be able to use this rule as a direct response to the actual act of destruction of the documents prior to the commencement of proceedings (because the rules do not apply at that stage), its sanction would have to be limited to a consideration of the effect of the non-disclosure in the list of documents on the party seeking discovery. If, for example, the latter already knows that they have been destroyed, so that he is not taken by surprise, the prejudice may be minimal.

In *McCabe*, Eames J. sought to avoid this limitation by characterising the failure to disclose the documents as "a very deliberate strategy designed to avoid exposure of the significant level of destruction of documents, and to avoid, in turn, the exposure of the broader strategy which had been put in place to deny a fair trial to the plaintiff".[17] The learned judge was of the view that the applicable rule empowered him to strike out the defence for non-compliance with his order requiring discovery.[18] The Court of Appeal, having determined that the defendants had not been in breach of any obligation in destroying the documents prior to the commencement of proceedings against them,[19] concluded that any prejudice resulting from the non-compliance with

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[11] See, for example, *Manilal & Sons v. Bhupendra K.J. Shan (t/a J.B. International)* [1990] 2 M.L.J. 282; [1989] S.L.R. 1182; *Federal Lands Commissioner v. Neo Hong Huat* (unreported judgment of Chan Seng Onn J.C. (as he then was) in R.A. 301/97; Suit No. 721/97; Judgment dated 22 April 1998, at para. 43); *Tan Kok Ing v. Ang Boon Aik & Ors.* (Suit No. 991 of 1994; judgment dated 17 September 2002). The court may even terminate a party's case if he has consistently failed to comply with ordinary court orders so that his conduct is clearly contumacious (*Soh Lup Chee & Ors. v. Seow Boon Cheng & Anor.* [2002] 2 S.L.R. 267).

[12] In *Landauer v. Comins & Co.*, *Times*, 7 August 1991, Lloyd L.J. stated that the deliberate suppression of a document might justify the dismissal of an action or the striking out of the defence even though a fair trial would still be possible. Also see *Coleman v. Dunlop Ltd*. (unreported judgment of English Court of Appeal dated 20 October 1999).

[13] See, for example, *Logicrose Ltd. v. Southend United Football Company Ltd., Times*, 5 March 1988 (Chancery Division, 5 February 1988, judgment of Millett J.). The case was cited with approval in *Arrow Nominees Inc. v. Blackledge* [2001] B.C.C. 591, at para. 54. Also see *Douglas v. Hello! Ltd. (No. 3)* [2003] E.M.L.R. 29, at para. 90.

[14] The rule also empowers the court to order that an affidavit verifying the list be made.

[15] Also see Form 40 of Appendix A of the *Rules of Court* which requires such documents to be listed.

[16] See *S.M.S. v. Power & Energy* [1996] 1 S.L.R. 767.

[17] [2002] V.S.C. 73, at para. 354.

[18] The rule being r. 24.02 (which imposes sanctions similar to those in O. 24, r. 16 of Singapore's *Rules of Court*).

[19] *I.e.*, no case had been put forward indicating that the defendant had attempted to pervert the course of justice or had committed criminal contempt. The Court of Appeal also concluded that Eames J. had

Eames J.'s order requiring discovery (*i.e.*, the failure to disclose the documents and what happened to them) was limited (the main prejudice having ensued from the destruction of evidence prior to the commencement of the action) and not sufficient to justify striking out the defence.[20]

## III. Decision of the Court of Appeal In *McCabe* and Its Subsequent Endorsement By the English High Court

According to the Court of Appeal in *McCabe*, currently the leading authority directly concerning the issue,[21] although a court may draw adverse inferences when it is appropriate to do so, it only has power to intervene and make orders[22] in respect of the destruction of documents prior to the commencement of proceedings if the responsible person acted illegally by attempting to pervert the course of justice or by committing criminal contempt.[23] The Court of Appeal added that, in the context of a civil suit, the party alleging pre-action destruction of documents only has to prove the offence on a balance of probabilities. In *McCabe* itself, the Court of Appeal did not decide the question of whether the defendants' conduct constituted an attempt to pervert the course of justice[24] because this "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".[25]

The views of the Court of Appeal in *McCabe* were endorsed by the English High Court in *Douglas v. Hello! Ltd. (No. 3)*,[26] a case which involved claims by Michael Douglas and his wife Catherine Zeta-Jones against certain publishers and distributors of a magazine for breach of confidence and unauthorised publication of photographs of their wedding and reception. The claimants applied for the defences to be struck out, *inter alia*, on the basis that the defendants had deliberately destroyed or disposed of documents which supported the position taken by the claimants. Sir Andrew Morrit V-C drew a distinction between the documents which had been destroyed and disposed of prior to and after the commencement of proceedings. The learned judge acknowledged that there was no English authority on the issue and applied

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wrongly rejected the defendant's claim to privilege in respect of many of the documents. (See the Court of Appeal's judgment ([2002] V.S.C.A. 197) from para. 110 and its conclusion at para. 191).

20 [2002] V.S.C.A. 197, at para. 185 (2nd sub-para.). The Court of Appeal concluded that there was "… 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" (*ibid.* at para. 183). The Court of Appeal (*ibid.* at para. 184) pointed out that the judge could have made a further order for discovery, a further affidavit of documents or a further affidavit of explanation "in order to make express that which, [in Eames J.'s opinion], had not been stated even if the failure to state it was … the result of a very deliberate strategy …".

21 The Court of Appeal pointed out that that there was no existing authority. See paras. 146 and 172.

22 Such as those expressed in O. 24, r. 16, which concerns non-compliance in the course of proceedings. (The rule is considered above, under "Position under Singapore's *Rules of Court*".)

23 *I.e.*, the doing of some act which has "a tendency and is intended to pervert the administration of public justice": *R. v. Rogerson* (1992) 174 C.L.R. 268 at 277. Also see the cases set out in note 38. For the meaning of "criminal contempt", see the main text accompanying notes 37–39.

24 [2002] V.S.C.A. 197, at para. 174.

25 *Ibid.* at para. 175. Furthermore, the Court of Appeal disagreed with Eames J.'s conclusion that the destruction of the documents constituted a breach of the rules of court governing discovery (*ibid.* at paras. 175–185).

26 [2003] E.M.L.R. 29.

the principle formulated by the Court of Appeal in *McCabe*. His Honour concluded that he could not intervene in the absence of "any evidence to suggest that … the documents were destroyed (e-mails passing between personnel in the defendant's enterprise) in an attempt to pervert the course of justice".[27] The very brief treatment of the principle in this case may open the way for a more considered analysis of the law in England.

## IV. Some Fundamental Considerations

Every party takes a risk that he may be unable to rely at trial on all the evidence which would have been favourable to him but which is no longer available. For example, a witness may no longer be available because his whereabouts are unknown or he may have passed away and his evidence was not previously recorded.[28] A relevant document may be lost or, unknown to the party hoping to rely on it and the court, it may not have been disclosed in the course of discovery.[29] The mere fact that not all potentially favourable evidence is available to a party does not entitle him to redress in the form of a procedural or other remedy.[30] The question of whether destruction of evidence before the commencement of proceedings ought to be a basis for court intervention should be decided by considering the nature of the destructive act and its effect on the proceedings (in the sense of whether it causes injustice). Clearly, a person who owns a document or is otherwise entitled to dispose of the document has the right to destroy it without consequence in the absence of any legal duty requiring its preservation. Therefore, it is fair to say that if a person intentionally destroys a document for an innocuous reason (such as his belief that it no longer has any value) or accidentally destroys the document (without any ulterior motive), the party seeking to rely on the document would not have any redress irrespective of the importance of the document to him. This would be part of the risk of taking a case to trial. At the other end of the spectrum, one could have a situation in which the document was destroyed with the specific intention of avoiding the production or use of that document at trial. In this situation, the person who destroyed the document has, it is submitted, acted beyond his right of ownership or control of the document by unlawfully interfering with the judicial process.[31] Here he abuses the court's process and the judicial response would normally be the dismissal of the action (where the plaintiff is the culpable party) or the striking out of the defence (where the defendant is the culpable party).[32]

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27 *Ibid.* at para. 87. With regard to the destruction or disposal of evidence in the course of proceedings, his Honour concluded that although the defendants' conduct "[left] a very great deal to be desired," it did not prevent a fair trial and, accordingly, did not justify the striking out of the defence or any part of it (*ibid.* at para. 104).

28 For example, in a deposition or affidavit.

29 Obviously, sanctions could be imposed for non-compliance pursuant to O. 24, r. 16 if the court becomes aware of this impropriety.

30 Of course, non-compliance with the rules of discovery in the course of proceedings does invite sanctions by the court. See above, under "Position Under Singapore's *Rules of Court*".

31 The circumstances would constitute criminal contempt and/or an offence pursuant to s. 204 of the *Penal Code*.

32 See below, under "If the Court Does Have the Power to Intervene, What Might It Do?" and "Concluding Observations".

The more difficult question which arises is whether the court can make less drastic orders (other than dismissing the action or striking out the defence) where the conduct of the culpable party lies somewhere in between the extreme points of accidental or innocuous destruction and destruction specifically intended to obstruct the course of justice. In this intermediate situation, should the party deprived of the document be entitled to a procedural remedy commensurate with the resulting injustice (the extent to which his opportunity to have a fair trial has been compromised)? In *McCabe*, the Court of Appeal ruled that a court should only intervene and grant redress to the party deprived of evidence "if the responsible person acted illegally by attempting to pervert the course of justice or by committing criminal contempt".[33] It is submitted that this criteria is too strict in the context of Singapore's legal framework and that the courts here should be trusted to exercise their inherent powers in accordance with the general principles recently established by the Singapore Court of Appeal.[34]

## V. Whether the Court of Appeal's Position in the *McCabe* Litigation Is Too Restrictive in the Context of Singapore's Legal Framework

If the Court of Appeal's judgment in *McCabe* is applied without qualification by a Singapore court, its ability to intervene in civil proceedings to grant relief would depend on whether an offence has been committed pursuant to s. 204 of the *Penal Code*,[35] the provision which most closely corresponds (in the context of document destruction) to the offence referred to by the Court of Appeal in *McCabe* as "attempting to pervert the course of justice".[36] Section 204 states:

> Whoever secretes or destroys any document which he may be lawfully compelled to produce as evidence before a court of justice, or in any proceeding lawfully held before a public servant as such, or obliterates or renders illegible the whole or any part of such document with the intention of preventing the same from being produced or used as evidence before such court or public servant as aforesaid, or after he has been lawfully summoned or required to produce the same for that purpose, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.

As for "criminal contempt", the Singapore High Court stated in *Summit Holdings Ltd. & Anor. v. Business Software Alliance*[37] that it is "conduct which frustrated or impeded the due administration of justice" and that its underlying policy is the "protection of the administration of justice and the maintenance of the court's authority". It is not entirely clear whether this common law offence can be committed before the

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33 See main text accompanying notes 21–25.

34 The inherent power of the court is considered below, under "Whether the Singapore Courts Have the Inherent Power to Grant Relief to a Party Who Has Suffered Injustice As a Result of the Destruction of Material Evidence Before the Commencement of Proceedings".

35 Cap. 103, 2000 Rev. Ed. Sing.

36 The *Penal Code* includes a series of "offences against public justice". See Chap. XI of the *Penal Code*.

37 [1999] 3 S.L.R. 197, at para. 25.

commencement of legal proceedings.[38] If it can, it is submitted that s. 204 is a specific application of the doctrine in that a person who "secretes or destroys" documents for the purpose of preventing them from being used in evidence is clearly involved in "conduct which frustrate[s] or impede[s] the due administration of justice".[39] Accordingly, for the purpose of this article, s. 204 of the *Penal Code* and the more general doctrine of criminal contempt will be treated synonymously.

A number of observations need to be made about s. 204. It extends to both civil and criminal proceedings. Literally construed, it applies to secretion or destruction during the course of a trial,[40] prior to a trial[41] and even prior to the initiation of any proceedings. In fact, the section does not impose a requirement that there be any proceedings at all.[42] Three essential elements set the scope of s. 204 of the *Penal Code*: (1) the accused person must have secreted or destroyed the document;[43] (2) he "may" (not must) be required to produce the document as evidence in a court or legally sanctioned proceedings;[44] and (3) he must, at the time he secreted or destroyed the document, have intended to prevent its production or use as evidence in the proceedings.

It is submitted that the second element of the section is satisfied even though the responsible person is not aware that he might be called as a witness (as when he destroys the document thinking that some other person might be called to produce it). Furthermore, on a literal construction, it seems that the proceedings do not have to be actually anticipated.[45] It may be sufficient that the person who destroyed the evidence did so with a view to preventing any "possible" proceedings in the future. Such an interpretation seems tenable on the basis of the generality of the phrase: "before a court of justice, or in any proceeding"; *i.e.*, any court or any proceeding which might eventuate. An important question arises as to how far back in time the section extends; for example, where a drug manufacturer, realising that one of its

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38 In *McCabe*, the Court of Appeal left this question open but was certain that the common law offence of attempting to pervert the course of justice could be committed prior to the commencement of proceedings (at para. 173). This was also the conclusion of Mason C.J. in *R. v. Rogerson* (1992) 174 C.L.R. 268 at 277. Also see *Meissner v. R.* (1995) 184 C.L.R. 132 at 144. In the English case of *R. v. Rafique & Ors.* (1993) Q.B. 843, the Court of Appeal held that the offence of attempting to pervert the course of justice could be committed after a crime and before the commencement of investigations (guns and cartridges concealed by accused after a shooting). The court distinguished *R. v. Selvage* [1982] Q.B. 372 on the ground that no proceedings were even contemplated by the accused person when she had altered certain records. In *Rafique*, the Court of Appeal determined (*ibid.* at 850-1) that "It was open to the jury to conclude that, to put it no higher, the possibility of judicial proceedings must have been in the contemplation of the appellants". Also see *R. v. Lawrence Machin* (1980) 71 Cr. App. R. 166; *R. v. Rowell* (1977) 65 Cr. App. R. 174.

39 Other provisions on contempt include, for example, s. 7 of the *Supreme Court of Judicature Act* (Cap. 322, 1999 Rev. Ed. Sing.) and s. 8 of the *Subordinate Courts Act* (Cap. 321, 1999 Rev. Ed. Sing.).

40 The words "after he has been lawfully summoned or required to produce the same" indicate their application to secretion or destruction during the course of proceedings.

41 *Ibid*.

42 In *Gour's Penal Code of India*, 11th ed., Vol. 2 (India: Eastern Book Company, 2000) at 1849, it is stated that the section "contemplates, but does not necessarily imply, the institution of some proceedings …".

43 Or rendered "illegible the whole or any part of such document".

44 All the more, an offence is committed if the secretion or destruction occurs "after he has been lawfully summoned or required to produce the same for that purpose".

45 Compare this to the English position which is to the effect that the offence of attempting to pervert the course of justice is predicated on the contemplation of future proceedings. See *R. v. Selvage* [1982] Q.B. 372 and other cases considered in note 38.

products has resulted in the death of certain users, destroys incriminating documents even before any complaint is made or dispute arises. This could be many years before an action is brought against the company. In England, it has been held in the context of criminal proceedings that an attempt to pervert the course of justice may be constituted by the disposal of evidence after the commission of a crime and before the commencement of investigations.[46] It might be argued that a parallel approach in civil proceedings is appropriate if the documents were destroyed by their owner because they incriminated him in respect of a wrong which he previously committed. Of course, the longer the period between the date of destruction and the date of commencement of proceedings, the more difficult it may be for the prosecution to establish the nexus between the two events[47] and, therefore, the element of intention which is fundamental to the section.[48] For example, the drug manufacturer may argue that while it was aware that a dispute might arise which could eventually lead to legal proceedings, it destroyed the documents as part of its "document retention policy" and that it had no specific intention to prevent the production or use of the destroyed documents at trial as required by s. 204.[49]

As for the third element of the section, the prosecution must establish a specific intention on the part of the accused to destroy evidence for the purpose of preventing its production or use in the proceedings.[50] As the offence involves an intention to prevent its production *or* use as evidence, he may be convicted even though the court would have ruled that the produced document was inadmissible.[51] The relevancy of the document is immaterial so that a conviction is possible even though the accused erroneously thought that the document would be used.

In spite of the apparent breadth of s. 204, it does not extend to every situation in which court intervention in civil proceedings may be thought to be appropriate. The following scenarios reveal potential lacunae:

(1) A person ($X$) deliberately destroys his documents in the course of re-organising his papers without the specific intention of obstructing justice, although he is aware that they could be used against him in some future action which, as yet, is not anticipated. However, even if $X$ loses his argument that anticipation is a requirement, he would succeed in avoiding criminal liability on the basis that he did not have the specific intention (mandated by s. 204) to prevent the document from being "produced or used in evidence".[52]

(2) A person ($Y$) deliberately destroys a document because he knows it could be used in proceedings against his wife ($X$). $X$ knew of the incriminating nature of the document and left it on $Y$'s desk. Section 204 does not apply to $X$ in absence of conspiracy or abetment or other form of involvement on her

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46 See *R. v. Rafique & Ors.* [1993] Q.B. 843 and related cases (cited in note 38).

47 *I.e.*, that the evidence was destroyed to avoid its production or use at trial.

48 The Court of Appeal in *McCabe* (*ibid.* at para. 145) did not resolve this problem in the context of the common law offence.

49 See scenario 1 below.

50 Such an intention was established to the satisfaction of Whyatt J. in *Ang Chiew Choon v. R.* [1957] 1 M.L.J. 133 but not in the Bombay case of *R. v. Gangaram Tukaram* [1912] 14 B.L.R. 1163.

51 Because the document would have been produced prior to the court's determination.

52 See main text accompanying notes 50 and 51.

part in the act of destruction.[53] *Y*, who certainly destroyed the document for the purpose of avoiding its production or use at trial, would only be liable under s. 204 if he could have been "lawfully compelled to produce" it.

(3) A person (*X*) destroys or secretes the document merely to annoy the other party but not with the intention of preventing the production of the document. *X* has no such intention because he had intended to produce it later (assuming he only intended to conceal it temporarily) or may have erroneously thought that another person would have a copy which could be produced.

(4) A person (*X*) destroys the document because it includes sensitive information which could embarrass him. He knows that another part of the document (quite separate from the part which could embarrass him) might be relevant in future litigation against him but this is not the reason for destroying it (he might assume that he can win his case in spite of the document).

It would be difficult to prove that *X* had the requisite intention pursuant to s. 204 in any of these scenarios. Yet, there is some culpability on his or her part. The circumstances of the disposal are not accidental. Indeed, *X* intentionally committed a particular act which resulted in the destruction of the document. At the very least, there is a reckless disregard of the administration of justice and the interest of the other party in all four situations.[54] If the case of the innocent party is compromised by such conduct, should he be entitled to relief which would redress the balance of justice between him and *X*? If the conclusion of the Court of Appeal in *McCabe* is endorsed in Singapore, the answer is that the court may only draw an adverse inference against *X* in these circumstances. The position may be different in Australia because the case law there (and in England) is to the effect that "an attempt to pervert the course of justice consists in the doing of some act which has a *tendency* and is intended to pervert the administration of public justice".[55] Section 204 of the *Penal Code*, however, requires a specific act of secretion or destruction. Therefore, in the second scenario (above), *X* might be liable at common law if his act of leaving it somewhere for *Y* to destroy (even in the absence of abetment and conspiracy) because it is an act which has "a tendency and is intended to pervert the administration of public justice".[56] It is doubtful that *X* would be criminally liable under s. 204 of the *Penal Code* in these circumstances.

There is the further concern that if unlawful conduct within the scope of s. 204 is the sole criterion for determining whether a court should intervene, a party may be able to evade and abuse the strict terms of the section. Although the standard of balance of probabilities applies in civil proceedings in deciding whether the offence has been committed (if the view of the Court of Appeal in *McCabe* is endorsed),[57] it may still be difficult to establish the elements of s. 204 even to this level if the

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[53] It would probably be argued that she was involved by leaving the document on *Y*'s desk. However, this might be rebutted by *X*'s evidence that she left it on *Y*'s desk only so that the latter could read the document.

[54] In *Manilal & Sons v. Bhupendra K.J. Shan (t/a J.B. International)* [1989] S.L.R. 1182 at 1196, Chao Hick Tin J.C. (as his Honour then was) stated that wilfullness may be established by conduct amounting to gross negligence.

[55] Emphasis added. *R. v. Rogerson* (1992) 174 C.L.R. 268, at 277. For English cases, see *supra* note 38.

[56] *Ibid*.

[57] See sentence in main text after note 23.

culpable party has carefully planned the disposal of the document so that he does not fall within the scope of the provision.[58] The burden of proof is on the party asserting that the documents were destroyed before the commencement of proceedings. It is unlikely that he would be aware of the circumstances of the documents at that stage. On the other hand, the party alleged to have destroyed the documents prior to the commencement of proceedings may be able to equalise the probabilities by showing that he did not have the specific intention to prevent evidence from being produced or used at trial, an essential element of s. 204.[59] A further point is that it is not appropriate for a civil court to apply the criteria for a criminal offence to discovery between the parties, a process which relies on different considerations pertinent to a private dispute between litigants who ideally enjoy adversarial equality. While a criminal court may commit the accused to prison or fine him as a punishment, a civil court is primarily concerned with redressing the adversarial balance and to prevent the abuse of its process. There is much to be said for allowing the courts to exercise their inherent power in a flexible manner according to the circumstances of the case rather than limiting them to a strict criminal concept quite alien to the civil matrix. The legal basis for this advocated approach is considered in the following paragraphs.

## VI. Whether the Singapore Courts Have the Inherent Power to Grant Relief to a Party Who Has Suffered Injustice as a Result of the Destruction of Material Evidence Before the Commencement of Proceedings

May the court exercise its inherent power to make whatever order it considers just in response to improper pre-action conduct which has an adverse impact on the innocent party in the action itself? That the court has an inherent power to prevent injustice or an abuse of the court's process is beyond any doubt.[60] Order 92, r. 4 states:

> For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

As is evident from this provision, the court's inherent power is only referred to, not created, by the Rules of Court.[61] Accordingly, the exercise of this power is not limited, as in the case of the Rules of Court, to conduct in the course of proceedings. The issue is whether the conduct could impact on the subsequent proceedings by causing injustice or by abusing the court's process so that the court's intervention is necessary to prevent the mischief. The provision might be construed to apply only

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58 See the four scenarios set out in the main text after note 51.

59 *I.e.*, it would not be difficult for him to show that it was just as likely that the document was destroyed accidentally.

60 See *Wee Soon Kim v. Law Society of Singapore* [2001] 4 S.L.R. 25; *Roberto Building Material Pte. Ltd. & Ors. v. Oversea-Chinese Banking Corporation & Anor.* [2003] 2 S.L.R. 353; *Samsung Corporation v. Chinese Chamber Realty Pte. Ltd. & Ors.* [2003] 3 S.L.R. 656 (H.C.); [2004] 1 S.L.R. 382 (C.A.). Also see "Inherent Jurisdiction Re–visited: An expanding doctrine" [2002] 14 S.Ac.L.J. Pt. 1 at 1–17; "The inherent powers of the court" [1997] S.J.L.S. at 1–50.

61 See *Chang Soon, Mark v. Zhang Weiquin*, Div. No. 600838 of 2002; judgment dated 9 December 2002.

to conduct in the course of proceedings on the ground that the court has no role until its jurisdiction is invoked by the commencement of legal proceedings. It could be further argued that the Rules of Court provide self-help remedies which enable a party to make an application to the court to order the preservation of evidence[62] and/or the disclosure and production of documents[63] before the commencement of the substantive proceedings. It is submitted that this view is too restrictive for it does not recognise that self-help remedies are ineffective when, as is usually the situation, evidence has already been destroyed or is to be destroyed in complete secrecy. Even if the person seeking pre-action relief is aware that disposal is about to take place, he may not be able to satisfy the stringent conditions (including the requisite proof) for a pre-emptive detention order.

The courts will not normally exercise their inherent power to grant a remedy where the circumstances are already effectively governed by statute or a rule of court and the policy of the provision is that its prescribed scope should not be extended.[64] The power of the court to impose sanctions pursuant to O. 24, r. 16[65] is limited to non-compliance with a rule or court order requiring discovery in the course of proceedings because the Rules of Court apply to pending proceedings.[66] *A fortiori*, the policy of O. 24, r. 16 should not be construed as affecting the court's inherent power, as expressed in O. 92, r. 4, to make appropriate orders in respect of pre-action conduct if non-intervention would result in injustice or abuse of process. Indeed, it is well established that a court may exercise its inherent power to grant relief not within the scope of a pertinent rule of court.[67] As the Court of Appeal pointed out in *Wee Soon Kim*, this power "should not be circumscribed by rigid criteria or tests. In each instance the court must exercise it judiciously"[68] or in a "just and equitable"[69] manner; it does not have to limit the circumstances in which it can apply this power.[70] The Court of Appeal went on to state: "… Without intending to

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62 For example, an *ex parte* application for an *Anton Piller* order.

63 For example, pre-action discovery pursuant to O. 24, r. 6 (see main text accompanying notes 8 and 9).

64 See the cases and articles referred to in note 60. A need for the exercise of inherent power does not arise if there is a procedural mechanism (whether provided by statute or the *Rules of Court*) in place which effectively governs the circumstances. In *Wee Soon Kim* (cited in note 60), this was Part VII of the *Legal Profession Act* (Cap. 161, 1979 Rev. Ed. Sing.), which "sets out an elaborate scheme on how a complaint against a solicitor should be dealt with." (*Ibid.* at para. 28.) Also see *Tan Kok Ing v. Tan Swee Meng and others* [2003] 1 S.L.R. 657; *Four Pillars Enterprises Co. Ltd. v. Beiersdorf Aktiengesellschaft* [1999] 1 S.L.R. 737.

65 Discussed above, under "Position under Singapore's *Rules of Court*".

66 As explained above, under "Position under Singapore's *Rules of Court*", the rules apply only to proceedings before the court. The court may take into account conduct before the commencement of proceedings for the purpose of determining costs (see O. 59, r. 5).

67 See *The Nagasaki Spirit* [1994] 2 S.L.R. 621, in which the High Court exercised its inherent power to grant relief in circumstances not recognised by an admiralty rule. In doing so, it applied *The Mardina Merchant* [1974] 3 All E.R. 749. The approach of Brandon J. in *The Mardina Merchant* was endorsed by the Court of Appeal in *Wee Soon Kim v. Law Society of Singapore* [2001] 4 S.L.R. 25 at para. 24. Also see the cases and articles cited in note 60.

68 [2001] 4 S.L.R. 25, at para. 27. The Court of Appeal referred to Sir Jack Jacob's observation (in "The Inherent Jurisdiction of the Court" (1970) C.L.P. 23, at 51), that the court may invoke its inherent jurisdiction "when it is just and equitable to do so and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression and to do justice between the parties".

69 *Ibid*.

70 *Ibid.* at para. 26.

be exhaustive, we think an essential touchstone is really that of 'need'."[71] The Court of Appeal affirmed its posture in *Samsung Corporation v. Chinese Chamber Realty Pte. Ltd.* and added that other compelling reasons (additional touchstones) "may well be the 'justice of the case' or the 'prevention of abuse' ".[72] It is conceivable that all three "touchstones" might apply where a party has deliberately disposed of incriminating evidence in anticipation of legal proceedings. As the opposing party would be deprived of his right to rely on relevant and disclosable evidence,[73] he would be denied a fair trial if the court were to do nothing. In these circumstances, he has a "need" for judicial relief to prevent injustice. Furthermore, in the context of the administration of justice, there is a need to prevent the abuse of its process.[74]

## VII. If the Court Does Have the Power To Intervene, What Might It Do?

While the concerns of the criminal law are whether the destruction of material evidence constitutes an "offence against public justice"[75] and punishment in the event of conviction, the role of a judge in civil proceedings is to determine whether the conduct has compromised the innocent party's opportunity to have a fair trial so that the court's intervention is necessary to redress the balance of justice (or, in the words of O. 92, r. 4, "to prevent injustice"). In exercising its discretion to make the appropriate order, the court would take into account the extent to which a fair trial has been compromised, the circumstances and nature of the destruction of the evidence (*i.e.*, the culpability of the responsible person)[76] and what relief would most effectively neutralise or mitigate the harm done. The court also has the inherent power to prevent an abuse of its own process.[77]

### A. *Termination of the Culpable Party's Case*

The court is empowered by O. 24, r. 16(1) to dismiss the plaintiff's action or strike out the defence and enter judgment against the defendant in respect of non-compliance with discovery requirements in the course of proceedings. In view of the extreme nature of this sanction, the court is only likely to act in this respect if the outcome is obviously justified. Hence, the English courts have made such an order where

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71 *Ibid*.

72 [2004] 1 S.L.R. 382, at para. 15. The Court of Appeal actually stated: "In other circumstances, the compelling reason may well be 'the justice of the case' or the 'prevention of abuse'." These two considerations are enshrined in O. 92, r. 4.

73 Unless it is privileged from disclosure.

74 The court may consider its own needs as, for example, whether it would be able to deliberate more effectively if it were to exercise its inherent jurisdiction. In *Wee Soon Kim*, the Court of Appeal did not conclude that the joinder of the solicitors would have assisted the court. This was because all necessary documents were before the court.

75 Section 204 is within the chapter XI, which is entitled: "False Evidence and Offences against Public Justice".

76 Such as whether he acted intentionally, recklessly or accidentally.

77 See above: "Whether the Singapore Courts Have the Inherent Power to Grant Relief to a Party Who Has Suffered Injustice as a Result of the Destruction of Material Evidence Before the Commencement of Proceedings".

intentional non-compliance with discovery obligations in the course of proceedings has either resulted in the impossibility of a fair trial or there has been an abuse of process "as to render further proceedings unsatisfactory and to prevent the court from doing justice".[78] In *McCabe*, the Court of Appeal ruled that the court may exercise this power to terminate a case[79] where the conduct constitutes an attempt to pervert the course of justice (in the Singapore context, an offence pursuant to s. 204 of the *Penal Code*) or criminal contempt and this is the case presented by the innocent party.[80] If one considers, firstly, the judicial reluctance to terminate a party's case even in the context of non-compliance with discovery rules in the course of proceedings and, secondly, the individual's general entitlement to dispose of his own documents (being his property),[81] it is unlikely that a Singapore court would terminate a case for pre-action destruction of documents unless the conduct is unlawful or so reprehensible that the court's failure to respond would compromise its dignity. That said, it is not inconceivable that a court might terminate the culpable party's case, despite the absence of prejudice to the innocent party (so that a fair trial remains possible),[82] on the basis of abuse of process. It is harder to imagine a more serious abuse of process than a situation in which a party seeks relief from the very system which he has corrupted for his own purpose.[83] As has been said, "A litigant who mocks a court of law cannot in principle be allowed to invoke the assistance or the adjudicative facilities of the court."[84] Although the act of destroying the documents may have occurred before any "process" was commenced, it is the institution of the proceedings in these circumstances which constitutes the abuse and, therefore, is a ground on which the court can exercise its inherent power to dismiss the action.[85]

### B. *Orders Other than the Termination of the Culpable Party's Case*

According to the Court of Appeal in *McCabe*, the same principle applies whether a court dismisses an action/strikes out a defence or makes any other order in response to

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78 Chadwick L.J. in *Arrow Nominees Inc. v. Blackledge*, *The Times*, 7 July 2000; [2001] B.C.C. 591 at para. 54. Also see *Douglas v. Hello! Ltd. (No. 3)* [2003] E.M.L.R. 29 at paras. 88–90; *Danvillier v. Myers* [1883] W.N. 58; *Caven-Atack v. Church of Scientology Religious Education College Inc.*, 31 October 1994 (unreported judgment of the English Court of Appeal). There are other grounds as well including intentional non-compliance with court orders. See, for example, *Federal Lands Commissioner v. Neo Hong Huat* (Suit 721 of 1997; judgment dated 22 April 1998); *Logicrose Ltd. v. Southend United Football Club Ltd.*, *The Times*, 5 March 1988; *Landauer Ltd. v. Comins & Co.*, *The Times*, 7 August 1991; *Coleman v. Dunlop Ltd.* (unreported judgment of English Court of Appeal dated 20 October 1999).

79 In addition to other orders it might make. See below, "Orders Other than the Termination of the Culpable Party's Case".

80 See above, "Decision of the Court of Appeal in *McCabe* and Its Subsequent Endorsement by the English High Court".

81 Assuming no legal rule applies requiring him to keep the documents. *Supra* note 1.

82 As, for example, when the facts can be proved by evidence other than the destroyed documents.

83 Such conduct would be clearly caught by s. 204 of the *Penal Code*.

84 *Per* Lai Kew Chai J. in *Lee Kuan Yew v. Tang Liang Hong & Anor. and other actions (No. 2)* [1997] 2 S.L.R. 833 at para. 6.

85 Note, however, the recent observations of Sir Andrew Morrit V-C in *Douglas v. Hello! Ltd. (No. 3)* [2003] E.M.L.R. 29 at para. 90, in which his Honour stated that the only concern of the court is whether the breach of the discovery rules would compromise the fairness of the trial (citing *Arrow Nominees Inc. v. Blackledge*, *The Times*, 7 July 2000; [2001] B.C.C. 591 and *Logicrose Ltd. v. Southend United Football Club Ltd.*, *The Times*, 5 March 1988).

pre-action destruction. That is, there must have been an attempt to pervert the course of justice or criminal contempt before the court intervenes at all (apart from drawing an adverse inference).[86] It is submitted that this approach is too inflexible because it does not take into account circumstances which may justify intervention in the interest of the prejudiced party even in the absence of criminality. There is no reason why a court should not be trusted to act to make necessary orders to prevent injustice on the basis of the principles already established by the Singapore courts.[87] For example, in the scenarios described in this article,[88] the court might consider disallowing the culpable party from raising arguments and adducing any evidence in respect of one or more of his allegations which might have been refuted by the innocent party if the latter had been given access to the destroyed evidence.[89] Indeed, short of abuse of process,[90] it may not be fair to the culpable party to relieve the innocent party of his legal obligations to establish certain elements of his claim or defence where his ability to do so has not been compromised by the missing evidence.[91] Where the facts can be proved by evidence other than the destroyed documents (for example, copies in the possession of a third party), the court should direct that discovery be given of this alternative source in the interest of a fair trial.[92] The court might also penalise the culpable party in costs[93] or make any other order which is just.[94]

### C. *Adverse Inferences*

A court may draw an adverse inference if it is appropriate to do so. Section 116 of the *Evidence Act* states:

> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

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86 The circumstances in which a court might draw an adverse inference are considered below, under "Adverse Inferences".

87 See above: "Whether the Singapore Courts Have the Inherent Power to Grant Relief to a Party who has Suffered Injustice as a Result of the Destruction of Material Evidence before the Commencement of Proceedings".

88 See the main text after note 51.

89 See *Dillon v. Nissan Motor Company Ltd.* 986 F. 2d. 263 (8th Circ. 1993). The plaintiff, who claimed to be injured as a result of a defect in his motor vehicle, arranged for the vehicle to be destroyed after it was inspected by his own expert. The court ruled that he could not adduce evidence relating to the inspection of the vehicle.

90 See the last part of the preceding paragraph. Where there has been abuse of process, the court may terminate the whole action even though the destroyed documents only concern one or more of the issues in the case. The reason often given is that the whole case has been tainted. See *Danvillier v. Myers* [1883] W.N. 58; *Caven-Atack v. Church of Scientology Religious Education College Inc.*, 31 October 1994 (unreported judgment of the English Court of Appeal).

91 This point was made by the Court of Appeal in *McCabe*, at para. 188.

92 Assuming there are no objections to disclosure and production such as privilege and subject to the conditions imposed by the rules as to discovery against third parties.

93 See *Capellupo v. F.M.C. Corporation* 126 F.R.D. (D. Minn. 1989); *Turner v. Hudson Transit Lines* 142 F.R.D. 68 (S.D.N.Y. 1991).

94 Pursuant to the court's inherent power.

Paragraphs (a)–(i) of the section illustrate the circumstances in which the court may make a presumption of fact (or draw an adverse inference). Being illustrations, the court may presume the existence of a fact in other circumstances when this is justified. Furthermore, although s. 116 applies to the course of a trial,[95] there is no reason why a court should not draw an adverse inference in an interlocutory matter as a matter of common sense. The closest illustration to a situation in which a person has destroyed documents is illustration (g), which provides that "evidence which could be and is not produced would if produced be unfavourable to the person who withholds it". As the destruction of material evidence is a more serious infraction than mere non-production (because destroyed evidence is impossible to recover),[96] the question arises as to whether the Court of Appeal's ruling in *McCabe*—that unless the culpable party's conduct constitutes an attempt to pervert the course of justice or criminal contempt, the court may only draw adverse inferences—is too limiting. An adverse inference may not be sufficient to redress the balance of justice if, for example, the destroyed evidence is crucial to the innocent party's case. Indeed, the culpable party may be only too willing to subject himself to an adverse inference if he believes that the harm to him is minimal compared to the damage inflicted on the innocent party.[97] Furthermore, the discretionary character of the presumption (the court is entitled not to draw an inference) may indicate a more limited impact than would be justified.[98] The doctrine of *omnia praesumuntur contra spoliatorem* (which presumes the very worst against the destroyer) is more forceful in this context.[99]

## VIII. Concluding Observations

In deciding that a court may only intervene in respect of pre-action destruction of evidence when there has been an attempt to pervert the course of justice or an act constituting criminal contempt, the Court of Appeal in *McCabe* set the balance between a person's right to control his own documents and the preservation of evidence in the interest of justice at the point of criminality. It has been suggested that while this may be a basis for terminating the culpable party's case,[100] a more flexible approach is apposite when his conduct, though not illegal, can nevertheless be classified as "wrongful". That is, where he lacks the specific intention necessary for a prosecution under s. 204 or for criminal contempt but acted in a manner which reveals that he was aware that the evidence would be crucial to future proceedings or showed a reckless disregard in this respect.[101] In these circumstances, the court should be entitled to intervene (by making the necessary orders) to redress the injustice (if any) suffered

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95 See s. 2(1) of the *Evidence Act* (Cap. 97, 1997 Rev. Ed. Sing.).

96 Whereas, in a situation involving non-production, the culpable party may change his mind and produce the evidence (for example, if he is admonished by the court).

97 In *McCabe*, Eames J. stated (at para. 376): "The defendant in choosing to destroy documents did so in the face of advice that these inferences might be drawn against it. It must be assumed that the defendant regarded the damage which the defence would suffer if the inferences were drawn against it, as being outweighed by the damage that it would suffer if the plaintiff had access to the documents".

98 See below, under "Concluding Observations".

99 The definition of this principle and its potential significance is considered below, under "Concluding Observations".

100 See above, "Termination of the Culpable Party's Case".

101 See the four scenarios (in the main text after note 51) and the discussion under "Adverse inferences" (immediately above).

by the innocent party.[102] Whether it does so or not and the form of relief granted (if the court does decide to intervene) depends on the specific circumstances of the case.[103] This broader principle is more appropriate in the civil context because there has been wrongful conduct: the culpable party has knowingly or recklessly deprived the innocent party of his right to rely on evidence thereby causing harm to the latter. The suggestion here is not that the culpable party has acted tortiously and that, therefore, the innocent party is entitled to substantive relief.[104] Rather, these circumstances give rise to a procedural basis for intervention by a court the scope of which should be sufficiently broad to redress the balance of justice. There are also important policy considerations here. The act of depriving the innocent party and the court of relevant evidence has the same effect whether committed before or after the commencement of proceedings. If a person believes that he only has to worry about judicial scrutiny once the legal proceedings have been commenced, he could destroy material evidence with impunity. Furthermore, if his civil responsibility is to be measured only by his criminality, he is in a position to abuse the system by ensuring that his conduct does not constitute an offence under s. 204 of the *Penal Code*.[105]

A more general objection to the Court of Appeal's approach in *McCabe* is that the extension of criminal law principles to the civil process is not appropriate when one considers that the latter is concerned with adversarial equality, not the conviction and punishment of criminals. If the innocent party who has been wrongfully deprived of evidence necessary for his case can only expect relief if a crime has been committed, he is effectively being put in the position of a prosecutor. Although he would only have to establish the elements of s. 204 of the *Penal Code* on a balance of probabilities,[106] even this standard may be particularly onerous if he has no knowledge of the circumstances of the destruction, which is extremely likely when documents have been secretly destroyed prior to the commencement of legal proceedings and before any curial supervision can take place. There is an evidentiary principle to the effect that the party with sole or particular knowledge of the circumstances may have to bear the burden of proof.[107] If applied to the issue under consideration, this would mean that once a party has established that the documents he seeks to rely on have been destroyed by the other party, the latter would have to prove on a balance of probabilities that the destruction was not wrongful. A related and more specific doctrine is the common law presumption of *omnia praesumuntur contra spoliatorem*, which literally means "all things are presumed against the destroyer".[108] The effect

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[102] See above, "Orders Other Than the Termination of the Culpable Party's Case".

[103] The court would take into account such matters as the nature of the culpable party's conduct and the ensuing prejudice suffered by the innocent party.

[104] Such a tort is not recognised in Singapore. Some American states recognise a tort of spoliation. Orders given in the United States have extended from the dismissal of the action (*Capellupo v. F.M.C. Corporation* 126 F.R.D. (D. Minn. 1989)) or allowing judgment to be entered (*Carlucci v. Piper Aircraft Corporation*, 102 F.R.D. 472 (1984)) to lesser sanctions such as disallowing the responsible party from pursuing a particular allegation (by directing that it be struck out or not allowing him to adduce evidence on it) (*Dillon v. Nissan Motor Company Ltd.*, 986 F. 2d. 263 (8th Circ. 1993)), drawing an adverse inference (*Turner v. Hudson Transit Lines*, 142 F.R.D. 68 (S.D.N.Y. 1991)) or imposing a costs sanction against him (as in *Capellupo* (above)).

[105] As shown in the scenarios above (main text after note 51).

[106] According to the Court of Appeal in *McCabe* (see main text after note 23).

[107] See s. 108 of the *Evidence Act* (Cap. 97, 1997 Rev. Ed. Sing.).

[108] Sometimes this doctrine is applied more generally to wrongdoers. See *Black's Law Dictionary*, 6th ed., 1990 at 1086: "All things are presumed against a despoiler or wrongdoer". Cases in which the doctrine

is that the person who destroyed the evidence has to rebut the presumption by proving on a balance of probabilities that he did not act wrongfully.[109] Assuming the presumption is not rebutted, the court would have a free hand[110] in determining the extent (if any) to which it should reject either the "wrongdoer's" position on the issue to which the destroyed evidence relates or his entire case (assuming that the court considers that his whole case has been tainted by his conduct). The court would then make the proper inferences against the destroyer and/or any appropriate orders to redress any injustice which has occurred.

## IX. Lawyer's Duties

Lawyers have a legal responsibility "to take positive steps to ensure that their clients appreciate at an early stage of the litigation, promptly after the writ is 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".[111] The lawyer must also advise his client of any statutory provisions which prohibit the destruction of documents (whether or not they apply in the context of pending litigation).[112] If the lawyer is aware that his client intends to destroy material evidence in anticipation of legal proceedings, he must warn the latter that such conduct could constitute criminal contempt or an offence pursuant to s. 204 of the *Penal Code*. Even if the destruction would not amount to a criminal act, the client should be informed that his case may be compromised by the court's response to such conduct.[113] If the lawyer is aware that relevant documents have been destroyed, he has the responsibility of ensuring (with his client's consent) that the list of documents indicates these circumstances.[114] If the client's consent is not forthcoming, the lawyer must apply to be discharged because he can no longer act without misleading the court.[115]

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has been applied in the context of evidence include: *St. Louis v. the Queen* (1895) 25 S.C.R. 649 at 652-3; *Spasic Estate v. Imperial Tobacco Ltd.* [1998] 42 O.R 3d. 391 at para. 28. In *Min Hong Auto Supply Pte. Ltd. v. Loh Chun Seng & Anor.* [1993] 3 S.L.R. 498, the Singapore High Court considered the doctrine in the context of non-production of evidence.

109 Wrongfully in a civil rather than criminal context. See the first paragraph under "Concluding Observations".

110 This is indicated by the words "everything … is to be presumed".

111 *Per* Megarry J. in *Rockwell Machine Tool v. E.P. Barrus (Concessionaires)* [1968] 1 W.L.R. 693 at 694. Also see *Koh Teck Hee (t/a Mui Teck Heng Garments & Trading) v. Leow Swee Lim (t/a Meyoung Trading)* [1992] 1 S.L.R. 905 at 909; *Infabrics v. Jaytex* [1985] F.S.R. 75; *Woods v. Martins Bank* [1959] 1 Q.B. 55 at 60; *Myers v. Elman* [1940] A.C. 282.

112 Examples of such provisions are given in note 1.

113 See above: "If the Court Does Have the Power to Intervene, What Might It Do?".

114 The list must indicate documents which have "at any time been, in [the respondent's] possession, custody or power, and if not then in his possession, custody or power, when he parted with it and what has become of it." Also see Form 40 of Appendix A of the Rules of Court which requires such documents to be listed. The lawyer must not conduct the case as if the destroyed documents continued to exist.

115 Art. 56 of the *Legal Profession (Professional Conduct) Rules* (2000, Rev. Ed.) [LP(PC)R] states that "An advocate and solicitor shall not knowingly deceive or mislead the Court …". Also see Art. 58 of the LP(PC)R, which provides, *inter alia*: "An advocate and solicitor shall cease to act for a client if—(a) the client refuses to authorise him to make some disclosure to the Court which his duty to the Court requires him to make; (b) the advocate and solicitor having become aware during the course of a case of the existence of a document which should have been but has not been disclosed on discovery, the client fails forthwith to disclose it."