

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

v

WARD KELLER PTY LTD
(ACN 009 628 157)

TITLE OF COURT: COURT OF APPEAL OF THE
NORTHERN TERRITORY

JURISDICTION: CIVIL APPEAL FROM THE SUPREME
COURT EXERCISING TERRITORY
JURISDICTION

FILE NO: NO. AP 9/2005 (20300145)

DELIVERED: 3 MARCH 2006

HEARING DATES: 15 FEBRUARY 2006

JUDGMENT OF: ANGEL, MILDREN & RILEY JJ

CATCHWORDS:

EVIDENCE - ADMISSIBILITY AND RELEVANCE – LEGAL
PROFESSIONAL PRIVILEGE

Appeal – Supreme Court – Legal professional privilege – Loss allegedly incurred as a result of negligent advice provided by first solicitors – Whether legal advice received from new solicitors (after alleged loss incurred) relevant - Whether appellant obtaining legal advice from new solicitors and pursuing claim thereby waived legal professional privilege – Appeal allowed.

Mann v Carnell (1999) 201 CLR 1, applied.

REPRESENTATION:

Counsel:

Appellant:	J Kelly
Respondent:	A Young

Solicitors:

Appellant:	Clayton Utz
Respondent:	Paul Maher

Judgment category classification:	B
Judgment ID Number:	Ang200602
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Banjo (NT) Pty Ltd v Ward Keller Pty Ltd [2006] NTCA 1
No. AP 9/2005 (20300145)

BETWEEN:

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

Appellant

AND:

WARD KELLER PTY LTD
(ACN 009 628 157)

Respondent

CORAM: ANGEL, MILDREN & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 3 March 2006)

THE COURT:

- [1] This is an appeal from an order of a single judge of the Supreme Court dismissing an appeal from an order of the Master that the plaintiff/appellant produce to the respondent/defendant certain documents from the appellant's supplementary list of documents.
- [2] The appellant, who sues the respondent firm of solicitors for damages for negligence and other relief, was the lessee of motel premises at Katherine. The premises suffered damage in the Katherine flood of 26 January 1998. A

dispute arose between the appellant and its lessor over their respective repair and maintenance obligations under the lease. The appellant retained the respondent as its solicitors to advise in respect of the dispute and to effect a renewal of the lease.

- [3] The appellant claims that negligently and in breach of its retainer the respondent advised the appellant there was no obligation upon the appellant to comply with certain obligations under the lease prior to the expiry of the initial term thereof and the exercise of the right of renewal. The appellant says it relied on the advice in not painting the leased premises before the expiry of the initial term and that it thereby lost its right of renewal. The appellant also claims that as a consequence its claim against the lessor for repairs and maintenance was settled on unfavourable terms as part of a negotiated new lease. The appellant says it would not have settled its claim on the terms it did if the respondent had given the correct advice.
- [4] The respondent for its part denies the appellant would have pursued its claim for repairs and maintenance and further, says that by not doing so the appellant failed to mitigate its loss.
- [5] At the time the appellant's claim against its lessor was settled it was represented by solicitors other than the respondent. The documents in dispute comprise communications and advice passing between the appellant and its new solicitors.

- [6] The appellant claims legal professional privilege in respect of the documents in dispute. The privileged nature of the documents is not in dispute. The respondent seeks their disclosure on the ground that the appellant has impliedly waived privilege. The implied waiver is said to arise from the allegation in the pleading that but for the respondent's breaches, the appellant would not have settled its claim against its lessor on the terms it did. The respondent says the appellant's motive in settling its claim is thus in issue and legal advice received by the appellant from its new solicitors is therefore relevant; hence the relevance of the documents of which production is sought.
- [7] The learned judge accepted the respondent's argument that the appellant's state of mind at the time it agreed to settle the claim against the lessor "is a central issue in the case" and that this "state of mind, it could be expected, was determined wholly or in large part by the advice it received from" its solicitors.
- [8] We are, with respect, unable to agree.
- [9] The appellant's loss as a result of the alleged negligent advice was the loss of the right of renewal of the lease. The lease was in fact renewed, but as a result of compromise, a feature of which was the allegedly unfavourable settlement of the appellant's claim for repairs and maintenance against the lessor. The issue at trial is not the appellant's state of mind or the legal advice given to the appellant relative to the settlement of the repair and

maintenance claim against the lessor but whether as an objective fact that settlement was reasonable and constituted a financial loss to the appellant. The question is not why the appellant settled, that is, did what it did, but what the appellant would have done had the respondent not given the advice it did. The appellant says it would have renewed its lease and successfully pressed its claim for repairs and maintenance against the lessor. The question whether the appellant would have so acted had it been given the correct advice by the respondent is a question of fact far removed in time and circumstance from any legal advice given to the appellant to compromise its claims against the lessor in order to recapture the lost lease. Any advice given to the appellant by its new solicitors is not relevant to these questions or any other issue between the parties.

- [10] The respondent submitted that the loss of the right of action for the claim for repairs and maintenance against the lessor was not caused by the alleged negligent advice given by the respondents, but was caused by the fact that the claim against the lessor was hopeless. Counsel for the respondent submitted that the appellant received legal advice from its new solicitors, that it is likely that that advice was to the effect that the claim was worthless and that the real cause of the settlement of the claim was that the appellant relied upon that advice. It was further submitted that this gave rise to an implied waiver because, in those circumstances there was what he described as an “issue waiver”. In support of this argument counsel relied upon a line of authorities which traces its origins to *Thomason v Council of the*

Municipality of Campbelltown (1939) 39 SR (NSW) 347. For a helpful discussion of the cases see the judgment of Byrne J in *Liquorland (Australia) Pty Ltd and Anor v Anghie and Ors* (2003) 7 VR 27.

- [11] However, assuming that those authorities are correct notwithstanding *Attorney-General v Maurice* (1986) 161 CLR 475, in our opinion they are of no assistance to the appellant for the simple reason that it is no part of the appellant's case that it relied upon the advice of its new solicitors. The respondent is not precluded from showing, at trial, that the claim against the lessor was in fact worthless, so no question of fairness arises. In other words, there is no inconsistency between the conduct of the appellant in the manner in which the appellant proposes to present its case at trial and the maintenance of the confidentiality and in those circumstances there is no implied waiver: see *Mann v Carnell* (1999) 201 CLR 1 at 13 (para[29]). Implied waiver does not arise because the respondent may wish to show that the true cause of the appellant's loss was that the appellant settled relying on its new solicitor's advice.

- [12] The appeal should be allowed and the Order of the Master set aside and the respondent's summons dismissed with costs both here and below.