# Don't rely upon legal professional privilege to recover hacked documents

## *Glencore International AG v Federal Commissioner of Taxation* [2019] HCA

**HAMISH BADDELEY** Barrister, William Forster Chambers

### Background

A law firm incorporated in Bermuda was hacked and millions of documents leaked to a consortium of international journalists, including documents purportedly subject to legal professional privilege in favour of the Glencore group of companies (**the Glencore documents**).

The ATO obtained a copy of the Glencore documents and Glencore asked that the ATO return the documents and provide an undertaking that they would not be referred to or relied upon. The ATO refused.

Glencore[1] commenced proceedings in the original jurisdiction of the High Court seeking an injunction restraining the ATO[2] from making any use of the Glencore documents and requiring their delivery up.

### Glencore's argument

Equity will restrain an apprehended breach of confidential information.[3] Further, equity will restrain third parties if their conscience is relevantly affected.[4]

The problem for Glencore was that the Glencore documents were in the public domain and there were no allegations concerning the ATO's conduct such as to affect its conscience. As such, Glencore did not seek an injunction on the ground of confidentiality.

Instead, Glencore submitted that legal professional privilege was itself sufficient to grant an injunction notwithstanding a lack of confidentiality.

That was a somewhat novel argument as traditionally legal professional privilege has been recognised as a 'shield' guarding against the compulsory

disclosure of documents rather than a 'sword' supporting a claim for the return of documents that have already been disclosed and have lost confidentiality.[5]

However, Glencore argued that:

a. legal professional privileged has been recognised as a fundamental common law right;

b. the rationale for legal professional privilege is the furtherance of the administration of justice through the fostering of trust and candour in the relationship between lawyer and client;

c. the recognition of an actionable right to restrain the use of and recover privileged documents advances that policy;

d. the scope of the privilege should reflect the policy upon which it is based;

e. if an injunction will be granted on the basis that documents are confidential rather than privileged, there is a gap in the law which should be remedied; and

f. common law courts elsewhere have granted injunctions on a basis other than breach of confidential information – referring to *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1327 *(Lachaux) and Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 (Wee Shuo Woon).

## The High Court's decision

In a unanimous decision the High Court dismissed Glencore's claim and confirmed that while legal professional privilege may be described as a "right", it is a "right" to resist the compulsory disclosure of information, rather than a freestanding "right" capable of founding a cause of action.

The High Court found that Lachaux and Wee Shuo Woon do not support the notion that common law courts elsewhere are granting injunctions on a basis other than breach of confidential information.

In Lachaux the England and Wales Court of Appeal upheld the trial judge's decision that the subject documents remained confidential despite the wife's evidence that they had been provided to the media.

In Wee Shuo Woon the Court of Appeal of Singapore made orders on the basis that the subject emails remained confidential notwithstanding that they had been hacked and uploaded to the internet. This was because the emails were only potentially accessible and contained only a minute portion of the data that was stolen and uploaded. Further, the appellant must have known that the emails were confidential and privileged when he worked through the mass of hacked materials to find them.

In relation to Glencore's argument that the policy behind the privilege was furthered by extending the scope of the privilege to address the 'gap' in the law, the High Court reasoned that:

a. the rationale for legal professional privilege is that it enhances the administration of justice by encouraging clients to retain a lawyer and to make full and frank disclosure to the lawyer;

b. however, there is another public interest which legal professional privilege does not promote—being that the fair conduct of litigation requires that all relevant documentary evidence be available;

c. in recognising legal professional privilege, the law has struck a balance between the two competing public interests in favour of the privilege. This can have serious consequences, for example, where an accused person is denied access to documents which might support his or her defence because those documents are privileged;

d. in striking a balance between the two competing public interests, it has long been the policy of the law that the administration of justice is sufficiently secured by the grant of the immunity from disclosure; and

e. it is not sufficient to warrant a new remedy to say that the public interest which supports the privilege will be furthered because communications between client and lawyer will be even more secure. Policy considerations may influence the development of the law but only where that development is available having regard to the state of settled principles (here the settled principles were against that development as per subparagraph (d) above).

Given its decision, the High Court found it unnecessary to consider the ATO's argument that it was in fact obliged to retain and use the documents in question by reason of s 166 of the *Income Tax Assessment Act 1936* (Cth) (the ITAA) which relevantly provides that the Commissioner must make an assessment of a taxpayer's taxable income from the taxpayer's returns "and from any other information in the Commissioner's possession". It did, however, note that the relief sought by Glencore runs into that further difficulty and would involve an ill-defined cause of action which may be brought against anyone in relation to documents which may be in the public domain. →

## Unresolved issues

The High Court concluded its decision by saying that "if there is a gap in the law, legal professional privilege is not the area which might be developed in order to provide the remedy sought". It did not elaborate on what that other area of the law, if any, might be.

One possible answer is suggested in the seemingly generous findings by the courts in Lachaux and Wee Shuo Woon that confidentiality persists in documents notwithstanding that they may have been provided to the media or have been uploaded to the internet and are technically accessible by the public. Drawing upon those decisions, it is recommended that a party whose documents have been hacked and disseminated should be slow to concede that confidentiality has been lost and slow to rule out an injunction on the grounds of confidentiality or that the other party's conscience is relevantly affected.

However, straining the law on confidentiality is an artificial solution and would not overcome the problems posed, for example, by s 166 of the ITAA. It seems that legislative intervention is probably required if there is to be true protection for those whose privileged documents have been hacked.

In the meantime, the key lessons from *Glencore International AG v Federal Commissioner of Taxation* seem to be to:

a. take precautions against being hacked;

b. if you do get hacked, quickly take steps to maintain confidentiality over the documents;[6]

c. do not rely upon legal professional privilege as providing a basis upon which to restrain others from using the documents; and

d. notwithstanding that your privileged documents may be uploaded to the internet or provided to the media, consider whether it is still possible to argue that they remain confidential (in line with Lachaux and Wee Shuo Woon) and, if so, consider seeking remedies on that basis. ■

1. The plaintiffs are collectively referred to as 'Glencore' herein. The plaintiffs were Glencore International AG (first plaintiff), Glencore Investment Pty Ltd (second plaintiff), Glencore Australia Holdings Pty Ltd (third plaintiff) and Glencore Investment Holdings Australia (fourth plaintiff).

2. The defendants are collectively referred to as the 'ATO' herein. The defendants were the Commissioner of Taxation of the Commonwealth of Australia (first defendant), Neil Olesen, Second Commissioner of Taxation (second defendant) and Mark Konza, Deputy Commissioner of Taxation (third defendant).

3. *Lord Ashburton v Pape* [1913] 2 Ch 469.

4. *Johns v Australian Securities Commission* (1993) 178 CLR 408; *Lord Ashburton v Pape* [1913] 2 Ch 469.

5. That is not to say that when privileged documents are mistakenly provided to an opposing party in the course of litigation they need not be returned. As recently explained in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303, when privileged documents are mistakenly provided to the other parties' solicitors in the course of discovery they should be returned as a matter of practice. In fact, various solicitors' conduct rules set out the duty of a solicitor to return material, which is known or reasonably suspected to be confidential, where the solicitor is aware that its disclosure was inadvertent (see [64]-[65]). However, as the High Court said in *Expense Reduction Analysts Group* at [66] and [67]: "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 is an example of professional, ethical obligations of legal practitioners supporting the objectives of the proper administration of justice."

   In *Expense Reduction Analysts Group* the High Court ordered the return of the privileged documents under the court's case management powers and was critical of the respondent failing to do so of its own volition. Accordingly, *Expense Reduction Analysts Group* does not stand for the proposition that legal professional privilege provides a basis for an injunction restraining the use of privilege documents and requiring their return (as the orders were there made under the court's case management powers it was not necessary for the holder of the privilege to seek an injunction). Further, it did not consider the situation where privileged documents have been hacked and put into the public domain (being the subject matter of *Glencore International AG v Federal Commissioner of Taxation* [2019] HCA 26).

6. That is probably easier said than done and may involve seeking orders that the material be removed from the public domain (if possible) and its further publication prohibited.

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