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On the Naughty List: inadvisable communications and how to avoid them

By Robert Blackett

This article discusses a few examples of indelicate emails and other communications which have come to light in litigation. A business might reap real (albeit hard to measure) rewards in terms of risks averted, embarrassment spared, money, reputations and careers saved if it could instill in its workforce:

- just how pervasive and durable the electronic record is;
- just how strictly enforced, extensive and effective the obligations of litigants are to search for and disclose documents which are harmful to their case;
- the rigour with which these things will be pored over in any substantial litigation; and
- how little interest courts and tribunals have in what witnesses say and how much more important are the contemporaneous documents (see *Armagas Ltd* v. *Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep 1, where Robert Goff LJ said it was necessary to approach the assessment of factual witnesses "*by reference to the objective facts proved independently of their testimony, in particular, by reference to the documents in the case …*". See also *Gestmin SGPS SA* v. *Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) where Leggatt J said: "… *the best approach for a judge to adopt in the trial of a commercial case is, in my view, 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*").

The need to be mindful of potential litigation when writing emails and other documents is especially pertinent for construction and engineering businesses. Projects take a long time, generate a lot of documents and can lead to substantial disputes in which every off-hand email will be pored over intensely. If a project overruns, or if what has been designed or built doesn't work properly, it will be the contractor which holds most of the relevant evidence and was best placed to understand what happened and where responsibility lies. Hence, while an employer's disclosure may be anodyne, a contractor's can provide a rich source of documents in which delays and defects are debated, blame is apportioned, worst case scenarios are posited and plans for averting them are hatched.

Don't write anything you wouldn't want read in open court?

It's often said that you shouldn't write anything you wouldn't want read in open court. Following that rule would eliminate many of the embarrassing communications which feature in the cases discussed below in which people gossip, boast and banter, express unsavoury opinions and reveal unflattering information about their own disreputable behaviour, bad faith or bad motives

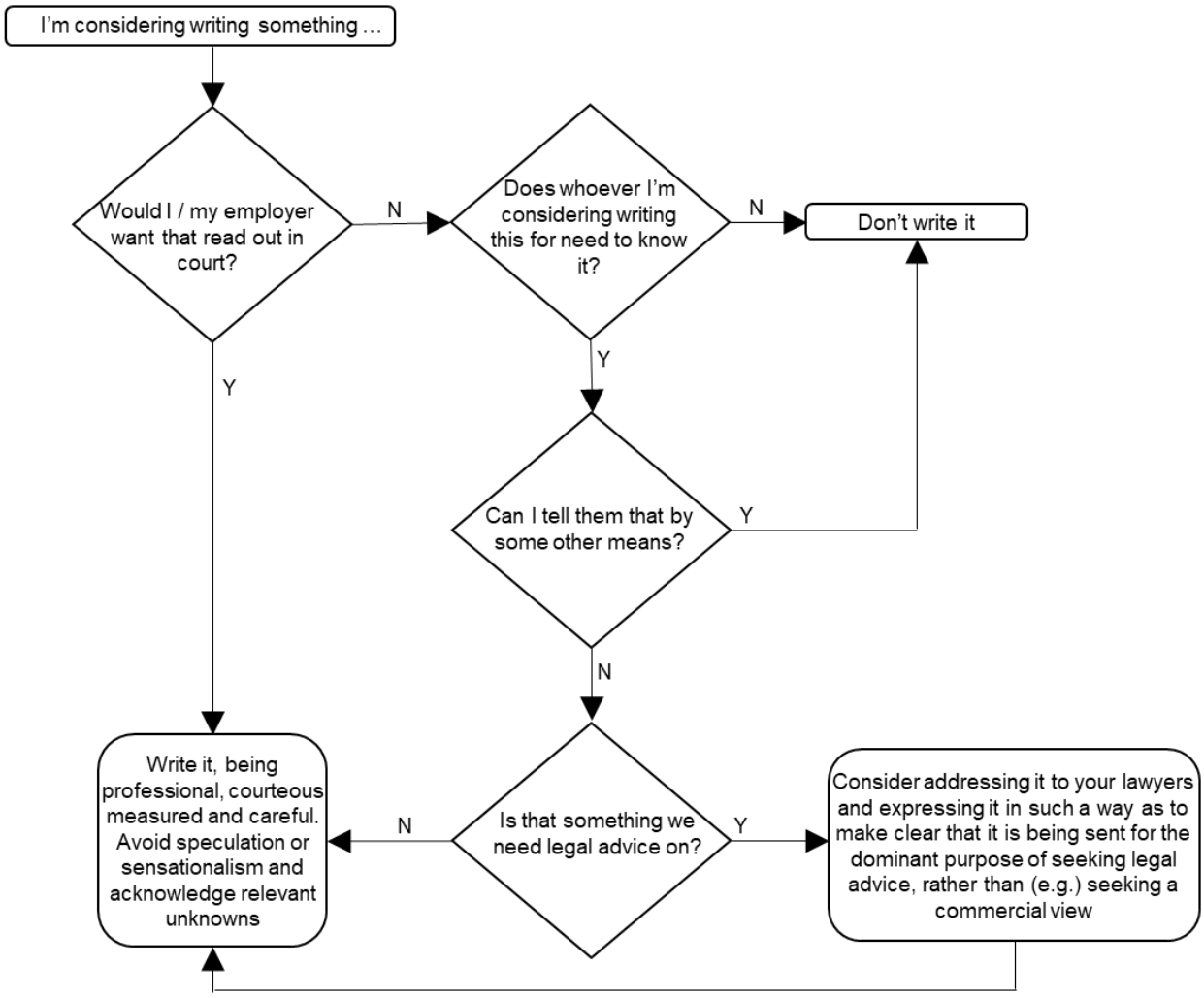
As useful as that rule is, though, it is something of a blunt instrument. One does not want people to refrain from ever writing anything uncomplimentary about their employer and its work or products, burying bad news and being insufferably positive all the time, like officials in Mao's China, reporting ever greater grain surpluses

as people starve. Bad news, risks and problems do need to be discussed and reported 'up the chain' so managers know about them and can decide what to do about them.

Sometimes it is necessary to produce documents, such as reports on potential problems with one's work or products, and the implications. To serve their purpose these need to be frank and accurate, even if the result is not something one would want read out in litigation about the subject matter. A business cannot hope to avoid producing these. A realistic aim is to avoid producing them unnecessarily, ensure they contain no more damaging material than is really necessary and seek to make them legally privileged where one legitimately can.

On this latter point, it is however worth remembering that even privileged documents can end up being read out in court, as some of the cases below illustrate. Don't feel that just because a document is probably going to be privileged, you can let rip and say whatever you want.

A more nuanced gloss on the 'don't write anything you wouldn't want read in court' rule thus might be:



One also needs to be aware that once something has been written down, the damage (in terms of litigation risk) is usually done. Going back and amending the document will generally make things worse, because when and how things were changed will be recorded in metadata and backed-up copies.

Ideally, besides merely discouraging the creation of potentially unhelpful material, a business would want to go one step further and have people recognise the importance of creating documents which might be useful in future litigation.

An obvious example is when receiving information or giving advice over the telephone, to send a follow-up email (or at least take a note) so that there is a contemporaneous record. But there are subtler examples too. For example, where a contract imposes an obligation to act 'reasonably' or in good faith (for example when making an assessment of some application for additional payment, or when seeking to agree a solution to be implemented in response to some technical problem) sending some correspondence to illustrate that

one has indeed given careful, balanced consideration to what the other party had proposed, and recording carefully one's reasons for any decision, are good ideas.

Just as importantly, when someone else sends you their own minute, report or summary, is to be sure to check its accuracy and write back to them with any corrections. Otherwise, in three or four years' time, it is the contemporaneous document which is going to be believed, not your faded recollection that what they wrote was 'not quite right'.

"*Unguarded comments*"

This article was largely prompted by *Essex County Council* v *UBB Waste (Essex) Ltd (Rev 1)* [2020] EWHC 1581. Early in the judgment, Pepperall J observed:

> "*UBB's disclosure includes a number of internal documents in which UBB personnel exchanged unguarded comments. … it may well be that the Authority was, at least on certain issues, more astute to avoid recording matters in writing.*"

The contractor's disclosure featured both cringeworthy emails which made witnesses look dishonest and internal reports tending to show (contrary to the position taken at trial) that what the contractor had built was not in accordance with the contract. To really appreciate them it is first necessary to explain something about the matters in dispute – please bear with me as I promise the emails are worth it.

Setting the scene

In May 2012 Essex County Council (the "**Authority**") had retained UBB Waste (Essex) Ltd ("**UBB**") to design, construct, finance, commission, operate and maintain a mechanical biological treatment ("**MBT**") plant at Basildon in Essex, to process the county's household waste, both 'black bag' waste collected from homes and "**HWRC**" waste, from Household Waste Recycling Centres (where bulky items like furniture and mattresses could be taken). UBB was a joint venture between Urbaser Limited and Balfour Beatty Investments Limited. The contract was worth around £800 million over 25 years. After construction the contract anticipated a commissioning period followed by Acceptance Tests. Once these were passed, UBB would become entitled to be paid higher rates for operating the facility. If the plant failed to pass by a certain longstop date, the Authority would be entitled to terminate the contract.

Waste the Authority delivered to the plant was to be tested regularly. If its composition should fall outside certain limits ('Band A') and this could not be rectified by sourcing 'better' waste, UBB would (simplifying somewhat) be entitled to an extension of time for any consequent delay, and to be paid any associated costs and the costs of any modifications which might be required to be made to the plant.

The plant (christened Tovi EcoPark) is not the stereotypically utilitarian industrial building one might have expected, some thought clearly having gone into the design and landscaping of the public facing parts. For a picture see e.g. http://www.ubbessex.co.uk/wp-content/uploads/2013/12/UBB-Winter-Newsletter-2015.pdf. Construction was completed in November 2014, but the plant then failed to pass contractual Acceptance Tests within required time.

To pass the Acceptance Tests the plant had to deliver certain levels of performance when operating in each of what were termed "**SRF**" mode and "**bio-stabilisation**" mode. In each mode the plant had to achieve a minimum throughput, while removing from the waste a certain proportion of any recyclates (card, metals, certain plastics, aggregates, largely comprising stones and glass) it contained.

In SRF mode, the rest of the waste was to be turned into 'solid recovered fuel', which was required to meet a particular specification and could be burned to generate power. In bio-stabilisation mode, the balance of the waste was required to be turned into 'stabilised output material' ("**SOM**") which would go into landfill.

When tested in bio-stabilisation mode, the plant was required to achieve a certain level of 'recovery' and a certain level of 'BMW reduction':

- Recovery meant the difference between the weight of material delivered to the plant and the weight of material going to landfill. This recovery could be achieved through: (i) recyclates being removed; (ii) gas being vented as material biodegraded (presumably also through water evaporating or draining out of the waste).

- "**BMW reduction**" meant reducing the potential of any 'biodegradable municipal waste' ("**BMW**") which the waste contained to produce methane (a greenhouse gas). BMW biodegrades more quickly and produces less methane if it biodegrades aerobically (in an oxygen rich environment) than anaerobically (in an oxygen poor environment).

As originally designed, irrespective of what mode the plant was operating in, most waste received by the plant would first be passed through a 'pre-processing unit' where it was subjected to various manual and mechanical processes intended to identify and remove card, metals and certain plastics and then shredded. The exception was HSFW which was simply shredded and then metals removed with an electromagnet. All the remaining waste (including the shredded HSFW) was next to be subject to 'bio-stabilisation'. This involved moving it over a period of several weeks through huge 'biohalls' (each twice the size of a football pitch) during which time the waste would repeatedly be turned over mechanically with a rotopala bucket wheel to aerate it. This would (in theory) allow a large proportion of the BMW it contained to biodegrade aerobically to produce the requisite recovery and BMW reduction. A short video showing the equipment used can be seen at https://youtube/l60C67geya4. The scale of the plant can be seen at https://www.tatasteelconstruction.com/en_GB/tata-steel-case-studies/industrial/Tovi-Eco-Park. After the biohalls, the bio-stabilised waste would have aggregates (glass, stone) removed, and the balance would be output as SRF or SOM.

The plant proved to be capable of the required throughput and recyclate recovery in SRF mode and of producing SRF of the required quality. The problem with the plant was that when operating in bio-stabilisation mode it did not achieve the throughput tonnage, BMW reduction and recovery needed to pass the Acceptance Tests.

The dispute

The plant's failure to pass the Acceptance Tests engendered a slew of adjudications (at least five). Litigation in the Technology and Construction Court started in April 2017 (there was also a spin-off case in the Administrative court challenging one of the Authority's planning decisions). The disclosure process alone

reportedly cost the parties around £10 million (see the judgment on costs and interest [2020] EWHC 2387 at paragraph 58.4). There were several weeks of hearings, during 2019. The main judgment was handed down in June 2020, a bit over three years after the proceedings began.

In the main TCC litigation the Authority sought a declaration that since the plant had failed to pass the Acceptance Tests by the longstop date the Authority was entitled to terminate the contract. The Authority also claimed to recover losses it had suffered by reason of the Plant's underperformance.

UBB denied these claims seeking an extension of time and (by the end) around £100 million of additional payment. UBB's claim was not straightforward.

- UBB may, at one point, have been claiming it was prevented from passing the Acceptance Tests by the waste composition having fallen outside Band A (paragraph 3.1) but UBB latterly seems to have accepted that the plant, as originally designed, had not been capable of passing the Acceptance Tests, even with Band A waste (e.g. paragraph 169).

- UBB claimed it was entitled to have modified the plant by adding and then operating what it called a "**QSRF line**" whereby, even when the plant was operating in bio-stabilisation mode, about 25% of the waste would simply be shredded and immediately (as the Authority's expert put it) "*pushed out the back door*" as 'Quick' SRF having entirely bypassed the biohalls and not undergone any bio-stabilisation. UBB seems later to have conceded, however, that even with the QSRF line, the plant could not have passed all the Acceptance Tests in bio-stabilisation mode (paragraphs 302, 305).

- UBB argued that, although the contract required the plant to be tested in both modes and meet performance criteria in each, the Authority had no right to insist that the plant be tested in bio-stabilisation mode because doing so would result in output being disposed to landfill rather than used for energy production. This is contrary to the 'waste hierarchy' which local authorities have to observe under the Waste (England & Wales) Regulations 2011 (paragraph 138.4).

- UBB argued that because the contract was a very long-term 'relational' contract it imposed upon the Authority an implied duty to act in good faith and not irrationally, arbitrarily or capriciously. This, UBB seems to have argued, meant the Authority could not insist on its right to have the plant pass the contractual Acceptance Tests, but was obligated to have agreed, in exchange for a reduction in UBB's fees, to us a different test which the plant could pass, and/or agree that the plant need only ever be tested / operated in SRF mode.

A rubbish outcome

The judge found that during the relevant period the composition of the waste had been within the contractual limits. The problems with the Plant were not due to the composition of the waste but UBB's defective design (which the judge described as "*little more than calculations on the back of the proverbial fag pack*"). UBB had greatly overestimated how dense the waste would be on arriving at the biohalls, so had underestimated how big the biohalls needed to be and, to win the contract, had recklessly guaranteed that its plant would achieve an unrealistically high level of BMW reduction, which was not based on any real analysis or calculation. UBB had not been entitled to add / operate the QSRF line and, in any case, the plant would still be incapable of passing the Acceptance Tests even with the QSRF line. The Waste Regulations did not

prohibit the Authority from insisting that UBB test the plant in bio-stabilisation mode to demonstrate the contracted for performance. And it was "*hopeless to suggest that the Authority was under a contractual obligation to agree fundamental changes to the contract and the Acceptance Tests in order to keep the project on track*".

The Authority was thus entitled to terminate the contract, around £10 million for losses caused by the plant's underperformance to date, and around £100,000 per month for its ongoing losses. In August 2020 UBB was placed into administration, and the plant reportedly stopped accepting waste, causing the Authority thereafter to send waste to landfill under a series of short term contracts, and to incur additional landfill tax. In September 2020 the Authority was awarded indemnity costs and has reported that UBB's application for permission to appeal has been refused by the trial judge. In October 2020, the Authority announced that it was launching a competition, inviting new bids to supply the county's waste disposal services, but that it would be forced to continue sending large quantities of waste to landfill until at least March 2021.

"*Don't tell anybody but …*"

The judge was critical of UBB's lead designer, Pedro Faraldo. As the judge put it "*a number of documents cast doubt as to Mr. Faraldo's integrity*".

During the bidding process, Mr. Faraldo had proposed maximum odour levels for the plant expressed in ou/Nm^3 (odour units per normal cubic metre) rather than ou/m3, as the invitation to bid had specified. This, said the judge, "*was not a simple error but an attempt to obtain advantage that Mr. Faraldo hoped no one would spot*". He had written to a colleague:

> "*Don't tell anybody but I used ou/Nm3, that means that the 1,500 is actually 1,500 ou/Nm3 jejeje …*"

Indicating that his instinct was not to be honest if pulled up on the point, he added:

> "*Hope yes, let's try that they don't realise, in any case if they pick it … we can just say that was a mistake and include to ou/m3*"

He later concluded using Nm^3 did not favour UBB and wrote:

> "*Fuck, the stupid is clearly me, it is worse for us using the ou/Nm3, so we need to go back to Alex* [the Authority's technical manager]*, I'll do it?? Or shall we tell him that someone doing a prove* [sic] *reading spoted* [sic] *it (to avoid probs??)*"

"*We must come clean*"

The Authority published the criteria it would use in assessing bids which would assign a relatively high 'score' to bidders who guaranteed a BMW Reduction of more than 84%. UBB bid on the basis that its design was guaranteed to achieve an 84.2% BMW Reduction. This was not based on any real calculation but because, as the judge put it, "*there was some magic in that 84% threshold*".

UBB and the subcontractor which was to design the biohalls were unfamiliar with the "*BMc*" test which was going to be used to measure BMW reduction at the plant. The performance of other plants the subcontractor had designed were measured and guaranteed by reference to a different testing methodology / metric called "*AT4*" which is used in continental Europe. UBB asked the Environment Agency if there was any data on the performance of other plants measured according to the BMc metric which it could use. The EA didn't know but cautioned UBB that, in any case, different MBT plants' configurations, the composition of the waste they treat, and so the BMW reduction they achieve varies vastly. Arguably, UBB should have found a comparable plant and run BMc tests and AT4 tests to work out the correlation. Instead UBB simply asked the subcontractor which was to supply the biohalls for a "*quick estimation*" as to their performance. The subcontractor replied stating the performance it had guaranteed to achieve at a plant in Vacarisses, near Barcelona which was unfinished, untested, had a different configuration to the Essex plant, would be treating different waste and where the guaranteed performance was expressed only in terms of AT4.

From this unpromising data an external consultant calculated the Essex plant might achieve a 76.2% BMW reduction, but cautioned this was based on several assumptions (particularly about the correlation between BMc and AT4) which would need to be confirmed. UBB nonetheless immediately reported to the Authority that its plant would achieve 80% BMW Reduction. When the Authority asked how this was calculated, UBB wrote to the consultant "*The Council has asked us to provide a rationale for the 80% of BMW reduction, I have modified the file to justify this value … can you please check there is nothing strange and that we can justify it if they ask for further explanations*". The consultant swiftly replied: "*I think its (sic) ok. I hope it is anyway!*". UBB prepared some further calculations, this time showing the magic 84.2%, still based on the unverified values and assumptions, for which the judge found there was "*no proper basis*".

Late in the bidding process alarm bells began to ring within UBB. Balfour Beatty's internal emails included the following exchange: "*It looks like they* [Urbaser] *may well have guaranteed a rather racy BMW diversion performance - which it looks like it was based on untested and simplified assumptions*" "*Ultimately if we need to change our position or simply cannot deliver this guarantee then we must come clean and see what Essex want to do*".

As the judge observed: "*Unfortunately, UBB did not then "come clean." Instead, it stood by its 84.2% guarantee and ultimately contracted … on the basis of this flawed guarantee*".

In the event the plant proved incapable of that guaranteed performance. An internal UBB report produced after the problems with the design had become apparent would later record that: "*84% BMW reduction … is unattainable … The 84% was bid in error*".

"*The facility will never operate as intended*"

UBB's design assumed the density of waste received by the plant would be 0.35 t/m^3 but would increase to 0.55 t/m^3 by the time the waste reached the biohalls, after pre-processing, where recyclates were removed and the waste was shredded. This was not based on any calculation but a quick exchange of emails in which Pedro Faraldo had asked Taim Weser, the subcontractor which was to supply the biohalls, for "*a quick review of our estimations*", and the subcontractor had suggested, based on its experience, that waste arriving in the biohalls might be 0.55m^3.

UBB never sought to calculate what the effect of the pre-processing would be on the density, did not ask Masias, the designer of the pre-processing plant, what the impact of its process on density would be and did not contract with Masias on the basis that Masias was required to deliver output waste at a specified density. As the judge put it: "[d]*espite Mr Faraldo's* [UBB's chief designer's] *acceptance in cross-examination that "no one in their right mind" would design a £100 million facility on the basis of the quick review in the exchange of emails … I am driven to the conclusion that that is precisely what UBB did*".

When the plant came to be commissioned, the density of waste arriving in the biohalls proved to be only 0.3 t/m3, about half what UBB had designed the plant for. The realisation dawned that the biohalls were about half the size they needed to be, and the plant could only treat waste at around half the rate it needed to.

An internal Balfour Beatty note recorded: "*During the last period it has been established that the facility will never operate as intended. To process the waste at the density currently being achieved (which is now reported to be normal) at the biohalls, indicates the halls are approximately 50% undersized …*

Verbally David Silva [of Urbaser] *has admitted to getting the original density assumption wrong and accepts that this has lead (sic) to a facility design that is incapable of achieving the required throughput*."

"*You don't need a super bullshitter to tell a judge that …*"

Mr. Faraldo wrote in an internal email "*You don't need a super bullshitter to tell a judge that we gave them the composition, and that* [Taim Weser] *as a technological expert, formulated its own density hypothesis (it's true that we validated it at the time, but okay, if we send a British person, they'll surely cope with it).*" Presumably this was in the context of a discussion as to whether UBB could successfully pursue a claim against Taim Weser. The implication seems to be that Mr. Faraldo considered himself "*a super bullshitter*" who could convince a judge that the issue was Taim Weser's fault.

"Vender la moto"

A series of internal documents and a report from an outside consultant examined the problems with the plant and identified modifications which UBB could make to try to overcome the problem with the biohalls (while recognising that even with these changes, it was probably going to be impossible to pass the Acceptance Tests). A "*Red Team*" UBB had formed to investigate the problem indicated that it was not rectifiable and recommended that UBB try to renegotiate the contract and 'buy down' the performance it had to achieve (estimating the cost of doing so as £77 million). A paper headed "*Nightmare Scenarios*" identified that, failing a successful negotiation, UBB would be in default and the authority would be entitled to terminate.

One of the actions identified by UBB was to shorten the time the waste would spend in the biohalls from 7 weeks to 6 weeks. To make this change to the design / method would require the Authority's approval.

An external consultant advised UBB that reducing the bio stabilization period to 6 weeks would "*rely on unrealistic biological degradation results to be able to operate successfully*". Mr. Faraldo nonetheless emailed Alex Creecy (the Authority's technical manager) a proposal to reduce the time waste would spend in the biohalls from seven weeks to six weeks, including some data which was intended to show that most biological activity occurring in the first two to three weeks. Mr. Faraldo concluded: *"That leads us to believe*

the risk of the 6 week process versus the 7 week, is minimum or non-existing (sic) …". Allowing the reduction in treatment time would not result in the waste being treated to a lower standard.

Mr. Faraldo forwarded the email he had sent Mr. Creecy to two colleagues with the comment "*today's motorbike selling*" (in Spanish). Mr. Faraldo accepted in cross-examination that this idiom translated to being a second-hand car dealer (Wiktionary defines "*vendemotos*" - motorbike seller - as a colloquial term for someone who can easily talk somebody into buying things they don't need or things of low quality).

Mr. Creecy replied that the data shared by Mr. Faraldo had given him "*some confidence*" as to the likely impact of shortening the residence period in the biohalls so that he was inclined to accept the proposal. Mr. Faraldo forwarded this to his colleagues, adding "*there you go … at the limit with the 6 week process*". They responded: "*Gooooaaaaaal!!!! Little Peter motorbike seller … top scorer!!!!*" and "*I believe I also had the privilege … of seeing you really fuck Alex, from afar. … Alex sucked it all up* …".

In his monthly internal reports on the project Mr. Faraldo referenced his "*bullshitting on the biohall*" and his "*bullshitting contribution for the biohall*".

"I … don't think I'm so good lying face to face"

Another aspect of UBB's plan to reduce the burden on the undersize biohalls was to make a series of piecemeal modifications to the design the combined effect of which would be to allow a very large proportion of incoming waste to be sent down a new QSRF line where it would be shredded and any ferrous metal would be removed with a magnet but it would then immediately be sent "*out the back door*" as 'quick' SRF having bypassed pre-processing (so no recyclates other would be removed) and the biohalls (so the waste would have undergone no stabilisation).

Mr. Faraldo sought to sell the introduction of this QSRF line to the Authority by explaining that the HWRC waste contained a lot of non-organic, low density material like foam mattresses which would not biodegrade. He described the new line as being proposed to "*increase the flexibility of the overall plant providing the option of not sending 'low-density and low-biodegradability waste' to the bio-stabilisation process*" and represented that "*we do not intend to use this option in the event HWRC contains biodegradable waste or potentially recyclable waste (black bag) that will be run through processing/biohall*". The Authority agreed to UBB's adding this option.

As the judge put it: "*the limited scope of the initial proposal and the low-key description of it as an "option" to add flexibility are, in my judgment, in sharp contrast to UBB's internal realisation that this and other modifications were required in order to address a serious problem caused by a fundamental design error that, left unaddressed, would mean that the facility had no prospect of processing the required throughput of waste*".

UBB then proposed a series of further piecemeal changes to the design, adding extra shredders and magnets and characterising these as "*improvements*" which UBB was offering to make at no cost to the Authority and assuring that they involved "*no risks*". The combined effect of which would be to greatly increase the capacity of the QSRF line, to handle not just the odd consignment of HWRC waste which contained a lot of mattresses, but much larger volumes of material (around 25% of the waste received by the plant). The Authority would approve several of the modifications.

Mr. Faraldo forwarded some of the associated correspondence to his colleagues identifying three "*bullshitting steps*" and prompting them to respond "*You are a genie. You have them where you need them*". When, however, the Authority raised a question about how UBB was going to sample the HWRC waste, (presumably seeking to understand how UBB planned to distinguish HWRC waste which did not contain biodegradable or potentially recyclable waste, and so was suitable to be sent down the QSRF line) Mr. Faraldo wrote "*I told them that we are finalising the details, but don't think I'm so good lying face to face*".

The last modification UBB proposed was the installation of a walking floor and a trailer unloading system which would allow UBB to operate the plant as UBB had really intended – not just diverting low-density non-biodegradable bulky waste away from the biohalls but achieving the "*full-bore*" diversion of all the HWRC waste down that line. The Authority rejected these modifications.

It is worth mentioning the ambitious argument which UBB would later make on this point at trial. UBB argued that the Authority must have realised (despite what UBB had told) that the modifications the Authority had previously consented to were not really just for occasional bulky inorganic waste, but were to send vast quantities of other waste down the QSRF line and, since the Authority had not objected to those modifications, UBB had proceeded to spend over £2 million on those other modifications on the assumption that it would be allowed to operate the QSRF line in that way. The Authority was thus estopped from resisting further modifications necessary to achieve that. The court was not impressed by this argument. And it was only when UBB requested the walking floor and truck unloading system modifications that the "*the penny … dropped*", with Authority's internal emails showing that Mr. Creecy had been "*genuinely shocked*" when he realised the amounts of QSRF UBB was planning to produce.

"*We can even tell them that in some way the density problem is their fault*"

Sometime after the Authority rejected the proposed walking floor and trailer unloading system, composition testing revealed a drop in the level of BMW waste, which fell below the 'Band A' level. Mr. Faraldo promptly sent an internal email "[p]*erhaps here is one of the answers to all the problems!! (maybe the solution)*" later adding that he was "*getting kind of excited*" and "*We need to tell them the impact that the composition have (sic) in the Commissioning and proposed solution. If it is confirmed, ECC cover all costs, delays etc*". He then sought input from others for the "*Impact and Remedy Report*" which UBB had to submit in these circumstances (identifying the impact, if any, of the divergent composition and proposing a solution): "*The idea is to begin to build a report that can identify the issues created by the 'crappy' waste … we have to focus it on listing every issue that we can link to the lack of biodegradable material … if anyone has any input on the nonsense, it'd be welcome, so if you have any crazy ideas share them*".

As the judge put it: "*Mr Faraldo was contemplating that UBB might be able to seize upon the latest composition data to blame the waste for all ills and propose the acceptance of the QSRF Line and other modifications as part of the necessary solution, all at the Authority's cost. It was an audacious plan given that the true causes of the facility's inability to pass the tests were the serious density design error and the unrealistic BMW reduction bid*" (as UBB knew full well, and had already recorded extensively in its internal correspondence).

Mr. Faraldo's "*audacious plan*" did not work. The judge would later hold that, calculated according to the contractual formula, the composition of the waste did not fall outside Band A by a big enough margin, for long enough, to trigger the 'impact and remedy' procedure. The plant had been incapable of passing the

Acceptance Tests, due to defects in the design and not due to any divergence in the composition of the waste.

Some observations on *UBB v Essex*

It is debatable how much of a role UBB's 'unguarded' internal emails and unprivileged reports played in the judge's ultimate decision.

It is tempting to dismiss UBB's unfortunate correspondence as having played no role whatsoever in the decision. The case turned on the factual questions of whether UBB's plant was capable of passing the Acceptance Tests and, if not, why not. Nothing turned on any question as to UBB's motives and integrity (it was not the case, for example, that the Authority's case rested on proving any bad faith on UBB's side). Mr. Faraldo's credibility was arguably irrelevant too, because the core factual question was a matter for independent expert evidence. It so happened that the court found the Authority's experts more credible, largely because UBB's expert proved to have been subject to a litany of undisclosed conflicts of interest. Ultimately, of course, no amount of internal correspondence, irrespective of how polished and composed it was, could have changed the fact that UBB's plant did not work as promised.

Similarly, the later decision to award the Authority indemnity costs was not expressly based on UBB's conduct, as revealed in UBB's internal correspondence, but on the fact that the Authority had made a Part 36 offer to settle the case, and had then gone on to obtain a judgment which was more advantageous than the offer.

Another view, though is, that judges (consciously or unconsciously) may first choose a deserving winner based on their overall impression and only then compose the judgment following the chain of reasoning which best justifies that result, so that writing a judgment is less like working through an equation to derive the solution, and more like writing a set of directions for how to get to a destination which one has selected in advance. If that is true, then UBB's correspondence, can hardly have engendered much sympathy for UBB, and the hypocrisy they exposed will have made the 'good faith' argument, which UBB's case ultimately rested on, all the more jarring and unpalatable. As the judge put it:

> *"There is some irony in UBB's promotion of the implied term of good faith since it is certainly arguable that it did not itself act in good faith in its original concealment of the density problem, its attempts to replace the BMc test and its piecemeal presentation of the QSRF Line when it understood full well that it needed to divert significant waste away from the biohalls if it was to meet the guaranteed Throughput."*

Even if UBB's 'unguarded' emails and unprivileged internal reports had not caused or contributed to losing this case, that hardly means they were without consequence for UBB. Such material could have reputational impact which long outlives the litigation as any future client doing due diligence on UBB/Urbaser is likely to come across it, preserved forever on the internet in law reports and articles such as this one. A benefit of agreeing that disputes will be resolved by way of arbitration rather than litigation is to greatly reduce the risk of reputationally harmful material coming to light in litigation and being immortalised in the public record.

"*We can get away with the date error*"

An example of a *privileged* communication which the author regretted being read out in court was *Boreh* v *Republic of Djibouti & Ors* [2015] EWHC 769 (Comm). Boreh was a wealthy Djibouti national and the chairman of the board of directors of the country's ports authority. He left Djibouti following a dispute about his and his companies' tax liabilities.

After leaving Djibouti, Boreh was convicted in his absence of terrorism and sentenced to 15 years imprisonment - specifically, for having instigated a grenade attack which had been carried out on 4 March 2009 at a place called Nougaprix. The evidence on which Boreh was convicted consisted of: (i) a covert recording of a telephone conversation, said to have taken place on 5 March, the day following the attack, in which a person named Abdillahi had told Boreh "*last night the act was completed in the first district*" and "*the people heard it and it had a deep resonance*", "*last night we bought the scrap metal and near Harbi Square and the first district the matter was concluded and it went well. Tonight we are counting on concluding the same act*"; and (ii) a transcript (which Abdillahi had refused to sign) of a purported confession Abdillahi made in a police interview, admitting this conversation was him reporting on the grenade attack he had carried out at Nougaprix the day before, the reference to the first district being a coded reference to Nougaprix. The judgment made several references to the fact of the calls having taken place on 5 March.

Djibouti and the port authority brought a claim against Boreh in England, alleging he had improperly profited from his position in various ways and applied for an interim freezing injunction over Boreh's assets. The application, supported by an affidavit from Peter Gray, a partner in Gibson Dunn, the solicitors firm which was representing Djibouti, placed heavy reliance on Boreh's conviction. The injunction was granted. The judgment said:

> *"There is on the basis of the telephone transcript of conversations between Mr Boreh and the Abdillahi brothers, an arguable case that the defendant was involved in and directing terrorist acts in Djibouti. Whilst it is undoubtedly right that somebody who has acted as a terrorist would not necessarily be somebody who would dissipate his assets, in view of all the other evidence, it does seem to me the court is entitled to take a common sense view, and to take the view that somebody who is at least arguably engaged in terrorism is well able and likely to divert his assets to make himself judgment-proof. So it does seem to me that there is a real risk of dissipation here."*

When the matter returned to court, however, it emerged that the transcript of the telephone conversation had been misdated. They were not from 5 March, the day after the attack, but from 4 March, the day the attack occurred. There had not been any attack the previous night, 3 March, so whatever had "*went well*" "*last night*" and was planned to done again "*tonight*" it was not a terrorist attack. Boreh's conviction was unsafe. The court had been misled.

An issue arose as to whether the solicitor had knowingly or recklessly misled the court or whether this was an unintended oversight. The significance of that question for Djibouti was that an applicant for an injunction must come to the court with 'clean hands'. If Djibouti had deliberately misled the court then, even if it would have been entitled to the freezing order for reasons unrelated to Boreh's conviction, its freezing order was liable to be set aside. In an attempt to prove that it had not knowingly or recklessly misled the court, Djibouti waived privilege in documents going to this issue.

It emerged that, in August 2013 a few weeks before the hearing, Mr. Gray had been involved in drafting an extradition request to authorities in Dubai for the extradition of Mr Boreh to Djibouti. A draft referred to an attack on 4 March and the telephone call intercepted on 5 March. Counsel had raised a question as to what time the call took place. One of the firm's associates had obtained the call log and discovered that the calls had in fact taken place on 4 March, not 5 March as stated in the Djibouti judgment. She identified this in an email as "*a critical discrepancy that must be cleared*". Mr. Gray congratulated her on spotting this: "*Many people would not have checked and disaster would most certainly have followed*".

He later sent an email to his team, however, claiming to have discussed the matter with counsel and that "*we agree that having reviewed the evidence, we can get away with the date error*". An attendance note of a meeting to finalise the extradition request recorded Mr. Gray as saying: "*Going to fudge the error of the date …*". This would lead the judge to hold: "*Despite his knowledge that the conviction was unsafe and the evidence on which it was based was unreliable, from 26 August 2013 onwards he adopted a strategy of not revealing this to any court or outside agency such as Interpol. Hence the tactic of "getting away with the date error" or "fudging the error of the date" rather than being entirely open and frank with the Dubai court (and thereafter the English court) about the unreliability of the evidence and the unsafety of the conviction. As I have already held, "fudging the error of the date" was the language of concealment and not the approach of a solicitor of integrity*".

This strategy of not revealing that the conviction was unsafe continued in his affidavit in support of the freezing order application. It referenced Mr. Boreh's conviction, stating equivocally: "*I have provided an English language version of the extradition request submitted by the Djibouti Authorities to the UAE. This evidence in support is at the very least reflective of a case to be answered by Mr Boreh*". There was no mention of the dating error. The misdated transcripts were exhibited. The judge held:

> *"I accept that Mr Gray did not deliberately include the wrong transcripts in the exhibit to his affidavit and this was an inadvertent mistake by the Gibson Dunn staff who put the exhibit together so that when the hearing started he would not have known that the wrong transcripts had been exhibited. However, once Mr Qureshi QC started making the submissions he did on the morning of the first day of the hearing … Mr Gray must have appreciated that the discussion with the court was proceeding on the false basis that the phone calls had been after the Nougaprix attack, not before, as he knew was in fact the position. It beggars belief that he did not realise that counsel and the court were under that misapprehension. … the issue about the telephone calls being evidence that Mr Boreh was implicated in a grenade attack on the Nougaprix supermarket the night before the calls was not the subject of some passing reference, but was an issue to which counsel and the court returned again and again. In those circumstances, I simply do not accept Mr Gray's evidence that because he was tired or doing his emails or leaving it all to Mr Qureshi QC, he was not listening or concentrating. On the contrary, the fact that immediately after the hearing had finished on 11 September 2013, he asked Ms Kahn to include in the draft Interpol letter references to the transcript of the previous day where the court had said there was an arguable case that Mr Boreh was involved in terrorism, demonstrates that he was listening and concentrating as one would expect of the partner in charge of a case of this seriousness, sitting behind counsel in court."*

Djibouti's freezing injunction was set aside and, presumably, Djibouti will have been the subject of an unfavourable costs order. One can see that, absent the emails about getting away with and fudging the date error, the outcome might have been different.

A postscript is that at trial, Boreh would allege that the whole case against him was politically motivated, part of a campaign by the President and those around him to destroy Mr. Boreh politically and personally. The judgment [2016] EWHC 405 (Comm) includes:

> *"One matter of considerable concern, which clearly is part of a concerted campaign against Mr Boreh and his businesses is the false terrorism conviction and the subsequent reprehensible conduct of the Government … The relevant Government officials were clearly complicit, not only in the concoction of false evidence, but in the concealment from the Court of the fact that the conviction was on a false basis and unsafe. The Republic continued to rely upon the conviction knowing it was unsafe, in order to keep Mr Boreh on the Red Notice list and to seek his extradition to Djibouti. …"*
>
> *"… the campaign which has been waged by the President and the Republic against Mr Boreh and his companies and the political motivation for it … does cast doubt upon the bona fides of the claims, ... It provides an explanation for why witnesses called by the Republic did not tell the truth, ... It also provides confirmation of the capricious nature of the regime in Djibouti …"*

All Djibouti's claims against Boreh were dismissed. On 21 May 2020, the Solicitors Regulation Authority published its decision to prosecute Peter Gray before the Solicitors Disciplinary Tribunal in connection with his having misled the court in *Boreh*.

"Churn that bill baby"

A particularly well known case of indelicate emails emerging in litigation emerged in a 2013 fee dispute between law firm DLA Piper and an energy industry executive called Adam Victor. DLA Piper sued their client for unpaid bills, Victor counterclaimed alleging a "*sweeping practice of overbilling*". Some choice emails which emerged in discovery included: "*I hear we are already 200k over our estimate – that's Team DLA Piper!*" and "*Now Vince has random people working full time on random research projects in standard 'churn that bill, baby!' mode. That bill shall know no limits*." Seven years on, these emails are regularly trotted out in new and comment pieces (including this one) doing reputational damage to the firm in question, and probably to the legal profession in general.

"*Make the bait more enticing*"

Thompson v *Arnold* [2007] EWHC 1875 provides another illustration of how even privileged communications written to your lawyers and anything unguarded written in them can sometimes end up being read out in court. A woman was diagnosed as having terminal breast cancer and a short time to live. She brought a claim against a doctor for having previously misdiagnosed the lump in her breast as being benign. Her claim was for the loss she would suffer during her lifetime and funeral expenses, and stated "[a]*fter her death a separate claim will be pursued by her dependents under the FAA* [Fatal Accidents Act] *1976*". Those representing her were evidently ignorant of the fact that an FAA claim cannot be brought where the deceased has already been awarded, or has agreed, damages for his or her injury. Those acting for the doctor's

insurers spotted this mistake and agreed a settlement. The claimant's estate and dependents later sought to set aside the claim on the basis of unilateral mistake. Each party waived privilege in its respective file of correspondence.

On the insurer's side an email emerged in which a claims handler or in -house solicitor at the insurer had proposed increasing the amount of a posited settlement offer slightly: "*to make the bait more enticing*" – i.e. to increase the chance of the claimant agreeing the settlement quickly, before she died and without having realised the error, thereby deprive her dependents of their claims. The claim to set aside the settlement agreement ultimately failed – the insurer had been under no duty to alert the claimant's solicitors. But the person who had written that email was still subjected to an embarrassing cross-examination, with the judge characterising him as "*ruthless" "callous and hard hearted*" and lacking in scruples. One can see that, if the case had been only slightly different, and had somehow turned on his credibility regarding some disputed fact, that email could have been more decisive.

Incidentally, the claimant's argument that the defendant should not have capitalised on this mistake was not helped by the fact that the claimant's disclosure showed that, in agreeing the settlement, the claimant's lawyers had themselves believed the insurer had offered too much in error, having mistakenly overlooked another (different) flaw in the claim which the claimant knew about.

"*I don't want to cook the books anymore*"

A fraud trial in the US of three former partners in the law firm Dewey & LeBouef revealed some choice emails. An email conversation among partners who were discussing leaving the firm included: "*Time to start minding the clients closely and spending Momma LeBoeuf's money like its water*" prompting a partner to respond that the GC of one his clients was "*getting a nice bottle of wine on Monday, I can assure you*". Other choice emails included "*I spend most days bullshitting people*", "*do what I do. Work out a lot and do drugs*", "*I don't want to cook the books anymore*" and "*can you find another clueless auditor for next year?*".

"*Either of you's jumped on this … bandwagon?*"

Saunderson & Ors v *Sonae Industria (UK) Ltd [2015] EWHC 2264 (QB)* concerned a claim by over 16,000 people for minor personal injuries said to have been caused by smoke from a fire at a particle board manufacturing plant near where they lived and worked. Lawyers for the defendants found a conversation which a defendant had with two friends on Twitter:

> *"Leon Swift: either of you's jumped on this sonae claim bandwagon?*
>
> *"Leon Swift they've admitted liability so anyone living or working in the area at the time of the fire can claim"*
>
> *"MC: not for me #too honest*
>
> *Leon Swift: too honest ya, good one matt. I'm getting involved I reckon, pays for the summer holiday if it goes thru*
>
> *TC: ha ha you're a bad man Leon*

MC: he's a fraud Tom"

Mr. Swift's claim was held to be fraudulent and was dismissed. The case provides a neat illustration of naivete regarding the electronic record, and how thoroughly it is likely to be perused in litigation. Ultimately all the other claims were dismissed too.

In *Cirencester Friendly Society Ltd* v *Parkin* [2015] EWHC 1750 an insurer sought to recover money which it had paid a Mr. Parkin under an income protection policy, alleging that his claims had been fraudulent. The judge observed: "*like so many people nowadays, in particular those who seem minded to seek to perpetrate frauds, he seemed incapable of keeping off the Internet and sharing the true nature of his activities through social media. So it was that it has transpired that, far from being incapable of working and suffering from any such condition as he has described, he … seems to have spent the greater part of the last 10 or 12 years refurbishing a Noble sports car and driving it, sometimes racing it, principally in Cyprus*". He was ordered to repay the monies he had been paid under the policy.

The impact of an unthinking post on social media can be even more serious. In *Jet 2 Holidays Ltd* v *Hughes & Anor* [2019] EWCA Civ 1858. Karl and Laura Hughes legal advisers wrote letters of claim to a tour operator, giving notice that they intended to bring a claim for damages as a result of food poisoning contracted on a package holiday, each provided a witness statement with a signed statement of truth describing their dreadful holiday. The tour operator found several Facebook posts, a YouTube video and two Twitter posts, which indicated that the respondents and their children were physically well during the holiday and had an enjoyable time while staying at the hotel. Mr. and Mrs. Hughes did not pursue their claim. The tour operator commenced committal proceedings, seeking to have the Hughes committed for contempt of court. The proceedings were struck out at first instance but reinstated by the Court of Appeal. It is unclear what has since happened in that litigation.

Other sources of unhelpful material

One should consider potential litigation when writing internal emails and reports and even more obviously (one might have thought) social media posts. It is worth mentioning, briefly, some less obvious sources of material which are worth being aware of.

***The Apprentice* error**

The Apprentice (as if you didn't know) is a television show in which contestants compete in a series of challenges to convince Lord Alan Sugar (or, in the US, Donald Trump) to invest in their business ideas.

The best bit is, indisputably, about five weeks into the process when contestants are subjected to a series of excruciatingly uncomfortable interviews in which the lies they have told to get on the show are exposed. Invariably, some grand claim which a contestant has made about their existing business will be disproven when their stony faced inquisitor simply produces a print-out from the Companies House website which shows that the contestant doesn't really own the business, or that it hasn't made the millions they claim, leaving the contestant gasping, having somehow to that point been completely unaware that companies' accounts and many other documents are freely available in this way.

Occasionally something similar will occur in litigation. We have experience of a case (settled before trial) which concerned an alleged oral agreement about how a clause in a contract was going to work, the effect of which would have been that the Defendant would have to pay a certain sum (several million pounds) to the Claimant on the happening of a certain event. The Defendant denied any such agreement but had committed the classic *Apprentice* error, because the fact that the Defendant would be required to pay the Claimant the exact sum in question had been recorded in the Defendant's audited accounts for the best part of a decade.

We go *WayBack*

It should (by now) be instilled into the public consciousness to assume that anything you ever write on the internet is potentially going to be there forever and be very hard to erase. This is exemplified by the Wayback Machine (web.archive.org) which takes 'snapshots' of websites and provides an archive which allows one to see how and when they changed. This has occasionally proved relevant in litigation, as where experts have made changes to their websites to remove references to ventures which proved unsuccessful, or to beef-up their claimed experience in some field or other shortly before trial.

No person is a hero to their search engine

Another source of damaging information is a witness's internet search history. This can be highly relevant in criminal cases ('hey Google, what's the best way to dispose of a body') but could also be relevant in a civil context. Looking at what internet searches someone was making at a crucial time could provide a hugely valuable insight as to what they were thinking or planning, where their motives lay and what sources of information they were relying on (potentially highly relevant in a case about negligent advice or a negligent design).

Conclusions

'Litigation naivete' can be expensive. Instilling in one's workforce that electronic documents are forever, nothing will be overlooked, and recollection counts for nothing if contradicted by a contemporaneous document, can produce real (albeit hard to measure) benefits.

Superficially, encouraging people to pause to think about how the things they write might just make them better at concealing mistakes and wrongdoing. But it seems overwhelmingly likely that making people more alert to the risks of litigation is likely to make them more careful, considered, conscientious and rigorous, make fewer errors, cut fewer corners and keep better records to show that they have, in fact, acted properly.