SILENT, BUT DEADLY

Inferences from silence

Abstract

The old adage is that rules are meant to be broken and, if they were not, lawyers would certainly starve. But while broken rules sometimes give us our clients, the old adage should not extend to the arena of civil litigation where broken rules may prove fatal to our respective litigants' claims. For civil lawyers, silence is rarely rewarded. Quite apart from the mandatory nature of disclosure of documents, there is the requirement to disclose (as concisely as possible) all facts germane to our clients' cases, to call the required witnesses at trial so that they may give evidence of all facts relevant to the case, to ask certain questions of opposing witnesses during cross-examination and to raise at the trial all legal issues which counsel may wish to raise on any appeal.

As attorneys our forensic tools include our abilities to draft claims, defences, replies and affidavits in a professional manner, to assess the need for the calling of witnesses and the relevance of the evidence which they are likely to give, to cross-examine witnesses in order to diminish their credibility and/or to confront them with the substance of the case we propose to advance. This paper examines the effect that silence or omission may have on our clients' cases by considering these main areas: [(a)] silence in pleadings, [(b)] silence of witnesses, [(c)] silence of advocates, and [(d)] the courts' inferences from silence.

It may very well be that we will find that silence is (not always) golden.

[(a)] Silence in pleadings and [(b)] silence of witnesses will be dealt with in Part I (done by Mikhail H. R. Williams).
[(c)] Silence of advocates will be dealt with in Part II (done by Richard R. Rietzin).
[(d)] The courts' inferences from silence will be dealt with in Part II (done by Mikhail H. R. Williams).

CONTENTS

PART I

INTRODUCTION

1. In the early 1720s, a very lucky chimney sweep found a jewel with a precious stone in it. He took the jewel to a goldsmith's shop, where it was examined by the goldsmith's apprentice. When the apprentice completed his examination of the jewel, he handed it back to the chimney sweeper without the precious stone in it. Unable to resolve the dispute which surely ensued, the chimney sweep took the goldsmith to court for the return of the jewel.

2. At the trial, the stone was never produced by the defendant. Pratt, C.J., who presided over the case, directed the jury to consider the evidence from other goldsmiths about the quality of stone that *could* fit into the socket of the jewel and to ascribe to it the highest quality and value unless the defendant produced the stone, or proved a lower value. This was the "finder's keeper's" case of **Armory v Delamirie**[1] which is one of the earliest examples of inferences which courts draw from the silence of a party.

3. The holding of Armory has been applied as recently as 2015 in **Shobna Gulati & Others v MGN Limited**[2], where the England & Wales High Court reiterated the principle from Armory in this way:

> "*If the wrongdoer prevents the innocent party from proving how much of his property has been taken, then the wrongdoer is liable to the greatest extent that is possible in the circumstances…*[3]"

4. Lord Diplock applied similar reasoning to circumstances of negligence in the 1972 case of **British Railways Board v Herrington**[4]**.** This is a case where a six year old trespasser entered onto railway lines through an obvious hole in a fence. He got injured on the property owned by the railway company and succeeded in a claim against the company for occupier's liability. On behalf of the House of Lords, Lord Diplock held:

> "The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold....[5]"

[1] [1722] 93 ER 664, KB
[2] [2015] EWHC 1482 (Ch)
[3] Ibid, para. 83.
[4] [1972] AC 877, 930-931
[5] Ibid, p 930

5. Lord Diplock's decision has been heavily criticized, including fairly recently by the UK Supreme Court[6], however, it does foreshadow the dangers of silence in civil litigation, which remain notwithstanding the criticisms.

6. It is against this background that this paper explores the consequences which may flow from the silence of parties (and of their Counsel) by examining four main headings, namely: (a) *silence in pleadings*, (b) *silence of witnesses*, (c) *silence of advocates* and (d) *the courts' inferences from silence*.

SILENCE IN PLEADINGS

7. Nothing can damage a drafter's ego or reputation more than hearing from a court that a case is not properly pleaded, or that the drafter left out a crucial element of the case. If the drafter is lucky, an early amendment or application to amend will be sufficient to prevent your client from losing his or her case, but if it is not early, or if a court refuses the amendment, more than just the drafter's ego may become damaged in the end. It may very well be that the client may be so aggrieved by the omission that he or she may take you to court or lodge a complaint.

8. It is no secret that trial judges have an awesome responsibility when it comes to fact-finding that is revered by the courts of appeal. This is, in part, because the trial judge is said to enjoy the benefit of seeing and hearing the witnesses; however, Lord Ackner carefully explained that:

> *"…where the wrong impression can be gained by the most experienced of judges if he relies solely on the demeanour of the witnesses, it is important for him to check that impression against contemporary documents, where they exist,* ***against the pleaded case*** *and against the inherent probability or improbability of the rival contentions, in the light in particular of facts and matters which are common ground or unchallenged, or disputed only as an afterthought or otherwise in a very unsatisfactory manner. Unless this approach is adopted, there is a real risk that the evidence will not be properly evaluated and the trial judge will in the result have failed to take proper advantage of having seen and heard the witnesses.*[7]"

9. The approach of Lord Ackner stated above in 1989 was first articulated by him in a 1987 case[8]. This approach explains that upon seeing and hearing a witness, the judge is required to:
   (a) Compare the evidence of the witnesses to the contemporaneous documents, where available;
   (b) Compare it to the pleaded case;

[6] Prest v Petrodel Resources Limited and others [2013] UKSC 34, paragraph 44
[7] Horace Reid v Charles and Another [1989] UKPC 24, an appeal from the Court of Appeal of Trinidad and Tobago, page 6 (below The judgment of Mr. Justice McMillan)
[8] AG and another v Kalicklal Bhoopal Samlal (1987) 36 WIR 383 page 387

(c) Apply common sense in discerning whether the story of either side is probable or improbable having regard to:
   i. The common or unchallenged grounds;
   ii. Grounds disputed only as an afterthought; and
   iii. Grounds advanced in a wholly unsatisfactory manner.

10. It therefore naturally follows that if the pleadings are silent on important issues or even unsatisfactory in the manner expressed, it may result in an adverse finding against witnesses and by extension the side for whom the witness was called.

11. In **Boake Allen Ltd v HMRC[9],** Mummery LJ explained the importance of pleadings in this way:

> "While it is good sense not to be pernickety about pleadings, the basic requirement that material facts should be pleaded is there for a good reason—so that the other side can respond to the pleaded case by way of admission or denial of facts, thereby defining the issues for decision for the benefit of the parties and the court…."

12. The words of Mummery LJ are quite similar to the words of Sykes, J (as he then was) when he wrote that *"[t]he CPR represents an attempt to modernize civil litigation by emphasizing efficiency, proportionality and reduction of costs while maintaining principles of fairness. It does this by asking that the parties plead in a manner (Parts 8 and 10) which enables the court to carry out its duty to manage cases actively (rule 25.1) by identifying issues early (rule 25.1 (b)) and deciding which issues need a trial and which can be dealt with summarily (rule 25.1 (c)) or not dealt with at all rule 26.1 (2) (k))*[10]."

13. In fact, the drafters of the CPR made it very clear that the claimant is required to set out all the facts on which his or her intends to rely[11] and where this is not done, the claimant may not rely on any allegation or factual argument which was not set out in the particulars of claim which could have been set out there, unless the court gives permission[12].

14. Despite that however, in the vast majority of cases, the argument about insufficiency of pleadings does not seem to receive the support of the judges. In the UK, the High Court was quite direct when it stated:

> "The general approach of the courts under the Civil Procedure Rules, and specifically the specialist courts, is to take a pragmatic approach to pleadings and not to shut a party out from having its case heard on overly literal analysis of such a document. ***Technical pleading objections are***

[9] [2006] EWCA Civ 25, para [131]
[10] Janet Edwards v Jamaica Beverages Limited (unreported) Suit No. C.L. 2002/E – 037, delivered March 23, 2010, para 48
[11] R 8.9(1)
[12] R. 8.9A

> ***certainly not encouraged, although very occasionally they are justified***[13].”

a. <u>Claimants' pleadings</u>

15. It is generally the Jamaican reality to not shut claimants out of the judgment seat because of defective pleadings, and from a policy consideration stance it is often times understandable. There are however circumstances where defective pleadings will be more than just an inconvenience.

16. One classical example is **fraud.** If one rule seems to withstand the test of time, it is this, that:

> “It is settled law that any charge of fraud must be plead and sufficiently particularized. This principle was expressed by Thesiger, L.J. in *Davy v Garrett (1877) 7 Ch. D. 473 at 489* in the following words:
>
> > “In the Common Law Courts no rule was more clearly settled than that fraud must be **distinctly alleged and as distinctly proved**, **and that it was not allowable to leave fraud to be inferred from the facts**.[14]””

17. The rule has been interpreted and expounded by our Supreme Court – reemphasizing the mammoth importance of pleadings and the type of pleadings necessary in cases of fraud. One judge held recently:

> “It is well known that fraud must be specifically pleaded, that is the acts being relied upon to prove dishonesty need to [be] stated. This has not been done and to that extent the pleadings regarding [the 3rd defendant] are defective and it does not appear that any further particulars are forthcoming…. ***The law is that where fraud is being alleged then the pleading must be unequivocal that it is dishonesty that is being relied on. If the pleadings are consistent with fraud and something else, then it is equivocal and therefore it is defective*** (**Armitage v Nurse** [1998] Ch 241, 257 (Millett LJ))[15].

18. The warning here is that if the drafter omits to plead facts which illustrate unmistakable dishonesty, the claim for fraud will, more likely than not, fail and the silence will likely be deadly.

19. Even in the more common cases of *negligence*, there are certain instances where silent pleadings will be fatal. This tends to come up mainly where an unpleaded injury is statute

[13] Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd [2018] EWHC 1577 (TCC), para 46
[14] Leroy McGregor v Verda Francis [2013] JMSC Civ. 172, para 36
[15] Andrea Green and Anor v Christine Findlay and Others [2015] JMSC Civ 157

barred, and applications to amend are made to include those injuries after the limitation period. Straw J[16] referred briefly to two situations such as this. She wrote:

> "In [**Judith Godmar v Ciboney Group Ltd. SCCA 144/2001]**, the claimant was allowed to amend her statement of case by adding further sums as special damage. However her application to add post traumatic stress disorder as an additional injury was refused. The court held that the additional sums for special damages were merely the cost of further treatment for injuries pleaded during the limitation period. *However the claim for post traumatic stress disorder was held to be a claim for a new injury after the end of the limitation period*…."

20. The conclusion therefore is that if you neglect to include an injury in the pleadings, and the limitation period runs out, then your silence may be deadly to the unpleaded injury.

21. Interestingly, one could argue that claimants seem to receive greater leniency than defendants when a point on pleadings is raised. There is a distinction between a *prima facie* case, which pleadings are to disclose on the one hand, and the burden of proof on the other hand. The idea is that the burden of proof is to be satisfied before the trial judge, while a *prima facie* case is to be satisfied on the pleadings.

22. When a point about pleadings was raised in one case, our Court of Appeal held that a cause of action is by definition: *"every **fact** which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court"*[17], which seems to emphasize the importance of claimants adhering to their Part 8 obligations to state all relevant *facts* in claim documents[18].

23. The same Court of Appeal equally accepted that "*in modern times… it is sufficient for a pleader to plead the material facts. He need not plead the legal consequences which flow from them. Even although he has stated the legal consequences inaccurately or incompletely, that does not shut him out from arguing points of law which arise on the facts pleaded*" [19] even in claims commenced by fixed date claim forms.

24. This approach seems to be more lenient than the words of the CPR since the CPR themselves impose a consequence in r 8.9A which is that a claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission[20]. It also goes further by making provisions for the striking out of claims if it *discloses* no reasonable grounds for bringing the claim[21], or if it does not comply with the *requirements of Part 8*[22].

---

[16] Foster Bryan v Vanguard Security Company Limited [2016] JMSC Civ. 98
[17] Medical And Immuniodiagnostic Laboratory Limited v Dorett O'Meally Johnson [2010] JMCA Civ 42, para 4
[18] Rule 8.9
[19] Capital & Credit Merchant Bank Limited v The Real Estate Board & Others [2013] JMCA Civ 29, para 134
[20] See also the consequence set by r. 8.9A
[21] R. 26.3(1) (c)
[22] R. 226.3(1) (d)

25. A very interesting case which illustrates this point is that of **Roxanne Peart v Shameer Thomas & Others**[23]. In Roxanne's pleadings, she stated that Shameer had stabbed her in the eye with a pencil, and the stabbing caused her to lose her sight in the same left eye. Despite the pleaded fact of the stabbing, she sought damages for negligence against Shameer, their classroom teacher, principal, board of management, the Ministry of Education, and the Attorney General of Jamaica. In arriving at its conclusion, the court found that section 48 (g) of the Judicature (Supreme Court) Act confirmed the court's inherent power to give to a claimant all such remedies as the claimant appears entitled to in respect of a claim properly brought forward. In the court's words:

> "It is clear from [section 48(g)] that once the claim is properly brought, the Court is required to grant all such remedies that any of the parties appear to be entitled to. The words "appear to be entitled to" mean just what they say, that is, not necessarily the remedy which the parties have pleaded or believe that they should be granted. The rationale behind bestowing this power on the Court, in my opinion, is not only to save judicial time and expense, but also to ensure that the cases that are before the Court are dealt with justly.[24]"

26. Our Court of Appeal in a different case which was cited in **Roxanne Peart**, has also accepted that:

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. *In the majority of proceedings identification of the documents upon which a party relies, together with copies of the party's witness statements, will make the detail of the nature of the case the other side has to meet obvious.* This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules."[25]

27. This seems to suggest that witness statements/affidavit evidence and documentary evidence can possibly aid a poorly drafted claim form/fixed date claim form and particulars of claim. So quite a bit of latitude has been extended to claimants' pleadings, save for cases of fraud and limitations of actions, and any other cause of action which must be specifically pleaded. In fact, silent pleadings may not be as deadly as many of us originally thought as far as a claimant is concerned since the claimant has the ability to amend his or her claim.

---

[23] Roxanne Peart v Shameer Thomas, Brenda O'Connor, Angella Thomas, The Board of Management of the Snowden All-Age School, The Ministry of Education and The Attorney General of Jamaica [2017] JMSC Civ. 60

[24] Ibid, para [77]

[25] Capital & Credit Merchant Bank Limited v The Real Estate Board & Others [2013] JMCA Civ 29, Cf: McPhilemy v Times Newspapers Ltd and Others [1999] 3 All ER 775,792-3, Lord Woolf MR

28. "*Once pleadings are amended, what stood before amendment is no longer material before the court and no longer defines the issues to be tried.*"[26] There are various cases which document our courts' willingness to allow claimants to amend their claims. For example, a claimant was allowed amendments after evidence and submissions were completed[27]. However, claimants will face a harder time if a defendant were to strike first.

29. In one case for example, a defendant company applied to have the claim against it struck out on the basis that the pleaded case disclosed no reasonable grounds for the claim against that defendant. In response to the application to strike out, the claimant amended its statement of case before CMC, without an application to do so, proposing to include grounds for bringing a claim against the applicant/defendant.

30. Mangatal J, in essence held that when faced with an application to strike out for defective pleadings, it is not correct to pull the rug from under the feet of the party applying to strike out the case by filing an amended document without permission of the court, even if there has not been a CMC or First Hearing. The proper course, according to Mangatal J, is to apply for permission to amend, and to demonstrate to the court the strength of the proposed amendments – otherwise, the court will be facilitating a situation where the claimant tells the defendant to "Hug, it (the amendment) up!" or "Love dat!"[28]

31. Mangatal's ruling was based on a previously decision of the Court of Appeal on the point.[29] The point to take away here is if you are a drafting for a claimant you should try to ensure that you do not leave your pleadings susceptible to a striking out application.

32. Is there any situation where silent pleadings may be advantageous to a claimant? The doctrine of "*res ipsa loquitor*", which requires the claimant to not know how the thing causing the injury complained of occurred, but the thing was of such a nature that it must have been caused by the negligence of the defendant who exercised control over the thing, seems to be the easiest answer.

33. Notwithstanding the *res ipsa* exception, the underlying principle is that the opposing side (and the court) should be able to know what facts are in issue between the parties, and know (if not be able to predict) the legal arguments that will flow from those facts. If per chance you arrive at trial with defective pleadings, the court, in exercising its duty in accordance with the words of Lord Ackner, may draw adverse inferences from the pleadings.

b. Defendants' pleadings

34. A defendant has similar rules which apply to his defence. The defence must set out all the facts on which the defendant relies to dispute the claim[30], as short as possible[31], stating

[26] B & J Equipment Rental v Joseph Nanco [2013] JMCA Civ 2, para [36]
[27] Shaquille Forbes v Ralston Baker et al (unreported) Jamaica, Supreme Court, Claim No. 2006 HCV 02938, delivered March 10, 2011
[28] Index Communication Network Ltd v Capital Solutions Limited, et al [2012] JMSC Civ 50, para [44]
[29] Pan Caribbean Financial Services Ltd et al v Cartade Robert, et al [2011] JMCA Civ 2
[30] R. 10.5 (1)

what allegations are admitted[32], denied[33] (with the reasons for denial and/or the defendant's alternative version of events[34]) or neither admitted nor denied[35]. The defendant must also annex any document necessary to the defence[36], and may not rely on any allegation or factual argument which is not set out in the defence unless the court gives permissions.[37] Arguably however, for a defendant, silent pleadings are more likely to be fatal than for a claimant.

35. For this part, we will examine two common situations in which a defendant may (but hopefully does not) find himself: (1) where the defendant does not file a defence, and (2) where a defence is filed but it consists of bare denials, or does not comply with the rules or does not raise a defence which must be pleaded.

36. If a claimant presents a sufficiently strong case, and a defendant fails to respond or does so inadequately, the claimant's case *should* succeed. In civil litigation, a weak case can become strong where a defendant refuses to respond in pleadings. Lord Lowry [in]famously stated:

> "*In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party would be expected to give evidence.* ***Thus, depending on the circumstances a prima facie case may become a strong or even an overwhelming case****. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified*.[38]"

37. There is an understandable fear of default judgment, and this creates a perception that when it comes to silence, defendants may be treated less leniently than their counterparts. In Trinidad and Tobago for instance, there once was a time when the courts treated an application to set aside default judgment as a relief from sanctions applications. The idea was once that a default judgment was a "sanction" imposed by the rules on a defendant for not filing a defence within the time stipulated by the rules. However, the Privy Council made it clear that:

> "There is no rule which states that, if a defendant fails to file a defence within the period specified by the CPR, no defence may be filed unless the court permits…. It is straining language to say that a sanction is imposed

---

[31] R. 10. 5 (2)
[32] R. 10.5 (3) (a)
[33] R. 10.5 (3) (b)
[34] R. 10.5 (4)
[35] R. 10.5 (3) (c)
[36] R. 10. 5 (6)
[37] R. 10.7
[38] *R v Inland Revenue Commissioners, Ex p TC Coombs & Co* [1991] 2 AC 283, 300; Cf: Prest v Petrodel Resources Limited and others [2013] UKSC 34

> by the rules in such circumstances. At most, it can be said that, if the defendant fails to file a defence within the prescribed period and does not apply for an extension of time, he is at risk of a request by the claimant that judgment in default should be entered in his favour. This is not a sanction imposed by the rules. Sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose[39]."

38. Not merely for the sake of semantics, it is worth reiterating that default judgment is not a sanction for a delinquent defendant – it can more accurately be termed (borrowing the words of the PC) a "risk" the defendant runs by his silence. Understandably therefore, we appreciate the urgency to respond when a claim is served on a defendant in order to avoid that risk.

39. But urgency is not its own rationale, since the defence must be formulated in such a manner that it does not amount to admissions, or bare denials. A defence cannot simply deny without explanation. In fact Sykes, J (as he then was) directly said that as far as defence is concerned "neutrality is not a viable option under the CPR."[40] He also said "it is obvious that the whole of rule 10.5 has relegated to the dust bin of legal history the phenomenon known as a bare denial that bedeviled civil litigation in times past."[41] With such strong language, it is not surprising that silent defences are fatal.

40. Let us however assume that a defence has been filed within time and there is no threat of default judgment, there are certain other circumstances where silence will be fatal. One such situation is related to "limitation defences".

41. On this point, Panton P, was content to refer to a quotation from the speech of Lord Griffiths on behalf of the House of Lords where it was held that *if a defendant decides not to plead a limitation defence and to fight the case on the merits he should not be permitted to fall back upon a plea of limitation as a second line of defence at the end of the trial when it is apparent that he is likely to lose on the merits."*[42] There may very well be instances as well where the court may raise the limitation defence of its own motion. Regardless, it is better to be safe than sorry.

42. The scenario before Lord Griffiths is, however, readily distinguishable from most cases. In that case the attorney for the defendant realized, in his closing speech, that his client was going to lose, and decided to argue limitation at the very last minute. This distinction should give some comfort, but regardless, the principle that a limitation defence should be pleaded remains.

[39] The Attorney General of Trinidad and Tobago v Keron Matthews [2011] UKPC 38, para 16
[40] Janet Edwards v Jamaica Beverages Limited (unreported) Jamaica, Supreme Court, Suit No. C.L. 2002/E – 037, delivered March 23, 2010, para 34
[41] Ibid, para 36
[42] Topaz Jewellers et al v National Commercial Bank Ja Ltd [2011] JMCA Civ 20 para [11]

43. Another example is where a defendant intends to argue that the claimant failed to mitigate his losses. On this point, a St. Lucian PC case[43] was affirmed in a later Trinidad & Tobago PC case[44]. The Board said:

> "It should however be clearly understood that if a defendant intends to contend that a plaintiff has failed to act reasonably to mitigate his or her damaged, notice of such contention should be clearly given to the plaintiff long enough before the hearing to enable the plaintiff to prepare to meet it."

44. The same can be said of "contributory negligence". Albeit the Law Reform (Contributory Negligence) Act does not specifically state the requirement to plead this defence, our courts have held that it is required. In **Ainsworth Blackwood Snr v Naudia Crosskill and Glenmore Waul[45]**, D. Fraser, J held that *case law has made it clear that the defence needs to be pleaded before defendants can reap its benefit.*

45. When one considers all the foregoing defences, it is clear that where a positive defence is applicable to the case but is not pleaded, it seems to be fatal. It is arguable that a defendant does not easily receive the empathy of our courts as far as pleadings are concerned and possibly for good reason– the conclusion being that a defendant's silence in pleadings is more likely to be fatal.

SILENCE OF WITNESSES

46. So you've now pleaded your case, mediation fails, you have flown through the gates of case management and pre-trial review, and witness statements have been filed. We should be familiar with the provision that if you fail to file a witness statement or witness summary by the stipulated time, you should not be permitted to call any intended witness unless a relief from sanctions application is made and granted.[46]

47. There is however one local first instance ruling where a defendant filed a defective witness summary of what he intended to say in the witness box within the time stipulated to do so, but did not file a witness statement any time thereafter. At the trial, the same defendant attempted to give his evidence-in-chief. The Court first ruled that the witness summary was materially defective and because of those defects the witness summary could not be relied on. The court went further to consider whether or not an examination-in-chief of the witness would be suitable. The court found, "*it would not be fair or in keeping with the overriding objective set out in the C.P.R for the Court to now allow the 1st Defendant to range large in oral evidence, potentially taking the Claimant by surprise. To rule otherwise would have been to place the litigants right back in the "bad old days" of trial by ambush before the advent of the C.P.R*[47]."

[43] Geest plc v Lansiquot (St Lucia) [2002] UKPC 48; [2002] 1WLR 3111, para 16
[44] Terrence Calix v Attorney General of Trinidad and Tobago [2013] UKPC 15 para 20
[45] [2014] JMSC Civ 28 para [39]
[46] Rule 29.11
[47] Olga James-Reid v Stephen Clarke & David Davis (unreported) Jamaica, Supreme Court, claim No. J004 of 2001, decided 5th October, 2007

48. The nuance between witness summary/witness statements apart, the principle that is discernible is that the disclosure of statements before the trial is designed to prevent surprises from the witness box. In this way, if the statement/summary does not include the requirements of the CPR or the requirements of the case, the silence *may* be fatal.

49. On the other hand, let us consider this scenario: you have a perfectly good witness statement from a key witness, and before the trial, the witness dies, or cannot be found – worse without any forewarning, the witness is a no show.

50. Thankfully, in the first two of these situations our Evidence Act provides some assistance. Where a witness dies, his or her witness statement may be tendered as evidence through a notice of intention to tender into evidence hearsay statements contained in a document[48], and if you are able to demonstrate that you have taken all reasonable steps to find a witness and were still unable to find him or her, then the court may accept the statement as hearsay.[49]

51. However, the Evidence Act does not assist a litigant where the witness, without forewarning fails to show. As one local judge wrote, "*It is my considered opinion that had witness B been found, informed for court and he declined to attend there would be no basis for admitting the evidence… because [the] provision [under the Evidence Act] requires proof that he cannot be found not proof that he was found and did not attend.*[50]" In other words, our Evidence Act does not use non-attendance as a criterion for putting the witness statement in as hearsay evidence. The consequence is that you will be left in an embarrassing position where you have the witness statement in hand, but no witness and therefore no evidence.

52. The opposing counsel will invariably argue then that without the key witness' evidence, your client has failed to prove his case on a balance of probabilities – he has not met his legal and evidential burden to prove his case or some crucial element of his case. So for example, in a case of detinue, where there is no evidence of an unconditional demand for the return of the detained object, the claim is bound to fail[51], or in cases of fraud, where there is no witness that can definitively pin acts of dishonesty on a defendant, the claim will also likely fail.

53. A local case which seemed to turn almost exclusively on the silence of a witness is the case of **Oscar Clarke v The Attorney General**[52]. The claimant was a police officer who was on duty at a police station in the company of two other officers and a juvenile who was being cautioned and a man armed with a machete who was protesting for the release of the juvenile. The machete wielding man severely chopped the claimant several times over his body before the claimant could discharge his firearm. The man threw his machete away as he escaped the gunshots by locking himself into a nearby abandoned house. The claimant

[48] Evidence Act section 31E (2) and (4) (a) ;
[49] Evidence Act section 41E (4) (d); R v Adijah Palmer, et al [2013] JMGCCDD 1
[50] R v Adijah Palmer, et al, supra, paragraph [36]
[51] Amy Bogle v The Transport Authority consolidated with Amy Bogle v Lloyd Bowen et al [2015] JMSC Civ.258, paragraphs [8]-[9]
[52] [2016] JMSC Civ 65

sued the government claiming that the government's negligence caused him the injuries he sustained. At the trial, the defendant only asked one question in cross-examination and led no evidence. The court found:

> [54] In the case at hand, the evidence led by the claimant in proof of his claim, was woefully lacking in sufficiency. Whilst it is worthwhile to remember that the defence led before this court, at trial, no evidence whatsoever, that failure on their part, to lead evidence, has not at all, served to negate the legal onus which rests solely on the claimant, if he wishes to be successful in proof of his claim, to prove his claim on a balance of probabilities[53].

54. In essence, the court held that the silence of the defendant in failing to call witnesses and/or leading evidence was not as severe as the claimant's failure to lead evidence which would establish a crucial element of his case. This position falls into the principles which the UK's courts have outlined. These principles have been expressed in this way[54]:

(a) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material to give on an issue in an action.

(b) If a court is willing to draw adverse inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(c) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference; in other words, there must be a case to answer on that issue.

(d) If the reason for the witness's absence or silence satisfies the court, then no adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potential detrimental effect of his/her absence or silence may be reduced or nullified.

55. So, the conclusion is that the silence of a witness may have certain detrimental effects, which may or may not be deadly, *based on the circumstances*. These consequences include:

(a) Where a witness statement is not filed within time, the witness may not be called unless there is a successful relief from sanctions application or extension of time before the time for compliance has passed;

[53] Ibid, para [54]
[54] Gordon Ramsay v Love [2015] EWHC 65 (Ch) para 13.

(b) Even where a witness summary is filed within time, the court may not allow the intended witness to give evidence because of the potential risk of the witness saying something which may take the other litigant(s) by surprise; and

(c) Where the witness omits to lead or give evidence on a crucial aspect of his or her case, this may be fatal to the case, unless there is some explanation given which may reduce or nullify any adverse inferences which may be drawn.

56. There is however one saving argument, which is that a court should not make an adverse inference where the absent witness would not have assisted the court. In one such situation, a court declined to make an adverse finding by the paucity of evidence of a party. Opposing Counsel submitted to the court that it should draw inferences adverse to a defendant flowing from its failure to call relevant witnesses. The court held that it "***cannot conclude that these men could have given me no relevant evidence, but I do conclude that their evidence could not have assisted me significantly***."[55]

57. So to the extent that the evidence would be relevant and would have been of significant assistance to the court, then, the silence (or absence) of the witness may be fatal.

[55] Susan Saundeson & others v Sonae Industria (UK) Ltd [2015] EWCA 2264 (QB) para 56

PART II

SILENCE OF ADVOCATES

58. In this part of the paper we consider two very important rules of civil practice. They concern aspects of the conduct of a civil claim before the court and of an application before a Judge or a Master in chambers. We examine, very briefly, what may happen when counsel, for one reason or another, omits to ask certain questions in cross-examination and/or omits to raise particular points of law in argument at the trial (hearing) or on the hearing of an application. In resolving the potentially very serious consequences of such omissions, the touchstone is fairness in the context of the due administration of justice.

a. The rule in Browne v Dunn 1894 6 R. 67

"All I insist on, and nothing else, is that you should show the whole world that you are not afraid. Be silent, if you choose; but when it is necessary, speak – and speak in such a way that people will remember it." – Wolfgang Amadeus Mozart

59. The common law rule in **Browne v Dunn** is a rule of fairness. It ensures that witnesses have the opportunity to explain if the opposing party intends to later contradict or discredit them. Note the dual operation of the rule "contradict **or** discredit".

60. The rule is an important rule of professional practice. It requires that unless notice has been clearly given, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his/her evidence, especially where the case relies upon inferences[56] to be drawn from other evidence in the proceedings. In light of the rule against case splitting[57] it is unfair to the witness and the party calling the witness, to deny an opportunity for an explanation if the opposing party, at a later point, intends to invite disbelief or criticize the witness or to adduce contradictory evidence.

61. It is critical to note that we are dealing here with civil cases only. The rule in **Browne v Dunn** applies differently, or not at all, in criminal cases.[58]

62. In the case which gave its name to the rule, the plaintiff, Browne, sued a solicitor, Dunn, for libel for preparing a document by which nine of Browne's neighbours purported to instruct Dunn to apply for a summons against Browne for annoying them and for attempting thereby to provoke a breach of the peace.

63. When the document was prepared, the plaintiff and defendant were not on good terms and Dunn knew that certain summonses and cross-summonses were to be heard on the day following the date of the document.

[56] In which case, of course, the nature of the case may not be immediately apparent to the witness.
[57] Port of Melbourne Authority v Anshun Pty Ltd [1981] HCA 45; (1981) 147 CLR 589 (1 September 1981)
[58] MWJ v R [2005] HCA 74; (2005) 222 ALR 436

64. On that following day, after hearing various summonses, a Magistrate bound over Browne to keep the peace.

65. Browne later found out about the document and brought his libel action against Dunn. One of the signatories gave evidence for the plaintiff. All the other signatories, except for one who had died and one Mr. King who was not called, gave evidence for the defendant.

66. The plaintiff's case was that the document was a sham and was drafted and signed gratuitously without any honest or legitimate object but, rather, for the sole purpose of annoyance and injury to Browne.

67. The defendant's witnesses gave evidence to the effect that they really had employed Dunn as their solicitor. Two of the signatories were not cross-examined about the quarrel that they had had with the plaintiff.

68. The jury found for the plaintiff. The Court of Appeal entered judgment for the defendant. The plaintiff appealed to the House of Lords.

*(i) **The rule***

"Silence, like a cancer, grows." – Paul Simon

69. Lord Herschell LC formulated the first limb of the rule and went on to state the rule's limitation. The Lord Chancellor said at p. 70 –

> "Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit.
> . . . .
> . . . .it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it."

70. Note that, here, Lord Herschell was directing his attention to impeaching the credibility of the witness without having impugned it during cross-examination.

71. In the same case, Lord Halsbury spoke of the need to put one's case to the witness as well. His Lordship said at p. 76 –

> "My Lords, with regards to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.
>
> . . . .
>
> My Lords, it seems to me that it would be a perfect outrage and violation of the proper conduct of a case at Nisi Prius if, after the learned counsel had declined to cross-examine the witness upon that evidence, it is not to be taken as a fact that that witness did complain of the plaintiff's proceedings, that he did receive advice, that he went round to Mr. Dunn as a solicitor, and that he did sign that retainer, the whole case on the other side being that the retainer was a mere counterfeit proceeding and not a genuine retainer at all."

72. Putting one's case to the witness is essential. Hunt, J. in **Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation** [1983] 1 NSWLR 1 said at 16 –

> "It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn…"

73. As recently as 2017, the Judicial Committee of the Privy Council confirmed the applicability of the rule. In **Chen v Ng**[59] Lords Neuberger and Mance, who delivered the Committee's advice, said at [53] –

[59] Chen v Ng [2017] UKPC 27

> " . . . . where it is not made clear during (or before) a trial that the evidence, or a significant aspect of the evidence, of a witness (especially if he is a party in the proceedings) is challenged as inaccurate, it is not appropriate, at least in the absence of further relevant facts, for the evidence then to be challenged in closing speeches or in the subsequent judgment."

(i) <u>The rationale</u>

74. At 22 – 23 Hunt, J. in **Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation** explained the reasons for this rule of professional practice –

> "… There are many reasons why it should be made clear, prior to final addresses and by way of cross-examination or otherwise, not only that the evidence of the witness is to be challenged but also how it is to be challenged. Firstly, it gives the witness the opportunity to deny the challenge on oath, to show his mettle under attack (so to speak), although this may often be of little value. Secondly, and far more significantly, it gives the party calling the witness the opportunity to call corroborative evidence which in the absence of such a challenge is unlikely to have been called.[60] Thirdly, it gives the witness the opportunity both to explain or to qualify his own evidence in the light of the contradiction of which warning has been given and also, if he can, to explain or to qualify the other evidence upon which the challenge is to be based…"

75. The rationale of the rule has also been explained from the court's point of view. Wells, J. in **Reid v Kerr** (1974) 9 SASR 367 said –

> "...a judge... is entitled to have presented to him... issues of fact that are well and truly joined on the evidence; there is nothing more frustrating to a tribunal of fact than to be presented with two important bodies of evidence which are inherently opposed in substance but which, because Browne & Dunn has not been observed, have not been brought into direct opposition, and serenely past one another like two trains in the night."

76. Rule 29.9(1) (c) of the Civil Procedure Rules, 2002 provides that a witness giving oral evidence may, with the permission of the court, comment on evidence given by other witnesses. However, the court will give permission only if it considers that there is good reason not to confine the evidence of the witness to the witness statement.

[60] In this day and age where, under the Civil Procedure Rules, 2002, the number of witnesses is limited in advance and witness statements are exchanged in advance, this reason for complying with the rule in Browne v Dunn takes on even greater significance. Since a party is unlikely to be able to call corroborative evidence, the failure to comply with the rule may well have greater adverse consequences for the opponent's case than may have been visited upon that case under the previous procedure.

77. Since witness statements are usually exchanged at the same time there is always the chance that, despite the pleadings and disclosure, they will not join issue one or more important aspects of the evidence. Rule 29.9(1)(c) will help address that difficulty and will allow the case to proceed more in keeping with the ethos of the rule in **Browne v Dunn**.

(ii) How to comply with the rule

78. Fortunately, counsel can comply with the rule very simply by asking questions of the witness –

(i) Put your case to the witness –

a. "Isn't it a fact that . . . . . ."
b. "Could it be the case . . . . ?"

(ii) Impeach the credibility of the witness –

a. "Are you seriously asking this Honourable Court to accept that . . . . . .?"
b. "I suggest you are not telling the truth"

79. How the advocate frames the questions is a matter of personal style. But put the questions she must![61]

(iii)Limitations of the rule

80. As we have seen, if it is perfectly clear that the witness has full notice that it is intended to impeach his/her credit, there is no need to formulate the questions in the manner suggested.

81. In Jamaica, authority for this proposition may be found in **D & LH Services Limited, Isadra International Limited, Daley Walker & Lee Hing and The Estate Clifton Daley v The Attorney General And The Commissioner of the Jamaica Fire Brigade** [2015] JMCA Civ 65, where McDonald-Bishop JA (Ag.) (as she was then) and with whom Phillips and Brooks JJA agreed said at [57] –

> "The general rule that the witness should be cross-examined when it is intended to ask the tribunal of fact to disbelieve him on a point, however, is not absolute and inflexible. In the same case, Browne and Dunn, it was recognised that the witness need not be cross-examined on an issue in question if it is otherwise perfectly clear that he has had full notice beforehand, in which it has been "distinctly and unmistakably given" that there is an intention to impeach the credibility of his story or if the story is of an "incredible and of a romancing character". In other words, the rule may be departed from if, for instance, the point upon which the witness is to be impeached is so manifest, that it is not necessary to waste time in putting questions to him upon it. Also, it is not always necessary to put to

[61] The writer's humble suggestion to those embarking on careers as advocates is to sit in court and watch and listen and in that way to learn at the feet of our very best advocates.

> the witness explicitly that he is lying, provided that the overall tenor of the cross-examination is designed to show that his account is incapable of belief (see Adrian Keane, The Modern Law of Evidence, 7th edition, pages 195-196)."

(iv) <u>What constitutes "full notice beforehand"?</u>

82. Sykes, J. (as he then was) in **Phillip Granston v Attorney General of Jamaica** 2003 HCV 1680 held that assertions in witness statements of a position contrary to that advanced by a witness will not satisfy the "full notice beforehand" limitation. At [13] His Lordship said –

> "13. It is clear then, that asserting in witness statement a contrary position to that of the opposing side, cannot be a fact, and, in my view, surely does not do away with the necessity to confront the witness while he's testifying with the contrary version, so that he has an opportunity to respond to the assertion.
> . . . .
> 23. . . . . it is not clear what is meant by notice before hand that the testimony of the witness is to be impeached. It could be said to include witness statements from the opposing side.
> . . . .
> 24. The difficulty with this approach is as follows: until the witness goes into the box and expressly adopts the witness statement as his, there is no evidence before the court (ignoring evidence by affidavit). The fact that a witness makes an assertion does not mean that at the time of trial when the witness is in the witness box the assertion will necessarily be adopted by the witness. Instructions may change between time when the witness statement is served and the time the witness goes into the witness box.
> . . . .

83. Then Sykes, J. offers a word of advice to advocates –

> "27. . . . . All this suggests to me that it is a better practice to specifically indicate to the witness what aspect of his testimony is not accepted rather than rely on this notion of prior notice."

84. A note of caution. To the extent that His Lordship may be thought to have suggested at [24] that an affidavit is evidence upon its being filed, it must be very clearly and unmistakably recognized that an affidavit does not become evidence unless and until it is read to the court[62] either by counsel or by the litigant in person, as the case may be. Once filed an affidavit cannot be uplifted but counsel is not obliged to read affidavits which have been filed.

[62] Note that evidence is led by affidavit not by merely filing the affidavit but by reading it to the Court. An affidavit which has been placed on the file does not become part of the proceedings until it is read to the Court (see *Manson v Ponninghaus* [1911] VLR 239).

85. An important point of difference. It has been said that where the issues in dispute are well known to the parties from the discovery process, the fact that the witness has had notice of the issues will make the rule redundant.[63] In **Porter v Oamps**[64], Raphael FM concluded that Browne v Dunn did not apply because the parties were aware of the issues by the time of the trial and knew the responses that each witness was likely to give to the propositions put to them.

86. Given the vast number of cases which have both reiterated and applied the "full notice beforehand limitation" of the rule in Browne v Dunn, Sykes, J.'s view that a witness statement cannot constitute full notice beforehand may be regarded as unusual if not unique. Of course the simpler the issues, the less will be required of counsel in putting his case to his opponent's witnesses. The more complex the issues and/or, as we have already seen, the more the case relies on inferences, the more will be required of counsel in that regard.

(v) <u>The consequences of the failure to comply with the rule in Browne v Dunn</u>

"And touched the sounds of silence"- Paul Simon

87. In short, the consequences can be detrimental. As Sykes, J observed in **Phillip Granston v Attorney General of Jamaica** 2003 HCV 1680 at [28] –

> "It would seem to me that advance notice cannot obviate the necessity to indicate to the witness any challenge to an important part of his testimony. Any failure to do this, particularly in circumstances where the witness has not been discredited can have detrimental consequences for the party that fails to make the challenge."

88. The consequences imposed by the court, once the rule is infringed, will be to secure fairness. In **Regina v Birks** (1990) 19 NSWLR 677 at p.688 Gleeson CJ said –

> "The consequences of a failure to observe the rule in Browne v Dunn will vary depending upon the circumstances of the case, but they will usually be related to the central object of the rule, which is to secure fairness."

- *Firstly, the advocate is precluded from impeaching the credibility of the witness in his or her address/submissions*

89. As Lord Herschell said in **Browne v Dunn** itself at p. 71 –

> "All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted."

[63] Uniform Evidence Law (Australian Law Reform Commission Report 102, 8 February, 2006) paragraph 5.146
[64] (2004) 207 ALR 635

90. As well, Lord Morris there said at p. 77 –

> "My Lords, there is another point upon which I would wish to guard myself, namely, with respect to laying down any hard-and-fast rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit. In this case, I am clearly of opinion that the witnesses, having given their testimony, and not having been cross-examined, having deposed to a state of facts which is quite reconcilable with the rest of the case, and with the fact of the retainer having been given, it was impossible for the plaintiff to ask the jury at the trial, and it is impossible for him to ask any legal tribunal, to say that these witnesses are not to be credited. But I can quite understand a case in which a story told by a witness may have been of so incredible and romancing a character that the most effective cross-examination would be to ask him to leave the box. I therefore wish it to be understood that I would not concur in ruling that it was necessary, in order to impeach a witness's credit, that you should take him through the story which he had told, giving him notice by the questions that you impeached his credit."

- *Secondly, the court cannot reject the witness's evidence*

91. The Privy Council reminded us in **Chin v. Audrey Ramona Chin (Jamaica)**[65], if we needed any reminding at all, that in the absence of cross-examination on a critical issue, it is not possible for a court to decide that issue. There the issue was whether Mrs. Chin was beneficially entitled to half the shares in Lasco Foods Ltd. However, although the parties swore affidavits in which opposing claims were made as to the ownership of the shares, the parties were not cross-examined. Accordingly, Panton, J. who presided at the trial, was not in a position to assess the credibility of the deponents though that was central to the determination of the critical issue. Mr. Chin argued successfully in the Privy Council that, having sworn to an opposing case, he had a right to have his credibility tested. Since there was no cross-examination of him at the trial, neither the trial judge nor the Court of Appeal could make any findings as to credibility. The case was, accordingly, remitted for re-trial to enable the requisite cross-examination, the findings as to credibility to be made and the critical issue in the case to be determined.

92. Sykes, J. said in **Granston** at [18] –

> "The position I have stated regarding the necessity to challenge you witness while he's in the box is supported by long established authority. To summarize the position: if a witness is not challenged while he's in the box on any part of his evidence which is not accepted by his opponent then it is taken barring the circumstances where it can be said that the witnesses testimony has been severely discredited or overwhelmed by other evidence it is very difficult for court reject the witnesses testimony on the unchallenged part of his evidence."

[65] [2001] UKPC 7 (12th February, 2001)

- *Thirdly, the cogency of the witness's evidence may be enhanced*

93. In his address entitled "**The rule in Browne v Dunn**" to the Institute of Arbitrators, Australia, The Honourable Mr. Justice Morton Rolfe Q.C., a Judge of the New South Wales Supreme Court said –

> "In addition to the question of fairness, there is also the question of the cogency of unchallenged evidence. If evidence is not challenged in cross-examination the tribunal of fact may the more readily accept it. Indeed, if such evidence has not been challenged, the failure of the tribunal of fact to accept it, unless of course it is patently absurd, may constitute an error in point of law."

94. In the Jamaican case of **Dalton Wilson v Raymond Reid** SCCA No. 14/2005, Smith, JA said –

> "I am inclined to agree with Lord Gifford. In a claim for damages the claimant must specifically plead and prove each item for which he makes a claim. The claimant's evidence that he worked as a security guard was not challenged. In his particulars of claim under the caption "Particulars of Loss of Earning Capacity" the respondent averred that at the time of the accident he was working full-time as a security guard and used to do electrical work in his spare time. There was not even a hint of a suggestion that he was not speaking the truth in this regard. Generally, where the court is to be asked to disbelieve a witness, the witness should be cross-examined in that regard. Failure to cross-examine the witness on some material part of his evidence or at all may be treated as acceptance of the truth of that part or the whole of his evidence – See **Markem Corporation and Anor. v Zipher Limited** [2005] EWCA Civ. 267[66] following **Browne v Dunn** [1894] 6 R. 67.

95. Another note of caution. To the extent that Smith, JA may be thought to have suggested that a pleading is evidence, it must again be clearly and unmistakably recognized that a draft pleading (or any pleading for that matter) is not, in fact, evidence[67] – and this is so whether the pleading contains a certificate of truth or not.

96. As we've seen, Lord Ackner exhorts judges to check their impressions from demeanour against the evidence, the pleaded case, logic, experience and common sense. Accordingly, the failure to comply with the rule in Browne v Dunn may very well amount to a lost opportunity to how the cross-examiner's case is to be made out.

[66] Where it was observed that Australian and Canadian practitioners were very alive to the rule in Browne v Dunn.
[67] Attorney General v John MacKay [2012] JMCA App 1 at [8]. The exception would be where affidavits serve the function of both pleadings and evidence as in some family law proceedings and proceedings commenced by fixed date claim forms.

(vi) Remedies for breach of the rule

97. The remedy to be applied when a breach of the rule occurs lies within the discretion[68] of the judge. It will be for her to decide what steps to take to ensure that the trial (or application) does not miscarry.

> "[The judge] may, for example, require the relevant witness to be recalled for further cross-examination before allowing the contradictory evidence to be given or he may decline to allow the party in default to address upon a particular subject upon which the opposing party was not cross-examined . . . .": **PayLess Superbarn (NSW) Pty Limited v O'Gara** (1990) 19 NSWLR 551 per Clarke, JA.

98. In an extreme case non-observance may lead the court to deny a party's right to call admissible and relevant evidence as, in fact, happened in the **PayLess Superbarn** case.

99. Indeed, the court may –

a. order, as we've seen, that the witness be recalled to address the matters on which he or she should have been cross-examined;
b. prevent the party who breached the rule from calling evidence which contradicts or challenges that witness' evidence in chief;
c. decline, as we've also seen, to allow a party to address on a subject upon which the witness was not cross-examined;
d. allow a party to re-open its case to lead evidence to rebut the contradictory evidence or corroborate the evidence in chief of the witness;
e. comment to the tribunal of fact that the cross-examiner did not challenge the witness' evidence in cross-examination, when that could have occurred; or
f. comment to the jury that the evidence of a witness should be treated as a 'recent invention' because it 'raises matters that counsel for the party calling that witness could have, but did not, put in cross-examination to the opponent's witness'.

(vii) Conclusion

100. The rule in **Browne v Dunn** is designed to ensure a fair trial by affording the witness an opportunity to comment of the opponent's case and of defending his/her credibility. It can be complied with quickly and easily. It is not necessary to comply if full notice of an intention to impeach the credibility of the witness has been given beforehand. Failure to comply with the rule can have very serious adverse consequences for the case that counsel is briefed to advance. Where there has been a failure, the court will fashion a remedy consistent with the principle of fairness in the context of the due administration of justice which underlies the rule.

[68] As to the manner in which discretions should, and should not, be exercised see, e.g., House v R [1936] HCA 40; (1936) 55 CLR 499 (17 August 1936)

b. <u>Raising a New Issue on Appeal</u>

101. As is so often the case, there is a tension between the imperatives of the due administration of justice, (in this case the finality of litigation – being one pillar of the just, quick and cheap disposal of cases) on the one hand, and doing justice as between the individual litigants on the other.

(i) Judicature (Appellate Jurisdiction) Act

102. The Judicature (Appellate Jurisdiction) Act does not appear to address the question of the nature of an appeal nor whether the Court of Appeal has jurisdiction to entertain a fresh argument on appeal.

(ii) Court of Appeal Rules, 2002

103. Rule 1.16 of the Court of Appeal Rules, 2002 provides that an appeal shall be by way of re-hearing and at the hearing of the appeal no party may rely on a matter not contained in that party's notice of appeal or counter-notice unless it was relied on by the court below or the court gives permission.

104. It goes on to provide that the court is not confined to the grounds set out in the notice of appeal or counter-notice, but may not make its decision on any ground not set out in the notice of appeal or counter-notice unless the other parties to the appeal have had sufficient opportunity to contest such ground.

(iii)Meaning of "re-hearing"

105. In **Coulton v Holcombe** [1986] HCA 33; (1986) 162 CLR 1 (19 June 1986) Gibbs C.J., Wilson, Brennan and Dawson JJ said –

> "The provision that "the appeal shall be by way of rehearing" is well understood, as Windeyer J. made clear in **Da Costa v. Cockburn Salvage & Trading Pty. Ltd.** [1970] HCA 43; (1970) 124 CLR 192, at pp 208-209:
>
> > "This does not mean that the appeal is a complete re-hearing as a new trial is. It means that the case is to be determined by the Full Court, its members considering for themselves the issues the trial judge had to determine and the effect of the evidence he heard as appearing in the record of the proceedings before him, but applying the law as it is when the appeal is heard not as it was when the trial occurred: see **Attorney-General v. Birmingham Tame, and Rea District Drainage Board** (1912) AC 788, at pp

801-802, and **Attorney-General v. Vernazza** (1960) A.C. 965".

(iv) The Judicial Committee of the Privy Council's view

106. The principles of fair play and of counsel being bound by the choices she/he makes were expressed by Lord Dunedin and Lord Sumner in **Ahmed Musaji Saleji v Hashim Ebrahim Saleji** Privy Council Appeal No. 87 of 1914 from the High Court of Judicature at Fort William in Bengal in the following way –

> "Their Lordships would unfeignedly deplore a state of procedure to enable the appellants to take their chance of success before the assistant referee at such a cost in time and money and then, after they had lost the day, to contend that the matter should never have gone before him at all;
>
> . . . .
>
> The appellants took their objection too late and the High Court rightly decided against them."

107. Normally, the Privy Council will not entertain a fresh argument on appeal. As was pointed out Kerr, Clarke, Wilson, Carnwath & Hodge, LLJ in **Attorney General v Dumas** [2017] UKPC 12 –

> "27. The Attorney General in his written case sought to raise new arguments which had not been presented to Mohammed J or to the Court of Appeal. The Board agreed to hear the submissions de bene esse. It will rarely be appropriate for the Board to consider submissions which have not been presented to the courts in Trinidad and Tobago. But because the appeal raises constitutional issues, because the Board is satisfied that there is no substance in the new arguments and because, therefore, Mr Dumas's counsel is not prejudiced by the late arrival of those submissions, the Board deals with them briefly."

108. In **De La Haye (Appellant) v Air Mauritius Ltd (Respondent) (Mauritius)** [2018] UKPC 14 Lord Hughes delivering the advice of the Board said at [17] and following –

> "17. Mr Bibi also sought the leave of the Board to raise three entirely new grounds of appeal. These had not figured at any stage in either of the courts below. The Board needs to repeat what it said on this topic quite recently in **Grewals (Mauritius) Ltd v Koo Seen Lin** [2016] UKPC 11; [2016] IRLR 638, when a similar attempt was made.
>
> > "24. The Board's role is to hear appeals from decisions in the courts of the country where the dispute arose. Whilst it sometimes happens that the argument develops as the case progresses through the courts, the Board will not normally

> entertain an argument which was not advanced below unless it can be done without injustice …
>
> 25. The consequence of this very late development of a new argument is twofold. Firstly, it is quite apparent that Grewals had not had a proper opportunity to consider it, and the Board was in consequence deprived of any considered argument by way of response to it. Secondly, and more importantly, the Board is deprived of the considered conclusions of the Industrial Court and Supreme Court on the point. The argument which it is sought to develop may have considerable implications for the practice of employment law in Mauritius. An analysis of how it can or cannot be accommodated within the law and practice of employment in that jurisdiction is an essential element in arriving at a correct conclusion about it. It would be unfair to the other party to this case, and potentially dangerous to the development of Mauritian employment law, for the Board to rule on this point without the necessary groundwork having even been attempted.
>
> 26. It may be that in some instances an entirely new argument is so indisputably correct that it can and should be entertained without injustice even though it had been overlooked through all the earlier stages of the litigation. That is not, however, this case."

18. It should be added that there may be occasions when no injustice would be done by entertaining a new argument, at least if it is a pure point of law. Mr Bibi identified the old case of **Connecticut Fire Insurance Co v Kavanagh** [1892] AC 473 as accepting that proposition, albeit in a case in which the fresh argument was not permitted because it was far from clear that the evidence would not have had to be different if the new argument had been raised at trial. That is, however, only one circumstance relevant to whether there would be injustice in investigating entirely new arguments. Another is undoubtedly the great desirability of the Board having the considered opinion on the topic of the courts in the country from which the question comes to it, especially a court of specialist jurisdiction such as the Industrial Court.

19. In the event, the Board permitted Mr Bibi to outline his three new arguments, in order to decide whether they should properly proceed to adjudicate upon them or not."

109. Thus, if –

(i) the appeal raises constitutional issues;
(ii) it is a pure point of law;
(iii) it is clear that the evidence would not have been different had the new argument been raised at the trial;
(iv) it is wrong[69]; and/or
(v) the new argument is so indisputably correct that it can and should be entertained without injustice;

the Board may allow to the argument to be outlined or advanced.

110. However, if –

a. the other side has had no opportunity to consider it;
b. the evidence may, not must, have been different had the point been raised below; or
c. the other side is prejudiced;
d. then the normal rule that the Privy Council will not entertain the new point will apply.

(v) The Australian perspective

111. The Australian position in relation to legal issues not raised in the court below is set out in **Coulton v Holcombe** [1970] HCA 43; (1970) 124 CLR 192, at pp 208-209 in which Gibbs C.J., Wilson, Brennan and Dawson JJ went on to say –

> "It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish. The powers of an appellate court with respect to amendment are ordinarily to be exercised within the general framework of the issues so determined and not otherwise. In a case where, had the issue been raised in the court below, evidence could have been given which by any possibility could have prevented the point from succeeding, this Court has firmly maintained the principle that the point cannot be taken afterwards: see **Suttor v. Gundowda Pty. Ltd.** [1950] HCA 35; (1950) 81 CLR 418, at p 438; **Bloemen v. The Commonwealth** (1975) 49 ALJR 219. In **O'Brien v. Komesaroff** [1982] HCA 33; (1982) 150 CLR 310, Mason J., in a judgment in which the other members of the Court concurred, said at p 319:
>
> > "In some cases when a question of law is raised for the first time in an ultimate court of appeal, as for example upon the

[69] E.g. Sagicor Bank Jamaica Limited (Appellant) v Taylor-Wright (Respondent) (Jamaica) [2018] UKPC 12

> construction of a document, or upon facts either admitted or proved beyond controversy, it is expedient in the interests of justice that the question should be argued and decided (**Connecticut Fire Insurance Co. v. Kavanagh** (1892) AC 473, at p 480; **Suttor v. Gundowda Pty. Ltd.** [1950] HCA 35; (1950) 81 CLR 418, at p 438; **Green v. Sommerville** [1979] HCA 60; (1979) 141 CLR 594, at pp 607-608). However, this is not such a case. The facts are not admitted nor are they beyond controversy. The consequence is that the appellants' case fails at the threshold. They cannot argue this point on appeal; it was not pleaded by them nor was it made an issue by the conduct of the parties at the trial".

In our opinion, no distinction is to be drawn in the application of these principles between an intermediate court of appeal and an ultimate court of appeal. Finally, in a recent decision of six Justices of this Court - **University of Wollongong v. Metwally** (No. 2) [1985] HCA 28; (1985) 59 ALJR 481, at p 483; [1985] HCA 28; 60 ALR 68, at p 71 - the Court said:

> "It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so".

10. The Court of Appeal recognized the great importance, in the public interest, of these principles. Their Honours summarized them in the following terms:

> "the finality of litigation; the difficulty of inducing an appeal court to consider new facts; the undesirability of encouraging tactical decisions not to present an issue at first instance: keeping it in reserve for appeal; and the need for vigilance to avoid injustice to a party having to meet new facts and new issues of law for the first time at the appeal court".

The Court then examined three countervailing considerations which it believed to be special to the case. The first was that the new issue touches upon the public law of the State because it involves the interpretation of a public statute, the powers of a statutory commission

and the conduct of statutory office holders. The second consideration was that another appeal involving some, but not all of the landholders who are parties to the present action, had been listed for hearing. The appeal involved another water site but the same point might be raised. The principle favouring finality of litigation might therefore, so it was said, dictate an early determination of the issue. The third consideration advanced was that, being a matter of public law, the new issue involved not only the parties, the Commission and the Land Board, but the wider community, other landholders, the Executive Government and the Parliament, all of whom had an interest in the clarification of statutory duties and due observance of the law by statutory office holders. The case therefore differed from one of private litigation inter partes.

11. The Court of Appeal concluded that the interests of finality and justice, as well as due observance of the law by public officials, favoured the granting of the applications of the first respondents. Although in the course of argument in this Court attention was paid to the principles governing the admission of further evidence in a case such as this where the further evidence does not concern matters occurring after the trial, we do not find it necessary to consider those matters. It seems to us that provided the decision to open up the new issue can be supported as being within the ambit of a proper discretionary judgment, then the consequential decisions in relation to the admission of additional material which the parties think it necessary to have in order to determine the new issue could not be open to challenge. Of course, the need to gather further evidence which may give rise to further disputation is a matter which bears directly on the justice of the decision to allow the new issue to be litigated at the appellate stage."

(vi) The Canadian approach

112. The Canadian approach is to all intents and purposes identical. The Court of Appeal's discretion to allow a litigant to raise new issues on appeal will be guided by a balancing of the interests of justice as they affect all parties. The court will exercise its discretion sparingly and generally only in situations where all of the relevant evidence to the submission can be found in the record; and the respondent will not suffer prejudice by the failure of the appellant to raise the new argument at trial.

113. The general statement of the factors to be considered by an appellate court in determining whether it should permit a new issue to be raised on appeal, and the exacting standard to be applied, traces to the following passage from the Supreme Court of Canada in Joint Stock Steamship Co. v. "Euphemia" (The):

> "The principle upon which a Court of Appeal ought to act when a view of the facts of a case is presented before it which has not been suggested before, is stated by Lord Herschell in The "Tasmania" [15 App. Cas. 223], at p. 225, thus:
>
> > "My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal ought to be most jealously scrutinized. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them."
>
> It appears to me that under these circumstances a court of appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box."

114. The Court of Appeal of British Columbia has been clear that the onus is on the party seeking to raise a new issue to persuade the court that all of the facts required to address the issue are before the court, as fully as if the issue had been argued at trial.[70]

115. The regard for evidentiary issues reflects that the caution around permitting one party to raise a new issue on appeal is "primarily to prevent prejudice to the party against whom the issue is raised."[71]

[70] On Call Internet Services Ltd. v. Telus Communications Company, 2013 BCCA 366 at para. 66 [On Call]; Ulmer at para. 27; and R. v. Winfield, 2009 YKCA 9 at para. 18.
[71] On Call at para. 66; Pinto at para. 27; and O'Bryan.

PART III

THE COURTS' INFERENCES FROM SILENCE

116. The ability of the court to make adverse findings or inferences from the silence of parties is pervasive and as the axiom goes, "is based on the circumstances". As far as litigation goes, the trial judge is always called upon to make inferences from the evidence present before him or her, or what is not before him or her, which has been invariably established in this paper. What has also been established is that the court is restricted in what inferences should be drawn[72].

117. The PC appears to have relaxed the circumstances within which the courts can make inferences in ancillary matrimonial proceedings. It is said that the court's duty in ancillary matrimonial matters is more *inquisitorial* than *adversarial*[73]. Lord Sumption explains it in this way:

> "….*The concept of the burden of proof, which has always been one of the main factors inhibiting the drawing of adverse inferences from the absence of evidence or disclosure, cannot be applied in the same way to proceedings [for ancillary financial relief in matrimonial proceedings] as it is in ordinary litigation*[74]."

118. From Lord Sumption, we are able to surmise that the court is entitled to draw adverse inferences from the absence of evidence or from non-disclosure disclosure (subject to certain conditions which Lord Sumption himself mentions), but the court may have an even greater degree of flexibility to draw inferences where a judge may *be required to draw on their own experiences*.

119. However, Lord Sumption also said that "*these considerations are not a licence to engage in pure speculation… but judges exercising family jurisdiction are entitled to draw on their experience and take notice of the inherent probabilities when deciding what an uncommunicative [spouse] is likely to be concealing*.[75]"

120. This exception notwithstanding, in this Part, we will examine the duty of the court to give reasons for its decision, and the inferences that higher courts can make where there is silence of the trial judge in the reasons given for his or her decision.

121. In the case of **Flannery v Halifax**[76], four general comments were given by the EWCA as to why reasons for a judge's decisions (especially the trial judge) are required. These four comments are:

    a. The duty is a function of due process and therefore of justice;

[72] See paragraph 38.
[73] Prest v Petrodel Resources Limited and others [2013] UKSC 34, para 45.
[74] Ibid, para 45
[75] Ibid, para 45
[76] Flannery and Another v Halifax Estate Agencies Ltd (t/a Colley's Professional Services) [2000] 1 W.L.R 377

b. *The want of reasons may be a good self-standing ground of appea*l;
c. Where the dispute involves something in the nature of intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other; and
d. The rule is the same whether the case involves mainly the witnesses' truthfulness or recall of events or reasoning and analysis whether with experts or otherwise. *Transparency should be the catchword.*

122. In essence, the parties are entitled to know why the judge ruled the way he or she did, why one side prevailed over the other, and why the other side lost. In this way the function of *due process* and *justice* is easily discernible from the perspective of the litigant. From the perspective of the court of appeal, where a judge fails to give reasons for his or her decision, the court of appeal may find that that in and of itself is a good enough reason to rule that the decision of the trial judge is appealable.

123. In a decision in the EWCA, the appeal court ordered a retrial where *implicit* findings were made on an important fact in issue[77]. The court held, "*the result is that while… a fair reading of the judgment suggests that the judge implicitly did not believe the [appellant], there is no express finding to that effect and no clear reasons for that conclusion. This is an unacceptable way of deciding the case…*[78]"

124. The idea is that the courts of appeal need to be enabled to carry out its function of determining whether the trial judge acted injudicially, misunderstood or misapplied the law and facts. The starting place for that function is the reasons the judge gives, and without same, it restricts the rights of the litigants to the appeal. More particularly, where a trial judge decides to draw adverse inferences against a party, the parties and the courts of appeal are required to know the basis for which those inferences were drawn. *Transparency is the catchword.*

125. The caution therefore is this: a court is inclined to draw inferences from the silence of a party – in pleadings, from the witnesses, from the impression garnered under cross-examination, etc, but where it makes such inferences, the basis on which the judge is inclined to one position over the other ought to be clear, otherwise the judgment of the trial judge may be rendered *unsafe*.

126. However, the reality is that based on case load, lack of resources, and public pressure our trial judges may not always be able to give judgments that express the judge's reasons completely. To this extent, the **Flannery v Halifax** comments are not rigid.

127. In a decision of the EWCA[79] in respect of three appeals, all grounded on the argument that the judge gave inadequate reasons for decisions, the appeal judges found that although there were several shortcomings in the respective judgments, when they consider the

[77] The Gulf Agencies Ltd v Abdul Salam Seid Ahmed [2016] EWCA Civ 44
[78] Ibid, para 37.
[79] Peter Andrew English v Emery Reimbold & Strick Limited; DJ&C Withers Limited v Ambic Equipment Limited; Verrechia t/a Freightmaster Commercials v Commissioner of Police for The Metropolis [2002] EWCA Civ 605

underlying material before the judge, the record of appeal, the transcript, the written submissions etc, the judge's reasoning were clear. In a postscript conclusion the judges gave this potent enough view:

> "In each of these appeals, the judgment created uncertainty as to the reasons for the decision. In each appeal that uncertainty was resolved, but only after an appeal which involved consideration of the underlying evidence and submissions. We feel that in each case the appellants should have appreciated why it was that they had not been successful, but may have been tempted by the example of *Flannery* to seek to have the decision of the trial Judge set aside. There are two lessons to be drawn from these appeals. The first is that, while it is perfectly acceptable for reasons to be set out briefly in a judgment, it is the duty of the Judge to produce a judgment that gives a clear explanation for his or her order. **The second is that an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the Judge has reached an adverse decision**."

128. So judges have a duty to give reasons that explains the judgment of the court, and where those reasons do not explain *why* the judge ruled how he or she ruled the decision may be appealable. To the extent that it may be appealable, the trial judge's silence, in civil litigation, may be fatal. However although the written reasons may appear inadequate or silent, but can otherwise be said to be quite adequate or "loud" when read with the knowledge of the evidence and submissions made at the trial, then the silence of the trial judge may not necessarily be fatal. Proceed to the Court of Appeal with caution!

CONCLUSION

129. This paper is aimed at preventing some of the pitfalls that silence can create for litigants (and their attorneys), but it is also aimed at having us being able to identify these pitfalls in to use to our advantage. The pitfalls of judges can be used to the litigants' advantage as well.

130. For instance, if the advocate is bound by **Browne v Dunn**[80], then it can be said that the courts are equally bound by it. The 1894 case has been applied as recently as 2017 by the PC in the case of **Chen v Ng**[81] on appeal from the Eastern Caribbean (British Virgin Island), where the Board seemed to have accepted that the general rule stemming from **Browne v Dunn** is that "*where it is not made clear during (or before) a trial that the evidence, or a significant aspect of the evidence, of a witness (especially if he is a party in the proceedings) is challenged as inaccurate, it is not appropriate, at least in the absence*

[80] *Supra*
[81] Chen v Ng *supra*

of further relevant facts, for the evidence then to be challenged in closing speeches or ***in the subsequent judgment.***[82]"

131. The rule therefore restricts the general duty of the judge to give reasons for his or her judgment. In fact the passage from **Chen v Ng** is authority for the proposition that it is not permissible for the judge to draw adverse inferences from evidence not challenged during the course of the trial, in the delivery of the judgment.

132. By necessary implication of the general rule of *Browne n Dunn*, if the reasons given by a trial judge to reject the evidence of a witness are not reasons which were put to the witness, the finding of the trial judge is wrong in law. The useful rationale from the PC is ably summarized by it in the following words:

> …. (i) the issue concerned was central to the whole proceedings, (ii) neither ground which the judge gave for disbelieving Mr. Ng on that issue was put to Mr. Ng, (iii) neither ground was referred to at the hearing at any time, save that the second (less significant) ground had been addressed in Mr. Ng's witness statement, (iv) neither ground was obscure or difficult and so each could reasonably be expected to have been raised in cross-examination, (v) it is quite possible that Mr. Ng would have been given believable evidence which weakened or undermined those ground and (vi) there is nothing in the judgment which can reasonably be invoked to say that it is reasonably clear that the judge would have reached the same conclusion without those grounds.[83]

133. So while the failure of the judge to adhere to **Browne v Dunn** is not "silence" in its truest sense it is however quite a deadly mistake that litigants may want to take advantage of in higher courts.

134. Depending on the circumstances, silence may be your best friend or your worst enemy.

[82] Ibid, para 53.
[83] Chen v Ng supra, para 61.