

*John Holland Pty Ltd v ASIC* [2010] NTSC 10

PARTIES: JOHN HOLLAND PTY LTD

v

AUSTRALIAN SECURITIES AND  
INVESTMENT COMMISSION

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
TERRITORY EXERCISING  
TERRITORY JURISDICTION

FILE NO: No 3 of 2010 (21001236)

DELIVERED: 25 March 2010

HEARING DATES: 25 March 2010

JUDGMENT OF: MILDREN J

**CATCHWORDS:**

CORPORATIONS – deregistration – reinstatement – whether applicant is aggrieved by deregistration – whether Court is satisfied it is just that company’s registration be reinstated – reinstatement sought for proceedings to recover monies – order conditional on payment of ASIC’s costs – section 601AH(2) *Corporations Act 2001* (NT)

*Corporations Act 2001* (NT), s 601AA(2), s 601AD, s 601AG, s 601AH(2)

*ACCC v ASIC* (2000) 174 ALR 688; *AMP General Insurance Limited v Victorian Workcover Authority* (2006) 15 VR 175; (2006) 60 ACSR 199; *Donmastry Pty Ltd v Albarran* (2004) 49 ACSR 745; *Pilarinos v Australian Securities and Investments Commission* (2006) 24 ACLC 775; applied

**REPRESENTATION:**

*Counsel:*

Plaintiff: N Christrup  
Defendant:

*Solicitors:*

Plaintiff: Minter Ellison  
Defendant:

Judgment category classification: B

Number of pages: 7

IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*John Holland Pty Ltd v ASIC* [2010] NTSC 10  
No. 3 of 2010 (21001236)

BETWEEN:

**JOHN HOLLAND PTY LTD**  
Plaintiff

AND:

**AUSTRALIAN SECURITIES AND  
INVESTMENT COMMISSION**  
Defendant

CORAM: MILDREN J

EX TEMPORE REASONS FOR JUDGMENT

(Delivered 25 March 2010)

- [1] This is an application by John Holland Pty Ltd for an order under s 601AH(2) of the *Corporations Act 2001* (NT) (the Act), that the defendant, Australian Securities and Investments Commission (ASIC), reinstate the registration of Stark Investments Pty Ltd.
- [2] 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.

[3] On the material before the Court, ASIC does not oppose the application if the following conditions are satisfied:

(a) The order sought for reinstatement is in terms of s 601AH(2) of the Act, requiring ASIC to reinstate the registration of the company;

(b) the applicant notifies the former officeholders of the company of the application;

(c) the Court order is lodged with ASIC, so that ASIC can reinstate the company; and

(d) the applicant pays ASIC's costs of \$434 upon lodgement of the Court order.

[4] The evidence before me is that the applicant is prepared to consent to those conditions. There is evidence that the former directors of the company, Peter Stark and Leonne Stark have been notified of this application. They, through their solicitors, have indicated that they have no opposition to the application.

[5] The plaintiff claims to be an aggrieved person for the following reasons. John Holland Pty Ltd is the first defendant in action 84 of 2005 in this Court, in which the plaintiff is the Northern Territory of Australia. In that

action, the plaintiff alleges that defective work being managed by the plaintiff was done in the redevelopment of the Alice Springs Hospital, located at 6 Gap Road, Alice Springs.

- [6] In or about November 1998, the Northern Territory and John Holland had entered into a contract for the management of redevelopment works at the hospital. John Holland was responsible to the Northern Territory under the head contract, for managing the planning, design, documentation and construction. John Holland engaged a number of subcontractors to execute different aspects of the works and entered into subcontracts with those subcontractors. As part of this process, in or about September 2000, John Holland entered into a subcontract with the company Stark Investments Pty Ltd.
- [7] In its statement of claim filed on 26 March 2008 in the proceedings brought by the Northern Territory, the Northern Territory alleges that John Holland failed to comply with a number of terms of the head contract. Relevant to this application were John Holland's obligations in respect of the supply and installation of walls and partitions.
- [8] John Holland has filed a defence in the principal proceedings and, in effect, in it has denied that the Territory is entitled to the relief sought. However, John Holland now seeks to join the company as a third party to the proceedings. A third party notice has, in fact, been drafted but not yet served. That is not possible, because Stark Investments Pty Ltd, which was

a registered corporation, has since become deregistered. The application to deregister was made on or about 8 December 2006 for the voluntary deregistration of the company pursuant to s 601AA(2) of the Act.

[9] On 13 February 2007, ASIC published by a notice in the gazette, that Stark Investments Pty Ltd would be deregistered when two months had passed from the publication. On or about 13 April 2007, Stark was deregistered by ASIC.

[10] The claim which John Holland seeks to pursue in the third party proceedings is a claim in negligence and/or for damages for breach of contract. Unless and until the company is reinstated, that claim cannot be brought.<sup>1</sup>

[11] In his written submissions, Mr Chrstrup for the applicant, submits that the words, “person aggrieved” in s 601AH(2) are words of wide import and should not be subjected to a restrictive interpretation. It has been held that they include a person who is aggrieved in a way which is genuine and real, and not merely theoretical, petty or fanciful, and it includes, but is not confined to, a person who will or may well suffer financial loss by the fact of the company being struck off.<sup>2</sup> Where the pursuit of a claim for damages is impossible, that of itself is usually sufficient to make a plaintiff a person aggrieved by deregistration.<sup>3</sup>

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<sup>1</sup> see s 601AD of the Act.

<sup>2</sup> See *Pilarinos v Australian Securities and Investments Commission* (2006) 24 ACLC 775 at [95] and [99].

<sup>3</sup> See *Donmastry Pty Ltd v Albarran* (2004) 49 ACSR 745 at [4].

[12] I note that in the affidavit of Mr Cureton, sworn 12 January 2010, there has been various correspondence with parties who are solicitors for various insurers of the former company. Those insurers have not indicated whether they are prepared to grant indemnity to the company or not. Therefore, any argument that the applicant might otherwise be able to pursue, rights of recovery under s 601AG of the Act, does not arise. I am satisfied, in the circumstances, that John Holland Pty Ltd is an “aggrieved person” within the meaning of the Act.

[13] The next question is whether it is just for the company to be reinstated. As submitted in the written submissions prepared by Mr Christrup, the decision to order reinstatement is a discretionary one, requiring the Court to consider and weigh, fairly and rationally, all of the relevant circumstances.<sup>4</sup>

[14] The applicant points to the following factors in favour of reinstatement:

1. It submits that it will not be able to pursue its claim for damages unless the company is reinstated.
2. Neither ASIC nor the former directors, who are the only parties who might conceivably object and whose interests would otherwise have to be weighed against any prejudice to the plaintiff, oppose the order.

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<sup>4</sup> See *AMP General Insurance Limited v Victorian Workcover Authority* (2006) 15 VR 175 at [27]; (2006) 60 ACSR 199 at [27].

3. The applicant claims that it has reasonable prospects of success, given the terms of the contract between John Holland Pty Ltd and the company.

[15] I do not think that I am in a position to make any judgment about that.

However, that is what the applicant contends.

1. There is no evidence that the company is insolvent, let alone hopelessly insolvent.
2. The company was not in liquidation immediately prior to the deregistration and so there is no need to ensure that a liquidator will be acting.
3. That the deregistration followed an administrative process, as opposed to an orderly winding up.

[16] I also accept the submission of Mr Christrup that the possibility that the company may not be able to pay any judgment ultimately obtained does not render the reinstatement futile, as that is not a matter to be determined prematurely on the application.<sup>5</sup>

[17] In this case, there is a further reason which has not even been referred to by Mr Christrup, but I would have thought it would have been high on his list of priorities, namely, that there may be an insurer who would be liable to indemnify the company against any claim which John Holland Pty Ltd has,

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<sup>5</sup> See *ACCC v ASIC* (2000) 174 ALR 688.

and that that may not be able to be ascertained except through the process of re-registration.

[18] In all the circumstances, I consider that it is just to order the Australian Securities and Investments Commission to reinstate the company. There will, therefore, be an order that the Australian Securities and Investments Commission reinstate the registration of Stark Investments Pty Ltd (ACN 009603972) upon the applicant lodging this order with the Australian Securities and Investments Commission and paying ASIC's costs of \$434 upon lodgement of the Court's order. I make no order as to costs.

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