HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER AND KEANE JJ

EXPENSE REDUCTION ANALYSTS GROUP PTY LTD & ORS — APPELLANTS

AND

ARMSTRONG STRATEGIC MANAGEMENT AND MARKETING PTY LIMITED & ORS — RESPONDENTS

Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited
[2013] HCA 46
6 November 2013
S118/2013

ORDER

1. *Appeal allowed.*

2. *Application for special leave to cross-appeal dismissed.*

3. *Set aside orders 4 to 10 of the Court of Appeal of the Supreme Court of New South Wales made on 18 December 2012 and, in their place, order that:*

   (a) the appeal to that Court be dismissed; and

   (b) the respondents pay the appellants' costs of the appeal to that Court.

4. *Set aside order 3 of the Supreme Court of New South Wales made on 4 May 2012 and, in its place, order that the respondents pay the appellants' costs of the Amended Notice of Motion dated 24 February 2012.*

5. *The respondents pay the appellants' costs of this appeal and the respondents' application for special leave to cross-appeal.*

6. *With respect to the documents numbered 9, 10, 11 and 19 in Exhibit A Confidential in the Supreme Court of New South Wales, within seven days of the making of this order, the respondents must:*

   (a) deliver up all hard copies of the four documents in their possession, custody or power to the solicitors for the appellants;

   (b) return any computer disk containing copies of the four documents in their possession, custody or power to the solicitors for the appellants;

   (c) delete all electronic copies of the four documents; and

   (d) provide written confirmation of compliance with this order to the solicitors for the appellants.

7. *The interim order with respect to confidential documents made by consent on 31 October 2013 be continued.*

On appeal from the Supreme Court of New South Wales

Representation

N C Hutley SC with E A J Hyde and S Kanagaratnam for the appellants (instructed by Norton Rose Fulbright Australia)

I R Pike SC with C N Bova for the respondents (instructed by Marque Lawyers)

CATCHWORDS

Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited

Practice and procedure – Discovery – Parties to commercial dispute ordered to give general discovery – Documents subject to client legal privilege mistakenly listed as non-privileged in appellants' Lists of Documents – Privileged documents inadvertently disclosed to respondents' solicitors – Whether Supreme Court had power to permit amendment of Lists of Documents – Whether Supreme Court had power to order respondents' solicitors to return documents.

Confidential information – Whether correct basis of jurisdiction for court to order return of inadvertently disclosed documents.

Client legal privilege – Whether privilege had been waived – Whether appellants' actions inconsistent with maintenance of claim to privilege.

Words and phrases – "case management", "client legal privilege", "discovery", "inadvertent disclosure", "waiver".

Civil Procedure Act 2005 (NSW), Pt 6.
Evidence Act 1995 (NSW), s 122.
Uniform Civil Procedure Rules 2005 (NSW), rr 21.2, 21.3.

1 FRENCH CJ, KIEFEL, BELL, GAGELER AND KEANE JJ. In 2010 the three respondents (together "the Armstrong parties") commenced proceedings against the 10 appellants (together "the ERA parties") in the District Court of New South Wales. They sought damages for the loss which they alleged they had suffered by reason of the ERA parties' conduct in connection with the entry into, performance and termination of agreements under which the parties established an insurance expense reduction consulting business in Australia and overseas. The proceedings were subsequently transferred to the Supreme Court of New South Wales. This appeal, however, focuses upon events tangential to the main proceedings – the inadvertent disclosure of documents subject to client legal privilege during the process of discovery.

2 At all relevant times, the Armstrong parties were represented by Marque Lawyers. At the time of the disclosure, Norton Rose Australia (as that firm was then called) acted for the individual appellants. Two of the corporate appellants were represented by another firm. However, the appellants have a common interest in the documents and Norton Rose has acted for all the ERA parties since these proceedings were brought.

3 On 22 July 2011, the parties were ordered to give verified, general discovery by a judge of the Supreme Court. That power is provided by r 21.2 of the Uniform Civil Procedure Rules 2005 (NSW) ("the UCPR") made under the *Civil Procedure Act* 2005 (NSW) ("the CPA"). Part 6 of the CPA also gives duties and powers of case management to courts in New South Wales.

4 After Norton Rose served its clients' verified Lists of Documents and disks on Marque Lawyers, some correspondence was exchanged between the two firms. The upshot of this correspondence was a claim by Norton Rose that a number of documents, the subject of client legal privilege, had inadvertently been disclosed contrary to its clients' instructions. Marque Lawyers declined to return the documents and to give the undertaking which Norton Rose sought, not because it disputed the assertion of inadvertence, but because of its view that any privilege attaching to the documents had been waived.

5 The matter came before Bergin CJ in Eq on a motion by the ERA parties for injunctive and other relief. By the time of her Honour's decision, 13 documents remained in dispute. Her Honour found that nine of the documents were disclosed inadvertently[1]. The effect of certain of the orders

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1 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* [2012] NSWSC 393.

made by her Honour was that the disks were to be returned by Marque Lawyers and replaced by Norton Rose, after removal of those nine documents from the disks. The Court of Appeal allowed the Armstrong parties' appeal on the basis that the mistakes in disclosure of the documents in the discovery process would not have been obvious to a reasonable solicitor and dismissed the ERA parties' cross-summons seeking leave to cross-appeal with costs[2].

6 The proceedings concerning the 13 documents were substantial. The hearing before the primary judge extended over some three days, during which evidence was given by the solicitors involved and those at Norton Rose responsible for discovery. The appeal resulted in lengthy reasons for judgment by the Court of Appeal.

7 Proceedings of this kind and length concerning a tangential issue should have been averted. There was no need to resort to an action in the equitable jurisdiction of the Supreme Court to obtain relief. That Court has all the powers necessary to deal with an issue relating to discovery and which required, essentially, that a party be permitted to correct a mistake. Those powers exist by virtue of the Court's role in the supervision of the process of discovery and the express powers given by Pt 6 of the CPA to ensure the "just, quick and cheap resolution of the real issues in the dispute or proceedings."[3] Those powers should have been exercised in relation to each of the 13 privileged documents for the reasons which follow.

The discovery process and the disclosure

8 Discovery by the ERA parties involved approximately 60,000 documents, a task which the primary judge understandably described as "huge"[4]. To undertake this task, and in order to identify documents for which privilege should be claimed, Norton Rose used an electronic database to store documents in a centralised, accessible manner. The fields within the database included document type and description. The person reviewing the documents coded them for "Relevance" and "Privilege". If a selection to "Yes" or "Part" was not

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2 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* (2012) 295 ALR 348.

3 *Civil Procedure Act* 2005 (NSW), s 56(1).

4 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* [2012] NSWSC 393 at [21].

made in the Privilege field, the default position for Privilege was left as "No" and the document would appear in the non-privileged section of the Lists of Documents.

9 The persons who were given the task of reviewing the documents were not very experienced in the process of discovery. Nevertheless, it has not been suggested that their level of competence was insufficient for the task. The reviewers were briefed on the issues in the proceedings and the principles relating to privilege. They were told that the clients had instructed Norton Rose that client legal privilege was to be claimed in respect of all documents to which it attached. After their review, a more senior solicitor conducted an "audit" of the reviewed documents by randomly checking descriptions of documents against the printed Lists of Documents.

10 The Armstrong parties do not suggest that the electronic means utilised to sort and store the documents was inappropriate or inadequate. They make no claim as to the reasonableness of the efforts made by the ERA parties to correctly distinguish privileged and non-privileged documents. Some of the reviewers later gave evidence that they must have made an error in failing to activate the "Yes" instruction, so that the database defaulted to no privilege. How the error came to be made is not to the point. The fact is that a number of privileged documents, including the 13 in question, which were not intended to be listed as non-privileged were in fact listed as such.

The claim of inadvertence and the response

11 Marque Lawyers received the disks which contained the privileged documents in question on 19 October 2011. It did not immediately inspect them, but forwarded them to the third respondent, Mr Armstrong, the following day. On 25 November 2011, Ms Hannah Marshall, a Senior Associate of Marque Lawyers, commenced the process of inspection of the documents. From looking at annotations made by Mr Armstrong, she was able to observe that a number of the documents appeared to relate to communications between the corporate ERA parties and lawyers. Ms Marshall, after consulting with the responsible partner of Marque Lawyers, Mr Michael Bradley, wrote to Norton Rose pointing to an apparent inconsistency, whereby client legal privilege had been claimed with respect to some but not all communications of this kind. She gave as examples seven documents where it appeared that the ERA parties were obtaining legal advice but in respect of which no claim of privilege was made.

12 The partner in charge of the litigation at Norton Rose, Mr Stephen Klotz, responded on 6 December 2011. He thanked Marque Lawyers "for bringing to

our attention the mistaken production of privileged documents". He explained that they had inadvertently not been marked as privileged by the reviewers, when clearly they ought to have been. He said that the clients maintained their claim of privilege. He sought return of all copies of the documents and an undertaking that they would not be relied on in the proceedings or otherwise.

13 On 12 December 2011, Ms Marshall wrote to Norton Rose stating that, in Marque Lawyers' view, its clients had no obligation to return the documents and any privilege attaching to them had been waived.

14 After completing a full search for other documents which may have been inadvertently disclosed, on 23 December 2011 Norton Rose filed the notice of motion which set in train these proceedings.

The primary judge's approach

15 In evidence which they gave on the hearing of the motion, none of the reviewers claimed to have recalled forming a view about whether to claim privilege with respect to the documents in question. It would have been surprising if they had. Her Honour accepted the evidence as to their beliefs: that they would not have made an error in deciding whether the documents were privileged and that the only possible cause of the failure to claim privilege over the documents in the list was their failure properly to manipulate the electronic system[5]. These beliefs are inconsistent with the reviewers having formed an intention not to claim privilege. Further, to form such an intention would have been contrary to their clients' instructions.

16 It is to be inferred from the primary judge's reasons, and is consistent with the orders ultimately made respecting the nine documents, that it was her Honour's view that if the documents had been disclosed inadvertently, privilege would not have been waived. Conversely, her Honour's view was that, absent a finding of mistake, disclosure would amount to a waiver of the privilege not to produce them.

17 However, her Honour considered that it was necessary for the ERA parties to establish that the reviewers had actually intended to claim privilege over each of the documents before consideration could be given to whether a mistake had occurred. Her Honour said that the ERA parties needed to demonstrate that the

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5 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* [2012] NSWSC 393 at [54].

reviewers intended to claim privilege, but that by inadvertence or mistake the documents were included in the non-privileged section of the Lists of Documents[6]. The reviewers' belief, that they would not have formed the view that the relevant document was not privileged, was insufficient to prove that they had formed an intention to claim privilege.

18 It was on this basis that her Honour could not be satisfied that the disclosure of four of the documents was inadvertent[7]. Her Honour was able to conclude that the disclosure of nine[8] of the documents was inadvertent because the requisite intention to claim privilege was evident from the inclusion of duplicates of those documents in the privileged section of the Lists of Documents[9]. That is to say, her Honour was prepared to accept that the originals of the nine documents had been mistakenly listed as not privileged when a correct listing of their duplicates as privileged had been made. However, her Honour was not prepared to accept that the listing of the four documents as non-privileged resulted from a similar error.

19 It will be apparent that her Honour was not determining the question of intention as that concept relates to the law of waiver. Her Honour was concerned with whether there was a present intention to claim privilege, not whether there was an intention to abandon such a claim[10].

20 It may be accepted that a continuing intention to claim privilege is relevant to the question of whether there has been a waiver of the privilege. But it was not necessary to prove a continuing intention to show that a reviewer

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6 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* [2012] NSWSC 393 at [55]-[56].

7 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* [2012] NSWSC 393 at [63].

8 In her reasons, her Honour only made this finding with respect to seven documents. However, the Armstrong parties' counsel had accepted during the course of oral argument before her Honour that her ruling on two of those seven documents would also apply to an additional two documents.

9 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* [2012] NSWSC 393 at [56], [58].

10 See further [30]-[33] below.

formed an intention with respect to each document at the time it was listed. It was sufficient to prove that the ERA parties intended to maintain their claims to privilege and that the reviewers were carrying out their clients' instructions. From that point, the fact of mistake in the incorrect listing of the documents could be inferred. The evidentiary value of the correct listing of the nine duplicate documents in the privileged section is to confirm, specifically, that their contrary listing as non-privileged resulted from an error and to suggest, more generally, that mistakes were being made in the process of listing.

21 The finding which should have been made with respect to each of the 13 documents in question was that its disclosure was inadvertent and unintentional, as Norton Rose claimed. As will be explained later in these reasons, there had been no waiver of privilege.

The approach of the Court of Appeal

22 The starting point in the reasoning of the Court of Appeal (Campbell JA, Macfarlan JA and Sackville AJA) was to identify the relief sought: orders by way of injunction[11]. The question which then arose was as to the basis, in law or in equity, for that relief. Campbell JA considered that the common law relating to client legal privilege could not itself found such an order, nor could provisions of the *Evidence Act* 1995 (NSW). In his Honour's view the only basis in principle must be the law relating to confidential information[12].

23 Campbell JA formed the view that no decision of this Court dealt with the principles to be applied when deciding whether privileged documents that have been provided on discovery by mistake should be returned[13]. His Honour therefore surveyed a number of English and Australian cases. The cases to which his Honour referred included *Lord Ashburton v Pape*[14], one of the leading authorities with respect to the equitable jurisdiction relating to confidential

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11 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* (2012) 295 ALR 348 at 371 [102] per Campbell JA.

12 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* (2012) 295 ALR 348 at 372 [105].

13 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* (2012) 295 ALR 348 at 371 [101].

14 [1913] 2 Ch 469.

information. More directly influential to the approach taken by his Honour were the decisions of English courts dealing with whether equitable relief should be given where privileged documents have been mistakenly produced for inspection.

24 In *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership*[15], as Campbell JA noted, the Court of Appeal stated three principles which might be applied where a privileged document is mistakenly included in lists of non-privileged documents in the process of discovery. They may be summarised as follows: (1) where a document is mistakenly included by a party, the court will ordinarily permit that party to amend its List of Documents, under the rules of court, at any time prior to inspection; (2) generally it is too late to correct the mistake by injunctive relief once another party has inspected the documents; (3) injunctive relief may otherwise issue (a) where inspection has been procured by fraud or (b) where, on inspection, the other party or that party's solicitor realised that the document was made available for inspection as a result of an obvious mistake. In either of these events the court has power, in its equitable jurisdiction, to grant an injunction to preserve the confidentiality of the communication.

25 The question which Campbell JA considered to arise in the present case, in relation to whether injunctions could have been granted, was whether the circumstances in which the privileged documents were communicated to or obtained by the Armstrong parties were such as to impose an obligation of conscience upon them[16]. The test applied by his Honour to determine that question was whether "a reasonable solicitor in the position of Ms Marshall should have realised that the documents had been disclosed by mistake."[17] That test, his Honour observed, had been applied in *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* and other cases. It seemed appropriate to permit the exception of an obvious mistake from the general rule that discovery may be relied upon.

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15 [1987] 1 WLR 1027 at 1045-1046 per Slade LJ; [1987] 2 All ER 716 at 730-731.

16 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* (2012) 295 ALR 348 at 386-387 [165]-[167].

17 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* (2012) 295 ALR 348 at 387 [166].

26 Campbell JA concluded that the test was not satisfied and no obligation of confidence could be brought home to the Armstrong parties concerning the documents. The injunctions should have been refused[18]. In his Honour's view, the manner of discovery would have conveyed that it had been conducted with some care and the Lists of Documents were accompanied by the requisite affidavits and solicitor's certificate. His Honour observed that the documents on their face contained some legal advice relating to matters in issue and discussions between various of the defendants concerning that advice. However, he considered that little weight could be placed upon Ms Marshall's failure to realise there had been any mistaken discovery, since she only read the documents in question after Norton Rose filed the notice of motion[19].

27 His Honour also found that privilege in the documents had, in any event, been waived. His Honour's reasons for this conclusion were that: Norton Rose's sending of the documents was an intentional act carried out with knowledge that privileged documents may be withheld from production; that act was done in the context of a court-ordered discovery process, where the parties' Lists of Documents were verified and certified; there was a lapse of time between the disclosure of the documents and the claim of mistake; and the mistake was not obvious. In all these circumstances, his Honour thought it would be inconsistent for the ERA parties to contend that the documents were privileged[20].

28 The significance his Honour attached to the lapse of time which had occurred does not appear to have been directed to what in fact resulted from the disclosure in this case, but rather to what might result in any case where there is delay. He explained that it is to be expected of litigation in the Commercial List that documents made available for inspection will be read promptly, and it may be difficult or impossible for a party or its solicitor, having read documents, to

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18 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* (2012) 295 ALR 348 at 389 [172].

19 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* (2012) 295 ALR 348 at 388-389 [171(i)].

20 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* (2012) 295 ALR 348 at 390-391 [179]-[180].

disregard them. This may result in the inconvenience of a change of solicitor[21]. These considerations would appear to address matters of policy or discretion.

29 In relation to the final factor identified by his Honour as relevant to waiver, his Honour conceded that if it had been obvious that the documents had been disclosed by mistake, it may well be harder, in an individual case, to show inconsistency of conduct between handing over the documents and later claiming privilege[22].

30 According to its strict legal connotation, waiver is an intentional act done with knowledge whereby a person abandons a right (or privilege) by acting in a manner inconsistent with that right (or privilege)[23]. It may be express or implied. In most cases concerning waiver, the area of dispute is whether it is to be implied. In some cases waiver will be imputed by the law[24] with the consequence that a privilege is lost, even though that consequence was not intended by the party losing the privilege. The courts will impute an intention where the actions of a party are plainly inconsistent with the maintenance of the confidentiality which the privilege is intended to protect[25].

31 In *Craine v Colonial Mutual Fire Insurance Co Ltd*[26], it was explained that "'[w]aiver' is a doctrine of some arbitrariness introduced by the law to prevent a man in certain circumstances from taking up two inconsistent positions ... It is a conclusion of law when the necessary facts are established. It looks, however, chiefly to the conduct and position of the person who is said to have waived, in order to see whether he has 'approbated' so as to prevent him from

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21 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* (2012) 295 ALR 348 at 390-391 [179(e)].

22 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* (2012) 295 ALR 348 at 391 [179(f)].

23 *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305 at 326; [1920] HCA 64; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 658; [1937] HCA 58.

24 *Goldberg v Ng* (1995) 185 CLR 83 at 95-96; [1995] HCA 39.

25 *Mann v Carnell* (1999) 201 CLR 1 at 13 [29]; [1999] HCA 66.

26 (1920) 28 CLR 305 at 326.

'reprobating'". In *Mann v Carnell*[27], it was said that it is considerations of fairness which inform the court's view about an inconsistency which may be seen between the conduct of a party and the maintenance of confidentiality, though "not some overriding principle of fairness operating at large."

32 Those considerations, articulated in relation to waiver at common law, apply with equal force in relation to the statutory question posed by s 122(2) of the *Evidence Act*, and made applicable by s 131A of that Act to the determination of a question of waiver of client legal privilege arising in the context of pre-trial discovery. That question is whether the client or party concerned "has acted in a way that is inconsistent with the client or party objecting to" the production of a document.

33 The primary judge's findings point to an inconsistency in the Lists of Documents, but not one which clearly suggests abandonment of the privilege. The fact that the nine documents the subject of her Honour's order were listed in both the privileged and non-privileged sections of the Lists of Documents was apt to create confusion about the position taken by the ERA parties and is strongly indicative of mistake in what was otherwise a careful process of discovery. Ms Marshall's letter of 25 November 2011 to Norton Rose confirms that it was unclear to her what the Lists of Documents conveyed with respect to privilege.

34 Whatever doubts Marque Lawyers had about the claims for privilege were dispelled by the letter from Norton Rose of 6 December 2011 advising that some privileged documents had been incorrectly listed as non-privileged. This action by Norton Rose was not identified in the reasons of Campbell JA as relevant, yet it was important to convey the true position of the ERA parties. The letter was sent promptly once Norton Rose became aware that mistakes had been made. It was given before Ms Marshall had fully inspected the documents. The disks containing the documents remained with Mr Armstrong, although they should have been retrieved upon notification of the mistake. It is not evident that he came across the 13 documents in question himself.

35 These circumstances are not indicative of an inconsistent position being taken by the ERA parties' lawyers such that waiver should be imputed to those parties. The issue of waiver should never have been raised.

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27 (1999) 201 CLR 1 at 13 [29].

The approach of the English courts

36 It is noteworthy that in *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership*[28] the Court of Appeal did not accept that immediately a privileged document is disclosed the privilege is lost. Slade LJ considered that even after inspection the court is not powerless to intervene to correct the mistake. The general rule which his Lordship stated[29] – that, the circumstances of fraud or obvious mistake aside, once inspection has occurred it is too late to grant injunctions – was not based upon waiver having been effected by the disclosure. Its basis lies in policy. This may be seen from the acceptance by the Court of Appeal of submissions[30] to the effect that imposing a restriction on relief after the point of inspection provides "a simple practical rule". The rule puts the onus on the party giving discovery to ensure its accuracy and avoids the practical problems involved in restoring the status quo by prohibiting the party to whom the documents are disclosed from using the information. Nevertheless, the English courts recognise the two exceptions to that general rule, and in those cases will use their power in the equitable jurisdiction to make the injunctions.

37 In *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership*, the Court of Appeal discussed the use of its own powers concerning proceedings in only one context. The Court observed that if inspection had not occurred, the court would permit a party who had mistakenly disclosed a privileged document to amend its List of Documents, under O 20 r 8 of the Rules of the Supreme Court 1965 (UK)[31]. In fact, the terms of that rule did not restrict the making of any order to such a time. The restriction appears to have been self-imposed, by the adoption of the general rule which followed.

38 *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* was decided in 1987. Much has changed in the nature of litigation and the complexity of discovery since that time in Australia and in England. The Civil Procedure Rules

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28 [1987] 1 WLR 1027 at 1044; [1987] 2 All ER 716 at 730.

29 *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027 at 1045; [1987] 2 All ER 716 at 731.

30 *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027 at 1044; [1987] 2 All ER 716 at 729.

31 *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027 at 1045; [1987] 2 All ER 716 at 730-731.

1998 (UK) ("the CPR") have been in force since 1999. Their overriding objective is that "of enabling the court to deal with cases justly and at proportionate cost."[32] The courts are obliged to further that objective by "actively managing cases"[33]. The Rules followed upon the Woolf Report[34]. It was there made clear that case management was a central plank of the civil procedure reforms. Commenting upon developments in Australia which "show the way forward", Lord Woolf MR said[35]:

> "In … my interim report I described the introduction of judicial case management as crucial to the changes which are necessary in our civil justice system. Ultimate responsibility for the control of litigation must move from the litigants and their legal advisers to the court."

39 Speaking of what the case management provisions in the CPR might mean for the conduct of litigation, in *Jameel (Yousef) v Dow Jones & Co Inc*[36] the Court of Appeal explained that:

> "It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice."

Earlier, in *Biguzzi v Rank Leisure Plc*[37], Lord Woolf MR had doubted that authorities decided under the old procedure could continue to be binding or even persuasive.

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32 Civil Procedure Rules 1998 (UK), r 1.1(1).

33 Civil Procedure Rules 1998, r 1.4(1).

34 Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales*, (1996).

35 Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales*, (1996) at 14.

36 [2005] QB 946 at 965 [54].

37 [1999] 1 WLR 1926 at 1931-1932; [1999] 4 All ER 934 at 939.

40 There are some examples of the application of a new approach by English courts to case management. In *Hertsmere Primary Care Trust v Administrators of Balasubramanium's Estate*[38], the claimants sent a letter of offer which did not technically comply with the CPR. The defendant's lawyers realised the error and sought to take advantage of it at a later date in resisting a *Calderbank* style order for costs. Lightman J[39] rejected the defendant's submission that there was no duty on the part of its lawyers to cooperate and enable the claimants to rectify the error. His Honour said: "[t]hat may have been the law prior to the CPR, but it is not the law today."

41 However, the position appears to be otherwise with respect to cases involving the inadvertent disclosure of privileged or confidential documents, where the principles stated in *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* continue to be applied. This was most recently confirmed in *DuPont Nutrition Biosciences ApS v Novozymes A/S (UK)*[40] with respect to the use to be made of the power in r 31.20 of the CPR, which provides that "[w]here a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the permission of the court." Although the court's other case management powers were mentioned in *Al Fayed v Commissioner of Police for the Metropolis*[41], the Court of Appeal did not draw upon them.

42 Whatever be the position in England, the courts of New South Wales should actively engage in case management in order to achieve the purposes of the CPA. Before turning to discuss that in more detail, it is necessary to say something about the process of discovery in litigation as relevant to the approach to be taken by the courts to mistakes which occur in it.

Discovery – the context in which mistaken disclosure arises

43 It is important to bear in mind that the disks containing the privileged documents only came into the possession of the Armstrong parties as a result of

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38 [2005] 3 All ER 274.

39 *Hertsmere Primary Care Trust v Administrators of Balasubramanium's Estate* [2005] 3 All ER 274 at 278 [11].

40 [2013] EWHC 155 (Pat) at [55].

41 [2002] EWCA Civ 780 at [78].

the process of court-ordered discovery. They would not have known, and had no entitlement to know, of the ERA parties' documents but for the provisions of the UCPR and the order for discovery made pursuant to them. When an order for discovery is made under the UCPR, the party ordered to make discovery is obliged to comply with the order by serving a list of documents[42].

44 As Lord Diplock observed in *Harman v Secretary of State for the Home Department*[43], discovery is a practice peculiar to common law systems, whereby parties to litigation can be compelled to produce to one another, for inspection and copying, all the documents in their possession or control which contain information that may assist another party to advance its own case or to damage the case of the disclosing party. As his Lordship also observed[44], "[t]he use of discovery involves an inroad, in the interests of achieving justice, upon the right of the individual to keep his own documents to himself".

45 Although discovery is an inherently intrusive process, it is not intended that it be allowed to affect a person's entitlement to maintain the confidentiality of documents where the law allows. It follows that where a privileged document is inadvertently disclosed, the court should ordinarily permit the correction of that mistake and order the return of the document, if the party receiving the documents refuses to do so.

46 It must be acknowledged that the UCPR require a party giving discovery to be accurate in listing the documents which are available for production and inspection[45]. Of necessity, discovery must be a process upon which other parties can reasonably rely. A party should make every reasonable effort to ensure the accuracy of the verified Lists of Documents which are to form the basis for inspection. It was not suggested that this obligation was not met by the steps taken by Norton Rose with respect to its clients' discovery, yet mistakes still occurred.

47 This is not the occasion on which to express views about the manner and extent of the discovery process today with its resultant costs, or whether it should

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42 Uniform Civil Procedure Rules 2005 (NSW), r 21.3(1).

43 [1983] 1 AC 280 at 299.

44 *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 at 300.

45 Uniform Civil Procedure Rules 2005, r 21.4.

be subjected to substantial reform. That the process of discovery has assumed large proportions in some cases and become increasingly burdensome is well known. In its report *Managing Discovery: Discovery of Documents in Federal Courts*[46], the Australian Law Reform Commission referred to the challenges which discovery presents to the due administration of civil justice.

48 For present purposes, it is sufficient to observe that, in large commercial cases, mistakes are now more likely to occur. In *ISTIL Group Inc v Zahoor*[47], Lawrence Collins J observed that "[t]he combination of the increase in heavy litigation conducted by large teams of lawyers of varying experience and the indiscriminate use of photocopying has increased the risk of privileged documents being disclosed by mistake".

49 The courts will normally only permit an error to be corrected if a party acts promptly. If the party to whom the documents have been disclosed has been placed in a position, as a result of the disclosure, where it would be unfair to order the return of the privileged documents, relief may be refused. However, in taking such considerations (analogous to equitable considerations) into account, no narrow view is likely to be taken of the ability of a party, or the party's lawyers, to put any knowledge gained to one side. That must be so in the conduct of complex litigation unless the documents assume particular importance.

50 It goes without saying that the courts will not need to be concerned with the correction of error unless there is a dispute. In the case of inadvertent disclosure, this should not often arise.

The approach required by the CPA

51 In *Aon Risk Services Australia Ltd v Australian National University*[48], it was pointed out that case management is an accepted aspect of the system of civil justice administered by the courts in Australia. It had been recognised some time ago by courts in the common law world that a different approach was required to tackle the problems of delay and cost in the litigation process. Speed and

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46 Australian Law Reform Commission, *Managing Discovery: Discovery of Documents in Federal Courts*, Report No 115, (2011) at 13-14, 57-60.

47 [2003] 2 All ER 252 at 269 [72].

48 (2009) 239 CLR 175 at 211 [92]-[93], 213 [98]; [2009] HCA 27.

efficiency, in the sense of minimum delay and expense, are essential to a just resolution of proceedings. The achievement of a just but timely and cost-effective resolution of a dispute has effects not only upon the parties to the dispute but upon the court and other litigants. The decision in *Aon Risk Services Australia Ltd v Australian National University* was concerned with the Court Procedures Rules 2006 (ACT) as they applied to amendments to pleadings. However, the decision confirmed as correct an approach to interlocutory proceedings which has regard to the wider objects of the administration of justice.

52 Unsurprisingly, the case management rules with which the Court was concerned in *Aon Risk Services Australia Ltd v Australian National University* had essentially the same object as those stated in the CPA. The overriding purpose of the CPA and the rules of court provided for by the UCPR, as stated in s 56(1) of the CPA, is "to facilitate the just, quick and cheap resolution of the real issues in the dispute or proceedings." In order to achieve that purpose, s 56(2) provides that the court[49]:

> "must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule."

A duty is also imposed upon a party to civil proceedings. Section 56(3) provides that:

> "A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court."

Section 56(4) requires that lawyers representing a party to civil proceedings (or any person with a relevant interest in the proceedings) must not, by their conduct, put a party in breach of this duty.

53 Section 57 relevantly provides, with respect to case management by the court, that:

> "(1) For the purpose of furthering the overriding purpose referred to in section 56(1), proceedings in any court are to be managed having regard to the following objects:

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49 Defined in s 3(1) of the *Civil Procedure Act* 2005 to include a tribunal.

(a) the just determination of the proceedings,

(b) the efficient disposal of the business of the court,

(c) the efficient use of available judicial and administrative resources,

(d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties."

54 Section 58 provides in relevant part:

"(1) In deciding:

(a) whether to make any order or direction for the management of proceedings, including:

(i) any order for the amendment of a document, and

…

(iii) any other order of a procedural nature, and

(iv) any direction under Division 2, and

(b) the terms in which any such order or direction is to be made,

the court must seek to act in accordance with the dictates of justice."

Sub-section (2) of s 58 goes on to provide that for the purposes of determining what the dictates of justice are in a particular case, the court must have regard to the provisions of ss 56 and 57 and may have regard to a number of other matters, to the extent it considers them to be relevant. Amongst these matters is the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction made in the process of case management.

55 Section 59 provides:

"In any proceedings, the practice and procedure of the court should be implemented with the object of eliminating any lapse of time between the commencement of the proceedings and their final determination beyond

> that reasonably required for the interlocutory activities necessary for the fair and just determination of the issues in dispute between the parties and the preparation of the case for trial."

The CPA provides some broad powers to the court to enable it to fulfil its duties with respect to the management of proceedings. Sections 56 to 59 appear in Pt 6 of Div 1 ("Guiding principles") of the CPA. Division 2 of Pt 6 is entitled "Powers of court to give directions". Section 61(1) provides generally that:

> "The court may, by order, give such directions as it thinks fit (whether or not inconsistent with rules of court) for the speedy determination of the real issues between the parties to the proceedings."

Sub-section (2) goes on to provide that the court may, inter alia, direct the parties to take specified steps and give such other directions with respect to the conduct of the proceedings as it considers appropriate.

56 The evident intention and the expectation of the CPA is that the court use these broad powers to facilitate the overriding purpose. Parties continue to have the right to bring, pursue and defend proceedings in the court, but the conduct of those proceedings is firmly in the hands of the court. It is the duty of the parties and their lawyers to assist the court in furthering the overriding purpose.

57 That purpose may require a more robust and proactive approach on the part of the courts. Unduly technical and costly disputes about non-essential issues are clearly to be avoided. However, the powers of the court are not at large and are not to be exercised according to a judge's individualistic idea of what is fair in a given circumstance. Rather, the dictates of justice referred to in s 58 require that in determining what directions or orders to make in the conduct of the proceedings, regard is to be had in the first place to how the overriding purpose of the CPA can be furthered, together with other relevant matters, including those referred to in s 58(2). The focus is upon facilitating a just, quick and cheap resolution of the real issues in the proceedings, although not at all costs. The terms of the CPA assume that its purpose, to a large extent, will coincide with the dictates of justice.

The orders which should have been made

58 In addition to the general powers it gives to courts, the CPA also provides some more specific powers. The relevant power here is to be found in s 64 of the CPA, entitled "Amendment of documents generally", which appears in Div 3 of Pt 6 ("Other powers of court"). Section 64(1)(a) empowers the court, at any

stage in the proceedings, to order that any document in the proceedings be amended. Section 64(2) then provides that, subject to s 58 (the dictates of justice)[50]:

> "all necessary amendments are to be made for the purpose of determining the real questions … correcting any defect or error in the proceedings and avoiding multiplicity of proceedings."

The direction which the Supreme Court should promptly have made in this case was to permit Norton Rose to amend the Lists of Documents, together with consequential orders for the return of the disks to enable the privileged documents to be deleted. Such a direction and orders would have obviated the need to resort to the more complex questions concerning the grant of relief in the equitable jurisdiction. It would have served to defuse the dispute and dissuaded the Armstrong parties from alleging waiver. It accords with the overriding purpose and the dictates of justice.

59 It could hardly be suggested that the pursuit of satellite interlocutory proceedings of the kind here in question in any way fulfils the overriding purpose of the CPA. To the contrary, it is the very kind of conduct which should be avoided if those purposes are to be achieved. It involved a relatively minor issue relating to discovery, the resolution of which appears to have offered little advantage to the Armstrong parties. Its determination went no way towards the resolution of the real issues in dispute between the parties. Instead, it has distracted them from taking steps to a final hearing, encouraged the outlay of considerable expense and squandered the resources of the Court.

60 What the Court was faced with was a mistake which had occurred in the course of discovery. It was necessary that the mistake be corrected and the parties continue with their preparation for trial.

61 This was not a case where the fact of mistake was disputed. There was no conduct on the part of Norton Rose and its clients which would have weighed against the grant of that relief. There was no delay of any significance in the mistakes being notified or confirmed. The primary judge was not persuaded that

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50 It is to be observed that O 20 r 8 of the Rules of the Supreme Court 1965 (UK), which was referred to in *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027; [1987] 2 All ER 716, conferred similar powers, although they were not linked to express case management powers and duties.

the Armstrong parties would be prejudiced by requiring the disks to be returned[51].

62 It is difficult to see what benefit the Armstrong parties could have believed would be obtained by them by attempting to retain the documents. The possibility that they might support a further claim in the nature of a conspiracy between the ERA parties was canvassed. A similar claim had previously been struck out[52]. It was not apparent to Sackville AJA in the Court of Appeal that the additional claims would add anything of substance[53]. It is not immediately obvious how an attempt to replead such a claim could be said to advance the overriding purposes of the CPA.

63 Further, in reality, there was no question of waiver sufficient to be agitated before the Court. The documents disclosed during the discovery process were privileged, and Norton Rose's claim that disclosure occurred by mistake was not disputed. Any allegation of waiver was going to turn on a legal, technical argument tangential to the main proceedings, and should not have been made.

Solicitors' responsibilities

64 The question for a party to civil proceedings and its legal representatives is not just whether there is any real benefit to be gained from creating a dispute about whether a mistake in the course of discovery should be corrected. The CPA imposes a positive duty upon a party and its legal representatives to facilitate the CPA's purposes. Requiring a court to rule upon waiver and the grant of injunctive relief in circumstances such as the present could not be regarded as consistent with that duty.

65 The position of solicitors who are in receipt of privileged documents has another dimension. Rule 31 of the Australian Solicitors' Conduct Rules, which

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51 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* [2012] NSWSC 393 at [61].

52 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* [2011] NSWSC 704 per Ball J.

53 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* (2012) 295 ALR 348 at 396 [202]-[203].

were adopted by the Law Council of Australia[54], deals with the duty of a solicitor to return material, which is known or reasonably suspected to be confidential, where a solicitor is aware that its disclosure was inadvertent. It involves notifying the other solicitor of the disclosures and returning that material. The rule has been adopted in Queensland[55] and South Australia[56] and the Law Society of New South Wales presently proposes to adopt it[57].

66 Such a rule should not be necessary. In the not too distant past it was understood that acting in this way obviates unnecessary and costly interlocutory applications. It permits a prompt return to the status quo and thereby avoids complications which may arise in the making of orders for the rectification of the mistake and the return of documents.

67 This approach is important in a number of respects. One effect is that it promotes conduct which will assist the court to facilitate the overriding purposes of the CPA. It is an example of professional, ethical obligations of legal practitioners supporting the objectives of the proper administration of justice.

Orders

68 The appeal from the Court of Appeal of the Supreme Court of New South Wales should be allowed and the orders numbered 4 to 10 made by that Court set aside. The respondents' application for special leave to cross-appeal should be dismissed. With respect to the documents numbered 9, 10, 11 and 19 in Exhibit A Confidential, a direction should be made that within seven days of the making of this order the respondents:

(a) deliver up all hard copies of the four documents in their possession, custody or power to the solicitors for the appellants;

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54 Council of the Law Society of New South Wales, *Proposed New South Wales Professional Conduct and Practice Rules 2013 (Solicitors' Rules)* at 1.

55 Legal Profession (Australian Solicitors Conduct Rules) Notice 2012 (Q).

56 Australian Solicitors' Conduct Rules 2011 (SA).

57 Council of the Law Society of New South Wales, *Proposed New South Wales Professional Conduct and Practice Rules 2013 (Solicitors' Rules)*.

(b) return any computer disk containing copies of the four documents in their possession, custody or power to the solicitors for the appellants;

(c) delete all electronic copies of the four documents; and

(d) provide written confirmation of compliance with this order to the solicitors for the appellants.

A further order should be made that the order of the Supreme Court of New South Wales made on 4 May 2012 that the appellants and the respondents bear their own costs of the Amended Notice of Motion filed on 24 February 2012 be set aside. In its place, there should be an order that the respondents pay the appellants' costs of the Amended Notice of Motion. The respondents should also pay the appellants' costs of the appeal to the Court of Appeal, the applications for special leave to appeal and to cross-appeal and of this appeal.

69 It is unnecessary to order that the respondents be restrained from making any further use of the four documents.

70 The interim order for suppression of confidential documents made by consent in these proceedings pending a decision should be continued.