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HIGH COURT OF AUSTRALIA TAKES COMMONSENSE APPROACH TO MISTAKEN PROVISION OF PRIVILEGED DOCUMENTS IN DISCOVERY–RETURN THE DOCUMENTS AND "GET ON WITH IT"

The High Court of Australia decision in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46 brings to light an issue that has been of concern for lawyers involved in complex civil litigation for some time: the mistaken provision to an opponent of a document subject to client legal privilege. The concern has become greater in recent years due to information technology increasing the volume of potentially discoverable material.

The High Court addressed the issue through a robust endorsement of case management and a commonsense approach that sought to give effect to the overriding purpose of facilitating "the just, quick and cheap resolution of the real issues in the dispute or proceedings". The High Court took the view that discovery is a court process which the court should control so as to avoid satellite litigation. If a party mistakenly discloses a privileged document, the mistake should be promptly corrected to allow for the real issues in the dispute to be the subject of the parties' and court's resources. Equally, the parties and their lawyers are required to assist in the achievement of the overriding purpose and should not unnecessarily pursue interlocutory disputes.

BACKGROUND

Armstrong Strategic Management and Marketing Pty Limited and two others ("Armstrong") had brought a civil action against Expense Reduction Analysts Group Pty Ltd and nine others ("ERA") in the Commercial List of the Equity Division of the Supreme Court of New South Wales. This dispute involved the breakdown of a commercial relationship. During the course of this litigation, the fourth, fifth, sixth, ninth and tenth defendants were required to provide discovery.

The disclosure of documents was conducted as a separate process for each of the individual defendants. An electronic database called "Ringtail" was utilised to store the documents, and document reviewers were briefed on the matter and instructed to review each document and then check a box to indicate if the document was privileged and another if it was relevant. If the box was unchecked, the document was assumed to be not privileged. After this process was complete, a more senior solicitor undertook an audit of the draft List of Documents.

A verified List of Documents for each individual ERA party was completed and served. The documents were provided to the solicitors for Armstrong on compact disks containing electronic images which totaled approximately 60,000 documents.

Armstrong's solicitors reviewed the disclosed documents and found 13 documents that appeared to be subject to client legal privilege (the "Disputed Documents"). Armstrong's solicitors sent a letter to ERA's solicitors seeking clarification as to the basis of the other ERA individual defendants' claims for legal professional privilege in light of the absence of such a claim over some documents in the Fourth Defendant's list which "appear to relate to one or more of the defendants obtaining legal advice".

ERA's solicitors then wrote to Armstrong's solicitors, stating that due to "inadvertence on the part of one of the reviewers, [the Disputed Documents] *were* not marked as privileged" and sought the return of all documents which Armstrong's solicitors had identified as privileged. Armstrong's solicitors declined to return the documents and claimed that whatever privilege the documents might have held had been waived upon disclosure. ERA sought an injunction to prevent Armstrong from using the Disputed Documents.[1]

The Court below approached the issue by considering both waiver of privilege and protection of confidential information.

THE HIGH COURT'S REASONING

Discovery, Confidentiality and Mistakes. The High Court set the scene for its reliance on case management powers to resolve the issue before it by explaining that the mistaken provision of the Disputed Documents took place within the process of court-ordered discovery. The discovery process, the court noted, involves a balance between compelling disclosure of documents and preserving confidentiality where the law allows this, such as with client legal privilege. The Court also recognised that in large cases where the amount of discovery is great, there is an increased risk of privileged documents being mistakenly disclosed.

Case Management. The High Court reiterated its endorsement of case management, and that minimising cost and delay is essential to a just resolution of proceedings, from its decision in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175. The High Court then looked at the current dispute through the lens of Part 6 of the *Civil Procedure Act 2005* (NSW) which includes the overriding purpose of facilitating "the just, quick and cheap resolution of the real issues in the dispute or proceedings".

The High Court also referred to the specific powers of amendment in Part 6 and stated:[2]

> The direction which the Supreme Court should promptly have made in this case was to permit [ERA's solicitors] to amend the Lists of Documents, together with consequential orders for the return of the disks to enable the privileged documents to be deleted.
>
> It could hardly be suggested that the pursuit of satellite interlocutory proceedings of the kind here in question in any way fulfils the overriding purpose of the CPA. To the contrary, it is the very kind of conduct which should be avoided if those purposes are to be achieved.

The High Court took the view that the Supreme Court had adequate power to address the mistaken disclosure of the Disputed Documents and should have exercised that power so as to prevent the parties from being distracted from taking steps toward a final hearing, incurring considerable expense and squandering the resources of the Court.

Solicitors' Responsibilities. The High Court observed that the question for a party to civil proceedings and its legal

representatives is not just whether there is any real benefit to be gained from creating a dispute about whether a mistake in the course of discovery should be corrected. Rather, the question is whether pursuing such a tactic is consistent with the obligation to assist the Court to further the overriding purpose. Section 56(3) provides that:

> A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.

Section 56(4) requires that lawyers representing a party to civil proceedings (or any person with a relevant interest in the proceedings) must not, by their conduct, put a party in breach of this duty.

The Court stated categorically that "[r]equiring a court to rule upon waiver and the grant of injunctive relief in circumstances such as the present could not be regarded as consistent with that duty".[3] The High Court expects that such matters should be resolved by the legal representatives without needing to involve the Court.

Waiver. The High Court articulated a concise explanation of the concept of waiver as follows:

- Waiver is an intentional act done with knowledge whereby a person abandons a right (or privilege) by acting in a manner inconsistent with that right (or privilege).
- Waiver may be express or implied.
- In most cases concerning waiver, the area of dispute is whether it is to be implied.
- In some cases, waiver will be imputed by the law with the consequence that a privilege is lost, even though that consequence was not intended by the party losing the privilege.
- The courts will impute an intention where the actions of a party are plainly inconsistent with the maintenance of the confidentiality which the privilege is intended to protect.
- It is considerations of fairness which inform the court's view about an inconsistency which may be seen between the conduct of a party and the maintenance of confidentiality, although "not some overriding principle of fairness operating at large".
- Waiver of client legal privilege in the context of pre-trial discovery gives rise to the question of whether the client or party concerned "has acted in a way that is inconsistent with the client or party objecting to" the production of a document.

On the facts, the High Court found that waiver "should never have been raised".[4] This was because the supposed inconsistency did not exist. Rather, there was inconsistency in how the Disputed Documents had been treated in the Lists of Documents which would have created confusion and strongly indicated a mistake had occurred. However, ERA's solicitors's letter seeking the return of the Disputed Documents made clear that a mistake had in fact occurred, and the seeking of the return of the documents was consistent with seeking to maintain the privilege.

Delay. The High Court referred to delay at a number of points in its judgment. Delay can create a situation in which the party receiving the documents is placed in a position where it would be unfair to order their return, such as its requesting a change of solicitor once the solicitor has read the documents. However, the High Court indicated that unfairness should not be lightly found as lawyers and parties can be expected to put any knowledge gained to one side unless the documents are of particular importance.

In the current case, the disks containing the Disputed Documents were provided on 19 October 2011 and inspected by Armstrong's solicitors on 25 November 2011, at which point they found the error in the treatment of the Disputed Documents and communicated it to ERA's solicitors. On 6 December 2011, ERA's solicitors advised of the mistake and sought the return of the Disputed Documents. Armstrong's solicitors refused to return the Disputed Documents on 12 December 2011. ERA's solicitors filed a notice of motion to have the Disputed Documents returned on 23 December 2011. The High Court described the 6 December 2011 letter as being "sent promptly".[5]

Where an error gives rise to the mistaken provision of privileged documents, their return must be sought without delay.

DIFFERING FROM ENGLAND

The High Court rejected the more legalistic approach of English and some lower Australian courts which had held that once there had been disclosure of a (formerly) privileged document, the privilege—being merely a right to withhold production of the document—was lost. Accordingly, under that approach any restraint on the use of the document had to be founded on principles derived from the law relating to confidentiality—only where the recipient's conscience was so affected as to make it inappropriate for him to be able to use the document would he be restrained from doing so.

The much more down-to-earth approach of the High Court, which recognises privilege as a more robust creature than some of the earlier authorities had suggested, means that English authorities on the subject now need to be treated with some care in Australia.

LAWYER CONTACTS

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ENDNOTES

1 *See Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2012] NSWCA 430 at [15], [20], [34]-[35], [38]-[43].

2 *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46 at [58]-[59].

3 *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46 at [64].

4 *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46 at [35].

5 *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46 at [34].