

SUPREME COURT OF QUEENSLAND

CITATION: *BDO Corporate Finance (Qld) Ltd v Russell* [2019] QCA 49

PARTIES: **BDO CORPORATE FINANCE (QLD) LTD**
ACN 010 185 725
(applicant/respondent)
v
BRIAN BENJAMIN RUSSELL
(respondent/applicant)

FILE NO: Appeal No 11769 of 2018
SC No 8239 of 2012

DIVISION: Court of Appeal

PROCEEDING: Application to Strike Out – Further Order

ORIGINATING COURT: Supreme Court at Brisbane – Unreported, 31 October 2012
(Ann Lyons J)

DELIVERED ON: 22 March 2019

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGE: Fraser JA

ORDER: **Brian Benjamin Russell pay BDO Corporate Finance (Qld) Ltd’s costs of the application and appeal filed on 30 and 31 October 2018 respectively and of the application filed by BDO Corporate Finance (Qld) Ltd on 14 December 2018 on the standard basis.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW THE EVENT – COSTS OF AND INCIDENTAL TO PROCEEDING – where an incompetent application for an extension of time in which to appeal and notice of appeal were struck out – where a self-represented litigant was given notice that the application and appeal must be struck out and that costs would be sought on an indemnity basis if proceedings were not withdrawn – whether costs should follow the event – whether any portion of costs should be awarded on an indemnity basis – whether costs should be paid out of the appeal costs fund

Appeal Costs Fund Act 1973 (Qld)

BDO Corporate Finance (Qld) Ltd v Russell [\[2019\] QCA 39](#), explained

Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Ltd (1988) 81 ALR 397; [1988] FCA 202, applied

Karam v Palmone Shoes Pty Ltd [2012] VSCA 97, distinguished

COUNSEL: T Pincus for the applicant/respondent
The respondent/applicant appeared on his own behalf

SOLICITORS: Gadens Lawyers for the applicant/respondent
The respondent/applicant appeared on his own behalf

- [1] **FRASER JA:** An application and a notice of appeal filed by the applicant in late October 2018 were struck out upon the ground that they were incompetent, Mr Russell lacking any authority to commence litigation in a representative capacity for BRGOC Group Finance Pty Ltd, as he had purported to do.¹ The respondent has applied for an order that Mr Russell pay its costs of the application and appeal and of the respondent’s strike out application, on the standard basis up to and including 12 December 2018, and thereafter on an indemnity basis. Mr Russell contends that no order as to costs should be made or, alternatively, any costs he is ordered to pay should be paid out of the appeal costs fund.
- [2] The respondent, as the successful party, should be given its costs unless there is good reason to order otherwise.
- [3] Mr Russell’s submissions contend that the proceedings in the trial division which led to the judgment against which he sought to institute an appeal miscarried for reasons he seeks to attribute to the respondent. He contends that the application and notice of appeal were struck out because of his “failure to meet guidelines”, including his failure to file an affidavit of service upon the liquidators of the company and his failure to adduce other evidence. He contends that paragraph 13 of the reasons for the strike-out order accepted that the notice of appeal included a finding which was contrary to an affidavit sworn by an employee of the respondent.
- [4] None of these submissions is correct. As to the last point, paragraph 13 of the reasons notes simply that the notice of appeal, when read together with Mr Russell’s arguments, “does convey one potential ground of appeal that is comprehensible ... that the respondent was not entitled, and knew that it was not entitled, to apply to wind up the company because it was not a creditor, in that, contrary to an affidavit sworn by an employee of the respondent ...”. There is no finding to the effect that the contentions in the ground of appeal are correct or that the ground of appeal has merit. The reasons also reveal that even if Mr Russell remedied the many deficiencies in his evidence, that would not change the conclusion that Mr Russell was not entitled to bring the proceedings as a representative of the company as he purported to do.
- [5] Mr Russell should be ordered to pay the respondent’s costs. The only issue is whether any part of those costs should be assessed on the indemnity basis. The respondent contends for such an order on the grounds that on 6 December 2018 the respondent’s solicitor wrote to Mr Russell, clearly explaining that the application and appeal must be struck out because Mr Russell had no standing to bring the proceedings on behalf of the company and no prospect of overcoming that obstacle, and stating that the respondent would apply to strike out the documents unless by 12 December 2018 Mr Russell confirmed he would withdraw the proceedings. By that letter, the respondent gave notice that if Mr Russell did not withdraw the proceedings the respondent would seek costs on an indemnity basis.

¹ *BDO Corporate Finance (Qld) Ltd v Russell* [2019] QCA 39, particularly at [1] – [3] and [18].

- [6] In *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Ltd*² Woodward J observed that “it is appropriate to consider awarding “solicitor and client” or “indemnity” costs, whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success” and that in such cases “the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law”. I accept the submission for the respondent that Mr Russell commenced the proceedings in circumstances where, if properly advised, he should have known that he had no chance of success. The reasons for the strike out order make that clear.³ But as Woodward J explained, the commencement of an action which has no chance of success justifies the court in proceeding “to consider awarding” indemnity costs, so that “the court will need to consider how it should exercise its unfettered discretion”.⁴
- [7] The respondent referred to *Karam v Palmone Shoes Pty Ltd*⁵ in which the Victorian Court of Appeal observed that a “self-represented litigant cannot be allowed forever to stand behind the shield of his own ignorance; especially when it continues to subject other parties to cost and inconvenience and to add pointlessly to the load on the court’s already limited resources”. But for a procedural difficulty, indemnity costs would have been ordered against that self-represented litigant; but that was a case in which the fatal defects in the proceedings had been pointed out in previous judicial decisions.
- [8] The proceedings filed by the applicant were misconceived but I am not prepared to conclude that the applicant in fact bought those proceedings in wilful disregard of clearly established law or facts that he knew. That does not preclude an indemnity costs order but it is, I think, a relevant consideration. The applicant is not in the position of a litigant who, having been given reasons for a decision which clearly explain why the litigant cannot succeed, nevertheless persists with misconceived litigation and although Mr Russell did file quite lengthy affidavit evidence, he did not inappropriately add to the burden upon the respondent and the court by prolix arguments.
- [9] In the circumstances I am not persuaded that the costs should be ordered on an indemnity basis. If, contrary to my view, the power to order an indemnity certificate under the *Appeal Costs Funds Act 1973* is engaged, I decline to exercise the discretion to do so for the reasons already given.
- [10] I order that Brian Benjamin Russell pay BDO Corporate Finance (Qld) Ltd’s costs of the application and appeal filed on 30 and 31 October 2018 respectively and of the application filed by BDO Corporate Finance (Qld) Ltd on 14 December 2018 on the standard basis.

² (1988) 81 ALR 397; [1988] FCA 202 at 401.

³ [2019] QCA 39, especially at [18] and [31] – [32].

⁴ (1988) 81 ALR 397; [1988] FCA 202 at 401.

⁵ [2012] VSCA 97 at [36].