**CA before Mance LJ, Jacob LJ.** 30th April 2004.

**JUDGMENT : LORD JUSTICE MANCE**:

1. This is a renewed application on notice for permission to appeal from orders for disclosure and inspection made by Mr Nicholas Strauss QC sitting as a deputy judge in the Chancery Division on 11th August 2003, as well as from his refusal to make any mediation order and his order for costs.

2. The claim relates to security, allegedly granted in the early 1980s, over properties now worth £2 million which belong to one or other or all of three defendants. Such security is said to have been given to secure the debt to the claimant bank of a company owned or controlled by the first defendant. The defences common to all the defendants include an allegation that there was in or about August 1986 an oral compromise. The second and third defendants, who are the first defendant's wife and daughter as I understand it, also have additional defences based on allegations of undue influence. It appears that the defendants' documentation shows their Indian head office pressing their London branch, which was managed by Mr Harwant Singh in those days, to enforce the security in the latter part of 1986. But then there is nothing to explain, it appears, why there was many years' delay until the present proceedings were begun in December 2001. Mr Hodge QC, for the claimant bank, gives the oral explanation that the bank decided that it was preferable to seek to enforce guarantees given by the State Bank of India in respect of the same indebtedness and that that was what, as the documentation does show, the claimant bank was engaged in. He also draws our attention to two documents in 1990 which, on their face, might be taken to constitute some recognition, on the part of the first defendant at least, that indebtedness on his part continued to exist. He asked amongst other things for the rate of interest on the debt. However, that is a matter which is pleaded primarily in relation to an understandable suggestion that the claim might otherwise be so late in being pursued as to be time barred.

3. The defendants also say that the pursuit of the Indian bank is consistent with their case, because (they say) the alleged compromise involved an undertaking on their part to assist the claimant pursue the State Bank of Indian.

4. There are, it appears, no documents in the defendants' disclosure which directly support any suggestion of oral compromise, but what is said is that there is lack of documents generally relating either to any question of compromise or, on the claimant's case, any decision not to pursue the defendants but to divert attention to pursuit of the State Bank of India. On the defendants' case of course it is the former, and it is said in support of their defence to this action that the claimant must have destroyed documents.

*5.* The claimant made disclosure of documents in two stages. Initially in November 2002 it provided a list under cover of a disclosure statement by a Mr Mohanty, chief of its International Banking Division. Only 88 documents were then disclosed. There was a wrapped up statement relating to documents lost and destroyed, which is of some relevance. The list followed the form prescribed under practice direction 31. That is practice direction form 265 which, in relation to this head of disclosure, says: *"List and number here, the documents you once had in your control, but which you no longer have. For each document listed, say when it was last in your control and where it is now."*

6. The provision in the rule relating to disclosure of documents which are lost or destroyed is more general. Rule 31.10(4) states that:
*"The list must indicate–*
*(a) ...*
*(b) (i) those documents which are no longer in the party's control; and*
*(ii) what has happened to those documents."*
*But the list contemplates a more specific identification. The claimant clearly did not give any more specific identification. All it said was this:*
*"The Claimant has had the documents numbered and listed below, but they are no longer in the Claimant's control."*

Instead of listing or numbering any documents it then simply said, so far as relevant: *"Original and copy correspondence, e-mails, memoranda, reports, notes and attachments to documents destroyed on various dates unknown by the Claimant in the usual course of business ..."* without any dates or any further particulars. However, no objection was at the time taken to that as such.

7. The trial came on in spring 2003 and the claimant's former London branch manager, Mr Harwant Singh, was cross-examined. Prior to the trial in January, the defendants had raised points on the disclosure made. During cross-examination of Mr Harwant Singh, both he and the claimant generally had to confess that the claimant had a large number of further documents. Those documents were disclosed and do not, I understand, bear directly on the question whether there was a compromise, at least so we were informed. But the trial had to be halted while that disclosure was made and the defendants immediately threatened an application to strike out.

*8.* The further disclosure was made following a visit to India for three days by a solicitor from Slaughter and May (the claimant's solicitors) and junior counsel. They reviewed some 80 files and they brought back some 30 kilograms of documents for continuing review in the United Kingdom. The claimant then served a further list dated 7th May 2003 under 149 heads of documentation. Schedule C to that list contains another wrapped up statement regarding documents lost or destroyed, slightly fuller in form. It said: *"The Claimant had the documents described below, but such documents are no longer in its control.*

*1. Original and copy correspondence, e-mails, notes, memoranda, working papers, reports and enclosures/attachments to documents destroyed on various dates unknown by the Claimant in the usual course of business and/or during the transfer of documents belonging to the Claimant's former London office to the Claimant's Head Office in New Delhi, India.*

*2. Original correspondence, together with enclosures, emanating from the Claimant. The Claimant is not aware of the whereabouts of the originals of such correspondence..."*

9. Junior counsel during the inspection of the files in India which was primarily her responsibility since the solicitor concentrated on interviewing the clients, made notes on a hand computer, but unfortunately that was stolen later from her home and the notes had not been transcribed or printed out.

10. On 12th June 2003 the first defendant issued applications for both inspection and a strike-out. The former application applied for an order:

*"(1) that the Claimants do give disclosure of the original documents referred to in their List of Documents dated 21 November 2002 and Supplemental List of Documents dated 7 May 2003, together with the documents disclosed as copies in the Witness Statements of Nicholas Jeremy Archer and Mark Norman Millin, each dated 2 April 2003."*

Those were two solicitors' witness statements for the claimant.

11. A witness statement by Mr Hall-Jones for the defendants, dated 1st August 2003, pointed out that a number of documents had numbering on their bottom right-hand corner which did not show a full sequence. Mr Hall-Jones considered that he had identified some 180 "missing documents" by this exercise. In fact it appears that he may have been misled, in so far as the numbers may have included similar numbers coming from two similar sources, first, the claimant in India during an external investigation into their activities by the Enforcement Directorate, that is apparently an investigation relating to compliance with exchange control regulations, and the other by Mr Millin of Slaughter and May during the disclosure exercise which led to the supplemental list in May 2003.

12. Mr Hall-Jones' witness statement went on to indicate that what the defendant really wanted to inspect was all the original documents disclosed by the claimant and the original files on which such documents had appeared.

13. When the application came before the deputy judge, there was much discussion about what the claimant was seeking and what the purpose was. As was observed by the single judge (Carnwath LJ) when considering this matter orally on a previous renewed application for permission to appeal, it is not entirely easy to follow from the transcript what the range and direction of the argument was at

each stage. At one point, however, Mr Kay QC for the first defendant stated expressly that the focus of his application was on the application to strike out, which was going to be based on destruction of documents, although the defendant could not point to particular documents as having been destroyed. It is however right to say that the fact of destruction without good explanation could also be taken to support the substantive defence. Contrary to submissions made by the applicants, that is how I think the judge saw the position. Thus, he said in his judgment in paragraph 2:

"*The defendants have said from the outset that the claimant's disclosure of documents has been deliberately selective and/or that documents have been deliberately destroyed and the claimant's main witness was cross-examined at some length about the documents which existed at the time when he had charge of the matter.*"

Then in paragraphs 8 and 9 he went on:

*"8. Such an application is in my view an application for specific disclosure and inspection under CPR 31.12. The specific documents which are the subject matter of the application are the files themselves and the documents in the files which have not been disclosed and which are not relevant to the main issues in the action in the usual way, but only relevant to the inquiry in relation to missing documents.*

*9. The defendants accept that some documents in these files may not have been disclosed, and therefore that there will not necessarily be a complete number sequence, on the ground that they are irrelevant to the issues in the action or privileged. But they say, rightly, that they cannot tell whether the gaps in the numbering sequences in the disclosed documents are attributable to one or other of those reasons or whether they are attributable to the fact that the document in question is missing. Therefore, they cannot, either for the purpose of their striking out application, or for the purpose of the action if it proceeds, identify which documents are missing."*

14. The judge took the view that the lists were defective in not enumerating each document lost or destroyed, and in not addressing in relation to each what had happened to it. He recognised, however, that it would be extremely onerous to go through 80 files to identify privileged material and to cover up confidential material and that it would be inappropriate simply to allow the defendants' solicitors access on terms as to confidentiality. So it was in his view "not practicable to order disclosure and inspection of all 80 files": see paragraph 14 of his judgment. However, he had been told that the documents showing the numbered sequence on which Mr Hall-Jones had focused were confined to some three to four files, and that most of the documents disclosed came from those files rather than the 80 files. The three to four files have been called before us the enforcement files.

*15.* So he did not accede to the first defendant's application in its entirety, but he concluded that he could make an order for inspection: *"... limited to the three or four files which do have the numbered sequence and to make a supplementary order which will, so far as possible, have the effect of identifying any other relevant document which is missing and which can be identified."*

He then said this: *"The orders I propose to make are as follows:*

*1 That the files containing documents with the numbered sequence be produced for inspection in England. There will be a proviso to that order entitling the claimant to cover up any or part of a document which is privileged, or any document or part of a document which refers to the confidential affairs of other companies or of the bank itself but does not refer to the affairs of the defendants.*

*19 Paragraph 2 of the order will be*

*2 That the claimant should provide a list of documents which*
*(a) are referred to in the documents which have been disclosed; but*
*(b) have not been disclosed because they are no longer in its control.*

*In other words, the claimants are to provide information identifying the documents which are referred to in disclosed documents but which it has not been possible to disclose because they are no longer available."*

16. Counsel for the claimant, Miss Sandells, junior counsel before us, pointed out to him that this order was in itself in fact, as she put it, "incredibly wide", as it would oblige the claimant to look through all 80 files in India again. The judge controverted this. Counsel insisted that it was so, because in order to check whether a document referred to in the existing disclosure was not included because it was

irrelevant, or perhaps privileged, or had on the other hand gone missing, the claimant would have to go through all the 80 files again. The judge then said that this should have been done in the first place, and if it was the case then he was afraid that that was what the claimant had to do, although again he expressed the view that it would not be as onerous as all that because it would only be necessary in respect of documents which were not obviously irrelevant.

17. In his written reasons for refusing permission to appeal he helpfully amplified his thinking and said:
*"The decision was a straightforward exercise of my discretion. I made the least onerous order possible which was consistent with the defendants' legitimate interest, given the issues raised from the outset, in ascertaining which relevant documents are missing from the files, against a background in which the difficulties were the fault of the claimant.*

*As appears from the post-judgment discussion, I was not aware that the effect of even this order would be to require the claimant to go through many files. I am not convinced that is does have this effect, but even if it does, and I had realised it, I would have made the same order."*

18. The judge also refused the claimant's request that he make any form of mediation order. He expressed views that mediation itself could be expensive; second, that he would be reluctant to force mediation on a party with limited means, who was probably in difficulty funding the litigation anyway; third, that he could not actually require mediation in any event; fourth, that an order was unlikely in the circumstances to take the matter further; and fifth, that both sides had sensible solicitors who could still agree mediation if they thought it appropriate.

19. The judge further made an order for costs, which was that the first defendant's costs should be in the cause.

20. The claimant now renews its application for permission to appeal. Following refusal on paper by the single judge (Jonathan Parker LJ), Carnwath LJ directed that the application be determined on notice by two Lords Justices, with the appeal to follow if permission to appeal is given. Pursuant also to Carnwath LJ's order, a further witness statement has been filed from a solicitor from Slaughter and May explaining the difficulty and cost of complying with the order. Mr Hall-Jones has in response sworn another witness statement.

21. The claimant's first complaint is that the judge should not have made an order in order to facilitate satellite litigation in the form of a strike-out. However, as I have pointed out, the issue of destruction of documents was directly in issue, not just on the strike-out application but also as part of the substantive issues at trial, which is technically still adjourned. This was, as I see it, the judge's approach in the paragraphs I have already quoted. In any event, however, I would add that I have no doubt that he had, under the case management powers in the Civil Procedure Rules, jurisdiction to make an order for disclosure in the context of the application to strike out. In that regard, Mr Kay for the first defendant emphasises before us that we should be reluctant to interfere with case management decisions made by a first instance judge.

22. Then the claimant complains that the deputy judge interpreted CPR 31.10(3) and (4) as requiring a party to condescend to individual documents. But again, as I have already pointed out, the rule's literal effect is just that. As form N265 prescribed by practice direction 3.1 indicates, the claimant's initial list purported to respond to that form. No doubt, however, in many cases it will be unnecessary or inappropriate to insist on specific itemisation, and a court would not interfere with the customary general statement. This case should not be regarded as laying down any contrary principle in a run-of-the-mill case. However, the judge certainly had jurisdiction to insist on the requirement of the letter of the rules. Indeed, even the claimant appears to recognise this by the reference at the end of paragraph 19 of counsel's skeleton argument to exceptional circumstances where a court might do so. This case certainly falls within that category, and amply so.

23. As to paragraph 1 of the order, counsel in fact accepted before Carnwath LJ that this was "manageable". But the objection is made in the skeleton argument that the deputy judge had no power to order inspection of the files, since these had not been disclosed, in circumstances where CPR

31.12(3) reads: *"An order for specific inspection is an order that a party permit inspection of a document referred to in rule 31.3(2)."*

Rule 31.3(2) allows a party to state in his disclosure statement that he will not permit inspection of a document on the grounds that it would be disproportionate to do so.

24. It seems to me that the judge was entitled to short-circuit the procedure in order to avoid a series of applications. It is quite clear that the judge took the view that it was relevant to look at the enforcement files as a whole in the context of the particular issue relating to destruction of documents which had arisen, rather than to look at individual documents in the usual way. He was therefore entitled to make an order for specific disclosure. It was equally clear that the claimant was going to resist production, just as much as it resisted any order as to disclosure. The judge was entitled to combine an order for disclosure and inspection at the same time. Of course he had to take proper precautions to ensure that disclosure of the files did not disclose the contents of documents which were privileged, or were confidential to other clients, although it was accepted that there was less objection to the unusual aspect of disclosure of other documents which were simply irrelevant, but on the file. He catered for the former two categories, that is privileged and confidential documents, by entitling the claimant to cover them over, and, subject to that, he thought that the unusual circumstances of the case justified the disclosure of the files. Since this is accepted as a manageable exercise, it seems to me difficult to fault the judge's exercise of his discretion.

25. Mr Hodge submitted that it would have been sufficient simply to order a list by reference to page numbers in respect of each file confirming what there was in each file and if any documents were missing. That might have been one approach, but it was not the one which the judge thought proper. He was well placed to judge the preferable approach. He took the view that the whole of the enforcement files should be available for such comments to be possible, as could be made on the location of missing documents and that sort of nature of comment. It does not seem to me that this court can or should interfere with that exercise of his case management powers. I, for my part, would refuse the application for permission to appeal in respect of paragraph 1.

26. As to paragraph 2 of his order for disclosure, the complaint is about the disproportionate nature of the exercise required by the judge. The extent to which it is disproportionate has been further canvassed in the supplemental witness statements of Mrs Oliphant and Mr Hall-Jones since the judge's decision. Broadly, Mr Hall-Jones says he cannot believe that the 80 files or any large number of them are likely to be material. He suggests that large numbers of them are probably obviously irrelevant to most of the potentially missing documents because they will, he suggests, consist of things like bank statements. Against that we are told that that is simply not the case and that junior counsel only identified some two or so files or a very limited number which seemed to be confined to, for example, bank statements.

27. It seems to me that we have to approach it on the broad basis which the judge did, which was to accept that it would be excessively burdensome to introduce into this disclosure exercise any wholesale investigation that would require trawling through the 80 files. That is a decision which of course may have to be reviewed in the light of the evidence as it emerges from time to time, and is not intended to bind any future court if the picture appears to it different when the matter comes back before it. But for the present it is the picture which I take.

28. The exercise which the judge ordered was not of course the exercise that the first defendant was seeking by his application, or by Mr Hall-Jones' witness statement in support of the original application. What the first defendant wished was for the files to be available for him to inspect, so that he could try to assess what documents were missing. But that was the exercise which the judge concluded would be extremely burdensome if he were to order it to be undertaken by the claimant. He also thought, as I have said, that it was inappropriate to allow the first defendant's own legal advisers to trawl through the files.

29. In those circumstances, it appears to have been the judge's own idea to require the claimant itself to identify each document missing. As he recognised, he was himself under a misapprehension as to

how burdensome this would be when he initially conceived this order, although he eventually said that he would make it in any event.

30. I add that it seems to me there was one other factor which he might have considered, although I am not sure if it was directly raised before him. It has been raised in this court. That is that an objection to the blanket claim in respect of documents lost or destroyed was one which could have been raised back in 2002 when the original list was served, but all the more materially it could certainly have been raised after the supplementary list. It is of course in the light of the supplementary list that the judge's order was made. It does not appear to have been raised specifically in the light of the supplementary list. Had it been raised then, or indeed at any time before junior counsel and Slaughter and May went to India, I have no doubt that they would have kept more permanent notes of the disclosure process in India, with a view to identifying specifically documents which appeared to be lost or destroyed, as opposed to irrelevant, privileged or simply never in existence. In this connection there is perhaps some significance also in the theft of junior counsel's pocket computer.

31. I myself therefore think, in these circumstances and bearing in mind the premise from which the judge started about the burdensome nature of trawling through 80 files of documents, that paragraph 2 of the judge's order could work out disproportionately. It could lead to practically the same exercise as the judge rejected as extremely burdensome in the context of the application for disclosure and inspection of all 80 files. The impression I gain from the way in which the case on destruction of files is put is that it is primarily based on the sequential numbering used by the Enforcement Directorate. It is perhaps also influenced by the misconception that that numbering is part of the same sequence as the sequential numbering used by Mr Millin. But it is based primarily on the Enforcement Directorate's sequential numbering, and it relates primarily to the three or four files which are now going to be available in full, subject to covering over pages as privileged or as confidential to other clients.

32. It seems on the material we have been shown, including the subsequent witness statements of Mrs Oliphant and Mr Hall-Jones, somewhat speculative to suggest that documents not as yet disclosed but referred to in documents already disclosed will prove relevant, and certainly to suggest at this stage that any of such documents have been wilfully destroyed. In the absence of disclosure of all the 80 files, which the judge rejected as excessive, it is also difficult to see how paragraph 2 of the judge's order can assist an argument of wholesale destruction, in so far as that is based on the location within files of particular documents, and the suggested unlikelihood that documents could have gone missing from the middle of files except by deliberate removal. The judge did not order disclosure of more than four files. What he did order, which will ultimately result in a limited list of documents which the claimant will say are lost or destroyed in some way or other and the defendants may wish to say have been deliberately destroyed. That will not, it seems to me, be likely to throw much light on the case of deliberate destruction. It will simply exemplify further documents which, depending on other factors, the judge may or may not conclude were innocently or deliberately missing.

33. I therefore consider there is a case for saying that the judge erred in the factors which he had in mind when he first made paragraph 2 of his order, although I recognise that he later said that he would have made it in any event, and for saying that he erred in maintaining it once the error was pointing out to him. I also think that it is right to give some weight to the fact that there had never previously been any objection to the blanket form in which the third part of the list was prepared, that is schedule C in the second list, and the consideration that disclosure in April/May 2003 would have proceeded very differently if there had been such an objection at that stage.

34. Accordingly, I think that it is open to us in this court to review and that we should review the judge's order under paragraph 2. However, I would accept that the judge was fully entitled and bound to make some further order going beyond paragraph 1 of, as he said, a supplementary nature, bearing in mind the fact that it does appear likely that there are missing documents which have not been specifically identified as such. However, it should in the circumstances be more limited, at least in the first instance. In considering what order should now be made, the position must be judged in the light of the way matters have moved on since the hearing before the judge.

35. Mr Hall-Jones has very recently produced a list of the documents which he says can be identified from documents already disclosed and may fall within the category of missing documents. It is unfortunate that he has only done so recently. Mrs Oliphant's witness statement was provided back in January and Mr Hall-Jones's witness statement comes in dated 16th April, so there has not been a full opportunity to respond to it. However, Mr Kay points out that this was an exercise which the claimant could, if it had wanted, itself have undertaken, despite the stay of the requirement that it do so under the deputy judge's order.

36. What Mr Hall-Jones' witness statement helpfully does is, as I say, list, in relation to 1981 and then the period 1986 onwards, documents referred to in currently disclosed documents which appear to be missing. However, even a cursory inspection has shown Mr Hodge, who has in turn explained this to us, that a number of these documents are elsewhere disclosed in the claimant's list, that some of them are unlikely to exist at all (as Mr Hall-Jones' list to some extent accepts by, for example, question marks or use of the word "any" in the phrase "any records of telephone conversation") and furthermore that other categories are likely to include completely irrelevant documents and privileged documents.

37. We are really faced with two alternatives, it seems to me, if we take that list as a basis for the correct approach to the matter. Either we could require the first defendant, if he wished to pursue this further, to make out a case in more detail in relation to specific documents on that list for saying that they are documents which are missing, in the sense intended to be identified by the judge's order; or we could require the claimant to look at the list and to go through it, explaining why it says that particular documents are irrelevant, privileged or probably non-existent, and focusing on any remaining documents and then producing an explanation, if it can, as to any remaining documents.

38. In respect any apparently missing documents, a question also arises as to whether the claimant should undertake any such exercise simply by reference to documents now in London, readily accessible, presumably in the custody of Slaughter and May and counsel, or whether the claimant must go back to the 80 files straightaway and seek to go through them.

39. As to the basic choice between the two alternatives, it seems to me that it will be simpler to short cut the matter, especially in view of the relevant ease with which Mr Hodge persuaded me that it was possible to look at the list and demonstrate that a number of the documents were either already disclosed or clearly irrelevant or likely to be privileged. Rather than requiring the defendant to do a further exercise, we should require the claimant to go through the lists which Mr Hall-Jones has prepared and to identify after consideration those which are irrelevant, privileged or probably non-existent, and thereby to identify the remaining (which one can call "missing") documents, i.e. documents which are some stage probably existed but are not available.

40. As to the further question, I think that in the first instance, to avoid replicating the extremely expensive visit to India, this exercise should be done by the claimant by reference to London documents, i.e. documents here, and that the first defendant should then have liberty to restore the matter before the Chancery judge in the light of the answers given on the basis of documents available here by the claimant. The Chancery judge will then be able to see whether any further steps should be required in India. It may be that it will be much simpler to decide that when one has a refined and limited list of missing documents, that is documents which must at some stage have existed but cannot be found in the files here.

41. Subject to any points which counsel may wish to raise to clarify that aspect of the order, I would therefore grant permission to appeal in respect of paragraph 2 and to that extent allow the appeal, varying the judge's order to make that order instead.

42. As to the other questions before us, taking firstly mediation, it seems to me that we should not interfere with the judge's reasons which lie well within the ambit of his discretion as the judge in charge of the management of the case, and I would refuse the application for permission to appeal. It seems to me that to order mediation at this stage, or even to order that the parties use their best endeavours to consider mediation, is not something which he can be criticised for refusing to do.

43. As to costs, it seems to me that we will probably need to revisit these anyway in the light of the order that I have made. So I would leave them open. I would only say that on the basis of the judge's order, I would have seen no basis on which we could have been justified in interfering with the exercise of his discretion.

44. LORD JUSTICE JACOB: I agree.

**(Discussion as to costs)**

45. **LORD JUSTICE MANCE:** We have considered the question of costs. We think that if one were to look at the costs below first and to look at them in isolation there would be something to be said for varying the costs order. But in the light of our own decision, however, we think that it is probably to look at both the costs below and the costs on appeal compendiously and to try and arrive at what appears to us a just solution, taking into account the overall result.

46. The overall result is that on paragraph 1, which we believe is the more important paragraph, the first defendant has succeeded in the order which he sought. Admittedly below he sought a similar order in respect of the remaining 76 files. But the core files were files in respect of which he succeeded below and in respect of which he has maintained his success before us.

47. As regards paragraph 2, however, the success below has not been maintained in this court. We have concluded that the judge went further than he should have done, although we have left open the possibility that the matter may come back before him.

48. In those circumstances, we think that, rather than vary the order below, the right order in the light of the overall position is simply to leave the order below unaltered, that is first defendant's costs in cause, but to order that in respect of the appeal costs be simply in the cause.

49. So that is both parties' costs of the appeal are in the cause, whereas below the first defendant's costs are in the cause.

ORDER: Application for permission to appeal granted in relation to paragraph 2 of the order below; appeal allowed; both parties' costs of the appeal in the cause; the first defendant's costs below in the cause.

(Order not part of approved judgment)

MR D HODGE QC and MISS NICOLE SANDELLS (instructed by Messrs Slaughter & May, London EC1Y 8YY) appeared on behalf of the Applicant

MR M KAY QC (instructed by Messrs Middleton Potts, London EC1A 7NP) appeared on behalf of the Respondents