

The logo consists of the letters 'M', 'F', and 'B' in a white, serif font, spaced out horizontally against a dark blue square background.

## WhatsApp with disclosure obligations?

Some important guidance for the shipping and trading community in the age of instant messaging

### Speed Read

A decision of Mr Justice Calver of the Commercial Court in *ED&F Man Capital Markets Limited v Come Harvest Holdings Ltd et al* [2022] EWHC 229 (Comm) highlights how unexplained gaps in a party's disclosure of its representative's instant messaging exchanges may lead to negative consequences. Where a litigant deliberately attempts to put records of decision-making processes beyond scrutiny by using instant communication apps but then failing to disclose the relevant communications, it cannot complain if a court later draws adverse inferences from that behaviour.

### What happened in this case?

The claimant ("MCM") was victim to high-value fraud in relation to a series of nickel sale and repurchase ("repo") transactions. At the trial, it was able to demonstrate that it had been presented with fraudulent receipts that persuaded it to advance funds to several of the defendants. The fraud was well planned and hard to detect. When it was first uncovered, those of the defendants' representatives involved used private messaging platforms such as WeChat and WhatsApp, possibly in the belief that that would avoid them leaving a "paper trail".

After a series of disclosure requests, however, Ms He, who was the Senior Vice President of the tenth defendant ("Straits") revealed that her messaging account had been deleted, allegedly by her 2-year-old son. The Judge did not appear to have been persuaded that a baby would be permitted to play unsupervised with a company 'phone. He rejected the excuses given for the failure to preserve the relevant logs (which were that commercial discussions were not done via text messaging or, if they had been, they would also have been evidenced elsewhere such as in emails).

### What are a party's disclosure duties under English law?

Part 31 of the Civil Procedure Rules sets out the principles that govern disclosure of evidence in court proceedings. These include a duty to preserve and to provide all relevant documents that support, or contradict, a party's case. Part 31 defines "document" widely to include emails, texts and other electronic communications, as well as deleted documents and even metadata (that is, information *about* a document) that might show, for example, how a document was created, accessed, modified or destroyed.



## Why is this case of interest to lawyers and operators working in the shipping and trading sectors?

This case concerned repurchase transactions by which a seller raised short-term finance by selling a physical asset or security (in this case metal) and agreed to buy it back later at a higher price. Nevertheless, the principles of disclosure are plainly relevant to shipping and trade operators, and their legal or claims departments, particularly as the use of mobiles and apps for business communications becomes more commonplace.

### The financing scam

A nickel repo seller borrows funds, with the metal acting as the collateral. Given that the deal is essentially a short-term secured loan and that the underlying cargo cannot usually be easily transported, the sale is often conducted by delivery of an original warehouse receipt issued by a London Metals Exchange certified warehouse. The fact that warehouse receipts can be pledged to secure finance gave the defendants the opportunity to deceive third party buyers, which led to the underlying claims.

The receipts issued by Straits in this case appeared to give two of the defendants (“CH” and “MW”) a right to title of parcels of nickel. MCM eventually came to discover, however, that these were worthless counterfeits based upon colour-scanned copies of the original warehouse receipts (“OWRs”) issued by the warehouse to the true owner, Straits. At the trial, MCM alleged that the OWRs had remained with Straits or its financiers at all times, and they were never truly acquired by CH or MW.

The defendants’ fraud unravelled gradually as, one by one, the parties receiving warehouse receipts from Straits asked to be allowed to independently survey the nickel held in the warehouses, to check their inventory. Faced with such requests, Ms He and the third defendant (“Mr Kao”) had to quickly invent explanations as to why a third party (or its auditor) was claiming title to a particular nickel cargo but, according to the OWRs, that parcel of cargo remained with Straits or its bank.

The Judge found that He and Kao maintained contact by WeChat in order to try to overcome the problems caused by those requests to inspect “their” nickel cargo. Emails revealed that one excuse that He and Kao invented was that, whilst the OWRs were held to Straits’ order (as shown in the relevant warehouse records), the third party calling at the warehouse merely wanted to inspect the cargo prior to purchase.

Subsequently, when the warehouse-keepers began raising questions about the apparent ownership discrepancies, He and Kao were able to convince them that the OWRs had been temporarily transferred to Straits’ buyers, in order to explain why the records continued to show the metal as belonging to Straits.

Persuaded by these stories, the warehouse-keepers would grant access to the third parties who had been deceived, for them to inspect the nickel they thought they held. It was impossible for anyone to identify that Mr Kao had





never actually purchased the OWRs from Straits and so could not possibly pass title to those particular parcels of cargo.

When yet more queries from third parties' auditors followed, however, He and Kao finally realised they had a serious problem: if the warehouse-keeper told a third party that Straits had pledged an OWR to its own bank, the third party would discover that it could not simultaneously own the same cargo. The ruse, whereby Mr Kao was able to double-finance with banks such as MCM (despite Straits having already pledged the OWR to its bank), would finally be exposed. This prompted increasingly anxious instant messages recorded in the defendants' (disclosed) QQ chatlog. The Judge cited one such example, in which they appeared to be checking with one other that the relevant bank (or its surveyor) had been deceived:

*"Jessie 10:38:03 AM*

*Hui Ying, is everything OK after ANZ's staff went to the warehouse for inspection yesterday?*

*Hui Ying 10:39:06 AM*

*The warehouse did not say much about it*

*Hui Ying 10:39:07 AM*

*Hor hor*

*Hui Ying 10:39:17 AM*

*It should be fine*

*Jessie 10:39:37 AM*

*Ohh. Okay. Hahaha*

*Hui Ying 10:40:02 AM*

*Haha, let me update you again if there is news."*

The fraud was eventually discovered when one of the defrauded parties questioned the validity of the receipts it held, particularly the serial numbers. Fearful of losing their performance-based bonuses, He and other co-defendants immediately sought to sell off the cargo. A message from He (actually contained in part of the WhatsApp chat group that had been disclosed), warned: *"we must liquidate before Marex make police report"*. When one of the co-conspirators replied, *"It will be good enough of we sell off all the cargoes and not implicated"*, He replied *"Ok, let's pray for that"*. As the Judge wryly summarised: *"Unfortunately for them, their prayers were not answered."*

### **What should we take away from this?**

The *ED&F Man* case serves as an important reminder for litigants, particularly court users, that instant messaging platforms may be stored in the cloud but that does not mean they exist in an abstract, parallel dimension.

Importantly, the decision highlights how deliberate concealment or destruction of material that is plainly relevant can prove fatal to a party's case. The Judge here was not persuaded, following close analysis of all the evidence before him, that Straits' representative's messages and explanations were honest or innocent. The claim succeeded, and the claimant obtained judgment for damages in a sum exceeding USD 282 million.



Also, even if a device belongs to an individual, relevant business messages it contains may be disclosable in the context of litigation. Even where there is no wrongdoing as there was in the case under discussion, such content has the potential to cause commercial embarrassment when rude, sarcastic or, worse still, offensive remarks come to light.

It is increasingly routine to interact and to conduct business by text message as well as by email. That trend looks set to accelerate as communication technology evolves. But, where a party chooses to use instant messaging not just for convenience but - as happened here - to try to conceal a fraud, that by no means guarantees it will have the last “*hahaha*”.

If you have any questions in relation to the issues covered above, please contact the author, Peter Gercans ([pgercans@m-f-b.co.uk](mailto:pgercans@m-f-b.co.uk)) or your usual contact at MFB.



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