IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
BETWEEN:

No. S118 of 2013

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

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' REPLY SUBMISSIONS

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PART I: PUBLICATION

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

PART II: REPLY

A. The narrative of facts

2. With respect to the submissions made in the 3rd to 5th sentences of [40] of the Respondents' Submissions, there is no proper basis for the Respondents to reject the submission made in [15] of the Appellants' Submission.[1] The position of the Respondents before the primary judge was succinctly stated by senior counsel for the Respondents to be:[2]

> If [the Respondents] are permitted to use the documents they would be sought to be used to seek to amend the claim but if we are not permitted to use them they will be returned and that matter will go no further.

3. In light of the unchallenged evidence before the primary judge that the reviewers were instructed that: (a) any document that was privileged was to be the subject of a claim for privilege;[3] and (b) none of the reviewers had any authority to waive any claims for privilege over any of the documents,[4] the so-called "*three relevant factual matters*"[5] on which the Respondents place emphasis are of no moment for the following reasons.

4. *First*, even if it be assumed that the evidence of the reviewer was that he/she had, contrary to their instructions, specifically determined that a document was not privileged either because of some misconduct or a failure to appreciate the contents of the document (neither of which were the case here), such evidence would not have provided any basis for the court below to have concluded[6] that there had been a waiver of privilege based upon the authority of the solicitor acting for the Individual Defendants.[7]

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[1] The last two sentences of [40] of the Respondents' Submissions merely reveal that the Respondents have failed to grasp the import of the Appellants' submission.

[2] T5.30-44 **[AB 1/11]**. Also see CAJ at [200] **[AB 3/1159]**. In relation to the Respondents' Submissions at [74(g)], [74(h)] and [84], it is apparent that the Respondents wish to resile from that position and would now like to use the Disputed Documents beyond this stated purpose. In this regard, it should be noted that the fact that a party has seen a document that they cannot otherwise use in litigation is not a matter of any particular hardship. It is frequently the case in litigation that a party has seen a document (for example, in a mediation) that cannot be otherwise obtained or used or has a document in their possession that cannot be tendered because, for example, the party is unable to properly establish its origins as a business record or otherwise.

[3] CAJ at [46] **[AB 3/1094]**.

[4] CAJ at [16] **[AB 3/1083]**.

[5] Respondents' Submissions at [45] to [50].

[6] CAJ [178] to [180] **[AB 3/1148 - 1151]**.

[7] The other additional factual matters referred to in the Respondents' Submissions do not detract in any way from or undermine the evidence of the individual reviewers that the disclosure of the Disputed Documents was due to a mistake or inadvertence. For example, the fact that the audit by Harriet Dymond-Cate (a solicitor rather than a senior associate as referred to in the Respondents' Submissions: affidavit of Harriet Margaret Dymond-Cate affirmed on 23 March 2012 at [1] **[AB 2/574]**) did not identify the mistakes (Respondents' Submissions at [10], [13] and [100]), can have no bearing upon the evidence of the individual reviewers. Similar observations can be made

5. *Secondly*, it is unclear how evidence from the reviewers of the duplicates of the Disputed Documents which were claimed to have been privileged[8] could have properly informed the conclusion that the reviewers of the Disputed Documents had erred in failing to claim the privilege.

6. *Thirdly*, it is accepted that the Appellants' grounds of appeal depend on the finding that the Disputed Documents were mistakenly produced for inspection.[9] In relation to the submissions concerning the 4 Released Documents, the Appellants seek an order setting aside the substantive orders of the court below. The position of the Appellants with respect to the decision of the primary judge and the 4 Released Documents is that the Court can either overturn that decision or, alternatively, the question as to whether leave to cross-appeal ought to have been granted be remitted to the court below to be determined in accordance with the principles established by this appeal.[10]

B. The Appellants' argument in reply

Confidential information

7. The Respondents' Submissions provide no basis upon which to conclude that the court below was correct in holding that the only principled basis for the grant of the orders sought by the Appellants lay in the law of confidential information.[11]

8. *First*, the Respondents' Submissions are silent as to whether or not they accept as correct the proposition unequivocally relied upon by Slade LJ[12] that once a privilege document has been disclosed and inspected in the course of discovery, the privilege is lost.[13] Furthermore, if this is accepted as correct by the Respondents, they do not provide any basis as to why a 'special rule' with respect to waiver of privilege[14] should apply with respect to inadvertently discovered documents.

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with respect to the fact that the lists of documents were verified (Respondents' Submissions at [19] to [21]). These matters just illustrate the fact that the mistake was not discovered until after the documents had been (twice) disclosed to the Respondents. The additional factual matters referred to by the Respondents could possibly be relevant to a claim for an estoppel, but that is not how the Respondents put their case and, in any event, there is no evidence that the Respondents acted in any way to their detriment.

[8] Respondents' Submissions at [48] and [100] to [103].

[9] Respondents' Submissions at [49]. That issue, together with the Respondents' challenge as to whether the documents were in fact privileged, were the only matters that were subject to challenge before the primary judge and the court below. Contrary to the manner in which the court below dealt with the appeal, the Respondents did not seek to challenge the jurisdiction of the court to make the orders before the primary judge or the court below.

[10] See the Appellants' Submissions at [69] to [70].

[11] CAJ at [105] **[AB 3/1119]**.

[12] *Great Atlantic* at 729h and 730a.

[13] Campbell JA also appears to adopt the reasoning that once a privileged document has been seen by the other side in the course of discovery it is no longer privileged: CAJ at [98] **[AB 3/1114]** - "... *in the situation where once-privileged information has been disclosed to an opposite party* ..."; it is, however, difficult to reconcile this statement with the observations of Campbell JA at [173] of the CAJ **[AB 3/1147]**.

[14] *Cf* Appellants' Submissions at [61] to [64].

9. *Secondly*, and contrary to the submissions of the Respondents,[15] the principles in *Guinness Peat* are inextricably dependent upon an erroneous conclusion as to what was determined in *Great Atlantic* for the reasons set out in the Appellants' Submissions at [27] to [30].[16]

10. *Thirdly*, whilst it is accepted that the origins of the principles in *Guinness Peat* may be able to be traced to cases concerned with confidential information, contrary to the submissions of the Respondents,[17] the principles expressed by Slade LJ[18] were not concerned with the law of confidential information. As is apparent in the following statement of his Lordship, the jurisdiction being invoked was akin to equity's ability to relieve against a mistake:[19]

> Though in the field of contract law, the intentions of the parties are usually judged from an objective standpoint, the courts are prepared to depart from this standpoint where one party seeks to take advantage of an obvious mistake of the other party of which he is aware. I can see nothing to prevent this court from applying similar principles in exercising its equitable jurisdiction in the field of discovery, and, indeed think that this is the manner in which justice will be best served.

11. *Fourthly*, if the privilege is waived upon inspection but nevertheless a party is entitled to an order for the return of inadvertently discovered documents, the law of confidential information provides no proper legal basis upon which the court can relieve a party from their continuing obligations of discovery.[20] Confidentiality itself is insufficient to relieve a party from their compulsory discovery obligations.[21] Accordingly, the jurisdiction of the court to make the orders cannot be founded solely in the law of confidential information.[22]

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[15] Respondents' Submissions at [56] and [57].

[16] So much is also apparent from the conclusions of Slade LJ at p.731 where the following is stated: *Save where it is too late to restore the previous status quo (e.g. on facts similar to those of the* Great Atlantic *case), I do not think the law should encourage parties to litigation or their solicitors to take advantage of obvious mistakes made in the course of the process of discovery.*

[17] At [52], [59], [62] and [63].

[18] At p.730-31.

[19] At p.730j.

[20] See, for example, UCPR 21.6 which provides: "*If at any time after party B's affidavit is made, and before the end of the hearing, party B becomes aware: ... (b) that any document included in Part 1 of the list of documents which was claimed to be a privileged document was not, or has ceased to be, a privileged document, party B must forthwith give written notice to party A of that fact, and comply with rule 21.5 in respect of the document, as if the document had been included in Part 1 of the list of documents and the list had been served on the date of the giving of the notice.*" At the time of *Guinness Peat*, the obligation to give continuing discovery was under the common law: *Vernon v Bosley (No 2)* [1999] QB 18.

[21] In *Science Research Council v Nasse* [1980] AC 1028, Lord Wilberforce said at 1065 "*There is no principle in English law by which documents are protected from discovery by reason of confidentiality alone.*" Also see *Chantrey Martin & Co v Martin* [1953] 2 QB 286 at 294 and *Alfred Crompton Amusement Machines Ltd v Customs & Excise Commissioners (No 2)* [1974] AC 405 at 429.

[22] In Chapter 12 of *Legal Professional Privilege: Law and Theory*, by Jonathan Auburn Hart Publishing, 2000 at pp. 232-233 which is titled 'Inadvertent Disclosure' (which is relied upon by the Respondents at footnote 88 of the Respondents' Submissions), Mr Auburn expresses the view that is too simplistic to conclude that the argument in *Lord Ashburton v Pape* rests solely on the confidential nature of the communication (at p.239 – also see pp.246-7). Mr Auburn goes on to conclude with the observation that the "*[t]his whole area urgently needs to be reviewed*

12. *Finally,* with respect to the submissions[23] made in relation to the summary contained in [74] of the judgment in *Istil Group Inc v Zahoor,*[24] an analysis of that decision reveals no support for the Respondents' submission that the decision of the court below is "*undoubtedly correct*".[25]

The court had all necessary power

13. The Respondents appear to accept that the scope of the court's powers is as set out in the Appellants submissions;[26] the Respondents' principal responses[27] being: (a) it is not necessary to resort to such powers because of the well-established principles based upon the *Guinness Peat* line of authority;[28] (b) the court has never before invoked its jurisdiction in circumstances similar to those being considered in this case;[29] and (c) for the court to intervene, there needs to be some abuse of process which is more than a "*simple unfairness to a party*".[30]

14. The first two submissions provide no proper basis to justify the court below overturning the decision of the primary judge. In relation to the third, the powers of the court are not so confined; rather the court's jurisdiction will arise where the court's processes or procedures are converted into instruments of unfairness or injustice.[31] As is apparent from the recent decision of the Supreme Court of New Zealand in *Siemer v The Solicitor-General,*[32] the court's jurisdiction is concerned with upholding the due administration of justice.

Obligations of confidence on the respondents

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by the House of Lords" (at p.258). Furthermore, as is apparent from the discussion in this chapter, it is inaccurate, as the Respondents seek to do, to portray the confusion as being confined to decisions concerned with *Calcraft v Guest*: Respondents' Submissions at [66] to [67].

[23] Respondents' Submissions at [60] to [63].

[24] [2003] 2 All ER 252.

[25] Respondents' Submissions at [52]. It is apparent from the judgment that: (a) the court appears not to have had the benefit of submissions from the parties as to the difficulties associated with this area of law (at [67]); (b) notwithstanding the unsatisfactory nature of the principles, his honour was bound to follow the current state of the authorities (at [74]); and (c) the judgment has, like *Guinness Peat,* as its starting point an erroneous conclusion as to what was determined in *Great Atlantic* (at [89]).

[26] Respondents' Submissions at [71].

[27] In relation to [70] of the Respondents' Submissions, the Appellants' written submissions before the primary judge stated at [9(d)] that "*An inadvertent disclosure of a privileged document does not necessarily constitute a waiver by which the privilege is lost. Where the other party has been permitted to see the document only by reason of an obvious mistake, the Court has the power to intervene for the protection of the mistaken party by the grant of an injunction.. Furthermore, the Court should ordinarily intervene in such cases, unless the case is one where the injunction can properly be refused on the general principles affecting the grant of a discretionary remedy ...*". For the reasons set out in footnote 9 above, it was not necessary for the source of the court's power to be further explored before the primary judge; nor the court below.

[28] Respondents' Submissions at [71].

[29] Respondents' Submissions at [72].

[30] Respondents' Submissions at [73].

[31] Appellants' Submissions at [39] to [47]. In any event, this case involves more than "*simple unfairness*" to the Appellants.

[32] [2013] NZSC 68 at [113] to [114].

15. There is no basis for the Respondents' submissions 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.[33] As is made clear in *Vestergaard Frandsen A/S & Ors v Bestnet Europe Limited & Ors*,[34] the former employee of *Vestergaard*[35] could have had, depending on the facts, her conscience affected from the moment she was told that the information she received from the owner of the information was confidential.[36]

Privilege in the Disputed Documents

16. The Respondents' Submissions[37] do not provide any basis for the Court to conclude that the decision of the court below on this point was correct. Whilst the court below correctly identified that s.131A of the *Evidence Act* did not apply,[38] the finding of the court below[39] is unable to be reconciled unless the court below implicitly adopted the view that s.131A(1) of the *Evidence Act* extended the application of s.122 to the present facts. Furthermore, the Respondents fail to establish how it can be concluded that the mistaken disclosure of the Disputed Documents can amount to a deployment of those documents in the sense required by *Mann v Carnell* (if that be found to be the relevant test[40]).

PART III: NOTICE OF CROSS APPEAL

17. The Respondents ought not to be granted leave to cross-appeal from the refusal of the court below to grant leave to appeal from the interlocutory finding of the primary judge in respect of the 9 Withheld Documents. The findings of the primary judge were clearly open on the evidence that was before the court[41] and the decision is not attended with sufficient doubt to warrant further consideration in this appeal.

23 August 2013

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[33] Respondents' Submissions at [81].
[34] [2013] 1 WLR 1556 at [25].
[35] The position of Mr Armstrong and Ms Marshall cannot be said to be materially different to that of Mrs Sig.
[36] On the facts of the case, she could not be liable as she had received no confidential information or, at least, no relevant confidential information: at [28].
[37] At [86] to [90].
[38] CAJ at [104] **[AB 3/1118]** and Respondents' Submissions at [90].
[39] At [173] of the CAJ **[AB 3/1147]**: *"Any question of whether client legal privilege has been waived would have to be decided in accordance with the version of s 122 Evidence Act that is now in effect."*
[40] While notions of general fairness now have to be seen through the prism of inconsistency of conduct, that does not in any way invalidate the test in *Goldberg v NG*.
[41] See the matters referred to in [10] to [17] and [70] of the Appellants' Submissions and [3] to [5] above.