

Northern Territory of Australia v John Holland Pty Ltd & Ors
[2012] NTSC 92

PARTIES: THE NORTHERN TERRITORY OF AUSTRALIA

v

JOHN HOLLAND PTY LTD
(FORMERLY KNOWN AS JOHN HOLLAND CONSTRUCTION & ENGINEERING PTY LTD) (ACN 004 282 268) & ORS

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION

FILE NO: 84 of 2005 (20516282)

DELIVERED: 22 NOVEMBER 2012

HEARING DATES: 1 NOVEMBER 2012

JUDGMENT OF: KELLY J

REPRESENTATION:

Counsel:

Plaintiff: B Ilkovski
Defendant: J Bond SC

Solicitors:

Plaintiff: Clayton Utz
Defendant: Minter Ellison

Judgment category classification: C
Judgment ID Number: KEL12025
Number of pages: 11

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

Northern Territory of Australia v John Holland Pty Ltd & Ors
[2012] NTSC 92
No. 84 of 2005 (20516282)

BETWEEN:

**THE NORTHERN TERRITORY OF
AUSTRALIA**
Plaintiff

AND:

**JOHN HOLLAND PTY LTD
(FORMERLY KNOWN AS JOHN
HOLLAND CONSTRUCTION &
ENGINEERING PTY LTD)
(ACN 004 282 268)**
Defendant

AND:

**MEDICAL GAS SERVICES PTY LTD
(IN LIQUIDATION) (ACN 092 020 132)**
First Third Party

AND:

**TRAFALGAR BUILDING PROJECTS
PTY LTD (FORMERLY KNOWN AS
WORMALD BUILDING SERVICES)
(ACN 004 924 252)**
Second Third Party

AND:

**CONDITION AIR PTY LTD
(ACN 070 157 998)**
Third Third Party

AND:

**CHUBB FIRE SAFETY LIMITED
(FORMERLY KNOWN AS FIRE
FIGHTING ENTERPRISES)
(ACN 000 067 541)**

Fifth Third Party

AND:

**GS (NT) PTY LTD (FORMERLY
KNOWN AS GODFREY SPOWERS
(NT) PTY LTD) (ACN 069 699 878)**

Sixth Third Party

AND:

**STARK INVESTMENTS PTY LTD
(ACN 009 603 972)**

Seventh Third Party

AND:

GE FRANKONIA REINSURANCE LTD

Eighth Third Party

AND:

**WUERTTEMBERGISCHE
VERSICHERUNG AG**

Ninth Third Party

AND:

**MITSUI SUMITOMO INSURANCE
UNDERWRITING AT LLOYD'S
LIMITED ON BEHALF OF THE
UNDERWRITING MEMBERS OF
SYNDICATE 3210 AT LLOYD'S**

Tenth Third Party

AND:

**ARGO MANAGING AGENCY
LIMITED FORMERLY KNOWN AS
HERITAGE MANAGING AGENCY
LIMITED ON BEHALF OF THE**

**UNDERWRITING MEMBERS OF
SYNDICATE 3245 AT LLOYD'S**
Eleventh Third Party

AND:

**HISCOX SYNDICATES LIMITED ON
BEHALF OF THE UNDERWRITING
MEMBERS OF SYNDICATE 33 AT
LLOYD'S**
Twelfth Third Party

AND:

**CHUBB INSURANCE COMPANY OF
EUROPE**
Thirteenth Third Party

AND:

**ACE EUROPEAN GROUP LIMITED
FORMERLY ACE-INA UK LTD**
Fourteenth Third Party

AND:

**SR INTERNATIONAL BUSINESS
INSURANCE COMPANY LTD**
Fifteenth Third Party

AND:

**LIBERTY INSURANCE MUTUAL
INSURANCE COMPANY**
Sixteenth Third Party

AND:

**CATLIN UNDERWRITING AGENCIES
LTD ON BEHALF OF THE
UNDERWRITING MEMBERS OF
SYNDICATE 2003 LLOYD'S**
Seventeenth Third Party

AND:

**MARKEL INTERNATIONAL
INSURANCE COMPANY**
Eighteenth Third Party

AND:

**HOLMES FIRE & SAFETY LTD
(ACN 080 314 549)**
First Fourth Party

AND:

**ACER FORSTER PTY LTD (FOMERLY
KNOWN AS ACER FORSTER ALICE
SPRINGS) (ACN 079 017 020)**
Second Fourth Party

AND:

**GRANT O'CALLAGHAN PTY LTD
(ACN 088 146 543)**
Third Fourth Party

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 22 November 2012)

- [1] The defendant has requested further and better particulars of paragraphs 881 to 884 of the amended statement of claim.
- [2] Paragraph 881 pleads that the breaches pleaded elsewhere in the amended statement of claim were identified by one of three alternative methods:
- (a) non-invasive inspection;
 - (b) invasive examinations and testing; or

(c) during the performance of construction works at Clinical Management Ward, Day Procedure Unit and Paediatrics Ward.

These three methods are collectively defined in paragraph 881 as “Past Inspections and Examinations”.

[3] Paragraph 882 pleads that the Northern Territory engaged consultants to do four things:

- (a) perform the Past Inspections and Examinations;
- (b) determine the extent of defects in the nominated works;
- (c) propose solutions and methods to address or rectify those defects; and
- (d) prepare scopes of work and tenders “to address the breaches of [the nominated design and construction works] or to rectify the defects in [the nominated works]”.

[4] In paragraph 892 the Northern Territory claims as loss and damage (inter alia) the costs of the Past Inspections and Examinations¹ but not, so far as I can tell, the cost of the other work performed by consultants as pleaded in paragraph 882(b), (c) and (d). I was informed from the bar table, although it does not appear on the face of the pleading, that particulars of the amounts claimed by way of damages pursuant to paragraph 892(a) (that is for the cost of the Past Inspections and Examinations) are contained in Part 23.10 of Schedule 23, but that Part 23.10 also contains amounts alleged to have been

¹ Paragraph 892(a)

paid to consultants for the work done by those consultants set out in paragraphs 882(b), (c) and (d) none of which is claimed by way of damages.

[5] Part 23.10 of Schedule 23 does not distinguish between amounts paid to consultants for the Past Inspections and Examinations (claimed) and work done by consultants as described in sub-paragraphs 882(b), (c) and (d) (not claimed). This is all very unsatisfactory.

[6] The defendant has sought the following particulars of paragraph 881.

“2. In respect of each breach referred to in [881] of the Amended Statement of Claim, provide full particulars of:

(a) Whether the breach was identified by:

(i) non-invasive inspection;

(ii) invasive examination and testing; or

(iii) during the performance of construction works at:

(A) Clinical Management Ward;

(B) Day Procedure Unit; and

(C) Paediatrics Ward; and

(b) The manner in which each defect was identified.”

[7] I do not think it appropriate to order the plaintiff to provide particulars in those precise terms. It does not seem to be a material part of the case whether the investigations performed to discover a particular defect were

invasive or non-invasive or were part of construction works. However, it does seem to me that the plaintiff should provide proper particulars of the Past Inspections and Examinations for which it claims damages. I direct that the plaintiff provide the following further and better particulars of paragraphs 881 and 892(a).

[8] In relation to each of the Past Inspections and Examinations referred to in paragraph 881 for which the plaintiff claims damages pursuant to paragraph 892(a) state:

- (1) the nature of the inspection performed;
- (2) who performed that inspection or those inspections;
- (3) the cost of those inspections (by reference to the applicable items in Schedule 23); and
- (4) the defect or defects revealed by that inspection or those inspections (by reference to the applicable paragraph or paragraphs in the Amended Statement of Claim).

[9] It seems to me also that the plaintiff ought to further amend the statement of claim either to claim the cost of the work performed by consultants set out in paragraph 882(b) to (d) or to delete from Part 23.10 of Schedule 23 the costs that are referable to those works.

[10] The defendant has requested the following particulars of paragraph 882 of the amended statement of claim:

“3. In respect of [882] of the Amended Statement of Claim:

(a) provide full particulars of:

(i) each consultant allegedly engaged;

(ii) for each consultant, the terms and scope (including in respect of the matters set out in [882(a) to (d)]) of their respective engagement; and

(iii) the works and services which each consultant allegedly carried out in respect of [882(a) to (d)];

(b) provide full particulars of the proposed solutions and methods of address to rectify the alleged defects in the Fire Engineering Design and other listed works pleaded in [882(c)] of the Amended Statement of Claim;

(c) confirm, by appropriate reference to the pleading in the Amended Statement of Claim, the alleged defects in the listed Fire Engineering Design and other works pleaded in [882(c)] of the Amended Statement of Claim; and

(d) provide full particulars of the scopes of work or tenders to address the alleged breaches of the listed Fire Engineering Design and other works pleaded in [882(d)] of the Amended Statement of Claim.”

[11] Given that the amended statement of claim as it presently stands does not claim the cost of engaging consultants to perform the work described in subparagraphs 882(b), (c) and (d) and full particulars of the Past Inspections and Examinations have been ordered to be provided in connection with paragraph 881, it does not seem to me that the plaintiff ought to be ordered to provide these particulars. However, if the plaintiff amends the statement of claim to claim those costs as damages, in my view it would be appropriate

for the plaintiff to provide the requested particulars, other than those in request 3(a)(ii). It seems to me that that information is more properly categorised as evidence rather than particulars and in any case would be better provided in the form of discovery of the letters of engagement.

[12] The plaintiff has requested the following further and better particulars of paragraph 883 of the amended statement of claim.

“4. In respect of [883] of the Amended Statement of Claim, provide full particulars of:

- (a) the non-invasive inspections carried out;
- (b) the invasive examinations and testing carried out;
- (c) the non-invasive inspections that it is alleged have not been possible to carry out;
- (d) the invasive examinations and testing that it is alleged have not been possible to carry out; and
- (e) the operational requirements of the Hospital that have caused the lack of access to all areas of the Hospital (reasonably identifying those areas of the Hospital) such that the non-invasive inspections and the invasive examinations and testing have not been possible to carry out.”

[13] I do not think the plaintiff should be required to provide those particulars.

In relation to the requests in paragraphs (a) and (b) it does not seem to me to be a proper request for particulars of a pleading that inspections could not be carried out, to ask what inspections have been carried out. Further, I do not think it appropriate to require the plaintiff to provide particulars of a

negative. If the plaintiff is to establish at trial its entitlement to damages for the Future Inspections, Examinations and Works then it will be incumbent upon it to establish that, because of the operational requirements of the hospital, it has so far been unable to ascertain the full extent of the alleged breaches. This will be a matter for evidence.

[14] The defendant has requested the following further and better particulars of paragraph 884 of the amended statement of claim.

“5. In respect of [884(b)] of the Amended Statement of Claim:

(a) provide full particulars of the identification of each alleged non-compliance:

(i) by non-invasive inspection;

(ii) by invasive examination and testing; and

(iii) during the performance of construction works at Clinical Management Ward, Day Procedure Unit and Paediatrics Unit.

6. In respect of [884(d)] of the Amended Statement of Claim provide full particulars of:

(i) the construction logic; and

(ii) construction method,

in respect of each of the types of works listed.”

[15] I do not think the plaintiff should be required to provide those particulars.

The substance of paragraph 884 of the amended statement of claim is simply

a pleading that there is likely to be the same (or similar) number and quality of defects in the areas of the hospital that have so far not been examined as in the areas that have been examined and which are the subject of the pleading in the earlier paragraphs of the amended statement of claim. In my view this pleading does not require further particularisation.
