

John Holland Pty Ltd v Australian Securities & Investments Commission
[2010] NTSC 33

In the matter of: Free Enterprise (WA)
P/L (Deregistered) (ACN: 009 632 446)

PARTIES:

JOHN HOLLAND PTY LTD
(ACN 004 282 268)

v

AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION

TITLE OF COURT:

SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION:

SUPREME COURT OF THE
TERRITORY EXERCISING
TERRITORY JURISDICTION

FILE NO:

2 of 2010 (21000771)

DELIVERED:

25 June 2010

HEARING DATES:

1 April 2010

JUDGMENT OF:

KELLY J

CATCHWORDS:

REPRESENTATION:

Counsel:

Plaintiff:

N Christrup

Defendant:

Former Directors of Free
Enterprise (WA) Pty Ltd
(Deregistered):

G Clift

Solicitors:

Plaintiff: Minter Ellison

Defendant:

Former Directors of Free
Enterprise (WA) Pty Ltd
(Deregistered):

De Silva Hebron

Judgment category classification: C

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OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

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No. 2 of 2010 (21000771)

In the Matter of: Free Enterprise (WA)
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BETWEEN:

JOHN HOLLAND PTY LTD
(ACN 004 282 268)
Plaintiff

AND:

**AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION**
Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 25 June 2010)

- [1] John Holland Pty Ltd (“John Holland”) contracted with the Northern Territory to carry out building works at the Alice Springs Hospital. The Territory is suing John Holland for alleged defects in that work.
- [2] John Holland engaged a company then known as Project Plumbing Pty Ltd as a subcontractor to perform plumbing work associated with the building works.

- [3] Project Plumbing Pty Ltd performed part of the works under the subcontract and then, part way through the contract, sold the business of Project Plumbing to another company and changed its name to Free Enterprise Pty Ltd (“Free Enterprise”).
- [4] Although the purchaser performed the balance of the work under the subcontract, there was no novation of the subcontract and, in correspondence, John Holland made it clear that as it did not have a contract with the purchaser, payments would continue to be made to Free Enterprise.
- [5] Free Enterprise was deregistered on or about 14 October 2009 by Australian Securities and Investments Commission (“ASIC”) following an application lodged with ASIC by one of its directors, Lynette Bridger on 7 August 2009.
- [6] John Holland wishes to join Free Enterprise as a third party to the proceedings brought against John Holland by the Territory on the ground that part of the claim made against John Holland by the Territory relates to plumbing work for which Free Enterprise was responsible under the terms of the subcontract. John Holland claims that if the allegations of the Territory, in relation to certain plumbing works failing to comply with the head contract are made out then, *ipso facto*, Free Enterprise is in breach of the provisions of its subcontract with John Holland and John Holland is entitled to recover any loss proved by the Territory in relation to those works from Free Enterprise.

[7] As John Holland is unable to join Free Enterprise as a third party to the Territory's proceedings while it is deregistered, John Holland seeks an order directing ASIC to re-register Free Enterprise.

[8] Section 601AH(2) provides as follows:

- (2) The Court may make an order that ASIC reinstate the registration of a company if:
 - (a) an application for reinstatement is made to the Court by:
 - (i) a person aggrieved by the deregistration; or
 - (ii) a former liquidator of the company; and
 - (b) the Court is satisfied that it is just that the company's registration be reinstated.

[9] ASIC does not oppose the application. However, the former directors, John and Lynette Bridger have appeared and do oppose the application.

[10] John Holland claims to be an aggrieved person because without an order directing the re-registration of the company, it will be unable to pursue its claim in contract in third party proceedings against Free Enterprise. It is well established that this is sufficient to make a party aggrieved by deregistration for the purposes of giving it standing to apply to have the company re-registered.¹

[11] It remains to be determined whether it is just for the company's registration to be reinstated.

[12] In my opinion it is just that the company be restored to the register.

¹ *John Holland Pty Ltd v ASIC* [2010] NTSC 10 Mildren J at 11 and the cases cited therein.

- (a) The most important factor is that John Holland will not be able to pursue its damages claim if the company is not reinstated. There has been no suggestion that the claim is not *bona fide*. I do not know what the prospects of success of that action may be but there has been no suggestion by Free Enterprise that John Holland's claim is manifestly hopeless.
- (b) Free Enterprise was not in liquidation immediately prior to the deregistration so there is no need to ensure that a liquidator will be acting.
- (c) The deregistration followed an administrative process as opposed to an orderly winding up.
- (d) The former directors have known about the alleged defects in the company's works at least since the matter was raised in correspondence with the company in August 2003.
- (e) There is no evidence that the company is insolvent or was insolvent immediately before it was deregistered. The evidence is simply that at present it has no assets which one would expect to be the case with a deregistered company. The company sold its business and the directors have not adduced any evidence as to what happened to the proceeds of sale, other than an assertion in the affidavit of Lynette Bridger that all assets of the company were sold and the proceeds of sale together with all cash at hand were used to pay all outstanding

creditors with the result that at that time all assets held by the company in its own name were disposed of. It would be quite extraordinary if the total value of the company's assets exactly equalled the amount owing to creditors, and no details have been given of any shortfall or surplus.

- (f) The ex-director Lynette Bridger has deposed to the existence of two insurance policies and to her "understanding and belief" that those policies would not respond to the claim and that the company, if reinstated, would be uninsured in respect of the John Holland claims. The policies have not been exhibited and the basis of that "understanding and belief" has not been stated. There is no evidence on the basis of which I am able to determine one way or the other whether the company had insurance which would respond to the claim.

[13] Counsel for the directors submit that it would not be just to reinstate the company.

[14] The directors submit that the delay in bringing the third party proceedings has caused prejudice to the company and would make an order directing reinstatement unjust. Counsel for the directors pointed out that the principal proceedings were commenced by the Territory against John Holland in 2005, the statement of claim was served in March 2008, John Holland became aware of the deregistration of Free Enterprise in October 2009, and the

application for re-registration was filed on 7 January 2010. He says that the first contact between John Holland and Free Enterprise concerning the proposed third party proceeding was by letter dated 13 October 2009, one day before the company was deregistered and after the application for deregistration.

[15] The prejudice pointed to by counsel for the directors is the effluxion of approximately 10 years since the works were undertaken. However, whatever prejudice there may be to Free Enterprise as a result of the long period of time since the works were undertaken, is not really relevant to the present question of whether it is just to order re-registration of the company.

[16] The only delay relevant for that purpose is any delay between deregistration of the company and the application to re-register. There has been no substantial delay in bringing this application. Counsel for the directors conceded, properly, that if notice of the third party proceeding had been given in August 2009, before the application for deregistration of the company was made, so far as the third party proceedings are concerned, the company would have been in no better and no worse position than it will be now if an order is made for re-registration of the company. The only detriment that will have been suffered by the company as a result of this “delay” is the cost of the deregistration and re-registration process.

Moreover, although the proposed third party proceedings may only have been flagged in October 2009, correspondence between John Holland and Free Enterprise clearly put Free Enterprise on notice of claims in relation to

alleged defects in the subcontract works in August 2003, long before the company was deregistered.

[17] Counsel for the directors also submitted that the company will suffer prejudice because it has no cash with which to defend itself, the Bridgers (who automatically become directors of the company again) will not put any money into the company and will not carry out their duties as directors, and the company will be forced, as a shell without proper governance, to run a costly action. He submits that in the circumstances it would be unjust to reinstate the company.

[18] I reject this submission. The directors rely on *CGU Workers Compensation v Rockwell*² for the proposition that the unwillingness of directors to take an active part in the management of the company following reinstatement is a relevant consideration in determining whether or not it is just to order reinstatement of a company. However, *CGU v Rockwell* was a case where a workers compensation insurer was applying for winding up orders in conjunction with reinstatement, at least partly on the ground that it should be presumed that the directors and officers would be unwilling to resume their responsibilities.

[19] *CGU v Rockwell* is not authority for the proposition that directors can rely on their own proposed breaches of duty under the *Corporations Act* to resist re-registration of a company.

² (2006) 201 FLR 296 at 298 per Barrett J at para 9.

[20] Counsel for the directors submitted that any order for reinstatement should be made conditional upon the appointment of a liquidator to the company. I do not consider this appropriate in the absence of evidence that the company is insolvent. If the company is in fact insolvent, the directors can take the appropriate steps once the company is restored to the register.

[21] In the circumstances I am of the opinion that it would be just to direct ASIC to reinstate the company to the register. I will hear the parties as to the exact form of appropriate order.
