EXPENSE REDUCTION ANALYSTS GROUP PTY LTD & ORS v ARMSTRONG STRATEGIC MANAGEMENT AND MARKETING PTY LIMITED & ORS (S118/2013)

Court appealed from: New South Wales Court of Appeal
                        [2012] NSWCA 430

Date of judgment: 18 December 2012

Special leave granted: 7 June 2013

This matter concerns the mistaken provision of certain documents ("the Disputed Documents") during the discovery process in Supreme Court proceedings.

The Respondents' solicitors are Marque Lawyers ("Marque") and the solicitors for the Appellants are Norton Rose Australia ("Norton Rose"). Prior to verifying any lists of documents in the Supreme Court proceedings, Norton Rose gave Marque a CD of images of documents provided by some of the Appellants. Those documents had been reviewed by Norton Rose and released as not being subject to a privilege claim. Among them were the Disputed Documents. In October 2011 Norton Rose served verified lists of documents and further CDs of document images (which again included the Disputed Documents) on Marque. The Disputed Documents were all listed among documents over which there was no claim of privilege. Many of them however were also listed in sections of privileged documents or redacted documents.

Subsequent correspondence from Marque to Norton Rose mentioned that several of the discovered documents related to the obtaining of legal advice by some of the Appellants. Norton Rose then asserted that those documents were privileged and that they had been disclosed inadvertently. Norton Rose requested Marque to return the documents and undertake not to rely on them. Marque refused to do so, contending that any privilege had been waived. The Appellants then applied for orders that certain discovered documents (later refined to the Disputed Documents) be returned to them and not be further used in the proceedings.

On 26 April 2012 Justice Bergin granted the orders sought, except in relation to four documents ("the Released Documents"). Her Honour inferred that the Appellants had intended to claim privilege over those documents which had been included in duplicate in the privileged or redacted sections of the verified lists of documents. Those documents had therefore been inadvertently included in the non-privileged sections of the Appellants' lists and produced to the Respondents. Justice Bergin held that privilege over the Released Documents had been waived, as no evidence indicated that the Appellants had intended to claim privilege over those documents after Norton Rose had reviewed them.

On 18 December 2012 the Court of Appeal (Campbell & Macfarlan JJA, Sackville AJA) unanimously allowed the Respondents' appeal. Their Honours held that neither client legal privilege under the *Evidence Act* 1995 (NSW) nor legal professional privilege at common law could support the injunctions made. Such injunctions could however be supported by the law of confidential information. The Court of Appeal then found that the circumstances in which the Respondents obtained the Disputed Documents did not give rise to the necessary obligation of conscience on them. This was because Norton

Rose's disclosure of those documents was not a mistake that would have been obvious to the relevant solicitor at Marque.

The grounds of appeal include:

- The Court of Appeal erred in finding that the only principled basis for the grant of the orders sought by the Appellants before the primary judge lay in the law of confidential information.

- The Court of Appeal ought to have found that where there has been an error made in compliance with the Court's orders, processes and/or procedures (such as in giving discovery), the Court has all necessary power to make such orders as may be necessary so as to remedy any injustice that may be occasioned by allowing that error to stand.

On 26 June 2013 the Respondents filed a notice of cross appeal, the grounds of which include:

- The Court of Appeal erred in refusing the Respondents leave to appeal from the finding of the trial judge that a decision was made to claim privilege over the Documents.
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