



HIGH COURT OF AUSTRALIA

14 August 2019

GLENCORE INTERNATIONAL AG & ORS v COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA & ORS

[2019] HCA 26

Today the High Court unanimously dismissed proceedings by which the plaintiffs, being companies within the global Glencore plc group, sought an injunction restraining the defendants – the Commissioner, the Second Commissioner and the Deputy Commissioner of Taxation – and any other officer of the Australian Taxation Office from making any use of documents described as the "Glencore documents", on the basis that those documents are subject to legal professional privilege. The High Court held that legal professional privilege is not an actionable legal right capable of sounding in injunctive relief.

The plaintiffs identified the Glencore documents as having been created for the sole or dominant purpose of the provision by Appleby (Bermuda) Limited ("Appleby"), an incorporated law practice in Bermuda, of legal advice to the plaintiffs. They were amongst documents known as the "Paradise Papers", which were stolen from Appleby's electronic file management systems, provided to the International Consortium of Investigative Journalists, and further disseminated. After becoming aware that the Glencore documents were in the defendants' possession, the plaintiffs asserted that those documents are subject to legal professional privilege, and requested that the defendants return them and provide an undertaking that they would not be referred to or relied upon. The defendants did not accede to those requests. The plaintiffs brought proceedings in the original jurisdiction of the High Court, seeking an injunction in equity's auxiliary jurisdiction restraining the defendants' use of the Glencore documents and orders requiring the delivery up of the documents. The plaintiffs claimed that legal professional privilege was a sufficient basis for the grant of the injunction sought, and did not seek to rely on the equitable doctrine of breach of confidence, or to expand any other area of law. The defendants demurred on the principal ground that no cause of action was disclosed by which the plaintiffs were entitled to that relief.

The Court upheld the demurrer on the principal ground, holding that legal professional privilege is not a legal right which may found a cause of action. The privilege is only an immunity from the exercise of powers that would otherwise compel the disclosure of privileged communications. The Court held that policy considerations cannot justify the creation of a new, actionable right respecting privileged documents in circumstances where that development is not available having regard to the state of settled principles. The Court observed that on the present state of the law, once privileged communications have been disclosed, resort must be had to the equitable doctrine of breach of confidence for protection respecting the use of that material.

- *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.*