IN THE HIGH COURT OF AUSTRALIA **No. S118 of 2013**
SYDNEY REGISTRY
BETWEEN:

EXPENSE REDUCTION ANALYSTS GROUP PTY LIMITED
First Appellant

ERA INSURANCE SERVICES PTY LIMITED
Second Appellant

EXPENSE REDUCTION ANALYSTS AUSTRALASIA PTY LIMITED
Third Appellant

STUART ROY MICHAEL
Fourth Appellant

HIGH COURT OF AUSTRALIA
FILED
12 JUL 2013
THE REGISTRY SYDNEY

RONALD CLUCAS
Fifth Appellant

CHARLES FREDERICK MARFLEET
Sixth Appellant

ERAGICS LIMITED
Seventh Appellant

EXPENSE REDUCTION ANALYSTS INTERNATIONAL LIMITED
Eighth Appellant

KEITH JOHN CHAPMAN
Ninth Appellant

ANTHONY FREDERICK DORMER
Tenth Appellant

and

ARMSTRONG STRATEGIC MANAGEMENT AND MARKETING PTY LIMITED
First Respondent

ARMSTRONG CONSULTING PTY LIMITED
Second Respondent

KENNETH ALAN ARMSTRONG
Third Respondent

APPELLANTS' SUBMISSIONS

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Date of Document: 12 July 2013
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Reference: Stephen Klotz

PART I: PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: STATEMENT OF THE ISSUES

2. What is the power of the court to make orders restricting the use that can be made of a document which has been provided on discovery, as a result of a mistake or inadvertence, and the circumstances in which the power should be exercised?

3. Can a recipient of confidential information who comes by it innocently, but nevertheless gets to know that it was originally given in confidence, be restrained from dealing with that information?

4. What are the circumstances in which a claim of legal professional privilege or client legal privilege over a document is waived when the document has been provided on discovery, as a result of a mistake or inadvertence?

5. If there has been a wavier of privilege over a document, but the person receives the information in the circumstances referred to in paragraph 3 above, can that person be restrained from using the document?

PART III: SECTION 78B OF THE *JUDICIARY ACT* 1903

6. The Appellants have concluded that a notice in compliance with s.78B of the *Judiciary Act* 1903 (Cth.) is not necessary.

PART IV: CITATIONS

7. The medium neutral citation of the primary judge's decision is [2012] NSWSC 393 (the **PJ**). The decision of the New South Wales Court of Appeal is reported at (2012) 295 ALR 348 (the **CAJ**).

PART V: STATEMENT OF THE FACTS

8. The Respondents[1] are suing the Appellants[2] for damages arising from the entry into and performance of agreements by which the parties established an insurance expense reduction consulting business in Australia in 2004, and a similar global business in the United Kingdom in 2007, and the termination of those agreements in 2009 (**the main proceedings**).[3]

9. The Individual Defendants are, or were at the relevant time, directors of one or more of the Corporate Defendants and are represented by

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[1] Who are referred to as the 'Armstrong Parties' in the CAJ and consist of Ken Armstrong and two companies; Mr Armstrong is the CEO of both. The Armstrong Parties are represented by Marque Lawyers (**Marque**).

[2] Who are referred to as the 'ERA Parties' in the CAJ. Five of the ERA Parties are companies (**the Corporate Defendants**); the other five are natural persons (**the Individual Defendants**).

[3] The claims made in the proceedings are summarised in the CAJ at [13]. Also see *Armstrong Strategic Management and Marketing Pty Ltd & Ors v Expense Reduction Analysts Group Pty Ltd & Ors* [2011] NSWSC 704 at [2]; the "*Conspiracy Claims*" being struck out by that judgment.

NRFA[4] in the main proceedings. Two of the Corporate Defendants are represented in the main proceedings.[5] The other three Corporate Defendants are not represented in the main proceedings.[6] However, each of the Corporate Defendants and the Individual Defendants were applicants to the notice of motion[7] heard by the primary judge and were represented by NRFA for the purposes of the Motion (and subsequent appeals).

10. The parties were required to give discovery by to 7 October 2011.[8] During October 2011,[9] NRFA served on Marque verified lists of documents. The lists of the 5th, 6th, 9th and 10th defendants were identical.[10] There was a separate list of documents for the 4th defendant; the Disputed Documents were listed in the first (non-privileged) table (that list itself being 154 pages long and listed individually 1,577 documents).[11] The Australian Corporate Defendants did not give discovery by preparing separate lists.[12]

11. The process of the Individual Defendants giving discovery was an extensive task which involved approximately 60,000 documents.[13] To undertake this task and so that relevant documents could be identified and claims for privilege made, NRFA implemented the following system:

(a) An electronic database known as 'Ringtail' was used to store the documents in a centralised and accessible manner. [14]

(b) The reviewers of documents[15] were briefed on the issues in these proceedings and also in relation to the principles of privilege.[16] Each of the reviewers was instructed that any

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[4] Norton Rose Fulbright Australia (formerly Norton Rose Australia) who are instructed by the Individual Defendants.

[5] Being the 1st and 3rd defendants (the Australian corporations) represented by Dormers Commercial Lawyers & Consultants: CAJ at [12].

[6] Being the 2nd, 7th and 8th defendants (the 7th and 8th defendants being the English corporations): CAJ at [12]. Also see *Armstrong Strategic Management and Marketing Pty Ltd & Ors v Expense Reduction Analysts Group Pty Ltd & Ors* [2013] NSWSC 457 at [4].

[7] Being the notice of motion filed on 23 December 2011 by the Individual Defendants (the Corporate Defendants were subsequently added as parties to the motion) (**the Motion**) seeking the return (and injunctive orders in relation to the use) of 30 documents: CAJ at [44].

[8] By order of the Supreme Court of New South Wales the date was originally 21 September 2011 but was later extended to 7 October 2011: CAJ at [14].

[9] Informal discovery having been given by the Individual Defendants during late September 2011 (with NRFA providing Marque with a CD containing images of over 1,000 documents; it contained images of the documents ultimately the subject of contest before the primary judge): CAJ at [17]-[18].

[10] It had proved impossible to segregate who held what documents: CAJ at [21].

[11] CAJ at [22]-[23].

[12] CAJ at [21].

[13] CAJ at [15].

[14] CAJ at [15].

[15] Being 3 paralegals (one being a solicitor admitted in Germany on secondment to NRFA, one being a university student in her final stages of a law degree and one being a barrister admitted in England and Wales) and two graduate solicitors (one of approximately 12 months experience and another with approximately 12 to 18 months experience): PJ at [21].

[16] PJ at [22].

document that was privileged was to be the subject of a claim for privilege.[17] None of the reviewers had any authority to waive any claims for privilege over any of the documents.[18]

(c) Reviewers were required to make entries in the database to indicate whether the document was relevant and whether the document was privileged. If no entry was made to state that a document was privileged, the default setting of the program was that it was classified as being non-privileged.[19]

(d) Once draft lists of documents were prepared, an 'audit' process was undertaken in which the draft lists of documents were reviewed by a more senior solicitor employed by NRFA. Due to the fact that the auditing of the other defendants' lists of documents had identified no areas of concern as to how discovery had been given (including the methodology of privilege claims made in those lists), a more general audit was undertaken of the 4th defendant's lists of documents.[20]

12. During October 2011, CDs containing images of the documents in the non-privileged tables in the lists were provided by NRFA to Marque.[21] On 25 November 2011, Hannah Marshall[22] commenced her inspection of the discovered documents. She first referred to annotations that Mr Armstrong had prepared concerning Mr Michael's discovery and observed that a number of documents appeared to record communications between one or more of the directors of the Corporate Defendants and legal professionals.[23]

13. During this initial inspection on 25 November 2011, Marque wrote to NRFA querying the basis of the Individual Defendants' claims for privilege in light of the absence of such a claim by Mr Michael over documents "*that appear to relate to one or more of the defendants obtaining legal advice*".[24] The letter identified 6 documents (**the Initial Documents**); none of which were Disputed Documents.[25]

14. On 6 December 2011, NRFA wrote to Marque stating, *inter alia*, that due to "*inadvertence on the part of one of the reviewers,* [the Initial Documents] *were not marked as privileged*".[26] The letter sought the return of all copies of the Initial Documents (and any other privileged documents that Marque had identified) and an undertaking not to use or rely on the Initial Documents in these proceedings. The letter went on to say that NRFA were undertaking a further review of the

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[17] CAJ at [46].
[18] CAJ at [16].
[19] CAJ at [15].
[20] PJ at [23]-[24].
[21] Who forwarded them to Mr Armstrong: CAJ at [27].
[22] A lawyer employed by Marque: CAJ at [30].
[23] CAJ at [34].
[24] CAJ at [35].
[25] CAJ at [35].
[26] CAJ at [38].

discovery and that they would advise whether they required any further documents to be returned.[27] The Motion was filed as a result of the refusal to comply with the requests in this letter.

15. During the hearing before the primary judge, the Armstrong Parties only resisted the return of 11[28] of the 30 documents (the Armstrong Parties wishing to use the documents to endeavour to re-plead the Conspiracy Claims[29]) and the ERA parties widened the claim to seek relief concerning an additional 2[30] documents (collectively, **the Disputed Documents**).[31]

16. The primary judge had evidence from each of the reviewers of the Disputed Documents. None of them claimed that he or she had a recollection of forming the view that any particular document was privileged. Rather, the evidence of the reviewers was that, having seen again the Disputed Documents that he or she had reviewed, it was apparent that each of the documents was privileged and that it must have been an error on their part to fail to include an entry in the Ringtail database that showed the document as being privileged.[32]

17. In relation to the evidence referred to in paragraph 16 above, the primary judge found:[33]

> I am satisfied that [the reviewers of the Disputed Documents] honestly believed that they must have failed to manipulate the Ringtail system properly and that this was the only reason for the failure to claim privilege over the documents. I am also satisfied that they honestly believed that they would not have fallen into error in deciding that the documents were not privileged.

18. The Disputed Documents were found to have been privileged (or privileged in part).[34] The primary judge also found that there was no evidence that would lead to a conclusion that it would be unfair to make the orders sought by the ERA Parties.[35]

19. The primary judge granted the relief sought by the ERA Parties in relation to 9 documents (**the 9 Withheld Documents**) and declined to do so over 4 documents (**the 4 Released Documents**).[36]

20. A duplicate of each of the 9 Withheld Documents had been listed in the privileged or redacted parts of the lists of documents of the 4th

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[27] CAJ at [39].

[28] Being the documents referred to as documents 1, 3, 9 to 12, 19 to 22 and 25 in Confidential Exhibit A.

[29] This is clearly illustrated from the affidavit of Hannah Elizabeth Marshall affirmed on 7 February 2012 at [19] and the explanation given to the primary judge by senior counsel for the Respondents at T5.30-44. Also see CAJ at [200].

[30] Being documents 31 and 32 in Confidential Exhibit A. It was accepted by senior counsel for the Armstrong Parties that the position with respect to these 2 documents would abide with the primary judge's ruling with respect to documents 1 and 12: T104.37-44.

[31] CAJ at [7].

[32] CAJ at [45].

[33] CAJ at [45].

[34] CAJ at [8]. The privilege belonging to the ERA Parties: See, for example, the ruling of the primary judge at T14.13-15.20.

[35] PJ at [61].

[36] CAJ at [8].

defendant or other Individual Defendants. Due to that matter, the primary judge found that a decision was made to claim privilege over those documents and that they had been inadvertently listed in the non-privileged section of the 4th defendant's list of documents and were inadvertently produced to the plaintiffs for inspection.[37]

21. The 4 Released Documents were ones in relation to which there was no claim of privilege in the 4th defendant's list, and no duplicates had been listed in the privileged or redacted sections in any of the Individual Defendants' lists of documents. On that basis, the primary judge was not prepared to infer that there was any intention to claim privilege in relation to those documents.[38]

22. In the court below, both parties sought to challenge factual findings of the primary judge.[39] However, the court concluded that confidential information was the appropriate source of the power and, thus, these challenges to the factual findings of the primary judge were not relevant to determine the fate of the appeal.[40] The challenge to the factual by the primary judge with respect to the 4 Released Documents is dealt with at paragraphs 69 and 70 below.

23. The only further factual matter that arises is the point in time that the Disputed Documents were read by Mr Armstrong. The significance of which is only of relevance if the Court is to find that the source of the court's powers is in the law of confidential information. This is dealt with at paragraphs 65 to 68 below.

24. The court below set aside the orders of the primary judge and ordered that the Motion be dismissed.[41] The orders of the court below are the subject of a stay.[42]

PART VI: APPELLANTS' ARGUMENT

25. The Court of Appeal found[43] that the only principled basis for the grant of the orders sought by the Appellants[44] lay in the law of confidential information.[45] Accordingly, the Court of Appeal found that the orders ought not to have been made by the primary judge[46] as "*no obligation of confidence could be brought home to* [the

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[37] CAJ at [48].
[38] CAJ at [50].
[39] The Respondents sought leave to appeal against the primary judge's decision concerning the 9 Withheld Documents. The Appellants sought leave to cross-appeal against the refusal to grant relief concerning the 4 Released Documents: CAJ at [10].
[40] CAJ [185]-[189].
[41] CAJ at [11]. The application for leave to cross-appeal was also dismissed.
[42] Pursuant to orders made by the court below on 18 December 2012 and extended on 30 January 2013.
[43] The principal judgment was delivered by Campbell JA with whom Macfarlan JA at [195] and Sackville AJA at [196] agreed (subject to Sackville AJA reserving his position on whether privilege had been waived at [207]).
[44] Being an order to restrain the use that the Respondents could make of the Disputed Documents and an order requiring the Respondents return the Disputed Documents (collectively, **the orders**).
[45] CAJ at [105].
[46] CAJ at [172].

Respondents]."[47] Alternatively, the Court of Appeal found that, if the availability of the orders was dependent upon whether the privilege in the Disputed Documents had been waived (by virtue of s.122(2) of the *Evidence Act*[48] or the common law[49]), the privilege had been waived.[50] For the reasons set out below, the Appellants submit that the principle (and the alternate) approach of the Court of Appeal was wrong.

Appeal Ground 1 - Confidential information

26. The court below found that there were no decisions of this Court which make clear what principles are to be applied[51] and determined the appeal having regard to a set of rules based upon a line of authority developed in the United Kingdom from the principles identified in *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 2 All ER 716 by Slade LJ at 730 - 731.[52]

27. The Appellants submit that the *Guinness Peat* line of authority is wrong because the foundation of the principles in *Guinness Peat* is inextricably dependent upon an erroneous conclusion as to what was determined in *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529.

28. In *Great Atlantic*, the solicitors for the plaintiffs intended to discover, and gave discovery, of 2 paragraphs of a memorandum and claimed privilege over the remainder. In the course of opening the trial, counsel for the plaintiffs read the 2 discovered paragraphs of the memorandum onto the transcript; unaware that the memorandum contained further paragraphs and that privilege had been claimed over the remainder of the memorandum.

29. The above having occurred, the question being whether the defendants were entitled to see the remainder of the memorandum; the plaintiffs being said to have waived privilege over the remaining portion.[53] Relevantly, the English Court of Appeal held that:[54]

> In interlocutory proceedings and before trial it is possible to allow a party who discloses a document or part of a document by mistake to correct the error in certain circumstances. Where a document has been disclosed as a result of misconduct by the defendants, against the will of the plaintiffs and in any event not by the deliberate act of the plaintiffs, then remedial action both before and during the trial may be possible. But in my judgment the plaintiffs

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[47] CAJ at [172]; as neither Ms Marshall nor Mr Armstrong realised that the Disputed Documents were confidential and had been disclosed by mistake (CAJ at [165]) and a hypothetical reasonable solicitor would not have realised that a mistake had been made in disclosing the documents (CAJ at [169]-[171]).

[48] CAJ at [174].

[49] Being the principles in *Mann v Carnell* (1999) 201 CLR 1: CAJ at [90]-[93] and [174].

[50] CAJ at [173]. The conduct of the ERA Parties being inconsistent with the maintenance of the confidentiality which the privilege is intended to protect: CAJ at [173], [179] and [180].

[51] CAJ at [101].

[52] CAJ at [138]-[145]. As expanded upon in *Pizzey v Ford Motor Company Ltd* [1994] PIQR P15 (CAJ at [167]-[169]) and *Al Fayed v Commissioner of Police for the Metropolis* [2002] All ER (D) 450 (CAJ at [165]).

[53] At 533D to 534B.

[54] Per Templeman LJ at 538A to 539G; Dunn LJ agreeing at 541F.

> deliberately chose to read part of the document which dealt with one subject matter to the trial judge, and must disclose the whole. The deliberate introduction by the plaintiffs of part of the memorandum into the trial record as a result of a mistake made by the plaintiffs waives privilege with regard to the whole document. I can see no principle whereby the court could claim to exercise or could fairly and effectively exercise any discretion designed to put the clock back and forth and to undo what has been done.

30. As can be seen from the above, the error in *Great Atlantic* was not concerned with inadvertence as to whether to claim privilege but rather inadvertence as to the implications of using or deploying a document.[55] Accordingly, it is submitted that Slade LJ erred when he adopted[56] the following submission:[57]

> By analogy with the *Great Atlantic Insurance Co* case ... once a privilege document has not only been disclosed but inspected in the course of discovery; it is too late to put the clock back: the privilege is lost.

31. Furthermore, even if the above be wrong, it is not contended that the *Guinness Peat* line of authority ought to be adopted by this Court for the following four reasons.

32. *Firstly*, the following circumstances militate against its adoption: (a) the process of giving discovery under a court's process is attendant with inherent risks of mistakes being made; this risk is exacerbated in large commercial cases and the modern practices of storing communications and information in a digital form;[58] (b) regard must be had to the costs involved in giving discovery in large commercial cases and principles founded different eras may need to be tempered by principles such as those embodied in ss.56-60 of the *Civil Procedure Act* 2005 (NSW);[59] (c) whether a party is able to recover mistakenly disclosed documents should not be determined by the particular moment in time when the error is discovered or by the level of appreciation of the issues of the case of the person undertaking the inspection; (d) norms of a hypothetical reasonable solicitor produce an unrealistic and unworkable test;[60] and (e) the principles produce potentially inconsistent results: a confidential document which had been mistakenly disclosed to a third party might be used by that party in the lead up to the trial but, nevertheless, the document could be ruled inadmissible at a trial under s.122 of the *Evidence Act*.[61]

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[55] It may well be that the test requiring disclosure of the whole memorandum in such circumstances may be too broad, but that is not a question for determination in this appeal.

[56] At 730a.

[57] At 729h.

[58] See the CAJ at [197]-[199].

[59] Similar provisions apply in other courts: see, for example, section 1 of the *Civil Procedure Act* 2010 (Vic); Rule 1.32 of the *Federal Court Rules* 2011; Rule 5 of the *Uniform Civil Procedure Rules* 1999 (Qld); Rule 4B of *Rules of The Supreme Court* 1971 (WA); Rule 116 of the *Supreme Court Civil Rules* 2006 (SA); Rule 21 of the *Court Procedures Rules* 2006 (ACT); Rule 414A of the *Supreme Court Rules* 2000 (Tas) and Rule 34 of the *Supreme Court Rules* 1987 (NT).

[60] Particularly in circumstances such as a litigant in person, a matter which was left unresolved in the court below: CAJ at [169].

[61] *Cf* CAJ at [103] and [207].

33. *Secondly*, the circumstances by which a confidential document may end up inadvertently in the hands of another party are many and varied. As was recognised in *B v Auckland District Law Society* [2004] 1 NZLR 326 at [70], a party may have a right to recover possession on any one of a number of grounds. The *Guinness Peat* line of authority attempts to fashion rules governing the grant of relief concerning inadvertence in discovery by reference to the principles in *Great Atlantic* (which is dealt with a paragraphs 27 to 30 above) and *Calcraft v Guest* [1898] 1 QB 759 and *Lord Ashburton v Pape* [1913] 2 Ch 469 (both of which are dealt with below); cases which are not applicable to the particulars circumstances.

34. *Thirdly*, the principles in *Guinness Peat* have an uncertain legal foundation; the rules are said to be derived from principles to be found in *Calcraft v Guest* and *Lord Ashburton v Pape*.[62]

35. The unsatisfactory nature of the principles in *Calcraft* and *Lord Ashburton*, the difficulties in reconciling those cases and their interaction with the modern law are apparent from the decision of *ISTIL Group Inc v Zahoor* [2003] 2 All ER 252 at [67] to [94].[63] Courts in Canada, Singapore and New Zealand have declined to follow the principles in *Calcraft*[64] and, in Australia, Gibbs CJ and Brennan J (who were in the minority) in *Baker v Campbell* (1983) 153 CLR 52 expressed doubts about *Calcraft*.[65]

36. Courts which have been required to consider the principles in *Guinness Peat* have frequently expressed confusion as to the basis of the underlying principles.[66] A degree of this confusion can be explained by the erroneous application of *Great Atlantic* in *Guinness Peat.* The origins of the principles in *Guinness Peat* have also resulted in confusion as to whether the jurisdiction is dependent upon the law of confidential information. It is submitted that, contrary to the approach below, the better view is that the jurisdiction is not founded in the law of confidential information.[67]

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[62] Both cases being determined at a time when privilege was considered to be a rule of evidence rather than a common law right.

[63] Also see *English & American Insurance Co Ltd v Herbert Smith* [1987] 137 NLJ 14.

[64] See, for example, *Royal Bank of Canada v. Lee* (1992) 3 Alta LR (3d) 187, *Tentat Singapore Pte Ltd v Multiple Granite Pte Ltd & Ors* [2009] 1 SLR 42 and *R v Uljee* [1982] 1 NZLR 561.

[65] Gibbs CJ at 67 described it as being a "*rather remarkable rule*" and Brennan J at 110 was of the opinion that *Calcraft* should not be followed (also see the comments of Deane J at 112). That said, by virtue of the application of the *Uniform Evidence Law* in the courts of the Commonwealth, New South Wales, Victoria, Tasmania, the Australian Capital Territory, the Northern Territory and the Norfolk Island, the principles in *Calcraft* may be nothing more than an oddity of historical legal principle in such jurisdictions.

[66] See, for example, *Goldberg & Ors v NG & Ors* (1994) 33 NSWLR 639 at 674E per Clarke JA who stated "*[t]his area of the law is not without difficulty and there is a degree of internal conflict within the authorities. Further, it is difficult, if not impossible, to reconcile all the cases and, in particular, Calcraft v Guest ... and Lord Ashburton v Pape ...*". Also see the CAJ at [108]-[145].

[67] So much can be observed from: (a) The second and fourth propositions set out in the statements of Nourse LJ in *Goddard v Nationwide Building Society* [1987] 1 QB 670 at 685; (b) The analysis of Vinelott J in *Derby & Co Limited & Ors v Weldon & Ors (No. 8)* [1990] 3 All ER 762 at 766 to 772; a case which bears more than a passing resemblance to the facts of this case.[67] The orders made by Vinelott J were varied on appeal[67] however, the

37. Nevertheless, such uncertainties, overlayed with the inevitably intertwined question as to whether privilege has been waived,[68] has resulted in the *Guinness Peat* line of authority being a collection of complex rules, which are unnecessary and result in inconsistent, unsatisfactory outcomes.

38. *Finally*, a significant rationale for retaining the *Guinness Peat* line of authority appears to be based upon a view of the primacy of the discovery process[69] and an implicit fear that any change in approach will 'open the floodgates' and destroy the sanctity of the discovery process. Any such arguments should be rejected as a matter of principle.[70] In any event, the experience in Canada, where the *Guinness Peat* line of authority is no longer followed,[71] suggests that the process of discovery has not been destroyed nor have the courts been overwhelmed with frivolous or baseless claims.

Appeal Ground 2 - The court had all necessary power

39. For the reasons developed below, it is submitted that the more principled basis for the court's intervention ought to be founded upon the plenary powers of a court to control its own process. This Court should find that the court had all necessary power to make such orders as may be necessary so as to remedy any injustice that may be occasioned by allowing an error arising from court's orders, processes and/or procedures to stand.

40. The jurisdiction of the Supreme Court of New South Wales is contained in Part 2 of the *Supreme Court Act* 1970 (NSW). Section 22 provides:

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variations it did not concern whether the "*equitable jurisdiction*" to which Slade LJ makes reference in *Guinness Peat* was dependent upon or in any way confined by the law of confidential information; (c) The statement of Mann LJ in *Pizzey* (which is set out at [167] of the CAJ) that *"fraud and mistake"* are two categories whereby a party may be able to have a disclosed document returned to it by order of the court; and (d) The statement by the court in *Al Fayed* at [16(v)] that "*the court has jurisdiction to intervene to prevent the use of documents made available for inspection by mistake where justice requires.*"

[68] In that regard, the *Guinness Peat* line of authority inappropriately intertwines an entitlement to recover with the concept of waiver. It is submitted that the appropriate approach ought to be: (a) the entitlement to recovery should be determined separately from those concerning waiver; (b) that privilege has not been waived is not determinative of whether a document ought to be recovered; (c) likewise, that a document is found by the court to be unable to be recovered, is not determinative of whether privilege in the document has been waived (for the reasons developed below); and (d) assuming that an inadvertently disclosed confidential document is otherwise discoverable, the question of waiver may inform the court, in the exercise of its discretion, as to whether there would be utility in making orders concerning the return and use of it.

[69] See the matters referred to by Goldberg J in *Meltend Pty Limited v Restoration Clinics of Australia Pty Limited* (1997) 75 FCR 511 at 526-7. See also the CAJ at [153]-[154].

[70] This Court has observed in a variety of contexts that a 'floodgates argument' does not bear objective examination nor does it not provide a rationale for rejecting a legal principle or approach: see, for example, *Attorney-General (VIC) (Ex rel Black) & Ors v Commonwealth of Australia & Ors* (1981) 146 CLR 559; *Perre & Ors v Apand Pty Ltd* (1999) 198 CLR 180; *Alexander & Ors (t/as Minter Ellison) v Perpetual Trustees WA Ltd & Anor* (2003) 216 CLR 109; and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd (formerly Cardno & Davies Australia Pty Ltd) & Anor* (2004) 216 CLR 515.

[71] *Metcalfe et al. v. Metcalfe* (2001) 198 DLR (4th) 318 at [21]; *Double-E, Inc. v. Positive Action Tool Western Ltd.* [1989] 1 CF 163 at 170. Also see *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3rd ed. by Alan W. Bryant, Sidney N. Lederman, and Michelle K. Fuerst at §14.152.

> The Supreme Court of New South Wales as formerly established[72] as the superior court of record in New South Wales is hereby continued.
> (footnote added).

Section 23 provides:

> The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales.

41. Although the Supreme Court of New South Wales is frequently spoken of as a superior court of record with an unlimited 'inherent jurisdiction',[73] the jurisdiction conferred on the court (and the Supreme Courts of other states) is necessarily subject to various limits.[74]

42. However, the extent of such limitations and the appropriate judicial expression[75] need not be resolved as such matters are not determinative of the outcome of this appeal. Rather, the grant of jurisdiction to the Supreme Court of New South Wales conferred upon it the necessary power.

43. It has been long recognised in the common law that the power of a court over its own process is unlimited except to the extent that its power[76] in a particular matter is expressly taken away or regulated by statute or by some rule of court by which it is bound: *Cocker v Tempest* (1841) 151 ER 864. The principle in *Cocker v Tempest* has been found to apply with equal application in Australia.[77]

44. Likewise, this Court has accepted as correct[78] the statement of Lord Diplock in *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 at 536 that:

> ... the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.

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[72] The reference to "*as formerly established*" in s.22 is, as noted by French CJ in *Kermanianakis v Regional Publishers Pty Limited* (2009) 237 CLR 268 at [36], a reference to the *Supreme Court and Circuit Courts Act* 1900 (NSW) which provided in s.16 that the court was "*authorised to do the same things that could be done* by or before Her Majesty's Courts at Westminster or the respective Judges thereof in the administration of justice"'. The source of the court's jurisdiction and powers prior to the *Supreme Court and Circuit Courts Act* 1900 (NSW) are recorded by Kirby J in *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at [132].

[73] See, for example, '*The Inherent Jurisdiction of the Court*' by K Mason QC (1983) 57 ALJ 449 at 457-458 and the commentary as to the jurisdiction of the court in *Richie's Uniform Civil Procedure NSW*.

[74] See, for example, *Doyle v Commonwealth* (1985) 156 CLR 510 at 518; *Reid v Howard & Ors* (1995) 184 CLR 1 at 16; *ASIC v Edensor Nominees Pty Limited* (2001) 204 CLR 559 at [64] and *Batistatos v Roads and Traffic Authority of New South Wales* at [5], [13] and [121]-[135].

[75] That is, "*inherent*" or "*implied*" and "*jurisdiction*" or "*power*".

[76] The powers referred to in *Cocker v Tempest* are thought to predate the usage of the "inherent" jurisdiction of superior courts: see '*The Inherent Jurisdiction to Regulate Civil Proceedings*' by M S Dockery (1997) 13 LQR 120 at 122.

[77] See, for example, *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239 at 252 and *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75 at [27].

[78] See, for example, *Walton v Gardiner* (1993) 177 CLR 378 at 393; *Batistatos v Roads and Traffic Authority of New South Wales* at [6] and *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* at [28] and [56]-[58].

45. The statements of principle referred to above, have been relied upon by courts to prevent the misuse of their procedures in a variety of ways. For example, to refuse to hear any individual barrister or solicitor when the proper administration of justice necessitates it;[79] to restrain solicitors from acting in a particular case;[80] to ensure that discovery, including production of documents for inspection, is used only for the purpose of the relevant proceedings and, in the exercise of this power, to require express undertakings;[81] and to make appropriate orders, or to exact undertakings, or to limit inspection to the legal representatives of a party, in order to ensure that a document to be inspected is not used for purposes other than in relation to the proceedings.[82] Whilst certain broad categories of conduct attracting the intervention of the court have emerged,[83] the categories are not limited and development continues.[84]

46. There is no need for an 'abuse of process' to exist; indeed, there is no need for there to be any breach or inconsistency with the court's procedural rules. Rather, the court's jurisdiction will arise where the court's processes or procedures are converted into instruments of unfairness or injustice. That is, the outcome of the court's processes or procedures (if the conduct in question was permitted to stand), would result in an outcome that would be manifestly unfair to a party to litigation before the court; so much is apparent from the statement of Lord Diplock in *Hunter v Chief Constable of West Midlands Police*.[85]

47. The court, in exercising its powers, would need to give consideration to what is 'just'[86] in the particular circumstances of each case.[87] As such, the court being found to have such powers would not give rise to the problems referred to by Goldberg J in *Meltend*.[88]

48. It is accepted that the powers of a court to control its own process are only applicable to inadvertent disclosures made in the course of the court's processes. It is not contended that the Court should endeavour to state a test that is thought to be applicable to the range of circumstances by which a confidential document may end up

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[79] *Abse v Smith* [1986] QB 536.
[80] *Grimwade v Meagher* [1995] 1 VR 446.
[81] *Kimberley Mineral Holdings Ltd (In Liq) & Anor v McEwan* [1980] 1 NSWLR 210.
[82] *Registrar of the Supreme Court, Equity Division v Mcpherson & Ors* [1980] 1 NSWLR 688.
[83] Such as those identified by in *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75 at [27].
[84] *Batistatos v Roads and Traffic Authority of New South Wales* at [9] and *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* at [28].
[85] Also see, for example, the observations contained in the joint judgment of Mason CJ, Deane and Dawson JJ in *Walton v Gardiner* at 393.
[86] Concepts of the interests of justice can accommodate particular circumstances such as hardship that might be caused (due to delay or the like) if a document were ordered to be delivered up and an injunction placed on the use of the information contained.
[87] Such an approach being consistent with that taken in Canada.
[88] at 526-7

inadvertently in the hands of another party.[89] For example, whether the principles in *ASIC v Lindberg* (2009) 25 VR 398[90] are correct is a question to be determined on another occasion.[91]

49. The relevant circumstances which give rise to the particular unfairness or injustice to the Appellants which ought to have provided the primary judge with the necessary jurisdiction to make the orders are set out below:

(a) The mistake occurred in the giving of discovery by the Appellants to the Respondents pursuant to an order of the court.[92]

(b) Discovery is a very serious invasion of privacy and confidentiality of a litigant's affairs and the application of the court's processes and procedures should not operate so as to place on a litigant any harsher or more oppressive burden than strictly required. Protection by the court of obligations arising under discovery should not fall away as this would lead to increased temptation to destroy or conceal documents or to use the dissolving of the obligation as a tactical manoeuvre, such developments being undesirable from the point of view of the proper administration of justice.[93]

(c) Legal professional privilege is a common law right and not just a rule of evidence and it is a doctrine which is based upon the view that confidentiality is necessary for proper functioning of the legal system and not merely the proper conduct of particular litigation.[94]

(d) Having regard to the volume of material to be reviewed and the overarching obligations imposed on the parties to litigation,[95] NRFA implemented an appropriate system[96] so

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[89] It may well be that where the inadvertent disclosures outside of the court's processes, it is necessary to look at independent sources of power.

[90] Which was relied upon in the court below: CAJ at [158] and [161].

[91] In relation to *ASIC v Lindberg*, special leave to appeal was granted ([2009] HCATrans 331) but when the appeal was called on for hearing on 4 March 2010, the Court was informed that terms of settlement had been, or were about to be, signed and the Court ordered that the appellant have leave to file a notice of discontinuance ([2010] HCATrans 40).

[92] The rules by which discovery was to be given are found in the *Uniform Civil Procedure Rules* (**UCPR**) 21.3 and 21.5 (which are reproduced in Annexure A to these submissions).

[93] *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 at [308] and [309]; similar principles have been recognised in Australia: see, for example, *Hearne & Anor v Street & Ors* (2008) 235 CLR 125.

[94] See, for example, *Baker v Campbell* (1983) 153 CLR 52 at 410, 413, 431, 436 and 444; *Attorney-General for the Northern Territory v Maurice and Ors* (1986) 161 CLR 475 at 40; *Carter v Northmore Hale Davy & Leake & Ors* (1994-1995) 183 CLR 121 at 621; *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49 at 155 and *The Daniels Corporation International Pty Ltd & Anor v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 565.

[95] See ss. 56-60 of the *Civil Procedure Act* 2005 (NSW). In this regard, requirements that the solicitor on the record carefully go through each document to be disclosed have to be tempered in cases where the volume necessitate a degree of considered, informed and adequately supervised delegation to more junior employees: *Teo Wai Cheong v Crédit Industriel et Commercial* [2013] SGCA 33 at [47]. Such delegation being in keeping with the norms of "*quick, just and cheap*".

that claims for privilege could be identified and made (on behalf of its clients) over documents that were required to be discovered.

(e) As soon as the Appellants were made aware of the possibility of an error, steps were taken to remedy it.[97]

(f) The 9 Withheld Documents, over which the primary judge had granted the orders, were found to have been disclosed by mistake or inadvertence.[98]

(g) The Respondents wish to use the documents to endeavour to re-plead a conspiracy case that has already been struck out.[99]

(h) The primary judge found that there was no evidence that would lead to a conclusion that it would be unfair to make the orders sought by the Appellants.[100]

Appeal Ground 3 - Equity and mistake

50. The source of the court's power can also be found in equity's long established ability to intervene to remedy a mistake so as to prevent an injustice is well recognised; with equity fashioning remedies so as to allow the recovery of money or property passed over by mistake.[101]

51. It is submitted that the manifestations of the equitable jurisdiction referred to in *Guinness Peat* is inconsistent with equity's long established ability to intervene to remedy a mistake. If *Guinness Peat* truly sought to apply equity, there would be no need to shoehorn the right to recovery into certain arbitrary rules (such as, a party's ability to recover mistakenly disclosed documents should not be determined by the particular moment in time of inspection[102] or the level of appreciation of the issues of the case of the person undertaking the inspection to recognise the error).

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[96] See paragraph 11 above.

[97] See paragraph 14 above.

[98] CAJ at [105] and [187]-[189]. Whilst in the court below, the Appellants had sought to challenge the factual finding that the 4 Released Documents (over which no orders were made) were not disclosed by mistake or inadvertence and the Respondents had sought to challenge the factual finding in relation to the 9 Withheld Documents, the approach of Campbell JA, having seized upon confidential information as the appropriate source of the power, was such that the challenges to the factual findings of the primary judge were not considered to be relevant to determine the fate of the appeal and leave to appeal was not granted in respect of those matters.

[99] Whilst the Respondents now contend that they would also seek to use the Disputed Documents beyond this initially stated intention (see, for example, *Expense Reduction Analysts Group Pty Ltd & Ors v Armstrong Strategic Management and Marketing Pty Ltd & Ors* [2013] HCATrans 137 at 10 *cf* the matters referred to in footnote 29 above), this ought not to be a relevant consideration in determining this appeal.

[100] PJ at [61].

[101] See, for example, the discussion in Chapter 14 of *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, 4th ed. by RP Meagher, JD Heydon and MJ Leeming and Chapter 18 of *On Equity* by PW Young, C Croft and ML Smith. The remedies that have been adopted by courts include orders for the delivery up of copies of privileged documents in party's possession where the documents in question were inadvertently left with defendant's solicitors by plaintiff's solicitors: *Rouse v IOOF Australia Trustees* (1999) 202 LSJS 71. Leave to appeal from this decision was not granted: *Rouse v IOOF Australia Trustees* [1999] SASC 294.

[102] Even this question is subject to further arbitrary rules: see *National Insurance Co Ltd v Whirlybird Holdings Limited* [1994] 2 NZLR 513 at 516.

52. Rather, equity's ability to intervene to remedy a mistake would entitle a party to recover mistakenly produced documents subject to accepted, longstanding equitable defences such as hardship, laches and acquiescence.[103] It is submitted that there is no matter of principle which ought to be found to further restrict the scope of such powers, the powers of the court already being subject to the general principles affecting the grant of a discretion remedy.

Appeal Ground 5 - Obligations of confidence on the respondents

53. If, contrary to the above, this Court finds that the source of the court's powers lie in the law of confidential information, the decision of the court below miscarried because it paid no regard to, although it referred to,[104] the observations of Justice Gaudron in *Johns v Australian Securities Commission*[105] concerning the principles in *Fraser v Evans*.[106] The position of an innocent recipient of confidential information has been further considered in *Vestergaard Frandsen A/S & Ors v Bestnet Europe Limited & Ors* [2013] 1 WLR 1556 at [25] and [39].

54. There is no reason why the principles in *Fraser v Evans* and *Vestergaard* should not be found to apply equally in Australia.[107] That is unless this Court is to find that there is to be a 'special rule' that applies to discovered documents and it is submitted that there is no good reason why such a 'carve out' should be found to exist.[108] That the principles in *Fraser v Evans* have not been considered in the *Guinness Peat* line of authority is not surprising; as, on that approach, privilege, and hence confidentiality, is lost upon inspection.

55. The circumstances concerning the Disputed Documents relevant to the Respondents being bound by an obligation of conscience are as follows:

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[103] *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* at [21-480] and [21-485].
[104] CAJ at [100].
[105] (1993) 178 CLR 408 at 459-60.
[106] *Fraser v Evans* [1969] 1 QB 349 which is authority for the proposition that if a document which is confidential is received innocently but a person later becomes aware that it contains confidential information, equity can intervene to prevent its use.
[107] Single judges in Australia have adopted a similar approach: see, for example, *Foster v Mountford & Rigby Ltd* (1976) 29 FLR 233 at 238 where, a publisher was restrained on an interlocutory basis from continuing to publish and distribute a book revealing, in breach of an obligation of confidence on the part of the author, sites and objects of deep religious and cultural significance to particular Aboriginal claimant groups. Likewise, in *Wheatley v Bell* [1982] 2 NSWLR 544 at 550 an innocent licensee of a promotional business system was restrained on an interlocutory basis from using that system notwithstanding that they had apparently paid contracted amounts to a third party who had failed to observe an obligation of confidence to the plaintiff.
[108] It that regard, it is submitted there is no proper basis for this Court to find, contrary to the submission advanced by senior counsel for the Respondents in the application for special leave ([2013] HCATrans 137), that the principle in *Fraser v Evans* does not apply to the situation where it is the act of the owner of the confidential information, rather than a third party, handing over the information. Whilst it is accepted that it will usually be the case that a third party is involved, such a restriction would lead to absurd results. For example, in circumstances where a plaintiff and defendant were standing together and the plaintiff dropped a confidential document; if a third party picked up the document and handed it to the defendant, the defendant could be restrained but would not be able to be restrained if the plaintiff picked up the document and mistakenly handed it to the defendant.

(a) The Respondents were aware, or ought to have been aware, that there was potential for errors and mistakes to occur in the process of giving discovery.[109]

(b) Whilst there is a factual matter as to the point in time that the Disputed Documents were read by Mr Armstrong, there can be no question that Mr Armstrong was aware that the Appellants contended that the documents had been disclosed inadvertently by at least the time the Motion was filed (and certainly by the time the orders were made by the primary judge).

(c) With respect to Ms Marshall, she was aware that the Appellants contended that the documents had been disclosed inadvertently prior to any inspection of the Disputed Documents as she only inspected the documents after the Motion had been filed.[110]

56. By reasons of the fact that the Respondents want to use the documents to plead a new case, no practical hardship arises if the Respondents are restrained from dealing with the Disputed Documents.[111]

57. The application of the principles in *Fraser v Evans* and *Vestergaard* would also do away with issues such a hypothetical reasonable solicitor test.[112]

58. Accordingly, if confidential information is to be the source of the court's powers, then an innocent recipient of confidential documents which have been obtained as a result of an inadvertent disclosure of documents in the course of giving discovery must be capable of being subject to orders restraining the use of the documents and for the return of those documents.

Appeal Ground 5 & 6 - Privilege in the Disputed Documents

59. The findings of the court below that privilege in each of the Disputed Documents had been waived[113] miscarried for the following reasons:

60. *Firstly*, the court below simply adopted the wrong test in determining the question waiver. None of the cases which appear to have informed the decision in the court below[114] provide any proper support for the conclusion that privilege in each of the Disputed Documents

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[109] See also the matters referred to in the PJ at [8]-[13].

[110] CAJ at [171(i)].

[111] Furthermore, the primary judge found that there was no evidence that would lead to a conclusion that it would be unfair to make the orders sought by the Appellants: PJ at [61].

[112] It is accepted that considerations of a hypothetical reasonable solicitor (or, as the case may require, hypothetical reasonable person as was the case in *Vestergaard*) may well have some validity on the approach advanced by the Appellants; such considerations may well inform what is considered to be 'just' or equitable (depending on what is found to be source of the power).

[113] CAJ at [179]-[180]. The conduct of the Appellants being said to be inconsistent with the maintenance of the confidentiality which the privilege is intended to protect.

[114] CAJ at [90]-93] and [173]-[178].

had been waived; it is submitted that the cases referred to either support a conclusion that there had been no waiver,[115] or rely upon principles of waiver based upon the approach in *Guinness Peat*[116] (which is submitted to be wrong for the reasons set out in paragraphs 27 to 39 above) or do not concern inadvertent disclosure in discovery.[117]

61. *Secondly*, even if the above be wrong, the Appellants submit that the appropriate test for determining whether waiver of privilege has occurred, where there has been an inadvertent disclosure in the course of discovery, is that stated by Clarke JA in *Goldberg & Ors v NG & Ors* (1994) 33 NSWLR 639 at 674E to 675A.[118] In particular, Clarke JA held that:

> ... as a general rule, a party should be found to have waived his or her privilege if:
>
> (1) the party has expressly waived the privilege; or
>
> (2) the party has so conducted himself or herself that the law imputes to that party an intention to waive the privilege and such imputation will occur when the party (or his or her agent) intentionally performs a deliberate act which renders it unfair to another party that the privilege be maintained.
>
> If this is correct there is no basis for holding that the inadvertent inclusion of a reference to a document in a list of documents (or affidavit of discovery) constitutes a waiver of privilege in that document. Nor should there be a waiver if the party's agent inadvertently produces the document for inspection.

62. Whilst this decision of the Court of Appeal was upheld by this Court,[119] it did not address the particular observations of Clarke JA concerning discovery and inadvertent production for inspection in that context. Nevertheless, it is submitted that the appeal to this Court and the subsequent decisions of this Court,[120] do not in any way detract from the appropriateness of the test set out by Clarke JA in *Goldberg v NG*[121] albeit notions of general fairness now have to be seen through the prism of inconsistency of conduct.

63. *Thirdly*, contrary to the approach in the court below, neither s.122(2) of the *Evidence Act* nor the principles in *Mann v Carnell*, were applicable to circumstances of this case because: (a) s.122(2) cannot apply to circumstances which do not involve "*the adducing of*

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[115] *Hooker Corporation Ltd v Darling Harbour Authority* (1987) 9 NSWLR 538.

[116] *Meltend* and *Al Fayed*.

[117] *Mann v Carnell*, *Great Atlantic* and *Spedley Securities Ltd v Bank of New Zealand* (1991) 26 NSWLR 711.

[118] Mahoney JA agreed with the orders proposed by Clarke JA but did not consider this question: at 666B.

[119] *Goldberg & Ors v NG & Ors* (1995) 185 CLR 83.

[120] *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, *The Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543, *Mann v Carnell* and *Osland v Secretary, Department of Justice* (2008) 234 CLR 275.

[121] A similar approach was adopted by Buchanan J in *Australian Competition and Consumer Commission v Cathay Pacific Airways Ltd* (2012) 207 FCR 380 at [27]; whilst referred to in the court below, it was said to be of no assistance: CAJ at [163]. Also see *CMA Corporation Limited & Ors v Rowe & Ors* (2010) 277 ALR 163.

evidence". Contrary to the findings below, s.131A(1) of the *Evidence Act* does not extend the application of s.122 to the present facts (that is, the disputed documents have already been provided);[122] and (b) The principles in *Mann v Carnell* are not apposite as it did not concern the effect of production of privileged material but was concerned with whether waiver might be imputed from the advancement of an issue in proceedings. Accordingly, if the release has occurred inadvertently,[123] it can only be seen as the antithesis of deployment and waiver should not be ascribed.

64. *Fourthly*, even if s.122(2) of the *Evidence Act* and *Mann v Carnell* apply to determine whether privilege has been waived, the conclusion that it would be inconsistent for the Appellants to contend the Disputed Documents are privileged[124] does not bear scrutiny. There was no inconsistent act by the Appellants.[125] The analysis in the court below was that the waiver of privilege was said to be based upon the ostensible or implied authority of solicitors acting for the Individual Defendants also miscarried.[126] It is unclear how notions of ostensible authority could apply to the concept of a waiver of privilege and, in any event, such a finding fails to have proper regard to: (a) the proposition that the privilege is that of the client; and (b) and the unchallenged findings that none of the ERA Parties had instructed their solicitor to waive privilege and none of the reviewers had any authority to waive any claims for privilege over any of the documents.[127]

Point in time of inspection (Ground 4) & the findings of the primary judge in relation to the 4 Released Documents

65. The Court of Appeal found that Mr Armstrong had inspected the Disputed Documents prior to the Motion being filed.[128] Putting to one side the fact that the finding of the primary judge was not sought to be

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[122] The events have moved beyond the stage in the discovery process to which s.131A is addressed and the case cannot be re-formulated to fit the words of s.131A. It cannot be imputed to Parliament that it intended to apply s.122 to cases where there has been an unintended release of documents and where an application to assert and protect continuing confidentiality has been made. The common law position should not be taken to have been affected by ss.122(2) and 131A without, at least, the adoption of words in the sections clearly apposite to achieve that end.

[123] As was found to be the case in relation to the 9 Withheld Documents.

[124] CAJ at [180].

[125] Whilst there is no doubt many of the acts referred to in the CAJ at [179] were deliberate, they cannot be said to be relevantly deliberate for determining the question of waiver. Furthermore, it is unclear how the elapsing of 3 months could properly be relevant for determining the question of waiver in the circumstances of this case particularly given the volume of documents that had to be re-inspected: CAJ at 179(e). From [180] of the CAJ, it is clear that it is the cumulative effect of the circumstances in [179] that give rise to the finding of inconsistency of conduct but it is not explained how this can be so. Furthermore, the analysis in [179] does not refer to the fact that the letter from NRFA of 6 December 2011 made clear that a total review of the discovered documents was to occur.

[126] CAJ [178]-[180].

[127] CAJ at [16].

[128] CAJ at [179(e)].

challenged in the court below, the evidence[129] relied upon by the Respondents was that: (a) on 7 November 2011, Mr Armstrong provided Marque with comments on some of the documents in the 4th defendant's list; and (b) by 5 December 2011, Mr Armstrong had provided further comments to Marque on all of the discovery provided by the Individual Defendants.

66. It is submitted that the reference to "*all*" can only be understood as a reference to having considered the discovery provided by each Individual Defendants (rather than having only considered the discovery of the 4th defendant which was the position as at 7 November 2011), however, this does not amount to evidence of to having physically examined every individual document and, relevantly, each of the Disputed Documents. The evidence of the particular documents which had been inspected by Mr Armstrong was limited to the Initial Documents[130] and there was no positive evidence advanced that he had inspected the Disputed Documents at any point in time prior to the filing of the Motion.

67. Whilst the Appellants' entitlement to the relief sought is not dependent on this factual matter being resolved in the Appellants' favour (for the reasons set out above), the court below erred in disturbing the primary judge's finding of fact; the evidence was not capable of providing a basis to overturn such a finding.[131]

68. Accordingly, insofar as the principles in *Guinness Peat* ought to be applied, the question as to the return of the Disputed Documents had to be determined on a pre-inspection basis[132] and, in that regard, the court below fell into error.

69. Furthermore, the findings of the primary judge that there was no intention by the Appellants to claim privilege over the 4 Released Documents[133] should be overturned or, alternatively, the question as to whether leave to cross-appeal ought to have been granted remitted to the court below to be determined in accordance with the principles established by this appeal.

70. Having regard to:[134] (a) the evidence as to the system which was put in place by NRFA to ensure that claims for privilege were made; (b) the evidence as to the particular instructions which were provided to

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[129] Being Ms Marshall's affidavit of 7 February 2012 at [31] and [32] and the letter from Marque to NRFA dated 12 December 2011.

[130] See paragraphs 12 and 13 above.

[131] In relation to concession said by the Respondents to have been made by senior counsel for the Appellants in the court below (Respondents' summary of argument at [23] & [26]), this is not a concession but rather a restatement of the evidence relied upon by the Respondents.

[132] That is, if there has been a release of documents that are confidential (including because they involve legal professional privilege), and the error is realised and notified to the other prior to the documents in question having been examined, the court will normally order that the list may be amended and the documents be ordered to be returned.

[133] PJ at [62].

[134] See paragraphs 11, 16, 17 above.

the individual reviewers; (c) the explanation provided by the relevant reviewer in relation to the Disputed Documents; and (d) the findings made by the primary judge in relation to the evidence of the reviewers, it is submitted that the finding of the primary judge in relation to the 4 Released Documents miscarried, the Appellants having discharged their onus on the probabilities.[135] The only reasonable and definite inference that could have been drawn by the primary judge was that, as a result of a mistake or inadvertence, the 4 Released Documents were provided to the Respondents.[136]

PART VII: LEGISLATION

71. This Part is attached as Annexure A.

PART VIII: ORDERS SOUGHT

72. The Appellants seek the following orders:

1. Orders 4 to 10 of the Court of Appeal of the Supreme Court of New South Wales made on 18 December 2012 be set aside and, in their place, order that the appeal to the Court of Appeal be dismissed.

2. The finding made by the Supreme Court of New South Wales on 26 April 2012 that there had been a waiver of privilege in respect of the documents numbered 9, 10, 11 and 19 in Exhibit A Confidential (**Four Documents**) be set aside.

3. The Respondents, by themselves, their servants and agents, be restrained from making any further use of any of the Four Documents.

4. Within 7 days, the Respondents, by themselves, their servants and agents:

   (i) deliver up all hard copies of the Four Documents in their possession, custody or power to the solicitors for the Appellants;

   (ii) return any CD containing copies of the Four Documents in their possession, custody or power to the solicitors for the Appellants;

   (iii) delete all electronic copies of the Four Documents in their possession, custody or power; and

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[135] While it is trite law that the facts and circumstances of the case presented to the court must provide an appropriate basis to persuade the court that there was a reasonable likelihood of their existence; the relevant principle in regard to civil cases was expressed by this Court in *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5.

[136] That is, disclosure of those documents was due to mistakes by the relevant reviewer in the implementation of the system which had been put in place by NRFA. It was no answer to the question of whether something had been demonstrated as being more probable than not to say that another possibility was open (*Strong v Woolworths Limited & Anor* (2012) 246 CLR 182 at [34]) as the Respondents sought to do before the primary judge: PJ at [47]-[56] and [62]. Also see T39.27-45. That is, the Respondents contended before the primary judge that, notwithstanding the evidence led by the Appellants, it was open that the reviewer in question had, contrary to her instructions, determined to waive the claim for privilege over each of the Disputed Documents.

(iv) provide written confirmation to the solicitors for the Appellants of their compliance with this order.

5. The orders of the Supreme Court of New South Wales made on 4 May 2012 that the Appellants and Respondents bear their own costs of the amended notice of motion filed on 24 February 2012 be set aside.

6. The Respondents pay the Appellants' costs of the amended notice of motion, the appeal to the Court of Appeal, the application for special leave to appeal and of this appeal.

10 **PART IX: ESTIMATE OF TIME**

73. The Appellants estimate that 2 hours will be required for the presentation of their oral argument.

Dated: 12 July 2013

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Annexure A

Evidence Act 1995

Act No. 2 of 1995 as amended

This compilation was prepared on 16 September 2011
taking into account amendments up to Act No. 46 of 2011

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

Part 3.10—Privileges

Division 1—Client legal privilege

117 Definitions

(1) In this Division:

client includes the following:

(a) a person or body who engages a lawyer to provide legal services or who employs a lawyer (including under a contract of service);

(b) an employee or agent of a client;

(c) an employer of a lawyer if the employer is:

(i) the Commonwealth or a State or Territory; or

(ii) a body established by a law of the Commonwealth or a State or Territory;

(d) if, under a law of a State or Territory relating to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of a client—a manager, committee or person so acting;

(e) if a client has died—a personal representative of the client;

(f) a successor to the rights and obligations of a client, being rights and obligations in respect of which a confidential communication was made.

confidential communication means a communication made in such circumstances that, when it was made:

(a) the person who made it; or

(b) the person to whom it was made;
was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

confidential document means a document prepared in such circumstances that, when it was prepared:

(a) the person who prepared it; or

(b) the person for whom it was prepared;
was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

lawyer means:

(a) an Australian lawyer; and

(b) an Australian-registered foreign lawyer; and

(c) an overseas-registered foreign lawyer or a natural person who, under the law of a foreign country, is permitted to engage in legal practice in that country; and

(d) an employee or agent of a lawyer referred to in paragraph (a), (b) or (c).

party includes the following:

(a) an employee or agent of a party;

(b) if, under a law of a State or Territory relating to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of a party—a manager, committee or person so acting;

(c) if a party has died—a personal representative of the party;

(d) a successor to the rights and obligations of a party, being rights and obligations in respect of which a confidential communication was made.

(2) A reference in this Division to the commission of an act includes a reference to a failure to act.

This is the form of this section as at 29 September 2011; it has not been amended since that date.

Evidence Act 1995
Act No. 2 of 1995 as amended

This compilation was prepared on 16 September 2011
taking into account amendments up to Act No. 46 of 2011

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

Part 3.10—Privileges

Division 1—Client legal privilege

118 Legal advice

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

(a) a confidential communication made between the client and a lawyer; or

(b) a confidential communication made between 2 or more lawyers acting for the client; or

(c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person;
for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

This is the form of this section as at 29 September 2011; it has not been amended since that date.

Evidence Act 1995
Act No. 2 of 1995 as amended

This compilation was prepared on 16 September 2011
taking into account amendments up to Act No. 46 of 2011

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

Part 3.10—Privileges

Division 1—Client legal privilege

119 Litigation

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

(a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or

(b) the contents of a confidential document (whether delivered or not) that was prepared;

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

This is the form of this section as at 29 September 2011; it has not been amended since that date.

Evidence Act 1995
Act No. 2 of 1995 as amended

This compilation was prepared on 16 September 2011
taking into account amendments up to Act No. 46 of 2011

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Part 3.10—Privileges

Division 1—Client legal privilege

122 Loss of client legal privilege: consent and related matters

(1) This Division does not prevent the adducing of evidence given with the consent of the client or party concerned.

(2) Subject to subsection (5), this Division does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence because it would result in a disclosure of a kind referred to in section 118, 119 or 120.

(3) Without limiting subsection (2), a client or party is taken to have so acted if:

(a) the client or party knowingly and voluntarily disclosed the substance of the evidence to another person; or

(b) the substance of the evidence has been disclosed with the express or implied consent of the client or party.

(4) The reference in paragraph (3)(a) to a knowing and voluntary disclosure does not include a reference to a disclosure by a person who was, at the time of the disclosure, an employee or agent of the client or party or of a lawyer of the client or party unless the employee or agent was authorised by the client, party or lawyer to make the disclosure.

(5) A client or party is not taken to have acted in a manner inconsistent with the client or party objecting to the adducing of the evidence merely because:

(a) the substance of the evidence has been disclosed:

(i) in the course of making a confidential communication or preparing a confidential document; or

(ii) as a result of duress or deception; or

(iii) under compulsion of law; or

(iv) if the client or party is a body established by, or a person holding an office under, an Australian law—to the Minister, or the Minister of the Commonwealth, the State or Territory, administering the law, or part of the law, under which the body is established or the office is held; or

This is the form of this section as at 29 September 2011; it has not been amended since that date.

Evidence Act 1995
Act No. 2 of 1995 as amended

This compilation was prepared on 16 September 2011
taking into account amendments up to Act No. 46 of 2011

The text of any of those amendments not in force
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Part 3.10—Privileges

Division 4—General

131A Extended application of Division 1A

(1) This section applies if, in response to a disclosure requirement, a person claims that they are not compellable to answer any question or produce any document that would disclose the identity of the informant (within the meaning of section 126H) or enable that identity to be ascertained.

(1A) A party that seeks disclosure pursuant to a disclosure requirement may apply to the court for an order, under section 126H, that subsection 126H(1) does not apply in relation to the information or document.

(2) In this section, ***disclosure requirement*** means a court process or court order that requires the disclosure of information or a document and includes the following:

(a) a summons or subpoena to produce documents or give evidence;

(b) pre-trial discovery;

(c) non-party discovery;

(d) interrogatories;

(e) a notice to produce;

(f) a request to produce a document under Division 1 of Part 4.6.

This is the form of this section as at 29 September 2011; it has not been amended since that date.

Uniform Civil Procedure Rules 2005

Historical version for 9 September 2011 to 17 November 2011

Dictionary

privileged document means a document that contains privileged information.

privileged information means any of the following information:

(a) information of which evidence could not, by virtue of the operation of Division 1 of Part 3.10 of the *Evidence Act 1995*, be adduced in the proceedings over the objection of any person,

(b) information that discloses a protected confidence, the contents of a document recording a protected confidence or protected identity information (within the meaning of section 126B of the *Evidence Act (1995)* where:
(i) consent by the protected confider (within the meaning of section 126C of that Act) has not been given to disclosure of the confidence, contents or information, and
(ii) section 126D of that Act would not operate to stop Division 1A of Part 3.10 of that Act from preventing the adducing of evidence in respect of the confidence, contents or information,

(c) information of which evidence could not be adduced in the proceedings by virtue of the operation of section 126H of the *Evidence Act 1995*,

(d) information that tends to prove that a party by whom a document is required to be made available, or by whom an interrogatory is to be answered, under section 128 of the *Evidence Act 1995* or section 87 of the *Civil Procedure Act 2005*:
(i) has committed an offence against or arising under an Australian law or a law of a foreign country, or
(ii) is liable to pay a civil penalty,

(e) information the admission or use of which in a proceeding would be contrary to section 129 of the *Evidence Act 1995*,

(f) information that relates to matters of state within the meaning of section 130 of the *Evidence Act 1995*,

(g) information to which section 131 of the *Evidence Act 1995* applies,

(h) information:
(i) the disclosure of the contents of which, or
(ii) the production of which, or
(iii) the admission or use of which,
in the proceedings would be contrary to any Act (other than the *Evidence Act 1995*) or any Commonwealth Act (other than the *Evidence Act 1995* of the Commonwealth),
but does not include information that the court declares not to be privileged information for the purposes of those proceedings.

This is the form of this provision as at 29 September 2011; it has not been amended since that date.

Uniform Civil Procedure Rules 2005

Historical version for 9 September 2011 to 17 November 2011

21.3 List of documents to be prepared

(cf SCR Part 23, rule 3 (5) and (6); DCR Part 22, rule 3 (5) and (6))

(1) Party B must comply with an order for discovery by serving on party A a list of documents that deals with all of the documents (other than excluded documents) referred to in the order.

(2) The list of documents:

(a) must be divided into two parts:

(i) Part 1 relating to documents in the possession of party B, and

(ii) Part 2 relating to documents that are not, but that within the last 6 months prior to the commencement of the proceedings have been, in the possession of party B, and

(b) must include a brief description (by reference to nature and date or period) of each document or group of documents and, in the case of a group, the number of documents in that group, and

(c) must specify, against the description of each document or group in Part 2 of the list of documents, the person (if any) who party B believes to be in possession of the document or group of documents, and

(d) must identify any document that is claimed to be a privileged document, and specify the circumstances under which the privilege is claimed to arise.

(3) Party B must comply with the requirements of subrule (1):

(a) within 28 days after an order for discovery is made, or

(b) within such other period (whether more or less than 28 days) as the order may specify.

This is the form of this rule as at 29 September 2011; it has not been amended since that date.

Uniform Civil Procedure Rules 2005

Historical version for 9 September 2011 to 17 November 2011

21.5 Documents to be made available

(cf SCR Part 23, rule 3 (9) and (10); DCR Part 22, rule 3 (9) and (10))

(1) Subject to the requirements of any Act or law, Party B must ensure that the documents described in Part 1 of the list of documents (other than privileged documents):

(a) are physically kept and arranged in a way that makes the documents readily accessible and capable of convenient inspection by party A, and

(b) are identified in a way that enables particular documents to be readily retrieved,
from the time the list of documents is served on party A until the time the trial of the proceedings is completed.

(2) Within 21 days after service of the list of documents, or within such other period or at such other times as the court may specify, party B must, on request by party A:

(a) produce for party A's inspection the documents described in Part 1 of the list of documents (other than privileged documents), and

(b) make available to party A a person who is able to, and does on party A's request, explain the way the documents are arranged and assist in locating and identifying particular documents or classes of documents, and

(c) provide facilities for the inspection and copying of such of the documents (other than privileged documents) as are not capable of being photocopied, and

(d) provide photocopies of, or facilities for the photocopying of, such of the documents as are capable of being photocopied, subject to:

(i) party A's solicitor undertaking to pay the reasonable costs of providing those photocopies or facilities, or

(ii) if party A has no solicitor, party A providing to party B an amount not less than a reasonable estimate of the reasonable costs of providing those photocopies or facilities.

This is the form of this rule as at 29 September 2011; it has not been amended since that date.

Civil Procedure Act 2005 No 28

Historical version for 13 September 2011 to 9 September 2012

Division 1 Guiding principles

56 Overriding purpose

(cf SCR Part 1, rule 3)

(1) The overriding purpose of this Act and of rules of court, in their application to a civil dispute or civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the dispute or proceedings.

(2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.

(3) 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.

(3A) A party to a civil dispute or civil proceedings is under a duty to take reasonable steps to resolve or narrow the issues in dispute in accordance with the provisions of Part 2A (if any) that are applicable to the dispute or proceedings in a way that is consistent with the overriding purpose.

(4) Each of the following persons must not, by their conduct, cause a party to a civil dispute or civil proceedings to be put in breach of a duty identified in subsection (3) or (3A):

(a) any solicitor or barrister representing the party in the dispute or proceedings,

(b) any person with a relevant interest in the proceedings commenced by the party.

(5) The court may take into account any failure to comply with subsection (3), (3A) or (4) in exercising a discretion with respect to costs.

(6) For the purposes of this section, a person has a ***relevant interest*** in civil proceedings if the person:

(a) provides financial assistance or other assistance to any party to the proceedings, and

(b) exercises any direct or indirect control, or any influence, over the conduct of the proceedings or the conduct of a party in respect of the proceedings.

Note. Examples of persons who may have a relevant interest are insurers and persons who fund litigation.

(7) In this section:
party to a civil dispute means a person who is involved in the dispute.

This is the form of this section as at 29 September 2011; it has not been amended since that date.

Civil Procedure Act 2005 No 28

Historical version for 13 September 2011 to 9 September 2012

Division 1 Guiding principles

57 Objects of case management

(1) For the purpose of furthering the overriding purpose referred to in section 56 (1), proceedings in any court are to be managed having regard to the following objects:

(a) the just determination of the proceedings,

(b) the efficient disposal of the business of the court,

(c) the efficient use of available judicial and administrative resources,

(d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

(2) This Act and any rules of court are to be so construed and applied, and the practice and procedure of the courts are to be so regulated, as best to ensure the attainment of the objects referred to in subsection (1).

This is the form of this section as at 29 September 2011; it has not been amended since that date.

Civil Procedure Act 2005 No 28

Historical version for 13 September 2011 to 9 September 2012

Division 1 Guiding principles

58 Court to follow dictates of justice

(1) In deciding:

(a) whether to make any order or direction for the management of proceedings, including:

(i) any order for the amendment of a document, and

(ii) any order granting an adjournment or stay of proceedings, and

(iii) any other order of a procedural nature, and

(iv) any direction under Division 2, and

(b) the terms in which any such order or direction is to be made,
the court must seek to act in accordance with the dictates of justice.

(2) For the purpose of determining what are the dictates of justice in a particular case, the court:

(a) must have regard to the provisions of sections 56 and 57, and

(b) may have regard to the following matters to the extent to which it considers them relevant:

(i) the degree of difficulty or complexity to which the issues in the proceedings give rise,

(ii) the degree of expedition with which the respective parties have approached the proceedings, including the degree to which they have been timely in their interlocutory activities,

(iii) the degree to which any lack of expedition in approaching the proceedings has arisen from circumstances beyond the control of the respective parties,

(iv) the degree to which the respective parties have fulfilled their duties under section 56 (3),

(v) the use that any party has made, or could have made, of any opportunity that has been available to the party in the course of the proceedings, whether under rules of court, the practice of the court or any direction of a procedural nature given in the proceedings,

(vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction,

(vii) such other matters as the court considers relevant in the circumstances of the case.

This is the form of this section as at 29 September 2011; it has not been amended since that date.

Civil Procedure Act 2005 No 28

Historical version for 13 September 2011 to 9 September 2012

Division 1 Guiding principles

59 Elimination of delay

(cf Western Australia Supreme Court Rules, Order 1, rule 4A)

In any proceedings, the practice and procedure of the court should be implemented with the object of eliminating any lapse of time between the commencement of the proceedings and their final determination beyond that reasonably required for the interlocutory activities necessary for the fair and just determination of the issues in dispute between the parties and the preparation of the case for trial.

This is the form of this section as at 29 September 2011; it has not been amended since that date.

Civil Procedure Act 2005 No 28

Historical version for 13 September 2011 to 9 September 2012

Division 1 Guiding principles

60 Proportionality of costs

In any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the
importance and complexity of the subject-matter in dispute.

This is the form of this section as at 29 September 2011; it has not been amended since that date.