Dispute Resolution

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TIGHTENING THE REINS ON CASE MANAGEMENT

In-house counsel will need to be aware of this latest decision of the High Court which requires legal advisers to think carefully before launching interlocutory applications.

***Expense Reduction and Analysis Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd*[1]**

This case was ostensibly all about the inadvertent waiver of the client's legal professional privilege attaching to discovered documents. No doubt there are many practitioners who can tell tales of cases where privileged solicitor and client advice was mistakenly sent to the other side, but the lawyer on the other side had the good manners and good judgment to return the document unread.

In very large cases, involving tens of thousands, or even hundreds of thousands of documents, mistakes can happen despite care and attention being taken by the practitioners responsible for disclosure. This is the result of the sheer volume of documents involved in large and complex cases.

In this case, there were somewhere in the region of 60,000 documents to be discovered by the ERA parties. By the time the litigation about the inadvertent disclosure of some of these documents reached the Court of Appeal of New South Wales, only 13 documents were in issue.

The ERA parties decided to agitate the issue by seeking injunctions and other relief in the Supreme Court of New South Wales. The result of those proceedings was that nine of the 13 documents were found to have been disclosed inadvertently.

The Armstrong parties appealed that decision on the basis that the mistakes in disclosure of the documents would not have been obvious to a reasonable solicitor. In short, the High Court observed (at [6] and [7]) that the litigation on this single issue was substantial, occupying several days hearing and the production of lengthy reasons by the Court of Appeal. In the words of the High Court, "*proceedings of this kind and length concerning a tangential issue should have been averted.*" However, the High Court did not rest there. It proceeded to consider the issue of waiver in the context of inadvertent disclosure of privileged discovered documents, but it also took the opportunity to remind practitioners of their paramount duty to the Court.

1. [2013] HCA 46

In NSW, the Civil Procedure Act 2005 (the CPA) sets out the powers and obligations of the court with respect to case management in proceedings. In the present case, the High Court highlighted the overriding purpose of the CPA, which requires that the court "*facilitate the just, quick and cheap resolution of the real issue in the dispute or proceedings*"(s 56(1)).

In view of these objectives, the High Court advocated a more robust and proactive approach to the court's case management powers. Upon hearing the application, the Supreme Court should have allowed ERA to amend the list of documents and ordered for the return of the disks, allowing the privileged material to be deleted. These directions would have diffused the dispute and obviated the need for further court time, resources and expense.

The High Court emphasised that this case management obligation applies equally to the parties in civil proceedings and in particular to the lawyers representing those parties. In such circumstances as these, solicitors have a responsibility to determine not only whether there is any real, substantive benefit in disputing the return of inadvertently disclosed documents, but also to facilitate the overriding purposes of the CPA. These case management obligations will apply equally to in-house counsel who will have an equivalent duty to their internal clients to ensure that these obligations are not contravened. They will also apply equally in the context of arbitration which, of itself is designed to ensure efficiency and reduce expense.

The Court explained in strong terms, that bringing proceedings which went no way towards resolving a real issue in dispute could not be consistent with the solicitors' duties under those provisions. This conclusion is consistent with the view taken in *AON Risk Services Australia Ltd v Australian National University*[2], which described the vicious cycle of inefficiency that arises when the objectives of the duty to the court are forgotten. This approach accords with a solicitors' paramount duty to the court. Such a duty requires solicitors not to act in a way which is contrary to the proper administration of justice, even to the extent of priority over the interests and instructions of their client.

The Court further drew attention to Rule 31 of the Australian Solicitors' Conduct Rules, under which a solicitor must return material which is known or reasonably suspected to be confidential, where that solicitor is aware that the disclosure was inadvertent. While this provision is not yet in force in NSW, the rule reflects a common sense position which avoids complications and the need for unnecessary and costly interlocutory applications. The New Solicitors Rules, which will take effect from 1 January 2014, will codify this provision into NSW law and place a formal obligation on legal advisers. These new rules also demonstrate the increasing recognition occurring, at both at state and federal level, that case management is now the benchmark for the behaviour of litigants and their legal representatives throughout proceedings.

The courts have broad powers regarding the breach of these overarching obligations. Most commonly, and as illustrated in the present case, failure to observe these duties will be taken into account when making orders in the course of proceedings. In this instance, the contravention resulted in costs orders against the *Armstrong* parties in respect of each level of appeal. This kind of outcome could subsequently expose legal representatives to actions against them in negligence.

This case is ultimately a salutary reminder to practitioners that case management is not merely one of the number of factors to be addressed when acting for parties on one or other side of an interlocutory application. It is critically important that solicitors have regard to these professional and ethical obligations throughout proceedings, and that they conduct themselves in a way which will assist the court to facilitate the overriding purposes of the CPA.

For more information, please contact Julian Sher, Partner on +61 (0)8 9422 4701, or julian.sher@hfw.com, or your usual contact at HFW. Research by Orla Isaacson, Trainee.

2. (2009) 239 CLR 175

HOLMAN FENWICK WILLAN
Level 19, Alluvion
58 Mounts Bay Road
Perth WA 6000, Australia
T: +61 (0)8 9422 4700
F: +61 (0)8 9422 4777

Lawyers for international commerce hfw.com