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Reports, Comments & Notes

Australia: Acting on Opponents' Mistakes—*Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* and the Inadvertent Disclosure of Privileged Material

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The recent unanimous decision of the High Court of Australia in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd*[1] emphasises the need for lawyers (and courts) to take a less zealous and more proactive[2] approach to the inadvertent disclosure of privileged material, in order to avoid 'unduly technical and costly disputes about non-essential issues'.[3] The High Court also took the opportunity to highlight the self-evident nature of Rule 31 of the new Australian Solicitors' Conduct Rules,[4] which effectively provides that a solicitor who receives documents known or suspected to be confidential should return them to the party from whom they were received.

Expense Reduction Analysts involved discovery proceedings during a contractual dispute between the respondent 'Armstrong parties' and appellant parties in the ERA group. It ended time-consuming and costly proceedings about whether 13 documents inadvertently disclosed to Armstrong's solicitors, Marque Lawyers, by ERA's solicitors, Norton Rose, should be returned to ERA.

The inadvertent disclosure resulted, in part, because Norton Rose used an electronic database to collate and categorise their clients' documents during a court-ordered process of discovery under the Uniform Civil Procedure Rules 2005 (NSW) ('UCPR'). Documents in the database were listed in the non-privileged section of the List of Documents by default,

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1 [2013] HCA 46.

2 Rather than zealously pursuing every possible advantage, the Court found that the parties and their lawyers had a 'positive duty' to resolve their dispute in a just, cost and time-effective manner in accordance with the purpose of the Uniform Civil Procedure Rules 2005 (NSW) (paras 64 and 3).

3 para 57 of the judgment.

4 In force in Queensland and South Australia and proposed to be adopted in New South Wales at the time of the decision (para 65).

unless the lawyers reviewing and entering the documents selected either 'yes' or 'part' to the question of privilege. Nine documents (out of approximately 60,000 discovered by ERA)[5] were mistakenly classified and listed in both the 'privileged' and 'non-privileged' sections of the List delivered to Marque Lawyers, and four documents for which privilege might otherwise have been claimed were listed in the 'non-privileged' section.[6]

Although the lawyers initially reviewing and entering the documents into the electronic database were 'not very experienced',[7] criticism was not levelled at them or Norton Rose. The High Court acknowledged that mistakes can be made (particularly in large commercial cases)—despite reasonable precautions being taken.[8]

ERA had instructed Norton Rose to claim privilege for all documents for which it could be claimed. When the error was discovered, Norton Rose promptly sought the return of the documents and an undertaking that they would not be relied on—whether in the proceedings or otherwise.[9] Armstrong refused, arguing that any privilege attaching to the documents had been waived by their inadvertent disclosure.

The High Court thought that the lawyers, and to an extent the lower courts, had wasted time and money unnecessarily arguing and determining discrete points of equity and issues 'tangential'[10] to the real matters in dispute between the parties. In the High Court's view, the lower courts simply should have amended the List of Documents under their powers to facilitate the purpose of the UCPR legislation; namely the 'just, quick and cheap'[11] resolution of disputes.[12] Before this reached Australia's highest court, there had been 'substantial'[13] and costly litigation about the waiver of privilege in the New South Wales courts. This litigation had concentrated on evidence that a mistake had been made, whether Norton Rose made a continuing intention to claim privilege,[14] and whether an injunction could be granted against the Armstrong parties to protect confidential information.[15] However, the High

5 para 8.

6 paras 8 and 18.

7 para 9.

8 The Court quoted Lawrence Collins J in *ISTIL Group Inc v Zahoor* [2003] 2 All ER 252 at 269, who said that '[t]he combination of the increase in heavy litigation conducted by large teams of lawyers of varying experience and the indiscriminate use of photocopying has increased the risk of privileged documents being disclosed by mistake' (para 48).

9 para 12.

10 para 7.

11 Civil Procedure Act 2005 (NSW), s 56(1), footnote 3 of the judgment.

12 paras 7 and 58.

13 para 6.

14 The view of Bergin CJ in Eq was that if there was evidence that a mistake had been made (such as the classification of nine of the documents as both privileged and non-privileged), then privilege could not be said to have been waived, but without any such evidence that the reviewers had intended to claim privilege then any privilege would have been waived by the inadvertent disclosure (paras 16–18). Her Honour found that 'the reviewers' belief, that they would not have formed the view that the relevant document was not privileged, was insufficient to prove that they had formed an intention to claim privilege' (para 17), ordering the return of only those documents which had been listed twice.

15 The test expressed by Campbell JA was whether 'a reasonable solicitor in the position of [the solicitor for the Armstrong parties] should have realised that the documents had been disclosed by mistake' (quoted at para 25 of the High Court judgment). Absent any reasonable indication of mistake, there could be no obligation imposed on the Respondents to protect the confidentiality of the documents.

Court emphasised the need for the courts (and presumably their officers) to take 'a more robust and proactive approach'[16] to achieving the broader dictates of justice. Here, that meant avoiding costly litigation about a side issue which detracted from the main issues in dispute between the parties and 'offered little advantage to the Armstrong parties'.[17]

Whilst the lawyers' instinct was to adopt a zealous stance by refusing to return the documents,[18] this approach had to be modified by the ethical imperative of cooperative resolution reflected in the UCPR.[19] The High Court expressed its own disapproval of the Armstrong parties' zealous challenge to privilege by ordering costs against them,[20] and by approving the non-zealous approach to inadvertent disclosure reflected in Rule 31 of the Australian Solicitors' Conduct Rules. Indeed, the High Court thought that 'such a rule should not be necessary'[21] but is 'an example of professional, ethical obligations of legal practitioners supporting the objectives of the proper administration of justice'[22] by avoiding 'unnecessary and costly interlocutory applications'.[23]

The decision reminds of the need to take a less zealous and more pragmatic approach to resolving legal disputes. Where the issues in dispute are in essence side issues, and where, as in this case, the party seeking to take advantage of their opponent's error gains no particular advantage from doing so, and no injustice results from returning the documents, then a more cooperative approach is appropriate.

16 para 57.
17 para 59.
18 Marque Lawyers had not read the documents when they refused to return them, and they were of no particular advantage to the Armstrong parties (paras 26, 34, 59 and 62).
19 para 64.
20 Despite the Armstrong parties' having been relatively successful in the New South Wales courts.
21 para 66.
22 para 67.
23 para 66.