



## HIGH COURT OF AUSTRALIA

6 November 2013

### EXPENSE REDUCTION ANALYSTS GROUP PTY LTD & ORS v ARMSTRONG STRATEGIC MANAGEMENT AND MARKETING PTY LIMITED & ORS

[2013] HCA 46

Today the High Court unanimously held that the Supreme Court of New South Wales should have ordered that the respondents return 13 privileged documents which had been inadvertently disclosed to them by the appellants' solicitors during a court-ordered process of discovery.

The parties have been involved in commercial proceedings in the Supreme Court since 2010. In 2011, the Supreme Court ordered that the parties give verified, general discovery. During this process, a number of documents, which were subject to client legal privilege, were mistakenly listed in the non-privileged section of the appellants' verified Lists of Documents. Electronic copies of these documents were inadvertently disclosed to the respondents' solicitors, Marque Lawyers. Marque Lawyers refused to return the documents, asserting that their clients had no obligation to do so and that privilege in the documents had been waived by the disclosure.

The appellants sought orders in the Supreme Court to the effect that Marque Lawyers return 13 of the inadvertently disclosed documents. The Supreme Court ordered the return of nine documents, but considered that privilege in the four remaining documents had been waived, and so declined to order the return of those documents. The Court of Appeal overturned the Supreme Court's decision. It held that the Supreme Court did not have power to order the return of any of the 13 documents. According to the Court of Appeal, the orders sought could only be granted in the exercise of the Court's equitable jurisdiction, on the basis of the law of confidential information. The Court of Appeal found that there was no equitable obligation of confidence upon Marque Lawyers and so held that the orders sought by the appellants should have been refused. By grant of special leave, the appellants appealed to the High Court.

The High Court unanimously allowed the appeal. The Court held that the issue of waiver should never have been raised. There was no evidence that the appellants had acted inconsistently with the maintenance of their claims to privilege. There was also no need to resort to the Court's equitable jurisdiction. If a privileged document is inadvertently disclosed during discovery, the Supreme Court ordinarily has all powers necessary to permit the correction of that mistake and to order the return of the documents (if the party receiving the documents refuses to do so). These powers exist by virtue of the Supreme Court's role in the supervision of the process of discovery and the express powers given to it by Pt 6 of the *Civil Procedure Act 2005* (NSW) to ensure the "just, quick and cheap resolution of the real issues" in proceedings. The High Court held that, in this case, the Supreme Court should have promptly exercised these powers to permit the appellants to correct their solicitors' mistake.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*