

# SUPREME COURT OF QUEENSLAND

CITATION: *BDO Group Holdings (Qld) Limited & Anor v Sully (No 2)*  
[2015] QSC 201

PARTIES: **BDO GROUP HOLDINGS (QLD) LIMITED**  
**(FORMERLY BDO GROUP HOLDINGS (QLD) PTY LTD)**  
ACN 133 657 833  
(first applicant)  
**BDO ADMINISTRATION (QLD) PTY LTD**  
ACN 134 036 490  
(second applicant)  
v  
**BRIAN RUSSELL SULLY**  
(respondent)

FILE NO: Supreme Court No 2666 of 2015

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 21 July 2015

DELIVERED AT: Brisbane

HEARING DATE: On the papers

JUDGE: Flanagan J

ORDER: **The respondent pay the applicants' costs of the proceeding to be assessed or otherwise agreed.**

CATCHWORDS: PROCEDURE – COSTS – GENERAL RULE - COSTS FOLLOW THE EVENT – COSTS OF WHOLE ACTION – where the applicants were substantially successful in the proceeding to restrain the respondent under a restraint of trade provision – where the respondent seeks an order that the parties each pay their own costs or alternatively the applicants are only entitled to a proportion of their costs – whether costs should follow the event

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – OTHER CASES – SUBSTANTIAL SUCCESS – where the applicants were substantially successful in the proceeding to restrain the respondent under a restraint of trade provision – where the respondent seeks an order that the parties each pay their own costs or alternatively

the applicants are only entitled to a proportion of their costs – whether costs should depart from the general rule

*Uniform Civil Procedure Rules 1999 (Qld)*, r 681, r 684

*BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No 2)* [2009] QSC 64, cited

COUNSEL: D G Clothier QC, with G Sheahan, for the appellants  
K E Downes QC, with P McCafferty, for the respondent

SOLICITORS: McInnes Wilson Lawyers for the appellants  
Holding Redlich for the respondent

- [1] On 19 June 2015 the Court declared that certain restraint clauses contained in the BDO Shareholders' Agreement and the Employment Agreement were binding on the respondent for the period of 12 months from 19 April 2015. The Court also made orders that the respondent be restrained by injunction until 19 April 2016 from:
- (a) engaging in any activity which involves providing accounting services to any person who was, at any time within the 24 months prior to 19 April 2015, a client of the BDO Group; and
  - (b) inducing, soliciting or canvassing, approaching or accepting any approach from any person who was, at any time during the 24 month period prior to 19 April 2015, a client of the BDO Group, to obtain the custom of that person in a business or activity which:
    - (i) is the same or similar to the whole or material part or parts of the accounting services provided by the BDO Group; or
    - (ii) is in competition with the accounting services provided by the BDO Group.
- [2] The Court invited submissions as to costs. The respondent's submissions on costs were received 3 July 2015 and the applicants' submissions were received 16 July 2015. In imposing a restraint of 12 months I accepted the applicants' submission that the legitimate interests sought to be protected by the restraint clauses included both the goodwill of the BDO Group and its established customer connections. Whilst there is some evidence before the Court that the respondent was willing to settle the proceedings upon the basis that he be restrained for a period of six months,<sup>1</sup> it may be accepted that it was necessary for the applicants to bring the present proceedings to achieve a restraint of 12 months.
- [3] The applicants seek an order that the respondent pays the applicants' costs of the proceeding to be assessed on the standard basis. The applicants submit that they were substantially successful in the proceeding and costs should follow the event. Rule 681(1) of the *Uniform Civil Procedure Rules 1999 (Qld)* provides that the costs of a proceeding are in the discretion of the Court but follow the event, unless the Court orders otherwise.

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<sup>1</sup> Exhibit AKF-1 to the affidavit of Alanna Kate Fitzpatrick sworn 17 April 2015.

- [4] The respondent seeks an order that the parties each pay their own costs or alternatively that the applicants are entitled only to a proportion of their costs as determined by the Court. The respondent in this respect relies on r 684(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) which relevantly provides:

“(1) The court may make an order for costs in relation to a particular question in, or a particular part of, a proceeding.

(2) For subrule (1), the court may declare what percentage of the costs of the proceeding is attributable to the question or part of the proceeding to which the order relates.”

- [5] The applicants accept that they did not succeed on two issues, namely the validity of the 18 month restraint period and the validity of the restraint against bare competition (for which no injunction was sought at trial).<sup>2</sup> The applicants, however, refer to the observations of McMurdo J in *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No 2)* [2009] QSC 64 at [8]:

“I adhere to the view I expressed in *Australand Corporation (Qld) Pty Ltd v Johnson* that ordinarily the fact that a successful plaintiff fails on particular issues does not mean that the plaintiff should be deprived of some of its costs, although it may be appropriate to award costs of a particular question or part of a proceeding where that matter is definable and separable and has occupied a significant part of the trial.”

- [6] In the present case the hearing of the originating application took less than a day. The mere fact that the applicants were not successful on every issue is not a sufficient reason to depart from the usual principle that costs should follow the event. The restraint clauses contemplated different periods of restraint. There is no evidence that without the order of the Court the respondent was agreeable to a period of restraint beyond six months.<sup>3</sup>

- [7] The respondent submits however, that he had no choice but to defend the application as in its original form the application would have restricted the respondent from being able to practice as an accountant for 18 months or 12 months.<sup>4</sup> The orders made were substantially in accordance with the amended originating application.<sup>5</sup> The amended originating application sought restraint for a period of 18 months or alternatively 12 months. The applicants were therefore successful in obtaining both declaratory and injunctive relief in respect of the alternative 12 month period. Whilst the Court’s finding that a 12 month restraint was reasonable has the appearance of constituting the middle ground between the parties, a 12 month restraint is nevertheless consistent with the alternative relief sought by the applicants in the originating application.

- [8] The respondent further submits that his ability to earn an income has been significantly curtailed as a result of the orders made by the Court. The respondent submits that he will suffer hardship if an adverse costs order is made. Part of the consideration in making the orders was that the respondent, having been given the opportunity to consider the

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<sup>2</sup> Applicants’ submissions on costs, dated 16 July 2015, [18].

<sup>3</sup> Exhibit AKF-1 to the affidavit of Alanna Kate Fitzpatrick sworn 17 April 2015.

<sup>4</sup> Respondent’s submissions on costs dated 3 July 2015, [12].

<sup>5</sup> Applicants’ submissions on costs, dated 16 July 2015, [4], [5].

restraints prior to executing the relevant agreements, acknowledged that the restraints were reasonable as to duration.<sup>6</sup> I accept the submission of the applicants that the respondent's compliance with his legal obligations under the agreements is not a form of hardship.<sup>7</sup> It may also be accepted that the respondent's capacity to meet a costs order is irrelevant to the appropriateness of one being made. Nor is there any evidence before the Court as to the respondent's actual capacity to meet a costs order or that making one would cause him any hardship.

- [9] I therefore order that the respondent pay the applicants' costs of the proceeding to be assessed or otherwise agreed.

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<sup>6</sup> *BDO Group Holdings (Qld) Limited & Anor v Sully* [2015] QSC 166, [72](a).

<sup>7</sup> Applicants' submissions on costs, dated 16 July 2015, [11].