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High Court guidance on documents produced by mistake

The recent High Court decision in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46 (6 November 2013) (*Expense Reduction Analysts*), concerning inadvertent disclosure of documents, has highlighted the duties of practitioners and the courts to strive to resolve procedural or side issues in a straightforward manner.

Background

When parties are engaged in a discovery or similar process in litigation, they may accidentally produce to the other party documents that they did not intend to produce. Sometimes those documents (but for their inadvertent production) will be properly the subject of claims for privilege from production (for example, on the grounds of legal professional privilege).

The usual course in this scenario is for the producing party to notify the recipient of the error and request the return of the documents, together with undertakings not to use or disclose the information they may have learned from reading the documents before the request for their return.

In *Expense Reduction Analysts* the receiving party refused to return documents disclosed inadvertently. In this case, the producing party claimed that documents mistakenly produced in discovery were protected by legal professional privilege. The receiving party claimed that any privilege had been waived by the production of the documents.

The producing party successfully applied to the New South Wales Supreme Court for an injunction requiring the return of these mistakenly produced documents. This involved resort to the law on legal professional privilege, confidentiality, the granting of injunctions and waiver of rights. This order was overturned on appeal to the New South Wales Court of Appeal, with the law on waiver of rights again coming under focus.

High Court decision

Support for the return of documents

The High Court unanimously upheld the producing party's appeal and restored the decision at first instance. In its joint judgment, the High Court said (at paras [45] to [49] (references omitted)):

> 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.
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> It must be acknowledged that the [*Uniform Civil Procedure Rules 2005* (NSW)] require a party giving discovery to be accurate in listing the documents which are available for production and

> inspection. 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 [that is, the producing party] with respect to its clients' discovery, yet mistakes still occurred.
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> …
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> 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*, 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'.
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> 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.

Criticism of an overly technical approach

The High Court took the opportunity to exhort lower courts to take a practical approach to the resolution of such issues when they arise. The Court pointed out that the case management rules in the New South Wales Supreme Court were designed to facilitate the just, quick and cheap resolution of the real issues in the dispute or proceedings (see the *Civil Procedure Act 2005* (NSW) and the *Uniform Civil Procedure Rules 2005* (NSW), as informed by the High Court's decision in *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27 (5 August 2009)). The Court saw this purpose as calling for 'a more robust and proactive approach on the part of the courts', with '[u]nduly technical and costly disputes about non-essential issues' needing 'to be avoided' (see para [57]). The Court said (at para [58]):

> 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.

Finally, the High Court stressed the duty of solicitors and counsel, as part of their case management responsibilities, to prevent these things from occurring. The Court said (at para [64]):

> 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.

This comment takes further colour from the observation at para [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.

Significance of the decision

This judgement stands to assist parties who find themselves in the unfortunate position of having inadvertently disclosed privileged material in a court process. It is consistent in outcome with previous authorities such as *Director of Public Prosecutions v Kane* (1997) 140 FLR 468 but does not refer to them.

The Court's observations about the duties of practitioners and the courts to strive to resolve procedural or side issues in a straightforward manner are of wider application and serve as a reminder to those responsible for managing matters before the courts.

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