



GRANT TOMLINSON

Appellant

RAMSEY FOOD PROCESSING PTY LTD

Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Issues

2 Was the appellant a privy in interest of the Fair Work Ombudsman for the purposes of the doctrine of issue estoppel?

3 Did the relation of the Fair Work Ombudsman to the appellant, in any event, attract the operation of issue estoppel?

10 4 By way of contention, was the respondent the employer of the appellant on 6th July 2005 or 27th June 2008?

Part III: Notice under sec 78B of the *Judiciary Act 1903*

5 It is considered that notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) is not necessary.

Part IV: Facts

6 The Federal Court proceedings, *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* [2011] FCA 1176, were brought by the Fair Work Ombudsman against the respondent in relation to the appellant as one of a number of employees at the respondent's premises.

20 7 The Federal Court proceedings were claims to enforce the award entitlements of the appellant and certain others against the respondent as their employer from 16 October 2006 until 28 November 2008.

8 That claim with respect to the appellant was supported by affidavit evidence of the appellant which showed his knowledge that the purpose of those proceedings was to get the appellant his entitlements including long service leave, pay leave and annual leave.

9 The following declarations, among others, were made in the Federal Court proceedings:

(i) ...

(ii) Each of Grant Tomlinson ... was employed by the first respondent at the South Grafton Abattoir from at least 17 October 2006;

(iii) ...

(iv) ...

(v) ...

10 (vi) Each of Paul Marshall, Renee Park, Tempus Holdings Pty Ltd and Mortimer Administration Service Pty Ltd was, at all times material to the grant of relief in the present proceedings, under the direction and control of the first and second respondents;

(vii) Each of Paul Marshall, Renee Park, Tempus Holdings Pty Ltd and Mortimer Administration Service Pty Ltd, was at all times material to the grant of relief in the present proceedings, the agent of the first respondent;

(viii) The employment of each of the employees referred to in ... above was terminated by the first respondent, effective on and from 28 November 2008, by notice given on behalf of the first respondent on 25 November 2008;

20 (ix) The first respondent, in breach of clause 9 of the *Federal Meat Industry (Processing) Award 2000*, failed to afford notice of termination of their employment to each of the employees referred to in ... (ii) ... above;

(x) The first respondent, in breach of clause 9 of the said Award, failed to pay severance pay to each of the employees referred to in ... (ii) ... above as a result of the termination of their employment;

10 From 21 March 1998 until 29 October 2010 Stuart Ramsey was a director of Ramsey Food Processing Pty Ltd.

11 From 1998 Mr Ramsey was the person in effective control of the management and operation of the South Grafton Abattoir and was the person effectively in overall charge of operations at the Abattoir.

30 12 In 1998 Mr Marshall had become employed as the personnel officer at the Abattoir and his employment continued until 30 June 2009.

13 Mr Considine was engaged to work at the Abattoir in about August 2005 as a plant manager. He remained in that position until 7 November 2008. Mr Considine was second-in-charge at the Abattoir under Mr Ramsay who was in charge of daily operations at the Abattoir.

14 In 2005 the Abattoir reopened after a closure, reopening under the management of Ramsey Food Processing Pty Ltd.

15 On 6 July 2005 Mr Tomlinson sustained an injury to the left shoulder during the course of his employment with Ramsey Food Processing Pty Ltd.

16 On 16 October 2006 Mr Ramsey caused a letter to be sent to all employees, that letter being signed by Paul Marshall and shortly thereafter Mr Considine conducted a meeting with employees at Mr Ramsey's request whereby he indicated that a list of employees would transfer to Tempus [Federal Court judgement para 27]. On 25 November 2008 each of the persons referred to in the declarations made in the Federal Court proceedings at paras (i), (ii), (iii), (iv) and (v) were provided with letters which effectively brought their employment to an end effective on 28 November 2008.

17 On 17 March 2011 the appellant affirmed an affidavit in the Federal Court proceedings.

18 The appellant had on 27 June 2008 sustained injury to his lumbar spine and left shoulder during the course of his work at the Abattoir which is the subject of these proceedings.

19 Before the trial judge there was no dispute that the appellant commenced to work for the respondent in 2005 at the Abattoir.

20 It was common ground before the trial judge that if the appellant was found to be an employee of the respondent then the proceedings were doomed to fail due to a failure to satisfy the provisions of the *Workplace Injury Management & Workers Compensation Act 1998* (NSW) and *Workers Compensation Act 1987* (NSW).

21 On appeal Emmett JA set out the effect of the abovementioned legislation [paras 43-51, 53]. It was that legislation and the bars to bringing proceedings contained therein which were pleaded by paragraph 8 of the Defence of the respondent and which provided the basis for an application to strike out the cause of action, decision of which was referred to the end of the trial.

22 The question of employment in the District Court proceedings was the same question of employment which was addressed by Buchanan J in the Federal Court.

23 In the Court of Appeal the respondent succeeded on the issue estoppel based on the finding of employment [para 66, 93, 99], in the Federal Court proceedings.

24 On the question as to employment the Court of Appeal expressed a favourable disposition to the finding of Buchanan J but found it unnecessary due to the finding as to issue estoppel to determine that question and determine whether the trial judge had erred [para 99].

Part V: Legislation

25 The respondent accepts the statutes and regulations set out in the appellant's submissions.

Part VI: Argument

26 The Court of Appeal of the Supreme Court of New South Wales applied the principles in *Blair v Curran* (1939) 62 CLR 464 at 531-533 and *Ramsay v Pigram* (1967-68) 118 CLR 271 at 279 that the privy must claim under or through the person of whom he is said to be privy. See also *Kuligowski v Metrobus* (2004) 220 CLR 363 at 373. The interest, in relation to the appellant, sought to be vindicated by the Fair Work Ombudsman was the interest of the appellant, which by statute could be litigated for him by the Fair Work Ombudsman. Essential to the existence of that interest was the appellant's employment by the respondent, and was the principle disputed issue in the Federal Court.

27 The Fair Work Ombudsman's claims were therefore in substance and overtly derivative from a possible claim by the appellant to vindicate the appellant's interest as the respondent's employee. The appellant's relationship with the respondent grounded the Fair Work Ombudsman's claim.

28 The character of the Fair Work Ombudsman was thus a party claiming in the Federal Court under or through the appellant. It has these combined elements: (a) the Fair Work Ombudsman's successful claim to relief depends on establishing the facts that gave legal character of employment to the appellant's relations with the respondent; (b) the Fair Work Ombudsman's successful claim for relief was not merely incidentally but essentially for the benefit of and vindicating the legal rights of the appellant as an employee of the respondent; (c) the orders made in the Federal Court, were terms, in favour of the appellant (and co-workers) with the Fair Work Ombudsman having no beneficial interest at all in the fruits of those proceedings.

29 This dispels any suggestion to be gathered from the appellant's submissions that the outcome in the Federal Court was unsound, willy-nilly or unwelcome.

30 The Fair Work Ombudsman, by para 682(1)(d) of the *Fair Work Act 2009* (Cth) and by sec 719 of the *Workplace Relations Act 1996* is a statutory authority entitled to bring proceedings which will benefit a party no less effectively than representative proceedings in Chancery and later pursuant to court rules eg *Civil Procedure Act 2005* at Part 10, *Federal Court of Australia Act 1976* Part IVA. Individual represented persons, in such proceedings, can scarcely be said to control them, let alone to be *dominus litis*. That is an unnecessary

gloss on the substantive character which requires, in principle, a privy and interest to be bound by issue estoppel.

31 With immaterial exceptions, proceedings of these kinds have as a cardinal consequence that they will, by judicial decision of them, bind the persons who stood to gain from their success. They are different but cognate ways of serving the interests of finality in the administration of justice and efficiency in legal process.

32 Proceedings under sec 682 of the *Fair Work Act 2009* do not have any attributes marking them as any less apt to produce that salutary outcome.

33 In the Court of Appeal Emmett JA was correct in the identification of issues.

10

Part VII: Notice of Contention

34 The Court of Appeal considered the question of employment and was disposed to reach the conclusion reached by Buchanan J that the appellant continued to be employed by the respondent [para 99].

35 The respondent adopts, in support of the finding that the respondent was the employer of the appellant at the material times, the findings and reasoning made and explained by Buchanan J in the Federal Court proceedings. There was no attempt by the trial judge in the District Court to deal with that holding.

Part VIII: Time estimate

36 The respondent would seek no more than two hours for the presentation of the respondent's oral argument.

20

11th February 2015



	Bret Walker		Kelvin Andrews
Phone	(02) 8257 2527	Phone	(02) 8076 6666
Fax	(02) 9221 7974	Fax	(02) 8076 6622
Email	maggie.dalton@stjames.net.au	Email	kandrews@sirowendixon.com.au

Counsel for the respondent