SUPREME COURT OF QUEENSLAND

CITATION:	*Cavenham Pty Ltd v Robert Bax & Associates* [2010] QSC 307
PARTIES:	**CAVENHAM PTY LTD (ACN 003 736 672)** (Plaintiff) v **ROBERT BAX & ASSOCIATES (A Firm)** (Defendant)
FILE NO/S:	14239 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 August 2010
DELIVERED AT:	Brisbane
HEARING DATES:	9 July 2010
JUDGE:	Ann Lyons J
ORDER/S:	
CATCHWORDS	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES – where the plaintiff claims damages from the defendant solicitor for breach of contract and professional negligence – where each party has brought an application – where application brought by defendant for an order pursuant to r 161 of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR) that the plaintiff provide further and better particulars of its Amended Statement of Claim – where application brought by the plaintiff which seeks to strike out certain paragraphs of the defendant's Amended Defence – where the plaintiff also seeks further and better disclosure pursuant to r 223(1) of the UCPR – whether orders should be made compelling the plaintiff to provide further and better particulars – whether striking out of the defendant's Amended Defence should be allowed – whether an order should be made pursuant to r 223 of the UCPR for further and better disclosure by the defendant. *Lampson (Australia) Pty Limited v Ahden Engineering (Aust) Pty Limited* 1999 2 Qd R 252

COUNSEL:	K N Wilson SC for the plaintiff R Jackson for the defendant
SOLICITORS:	Shine Lawyers for the Plaintiff Brian Bartley & Associates for the defendant

Ann LYONS J

[1] In this action the plaintiff claims damages from its former solicitor for breach of contract and professional negligence. The plaintiff alleges that the defendant was retained to act for and to advise the plaintiff in relation to the advance of a number of loans to a third party, the preparation of security documents and the registration of those documents to secure the plaintiff's position.

[2] There are currently two applications before the court.

(i) The first is an application filed on 23 June 2010 by the defendant, Robert Bax & Associates, pursuant to r 161 of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR) for an order that the plaintiff provide further and better particulars of its Amended Statement of Claim (ASC).

(ii) There is also an application filed on 2 July 2010 by the plaintiff seeking to strike out para 6, subpara 7(a) and para 15 of the defendant's Amended Defence (AD) pursuant to r 171 of the UCPR and an order that the defendant amend its defence. The plaintiff also seeks an order pursuant to r 223(1) of the UCPR for further and better disclosure and an order that the defendant file and serve an affidavit pursuant to r 223(2) of the UCPR.

The defendant's application for further and better particulars of the plaintiff's Amended Statement of Claim

[3] On 25 May 2010 the plaintiff filed Further and Better Particulars (FBP) in response to the defendant's Request for Further and Better Particulars, dated 22 March 2010. By a letter dated 26 May 2010 the defendant's solicitors wrote to the plaintiff's solicitors complaining of deficiencies in the particulars that were provided. I will deal with the substance of the defendant's Request for Further and Better Particulars by reference to specific paragraphs in the ASC.

Paragraph 6 – the retainer

[4] In paragraph 6 of the ASC, it is alleged that on or about 5 October 2003 "and at all relevant times in between up until 5 June 2008 the plaintiff retained the defendant to do the things set out in paras (a) to (h)" of para 6. The terms of the retainer are said to be contained in those paragraphs.

[5] The defendant sought particulars of the retainer in respect of the five transactions referred to in the ASC as the First Loan, the Second Loan, the Third Loan, the Fourth Loan and the First Loan Extension.

[6] The particulars that were provided in para 1(a), (b) and (c) of the FBP in relation to the First, Second and Third Loan stated that the "defendant was retained by oral agreement made on or about 5 October 2003 between the plaintiff, through its agent

and Bank Manager, Mr Peter Lamb of the Bank of Queensland, and Mr Robert Bax, principal of the defendant firm".

[7] The particulars that were provided in para 1(d) of the FBP with respect to the Fourth Loan referred to an oral agreement made on or about 22 September 2005 "between the plaintiff, through its agent and Bank Manager, Mr Peter Lamb of the Bank of Queensland, and Mr Robert Bax, principal of the defendant firm".

[8] The particulars that were provided in para 1(e) of the FBP with respect to the First Loan Extension referred to an oral agreement made on a date unknown in November 2005 "between the plaintiff, through its agent and Bank Manager, Mr Peter Lamb of the Bank of Queensland, and Mr Robert Bax, principal of the defendant firm".

[9] The particulars which were provided in relation to the terms of the retainer on each of those occasions were provided pursuant to the following formula of words:

> "the terms of the retainer expressly or impliedly required the defendant to act for the plaintiff and to protect its commercial interests as money lender in the manner customary to that of a reasonable and prudent solicitor acting in a commercial loan transaction of this nature, *including* as set out in paragraph 6(b) to (h) of the amended particulars of claim". (my emphasis)

[10] The letter from the defendant's solicitors to the plaintiff's solicitors of 26 May 2010 sought to have the plaintiff confirm whether it was the plaintiff's case that, in relation to each of the retainers in relation to those five transactions, the agent, namely Mr Lamb, expressly retained the defendant on each occasion by using words to the effect alleged in the particulars.

[11] In my view, even though the defendant has admitted at para 6 of the Defence that it acted for the plaintiff, the further request is in fact a proper one given that the particulars provided allege an oral retainer through the agent Lamb on each specified occasion. I consider, therefore, that the particulars requested, as to whether the words were used on each occasion by Mr Lamb, are in fact required in order to ascertain the case against the defendant and to clarify whether it is alleged that the words were used on each occasion and gave rise to an express term or whether the terms are to be implied. It is clear that the allegation in para 6 of the ASC remains crucially in issue and the particulars are required in order to establish the precise terms of the retainer and the nature of the agreement alleged to have been made. The information is indeed necessary to understand the precise nature of the case against the defendant.

[12] I also consider that the form of the particulars raises an allegation of knowledge in the defendant which has not otherwise been referred to in the ASC. The particulars refer to the fact that the standard of care required of the defendant was to be "judged in light of the knowledge the defendant had or ought to have had relating to the First Loan." It is clear that the First Loan was advanced on or about 5 March 2001, which is several years prior to the first alleged retainer. Rule 150(2) requires that any fact from which knowledge is claimed to be an inference must be specifically pleaded. Accordingly, the facts from which the inference might be drawn that the defendant had that knowledge should be particularised.

[13] I also consider the form in which the particulars have been provided is inappropriate because the matters, of which the defendant is said to have knowledge, are expressed as an inclusive list of points rather than an exhaustive list. If there are further matters of which the defendant is alleged to have had knowledge, then they should be set out. If there are no further matters of which the defendant had knowledge, then that should be made clear.

[14] The defendant also complains about the formulaic response contained in the FBP. In particular in paras 1(a), (b), (c), (d) and (e) the formula of words set out is as follows:

> "Further, the standard of care expected of a reasonable and prudent solicitor in such retainer must be judged in light of the knowledge the defendant had or ought to have had at that time, including:
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> - the circumstances and background knowledge the defendant had or ought to have had relating to the First Loan;
> - the borrower had failed to register the first mortgage to secure the First Loan as originally required;
> - the borrower had since granted a first registered mortgage to NAB in breach of the Loan agreement for the First Loan;
> - the plaintiff had no registered security over real property for the First Loan;
> - the plaintiff was contemplating making further loans to the borrower (the Second and Third Loans) totalling $1, 110, 000.00;
> - the terms and security for the proposed Second and Third Loans."

[15] I agree with the complaint of the defendant that the setting out of the formula makes the meaning unclear. I consider that the plaintiff should clarify whether the reference to the "circumstances or background knowledge" in the first dot point are the matters set out in the following five dot points. If it is not a reference to the following dot points, the plaintiff should particularise what the circumstances are and what the background knowledge is.

Paragraph 32

[16] Paragraph 32(h) of the ASC states:

> "The defendant was negligent by:
>
> …
>
> h. failing to provide proper and prudent advice orally and in writing;"

[17] The request for particulars to the plaintiff was that if "proper and prudent" advice is alleged to be other than or additional to the matters set out in paras 32(a) to (g), then particulars ought to be provided. The FBP stated that proper and prudent advice should have *included* advice in relation to all matters as set out in subparas 32(a) to (g) and 32(i) to (cc) in the Statement of Claim.

[18] Once again, the plaintiff has used an inclusive list rather than an exhaustive list of the advice which they claim ought to have been given. The defendant is entitled to know with some precision the advice which it is alleged should have been given.

The plaintiff should clarify if there are further matters of which the defendant failed to advise the plaintiff and if so specify what it is.

Subparagraph 32(v)

[19] Subparagraph 32(v) of the ASC states that the defendant was negligent in "failing to act in accordance with best practice by authorising the advance of loan proceeds without being in possession of any; or appropriate loan and security *documentation* to fully secure the plaintiff's position;"(my emphasis). The defendant sought particulars of what loan or security documentation was alleged to be missing. The plaintiff stated in the FBP at para 17 that in relation to the Second Loan and the Third Loan that:

> "…at the time of the advance by the plaintiff's banker; the defendant was not in possession of the following documents at the relevant time:
> (i) Executed loan documentation;
> (ii) Executed mortgage document in registrable form
> (iii) *Funds* sufficient to stamp and register the mortgage."

[20] In relation to the Fourth Loan para 17 sets out that:

> "…at the time of the advance by the plaintiff's banker; the defendant was not in possession of the following documents at the relevant time:
> (i) Executed second mortgage documentation (as was required by the terms of the fourth loan agreement) over each of the properties , properly executed by all parties and in registrable form;
> (ii) *Funds* sufficient to stamp and register the same."

[21] In relation to the First Loan extension:

> "(i) Executed mortgage documentation properly executed by all parties and in registrable form;
> (ii) *Funds* sufficient to stamp and register the same." (my emphasis)

[22] The defendant responded to the plaintiff's FBP, stating that this was inconsistent with the ASC which refers only to '*documentation*' and not *'funds'*.

[23] While that is technically correct, the defect is in identifying in the particulars a matter which should have been alleged in the ASC. While the plaintiff's case is clear, it seems to me that strictly speaking it should have referred to funds as well as documentation in paragraph 32 (v) of the ASC. If the defendant were to persist with its complaint, I would give the plaintiff leave to amend accordingly. However it does not seem to me to be a matter in respect of which further particulars are required.

Subparagraphs 32(w) and 32(x)

[24] Paragraph 32 provides that the defendant was negligent and then sets out the allegations of negligence in subparas (a) to (cc). One of those allegations of negligence is set out in subparagraph (w) which states that the negligence was "Failing to promptly take adequate steps to register the mortgages." Subparagraph 32(x) then provides that another act of negligence was "Failing to counsel the

plaintiff as lender to seek independent valuations of properties or other evidence of value such as copies of contracts of sale".

[25] The defendant requested that the plaintiff state:

(a) in relation to each mortgage whether (and if so, what) detriment is alleged to have been suffered by the plaintiff by reason of the failure to register the mortgage promptly;

(b) in relation to each security property whether it is alleged that independent valuations or other evidence of value would have led the plaintiff to act differently and if so, in what respect.

[26] The defendant complains that the response by the plaintiff that the request "is not a valid request" for particulars is unsatisfactory because the defendant is seeking particulars of "what causation consequence might be alleged in respect of the alleged breaches". In my view, however, it would seem clear that the consequences of the alleged breaches are in fact satisfactorily pleaded in para 34 which provides that had the defendant discharged its duty of care and complied with its contractual obligations then the second, third and fourth loans would not have been advanced and there would not have been an extension of the first loan. Alternatively it is pleaded that proper security would have been obtained to ensure that in the event of default the plaintiff would not have been at risk of not having its loans repaid. Ultimately it is pleaded that if the defendant had discharged its duty the plaintiff would not have suffered any loss or would not have suffered losses to the extent that it did.

[27] Further particulars are not required.

[28] Accordingly, the further and better particulars requested in paras (a) and (b) only of the letter from the defendant's solicitors dated 26 May 2010 should be provided.

The plaintiff's application for further and better disclosure

[29] The application by the plaintiff is pursuant to r 223 of the UCPR.

[30] The plaintiff seeks an order that the defendant be required to file and serve an affidavit pursuant to r 223(2) stating that no file notes or memoranda has ever existed in relation to:

(a) the terms of the retainer pleaded at para 6 of the Defence;

(b) the instructions pleaded at para 9(a) of the Defence;

(c) the instructions pleaded at para 14 (d) of the Defence;

(d) the advice pleaded at para 15 (a) of the Defence.

[31] The defendant in the Defence admits that Mr Bax was given certain instructions, that he acted for the plaintiff and that he gave certain advice. There is however a fundamental dispute in relation to the extent of the work which the defendant was required to perform pursuant to the arrangement between the parties. The defendant claims that the retainer was restricted. It is also claimed that the defendant was not retained in relation to the Fourth Loan or the Extension of the First Loan. The defendant also denies that Mr Bax contracted with the plaintiff because he acted on a pro bono basis which meant that the defendant made no charge for its professional fees presumably was to be reimbursed the amount of the actual out of pocket expenses incurred.

[32] It is clear that in this case there is, as the plaintiff submits, a serious contest in relation to the extent of the defendant's retainer and the content of any advice given by the defendant. This is also evidenced by the defendant's request for further and better particulars in relation to the oral agreement alleged between Lamb and the defendant. It is clear there is a dispute about the nature and scope of the work the defendant was asked to do pursuant to an arrangement between the parties.

[33] The plaintiff argues that in the defence the defendant refers to specific meetings on certain dates in 2003 and 2004 and also details conversations and instructions on those dates between Mr Bax, Mr Lamb and the plaintiff's director Mr O'Connor. The plaintiff argues however that it is significant that despite that detail as to the conversations no file notes, memos, diaries or letters of advice are in fact disclosed to support that detail. Furthermore exhibit D128 at p 75 of the exhibits to the affidavit of William King sworn 2 July 2010 refers to a discussion between Mr Russell and Mr Bax on 28 June but no file note is disclosed. Exhibit C59 at p 78 of the exhibits to that affidavit also refers to an email which has not been disclosed.

[34] It is abundantly clear that there is a serious contest in relation to the nature of the retainer and the extent of the alleged agreement between the parties. I consider that given the detail as to specific conversations set out in the defence and the fact that no notes of conversations or file notes or memoranda have been disclosed the concern raised by the plaintiff can be specifically addressed by an affidavit from Mr Bax. I consider that in the circumstances such an order is justified and there is no indication that the defendant would suffer any particular disadvantage by being required to do so (*Lampson (Australia) Pty Limited v Ahden Engineering (Aust) Pty Limited*[1]).

[35] Accordingly, in the circumstances, I consider that the interests of justice require that the defendant provide further and better particulars of this documentation and, in relation to any documentation which the defendant says does not exist, that the defendant swear an affidavit in accordance with r 223(2), stating that no files, notes or memoranda ever existed in relation to the retainer, the instructions or the advice. In particular, specific reference should be made to the earlier discussion referred to in disclosed document D128 and the email referred to in the defendant's disclosed document C59.

[36] It is also alleged as a particular of negligence, at subparas 32(j) and (k) of the ASC, that the work was delegated by the defendant to inexperienced staff members.

[37] The plaintiff, therefore, also seeks an order that the defendant disclose certificates of admission, practising certificates or other qualifications in relation to any person who did legal work on the file of a non administrative nature.

[38] There is no doubt that the documents disclosed indicate that the work on the files at the defendant's office was done, in part at least, by Robert Bax, Lisa Isaac/Lisa Mitchell, Tracey Ford, and Belinda Isaac.

[39] The defendant, however, argues that the documents sought are irrelevant because the plaintiff alleges that the defendant was negligent by failing to advise the plaintiff appropriately, document the loan arrangement and obtain appropriate security. The defendant therefore argues that it is irrelevant to the claim whether or not the work

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[1] 1999 2 Qd R 252.

was undertaken by people lacking in experience, as the only issue is whether the work undertaken departed from the standard of care expected of a competent solicitor.

[40] In my view, the documents sought are relevant and should be disclosed, particularly as the allegations of negligence include allegations that the defendant delegated the responsibility of registration of mortgages to an inexperienced employee and that an inexperienced person carried out work for the plaintiff. Accordingly, I consider that the qualifications of all persons who carried out work of a non administrative nature on the files are relevant and should be disclosed.

[41] The plaintiff also seeks disclosure of the continuing professional development undertaken by those persons who worked on the files, as well as standard precedents held by the defendant.

[42] In my view, the disclosure sought in that regard is not relevant. I also note that this disclosure is now not pressed by the plaintiff. There will be no order, therefore, requiring such disclosure.

The application by the plaintiff to strike out the defendant's pleading

[43] The plaintiff seeks on order that paras 6, 7(a) and 15 of the Defence be struck out pursuant to UCPR 171 and an order that the defendant be ordered to amend its Defence.

[44] The plaintiff argues that para 6 is totally contradictory to para 15 of the Defence. Para 6 pleads a limited retainer to act for the plaintiff between September 2003 and November 2004 to prepare documents and to stamp and register them.

[45] Paragraph 15 of the ASC is as follows:

> "15. The defendant did not provide any advice to the plaintiff on that, or any other occasion, of the risks of not registering the second mortgage, or explain that not registering the mortgage, would mean that the plaintiff's loan was unsecured and that there was a high risk that the plaintiff could lose money."

[46] Paragraph 15 of the Defence is as follows:

> "15. The defendant denies paragraph 15 of the statement of claim because:
>
> (a) in the course of the conversation between O'Connor, Lamb and Bax referred to in paragraph 14 hereof, both Lamb and Bax advised O'Connor as to the dangers of not registering the second mortgage over lot 4, in that they said words to the effect that, being an unsecured creditor, O'Connor would 'run a distant second' to any secured creditor and that O'Connor would be 'in the melting pot with everyone else' but that if the mortgage was registered, then O'Connor would be the next to be paid after the existing first mortgagee;
>
> (b) Lamb advised O'Connor to the effect that:
>
> (i) Allen's reason for not wanting the mortgage registered was so that the first mortgagee (the National Australia

bank) would not know about the loan and Allen would appear to have greater equity in the property; and

(ii) if he was on the title, they would have to deal with you but if not, then you come last."

[47] It would seem clear that paragraph 15 contradicts para 6 of the defence. Para 6 pleads a retainer limited to the preparation and registration of documents however para 15 goes on to indicate that advice was given by Bax as to the dangers of not registering the second mortgage over lot 4. Accordingly paras 6 and 15 are embarrassing and should be struck out. Leave is given to the defendant to replead.

[48] Paragraph 7 of the ASC is as follows:

> "7. The retainer between the plaintiff and the defendant constituted a legally binding contract and further, the defendant owed to the plaintiff a duty of care in the discharge of its role as the plaintiff's solicitor."

[49] Paragraph 7 of the Defence is as follows:

> "7. As to paragraph 7 of the statement of claim, the defendant:
>
> (a) denies that he contracted with the plaintiff because he acted on a pro bono basis;
>
> (b) admits that, in acting for the plaintiff in relation to the matters set out in subparagraph 6(a) above, he owed the plaintiff a duty to take reasonable care."

[50] The plaintiff makes a number of further submissions in support of its contention that the defence is embarrassing, particularly with reference to paragraph 7. Only two should be noted. The first is that the basis for the denial of a contract is insufficient. The second is that, notwithstanding the denial, the defence makes regular reference to a retainer. Usually the expression "retainer" is used as a short form of the expression "contract of retainer". Further, the statement that the defendant acted on a pro bono basis may well simply convey that it would not charge professional fees, but does not exclude all forms of consideration from the plaintiff, e.g., an implied promise to pay any outlays incurred by the defendant. For these reasons, it seems to me that the denial in paragraph 7(a) of the defence is embarrassing. Accordingly paragraph 7 (a) should be struck out. Leave is given to replead.

[51] Whilst the Rule 444 Letter to the defendants dated 7 June 2010 complains in relation to para 31 of the Defence, that issue was addressed by the defendant's solicitors in their letter to the plaintiff's solicitors dated 8 June 2010 (sent on 2 July 2010) whereby the defendant proposed that it would amend the defence. That complaint and was not pursued at the hearing of the application and accordingly I will make no orders in that regard.

[52] Subject to submissions from counsel as to the form of the orders I would propose to make the following orders;

(1) The plaintiff is to provide the further and better particulars requested in paragraphs (a) and (b) of the letter from the defendant's solicitors dated 26 May 2010.

(2) The defendant is to swear an affidavit pursuant to UCPR 223(2) stating whether any files, notes or memoranda ever existed in relation to the retainer, the instructions or the advice.

(3) The defendant is to disclose the qualifications of all persons who carried out work of a non administrative nature on the files in question.

(4) Paragraphs 6, 7 (a) and 15 of the Defence are struck out pursuant to UCPR 171. The defendant is given leave to replead.

[53] I will hear submissions from counsel as to costs.