SUPREME COURT OF QUEENSLAND

CITATION:	*Rhyse Holdings Pty Ltd & Ors v McLaughlins (A Firm) & Anor* [2002] QCA 122
PARTIES:	**RHYSE HOLDINGS PTY LTD** ACN 051 910 500 (First Plaintiff / not a party to appeal) **MARGARET BAINBRIDGE** (Second Plaintiff / not a party to appeal) **OTTO SYROWATKA** (Third Plaintiff / not a party to appeal) **V** **STANTON HILLIER PARKER (QLD) PTY LTD** ACN 010 508 826 (Third Party / Respondent) **MCLAUGHLINS (A FIRM)** (First Defendant / First Appellant) **MCLAUGHLINS NOMINEES PTY LTD** ACN 010 668 845 (Second Defendant / Second Appellant)
FILE NO/S:	Appeal No 6146 of 2001 SC No 10865 of 1996
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 April 2002
DELIVERED AT:	Brisbane
HEARING DATE:	7 March 2002
JUDGES:	McPherson and Williams JJA and Byrne J Separate reasons for judgment of each member of the Court, each concurring as to the order made.
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	EVIDENCE – FACTS EXCLUDED FROM PROOF – ON GROUNDS OF PRIVILEGE – PROFESSIONAL CONFIDENCE – LEGAL PROFESSION – WAIVER OF PRIVILEGE – whether claim of legal privilege protected documents related to investigations by solicitors which had been referred to in the appellants' pleadings and which supported its claim against the third party respondents that it was reasonable to compromise the plaintiffs' claim. PROCEDURE – DISCOVERY AND INTERROGATORIES

– DISCOVERY AND INSPECTION OF DOCUMENTS – PRODUCTION AND INSPECTION – GROUNDS FOR RESISTING PRODUCTION – LEGAL PROFESSIONAL PRIVILEGE – WAIVER OF PRIVILEGE – appeal against interlocutory order granting an application for inspection of documents in which legal professional privilege was claimed - where the appellants' statement of claim referred to investigations by their solicitors which induced the appellants to settle the plaintiffs' action against them – whether those references in the statement of claim put in issue the substance of legal advice received by the appellants – whether there is inconsistency between such reliance and the continued claim of privilege with respect to the investigations made by the appellants' legal advisers and the resultant advice.

Attorney-General (*N.T.) v Maurice* (1986) 161 CLR 475, followed
Bayliss v Cassidy (No 2) [2000] 1 QdR 464 , followed
Biggin & Co Ltd v Permanite Ltd [1951] 2KB 314, followed
Goldberg v Ng (1995) 185 CLR 83, followed
Mann v Carnell (1999) 201 CLR 1
Unity Insurance Brokers Pty Limited v Rocco Pezzano Pty Limited (1998) 192 CLR 603, applied

COUNSEL: P H Morrison QC with H P Bowskill for the appellants
D R Cooper SC for the respondent

SOLICITORS: Minter Ellison for the appellants
McCabe Terrill for the respondent

[1] **MCPHERSON JA**: I agree with the reasons of Williams JA. The appeal should be dismissed with costs.

[2] **WILLIAMS JA:** This is an appeal against a decision of Helman J which effectively held that the appellants had waived legal professional privilege with respect to certain legal advice which they had received and documents in their possession.

[3] The first appellant (McLaughlins) is a firm of solicitors, and the second appellant (McLaughlins Nominees Pty Ltd) is a company, associated with the first appellant, which carries on a private mortgage lending business. The second appellant solicited investment moneys from members of the public for the purpose of making loans secured by mortgages over real property.

[4] The plaintiffs in the action (not parties to the appeal) invested a substantial sum of money with the second appellant which was ultimately lent to a borrower to finance the acquisition of property in Toowoomba. The borrower defaulted and the property was subsequently found to be of inadequate security to cover the moneys invested by the plaintiffs. In the action the plaintiffs sued the appellants on a variety of grounds to recoup their losses.

[5] The appellants brought third party proceedings against the respondent, Stanton Hillier Parker (Qld) Pty Ltd, the valuer who provided a valuation of the property in question prior to the loan transaction in question being entered into by the appellants.

[6] Prior to trial, and after an unsuccessful mediation involving the plaintiffs, the appellants and the respondent, the appellants compromised the action against them in accordance with the terms of an undated deed executed in or about June 1998. The plaintiffs agreed to accept $1.6 million inclusive of all costs; two of the plaintiffs agreed to purchase the subject property for $600,000 which reduced the sum to be paid by the appellants to $1 million.

[7] The appellants then prosecuted their third party claim against the respondent. The operative pleading is the First and Second Defendants Further Amended Statement of Claim against the Third Party filed 2 January 2001. The appellants rely on a number of causes of action in seeking to recover damages or contribution with respect to the losses they incurred in settling with the plaintiffs.

[8] Relevantly for present purposes that pleading contains the following:

> "2A(a) In or about June 1998, by an undated deed, the Plaintiffs and McLaughlins and McLaughlins Nominees agreed to settle this action as between them;
>
> (b) As at the date of the deed, McLaughlins Nominees was a mortgagee in possession of the Property;
>
> (c) Pursuant to the deed:
>
> (i) the Plaintiffs agreed to accept $1,600,000 inclusive of all costs ("the settlement sum");
>
> (ii) two of the Plaintiffs . . . agreed to purchase the Property at the price of $600,000 which price was to be paid by reduction of the settlement sum to $1,000,000;
>
> (d) The price of $600,000 was the approximate market value of the Property . . .
>
> (e) The basis of the settlement sum was as follows:
>
> . . .
>
> (f) Settlement of the deed and settlement of the sale of the Property occurred on 16 July 1998;
>
> (g) The terms of the settlement were reasonable taking into account the Defendants' prospects, the exigencies of litigation, the prospect of the Property continuing to fall in value, and the likely further cost of conducting the litigation as established by the following matters:
>
> (i) the Defendants by their legal advisers undertook substantial investigations in relation to the allegations of the Plaintiffs made in the Statement of Claim in this action including:
>
> (A) speaking to the solicitor involved in the transaction;
>
> (B) obtaining and analysing the documentary evidence in relation to the transactions; and
>
> (C) obtaining and analysing valuations of the Property the subject of the allegations.

(ii) As a result of conducting the investigations in relation to the transactions the subject of the Plaintiffs' action:

(A) the following facts and matters appeared to exist:

(I) the fact and matters referred to in paragraphs . . . of the Plaintiffs' Statement of Claim dated 15 May 1997;

. . .

(III) in and around the time of the settlement there was a danger of the value of the Property further deceasing in value;

(IV) the loss of the Plaintiffs was in excess of $1.6 million;

(B) . . .

. . .

(iii) The Defendants participated in a mediation with the Plaintiffs and the Third Party which was unsuccessful in settling the action;

(iv) The negotiations with the Plaintiffs revealed that the Plaintiffs would accept no less than the amount of $1.6 million to settle the action against the Defendants."

[9] It should be noted that during the hearing of the appeal, after some debate, senior counsel for the appellants conceded that the words "appeared to exist" in para 2A(g)(ii)(A) should be read as "appeared to the defendants to exist".

[10] In para 2 of its defence the respondent pleaded: "The Third Party does not admit the facts alleged in para 2A(g) because it is not possible to determine the alleged reasonableness given the generality of the Defendants' pleading and their failure to discover documents relating to their legal advice to settle the Plaintiffs' claims." In consequence the respondent sought further and better particulars and ultimately the appellants were ordered to give such particulars. Relevantly the following further and better particulars were provided:

"4. The defendants' prospects referred to in para 2A(g) were:

(a) that it appeared the matters referred to in paras . . . of the plaintiffs' Statement of Claim . . . would be established at trial and the defendants would be held liable in damages to the plaintiffs for $1,603,777 plus interest . . . and the plaintiffs' solicitor and client costs of the action;

(b) it was possible that a court may find the plaintiffs entitled to interest at a rate up 14%.

5. The exigencies of litigation referred to in para 2A(g) were:

(a) that the defendants would be found liable to the plaintiffs for the damages referred to in the preceding paragraph;

(b) that the defendants' liability to the plaintiffs might include interest at a rate up to 14% and their solicitor client costs of the action.

. . .

8. The specific legal advisers who undertook the investigations referred to in para 2A(g)(i) . . . were John Grant ("Grant") and Matthew Brady ("Brady") who at the time specified below were employed by Minter Ellison Lawyers.

9. Grant and Brady spoke to the solicitor involved in the transactions, Gregory Wheeldon ("Wheeldon") on the following occasions.
(a) . . .

10. Following are details of the specific documentary evidence referred to in para 2A(g)(i) . . . and when and by whom it was analysed:
(a) . . .

11. The facts and matters referred to in para 2A(g)(ii)(A) appeared to exist by virtue of the following investigations:
(a) . . . ."

[11] The above extract provides a sufficient outline of the particulars for present purposes.

[12] It was accepted by all parties that the appellants had to establish that the settlement was reasonable applying an objective test: *Unity Insurance Brokers Pty Limited v Rocco Pezzano Pty Limited* (1998) 192 CLR 603 at 608-9, 618 and 653.

[13] Further, the appellants did not dispute the proposition that legal professional privilege could be waived by their relying on privileged matter in a pleading. In *Bayliss v Cassidy (No 2)* [2000] 1 QdR 464 the defendants sought to justify their actions in question by relying on legal advice given with respect thereto. As McPherson JA noted at 474: "the defendants seek to sustain their case of reasonable and probable cause, and of absence of malice, affirmatively on the basis of legal advice given preparatory to or in connection with the prosecution in question. . . . it is not open to the defendants to justify their acts by reference to the advice they claim to have received, and at the same time also rely on legal professional privilege as a basis for refusing to permit the plaintiff to inspect the very material on which they rely for that justification." As is clear from perusing all the judgments in that case the privilege is only lost where the party puts in issue the substance of the privileged communication. In the present case the principal contention of senior counsel for the appellants was that the extracts from the pleading quoted above did not put in issue the substance of any privileged communication.

[14] Following *Goldberg v Ng* (1995) 185 CLR 83 and *Attorney-General* (*N.T.) v Maurice* (1986) 161 CLR 475 the court in *Bayliss* generally considered whether fairness required that the privilege should cease to be available to the defendants in the light of their conduct of the litigation. However, the High Court in *Mann v Carnell* (1999) 201 CLR 1 formulated the test rather differently; at 13 Gleeson CJ, Gaudron, Gummow and Callinan JJ said: "It is in inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege. . . . 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." Clearly seeking to obtain a forensic advantage by referring to the advice and then refusing to divulge details of it creates unfairness from the point of view of the opposing party. As McPherson JA pointed out, that is exactly what happened in *Bayliss.*

[15] The real question here is whether or not the matters pleaded in para 2A of the Statement of Claim quoted above put in issue the substance of legal advice received and in consequence there is inconsistency between such reliance and the continued claim of privilege with respect to the investigations made by the appellants' legal advisers and the resultant advice. The answer largely depends upon the proper construction of the pleading and that must be assessed in the light of the onus which the appellants had to discharge with respect to the settlement. What has to be proved in such circumstances was considered by the High Court in *Unity Insurance v Rocco*.

[16] Brennan CJ there said:

> "Evidence of the advice which the insurer received to induce it to accept the settlement is not proof in itself of the reasonableness of the settlement advised. The factors which lead to the giving of the advice are factors relevant to the reasonableness of the settlement but the only relevance of advice given by the insured's legal advisers to settle is that it tends to negative the hypothesis that the insured acted unreasonably in accepting the settlement. . . . The reasonableness of a settlement depends on the circumstances existing at the time, provided the plaintiff has acted reasonably in discovering the circumstances material to the settlement at that time."
> (608-9)

[17] McHugh J analysed at some length the reasoning in *Biggin & Co Ltd v Permanite Ltd* [1951] 2KB 314 and noted that therein Somervell LJ expressed the opinion that, while the client could prove that the settlement was made as a result of legal advice, the evidence of the advisers was not ordinarily relevant or admissible. McHugh J then went on: "With great respect, I am unable to accept that the evidence of the legal advisers is not normally relevant or admissible in such a case. On the contrary, in most cases where the settlement is made on legal advice, the evidence of the relevant legal advisers is vital. This is because the risk involved in the litigation and the reasoning which led to the settlement are the factors that will determine whether or not the settlement was reasonable." (616) On the facts of that case his Honour was able to observe at 618: "Apart from the fact that the insured solicitors and senior counsel advised the settlement, there was simply no evidence upon which the learned trial judge could determine whether objectively the settlement was reasonable." Because in that case there had been express reliance on what the lawyers had advised, McHugh J concluded that the insured had waived its legal professional privilege.

[18] The critical reasoning of Hayne J can be gleaned from the following extracts from his judgment:

> "Thus whether a party to litigation has received advice to settle may be important in deciding whether that person's conduct in settling the case was reasonable but, standing alone, the fact that a litigant was

> advised to settle at a particular figure reveals little or nothing about whether the settlement reached was reasonable. . . . What will usually be much more important is the reasoning that supported the advice that was given for that will ordinarily reveal why it was thought reasonable to compromise the claim as it was.
>
> Next, the question whether the settlement was reasonable must be judged by reference to the material the parties had available to them at the time the compromise was reached. . . . What is a reasonable compromise of the claim will almost always require consideration of the chances of the parties succeeding in their respective claims or defences and that prediction of likely outcomes must always be imperfect and imprecise. . . .
>
> It may well be that calling legal advisers to give evidence about the settlement may present some question about legal professional privilege but I do not accept that the evidence of the advisers would be irrelevant or inadmissible. Often it is the advisers who will be best placed to give evidence about the matters that were taken into account in deciding to settle the case and it is they who may well be able to deal with such matters as to what investigations had been made or why particular investigations had not been pursued."
> (653-655)

[19] Senior counsel for the appellants submitted that the pleading did not put legal advice given to the appellants with respect to the settlement. Indeed he contended that the appellants proposed to establish at trial the objective reasonableness of the settlement without referring to any such advice. He submitted that "we wish only to advance the documents, the objective results of the investigation, to the court and have the court make, without reference to the lawyers' views, or analysis, or passed between the lawyers and the client, the decision as to whether that settlement was reasonable." As I understand the submission he was contending that the trial judge would be invited to conclude from the bald facts asserted in para 2A, as later particularised, that the settlement was reasonable.

[20] Such an approach is not, in my view, compatible with the reasoning quoted above from the judgments in *Unity Insurance v Rocco*. Following that reasoning it seems to me that the appellants would have to disclose the advice in order to "reveal why it was thought reasonable to compromise the claim as it was". It is only when the advice is revealed that the court would be able to determine whether or not it was reasonable to compromise the claim on particular terms. It would be essential to know the chances of the claims and/or defences succeeding. As a corollary to that the court would want to know details of the investigations by legal advisers and what matters were taken into account by them in reaching their conclusion as to the exigencies of the litigation; that would necessarily involve knowing what investigations had been made and perhaps why other inquiries had not been undertaken. Paragraph 2A, as particularised, accords with the reasoning in *Unity Insurance v Rocco.* But in order to establish at trial the matters alleged therein to support the conclusion that the settlement was reasonable it will be necessary for the appellants to lead evidence as to legal advice they obtained with respect to the settlement and any documents relating thereto. Disclosure of those documents should be made in accordance with the *Uniform Civil Procedure Rules.*

[21] It follows that the decision of Helman J was correct and the appeal must be dismissed with costs.

[22] **BYRNE J**: Williams JA recites the material terms of the pleading and the particulars that set up the existence and reasonableness of the compromise.

[23] Coupled with the concession that para. 2A(g)(ii)(A) of the pleading implicitly asserts that the nominated "facts and matters appeared to exist" to the appellants, the pleaded case necessarily implies that (i) information obtained or brought into existence by the "legal advisors in their investigations" was sent by those lawyers to their clients, the appellants; and (ii) on considering those communications, the appellants thereby acquired knowledge of "the facts and matters" alleged to have appeared to them.

[24] Both the fact of those communications and the appellants' knowledge of their contents are thereby alleged by the pleading to be germane to the issue whether, as para 2A(g) asserts, the "terms of the settlement were reasonable…"

[25] Because the appellants' case depends in that way on those communications to demonstrate the reasonableness of the compromise, the claim to withhold the communications from production on grounds of legal professional privilege is inconsistent with the maintenance of confidentiality in them (cf *Mann v Carnell* (1999) 201 CLR 1, 13); and the privilege inevitably yields to that extent.

[26] The appeal should therefore be dismissed with costs.