SUPREME COURT OF QUEENSLAND

CITATION:	*Cavenham Pty Ltd v Robert Bax & Associates* [2011] QSC 348
PARTIES:	**CAVENHAM PTY LTD** ACN 003 736 672 (plaintiff) **v** **ROBERT BAX & ASSOCIATES** (defendant)
FILE NO:	SC No 14239 of 2009
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	14, 15 November 2011
JUDGE:	Chief Justice
ORDER:	**Judgment for the plaintiff against the defendant in the amount of $1,477,420.20, together with costs, including any reserved costs, to be assessed on the standard basis.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – DUTIES AND LIABILITIES – SOLICITOR AND CLIENT – RETAINER – EXTENT OF RETAINER – where the plaintiff company lent approximately $2.2 million in a series of four transactions to a Gold Coast night club – where the plaintiff had been told that the borrower's solicitors would register a first mortgage over the lot purchased with the funds from the first loan, but that did not occur – where the plaintiff believed the loan agreement amounted to security – where the plaintiff's bank manager had retained the defendant to act for the plaintiff after the first loan transaction was complete – where the nightclub business was placed into receivership – where the defendant argued the retainer was of a limited clerical type – what was the commencement date and scope of the retainer – whether the defendant had breached that retainer – whether the plaintiff would have entered into the second, third and fourth transactions or demanded payment under the first loan if properly advised by the defendant *Littler v Price* [2005] 1 Qd R 275, considered

COUNSEL:	K N Wilson SC for the plaintiff D J S Jackson QC, with R P S Jackson, for the defendant
SOLICITORS:	Shine Lawyers for the plaintiff Brian Bartley & Associates for the defendant

CHIEF JUSTICE:

Introduction

[1] The plaintiff company claims damages for the defendant's alleged negligence or breach of contract. The claim is based on the defendant's having acted as its solicitor in relation to a number of commercial transactions.

[2] The directors of the plaintiff, which acted as trustee for a family trust, at relevant times were Mr Michael O'Connor and his wife Mrs Susan O'Connor. Mr O'Connor represented the plaintiff in the relevant transactions. I accepted all of his evidence: I considered him a patently credible witness. There was some criticism in addresses. I did not accept that. I considered Mr O'Connor utterly forthcoming with palpably credible evidence, credible in both respects, that is, both truthful and reliable. I also accepted the other evidence given in the case, including that of Mr Pyne as to what a prudent solicitor would have done – although much of what he said was self-evident once one delineated the duty.

[3] On the basis of Mr O'Connor's evidence, I find that he was not experienced in loan transactions of this dimension, and that he was not familiar with legal securities and other legal aspects of commercial lending. That is entirely consistent with his having caused the plaintiff to engage in these risky transactions which jeopardized his family's financial security, as repayment of the amounts lent were secured against his family home. His actions betrayed singular commercial naiveté. (As was pointed out in closing addresses, the level of return that was being achieved was "little different [from] what could be achieved on a bank term deposit".)

[4] The transactions benefited the proprietors of Melba's Nightclub at the Gold Coast, Mr Paul Allen (now deceased) and Mr Geoffrey Sullivan. They operated through three companies: On the Park Management Pty Ltd, Dell International Pty Ltd and Rynah Pty Ltd.

[5] There were four transactions. I now set out some detail of them.

The first loan

[6] On 5 March 2001 the plaintiff lent On the Park Management Pty Ltd the sum of $350,000, to enable that company to acquire lot 4 (in a building on Cavill Avenue). The defendant had not by then been retained. To provide the funds, the plaintiff had to obtain a line of credit from the Commonwealth Bank. Repayment of the sum advanced was required in three years, with simple interest payable monthly in arrears in the meantime at 12 per cent per annum.

[7] The plaintiff was entitled to a registered first mortgage over lot 4 under clause 9 of the loan agreement. Mr Allen of the borrower told Mr O'Connor that the borrower's solicitors would register that mortgage. That did not occur.

[8] In early 2003 the plaintiff moved its business to the Bank of Queensland, where Mr O'Connor dealt with a manager Mr Peter Lamb. Mr Lamb told Mr O'Connor that there was no registered first mortgage. Mr O'Connor informed Mr Allen of this, and Mr Allen said that his business partner Mr Sullivan would sort it out. Neither did that occur.

[9] In fact on 23 December 2002 the National Australia Bank had secured a registered first mortgage in its favour over that lot.

The second and third loans

[10] In August 2003 Melba's sought a further $1.1 million from the plaintiff, to acquire lots 1 and 3 in the same complex. Mr O'Connor applied for funds from the Bank of Queensland. The bank approved a loan to the plaintiff on 30 September 2003, with $725,000 to be drawn on 13 October 2003 (loan two) and the balance of $385,000 on 17 December 2003 (loan three). The loan was conditional on the plaintiff's taking first registered mortgages over lot 1 (loan two), lot 3 (loan three) and lot 4 (loan one).

[11] In early September 2003, Mr O'Connor had met with Mr Lamb, in relation to the requirements of the Bank of Queensland, in the context of the first loan, and Mr O'Connor accepted Mr Lamb's advice that the plaintiff should retain Mr Bax, the principal of the defendant firm of solicitors, to act in the transactions on the plaintiff's behalf. I infer that Mr Lamb rightly assessed that Mr O'Connor was out of his depth. The matter then proceeded on the basis that Mr Lamb, acting on behalf of the plaintiff, would and did engage the defendant.

[12] Mr Bax prepared the loan agreements and mortgages in relation to these two loans, and first mortgages over lots 1 and 3 were registered. (None was however registered in respect of loan one.) The advances occurred on 13 October 2003 and 17 December 2003 respectively. The agreements were for 12 month terms, with simple interest payable monthly in arrears in the meantime of 10 per cent per annum.

[13] The National Australia Bank secured a second mortgage over lot 3, and that mortgage was registered on 18 May 2005. In the middle of that year, Mr Allen asked Mr O'Connor to release the plaintiff's first registered mortgage over lot 3, on the basis that the Bank wanted a first rather than a second registered mortgage. In lieu of the plaintiff's first registered mortgage, Mr Allen offered a second registered mortgage together with personal guarantees from Mr Sullivan and himself. Mistakenly believing that the plaintiff was sufficiently secured overall by the first mortgage over lot 1 in relation to the second loan, Mr O'Connor acceded to Mr Allen's proposal. Mr O'Connor had not sought advice from Mr Bax. On 30 June 2005 the plaintiff took the remarkable step of releasing its first registered mortgage over lot 3, and also agreed, for no apparent benefit to the plaintiff, to an effective assignment of the loan from Dell International Pty Ltd as borrower, to the company Rynah Pty Ltd. Again, Mr O'Connor had not consulted Mr Bax in relation to that change.

[14] The first communication in fact ever received by the plaintiff from Mr Bax as solicitor was a letter of 6 September 2004 in relation to the provision of Mr O'Connor's family trust deed. Then on 20 September 2004 the defendant wrote

again, enclosing the mortgage over lot 4 (the first loan) for execution. (To that extent the defendant had by then become involved with the first loan which had been effected prior to the defendant's having been retained.) Mr O'Connor returned the executed mortgage, but about a month later a representative of the defendant telephoned him to say that they were experiencing difficulties registering the mortgage, and in frustration, Mr O'Connor said not to worry about it: he mistakenly then believed the plaintiff was sufficiently covered by the mortgages over lots 1 and 3, and by the loan agreement itself, which he wrongly regarded as amounting to security – an amazing position which should have alerted any ordinarily prudent solicitor to the fact that things were awry: but unfortunately Mr Bax was not properly attending to the plaintiff's interests.

The fourth loan

[15] On 21 September 2005, Mr Allen sought a further substantial sum from the plaintiff, and on 30 September the plaintiff advanced $750,000 to Mr Allen personally. Solicitors Freestone and Kumnick (acting for On the Park Management Pty Ltd) drew up a loan agreement dated 21 September 2005 which provided for second mortgages over six properties privately owned which had been offered by Mr Allen. The plaintiff had to borrow the monies to make this advance, and did so from the Bank of Queensland. (Statutory charges in relation to land tax encumbered the title to four of those properties, a feature not drawn to the attention of Mr O'Connor.)

[16] In the meantime, in March 2004, the three year term of the first loan agreement had expired, without any repayment of principal. Mr O'Connor contacted the defendant in relation to this, and the defendant prepared an agreement dated 17 November 2005 providing, if in terms ineptly, for a three year extension of the time for repayment of that loan.

Subsequent events

[17] The nightclub business suffered financial distress and was placed into receivership on 2 June 2008. On 5 June 2008, Mr O'Connor met with the solicitor Mr Stephen Russell together with Mr Bax, at Mr Bax's offices. Mr Russell then commenced acting for the plaintiff and set about recovering its position. Mr Russell lodged caveats over lots 3 and 4 and the privately owned lands, and registered second mortgages over that private land. Mr Russell also secured the appointment of KordaMentha to take possession of lot 1. On 12 October 2009, the second registered mortgagee of lot 1, Westpac Bank, paid the plaintiff $1.1 million to release its first mortgage over that lot and the caveats and the second mortgages over Mr Allen's privately owned land, and that reduced the plaintiff's overall loss by approximately 50 per cent.

[18] The fees paid to KordaMentha amounted to $37,436.09. Fees paid to Mr Russell's firm were $120,561.61.

The retainer of the defendant

[19] The plaintiff alleges that it retained the defendant, through Mr Lamb, on or about 5 October 2003 in respect of the first, second and third loans, on or about 22 September 2005 in respect of the fourth loan, and in November 2005 in relation to

the extension of the first loan. The plaintiff alleges that that retainer obliged the defendant to act for the plaintiff and protect the plaintiff's commercial interests as money lender as a reasonable and prudent solicitor ordinarily would – in the respects particularized in para 6(b)-(h) of the second further amended statement of claim.

[20] The defendant alleges a much more limited, rather clerical type retainer. The defendant alleges that it was retained in relation to the first, second and third loans between 6 and 7 October 2003 and November 2004, its obligations being limited to preparing loan agreements in relation to loans two and three, and preparing, stamping and registering mortgages over lots 1 and 3, and a second mortgage over lot 4. The defendant denies having been retained in relation to the fourth loan or the first loan extension. See paras 6, 10(b) and 30 of the amended defence.

[21] Extraordinarily, given that pleaded position, Mr Bax did not give evidence. Determining the extent of the retainer, I am therefore essentially limited to the evidence of Mr O'Connor and the documents in exhibit one which constitutes the defendant's file.

[22] I infer that evidence from Mr Bax would not have assisted the defendant's case.

[23] While on the other hand it is true that the plaintiff did not call Mr Lamb (for which it was criticized), I accept there was no particular need for the plaintiff to do that. It is apparent from exhibit one that the defendant opened a file on 7 October 2003 and that Mr Lamb passed documents on to the defendant as Mr O'Connor expected. It was not put to Mr O'Connor that Mr Lamb did not engage Mr Bax on the plaintiff's behalf.

[24] I conclude from Mr O'Connor's evidence and exhibit one that the defendant acted as the plaintiff's solicitor in relation to these transactions from no later than 7 October 2003, and over the two ensuing years. It was a retainer to act generally in the plaintiff's interests in relation to proposed loans to Dell International Pty Ltd and the loan which had been made to On the Park Management Pty Ltd, under which that borrower was in breach by the time the defendant was retained.

[25] The suggested limitation on the retainer, to the largely clerical, was inconsistent with a number of features: for example, there was Mr Bax's quizzing Mr O'Connor at the unscheduled meeting in mid-2006 about the extent to which Mr O'Connor trusted Mr Allen, and as to the wisdom of relying on second mortgages; then there was the defendant's file note D145 in the second section of volume one of exhibit one, at a time when consolidation of the various loans was being contemplated, especially in its reference to a "letter…explaining risk", inferentially to be provided to Mr O'Connor; and reference should also be made to Mr Lamb's letter to Mr Bax of 18 March 2004, the first paragraph of which says:

> "Late last year Michael O'Connor sought *your professional advice as to the most effective method of protecting his interests* in a private financing agreement between his family trust and Dell International Pty Ltd." (emphasis added)

[26] I find that Mr Lamb engaged the defendant to act in that way on behalf of the plaintiff. Mr Lamb provided the defendant with the first loan agreement, the original of which is on the defendant's file. As I have said, the defendant opened

that file on 7 October 2003. I accepted Mr O'Connor's evidence that he did not meet with Mr Bax until in the second half of 2006. I accepted Mr O'Connor's rejection of suggestions of meetings in October 2003 and November 2004.

Breach of retainer

[27] The defendant's obligations in this sort of situation were helpfully analysed by Cullinane J in *Littler v Price* [2005] 1 Qd R 275.

[28] The defendant was obliged to act generally in the plaintiff's interests in relation to the proposed transactions. (See the advice which led to the retainer: transcript page 1-22, line 55.) That extended to the defendant's advising the plaintiff about the need for legal protection against contingencies which may arise. It was particularly relevant that the plaintiff was not well-versed in relation to these sorts of transactions, and the defendant should have taken the steps which overall would have led the plaintiff to some adequate understanding. The proper discharge of the defendant's retainer did not depend on the plaintiff's actively seeking advice. The defendant was obliged proactively to give the appropriate advice.

[29] Yet the defendant made no enquiry of the plaintiff, through Mr O'Connor, as to the level of the plaintiff's financial or business acumen; the defendant made no attempt to ensure that Mr O'Connor understood the scope of the first loan transaction, and the consequences of the breach of clause 9 as to the requirement of a first registered mortgage in favour of the plaintiff; the defendant did not counsel the plaintiff to consider calling up the first loan when repayment was not made; the defendant made no attempt to ascertain the value of the properties against which security was offered for the second and third loans (or to seek to view the purchase contracts relating to those lots); the defendant did not explore the availability of other assets which could have been provided as security; and the defendant failed overall to explain the risks involved in the transactions.

[30] The defendant breached its retainer from the plaintiff by reason of the failures covered in the preceding paragraph.

[31] It may be said that the defendant's approach was markedly "hands off". A couple of particular failures reflect that. For example, Mr Bax had a company search in relation to Dell International Pty Ltd which revealed it was a one dollar company, yet he failed to alert Mr O'Connor to that circumstance. Also he did not warn Mr O'Connor that the wrong company seal had been applied to the first loan agreement: the inference is compelling that he simply had not read it.

Consequences of breach of retainer

[32] I accepted Mr O'Connor's evidence that security was "critical" to him. He naively thought the plaintiff was making a "good safe investment".

[33] It was contended for the defendant that because of Mr O'Connor's confidence in and friendship with the operators of Melba's, and his belief that the properties offered as security were worth a lot of money, he would have proceeded with these transactions, as he did, even if given orthodox cautionary advice. I do not accept that.

[34] Mr O'Connor was left to negotiate his way through these dealings beset by ignorance and misconception. He was ignorant about the significance of mortgages, particularly issues of priority between first and second mortgages. He misconceived loan agreements, believing they conferred themselves some form of security. He was not alerted to the critical importance of ensuring adequate real property security for the substantial financial advances the plaintiff was asked to make.

[35] I infer that had the defendant advised the plaintiff properly, from October 2003, the plaintiff would (following advice) have demanded payment under the first loan agreement from the defaulting borrower, and that the plaintiff would not have entered into the subsequent transactions which from its angle proved so improvident. As to the former matter, I accept Mr Sullivan's evidence that the amount of the first loan would have been paid, if demanded, within three to six months.

[36] I also accept the supporting submission that "the plaintiff would have followed advice given to him by Mr Bax is demonstrated by what occurred when Mr Russell was appointed. Caveats were lodged, second mortgages were lodged, proceedings were commenced, receivers were appointed." In other words, just as Mr O'Connor followed Mr Russell's advice, he would likely have heeded the appropriate cautions had they been administered by Mr Bax.

Orders

[37] It was agreed that determining the claim on this basis, I should enter judgment for the plaintiff against the defendant in the amount of $1,477,420.20. I enter judgment accordingly, together with costs, including any reserved costs, to be assessed on the standard basis.

[38] I will of course entertain further submissions in relation to costs, or interest, as necessary.