

Banjo (NT) Pty Ltd v Ward Keller Pty Ltd [2005] NTSC 62

PARTIES:

BANJO (NT) PTY LTD
(ACN 080 143 317)

v

WARD KELLER PTY LTD
(ACN 009 628 157) (trading as Ward Keller
Lawyers)

TITLE OF COURT:

SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION:

SUPREME COURT OF THE NORTHERN
TERRITORY exercising Territory jurisdiction

FILE NO:

1/03 (20300145)

DELIVERED:

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JUDGMENT OF:

THOMAS J

REPRESENTATION:

Counsel:

Appellant: J Kelly
Respondent: A Young

Solicitors:

Appellant: Paul Maher
Respondent: Clayton Utz

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Banjo (NT) Pty Ltd v Ward Keller Pty Ltd [2005] NTSC 62
No. 1/03 (20300145)

BETWEEN:

BANJO PTY LTD
(ACN 080 143 317)
Appellant

AND:

WARD KELLER PTY LTD
(ACN 009 628 157) (trading as Ward
Keller Lawyers)
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 6 October 2005)

- [1] This is an appeal from a decision of the Master. Reasons for decision were delivered on 19 May 2005. The appeal is brought pursuant to Rule 77.05 of the Supreme Court Rules. The appeal is in the strict sense.
- [2] The order made by the Master on 17 June 2005 that is the subject of this appeal is as follows:

“The plaintiff produce to the defendant the documents from the plaintiff’s supplementary list of documents that are listed in the schedule to the affidavit of Joe Patterson affirmed 21 April 2005, except the parts of those documents which contain communications between the plaintiff and the plaintiff’s solicitors in relation to the plaintiff’s claim against Ward Keller Pty Ltd.”

- [3] The background to the matter is set out in paragraphs (1) and (2) of the reasons for decision of the Master dated 19 May 2005.

“[1] It is pleaded in the statement of claim that the plaintiff retained the defendant to provide legal services in relation to the lease of motel premises at Katherine. The plaintiff had leased these premises from other parties, referred to as “Ardmilla”. A dispute had arisen as to the repair and maintenance obligations of the parties to the lease, and the defendant was retained to advise as to this dispute and to effect the renewal of the lease. It is alleged that the defendant, in breach of the terms of its retainer, and of its duty, gave advice that put the renewal of the lease in doubt, and which required the plaintiff to compromise its claim as to repairs and maintenance on unfavourable terms. The plaintiff has pleaded that if the defendant had not been in breach, the plaintiff would not have settled on those terms. The defendant, in its defence, has denied that the plaintiff would have acted in the manner alleged, and alleges that the plaintiff could have pursued the claim, and by not doing so, failed to mitigate its loss.

[2] At the time the proceeding was compromised, the plaintiff was represented by solicitors other than the defendant. The plaintiff has claimed legal professional privilege for certain documents, alleging that these documents came into existence for the dominant purpose of providing legal advice to the plaintiff. The privileged nature of the documents is not in dispute, but the defendant seeks their disclosure on the grounds that the plaintiff has impliedly waived the privilege. The implied waiver is said to arise from the allegation in the pleading that, but for the defendants breaches, the plaintiff would not have settled its claim against Ardmilla on the terms that it did. This, it is argued, puts in issue the plaintiff’s motivation in settling its claim, which was likely to have been influenced by any legal advice received.”

- [4] The principle to be applied in deciding whether there has been a waiver of legal professional privilege was discussed in the High Court authority *Mann and Carnell* (1999) 201 CLR 1 Gleeson CJ, Gaudron, Gummow and Callinan JJ at 13:

“[28] At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege. It has been observed that "waiver" is a vague term, used in many senses, and that it often requires further definition according to the context. Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege. Examples include disclosure by a client of the client's version of a communication with a lawyer, which entitles the lawyer to give his or her account of the communication, or the institution of proceedings for professional negligence against a lawyer, in which the lawyer's evidence as to advice given to the client will be received.

[29] Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law". This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. Thus, in *Benecke v National Australia Bank*, the client was held to have waived privilege by giving evidence, in legal proceedings, concerning her instructions to a barrister in related proceedings, even though she apparently believed she could prevent the barrister from giving the barrister's version of those instructions. She did not subjectively intend to abandon the privilege. She may not even have turned her mind to the question. However, her intentional act was inconsistent with the maintenance of the confidentiality of the communication. What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.”

[5] Ms Kelly, counsel for the plaintiff/appellant referred to paragraph [6] of the Master’s reasons for decision which reads as follows:

“[6] It does not appear to be in dispute that the plaintiff had access to legal advice at the time the Ardmilla proceeding was settled.

It may reasonably be expected that the decision to settle would have been informed by that advice, so that the nature of the advice is likely to be of significance. In this respect, the facts are indistinguishable from those in *Liquorland v Anghie* (see paragraph 44). It would be “relevantly unfair”, that is, inconsistent with its claim for confidentiality, for the plaintiff to assert that it would have acted differently, while claiming privilege for the advice upon which it acted. I conclude that the plaintiff has impliedly waived legal professional privilege in respect of legal advice given to the plaintiff as to the settlement of the Ardmilla proceedings. It may be that the parties will be able to agree as to which documents should be produced. If not, I will hear the parties as to what orders should be made.

- [6] It is the submission by Ms Kelly on behalf of the appellant that in making this finding the Master was in error. It was argued for the appellant, that in this case, Banjo does not allege that Ward Keller’s negligence caused it to have a certain state of mind or of knowledge, so as to impliedly waive privilege over legal advice which might have a bearing on the formation of a state of mind/state of knowledge. It is the appellant’s position that Banjo is alleging that Ward Keller’s negligent advice created practical difficulties for it as a result of which it was deprived of an opportunity to achieve a more favourable resolution of its dispute with Ardmilla.
- [7] It is the argument for the appellant that the theoretical basis for implied waiver is inconsistency: it is not just that inconsistency is a kind of unfairness.
- [8] The appellant’s claim, in their substantive action against the defendant, is that had it not lost the right to renew its lease as a result of Ward Keller’s negligent advice, it could have achieved a better outcome in the Ardmilla

proceedings. It is the appellant's claim it had to give up a potentially valuable action against Ardmilla in order to get a renewal of its lease. On behalf of Banjo it is argued that Banjo's conduct in making such a claim is not inconsistent with its maintaining confidentiality in any legal advice it obtained in relation to settlement of that proceedings. It is argued that Banjo has not put in issue any advice it received in relation to the claim against Ardmilla but rather the objective value of the claim against Ardmilla.

[9] I turn to look at the relevant pleadings in the appellant's statement of claim.

[10] In paragraphs 25 and 26 the plaintiff sets out the breach of duty of care allegedly committed by the defendant. Paragraphs 27 and 28 state as follows:

- “27. If Ward Keller had not committed the Breaches referred to in sub-paragraphs 25(a) to (e) and (j) hereof or some of them:
- (a) Banjo would have complied with its obligations under clause A16 of the Lease prior to the expiry of the Initial Term;
 - (b) Banjo would have properly and validly accepted the Offer to Renew;
 - (c) At all material times Banjo would have had a right to assign the Lease with the consent of Ardmilla under clause A5 of the Lease and would have had the opportunity to sell its business as a going concern with the benefit of the Lease and/or would have so sold its business;
 - (d) Banjo would have commenced the Ardmilla Proceeding but only in relation to the matters referred to in sub-paragraph 7(a) hereof; and
 - (e) Banjo would not have resolved the Ardmilla Proceeding on the basis referred to in paragraph 24 hereof.

28. If Ward Keller had not committed the Breaches referred to in sub-paragraphs 25(f) to (j) hereof or some of them:
- (a) Banjo would have obtained independent legal advice in respect of the matters referred to in paragraphs 3 to 22 (inclusive) hereof;
 - (b) Banjo would have put in place and implemented a strategy which would have resulted in the renewal of the Lease; and
 - (c) Upon obtaining the renewal of the Lease, Banjo would have had a right to assign the Lease with the consent of Ardmilla under clause A5 of the Lease and would have had the opportunity to sell its business as a going concern with the benefit of the Lease and/or would have so sold its business.”

[11] The essential difference between the appellant and the respondent on this appeal is that the appellant argues there is no relevant state of mind of the appellant on which legal advice could have a bearing. The respondent states this is not correct and states that causation is an issue and this puts in issue the appellant's state of mind in settling its claim against Ardmilla.

[12] I prefer the argument advanced by Mr Young on behalf of the respondent.

[13] I do not consider it necessary to go beyond the High Court decision in *Mann v Carnell* (supra) to conclude that the principle to be applied here is whether the appellant plaintiff has given an implied waiver of privilege because there is an inconsistency between its conduct and the maintenance of the confidentiality of the communication between solicitor and client.

[14] There are a number of other authorities referred to by the parties and the Master in his reasons for decision.

- [15] The High Court authority of *Mann v Carnell* (supra) cites the decision in *Thomason v Municipality of Campbelltown* (1939) 39 SR(NSW) 347 per Jordan CJ at 359:

“... In these circumstances, since the fact and nature of the advice is an issue in the case, I am of opinion that privilege cannot be raised to prevent the proof of the advice. The position is analogous to that which arises in a suit in Equity to set aside a transaction on the ground of undue influence. In such a suit, it has always been the practice for the defendant to cross-examine the plaintiff with a view to proving that that plaintiff had competent legal advice when he entered into the transaction, and to call and examine the legal adviser if he is available; and I have never known it to be suggested that such evidence is inadmissible on the ground of the plaintiff’s privilege...”

- [16] I accept the respondent’s argument that the plaintiff’s state of mind, at the time it agreed to settle the claim against Ardmilla, is a central issue in the case. This state of mind, it could be expected, was determined wholly or in large part by the advice it received from Ward Keller.

- [17] The plaintiff’s argument that Banjo has put in issue the objective value of the Ardmilla Proceeding – not any advice it received in relation to it is not sustainable. I agree with the argument for the respondent that although the plaintiff has not directly put its legal advice in issue, it has done so by implication by putting causation in issue and consequently its state of mind.

- [18] I accept the argument advanced by Mr Young for the respondent; that the state of mind of the plaintiff can only be fairly assessed after having regard to factors relevant to the formation of that state of mind such as the legal advice about settlement received by the plaintiff.

[19] The plaintiff has pleaded that it would have acted differently but for the alleged breaches of duty. This is necessary to obtain more than nominal damages - *Hall v Foong* (1995) 65 SASR 281 Debelle J at 301:

“... In order to recover other than nominal damages for the lost opportunity, the plaintiff had to prove not only that the defendant was negligent in failing to advise her of the effect of Mr Cameron’s opinion but also that the defendant’s failure to advise had caused her loss: *Sykes v Midland Bank Executor & Trustee Co Ltd* [1971] 1 QB 113; *Lillicrap v Nalder & Son* [1993] 1 WLR 94; [1993] 1 All ER 724; *Hanflex Pty Ltd v N S Hope & Associates* [1990] 2 Qd R 218. The plaintiff had to prove on the balance of probabilities that, if properly advised, she would have acted differently. If she did not, she was entitled to nominal damages only for the breach of contract.”

[20] I do not consider there has been any error shown in the Master’s reasons for decision.

[21] Accordingly the appeal is dismissed.

[22] I grant leave to the parties to apply if the question of costs is not agreed.
