IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S7 of 2015

B E T W E E N:

GRANT TOMLINSON
Appellant

-and-

RAMSEY FOOD PROCESSING PTY LIMITED
Respondent

APPELLANT'S REPLY

Part I:

1. This reply is in a form suitable for publication on the Internet.

Part II:

Correction

2. Para [17] of the appellant's submissions should be deleted.

As to the respondent's alleged facts

3. The facts as asserted by the respondent in its submissions at paragraphs 7, 8, 12, 13, 14, 16, 20 and 22 require some comment and/or qualification.
4. The scope of the Federal Court proceedings was, at least in part, to enforce penalties. The pleadings, although available to the respondent, were not tendered (agreed fact and referenced in transcript page 173 omitted in error from the Appeal Book).
5. The allegation in paragraph 8 that the appellant by swearing the affidavit that was prepared, filed and read by the Fair Work Ombudsman gave the appellant insight into the Ombudsman's purpose is a *non sequitur*. The affidavit has none of the attributes that the respondent submits nor does the affidavit have the character suggested by Emmett JA of authorising the Federal Court proceedings. A person does not "authorise" proceedings by being a witness. The affidavit appears at AB 284 – 287. It speaks for itself.
6. The respondent's allegations *simpliciter* of certain persons being employed at "the abattoir" is capable of being misleading. There were many companies employing persons at the abattoir. AB 176.22 – 176.60, AB 285.51.
7. Mr Considine was not "second-in-charge at the abattoir" as alleged. In fact his roles were as sole director of Tempus and as a consultant employed by Drama Pty Limited who in turn was retained by one of the many companies associated with the abattoir. AB 174.60; 175.58.
8. Correctly stated, what was common ground between the parties, was "if [the respondent was] the employer within the meaning of the Workers Compensation Act[s] [the appellant] cannot succeed" (transcript page 186.5 omitted from Appeal Book).

As to the Notice of Contention.

9. The respondent seeks to raise by way of contention that the appellant was the employee of the respondent on 6th July 2005 or 27th June 2008. This contention is made by the respondent if it fails on the privy point.
10. The date of 6th July 2005 is not of any immediate relevance.

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Filed on behalf of the Appellant by
Monaco Solicitors
Level 5, 75 Elizabeth Street
Sydney NSW 2000

Tel: 02 9231 0461
Fax: 02 9231 6610
Reference: Kelly Keane
KK:MA:1539

11. For procedural reasons explained by the primary judge at Judgment paras # [6] and [7] AB382 the plaintiff's Motion to strike out paragraph 8 of the Defence (the privy point) and the question of employment other than on the privy point were dealt with together.
12. Notwithstanding that the respondent, as recorded at para # [7] of the Judgment, "*relied on an affidavit ... which established that the defendant intended to call witnesses who were employees at the same abattoir to give evidence.... relevant to the issue of the identity of the plaintiff's employer*". The respondent failed to do so. Only Mr Considine was called. He was not an employee but rather a consultant and he conceded at AB 175.20 – 175.45 that Tempus not Ramsay was the employer of the appellant. Further, the respondent's personnel officer was a witness available to give evidence. The personnel officer remained outside the courtroom. The respondent chose not to call that witness AB 192. No directors or any other manager of the respondent gave evidence. It is submitted that the respondent effectively abandoned, all but in name, what is now contended.
13. Further, the following evidence was left unexplained and unchallenged by the respondent (other than on the privy point and/or treating the findings of Buchanan J in the first Federal Court reasons for judgment as being binding on the appellant):
    a) Letter of termination; AB 282.
    b) Pay records showing income tax deductions by Tempus; AB 208 to 228.
    c) Pay records showing superannuation deductions by Tempus; AB 208 to 228.
    d) The evidence and admissions against the respondent's interest by Michael Considine at AB 175.20 – 175.45.
    e) Tempus was not controlled by the respondent; AB 174.60.
    f) Tempus had the power of control and power to dismiss its employees; AB 178.33.
    g) The Respondent whilst an employee was subject to direction by Tempus AB 175.26.
    h) Tempus executed a Deed with the appellant for the supply of labour and Mr Tomlinson was one of those employees to be supplied for labour; AB 175 (by agreement the Deed was treated as though in evidence transcript page 173 omitted in error from the Appeal Book).
    i) Tempus paid wages to the employees; AB208
    j) Tempus took out a workers compensation insurance policy for the employees; AB 175.33.
    k) Workers compensation claims were sent to the insurer for Tempus; AB 175.36
    l) Tempus' insurer paid workers compensation; AB 362
    m) Officers of the respondent rarely attended the worksite; AB178.29.
    n) The failure of the respondent to call "the personnel officer" who remained outside the court AB 192.
14. The primary judge having rejected the privy point considered the evidence and made findings of fact finding that the appellant was not an employee of Ramsey. Those findings are contained in Judgment paras [39, 17, 18, 19, 26, 27, 31, 40 and 46].
15. The respondent did not (other than on the privy point and/or treating the findings of Buchanan J in the first Federal Court reasons for judgment as being binding on the appellant) put any case before the primary judge that employment ought to be determined by reference to the "sham analysis" as that term is understood from *Raftland Pty Ltd as trustee of the Raftland Trust v Commissioner of Taxation [2008] HCA 21.*

16. In any event, the sham analysis, correctly understood, would not have supported any finding that Ramsey was "the employer" of the appellant.
17. In *Snook v London & West Riding Investments Ltd* [1967] 2 QB 786, Diplock LJ said at 802.
18. The doctrine of 'sham' as stated in *Snook* by Diplock LJ, was commented on by Kirby J in *Raftland.*
19. The concept of a 'sham' transaction was considered in *Equuscrop Pty Ltd v Glengallan Investments Pty* Ltd (2004) 218 CLR 471, where the High Court considered a complex investment arrangement that was alleged to have been a sham geared toward sustaining a partnership loss so as to enable a tax deduction to be obtained by subscribers to an investment scheme.
20. Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ, rejected the characterisation of the transactions as 'shams' and said at [46]:

> "Each of these transactions was legally effective. None of the transactions that took place on 30 June 1989 could be said to be sham.... "Sham" is an expression which has a well-understood legal meaning. *It refers to steps which take the form of a legally effective transaction but which the parties intend should have been apparent, or any, legal consequences... And of most particular relevance to the present matters, in accordance with its obligations under the written loan agreements, Rural Finance had applied the money it lent in payment of the application moneys due from the respondents for the units being bought.*"

21. In *Raftland* , by contrast, a finding of sham was upheld, though there was a suggestion that the word was there being used in a less pejorative sense than "fraud". The High Court found that there was never any intention by the trustee to pay a particular sum to the discretionary beneficiary (though that had been recorded in a resolution by the directors of the trustee) and that the resolution, as well as the appointment of the beneficiary of the trust, was an attempt to shelter income from taxation obligations. Their Honours found that **there was an intention common to all parties to the transaction that the resolution in question would not have substantive effect.**
22. Sham has a well-understood legal meaning, and that whether a sham is established or not depends on whether <u>all the parties</u> intend their respective rights and obligations to derive from what appears to be a legal arrangement.
23. Kirby J at [112] emphasised this in *Raftland*:

> "Important to this description is the idea that the parties do not intend to give effect to the legal arrangement set out in their apparent agreement, understood only according to its terms. In Australia, this has become essential to the notion of sham, which contemplates a disparity between the ostensible **<u>and the real *intentions* of the parties</u>**. The courts must therefore test the intentions of parties, as expressed in documentation, against their own testimony on the subject (if any) and the available objective evidence tending to show what that intention really was."

24. Kirby J further said in *Raftland* at [142]:
*"In other words, <u>where it is legally warranted</u>, sham analysis affords the court a ground for ignoring, instead of merely construing, the primary documentary material **<u>in determining the rights and obligations of the parties</u>**"*

25. The transactions by Ramsey were not only effective between the parties but were also effective between the parties and third parties i.e. the employees, Tempus's workers compensation insurer, the ATO, the workers' superannuation trustee, the ability of the Fair Work Ombudsman to enforce Greenwood J's penalties, funds were transferred, wages were paid, etc. The sham analysis is not satisfied as it cannot be said that the transactions "*creat[ed] between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend[ed] to create*".

26. Further the sham analysis is referenced to "the parties" and the intention of the "the parties". The appellant was not a party to any false intention and did not have any common intention that the acts and documents of the respondent was to be a sham; *Raftland supra* at [142].

27. Further, even if there was a "sham", the sham was on and not by the appellant or the other workers. The appellant and his co-workers were not "shammers". If there was a sham then they were equally deceived and as said in *Snook* (para 17 above) "*no unexpressed intentions of a 'shammer' affect*[s] *the rights of a party whom he deceived.*"

28. The impugned transactions did effect legal change: (a) vis-à-vis the appellant and Tempus as set out in paragraphs 13 and 14 above; (b) vis-à-vis the appellant and Ramsey as set out in paragraphs 13 and 14 above; (c) vis-à-vis Ramsey and Tempus as set out in the Deed AB 175; and, (d) it provided a mechanism for Ramsey to avoid the penalties imposed by Greenwood J (an ulterior motive does not of itself give rise to a sham) as noted by Buchanan J at para #3 of the first judgment . The appellant submits, that the transactions, properly analysed, did not satisfy the sham analysis and to the extent it is said Buchanan J found otherwise (and such a finding is binding the appellant), he erred.

29. A further difficulty facing the respondent's contention relates to the scheme created by the *Workers Compensation Act, 1987* and the *Workers Compensation and Workplace Injury Management Act, 1998* ("**the NSW workers compensation and work injury damages scheme**"). An injured worker is entitled to certain workers compensation benefits from "the employer" of the worker. Where "damages" in respect of the injury are successfully recovered against a person other than "the employer" the right to future compensation ceases and any compensation paid by "the employer" is required to be repaid to "the employer"; s151Z *Workers Compensation Act, 1987.*

<u>As to respondent's privity point submissions</u>

30. The respondent's submissions attempting to equate the proceedings brought by the Fair Work Ombudsman's with representative proceedings brought under statutory schemes established by Part 10 of the *Civil Procedure Act 2005* ("**CPA**") and Part IVA of the *Federal Court of Australia Act 1976* ("**FCA**") do not support the respondent's argument. True, s 159 CPA and s 33E FCA expressly dispenses with the need for consent of group members (presumably consent would be required but for group members absent these provisions) however, s 159 CPA and s 33E FCA are accompanied, by the right under s 162 CPA and s 33J FCA, to opt out. The Fair Work Act contains no such comparative provisions.

31. For the reasons submitted in paragraphs [17] to [28] above Buchanan J (and the parties appearing) could not have intended to treat the appellant as a party (or a privy of the Ombudsman) as the law would not have supported a finding of sham.

32. The Fair Work Ombudsman had a statutory power under s 682(1)(f) *Fair Work Act, 2009* to "represent" the appellant if this is what had been intended. The Fair Work Ombudsman did not represent the appellant. The Court of Appeal considered the

question of whether the Fair Work Ombudsman was representing the appellant under s 682(1)(f) as a person who had or may become a party to any proceedings. The respondent has not contended that the Court of Appeal per Emmett J [at para 86] erred, in holding, *"that language [of the Fair Work Act] suggests that the Fair Work Ombudsman would not* ***represent*** *an employee in a case where proceedings were commenced in the name of the Fair Work Ombudsman, rather than in the name of the employee who is or wants to become a party to the proceedings"*. The fact that the Fair Work Ombudsman had available the power under s 682(1)(f) to represent the appellant and chose not to exercise that power is telling.

33. It is incorrect (or at the very least - a large leap) to submit, as the respondent has at para [26], *"the interest ... sought to be vindicated by the Fair Work Ombudsman was the interest of the appellant"*. Had this been what the Fair Work Ombudsman's "sought" to achieve the direct use of s 682(1)(f) was available. What should be inferred is that the Fair Work Ombudsman intended to advance and did advance its own case for its own reasons. In this respect we repeat paras [30] to [35] of our Submissions.

34. Other than the power under s 682(1)(f) the Fair Work Ombudsman, by s 682(1)(d), had the power to bring proceedings in its name to make application or inquire into any practice that "may" be contrary to the Fair Work Act [s682(1)(c)] whilst promoting a harmonious, productive and cooperative workplace relations [s682(1)(a)]. These were not in any way the appellant's interests.

35. The Fair Work Ombudsman interests also concerned obtaining penalties and ensuring that the entity ordered to pay those penalties would not escape penalties in the same way as the penalties ordered by Greenwood J were avoided.

36. The Functions of the Fair Work Ombudsman are set out in s 682 Fair Work Act. The functions are to be exercised to promote, inter alia, *productive and co-operative workplace relations*. The term "workplace relations" is not statutorily defined. It clearly can have a broad meaning. One can "promote" productivity and/or cooperativeness by making an example of those thought to be skating around the spirit of "workplace relations". The Ombudsman's interests extend to **all** workplace relations including ones that do not include the appellant and/or the respondent.

37. It is incorrect to submit that the Fair Work Ombudsman had no beneficial interest in the proceedings: (a) penalties were sought and ordered; (b) the Fair Work Ombudsman' s had an interest in who the penalties were ordered against; (c) the Fair Work Ombudsman had an interest/obligation to inquire into any practice that may be contrary to the Fair Work Act; (d) the Fair Work Ombudsman's was entitled to take such action as it considered promoted productive workplace relations; and, (e) the Fair Work Ombudsman's was entitled to take such action as it considered promoted harmonious workplace relations as a whole.

38. The appellant repeats and notes that the respondent has not sought to distinguish the appellant's submissions that the authorities *Eljazzar v BHP Iron Ore Pty Ltd* and *Young v Public Service Board,* properly considered, would not support a finding of privity.

Dated: 4 March 2015

Maria Aravena Gutierrez, solicitor, signing on behalf of David Bennett AC QC

Phone 02 8815 9108
Fax 02 9101 9499
Email david.bennett@5wentworth.com