

# SUPREME COURT OF QUEENSLAND

CITATION: *Cavenham Pty Ltd v Robert Bax & Associates (No 2)* [2010] QSC 328

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: 3 September 2010

DELIVERED AT: Brisbane

HEARING DATES: 9 July 2010

JUDGE: Ann Lyons J

ORDER/S:

- 1. The plaintiff provide further and better particulars of its amended statement of claim in terms of the matters addressed in subparagraphs (a) and (b) of the letter from Brian Bartley & Associates to Shine Lawyers dated 26 May 2010 and which appears at pages 4 and 5 of the exhibit bundle to the affidavit of Brian David Bartley filed 23 June 2010;**
- 2. The plaintiff have leave to amend subparagraph 32(v) of its statement of claim to include an allegation that the defendant was not in possession of funds sufficient to stamp and register documentation at the time of the advance by the plaintiff's banker;**
- 3. Mr Bax swear an affidavit, within twenty-eight (28) days, pursuant to UCPR 223, stating whether any of the following documents (to the extent they have not already been disclosed) are or have been in his possession, and if they have been but are**

no longer in his possession, when and in what circumstances they ceased to be in his possession:

- (i) Any file notes, memoranda or correspondence in relation to:
    - (A) The terms of the retainer pleaded at paragraph 6 of the defence;
    - (B) The instructions pleaded at subparagraph 9(a) of the defence;
    - (C) The instructions pleaded at subparagraph 14(d) of the defence;
  - (ii) Any document relating to the earlier discussion referred to in the defendant's disclosed document D128;
  - (iii) The email referred to in the defendant's disclosed document C59;
4. The defendant make further and better disclosure, within 28 days, of documents evidencing any qualifications of those persons who carried out work of a non-administrative nature on behalf of the plaintiff;
  5. Paragraphs 7(a) and 15 of the defence be struck out;
  6. The defendant have leave to re-plead within 14 days;
  7. There be no order as to the costs of the defendant's application filed 23 June 2010;
  8. The defendant pay the plaintiff's costs of and incidental to the plaintiff's application filed 2 July 2010, to be assessed on the standard basis.

**CATCHWORDS**

PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – where an application was brought by each party in the proceeding – where judgment delivered in respect of both applications – where argument as to costs and form of the orders – whether the plaintiff's or the

defendant's proposed draft Orders should be adopted

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] On 23 August 2010 I delivered a judgment in relation to two applications brought in this action where the plaintiff claims damages from its former solicitor for breach of contract and professional negligence. I indicated that I would hear from Counsel as to the form of the orders and as to costs. Written submissions as to the form of the orders arising from that judgment and as to the costs of each application were provided by the plaintiff and the defendant on 24, 25 and 26 August 2010.

**Costs**

**The Defendant's Application**

- [2] The first application was filed by the defendant on 23 June 2010 and sought 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 (ASC).
- [3] I ultimately found that 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. I did not find that further and better particulars were required in respect of each request of the defendant.
- [4] I therefore consider the appropriate order is that there be no order as to the costs of the defendant's application filed 23 June 2010.

**The Plaintiff's Application**

- [5] The plaintiff's application was filed on 2 July 2010 and sought 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.
- [6] The plaintiff also sought 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.
- [7] In respect of the costs of their application, the plaintiff submits that each order sought was obtained and therefore costs should follow the event. The plaintiff seeks an order that the defendant pay its costs of and incidental to the application to be assessed on the standard basis. The defendant concedes that there should be an order for costs in favour of the plaintiff and submits that costs should be assessed.
- [8] As the plaintiff was wholly successful in its application, I will make an order in the terms proposed by the plaintiff that is, the defendant pay the plaintiff's costs of and

incidental to the plaintiff's application filed 2 July 2010, to be assessed on the standard basis.

### **The Form of the Orders**

- [9] The defendant and the plaintiff both submitted proposed orders with their further written submissions. There is contention as to the disclosure obligations of the defendant in relation to para 15 of the AD which is now to be struck out.
- [10] The defendant argues that there can be no allegation in issue in the pleadings to which any obligation of disclosure can attach where para 15 is struck out and therefore it would be inappropriate for Mr Bax to swear an affidavit in relation to it.
- [11] The defendant argues that r 223 permits the making of orders relating to disclosure but the obligation of disclosure (in aid of which r 223 might be relied upon) is in respect of documents directly relevant to allegations in issue in the pleadings.
- [12] In my view the order, and the defendant's affidavit, should include reference to the advice in para 15 of the AD because that advice, if given, is relevant to the determination of the terms of the retainer. I consider that it is clear that a positive assertion has been made by the defendant that certain advice was given and it does not matter that para 15 is in fact being struck out. Furthermore, the defendant has been given leave to re-plead and it is not known whether the advice will be referred to in the re-pleading. Clearly, further applications to court should be avoided.
- [13] The defendant submits that the affidavit to be filed by Mr Bax pursuant to r 223 should only be in relation to the documents which have not already been disclosed.
- [14] The plaintiff contends that the defendant's proposed order is the first time the suggestion has been made that documents may have already been disclosed which pertain to the disputed retainer and advice. The plaintiff also submits that their application was argued on the basis that there had been no such disclosure and that the defendant should be required to swear an affidavit which will include identifying all documents that the defendant has pertaining to the disputed issues.
- [15] It would seem to me that, as the defendant submits, the documents have in fact been referred to in correspondence with the solicitors for the plaintiff since 20 May 2010 as well as in the defendant's list of documents exhibited to Mr King's affidavit sworn 2 July 2010. The letters between the parties at pages 18 to 20 and 22 to 24 of the exhibits to Mr King's affidavit as well as the affidavit of Mr Brian Bartley sworn 6 July 2010 set out the factual basis upon which the application was conducted (there being no cross-examination of any deponent). That correspondence states that the defendant had disclosed any notes of discussions or correspondence with the plaintiff directly relevant to an allegation in issue on the pleadings. The defendant contends that it would be oppressive to order the defendant to prepare an affidavit in respect of documents already disclosed.
- [16] It would seem to me that in the circumstances the order should be restricted to the documents which have not already been disclosed.
- [17] In relation to whether para 6 of the defence should be struck out, it is clear that the major difficulty with that paragraph was, as the defendant submits, its inconsistency

with para 15. If para 15 is struck out, then there is no requirement for para 6 to be struck out.

## **ORDERS**

1. The plaintiff provide further and better particulars of its amended statement of claim in terms of the matters addressed in subparagraphs (a) and (b) of the letter from Brian Bartley & Associates to Shine Lawyers dated 26 May 2010 and which appears at pages 4 and 5 of the exhibit bundle to the affidavit of Brian David Bartley filed 23 June 2010;
2. The plaintiff have leave to amend subparagraph 32(v) of its statement of claim to include an allegation that the defendant was not in possession of funds sufficient to stamp and register documentation at the time of the advance by the plaintiff's banker;
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  - (iii) The email referred to in the defendant's disclosed document C59;
4. The defendant make further and better disclosure, within 28 days, of documents evidencing any qualifications of those persons who carried out work of a non-administrative nature on behalf of the plaintiff;
5. Paragraphs 7(a) and 15 of the defence be struck out;
6. The defendant have leave to re-plead within 14 days;
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8. The defendant pay the plaintiff's costs of and incidental to the plaintiff's application filed 2 July 2010, to be assessed on the standard basis.