SUPREME COURT OF QUEENSLAND

CITATION:	*Robert Bax & Associates v Cavenham Pty Ltd* [2011] QCA 195
PARTIES:	**ROBERT BAX & ASSOCIATES** (appellant) **v** **CAVENHAM PTY LTD** ACN 003 738 672 (respondent)
FILE NO/S:	Appeal No 9967 of 2010 SC No 14239 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Order
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Judgment delivered 25 March 2011 Further order delivered 12 August 2011
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Margaret McMurdo P, Fraser and White JJA Judgment of the Court
FURTHER ORDER:	**The costs order made on 25 March 2011 is confirmed**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where part of the appellant's defence was held to be inconsistent and was struck out by the primary judge – where the appeal was allowed with costs – where the respondent contended it should not be ordered to pay the appellant's costs of the appeal because it offered to allow the appellant to replead its defence in its original form for the purposes of the trial – where the respondent did not offer to compromise the appeal or consent to setting aside the part of the primary judge's order relating to the relevant paragraph of the defence – whether the respondent should pay the appellant's costs of the appeal
COUNSEL:	No appearance by the appellant, the appellant's submissions were heard on the papers No appearance by the respondent, the respondent's submissions were heard on the papers
SOLICITORS:	Brian Bartley & Associates for the appellant Shine Lawyers for the respondent

[1] **THE COURT**: This Court delivered its reasons for judgment allowing the appeal with costs on 25 March 2011. The parties were given leave in accordance with Practice Direction 2 of 2010 to make submissions as to the costs of the appeal.

[2] The appeal was from orders made in interlocutory applications heard in the Trial Division on 9 July 2010 and taken out on 3 September 2010. The respondent successfully obtained orders for disclosure; the filing of an affidavit under *Uniform Civil Procedure Rules* 1999 (UCPR) r 223; and the striking out of para 7(a) and para 15 of the appellant's defence, with leave to replead. The appellant was ordered to provide further and better particulars and was given leave to amend subpara 32(v) of its amended statement of claim. The primary judge made no order as to the costs of the appellant's application but the appellant was ordered to pay the respondent's costs of the respondent's application.

[3] On 16 September 2010, the appellant filed its appeal only against the primary judge's order striking out para 15 of its defence. The appellant was successful in this appeal which was heard on 17 March 2011.

[4] The respondent contends it should not be ordered to pay the appellant's costs of the appeal because of the following background matters.

[5] The solicitors for the respondent wrote to the solicitors for the appellant on 15 November 2010 in terms which included:

> "1. We have instructions to contest your appeal. It is our view that her Honour's reasoning was correct.
>
> 2. Your appeal does not stay the prosecution of our client's claim.
>
> 3. We do not consider that the substance of your appeal if it succeeds or is dismissed materially alters the issues in dispute between the parties. That being the case there is no valid reason why the action should not proceed. If the basis for your refusal to sign our client's Request for Trial Date is the appeal, then for the purpose of allowing the action to be advanced without delay, and in light of the trivial nature of the pleading point you seek to appeal, we are more than happy for you to re-plead your Defence in its original form for the purposes of Trial. The appeal can be contested separately."

[6] On 23 November 2010, the appellant's solicitors responded in terms which included:

> "If the matter were to proceed to trial on the basis of the pleadings as they presently stand, then our client would be restricted in the evidence it could call at trial and it therefore intends to prosecute the appeal.
>
> The proposal contained in your further letter dated 15 November – that our client be permitted to re-plead the defence in its original form for purposes of the trial – is one that we have difficulty understanding. It raises the prospect that, if our appeal is unsuccessful, then there will, in the meantime, have been a trial conducted on the basis of an allegation which our client ought not have made. If we assume further that your client loses at the trial, is it your client's position that, having won the appeal, it is then entitled

> to seek a retrial on the basis of the defence unamended by the reinsertion of paragraph 15?
>
> If your client wishes the matter to proceed without being delayed by the appeal, then it should consent to an order that the appeal be allowed and pay the costs of the appeal. …"

[7] On 1 December 2010, the respondent's lawyers wrote to the appellant's lawyers in terms which included:

> "We reiterate the matters referred to in our letter to you of 15 November where we confirmed that in order to avoid delay involved with the hearing of an appeal relating to a matter which is trivial in the overall context of the litigation, the plaintiff is agreeable to your client repleading its defence in the original form for the purposes of trial.
>
> On the basis of that concession there is no sufficient reason why the proceedings should not be advanced. The appeal does not act as a stay on the advancement of the claim.
>
> …"

[8] The respondent submits it should not be liable for the appellant's costs of the appeal as, in light of this correspondence between the parties, the appeal served no practical purpose. The same result could have been achieved by the appellant accepting the respondent's offer to replead. It contends that the appropriate order as to the costs of the appeal is that there be no order for costs.

[9] The appellant emphasises that the respondent at no point conceded that para 15 of the defence had been wrongly struck out. And nor did it at any time offer to consent to the appeal being allowed. It always maintained that the primary judge's order striking out para 15 was correct. It would have been inappropriate and arguably an abuse of process to agree with the respondent to ignore the order of the primary judge striking out para 15. The appellant contends that it should have its costs of the appeal in which it was successful.

[10] It is unfortunate that the parties were unable to settle their dispute about para 15 in a way that avoided incurring the costs of an appeal. True it is that the respondent, in an effort to have the matter proceed to trial in a timely way, offered to allow the appellant to replead its defence to include para 15. But, as the appellant points out, this offer placed it in a difficult position whilst the primary judge's order stood striking out para 15. The respondent did not offer to compromise the appeal or consent to setting aside that part of the primary judge's order relating to para 15. By the time of the respondent's letter of 15 November 2010, both parties had already filed their original outlines of argument in the appeal. In those circumstances, it was not unreasonable for the appellant to continue to prosecute its appeal. Ordinarily, costs follow the event. We are unpersuaded that the ordinary rule should not apply in this case.

[11] For these reasons we would confirm the costs order made on 25 March 2011.

FURTHER ORDER:

The costs order made on 25 March 2011 is confirmed.