IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S118 of 2013

ON APPEAL FROM THE COURT OF APPEAL IN THE SUPREME COURT OF NEW SOUTH WALES

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

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 & ORS
First Respondent

ARMSTRONG CONSULTING PTY LIMITED
Second Respondent

KENNETH ALAN ARMSTRONG
Third Respondent

RESPONDENTS' SUBMISSIONS

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Part I: Certification for Internet Publication

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

Part II: The Issues

2. The appeal and cross-appeal present the following two issues.

3. Whether documents which were produced informally and then formally as part of discovery, and listed in the non-privileged part of a verified list of documents, should be returned in circumstances where:

   (a) the documents were reviewed by the respondents; and

   (b) the Court of Appeal found that a reasonable solicitor in the position of the recipient of the documents would not have appreciated that the documents had twice been produced by mistake?

4. Whether in any event the documents in question were produced inadvertently or by mistake?

Part III: Judiciary Act

5. It is certified that the respondents do not consider that notice should be given in compliance with s 78B of the *Judiciary Act 1903*.

Part IV: Narrative of Facts

6. The appellants' narrative is not a complete record of the facts relevant to the disposition of the appeal and the cross-appeal, being principally the circumstances in which the documents in question came to be produced to the respondents.

7. The relevant facts are comprehensively recounted in the reasons of Campbell JA at [12]-[44][1] and may be summarised as follows.

8. On 22 July 2011, the Court made orders requiring the respondents and the fourth, fifth, sixth, ninth and tenth appellants (**Individual Appellants**) to give general discovery by 21 September 2011.[2]

9. On 22 September 2011, by consent, the Court extended the time for the exchange of verified lists of documents to 7 October 2011.[3] In connection with this consent order, it was agreed that the Individual Appellants *"would provide informal discovery of documents that had as at late September [2011] been reviewed."*[4]

10. On 29 September 2011, Ms Harriet Dymond-Cate, a senior associate in the employ of the solicitors for the Individual Appellants (**NRFA**) spent two and a half hours accessing documents relevant to the Armstrong matter. Ms Harriet Dymond-Cate's timesheets also showed that she spent five hours and twenty minutes on tasks concerning the Armstrong matter, one of which was *"reviewing privilege calls for informal discovery provided to Marque."*[5]

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[1] AB 3/1082-1093.
[2] CAJ at [14]. At the time general discovery was ordered, the conspiracy claim initially brought by the respondents had been struck out: CAJ at [13] and [2011] NSWSC 704 at AB 1/172-183.
[3] CAJ at [14].
[4] CAJ at [17].
[5] CAJ at [19].

11. Also on 29 September 2011, before any lists of documents had been verified or served, NRFA wrote to the solicitors for the respondents (**Marque**) as follows:[6]

> As requested we enclose a CD containing a tranche of documents provided to you by way of informal discovery.
>
> We note that the enclosed documents (as well as additional documents not yet available for inspection), will be listed and verified in a list of documents.
>
> You will see that each document contained on the CD is identified by a document identification number which will correspond with the number given to each document in the list of documents.

12. The CD enclosed with NRFA's letter of 29 September 2011 contained images of over 1,000 documents. An image of each of the documents in issue in this appeal was on the CD.[7]

13. Once draft lists of documents were prepared, they were reviewed by a more senior solicitor employed by NRFA.[8] The evidence of this process was that the review *"was undertaken by an audit type process"* which did not involve a *"physical inspection of all documents"* in the lists.[9]

14. On 7 October 2011, NRFA served on Marque a verified list of documents of the fifth and ninth appellants.[10]

15. On 9 October 2011, NRFA served on Marque a verified list of documents of the sixth and tenth appellants.[11]

16. On 13 October 2011, NRFA served on Marque a verified list of documents of the fourth appellant.[12] The list comprised 2,155 documents.[13] Part 1 of the list was divided into three separate tables, the second and third of which identified the documents concerning which a claim for privilege was made.[14] The first (non-privileged) table was 154 pages long, and listed individually 1,577 documents.[15] It had eight columns. Those columns identified each document by number, and gave its main date, the type of document it was (email, agreement etc), the title of the document, who it was to, who it was from, and any recipients to whom it was copied.[16]

17. Each of the documents in issue in this appeal was listed in the first (non-privileged) table in the list.[17]

18. The following table identifies each of the documents in issue in this appeal by reference to its item number in the fourth appellant's list of documents and where it can be found in the appeal books:

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[6] CAJ at [18].
[7] CAJ at [18].
[8] CAJ at [20].
[9] CAJ at [20].
[10] CAJ at [21]. AB 1/188. A copy of the list is at AB 1/194-400.
[11] CAJ at [21]. AB 1/189.
[12] CAJ at [22]. AB 1/401.
[13] CAJ at [22]. Although NRFA had reviewed approximately 60,000 documents for the purpose of the Individual Appellants giving discovery: CAJ at [15].
[14] CAJ at [22].
[15] CAJ at [23].
[16] CAJ at [23].
[17] CAJ at [22].

Doc	List of docs	Copy of docs
1	639 (AB 1/257)	AB 3/877
3	650 (AB 1/258)	AB 3/884
9	979 (AB 1/292)	AB 3/897
10	980 (AB 1/292)	AB 3/902
11	981 (AB 1/293)	AB 3/906
12	986 (AB 1/293)	AB 3/911
19	996 (AB 1/294)	AB 3/915
20	1001 (AB 1/295)	AB 3/921
21	1002 (AB 1/295)	AB 3/931
22	1008 (AB 1/295)	AB 3/941
25	1266 (AB 1/321)	AB 3/949
31	638 (AB 1/257)	AB 3/955
32	989 (AB 1/293)	AB 3/962

19. The fourth appellant's list of documents was accompanied by an affidavit of the fourth appellant, affirmed on 13 October 2011, which stated that he had made reasonable searches as to the existence and location of the documents referred to in the order.[18] It stated his belief that the only documents relevant to a fact in issue in the proceedings that had been in his possession in the previous six months were those listed in Part 1 of the list of documents.[19] It stated the bases upon which he claimed that the documents in the second table were privileged.[20] The third table listed some redacted documents, concerning which the fourth appellant's affidavit asserted that the redacted parts were privileged.[21]

20. The fourth appellant's list of documents was also accompanied by a certificate from his solicitor which stated that he had advised the fourth appellant as to the obligations arising under the order for discovery, and (in substance) that he was not aware of any documents that should have been discovered but had not been discovered.[22]

21. The first and third appellants did not serve verified lists of documents.[23] Rather, the first and third appellants were ordered to serve affidavits confirming that each had reviewed the verified lists of documents of the fourth, fifth, sixth, ninth and tenth appellants and had no further documents in their possession, which they did.[24]

22. On 13 October 2011, Marque wrote to NRFA seeking an explanation as to the basis for a claim of privilege over certain documents contained in the privileged parts of the lists of the fifth, sixth, ninth and tenth appellants which, according to the descriptions contained in the list, "would not on their face appear to attract privilege."[25]

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[18] CAJ at [22]. AB 1/192-193.
[19] CAJ at [22]. AB 1/192-193.
[20] CAJ at [22]. AB 1/192-193.
[21] CAJ at [22]. AB 1/192-193.
[22] CAJ at [22]. AB 1/190-191.
[23] CAJ at [21].
[24] This was done on 21 October 2011: CAJ at [28]. AB 2/794-2/797.
[25] CAJ at [24]-[26] and AB 2/791-793.

23. On 14 October 2011 orders were made for completion of inspection of discovery by 4 November 2011 and for the exchange of evidence.

24. On 19 October 2011, NRFA provided to Marque copies of the documents discovered by the Individual Appellants by way of formal discovery stating in correspondence that they:[26]

> ... **enclose** 4 CD's enclosing our client's discovery as follows:
>
> 1. Fourth Defendant general discovery;
> 2. Fourth Defendant redacted documents;
> 3. Fifth, Sixth, Ninth and Tenth Defendants general discovery; and
> 4. Fifth, Sixth, Ninth and Tenth Defendants redacted documents.

25. The CDs provided on behalf of the fourth appellant included images of each of the documents in issue in this appeal.[27]

26. On 20 October 2011, Marque forwarded the CDs to the third respondent, Mr Armstrong.[28]

27. On 24 October 2011, NRFA replied to Marque's letter of 13 October 2011.[29] NRFA stated that legal advice privilege was claimed over Documents 737, 742 and 746, but that the claim for privilege over Document 823 was no longer maintained. NRFA advised that the claim for "without prejudice" privilege had been a mistake, and that the claim should have been for "legal advice" privilege.

28. Ms Hannah Marshall, a senior associate in the employ of Marque, who had the ordinary carriage of the matter for the respondents, was cross-examined about her state of mind at the time of receiving this letter as follows:[30]

> Q. Wasn't it apparent to you from that response to your letter in which you had queried the extent of privilege claimed, apparent that Norton Rose intended to be claiming the privilege widely?
>
> A. What was apparent was that they had given careful consideration to the question of privilege.

29. On 7 November 2011, the third respondent provided Marque with his comments on some of the documents produced by the fourth appellant.[31]

30. On 21 November 2011, Marque replied to NRFA's letter of 24 October 2011.[32]

31. On 25 November 2011, Ms Marshall commenced inspection of the appellants' discovered documents.[33] This was the first time she had looked at any of those documents, as opposed to considering the way in which they had been described in the list of documents.[34] She approached the task by

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[26] CAJ at [27]. AB 1/405.
[27] CAJ at [27].
[28] CAJ at [27].
[29] CAJ at [29]; AB 2/798-799.
[30] CAJ at [30]. Transcript 45.6 – 45.10 (AB 1/51).
[31] CAJ at [31]. Affidavit of Hannah Elizabeth Marshall affirmed 7 February 2012 at [27]; AB 2/614.
[32] CAJ at [32]-[33]. AB 2/800-801.
[33] CAJ at [34].
[34] CAJ at [34].

first referring to the annotations that Mr Armstrong had prepared concerning the fourth appellant's discovery.[35] She observed that a number of documents appeared to record communications between one or more of the directors of the corporate appellants and legal professionals.[36]

32. Also on 25 November 2011, Marque wrote to NRFA in terms that included:[37]

> We have today identified a number of documents in [the fourth appellant's] verified list of documents that appear to relate to one or more of the defendants obtaining legal advice and over which your clients make no claim for privilege. **By way of example** we refer you to items 867, 868, 901, 903, 904, 907, 908. This is not an exhaustive list.
>
> Can you please explain the basis on which your client maintains its claims for legal professional privilege in light of the disclosure of the types of documents identified in [the fourth appellant's] verified list. (emphasis added)

33. Ms Marshall was cross-examined on this letter.[38] Relevant parts of that cross-examination are extracted at CAJ [36].

34. On 5 December 2011, the third respondent provided Marque with further comments on **all** of the discovery documents that had been produced by the Individual Appellants.[39] In his review of the documents, the third respondent did not consider that any of the documents in issue in this appeal had been produced inadvertently or by mistake.[40] Significantly this inspection by the third respondent of all of the documents discovered included the documents in question in this appeal and was completed prior to the appellants raising with the respondents any suggestion that the documents had been included in the non-privileged section of the fourth appellant's list of documents, and twice handed over for inspection, by reason of a mistake.

35. On 6 December 2011, NRFA replied to Marque's letter of 25 November 2011, alleging that documents 868, 868, 901 and 903 had been inadvertently produced for inspection and requesting that they be returned to NRFA.[41] Those documents are not in issue in this appeal.[42] The letter went on to say that NRFA were undertaking a further review of discovery, and that they would advise whether they required any further documents to be returned.[43]

36. Ms Marshall accepted in cross-examination that when she received that letter, she realised NRFA was claiming there had been a mistake in relation to those four documents.[44]

37. On 12 December 2011, Marque replied to NRFA's letter of 6 December 2011 refusing to return the four documents requested.[45]

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[35] CAJ at [34].
[36] CAJ at [34].
[37] CAJ at [35]. AB 1/406. Contrary to the Appellants' Submissions at [13], this letter identified by way of example, seven documents, not six documents.
[38] AB 1/49-51.
[39] CAJ at [37].
[40] Affidavit of Hannah Elizabeth Marshall affirmed 7 February 2012 at [32]; AB 2/615.
[41] CAJ at [38]. AB 1/407.
[42] CAJ at [41].
[43] CAJ at [39]. AB 1/407.
[44] CAJ at [40]; T 46.45 (AB 1/52).
[45] CAJ at [42]-[43]. AB 1/408-409.

38. On 23 December 2011, the Individual Appellants filed a notice of motion seeking the return of 30 documents and to restrain the respondents' use of those documents.[46]

39. The motion was amended on 24 February 2012 to include additional appellants as parties and two further documents.[47]

40. The amended motion was heard over three days (1, 23 and 28 March 2012).[48] During the course of the hearing, the primary judge found two of the documents were not privileged and the respondents returned 17 documents to the appellants, leaving 13 documents in issue.[49] The appellants' suggestion that those documents were in issue because the respondents wished to endeavor to re-plead the conspiracy claims is rejected.[50] The appellants determined that the documents were relevant to facts in issue in the proceedings well after the conspiracy claim had been struck out. The appellants do not submit that the documents were improperly discovered (as opposed to mistakenly produced for inspection).

41. The primary judge delivered her reasons on 26 April 2012. Her Honour granted the appellants' relief in relation to nine documents (**Nine Withheld Documents**), but refused relief in relation to four documents (**Four Released Documents**)[51] (together the "**Disputed Documents**").

42. The reason why the primary judge granted the appellants relief in relation to the Nine Withheld documents was that her Honour inferred that *"the [appellants] intended to claim privilege over these documents but that they were inadvertently listed in the open, non-privileged section of the [fourth appellant's] Verified List of Documents and were inadvertently produced to the plaintiffs for inspection."*[52]

43. The basis for this inference was a table provided to the primary judge at her request after the close of the oral hearing.[53] A copy of the table is at AB 3/987-991. The table sought to summarise whether, and if so where, a claim for privilege was made in respect of the Disputed Documents elsewhere in the fourth appellant's verified list of documents or in the fifth, sixth, ninth and tenth appellants' verified list of documents.[54] Self-evidently the respondents were unable to check the accuracy of the table because they did not have access to the documents listed in the privileged part of those lists.

44. The respondents sought leave to challenge the finding in the Court of Appeal. Leave was refused because the Court of Appeal held it was unnecessary to determine the issue.[55] This was because Campbell JA said that even if the appellants had intended to claim privilege over the Nine Withheld Documents, *"in circumstances where it was not obvious to a reasonable*

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[46] CAJ at [44]. Ms Marshall did not review any further documents until after the motion was filed.
[47] AB 1/1-5.
[48] CAJ at [6].
[49] CAJ at [7].
[50] Appellants' submissions at paragraph 15.
[51] CAJ at [8].
[52] PJ at [59]; AB 3/1014. The basis for drawing the inference was set out at PJ [58].
[53] Transcript 109.26-109.29. AB 1/121.
[54] The fifth, sixth, ninth and tenth appellants' lists of documents were not in evidence.
[55] CAJ at [188].

solicitor receiving them that the Disputed Documents have been provided by mistake, whether there was actually a mistake leads nowhere so far as entitlement to the injunctions is concerned."[56] Campbell JA did, however, give a strong indication that the primary judge erred.[57]

45. In this Court the respondents seek special leave to cross-appeal from the Court of Appeal's refusal of leave to appeal the primary judge's finding that a decision was made to claim privilege over the Nine Withheld Documents.[58] This is addressed in Part VII below. It is, however, important to emphasise three relevant factual matters at this stage.

46. First, none of the persons involved in the review of the Disputed Documents had a recollection of forming the view that any particular document was privileged.[59] Rather, the evidence of all of them was, in substance, that having seen again those of the Disputed Documents that he or she reviewed, it was apparent that each of the documents was privileged.[60] Each of them deposed that it must have been an error on their part to fail to include an entry in the database that showed the document as being privileged.[61]

47. Although, as the appellants submit, the primary judge was satisfied as to the belief of the reviewers in this regard,[62] they do not draw attention to what Campbell JA regarded as *"[a] critical passage in the reasoning in the court below"* that:[63]

> The untested claims in the reviewers' affidavits are no higher than a "belief" that they would not have formed the view that the document was not privileged. This is not sufficient to show that the defendants intended to claim privilege over the specific Documents that are the subject of the Notice of Motion.[64]

48. Second, the appellants led no evidence as to who of the six solicitors and paralegals involved in the review,[65] reviewed the purported duplicates of the Nine Withheld Documents that were listed in the privileged sections of the fourth appellant's or the other appellants' verified lists of documents. As Campbell JA said:[66]

> Sometimes the one reviewer had classified a Disputed Document as non-privileged on two or three different occasions. While the reviewer who had classified each Disputed Document as not privileged was identified, the reviewer who had classified a copy of the same Disputed Document as privileged was not identified.

49. Third, each of the appellants' grounds of appeal depend on a finding that the Disputed Documents were mistakenly produced for inspection. If this Court

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[56] CAJ at [188].
[57] CAJ at [188] where his Honour said *"[w]hether some unidentified person who worked for [NRFA] had made a decision to claim privilege concerning a different copy of the same document goes some way towards determining whether the Disputed Documents were provided by mistake, but is not determinative of the question."*
[58] AB 3/1174-1177.
[59] CAJ at [45].
[60] CAJ at [45].
[61] CAJ at [45].
[62] CAJ at [45]; PJ at [54].
[63] CAJ at [47].
[64] PJ at [56].
[65] CAJ at [15].
[66] CAJ at [188].

grants the respondents special leave to appeal and holds that the primary judge erred in finding that a decision was made to claim privilege over the Nine Withheld Documents, then the appeal must be dismissed.

50. In this regard it is important to note that the appellants' grounds of appeal do not challenge the Court of Appeal's refusal to grant them leave to appeal from the primary judge's failure to conclude that there was an intention to claim privilege concerning the Four Withheld Documents[67] (although the appellants seek to address such an error at paragraphs 69 and 70 of their submissions).

Part V: Constitution Provisions, Statutes and Regulations

51. The respondents accept the accuracy of Annexure A to the Appellants' Submissions, but for the reasons set out below those provisions are largely irrelevant to the determination of the appeal.

Part VI: Respondents' Argument in Answer

52. The Court of Appeal's decision, and in particular its conclusion that *"the only basis of principle on which the injunctions sought could be obtained is... the law of confidential information"*[68] – is undoubtedly correct. It is the application of well-established principle which has been developed and consistently applied in superior Courts in the United Kingdom[69] and in Australia.[70] The Court of Appeal's approach should be endorsed by the High Court as correct in principle and of general application.

53. The respondents' answer to the appellants' argument is set out below. Before addressing each of the grounds of appeal, however, it is important to make two observations.

54. First, the submission that the appellants now make in this Court as to the appropriate principle or principles is contrary to their submissions below. Both parties below accepted the relevant principles were summarised by Slade LJ in *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 2 All ER 716 (***Guinness Peat***) at 730-731[71] and, assuming mistake, directed their attention to whether the mistake was obvious to the recipient or alternatively to a hypothetical reasonable solicitor.

55. Second, the appellants do not engage with the orthodox principled approach of the Court of Appeal in an attempt to demonstrate error. Rather, they seek to undermine the well-trodden and well-established path of *Guinness Peat* and then suggest - as no other case has previously suggested – that the inherent jurisdiction of the Court should be applied and invoked in circumstances which are classically the domain of equity.

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[67] CAJ at [189].
[68] CAJ at [105].
[69] See fn 74 below.
[70] *Meltend Pty Ltd v Restoration Clinics of Australia Pty Ltd* (1997) 75 FCR 511, *Trevorrow v State of South Australia (No. 4)* [2006] SASC 42 (2006) 94 SASR 64; *Australian Securities and Investments Commission v Lindberg* [2009] VSCA 234 (2009) 25 VR 398.
[71] And applied in *Meltend Pty Ltd & Ors v Restoration Clinics of Australia Pty Ltd & Ors* (1997) 75 FCR 511 (Goldberg J) and *Grace v Grace* [2010] NSWSC 1514 (Brereton J). See Summary of Argument below at [3.19]-[3.28] and Response below at [1.10]-[1.16]. See also transcript below 16/07/12 at 58.13 – 58.24.

Appeal Ground 2[72] *– Confidential information*

56. Contrary to [27] of the Appellants' Submissions, the foundation of the principles in *Guinness Peat* is not inextricably dependent upon an erroneous conclusion as to what was determined in *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529 (***Great Atlantic***). This is at least because the passage set out from Slade LJ's reasons in *Guinness Peat* at [30] of the Appellants' Submissions is not the basis for his Lordship's articulation of the relevant principles at 730-731. Rather, the decision in *Guinness Peat* is an application of the principles set out and applied in *Lord Ashburton v Pape* [1913] 2 Ch 469, *Goddard v Nationwide Building Society* [1986] 3 WLR 734, *English and American Insurance Co Ltd v Herbert Smith & Co (a firm)* (1987) 137 NLJ 148 and *In re Briamore Manufacturing Ltd* [1986] 1 WLR 1429 (save that Slade LJ expressed a minor reservation in respect of *Briamore).*[73]

57. The reference to *Great Atlantic* in *Guinness Peat* must be understood in context. It was simply being used by counsel for the plaintiffs in that case as an example of how confidence may be lost in a confidential communication by reading the communication in open court. In *Great Atlantic*, given that the confidential communication had been read in open court, the Court held that it was too late to correct the error.

58. The appellants otherwise submit that even though there is an abundance of case law applying *Guinness Peat,*[74] the Court ought not adopt the *Guinness Peat* approach for four reasons.[75] Each of those reasons is addressed in turn below. Before doing so, however, it is important to distinguish between the question of principle as to whether *"the only basis of principle on which the injunctions sought could be obtained"* was *"the law of confidential information"* (ground 2 of the appeal) and the application of that principle in the present context. This distinction is not apparent from the appellants' submission on this ground.

59. Insofar as the question of principle is concerned, it is difficult to see how the equitable remedy of an injunction can be founded on anything other than the law of confidential information. As Campbell JA said in the Court below:[76]

> The obligations of confidentiality that are a necessary precondition for either legal professional privilege or client legal privilege will often be ones that arise as a matter of contract between solicitor and client, or between solicitor and someone from whom

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[72] See AB 3/1170. Not ground 1 as suggested in the Appellants' Submissions.

[73] The reservation was that where "the other party or his solicitor either (a) has procured inspection of the relevant document by fraud, or (b) on inspection, realises that he 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 in exercise of the equitable jurisdiction illustrated by the *Ashburton, Goddard and Herbert Smith* cases. Furthermore, in my view it 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 example on the ground of inordinate delay: see *Goddard's case* [1986] 3 WLR 734, 745E-F per Nourse LJ."

[74] For example, in the United Kingdom see *Derby & Co Ltd & Ors v Weldon & Ors (No 8)* [1993] 1 WLR 73; *Pizzey v Ford Motor Company Ltd* [1994] PIQR 15; *International Business Machines Corp v Phoenix International (Computers) Ltd* [1995] 1 All ER 413; *Hayes v Dowding* [1996] PNLR 578; *Al Fayed & Ors v Commissioner of Police of the Metropolis & Ors* [2002] EWCA Civ 780; *Istil Group Inc v Zahoor* [2003] 2 All ER 252; *Byrne v Shannon Faynes Port Co* [2007] IEHC 315.

[75] Appellants' Submissions at [31].

[76] CAJ at [98].

> information is obtained for the purpose of litigation. However, in the situation where once-privileged information has been disclosed to an opposite party in litigation there is usually no contractual obligation between the discloser and the disclosee. In such a situation any obligation of confidentiality that can be imposed on the opposite party must arise pursuant to equitable principles concerning confidential information.

60. Insofar as the application of the principle is concerned, it is well settled that confidence will only be maintained where the information was imparted in circumstances *"importing an obligation of confidence"*[77] recognising that "*the notion of an obligation of conscience [arises] from the circumstances in or through which the information was communicated or obtained*"[78] and that the relief which equity will grant to the owner of the confidence *"depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it."*[79]

61. In this context, it is ordinarily the position that where the owner does not communicate the information in circumstances *"importing an obligation of confidence"* the confidence is lost. As Megarry J said in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47: *"... there can be no binding obligation of confidence if that information is blurted out in public or is communicated in other circumstances which negative any duty of holding it confidential."* However, as Campbell JA said below at [100] (citations omitted):

> *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 does not provide an exhaustive statement of when equity will hold that an obligation of confidence has arisen. Even if there is no entrusting of confidential information by A to B in circumstances of confidence, there can sometimes be an obligation of confidence that attaches to information that is inherently confidential or private if that information is illegally or surreptitiously obtained, or is come across in the street, or is received unsolicited. In such a case there is "an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained." An obligation of confidentiality can be recognised even if there is no particular relationship between the parties and no deliberate malfeasance, but where a person receives information that, by virtue of the circumstances in which it is received, he or she knows or ought to know is confidential. The basis upon which equity intervenes in such circumstances is by deciding whether, in all the circumstances, it would be unconscientious for the recipient of the information to decline to respect the confidentiality of the information. That can depend not only on what the recipient knew at the time of receiving the information, but also on what the recipient has come to know by the time the court is considering whether or not to grant the remedy.

62. What the *Guinness Peat* approach does is to identify circumstances in which equity will intervene where documents have been produced for inspection by mistake. Rather than adopting what would seem to be the harsh approach taken in the *Briamore* decision, Slade LJ set out at 731 circumstances in which it would be unconscientious for the recipient of the information to decline to respect the confidentiality of the information; those circumstances being where *"the other party or his solicitor either (a) has procured inspection of the relevant documents by fraud, or (b) on inspection, realises that he has been permitted to see the documents only by reason of an obvious mistake."* As Slade LJ said at 731, there may be other exceptions to the general rule

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[77] *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47; see also *Del Casale Artedomus (Aust) Pty Ltd* [2007] NSWCA 172; (2007) 73 IPR 326 at [102]-[105] set out at CAJ [99].
[78] *Moorgate Tobacco v Philip Morris (No 2)* (1984) 156 CLR 414 at 438 per Deane J.
[79] *Seager v Copydex* [1967] 2 All ER 415 at 417–18 per Lord Denning.

that confidence in a document will be lost if voluntarily (though mistakenly) disclosed in litigation, however for the purposes of the case before him, the two exceptions he mentioned were sufficient. His Lordship concluded in this regard at 731: *"[s]ave where it is too late to restore the previous status quo (e.g. on facts similar to those of the* Great Atlantic *case [1981] 1 WLR 529), 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."*

63. The position was, with respect, well summarised in *Istil Group Inc v Zahoor*[80] as follows:

> The position on the authorities is this. First, it is clear that the jurisdiction to restrain the use of privileged documents is based on the equitable jurisdiction to restrain breach of confidence. The citation of the cases on the duty of confidentiality of an employee makes it plain that what the Court of Appeal was doing in *Lord Ashburton v. Pape* was applying the law of confidentiality in order to prevent disclosure of documents which would otherwise have been privileged, and were and remained confidential. Second, after a privileged document has been seen by the opposing party, the court may intervene by way of injunction in exercise of the equitable jurisdiction if the circumstances warrant such intervention on equitable grounds. Third, if the party in whose hands the document has come (or his solicitor) either (a) has procured inspection of the document by fraud or (b) on inspection, realises that he has been permitted to see the document only by reason of an obvious mistake, the court has the power to intervene by the grant of an injunction in exercise of the equitable jurisdiction. Fourth, in such cases the court should ordinarily intervene, unless the case is one where the injunction can properly be refused on the general principles affecting the grant of a discretionary remedy, e.g. on the ground of delay.[81]

64. Turning back to the four reasons advanced by the appellants as to why the *Guinness Peat* approach should not adopted by this Court, the first reason identifies a series of circumstances which are said to "militate against its adoption."[82] These circumstances are irrelevant to whether the principled basis on which the injunctions sought could be obtained is the law of confidential information. These circumstances are also irrelevant to whether it would be unconscientious for the recipient of the information to decline to respect the confidentiality of the information. However, to the extent they may be relevant, the respondents say:

(a) the importance of discovery and in particular verified discovery to the proper conduct of litigation cannot be overstated; the obligation is on the party giving discovery to determine what documents are discoverable and what documents are able to be inspected; a party seeking inspection should be entitled to assume that the discovery party has carried out the process of discovery properly and in accordance with relevant principles;[83]

(b) the matters referred to in (a) above should not be tempered by a need for proceedings to be conducted justly, quickly and cheaply; these aims

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[80] [2003] 2 All ER 252 at [74] (Mr Justice Lawrence Collins).

[81] See also *Al Fayed & Ors v Commissioner of Police of the Metropolis & Ors* [2002] EWCA Civ 780 at [16] per Lord Phillips MR, Walker LJ and Clarke LJ.

[82] Appellants' Submissions at [32].

[83] *Meltend Pty Ltd & Rosenbaum v Restoration Clinics of Australia Pty Ltd & Marzola* (1997) 75 FCR 511 at 526-527 (Goldberg J). See also *Guinness Peat* at 730, *Al Fayed* at [16].

can be achieved by limiting the scope of discovery to facts in issue in the proceedings[84] and to matters which are necessary for the resolution of the real issues in dispute in the proceedings;[85]

(c) it is important to the proper conduct of litigation that discovery is carried out properly and that any errors are promptly picked up;

(d) in circumstances where the recipient does not realise he or she has been permitted to see the document only by reason of a mistake, the imposition of a hypothetical reasonable solicitor test introduces an objective, workable, safeguard; and

(e) no question of waiver will arise because unless the party asserting confidence in the document recovers the document, the document is no longer a confidential privileged communication.

65. In relation to the second reason advanced by the appellants,[86] as has been explained above, the *Guinness Peat* line of authority does not attempt "to fashion rules concerning inadvertence in discovery by reference to the principles in *Great Atlantic.*" Moreover, insofar as it is suggested that the circumstances in which equity will intervene in this context are somehow limited or closed, the respondents repeat paragraph 62 above.

66. In relation to the third reason advanced by the appellants,[87] it is essential to distinguish between two separate principles:[88]

(a) if a party has in his possession a copy of a privileged document belonging to the other party, the holder of the copy may use it in evidence despite the fact that the original is privileged;[89] and

(b) however, the copy, as well as being a copy of a privileged document, is also a document obtained in breach of the equitable rule of confidence, and as such the owner of the original (legally privileged) document may apply to the court for an injunction to prevent the use of the document obtained through breach of confidence.[90]

67. This appeal concerns the principle set out in paragraph 66(b) above. Any debate, confusion or doubt, concerns the principle at paragraph 66(a) above. To the extent that Courts have declined to follow *Calcraft*, they have done so in the context of the principle in paragraph 66(a).

68. Moreover, there is no confusion in the authorities. At issue in *Istil Group Inc v Zahoor* was not the *Guinness Peat* approach, but rather, *"[t]he extent of the discretion of the Lord Ashburton v Pape line of authorities to restrain breach of confidence in relation to documents which have already been disclosed,*

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[84] Part 21 Rule 21.2 of the Uniform Civil Procedure Rules 2005 (NSW) which limits discovery to categories of documents which are relevant to a fact in issue.
[85] Supreme Court of New South Wales Practice Note SC Eq 11 – Disclosure in the Equity Division.
[86] Appellants' Submissions at [33].
[87] Appellants' Submissions at [34]-[37].
[88] J. Auburn, Legal Professional Privilege: Law and Theory, Hart Publishing, 2000, Ch 12 "Inadvertent Disclosure", pp 232-233.
[89] *Calcraft v Guest* [1898] 1 QB 759.
[90] *Lord Ashburton v Pape* [1913] 2 Ch 469.

but which would otherwise be privileged."[91] Further the Singapore and New Zealand authorities referred to in footnote 64 of the Appellants' Submissions do not assist the appellants because they concern the use of secondary evidence of an otherwise confidential communication (i.e. the principle in paragraph 66(a) above). Moreover, the decision in *Tentat* does not doubt the principle in *Lord Ashburton v Pape* and subsequent cases. The Canadian authority referred to is also of no assistance because, as that decision makes plain, it is premised on a different legal system to Australia and England, where privilege and confidentiality have merged.[92]

69. In relation to the fourth reason advanced by the appellants, the primacy of the discovery process is a legitimate and proper basis for the approach in *Guinness Peat* and subsequent cases. The *"floodgates"* cases referred to at footnote are in a completely different context and have no direct or indirect impact on the present problem. Insofar as the Canadian position is concerned, the authorities referred to in footnote 71 of the Appellants' Submissions do not doubt that equity provides the basis for the Court to intervene to restrain the use of inadvertently released privileged material.[93] The difference between the English position and the Canadian position is that *"[i]n Canada, the inadvertent disclosure of privileged materials will be restrained on the basis 'of the proper administration of justice' or 'in the interest of justice,' not merely on the basis of whether the mistake would have been obvious to the opposing side."*[94]

Appeal Ground 3[95] *– The court had all necessary power*

70. Appeal ground 3 can be shortly dealt with. At the outset, it needs to be observed that this was not the way the case was conducted either before the learned primary judge or the Court of Appeal. It was never suggested that the source of power for the making of the injunctions sought by the appellants lay in the Court's inherent power to control its own processes. As set out above, the case below was conducted on the basis that *Guinness Peat* set out the relevant principles.

71. There is no dispute that the Court has an inherent power to control its own processes and that the categories of case in which the Court may wish to exercise those powers is not closed. There is, however, no warrant for such plenary powers to be invoked in the circumstances of the present case, particularly where there is already in existence a well-established principle to apply.

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[91] [2003] 2 All ER 252 at [75] and [88] (Mr Justice Lawrence Collins). The remarks of Clarke JA in *Goldberg v Ng* (1994) 33 NSWLR 639 at 647E referred to at footnote 66 of the Appellants' Submissions were also principally prompted by this issue. As to Clarke JA's comments in *Goldberg v Ng*, see *Legal Professional Privilege in Australia*, 2nd Ed. by Desiatnik at p.113, esp. fn. 24.

[92] *Royal Bank of Canada v Lee* (1992) 3 Alta LR (3d) 187 at [17].

[93] *Double-E, Inc v Positive Action Tool Western Ltd* [1989] 1 CF 163 at [14]; *Metcalfe et al v Metcalfe* (2001) 198 DLR (4th) 318 at [21]. See also *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3rd ed. by Alan W. Bryant, Sidney N. Lederman, and Michelle K. Fuerst at [14.149].

[94] *Metcalfe* (2001) 198 DLR (4th) 318 at [21]. See also *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, at [14.152]-[14.153].

[95] Not ground 2 as suggested in the Appellants' Submissions.

72. None of the cases where the Court has seen fit to invoke the inherent jurisdiction to control the Court's own processes come anywhere near the circumstances of the present case. It must be borne in mind that whilst the Court ordered the parties in the present case to give discovery, it was then a matter for the parties to determine what documents fell within the orders for discovery and, more importantly, whether privilege should or should not be claimed in respect of any particular document. There is nothing in terms of the Court's process in ordering discovery that is in any material sense responsible for the Disputed Documents being made available for inspection.[96] That was the result of the appellants' own actions in twice providing copies of the relevant documents for inspection and including those documents in the non-privileged section of the Fourth Appellant's list of documents.

73. Further, it is clear from the cases which have considered the Court's inherent powers to control its own processes that the touchstone for whether conduct would amount to an abuse of process – which is the relevant touchstone – is not established by simple unfairness to a party.[97] The Appellants' Submissions, particularly at [47], rise no higher than this. The approach advocated by the appellants in this regard is, with respect, quite unprincipled and, as such, would be wholly unworkable. It would be difficult, if not impossible, for practitioners to determine whether, in the circumstances of any particular case, the documents were required to be handed back, and as a result there would likely be interminable applications to the Court to resolve such disputes. This is not a result that should be encouraged.

74. As to the relevant *"circumstances"* set out at [49] of the Appellants' Submissions, the respondents say:

    (a) whilst the mistake occurred in the giving of discovery by the appellants, the order for discovery simply provided the occasion but was not in any way causative of the handing over of the documents;

    (b) whilst discovery is a serious invasion of privacy it is, more importantly, a fundamental plank of the proper conduct of litigation. As set out above, any concerns as to the scope of discovery are more appropriately dealt with by the Court controlling the scope of discovery;

    (c) that legal professional privilege is a fundamental common law right and not just a rule of evidence cannot be doubted. It is, however, irrelevant in circumstances where the relevant documents are in the possession of the other side and what is sought from the Court is an injunction to provide for their return;

    (d) the fact that NRFA implemented an appropriate system is irrelevant;

    (e) prior to the appellants contending that the Disputed Documents were handed over by mistake, they had been reviewed by the third

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[96] Part 21 Rule 21.5(2)(a) of the *Uniform Civil Procedure Rules 2005* (NSW) provides that "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 produce for party A's inspection the documents described in Part 1 of the list of documents (other than privileged documents)...".

[97] See *Jeffery & Katauskas v SST Consulting* (2009) 229 CLR 75 at [28] per French CJ, Gummow, Hayne and Crennan JJ.

respondent. Further, the documents were handed over in the circumstances outlined above, including twice being provided for inspection and included in a verified list of documents;

(f) for the reasons set out above and below, the conclusion of the primary judge as to mistake/inadvertence in relation to the Nine Withheld Documents, cannot stand;

(g) the documents were discovered in the proceedings as being relevant to the issues as they currently stand, which do not include any claim for conspiracy. The respondents should be entitled to have access to all relevant documents in relation to the claims currently pleaded. As such, whilst the respondents do wish to use the documents to seek to re-plead a conspiracy case, this is irrelevant to the present issue;

(h) the learned primary judge's comments in relation to *"unfairness"* are not relevant to the proper application of principle. In any event, in circumstances where the documents are clearly relevant to the claims as currently pleaded, prejudice would be suffered by the respondents if they were denied access to them.

Appeal Ground 4[98] *– Equity and mistake*

75. There is no basis to contend that the equitable jurisdiction exercised in *Guinness Peat* and like cases is inconsistent with the undoubted power of equity to intervene to remedy a mistake. This is not the way the case was argued either before the learned primary judge or the Court of Appeal and no authority is cited by the appellants in support of this contention.

76. The jurisdiction exercised in *Guinness Peat* is a manifestation of the equitable jurisdiction applied to the circumstances of a breach of confidence.

77. In any event, for the reasons set out elsewhere in these submissions, the issue does not arise because the Court will not be satisfied that there was any relevant mistake.

Appeal Ground 6[99] *– Obligations of confidence on the respondents*

78. Contrary to [53] to [58] of the Appellants' Submissions, the decision of the Court of Appeal did not miscarry because it paid no regard to the observations of Gaudron J in *Johns v Australian Securities Commission*.

79. The matter was not argued by the appellants either before the learned primary judge or the Court of Appeal on the basis that *Fraser v Evans* and Gaudron J's remarks in *Johns v ASC* set out the relevant principle. Neither case was referred to in argument before the primary judge or the Court of Appeal. Indeed, senior counsel for the appellants in the Court of Appeal conceded that the appellants relied upon the jurisdiction set out in *Guinness Peat* and had to establish both inadvertence and obviousness in order to engage that equitable jurisdiction.[100]

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[98] Not ground 3 as suggested in the Appellants' Submissions.
[99] Not ground 5 as suggested in the Appellants' Submissions.
[100] Transcript 16/7/12 at 57.29-58.34.

80. There is no issue that the principle set out in *Fraser v Evans* and the recent Supreme Court decision in *Vestergaard Frandsen A/S & Ors v Bestnet Europe Limited & Ors* [2013] 1 WLR 1556 at [25] and [39] applies in Australia. No Australian authority has doubted this and indeed both Gaudron J (at 178 CLR 460) and McHugh J (at 178 CLR 474) in *Johns* referred to *Fraser v Evans* with approval.

81. *Fraser v Evans* was a markedly different case to the present involving a situation where an innocent third party received information which it subsequently discovered was obtained in circumstances involving a breach of confidence. Cases which have followed *Fraser v Evans* have done so principally in the same circumstances. These cases are to be contrasted with the present case where the relevant issue – as properly identified by Campbell JA in the Court of Appeal – is whether the information was handed over by the owner of that information in circumstances so as to bind the conscience of the recipient to keep it confidential.[101]

82. The circumstances referred to at [55] of the Appellants' Submissions are not sufficient to bind the conscience of the respondents. The matters relevant to the respondents' conscience are summarised by Campbell JA at [171] of the judgment in the Court of Appeal[102] and should be accepted by this Court.

83. Insofar as Mr Armstrong's knowledge is concerned,[103] this Court should not disturb the finding of Campbell JA at [179(e)][104] that Mr Armstrong had read all of the Disputed Documents prior to any suggestion being raised by the Appellants that they had been discovered and then handed over by mistake.

84. In relation to [56] of the Appellants' Submissions, notions of *"practical hardship"* have no role to play. If the appellants contend that the respondents will suffer no prejudice if the documents are ordered to be returned, then this submission should not be accepted. First, it needs to be kept in mind that the documents are, and were discovered on the basis that they were, relevant to the matters already pleaded in the proceedings. Significantly, the claims already pleaded include that the individual directors were knowingly concerned in the misleading or deceptive conduct of the corporate defendants. The documents are not only relevant to the respondents' desire to seek to re-plead the conspiracy claim that was previously struck out. Further, Mr Armstrong has considered all of the disputed documents and has provided comments on those disputed documents to the respondents' solicitors.

Appeal Ground 7 & 8[105] – Privilege in the Disputed Documents

85. The findings of the Court of Appeal that privilege in each of the Disputed Documents had been waived did not miscarry.

86. First, as Campbell JA remarked at [173] of the judgment[106] the Court's power to make the injunctions sought by the appellants did not depend upon

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[101] See also, for example, *Vestergaard* at [25].
[102] AB 3/1145-7.
[103] Being the relevant knowledge for the purposes of determining whether his conscience was bound: see *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 at 235-237 (per Lord Millett).
[104] AB 3/1150.
[105] Not 5 and 6 as suggested in the Appellants' Submissions.

whether privilege had been waived, and as such the decision of the Court of Appeal on whether privilege had been waived was not necessary for the result in the case. If the Court accepts the submissions above that the Court of Appeal was correct as to both the basis for the power to grant the injunctions sought and that the injunctions should not have been granted in the circumstances of the present case, then there is no need for this Court to consider questions of waiver.

87. As is clear on the face of the statute, the *Evidence Act* provisions deal with the adducing of evidence which has not yet arisen in the proceedings.

88. Contrary to the Appellants' Submissions, Campbell JA rightly recognized that the test under s.122 of the *Evidence Act* (as it applied at the time of the relevant conduct) was relevantly indistinguishable from the current common law test for waiver of legal professional privilege. That test is whether the appellants have acted in a way inconsistent with the maintenance of the privilege in the Disputed Documents. The matters summarised at [179][107] of the judgment lead inexorably to the conclusion that the actions of the appellants (through their solicitor) were relevantly inconsistent with the maintenance of the privilege.

89. There is no basis for this Court to adopt as the appropriate test the matters stated by Clarke JA in *Goldberg & Ors v Ng & Ors*. This is not the basis on which the case was argued either before the primary judge or in the Court of Appeal. Clarke JA was the only judge in the Court of Appeal in *Goldberg v Ng* to postulate such a test. Further, it is now clear that the test at common law for a waiver has moved on from *Goldberg v Ng* such that the test is now founded on inconsistency informed, where necessary, by questions of fairness.[108]

90. Contrary to [63] of the Appellants' Submissions, the Court of Appeal did not determine that s.131A(1) of the *Evidence Act* extended the application of s.122 to the present facts. No reference to where in the judgment this finding was apparently made is provided by the appellants. At [104] of the judgment[109] Campbell JA clearly stated that s.131A of the *Evidence Act* provided no assistance. As set out above, the Court of Appeal proceeded on the basis that the only power that the Court had in order to grant the injunctions sought by the appellants was equity's jurisdiction to restrain a breach of confidence. As such, it was not necessary to consider questions of waiver.

Point in time of inspection (Ground 5[110]) & the findings of the primary judge in relation to the 4 released documents

91. There is no basis for this Court to disturb the finding made by Campbell JA that Mr Armstrong had inspected and provided comments on all of the

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[106] AB 3/1147.
[107] AB 1149-1150.
[108] See *Mann v Carnell* (1999) 201 CLR 1 at 13 [28]-[29] per Gleeson CJ, Gaudron, Gummow and Callinan JJ.
[109] AB 1118-9.
[110] Not ground 4 as suggested in the Appellants' Submissions.

Disputed Documents prior to the Motion being filed.[111] The evidence at the hearing before the learned primary judge clearly established this fact. Indeed, there was no other evidence which would justify the conclusion the appellants now contend for, and senior counsel for the appellants in the Court of Appeal did not dispute that Mr Armstrong had read all of the documents prior to 5 December 2011.[112]

92. The uncontradicted evidence of Ms Marshall was to the following effect:

(a) on 7 November 2011, Mr Armstrong provided Marque Lawyers his comments on a number of the documents produced by Mr Michael, including a number of the Motion Documents;[113]

(b) on 5 December 2011, Mr Armstrong provided Marque Lawyers with further comments on all of the *"Directors' Discovery Documents"*, which included the Motion Documents and thus the Disputed Documents;[114]

(c) during the period 20 October 2011 to 5 December 2011, being the time that Mr Armstrong conducted his review of the Discovery Documents including the Motion Documents (including the Disputed Documents), he did not consider that the documents (Disputed Documents) had been produced inadvertently or by mistake.[115]

93. Accordingly, there is no basis for the appellants' submission at [68] that the question as to the return of the Disputed Documents has to be determined on a pre-inspection basis.

94. Further, there is no basis to overturn the findings of the primary judge that there was no intention by the appellants to claim privilege over the Four Released Documents. As set out below in relation to the respondents' Cross-Appeal, the learned primary judge's approach with respect to whether there was any intention to claim privilege over the Nine Withheld Documents cannot stand. The position in relation to the Four Released Documents is *a fortiori*. Having been given ample opportunity to prove the relevant intention, the appellants failed to do so.

95. The Court should therefore conclude that in respect of all thirteen documents in issue that there was no intention to claim privilege, and therefore no mistake.

Part VII: Notice of Cross-Appeal

96. The respondents seek special leave to cross-appeal from the Court of Appeal's refusal to grant them leave to appeal from the finding of the primary judge that a decision was made to claim privilege over the Nine Withheld Documents (**Finding**).

97. As has been already stated, the Court of Appeal refused the respondents leave to appeal the Finding because it was not necessary for the disposition of the appeal, in circumstances where Campbell JA found that it was not

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[111] See [179(e)] at AB 3/1149-1150.
[112] See Transcript 16/7/12 at 63.44-65.5.
[113] See [27] of Marshall at AB 3/614.
[114] See [31] of Marshall at AB 3/615.
[115] See [32] of Marshall at AB 3/615.

obvious to a reasonable solicitor receiving the Disputed Documents that they had been produced by mistake.[116]

98. Special leave to cross-appeal should be granted for two reasons. First, each of the appellants' arguments on appeal depend on the Finding. It is not suggested (nor could it be) that the relief granted by the primary judge should have been granted if there was no mistake. Second, the Finding is, with respect, plainly wrong.

99. Insofar as the second reason is concerned, the respondents primarily rely on their written supplementary submissions to the primary judge dated 28 March 2012.

100. Further, the respondents say that the table AB 3/987-991 did not enable the primary judge to draw the inference that she did. This is at least because there was no evidence before the primary judge as to who reviewed the duplicate documents and there was evidence that in addition to Ms Spencer, Ms Arnold and Ms Hoffmann-Ekstein, three other employees of the solicitors for the appellants were involved in the review process, including at least one senior associate who conducted an "audit".

101. Absent evidence that for example Ms Spencer (who reviewed Documents 1 and 3) also reviewed the duplicates of Documents 1 and 3 which were listed in the privileged parts of the other respondents' Verified Lists of Documents, and determined those duplicate documents to be privileged, the primary judge was not able to draw any inference in favour of the appellants.[117]

102. Indeed, even if there had been the evidence referred to in paragraph 101 above, the inference would not have been open to the primary judge or alternatively should not have been drawn.

103. It is also of some significance that it was well within the power of the appellants to adduce direct evidence as to who reviewed each of the duplicate documents but obviously chose not to.

Part VIII: Estimate of Time

104. The respondents estimate that they will require 2 hours to present the respondents' oral argument on all issues in the appeal and cross-appeal.

Dated: 9 August 2013

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[116] CAJ at [188]. See paragraph 44 above.

[117] As Street CJ said in *Gurnett v Macquarie Stevedoring Co. Pty Ltd* (1955) 55 SR (NSW) 243 at 248 *"... an inference is a reasonable conclusion drawn as a matter of strict logical deduction from known or assumed facts. It must be something that follows from given circumstances as certainly or probably true, and the mere possibility of truth is not sufficient to justify an inference to that effect."*