SUPREME COURT OF QUEENSLAND

CITATION:	*George & Ors v Holloway Nominees P/L* [2008] QCA 281
PARTIES:	**HOLLOWAY NOMINEES (QLD) PTY LTD** ACN 056 453 368 (plaintiff/respondent) **v** **IAN GEORGE** (first defendant/first appellant) **BONNYVIEW PTY LTD** ACN 087 181 575 (second defendant/second appellant) **DONNYVIEW PTY LTD** ACN 087 181 557 (third defendant/third appellant) **RAVENSVIEW PTY LTD** ACN 087 181 548 (fourth defendant/fourth appellant)
FILE NO/S:	Appeal No 3973 of 2008 SC No 7703 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 September 2008
DELIVERED AT:	Brisbane
HEARING DATE:	5 September 2008
JUDGES:	Mackenzie AJA, Cullinane and Douglas JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – OFFER AND ACCEPTANCE – MATTERS NOT GIVING RISE TO BINDING CONTRACT – STATEMENTS OF INTENTION, NEGOTIATIONS AND INVITATIONS TO TREAT – where the learned trial judge found that no oral joint venture agreement had been concluded between the first appellant and the respondent – where the learned trial judge referred to emails between the parties, but held they evidenced no more than discussion of the *possibility* of a joint venture – where the appellant argued that the emails constituted a notification of the joint venture – whether the learned trial judge erred in finding no joint venture existed TRADE AND COMMERCE – TRADE PRACTICES ACT

(1974) CTH AND RELATED LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – FALSE REPRESENTATIONS GENERALLY – where the learned trial judge found that the first appellant made representations to the effect that, if financial assistance was provided by the respondent, the money would be returned within 60 days – whether the learned trial judge made a finding concerning a representation not pleaded by the respondent – whether this finding was against the weight of the evidence

TRADE AND COMMERCE – TRADE PRACTICES ACT (1974) CTH AND RELATED LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – CHARACTER OR ATTRIBUTES OF CONDUCT OR REPRESENTATION – RELIANCE, INDUCEMENT AND CAUSATION – where the learned trial judge found that the respondent relied on the representations in causing an advance of money to be made to the appellants – where it was argued that the judgment did not refer to the evidence upon which the finding of reliance was made – where it was argued that the learned trial judge failed to specify the extent of reliance – whether the learned trial judge erred in finding reliance

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – PARTIES – where the learned trial judge found that the respondent's only source of funds was the Holloway Family Co Pty Ltd as trustee for the Holloway Superannuation Fund – where the learned trial judge nevertheless found that the respondent was the proper plaintiff in the proceeding – whether these findings were inconsistent – whether the learned trial judge erred in finding that the respondent was the proper plaintiff

Trade Practices Act 1974 (Cth), s 75B(1)(a), s 75B(1)(c), s 82

Holloway Nominees (Q) P/L v George & Ors [2008] QSC 63, affirmed

COUNSEL: R A Perry SC for the appellant
R D Cooper SC, with C L Francis, for the respondent

SOLICITORS: Lynch & Co for the appellant
Quinn and Scattini for the respondent

[1] **MACKENZIE AJA**: This is an appeal against a judgment in the sum of $247,482.54 and interest against each of the appellants in an action in the Trial Division. While there are a number of grounds of appeal, the one upon which the focus of oral argument was placed was whether there was reliance on

representations, upon which a finding that the first appellant was liable to the respondent for damages under s 82 of the *Trade Practices Act* 1974 (Cth) was dependent. In other respects, the written submissions were relied on. The grounds will be set out in greater detail when each is discussed.

[2] The respondent, of which Dr and Mrs Holloway were the directors, was trustee of the Holloway Property Trust, a property investment trust. There was also a company Holloway Family Co Pty Ltd, of which the Holloways were also directors and which was the trustee of the Holloway Superannuation Trust. They were also two of the directors along with Mr Colwell, a solicitor, of Pacific Vista Pty Ltd ("Pacific Vista"). The first appellant was the sole director of the second, third, and fourth appellants ("the corporate appellants").

[3] In 1993, the Holloways obtained an interest in Pacific Vista which was developing a residential subdivision at Bargara. In 1994 Mr Colwell had also invested in and become a director of Pacific Vista. An experienced marketing person left the company shortly after the Holloways became involved and within a couple of years or so, the company was in financial difficulties because of a low level of sales.

[4] In 1997, Mr Colwell introduced the Holloways to the first appellant as a person who could assist in the management of Pacific Vista. In October 1997, Pacific Vista entered into an agreement with another of the first appellant's companies for project management of Pacific Vista.

[5] Despite the first appellant's efforts, the development still failed to prosper and the Holloways sold substantial assets to provide funds for Pacific Vista. In and about 2000, the first appellant was also engaged, through the corporate appellants, in residential and commercial developments including one at Cashmere. Those developments were also not prospering and further financial assistance was needed.

[6] Consequently, there was a series of discussions, meetings and email exchanges between the Holloways, Colwell and the first appellant concerning a variety of projects in 2001. This resulted in an agreement, the nature of which was in issue at trial, pursuant to which moneys derived from the respondent were paid to Suncorp Metway accounts. One offset bond was lodged with the local authority in connection with the Cashmere development and the other was used to make payments towards completion of the stages of the Cashmere project then being completed. The judgment sum in the action represents the amount unrecovered under the agreement.

[7] At trial the plaintiff claimed entitlement to recover the moneys:

(a) Against the second, third, and fourth appellants – as moneys had and received;

(b) Against all appellants – as damages/compensation for misleading and deceptive conduct pursuant to the *Trade Practices Act* 1974 (Cth);

(c) Against the first appellant – as damages for negligence;

(d) Against the second, third, and fourth appellants – as damages for negligent misstatement; and

(e) Against the first, second, and third appellants – as damages for breach of contract.

Ground 1

[8] This ground is that the learned trial judge erred in finding that no oral joint venture agreement was concluded between the parties. The appellants had pleaded in their defence that, following meetings in February, March and April 2001, an oral joint venture of wide scope, involving three separate projects, was entered into. That was denied by the appellant, whose case essentially was that the transaction was in the nature of a loan. The main focus in this regard was on events in April 2001, of which more will be said later.

[9] The trial judge accepted that the range of projects had been raised in discussions but did not accept that a concluded joint venture had been entered into. The learned trial judge said it had been denied by the directors of the respondent and the first appellant's evidence had been equivocal on the point. He referred to emails in May 2001 between the first appellant and Dr Holloway, saying they were evidence that the possibility of a joint venture was still being discussed then. He also found that the first appellant's conduct, when the Holloways began to pursue him for repayment of the moneys advanced, was inconsistent with the existence of the joint venture.

[10] The appellants took issue with the learned trial judge's interpretation of the May 2001 emails. It was submitted that they should be treated as evidence of notification by Dr Holloway to the applicant that he was not going to complete the joint venture and that the first appellant's response should be seen as an attempt by him to suggest a variation. There is also a complaint that the learned trial judge's reasons were silent as to what constituted the evidence that was equivocal; on the contrary, it was submitted, the first appellant's evidence was cogent evidence of the existence of the joint venture.

[11] It must be said that if the communication from Dr Holloway in May 2001 is to be construed as the first notice given by him that he intended to withdraw from an existing joint venture, the first respondent's response is an extraordinarily relaxed one. Nor does it assert there were any joint ventures. The passage of the first appellant's evidence which is said by the appellants to be cogent evidence of the existence of the joint venture does not have that character. Rather, it leads to the conclusion that the learned judge was putting its effect at its highest in saying it was equivocal on the point. The evidence is more concerned with describing discussions than asserting the formation of a concluded agreement.

[12] The learned trial judge's observation that the first appellant's conduct, when Dr and Mrs Holloway began to pursue him for the money, was inconsistent with the existence of the joint venture does not particularise, in that paragraph of his reasons, such conduct. However, there are other passages where, after the bank withdrew some of the money to cover debts owed to it by one or more of the appellants, Dr Holloway contacted the first appellant and was told that it was "the bank's fault" and he would "get onto it". On 26 April 2002, the first appellant wrote to Dr Holloway on the corporate defendants' letterhead and offered to pay $60,000 cash as at the date of the letter. The explanation given in the letter for the difficulties was described by the learned trial judge as "implausible". It is likely that those findings were what the learned sentencing judge had in mind when he

spoke of the first appellant's conduct being inconsistent with the existence of a joint venture.

[13] I am satisfied that there is no substance in this ground.

Ground 2

[14] This ground is concerned with whether the learned trial judge's finding that the appellants made representations to the effect that, if financial assistance was provided by the plaintiff, the Cashmere development would be completed in 60 days, and the moneys returned within 60 days or upon completion of the Cashmere development, was against the weight of evidence. The learned trial judge had found that, irrespective of whether the differentiation between the times for repayment between two classes of money had been made before the money was advanced, he was satisfied that the first appellant went out of his way to assure the Holloways that the whole of the money, however described, would be returned no later than 60 days after it was advanced. He said that the first appellant's evidence on the point had shifted; in one passage of his evidence he said he did not recall saying that the corporate appellants needed financial assistance in order to enable them to complete the Cashmere development within 60 days and shortly afterwards he had denied doing so.

[15] In similar vein, the learned trial judge also referred to an answer the first appellant gave that, in February 2001, he had told Dr Holloway that the Cashmere land was almost ready to be submitted to Council for "linen plan, sealing and so forth" and was a month or a couple of months away from that happening. He also noted that Dr Holloway's evidence that the first appellant had told about the need for money to complete the Cashmere development had not been denied by the first appellant.

[16] There had been a submission by the appellants that there was a disparity of such a degree between the respondent's pleaded allegations of the statements made by the first appellant and the evidence given by the respondent's witnesses in that regard that their evidence should not be accepted. The learned trial judge said that such a disparity was always an issue to be taken into account with regard to credibility but it was only one issue among many in this particular case. He was not persuaded that the disparity was such that he should not accept the evidence of the Holloways on the representations. The evidence of the respondent's witnesses, contrasted with the nature of the first appellant's evidence, satisfied him that the representations had been made. Those were findings open to him on the evidence and no basis has been demonstrated for setting them aside.

[17] It was also submitted that there was an inconsistency arising from the passage in which he said there was a lack of clarity about whether there had been a specific delineation of the different times for repayment of the two categories of moneys before the time the money was advanced. It was said that that was a finding that the evidence was insufficient to establish particular pleaded facts, expressed as separate subparagraphs in the pleading, the substance of which was that the Holloways had been told that the Offset Amount would be returned within 60 days, the loan amount would be returned on completion of the Cashmere development, and the Cashmere development would be completed in 60 days. It seems self-evident from this that the representation was, in substance, alleged to be that all moneys would be returned within 60 days. Therefore, the finding that the first appellant went out of his way to assure the Holloways that the whole of the money, however described,

would be returned by no later than 60 days after it was advanced, said to be inconsistent with the finding about lack of delineation between the two categories of money, is consistent in substance with the allegation.

[18] It was submitted that the learned trial judge had made a finding concerning a representation not pleaded by the respondent at trial. The substance of the finding is that there was a representation that the money would be returned at a time no later than 60 days. Even if the representation found is not precisely in the words pleaded, it is the substance of the evidence that is critical. There is nothing in the complaint.

[19] The finding that the first appellant's evidence had shifted with regard to whether he had discussed the need of the corporate appellants for financial assistance to complete the Cashmere development within 60 days was challenged. It was submitted that when the passages were examined, it could be seen that the first appellant did recall discussing the issue of "needing cash for guarantees" with Dr Holloway. It is unlikely that the first appellant, in answering the second question in the negative, was making a response in that form, without further elaboration, because he perceived that there were three elements in the question, viz, the names of the three corporate appellants, a need for financial assistance, and a purposive element, to complete the project within 60 days. In the circumstances, notwithstanding the appellant's submission, when the two passages are read together they are capable of supporting the finding made by the learned trial judge. No cogent basis why that finding should not stand has been advanced.

[20] It was also submitted that the reflection on the first appellant's credibility inherent in the notion that his memory had improved over an adjournment between the question being asked for the first time and its being asked in the same form again after the break was inconsistent with a finding made earlier in the judgment. The finding that is said to be inconsistent is to the effect that the learned trial judge found that the issue of needing some financial assistance to complete the Cashmere development within 60 days had been mentioned by the first appellant in February 2001. However, that was not the point with which the learned trial judge was concerned in making the comments that he did. It was the fact, that in one answer, he said that the first appellant did not recall mentioning the need for financial assistance to complete the Cashmere development within 60 days but did discuss the issue of needing cash for guarantees. In the second he denied the same assertion. There was a basis upon which the finding could be made, and no demonstrated reason to set it aside.

[21] It was also submitted that the learned trial judge took into account an irrelevant consideration, that is to say, about the lodgement of the linen plan, because no such representation was pleaded by the respondent. The point being made by the first appellant in giving that answer was that he had told Dr Holloway that the Cashmere land was within a month or a couple of months away from a state in which, so far as Council requirements were concerned, it would be close to completion. The first appellant chose to introduce that information and, as the respondent points out, a matter of detail such as that complained about would not ordinarily be properly pleaded in any event.

[22] There is nothing in ground 2.

Ground 3

[23] Ground 3 is concerned with the proposition that the learned trial judge erred in law in finding that the respondent was the proper plaintiff. It was submitted that that finding was inconsistent with an earlier finding that the only source of funds available for use was the Holloway Family Co Pty Ltd as trustee of the Holloway Superannuation Fund. Any funds advanced were beneficially owned by the trustee and the trustee retained beneficial ownership of the moneys. The trustee was the only person able to authorise the disbursement of the moneys to Suncorp. Before the money was disbursed, the Holloways took an accountant's advice and there were minutes of meetings of both the respondent and the trustee in which it was resolved to lend the moneys to the respondent for the purpose of depositing them in an account in the name of the Holloway Nominees for the purposes of the appellants.

[24] The corresponding meeting of the respondent shows that the proposal outlined in the meeting of the trustee company was agreed to. The cheque butt shows that it was recorded as being paid to the solicitor's trust account on account of the respondent. The genuineness of the company meetings was amply established. The appellant's argument appears to rest on the proposition that the moneys, despite the structure of the transaction, were a debt owed to the superannuation trustee, not the respondent. The minutes show otherwise. There is no substance in the point.

Ground 4

[25] This ground is concerned with an argument that the learned trial judge's finding that the whole of the moneys were to be repaid within 60 days was against the weight of evidence. For similar reasons to those discussed in relation to ground 2 there is no substance in this ground.

Ground 5

[26] This ground is concerned with an argument that the learned trial judge erred in law in finding that the action in debt was available to the plaintiff. For the reasons discussed with regard to ground 3, the argument, insofar as it is based on the proposition that the moneys were not advanced by the respondent, has no substance. There is an alternative argument that the learned trial judge erred in finding that a document prepared by the first appellant and executed on behalf of the respondent constituted a direction by the first appellant acting on behalf of the other appellants to pay the moneys for the use of the corporate appellants. The learned trial judge found that the document had been prepared by the first appellant. It was done to evidence how he required the moneys advanced by the respondent to be disbursed. He knew that it would lead to moneys being disbursed by the solicitor from the trust account for the benefit of the appellants. There is no substance in the point.

[27] Another alternative argument was that the learned trial judge erred in characterising the deposit of the moneys in the accounts at Suncorp as moneys advanced to the corporate appellants. It was submitted that no evidence was adduced showing that any moneys were ever paid by the respondent or by the trustee to any of the corporate appellants. As the respondent submits, the moneys were clearly advanced by the respondent for the use and benefit of the appellants for the purposes of the Cashmere land. Moneys were withdrawn from the account by Suncorp for the use and benefit of the appellants in connection with the Cashmere land. There is also, in addition to the document prepared by the first appellant to which reference has already been made, a hand written document signed on 7 January 2003 containing a

statement "that on or about April 2001" the respondent and the three corporate appellants entered into an arrangement whereby the respondent made available to them the sum of money deposited at Suncorp. This ground fails.

Ground 6

[28] This is the ground argued in detail. It is concerned with an alleged error in law in finding that the Holloways relied on the representations (at least in part) in causing the advance of moneys to be made. It was submitted that there was no express reference to the evidence upon which the learned trial judge relied in finding reliance on the part of the Holloways. Nor did he specify to what extent the Holloways were found to have relied on the representations. There is also an issue raised as to whether any representation made after 14 April 2001, the date of the meetings where the respondent and the trustee authorised the transaction, could be the basis of reliance.

[29] The argument was based on evidence from Dr Holloway that they had decided to advance the money on the day they held the meetings of the respondent and the trustee, 14 April 2001. On the other hand, Mrs Holloway attributed a more provisional character to the contents of the minutes, saying that they would go ahead with it if their accountant could reassure them that it was totally safe. There is no evidence that the contents of the minutes of the meetings were made known to the first respondent. There is evidence that in the week after the meetings were held, the first appellant clearly recognised that it was necessary for the deal to proceed and that Mrs Holloway be persuaded that it should proceed. There is ample evidence that, notwithstanding that the resolutions were passed by the respective companies, no final decision had been made to proceed with the transaction until Mrs Holloway had her concerns about the transaction allayed.

[30] There was a subsequent meeting, which the learned trial judge found to have occurred on 20 April 2001, at which there was a discussion involving Mrs Holloway. The substantial issues upon which she acquired reassurance were that the money would be safe, that no one else could access it and that it would be returned within two months. It was at that meeting that she received what she thought was sufficient assurance from the first appellant and at the end of the discussion, a cheque that had been taken to the meeting unsigned was signed and given to the solicitor who processed it through his trust account. The learned trial judge accepted evidence from the Holloways and Mr Colwell, over the first appellant's denial, that the first appellant had brought to the meeting a document setting out the conversations they had had which had been signed by the participants at the meeting. For reasons that are unclear, the document could not be photocopied. A copy was never sent to the Holloways, and it was never disclosed. This was credit-based fact finding and no basis upon which it might be set aside was advanced.

[31] The learned trial judge made a finding that, notwithstanding that the minutes disclosed that the Directors had agreed to the proposals on 14 April 2001, it was clear that there had been no finalisation of the transaction at that time. There was ample evidence upon which the learned trial judge could make a finding of reliance. This ground is therefore not made out.

Ground 7

[32] This ground is that, in consequence of the matters referred to in grounds 1 to 6, the learned trial judge erred in law in finding the first appellant was liable to the respondent for damages under s 82 of the *Trade Practices Act* 1974 (Cth). The learned trial judge found that the first appellant's behaviour fell within s 75B(1)(a) and (c). His conduct aided in the making of the representations and he was directly knowingly concerned in the making of the contravening representation; he was source of them. He effectively was the corporate appellants, and their conduct was completely subject to his control. He then went on to find that he was liable under s 82 for damages. The only issue raised was that, unless reliance on the part of the respondent was established, there could be no accessorial liability found against the first appellant. For the reasons already given, reliance was established and the foundation of this ground falls away.

Notice of Contention

[33] There was a notice of contention to the effect that the judgment could be upheld on the ground that the first appellant had admitted, on his own and the corporate appellants' behalf, that they were liable to repay the debt to the respondent. Since it was conceded in the respondent's written and oral submissions that the first respondent could not have been liable personally to repay the debt, the issue was not pursued against the corporate appellants. It need be considered no further in the circumstances.

Order

[34] I would order that the appeal be dismissed with costs.

[35] **CULLINANE J:** I have read the draft reasons for judgment of Mackenzie AJA in this matter. I agree with those reasons and the order he proposes.

[36] **DOUGLAS J:** I also agree with the reasons for judgment of Mackenzie AJA and the order he proposes.