IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S7 of 2015

BETWEEN:

GRANT TOMLINSON
Appellant

-and-

RAMSEY FOOD PROCESSING PTY LIMITED
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification re Internet Publication

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

Part II: Issues

2. Was the appellant issue estopped by the Federal Court decision Fair Work Ombudsman v Ramsey Food Processing Pty Limited NSD 1005 of 2010 in proceedings commenced by the Fair Work Ombudsman that the appellant was not a party to.

3. Was the appellant's conduct by:
   a. being one of a number of workers who complained to the Fair Work Ombudsman that Tempus Pty Limited had under paid wage entitlements; and
   b. at the request of the Fair Work Ombudsman affirming the affidavit dated 17 March 2011 prepared by the Fair Work Ombudsman, such that the Fair Work Ombudsman thereby became the appellant's privy in *Fair Work Ombudsman v Ramsey Food Processing Pty Limited* NSD 1005 of 2010 ("**the Federal Court case**") in circumstances where the primary judge found that the appellant had no control of the Federal Court proceedings.

4. In circumstances where the primary judge found that the appellant had no control of the Federal Court proceedings was the appellant's conduct such that

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it could properly be said by the Court of Appeal of the Supreme Court of New South Wales:

i. "that the claim for those orders [against Ramsey] was made by the Fair Work Ombudsman on behalf of and for the benefit of Mr Tomlinson, and with his consent. That claim, in the language of Barwick CJ in *Ramsay v Pigram* [1968] HCA 34; (1967) 118 CLR 271 at 279, was made by the Ombudsman 'under or through the person of whom he is said to be a privy'"; or

ii. "The Fair Work Ombudsman was Mr Tomlinson's privy for the purposes of the application of the doctrine of issue estoppel"; or

iii. The appellant "authorised" the proceedings by the Fair Work Ombudsman against the respondent.

Part III: Judiciary Act 1903, s78B

5. The appellant does not consider any notice should be given under section 78B of the *Judiciary Act 1903*.

Part IV: Citations of Decisions below

6. Grant Tomlinson v Ramsey Food Processing Pty Limited [2013] NSWDC 64.

7. Ramsey Food Processing Pty Limited v Grant Tomlinson [2014] NSWCA 237

Part V: Relevant Facts

8. The appellant, as well as other employees, were employed by Tempus Pty Limited ("**Tempus**") at an abattoir owned by the respondent ("**Ramsey**").

9. The appellant was injured as a result of the negligence of Ramsey.

10. After the injury the appellant's employment was terminated. Tempus failed to pay all wage entitlements to the appellant and the other employees.

11. The employees (or at least 11 of them) complained to the Fair Work Ombudsman.

12. The Fair Work Ombudsman responded to the complaints by bringing proceedings in its name against Ramsey and a director of Ramsey in the Federal Court proceedings NSD 1005 of 2010.

13. The Federal Court case, *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* NSD 1005 of 2010 is reported at *[2011] FCA 1176 and (No. 2) [2012] FCA 408*.

14. The only parties to the Federal Court case were the Fair Work Ombudsman, Ramsey and a director of Ramsey.

15. In the Federal Court case the employees who made complaint to the Fair Work Ombudsman were defined as and referred to in the reasons for judgment as "the complainant employees". This term has no statutory meaning.

16. The Federal Court, by reason of Ramsey's relationship to Tempus:

i. Imposed fines on Ramsey and the director pursuant to the power in s 719 *Workplace Relations Act, 1996 (Cth) ("**WR Act**")*;
ii. Declared Ramsey to be the [undisclosed] principal of Tempus;
iii. Declared the appellant and the other employees of Tempus to be employees of Ramsey; and
iv. Pursuant to the power in s 719(6) *WR Act* ordered Ramsey to pay to the employee's wage entitlements that remained unpaid by Tempus.

s 719 relevantly provided:

(6) Where, in a proceeding against an employer under this section, it appears to the eligible court that an employee of the employer has not been paid an amount that the employer was required to pay under an applicable provision ... the court may order the employer to pay to the employee the amount of the underpayment.

The term "an applicable provision" was broadly defined.

17. The appellant did not receive any payment from Ramsey or otherwise as a consequence of the Federal Court case.

18. Independently of the Federal Court case the appellant commenced proceedings in the District Court of New South Wales claiming damages for personal injury under the *Civil Liability Act, 2002* against Ramsey.

19. In the District Court it was the appellant's case that Ramsey had a civil liability to the appellant.

20. It was common ground that if the appellant and the respondent were employee and employer this was fatal to the appellant's District Court proceedings.

21. The respondent pleaded, by way of paragraph [8] of its Defence, that the appellant was issue estopped by reason of the Federal Court case on the issue of employee/employer and thus Ramsey and not Tempus was the appellant's employer. The respondent did not allege employment on any basis other than the issue estoppel pleaded in paragraph [8].

22. The appellant as plaintiff in the District Court by Notice of Motion made application to strike out paragraph 8 of the respondent's Defence.

23. On the application of the respondent the Notice of Motion was dealt with at the hearing and not as a preliminary matter. The respondent as defendant did not tender at the hearing (ie on the Motion) any pleadings, any exhibits besides

one affidavit; any transcript or the second of two reasons for judgments from the Federal Court case; notwithstanding that the respondent admitted that such material was available to it to tender.

24. The primary judge did strike out paragraph 8 of the Defence.

25. In the District Court, the appellant, in addition to succeeding in having paragraph [8] of the Defence struck out, also, succeeded in proving the elements of his *Civil Liability Act, 2005* claim and was awarded a Verdict and Judgment in the sum of $155,069.

26. The District Court's judgment was set aside on appeal by the respondent to the Court of Appeal of the Supreme Court of New South Wales.

Part VI: Argument

27. The Court of Appeal of the Supreme Court of New South Wales has interpreted and applied *Ramsay v Pigram* in a manner not intended by the High Court and in a manner that is disruptive to the operation of the complaint system established under the *Fair Work Act, 2009*.

28. The appellant submits that:

a. He was not a party to the Federal court case;
b. He had no control of the Federal Court case;
c. The appellant's claim under the *Civil Liability Act, 2005* was not a claim through or under the Fair Work Ombudsman;
d. The Fair Work Ombudsman's claim under the *Fair Work Act* was not a claim through or under the appellant; and
e. The Fair Work Ombudsman's 'interest' was not equivalent to the appellant's interest and thus the appellant and the Fair Work Ombudsman are not privies of each other; and
f. The appellant did not "participate so actively in the first litigation that he assumed de facto the role of an actual party".

29. The appellant and 10 fellow workers made complaint to the Fair Work Ombudsman's office that his employer, Tempus, had failed to pay some of the worker's employment entitlements.

30. The Fair Work Ombudsman has an independent statutory role and discretions.

31. The Fair Work Ombudsman is established by s 681 *Fair Work Act, 2009 (Cth)*. Before the commencement of the *Fair Work Act, 2009* a similar office called the Workplace Ombudsman had been established by s 166A *WR Act*.

32. The functions of the Fair Work Ombudsman are set out in s 682 *Fair Work Act, 2009* as follows, relevantly:

(1) The Fair Work Ombudsman has the following functions:
(a) to promote:

(i) harmonious, productive and cooperative workplace relations; and
(ii) compliance with this Act and fair work instruments;
including by providing education, assistance and advice to employees, employers, outworkers, outworker entities and organisations and producing best practice guides to workplace relations or workplace practices;

(b) to monitor compliance with this Act and fair work instruments;

(c) ...

(d) **to commence proceedings in a court, or to make applications to FWA, to enforce this Act, fair work instruments and safety net contractual entitlements**;

(e) ...

33. There was no evidence that the appellant had any knowledge of or interest in matters that may have been of concern to the Fair Work Ombudsman such as the chances of or the economics of successfully prosecuting for penalties, the enforcement of penalties, the promotion of harmonious, productive and cooperative workplace relations, the Ombudsman's prosecutorial budget and resources, the Ombudsman's reasons or interest in advancing a case against Ramsey and its director rather than Tempus and/or its director and/or its shadow director for penalties. An inference was available that the director of Ramsey was also a shadow director of Tempus.

34. The Federal Court case produced two judgments. Both reasons for judgment referred to the evidence adduced by the Fair Work Ombudsman regarding previous proceedings in the Federal Court before Greenwood J involving other companies that the director of Ramsey had been a director of. The reasons for judgment recited a history that the other companies that the director of Ramsey had been a director of were placed into liquidation rather than satisfy the judgments of Greenwood J. This history was important enough to the Fair Work Ombudsman to have adduced this evidence. It also may have been a motivation to bring the proceedings against Ramsay and its director rather than against Tempus and its director.

35. In the Federal Court Tempus' s director gave evidence for the Fair Work Ombudsman against Ramsey and the director of Ramsey. The Fair Work Ombudsman may have in furtherance of the Ombudsman's interests offered inducements to obtain such co-operation. There is no evidence of Tempus or its director ever being prosecuted.

36. The significant factual events giving rise to a particular Federal Court case occurred during 2006 to 2008. The timeous legislation was the *WR Act.* The *WR Act* was repealed however certain relevant provisions (including s719) were preserved by operation of schedule 2 clause 11(1) *Fair Work (Transitional Provisions and Consequential Amendments) Act, 2009.*

37. Section 719 *WR Act* provided that proceedings could be brought in the Federal Court to impose a penalty where there has been a breach or breaches of "applicable provisions". Section 719(6) further provided that when

proceedings are commenced for a penalty the court may, in the penalty proceeding, exercise the following power:

> *(6) Where, in a proceeding against an employer under this section, it appears to the eligible court that an employee of the employer has not been paid an amount that the employer was required to pay under an applicable provision ..., the court may order the employer to pay to the employee the amount of the underpayment.*

38. Orders were made under s 719(6) because, presumably, "it appeared" to the Federal Court that the non-party "complainant employees" were entitled to a payment from Ramsay as "the employer" as Ramsey and Tempus had been parties to sham arrangements. There was no suggestion that the employees were in any way party to, aware of or complicit in those arrangements

39. Neither the appellant nor Tempus were a party to the Federal Court case.

40. The appellant, in conjunction with the other employees, was defined in one of the Federal Court judgments as the "complainant employees". The term "complainant employees" has no statutory definition but rather was a term used for convenience only in the first of the Federal Court's reasons for judgment.

41. The appellant did not "participate so actively in the first litigation that he assumed de facto the role of an actual party" as discussed in *Effem* by Gummow J. The appellant's only participation was as a person who affirmed an affidavit prepared, filed and read by the Fair Work Ombudsman.

42. There was an unchallenged finding by the primary judge that the appellant had no control of the Federal Court proceedings. The appellant had no control over the Fair Work Ombudsman.

43. In respect of the injury the appellant independently brought proceedings in the District Court of NSW under the *Civil Liability Act, 2002* for personal injury.

44. It was common ground that the District Court proceedings must fail if the appellant and the respondent were employee and employer by reason of the operation of both the *Workers Compensation Act, 1987* and the *Workers Compensation and Workplace Injury Management Act, 1998.*

45. It was the appellant's case that his relevant employer was the company Tempus. The respondent pleaded by way of defence that the appellant was issue estopped by reason of the Federal Court case on the issue of employee/employer and thus Ramsey and not Tempus was his employer.

46. Although available to the respondent, the respondent did not tender into evidence:

i. the Statement of Claim,
ii. the other pleadings,

iii. the transcript,
iv. the exhibits, or
v. the further judgment *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2) [2012] FCA 408*

from the Federal Court case.

47. The appellant was found by the primary judge in the District Court proceedings to not be the privy of or to the Fair Work Ombudsman. The appellant and the other employees were found "to have no control of the proceedings in the Federal Court". This finding was not the subject of challenge.

48. In respect of the Federal Court case, the appellant was not a party, the appellant had no power to control the proceedings nor any party to the proceedings. Tempus was also not a party. Tempus's workers compensation insurer was not a party.

49. Neither the appellant, nor Tempus, nor Tempus's insurer were advised that their interests were to be affected by the Federal Court case. The appellant, Tempus, nor Tempus's insurer were not joined or invited to join the Federal Court case as a party.

50. The appellant had provided his services as an employee to Tempus who:
    i. Held itself out to both the appellant and the world at large that they it was the appellant's employer;
    ii. Paid the appellant's wage;
    iii. Provided the appellant with payslips;
    iv. Deducted income tax and remitted it to the ATO;
    v. Became the insured for workers compensation purposes;
    vi. Paid the initial workers compensation payment;
    vii. Effected insurance with Gallagher Basset as insurer for Tempus *vis-à-vis* the appellant;
    viii. Caused Gallagher Basset, as insurer for Tempus, to manage the compensation claims and make payments of $114,982 to the appellant on behalf of Tempus;
    ix. Received $80,000 workers compensation refund in respect of "the employees";
    x. Received from the appellant his employment services as his employer;
    xi. Directed and controlled the work activities of the appellant; and
    xii. Deducted and remitted superannuation contributions from the appellant's salary.

51. Tempus had effected, with an insurer, Gallagher Basset, a statutory workers compensation policy in respect of the appellant's employment as the appellant's employer. Before, during and following the Federal Court case Tempus, Tempus's insurer and the appellant all accepted and administered the appellant's workers compensation rights and the workers compensation policy on the basis that the appellant was the employee of Tempus.

52. The appellant succeeded in the District Court however that court's judgment was set aside on appeal to the Court of Appeal of the Supreme Court of New South Wales overturning the primary judges finding in respect of the alleged issue estoppel.

53. The Fair Work Ombudsman was not the appellant's 'privity of interest'. The Fair Work Ombudsman 'interest' is in exercising its statutory functions including its policing and prosecutorial role and its role_to promote harmonious, productive and cooperative workplace relations; and compliance with the *Fair Work Act* and fair work instruments. The appellant had no such interest.

54. Broader statements from foreign jurisdictions suggesting that an economic interest is sufficient to satisfy the requirements of 'privity of interest' were rejected as representing the law in Australia as explained by Gummow J in *Trawl Industries v Effem Foods* and Northrop and Lee JJ in *Effem Foods v Trawl Industries*.

55. Even if the Fair Work Ombudsman's role could be said to be analogous to that of an industrial union's role vis-à-vis a member, a role, it is submitted, that would be much more closely aligned with the worker's 'interest', this would not support a finding of privity; see *Eljazzar v BHP Iron Ore Pty Ltd*; see also *Young v Public Service Board* where it was held by Lee J that members of an individual union or association have no legal privity of interest with the union in relation to proceedings in the NSW Industrial Commission.

56. It is respectfully submitted that the Court of Appeal of the Supreme Court of New South Wales fell in further error in that it did not expose any reasons for not following or distinguishing *Eljazzar v BHP Iron Ore Pty Ltd* and *Young v Public Service Board* notwithstanding the strong reliance upon these authorities.

Part VII Relevant Provisions

57. Relevant statutory provisions are annexed.

Part VIII: Orders sought

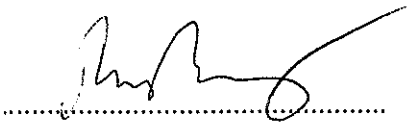
60. Appeal allowed with costs.

61. Set aside the order of the Court of Appeal of the Supreme Court of New South Wales made on 21 July 2014 and, in its place, order that the appeal to that Court be dismissed with costs.

Part IX: Estimate

62. The appellant's estimate is that 2 hours will be required for the presentation of its oral argument.

Dated: 22 January 2015



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ANNEXURE TO THE APPELLANT'S SUBMISSIONS

PART VII - Applicable statutory provisions

1. ***Fair Work Act 2009*** **(Cth) (as at 28 June 2013, no subsequent amendments have been made to the extracted provisions).**

Section 682 Functions of the Fair Work Ombudsman

(1) The Fair Work Ombudsman has the following functions:

(a) to promote:

(i) harmonious, productive and cooperative workplace relations; and

(ii) compliance with this Act and fair work instruments; including by providing education, assistance and advice to employees, employers, outworkers, outworker entities and organisations and producing best practice guides to workplace relations or workplace practices;

(b) to monitor compliance with this Act and fair work instruments;

(c) to inquire into, and investigate, any act or practice that may be contrary to this Act, a fair work instrument or a safety net contractual entitlement;

(d) to commence proceedings in a court, or to make applications to the FWC, to enforce this Act, fair work instruments and safety net contractual entitlements;

(e) to refer matters to relevant authorities;

(f) to represent employees or outworkers who are, or may become, a party to proceedings in a court, or a party to a matter before the FWC, under this Act or a fair work instrument, if the Fair Work Ombudsman considers that representing the employees or outworkers will promote compliance with this Act or the fair work instrument;

(g) any other functions conferred on the Fair Work Ombudsman by any Act.

Note 1: The Fair Work Ombudsman also has the functions of an inspector (see section 701).

Note 2: In performing functions under paragraph (a), the Fair Work Ombudsman might, for example, produce a best practice guide to achieving productivity through bargaining.

(2) The Fair Work Ombudsman must consult with the FWC in producing guidance material that relates to the functions of the FWC.

2. ***Fair Work (Transitional Provisions and Consequential Amendments Act) 2009*** **(The extracted provisions came into force on 1 July 2009 and are current at the date of these submissions).**

Part 3—Conduct before WR Act repeal day etc.

11 Conduct before repeal—WR Act continues to apply

Conduct before repeal

(1) The WR Act continues to apply, on and after the WR Act repeal day, in relation to conduct that occurred before the WR Act repeal day.

Note: For continuation and cessation of WR Act bodies and offices on and after the WR Act repeal day, see item 7 of Schedule 18.

3. ***Workplace Relations Act 1996*** **(Repealed as of 1 July 2009 by the *Fair Work (Transitional Provisions and Consequential Amendments) Act*, 2009).**

Section 719 Imposition and recovery of penalties (Section 719 of the *Workplace Relations Act 1996* is preserved by operation of schedule 2 clause 11(1) *Fair Work (Transitional Provisions and Consequential Amendments) Act, 2009*).

(1) An eligible court may impose a penalty in accordance with this Division on a person if:
   (a) the person is bound by an applicable provision; and
   (b) the person breaches the provision.

(2) Subject to subsection (3), where:
   (a) 2 or more breaches of an applicable provision are committed by the same person; and
   (b) the breaches arose out of a course of conduct by the person;

the breaches shall, for the purposes of this section, be taken to constitute a single breach of the term.

(3) Subsection (2) does not apply to a breach of an applicable provision that is committed by a person after an eligible court has imposed a penalty on the person for an earlier breach of the provision.

(4) The maximum penalty that may be imposed under subsection (1) for a breach of an applicable provision is:
   (a) 60 penalty units for an individual; or
   (b) 300 penalty units for a body corporate.

(5) If, in a proceeding under this section in relation to an ITEA, it appears to the eligible court that a party to the ITEA has suffered loss or damage as a result of a breach of the ITEA by the other party,

the court may order the other party to pay the amount of the loss or damage to the first-mentioned party.

(6) Where, in a proceeding against an employer under this section, it appears to the eligible court that an employee of the employer has not been paid an amount that the employer was required to pay under an applicable provision (except a term of an ITEA), the court may order the employer to pay to the employee the amount of the underpayment.

(7) Where, in a proceeding against an employer under this section, it appears to the eligible court that the employer has not paid an amount to a superannuation fund that the employer was required, under an applicable provision (except a term of an ITEA), to pay on behalf of a person, the court may order the employer to make a payment to or in respect of that person for the purpose of restoring the person, as far as practicable, to the position that the person would have been in had the employer not failed to pay the amount to the superannuation fund.

(8) Without limiting the generality of subsection (7), the eligible court may order that the employer pay to the superannuation fund referred to in subsection (7), or another superannuation fund, an amount equal to the amount (in this subsection called the ***unpaid amount***) that the employer failed to pay together with such additional amount as, in the opinion of the court, represents the return that would have accrued in respect of the unpaid amount had it been duly paid by the employer.

(9) An order must not be made under subsection (6) or (7) in relation to so much of an underpayment as relates to any period more than 6 years before the commencement of theproceeding.

(10) A proceeding under this section in relation to a breach of an applicable provision must be commenced not later than 6 years after the commission of the breach.