HIGH COURT OF AUSTRALIA

FRENCH CJ,
BELL, GAGELER, KEANE AND NETTLE JJ

GRANT TOMLINSON APPELLANT

AND

RAMSEY FOOD PROCESSING PTY LIMITED RESPONDENT

Tomlinson v Ramsey Food Processing Pty Limited
[2015] HCA 28
12 August 2015
S7/2015

ORDER

1. *Appeal allowed.*

2. *Set aside paragraphs 2, 3, 4 and 5 of the order of the Court of Appeal of the Supreme Court of New South Wales made on 21 July 2014.*

3. *Remit the matter to the Court of Appeal to determine the issue raised by the respondent's notice of contention in this Court.*

4. *The respondent pay the appellant's costs of the appeal to this Court and of the appeal to date in the Court of Appeal.*

On appeal from the Supreme Court of New South Wales

Representation

D M J Bennett QC with R I Goodridge for the appellant (instructed by Monaco Solicitors)

B W Walker SC with K W Andrews for the respondent (instructed by Colin Biggers & Paisley Solicitors)

CATCHWORDS

Tomlinson v Ramsey Food Processing Pty Limited

Estoppel – Issue estoppel – Appellant employed at abattoir operated by respondent – Appellant subsequently employed by third party providing labour services to respondent – Appellant complained to Fair Work Ombudsman that entitlements not paid upon termination of employment – Fair Work Ombudsman commenced proceedings in Federal Court of Australia against respondent – Federal Court determined respondent, not third party, was appellant's employer – Appellant commenced proceedings claiming damages from respondent for personal injury sustained at abattoir – Appellant argued third party, not respondent, was his employer – Respondent argued appellant was issue estopped by reason of Federal Court proceedings from denying that respondent was appellant's employer – Whether appellant was issue estopped by reason of declarations and orders made in Federal Court proceedings – Whether appellant was privy in interest with Fair Work Ombudsman in Federal Court proceedings.

Words and phrases – "claim under or through", "estoppel", "issue estoppel", "on behalf of", "privity of interest", "privy in interest".

1 FRENCH CJ, BELL, GAGELER AND KEANE JJ. The question in this appeal is whether the claiming by the Fair Work Ombudsman and the making by a court of declarations and orders in a civil penalty proceeding created an issue estoppel on which a respondent to that proceeding was entitled to rely in a subsequent common law proceeding brought against it by a worker.

2 The resolution of the question is that the claiming and the making of the declarations and orders created no issue estoppel, for want of sufficient connection in interest between the Fair Work Ombudsman and the worker.

How the question arises

3 Ramsey Food Processing Pty Limited ("Ramsey") operated an abattoir at South Grafton from 2005 until 2009. Mr Tomlinson started work at the abattoir in 2005.

4 Mr Tomlinson and other workers at the abattoir were told in October 2006 that their previous employment was at an end and that they would from then on be employed by Tempus Holdings Pty Ltd ("Tempus"). Mr Tomlinson and other workers at the abattoir were told in November 2008 that Tempus had then ceased "providing labour" to Ramsey, as a result of which Tempus was unable to offer them ongoing employment. Mr Tomlinson afterwards complained to the Fair Work Ombudsman that his "entitlements" had not been paid when he was made redundant.

5 The Fair Work Ombudsman is established under the *Fair Work Act* 2009 (Cth)[1]. The statutory functions of the Fair Work Ombudsman include to commence proceedings in a court "to enforce" the *Workplace Relations Act* 1996 (Cth) and awards made under that Act[2]. The statutory functions of the Fair Work Ombudsman also include "to represent" employees who are or may become parties to proceedings in a court if the Fair Work Ombudsman considers that

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1 Sections 681 and 696 of the *Fair Work Act* 2009 (Cth).

2 Section 682(1)(d) of the *Fair Work Act* 2009 (Cth), read with item 13(2) of Sched 18 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 (Cth).

representing those employees will promote compliance with the *Workplace Relations Act* or such an award[3].

6 In the exercise of the first of those functions, as distinct from the second, the Fair Work Ombudsman commenced a proceeding against Ramsey in the Federal Court of Australia. The Fair Work Ombudsman sought in that proceeding orders under a section of the *Workplace Relations Act* which conferred power on an "eligible court" to impose a civil penalty on application by the Fair Work Ombudsman on a person bound by and in breach of an "applicable provision"[4]. The latter expression was defined to encompass a term of an award made under the *Workplace Relations Act* as well as a term of the Australian Fair Pay and Conditions Standard[5].

7 The section of the *Workplace Relations Act* which conferred power on an eligible court to impose a civil penalty went on to confer power on that court to order that a person found to be an "employer" pay an amount to a person found to be an "employee". The relevant sub-section 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."

8 The Fair Work Ombudsman alleged in the proceeding against Ramsey in the Federal Court: that Ramsey, not Tempus, had been the employer of Mr Tomlinson and 10 other persons at the abattoir; that Ramsey, as employer, had been bound by the terms of an award applicable to employment in the meat industry made under the *Workplace Relations Act*[7] as well as by the terms of the

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3 Section 682(1)(f) of the *Fair Work Act* 2009 (Cth), read with item 13(2) of Sched 18 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 (Cth).

4 Section 719 of the *Workplace Relations Act* 1996 (Cth), read with s 718 of that Act, s 701 of the *Fair Work Act* 2009 (Cth) and item 13(1) of Sched 18 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 (Cth).

5 Section 717 of the *Workplace Relations Act* 1996 (Cth).

6 Section 719(6) of the *Workplace Relations Act* 1996 (Cth).

7 Federal Meat Industry (Processing) Award 2000.

Australian Fair Pay and Conditions Standard[8]; and that Ramsey, as employer, had failed to pay Mr Tomlinson and the other 10 persons amounts which Ramsey was required to pay to them on termination of their employment under particular terms of the applicable award[9] and under a particular term of the Australian Fair Pay and Conditions Standard[10]. The Fair Work Ombudsman sought a civil penalty for those breaches, together with orders that Ramsey pay Mr Tomlinson and the other persons the required amounts. Mr Tomlinson and the other persons were not parties to the proceeding.

9 The principal issue in the proceeding in the Federal Court was whether Ramsey or Tempus had been the employer of Mr Tomlinson and the 10 other persons at the abattoir. The Federal Court (Buchanan J), after a trial on the merits in which Mr Tomlinson provided evidence, determined that issue adversely to Ramsey[11]. The Federal Court held: that Ramsey had been the true employer; that everything done by Tempus had been done on behalf of Ramsey; and that the interposition of Tempus was a sham. The Federal Court went on to make declarations which included: that Mr Tomlinson and eight of the other persons had been employed at the abattoir at least since October 2006 (and that the other two persons had been employed since October and November 2007 respectively); that the employment of each of those persons had been terminated by Ramsey in November 2008; and that Ramsey had breached specified terms of the applicable award and of the Australian Fair Pay and Conditions Standard in failing to make specified payments to those employees. At the time of making those declarations, the Federal Court also made orders that Ramsey pay to Mr Tomlinson and to each of the other 10 persons specified amounts calculated as the amounts which Ramsey had underpaid those employees together with interest. The Federal Court went on in a later phase of the proceeding to impose a civil penalty on Ramsey payable to the Commonwealth in respect of the breaches the Court had declared[12].

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8 Part 7 of the *Workplace Relations Act* 1996 (Cth).

9 Clause 10 of the Federal Meat Industry (Processing) Award 2000.

10 Section 235 of the *Workplace Relations Act* 1996 (Cth).

11 *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174.

12 *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2)* [2012] FCA 408.

10 Mr Tomlinson subsequently brought a proceeding against Ramsey in the District Court of New South Wales in which Mr Tomlinson claimed damages in negligence at common law in respect of a personal injury he had sustained when working at the abattoir in June 2008. The case that Mr Tomlinson sought to mount was that, while Tempus was his employer, Ramsey as the party in control of the workplace owed him a duty of care akin to that owed by an employer, and that Ramsey's breach of that duty caused his injuries. If Ramsey was Mr Tomlinson's "employer" in June 2008, Mr Tomlinson was prevented from bringing that claim, or from recovering damages, by a number of provisions of New South Wales legislation governing management of[13], and limiting recovery for[14], workplace injuries. Ramsey relied on those provisions in its defence in the District Court proceeding. Ramsey argued that Mr Tomlinson was estopped by the declarations and orders made in the Federal Court proceeding from denying that Ramsey was his employer. Ramsey argued in the alternative that Ramsey was in fact Mr Tomlinson's employer. Neither party suggested in the District Court, or has suggested at any stage since, that there was any relevant difference between an employer for the purposes of that New South Wales legislation and an employer for the purposes of the *Fair Work Act* and the *Workplace Relations Act*.

11 The District Court (Mahony DCJ), after a trial on the merits, rejected Ramsey's argument of issue estoppel and found on the evidence before the District Court (which was more limited than the evidence that had been before the Federal Court) that Mr Tomlinson's employer in June 2008 had been Tempus and not Ramsey[15]. The District Court found the elements of Mr Tomlinson's cause of action in negligence to have been established and entered judgment for Mr Tomlinson against Ramsey for damages.

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13 Sections 280A, 315 and 318A of the *Workplace Injury Management and Workers Compensation Act* 1998 (NSW) and s 151C of the *Workers Compensation Act* 1987 (NSW).

14 Section 280B of the *Workplace Injury Management and Workers Compensation Act* 1998 (NSW) and ss 151H and 151G of the *Workers Compensation Act* 1987 (NSW).

15 *Tomlinson v Ramsey Food Processing Pty Ltd* [2013] NSWDC 64 at [39].

The question in the Court of Appeal

12 The Court of Appeal of the Supreme Court of New South Wales (Meagher, Ward and Emmett JJA) unanimously allowed an appeal by Ramsey[16]. The Court of Appeal set aside the judgment entered in the District Court and ordered instead that there be judgment for Ramsey.

13 The Court of Appeal held that the declarations and orders made in the earlier Federal Court proceeding created an estoppel on the issue of who had been Mr Tomlinson's employer between October 2006 and November 2008. That estoppel, the Court of Appeal held, was binding on Mr Tomlinson in the District Court proceeding by reason of Mr Tomlinson having been "privy" in interest with the Fair Work Ombudsman in the Federal Court proceeding according to the principle stated and applied in this Court in *Ramsay v Pigram*[17]. The Court of Appeal reasoned that Mr Tomlinson was privy in interest with the Fair Work Ombudsman according to that principle because the Fair Work Ombudsman, having sought those declarations and orders for his benefit, in a proceeding in which he participated by giving evidence, claimed in the Federal Court proceeding "under or through", or "on behalf of", Mr Tomlinson[18].

14 Emmett JA, with whom Ward JA agreed, indicated that he would have been disposed to allow Ramsey's appeal to the Court of Appeal on the alternative ground that the evidence before the District Court established that Mr Tomlinson's employer in June 2008 had in fact been Ramsey and not Tempus[19]. In light of his conclusion that Mr Tomlinson was estopped from asserting the contrary, however, Emmett JA did not reach a concluded position on that alternative ground of appeal. Meagher JA, in separate reasons for judgment, did not address the alternative ground of appeal.

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16 *Ramsey Food Processing Pty Ltd v Tomlinson* [2014] NSWCA 237.

17 (1968) 118 CLR 271; [1968] HCA 34.

18 *Ramsey Food Processing Pty Ltd v Tomlinson* [2014] NSWCA 237 at [19], [22], [83], [89]-[91].

19 *Ramsey Food Processing Pty Ltd v Tomlinson* [2014] NSWCA 237 at [22], [93]-[99].

The question in this Court

15 Mr Tomlinson, in his appeal by special leave to this Court, challenges the holding of the Court of Appeal that he was estopped from asserting in the District Court proceeding that Ramsey was not his employer. He says that he was not privy in interest with the Fair Work Ombudsman. Mr Tomlinson says that he did not claim "under or through" the Fair Work Ombudsman in the District Court proceeding, nor did the Ombudsman claim "under or through" Mr Tomlinson in the Federal Court proceeding.

16 Ramsey supports the reasoning of the Court of Appeal. By notice of contention, Ramsey also repeats the alternative argument, not determined in its appeal to the Court of Appeal, that the evidence before the District Court established that Mr Tomlinson's employer had in fact been Ramsey.

The question in perspective

17 It is common ground between Mr Tomlinson and Ramsey that the question of whether Mr Tomlinson was privy in interest with the Fair Work Ombudsman for the purpose of issue estoppel is to be determined by reference to the principle governing privity of interest stated and applied in this Court in *Ramsay v Pigram*. That principle, in the language of Barwick CJ, is that the "basic requirement of a privy in interest is that the privy must claim under or through the person of whom he is said to be a privy"[20]. It is not argued that some wider principle, along the lines of that which has since come to be adopted in the United Kingdom[21] or New Zealand[22] or Canada[23], should now be adopted in Australia.

18 Nor does resolution of the question of whether Mr Tomlinson was privy in interest with the Fair Work Ombudsman call for consideration of the related but distinct principle of mutuality, referred to in *Ramsay v Pigram*[24], by which an

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20 (1968) 118 CLR 271 at 279.

21 Eg *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510 at 515; [1977] 3 All ER 54 at 59-60; *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 32.

22 Eg *Shiels v Blakeley* [1986] 2 NZLR 262.

23 Eg *Rasanen v Rosemount Instruments Ltd* (1994) 112 DLR (4th) 683.

24 (1968) 118 CLR 271 at 276.

issue estoppel has traditionally been understood to be capable of assertion in a subsequent proceeding only by a party who was also a party, or the privy of a party, to the first proceeding[25]. The benefit of an estoppel in the District Court proceeding is claimed here only by Ramsey, which was both defendant in the District Court and respondent in the Federal Court.

19 To put the principle governing who is privy in interest stated and applied in *Ramsay v Pigram* in perspective, however, it is appropriate to say something more generally as to the place of issue estoppel in Australian law.

20 An exercise of judicial power, it has been held, involves "as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons"[26]. The rendering of a final judgment in that way "quells" the controversy between those persons[27]. The rights and obligations in controversy, as between those persons, cease to have an independent existence: they "merge" in that final judgment[28]. That merger has long been treated in Australia as equating to "res judicata" in the strict sense[29].

21 Estoppel in relation to judicial determinations is of a different nature. It is a common law doctrine informed, in its relevant application, by similar

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25 Handley, *Spencer Bower and Handley: Res Judicata*, 4th ed (2009) at [9.05].

26 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374; [1970] HCA 8.

27 *Fencott v Muller* (1983) 152 CLR 570 at 608; [1983] HCA 12.

28 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 106; [1931] HCA 34; *Blair v Curran* (1939) 62 CLR 464 at 532; [1939] HCA 23; *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 510; [1988] HCA 21.

29 *Blair v Curran* (1939) 62 CLR 464 at 532; *Jackson v Goldsmith* (1950) 81 CLR 446 at 466; [1950] HCA 22. Compare *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 at 180 [17].

considerations of finality and fairness[30]. Yet its operation is not confined to an exercise of judicial power; it also operates in the context of a final judgment having been rendered in other adversarial proceedings[31]. It operates in such a context as estoppel operates in other contexts: as a rule of law, to preclude the assertion of a right or obligation or the raising of an issue of fact or law[32].

22 Three forms of estoppel have now been recognised by the common law of Australia as having the potential to result from the rendering of a final judgment in an adversarial proceeding. The first is sometimes referred to as "cause of action estoppel"[33]. Estoppel in that form operates to preclude assertion in a subsequent proceeding of a claim to a right or obligation which was asserted in the proceeding and which was determined by the judgment. It is largely redundant where the final judgment was rendered in the exercise of judicial power, and where res judicata in the strict sense therefore applies to result in the merger of the right or obligation in the judgment. The second form of estoppel is almost always now referred to as "issue estoppel"[34]. Estoppel in that form operates to preclude the raising in a subsequent proceeding of an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in the judgment[35]. The classic expression of the primary consequence of its operation is that a "judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot

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30 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 604 [36]; [2002] HCA 56; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 17 [34]; [2005] HCA 12.

31 *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 at 453; [1973] HCA 59; *Kuligowski v Metrobus* (2004) 220 CLR 363 at 373-374 [22]; [2004] HCA 34.

32 *Jackson v Goldsmith* (1950) 81 CLR 446 at 466.

33 The expression was coined by Diplock LJ in *Thoday v Thoday* [1964] P 181 at 197-198.

34 The expression was coined by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537 at 560-561; [1921] HCA 56.

35 *Blair v Curran* (1939) 62 CLR 464 at 510, 531-533; *Jackson v Goldsmith* (1950) 81 CLR 446 at 466-467.

afterwards be raised between the same parties or their privies"[36]. The third form of estoppel is now most often referred to as "*Anshun* estoppel"[37], although it is still sometimes referred to as the "extended principle" in *Henderson v Henderson*[38]. That third form of estoppel is an extension of the first and of the second. Estoppel in that extended form operates to preclude the assertion of a claim[39], or the raising of an issue of fact or law[40], if that claim or issue was so connected with the subject matter of the first proceeding as to have made it unreasonable in the context of that first proceeding for the claim not to have been made or the issue not to have been raised in that proceeding[41]. The extended form has been treated in Australia as a "true estoppel"[42] and not as a form of res judicata in the strict sense[43]. Considerations similar to those which underpin this form of estoppel may support a preclusive abuse of process argument.

23 The present significance of the recognition of those three forms of estoppel is that each has the potential to preclude assertion of a right or obligation, or the raising of an issue of fact or law, between parties to a proceeding or their privies. Absent a principled basis for distinction – and none

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36 *Blair v Curran* (1939) 62 CLR 464 at 531. See also *Kuligowski v Metrobus* (2004) 220 CLR 363 at 373 [21].

37 After *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; [1981] HCA 45.

38 (1843) 3 Hare 100 [67 ER 313].

39 Eg *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; *Bryant v Commonwealth Bank of Australia* (1995) 57 FCR 287 at 297-298; *Ling v Commonwealth* (1996) 68 FCR 180 at 184, 188, 193.

40 *Hoysted v Federal Commissioner of Taxation* (1925) 37 CLR 290; [1926] AC 155.

41 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 598, 602-603.

42 *Rogers v The Queen* (1994) 181 CLR 251 at 275; [1994] HCA 42. See also *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 601-602, rejecting the approach in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 at 590.

43 *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 509, 512.

has been suggested – one principle must govern the identification of privies for the purpose of all forms of estoppel which result from the rendering of a final judgment in an adversarial proceeding.

24 To explain contemporary adherence to the comparatively narrow principle in *Ramsay v Pigram*, it is appropriate also to explain the relationship between the doctrine of estoppel and the doctrine of abuse of process as it has since come to be recognised and applied in Australia. The doctrine of abuse of process is informed in part by similar considerations of finality and fairness. Applied to the assertion of rights or obligations, or to the raising of issues in successive proceedings, it overlaps with the doctrine of estoppel. Thus, the assertion of a right or obligation, or the raising of an issue of fact or law, in a subsequent proceeding can be simultaneously: (1) the subject of an estoppel which has resulted from a final judgment in an earlier proceeding; and (2) conduct which constitutes an abuse of process in the subsequent proceeding.

25 Abuse of process, which may be invoked in areas in which estoppels also apply, is inherently broader and more flexible than estoppel. Although insusceptible of a formulation which comprises closed categories[44], abuse of process is capable of application in any circumstances in which the use of a court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute[45]. It can for that reason be available to relieve against injustice to a party or impairment to the system of administration of justice which might otherwise be occasioned in circumstances where a party to a subsequent proceeding is not bound by an estoppel.

26 Accordingly, it has been recognised that making a claim or raising an issue which was made or raised and determined in an earlier proceeding, or which ought reasonably to have been made or raised for determination in that earlier proceeding, can constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel[46]. Similarly, it has been recognised that making such a claim or raising such an issue can constitute an

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44 *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 262 [1], 265 [9]; [2006] HCA 27.

45 *PNJ v The Queen* (2009) 83 ALJR 384 at 385-386 [3]; 252 ALR 612 at 613; [2009] HCA 6.

46 *Walton v Gardiner* (1993) 177 CLR 378 at 393; [1993] HCA 77, citing *Reichel v Magrath* (1889) 14 App Cas 665 at 668; *Coffey v Secretary, Department of Social Security* (1999) 86 FCR 434 at 443 [25].

abuse of process where the party seeking to make the claim or to raise the issue in the later proceeding was neither a party to that earlier proceeding, nor the privy of a party to that earlier proceeding, and therefore could not be precluded by an estoppel[47].

27 The final element of the legal context relevant to explaining continuing adherence to the comparatively narrow principle in *Ramsay v Pigram* is the continuing existence of the distinct rule, equitable in origin, which prevents a person from actually recovering more than once for a given loss that results from breach of a given obligation[48]. The rule applies irrespective of the part, if any, which the person might have played in a proceeding which would otherwise facilitate the double recovery against which it guards. Its distinct operation was noted more than two centuries ago in the seminal explanation of issue estoppel[49]. There it was explained that "a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession" and that "it is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel"[50]. The explanation continued[51]:

> "The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury: but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by

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47 *O'Shane v Harbour Radio Pty Ltd* (2013) 85 NSWLR 698 at 722-724 [99]-[111] and the cases there cited. See to similar effect *Reichel v Magrath* (1889) 14 App Cas 665 and *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 at 185 [25], explaining *Johnson v Gore Wood & Co* [2002] 2 AC 1.

48 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 554 [99]; [2001] HCA 68. See also *Registrar-General (NSW) v Behn* (1981) 148 CLR 562 at 569; [1981] HCA 36; *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 608; [1996] HCA 38.

49 *Outram v Morewood* (1803) 3 East 346 [102 ER 630], quoted in *Hoysted v Federal Commissioner of Taxation* (1925) 37 CLR 290 at 299-300; [1926] AC 155 at 166-167.

50 *Outram v Morewood* (1803) 3 East 346 at 354-355 [102 ER 630 at 633].

51 *Outram v Morewood* (1803) 3 East 346 at 355 [102 ER 630 at 633].

> those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them."

The privity principle explained

28 The principle adopted and applied in *Ramsay v Pigram*, as that governing the identification of a person who is privy in interest with a party to proceedings for the purpose of an estoppel resulting from the rendering of a final judgment, was the principle propounded in argument in that case by Mr Deane QC. By reference to a passage in an early text on the law of estoppel, Mr Deane advanced the following proposition[52]:

> "As regards estoppel, the same doctrine applies to each category, namely that one who claims through another is, to the extent of his claim, subject to and able to take advantage of all estoppels affecting the person through whom he claims."

29 The higher-level principle which informed the formulation of that proposition was identified in a preceding passage in the same text. It was identified in terms of the maxim *qui sentit commodum sentire debet et onus*: who takes the benefit ought also to bear the burden[53]. That higher-level principle has long been recognised as informing the determination of the extent of the preclusive effect of other forms of estoppel[54]. It has particular resonance in relation to an estoppel which results from the rendering of a final judgment. Another early legal text explained its significance this way[55]:

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52 *Ramsay v Pigram* (1968) 118 CLR 271 at 273-274, reflecting Everest, *Everest and Strode's Law of Estoppel*, 3rd ed (1923) at 55.

53 Everest, *Everest and Strode's Law of Estoppel*, 3rd ed (1923) at 52. See to similar effect Croom-Johnson and Bridgman, *A Treatise on the Law of Evidence as Administered in England and Ireland, by His Honour the Late Judge Pitt Taylor*, 12th ed (1931), vol 1 at 87 [90] and vol 2 at 1062-1064 [1689]-[1691], quoted in part in *Ramsay v Pigram* (1968) 118 CLR 271 at 287-288.

54 See generally *Partridge v McIntosh & Sons Ltd* (1933) 49 CLR 453 at 462-463; [1933] HCA 38 and the cases there cited. See also *Taylor v Needham* (1810) 2 Taunt 278 at 282-283 [127 ER 1084 at 1086].

55 Herman, *Commentaries on the Law of Estoppel and Res Judicata*, (1886), vol 1 at 148 (footnotes omitted).

> "The maxim '*qui sentit commodum sentire debet [e]t onus*' is ... particularly explanatory of this branch of the law of estoppel, in accordance with which the record of a verdict followed by a judgment *inter partes* will estop not only the original parties, but those also who claim under them. A man will be bound by that which bound those under whom he claims *quoad* the subject-matter of the claim, for he who derives the benefit from a thing ought to sustain the burden, or feel the disadvantages attending it. And no man, except in certain cases, which are regulated by the statute law and law merchant, can transfer to another, a better right than he himself possesses. The grantee shall not be in a better condition than he who made the grant, and, therefore, privies in blood, law and estate shall be bound by and take advantage of estoppels. In order to give full effect to the rule by which parties are held estopped by a judgment, all persons who are represented by the parties or claim under them or in privity with them are as equally and as effectually estopped by the same proceedings."

30 That is the essential rationale for the pithy, already quoted statement of principle by Barwick CJ in *Ramsay v Pigram*[56].

31 Barwick CJ's explanation of the application of that statement of principle in *Ramsay v Pigram* is useful in illustrating its content. The result was to deny that the Government of New South Wales, then sued by the respondent for damages in negligence arising out of a collision with a police car, was privy in interest with the police officer driving that car, who had earlier sued the respondent for damages in negligence arising out of the same collision. His Honour explained[57]:

> "In every respect the action between the respondent and the police officer was personal to each of them, neither being in any sense in relation to the action or any of the issues involved in it, representative of another. Nor can it be said that the Government in any sense claims under or in virtue of the police officer or of any right of his, or that it derives any relevant interest through him."

32 It is important to recognise that Barwick CJ's explanation of the application of his statement of principle had two limbs. The conclusion that the

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56 Cf *Richards v Jenkins* (1887) 18 QBD 451 at 456-457.

57 (1968) 118 CLR 271 at 279.

Government was not privy in interest with the police officer was based on the absence of either representation of interest or derivation of interest.

33 Consistently with the rationale for the principle, the explanation demonstrates that a party to a later proceeding ("A") can be privy in interest with a party to an earlier proceeding ("B") on either of two bases. One basis is that A might have had some legal interest in the outcome of the earlier proceeding which was represented by B, or that B has some legal interest in the outcome of the later proceeding which is represented by A. The extent to which the representation by A or B will be sufficient to bind the other is the critical issue which will be explored later in these reasons. The other basis is that, after that earlier proceeding was concluded by judgment, A might have acquired from B some legal interest in respect of which B would be affected by an estoppel which A then relies on in the later proceeding.

34 Other bases on which a person might potentially be privy in interest with a party need not be explored. For present purposes, it is sufficient to focus on one operation of the first basis illustrated by the application of the principle in *Ramsay v Pigram*: where A has a legal interest in the outcome of the earlier proceeding which was represented by B.

35 Subsequent applications of the principle in *Ramsay v Pigram* have for the most part correctly emphasised that the interest of the privy must in each case be a legal interest: an economic or other interest on the part of A in the outcome of the earlier proceeding is insufficient. Those applications have also correctly emphasised that, absent a legal interest, such influence as A might have had over the conduct of the earlier proceeding is irrelevant even if that influence amounted to control. Thus, directors of a company, who also held shares in its parent company, were held not to be estopped from pursuing a later action to recover damages to compensate for a loss on their own account in circumstances where they had stood to gain financially from an earlier action by the company claiming damages for loss on the company's account. That was despite the directors having been found to have exercised effective control over the company's conduct of that earlier action[58]. The constraint on the conduct of A in such

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58 *Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd* (1993) 43 FCR 510. See also *Trawl Industries of Australia Pty Ltd (In liq) v Effem Foods Pty Ltd* (1992) 36 FCR 406 and *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 108 ALR 353.

circumstances lies not in an estoppel but, in an appropriate case, in abuse of process[59].

36 One subsequent application of the principle is especially instructive for the present case. It is *Young v Public Service Board*[60]. There, government employees claiming a declaration that their employer, the Public Service Board, had not determined their ordinary hours of work were held not to be estopped by a contrary finding of fact made in the course of resolving an earlier dispute between the Board and an industrial association of which they were members. The reasoning of Lee J in support of that conclusion acknowledged that the industrial association had in that earlier dispute made a claim which it was in the interests of its members collectively to assert. The reasoning acknowledged also that the claim was one which would, if accepted, have resulted in an award which was made binding by statute on the employees as well as the Board. But it emphasised that the claim was made by the association in an industrial context in which members individually had no capacity to appear in or control the proceedings which resulted in the resolution of the dispute[61]. The reasoning emphasised, in addition, that the employees were claiming the declaration sought in the later proceedings simply as employees of the Board, without regard to the industrial association or their membership of it[62].

37 The first strand of the reasoning in *Young* illustrates that a person does not become bound by an estoppel by reason of a party having represented legal interests of that person in an earlier proceeding merely as a consequence of that party having lawfully asserted a claim which, if accepted, would have resulted in a determination enhancing or enforcing a legal entitlement of the person. In the absence of the person having authorised the assertion of the claim, the representation must at least have been of such nature as to have protected the person from being unjustifiably subjected to an unwanted estoppel.

38 Why that should be so is not difficult to explain. It is a principle at the core of our legal system that a party claiming or denying the existence of a legal right or obligation should have an opportunity to present evidence and arguments to establish the facts and law on which the claim or denial is founded. There are

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59 Cf *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 30-31.

60 [1982] 2 NSWLR 456. See also *Eljazzar v BHP Iron Ore Pty Ltd* (1996) 65 IR 40.

61 [1982] 2 NSWLR 456 at 465-466.

62 [1982] 2 NSWLR 456 at 466.

countervailing considerations, some of which operate to create exceptions to that principle. Finality and fairness, including maintaining the certainty of past adjudicated outcomes and ensuring the predictability of future adjudicated outcomes, are amongst those countervailing considerations, and the estoppels informed by those considerations are amongst the exceptions to the principle. The operation of an estoppel, it must be remembered, is to preclude the assertion in a subsequent proceeding of what is claimed to be the truth.

39 The justice of binding to an estoppel a person who was a party to an earlier proceeding is readily apparent: the person has already had an opportunity to present evidence and arguments. The justice of binding to an estoppel a person whose legal interests stood to benefit from the making or defending of a claim by someone else in an earlier proceeding will often also be apparent. With the benefit of the claim or defence also comes the detriment of the estoppel. That, at least, is the underlying theory. But it is a theory which has limitations. It would be quite unjust for such a person to be precluded from asserting what the person claims to be the truth if the person did not have an opportunity to exercise control over the presentation of evidence and the making of arguments in the earlier proceeding and if the potential detriment to the person from creating such an estoppel was not fairly taken into account in the decision to make or defend the claim in the earlier proceeding or in the conduct of the earlier proceeding.

40 Traditional forms of representation which bind those represented to estoppels include representation by an agent, representation by a trustee, representation by a tutor or a guardian, and representation by another person under rules of court which permit representation of numerous persons who have the same interest in a proceeding[63]. To those traditional forms of representation can be added representation by a representative party in a modern class action[64]. Each of those forms of representation is typically the subject of fiduciary duties imposed on the representing party or of procedures overseen by the court (of which opt-in or opt-out procedures and approval of settlements in representative or class actions are examples), or of both, which guard against collateral risks of representation, including the risk to a represented person of the detriment of an estoppel operating in a subsequent proceeding outweighing the benefit to that person of participating in the current proceeding.

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63 As to the latter, see *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398 at 423-424; [1995] HCA 9.

64 *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384 at 399-406.

41 That is not necessarily the nature of the representation which occurs in a proceeding commenced by a statutory entity (whether a regulatory or other authority) or a statutory office-holder in the exercise of a power or capacity to make a claim to enforce a legal entitlement of another person. The entity or office-holder necessarily acts for statutorily mandated or permitted reasons within a statutorily defined area of responsibility in making such a claim. Other than where the entity or office-holder is specifically required or authorised by statute to make such a claim as a representative of another person, the entity or office-holder would not ordinarily be required by statute to consider interests of the person beyond those interests which fall within its own statutorily defined area of responsibility. The entity or office-holder might not even be permitted to consider broader interests of the other person, because to do so might conflict with the proper discharge of that statutory responsibility.

42 Were a person whose legal entitlement the statutory entity or office-holder claimed to enforce thereby to be privy in interest with the entity or office-holder for the purpose of the common law doctrine of estoppel, pursuit of the claim by the statutory entity might foreclose not only the pursuit of the same and other claims by that person, but also the raising by that person of issues of fact or of law in defence of claims brought against that person. The entity or office-holder, in acting within its statutorily defined area of responsibility, might in that way unwittingly preclude the future enforcement of other rights or obligations of far more value to that person.

43 For the conduct of the statutory entity or statutory office-holder to constrain the future conduct of the person would therefore have the real potential not only to occasion injustice to that person but to impose a practical impediment to the performance of the entity or statutory office-holder's statutory responsibilities. If such a result is not imposed by the statute under which the entity or office-holder acts, then such a result should not be superimposed by the common law of estoppel.

The privity principle applied

44 The Court of Appeal erred in concluding that the Fair Work Ombudsman was Mr Tomlinson's privy on the basis that, in the Federal Court proceeding, the Fair Work Ombudsman was enforcing Mr Tomlinson's entitlements "under or through", or "on behalf of", Mr Tomlinson. In truth, the Fair Work Ombudsman was acting pursuant to his statutory power to commence proceedings in a court

"to enforce" the *Workplace Relations Act* and an award made under that Act[65]. That power was not derived from Mr Tomlinson or his entitlements. The Fair Work Ombudsman was not acting pursuant to his distinct power "to represent" employees who are, or may become, a party to proceedings in a court[66]. The orders for the payment of Mr Tomlinson's entitlements were made, not in satisfaction of a claim asserted on behalf of Mr Tomlinson by the Fair Work Ombudsman as his representative, but pursuant to the power of the court to make such an order, which power arose when the court found that employees had not been paid their entitlements.

45 The statutory function conferred by the *Fair Work Act* on the Fair Work Ombudsman of commencing proceedings in a court to enforce terms of the Australian Fair Pay and Conditions Standard and of awards made under the *Workplace Relations Act*, as distinct from the statutory function of representing employees who are or may become parties to proceedings in a court, cannot be interpreted as requiring the Fair Work Ombudsman to consider legal interests of employees beyond the legal interests specifically protected by the enforcement action the Fair Work Ombudsman is authorised to undertake. Nor are those wider legal interests protected by the procedures which govern the exercise of power on the part of an eligible court.

46 Performing that function and invoking those procedures, the Fair Work Ombudsman did not represent the legal interests of Mr Tomlinson, in the sense which gives rise to an estoppel, by seeking in the Federal Court orders that Ramsey pay Mr Tomlinson and others amounts which Ramsey had failed to pay in breach of applicable terms. The fact that Mr Tomlinson had complained to the Fair Work Ombudsman and the fact that he provided evidence in the proceeding make no difference to that conclusion. Counsel for Ramsey disavowed any suggestion that Mr Tomlinson in fact gave to the Fair Work Ombudsman some additional non-statutory authority to act as his agent. The Fair Work Ombudsman acted in the discharge of its own statutory responsibility.

47 It follows that the declarations and orders made by the Federal Court in the proceeding commenced by the Fair Work Ombudsman created no estoppel binding on Mr Tomlinson in the subsequent District Court proceeding or in any

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65 Section 682(1)(d) of the *Fair Work Act* 2009 (Cth), read with item 13(2) of Sched 18 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 (Cth).

66 Section 682(1)(f) of the *Fair Work Act* 2009 (Cth).

other subsequent proceeding between Mr Tomlinson and Ramsey. If Mr Tomlinson was paid the amount that the Federal Court determined Ramsey to have underpaid and that it ordered Ramsey to pay to him, Mr Tomlinson would be prevented from personally pursuing Ramsey for the same amount. That would not be because of the operation of an estoppel arising from the order made by the Federal Court. It would be the result of the operation of the distinct rule against double recovery.

48 It has never been suggested that Mr Tomlinson's conduct in bringing the District Court proceeding constituted an abuse of process.

Disposition of the appeal

49 There remains the question, raised but not determined in Ramsey's appeal to the Court of Appeal and raised again by Ramsey in its notice of contention in this appeal, as to whether or not the evidence before the District Court established that Mr Tomlinson's employer had in fact been Ramsey. Neither party suggests that the determination of that question involves any novel or important question of principle. What the determination of that question does involve is an analysis of the evidence before the District Court as distinct from that which had been before the Federal Court. It is inappropriate that such an evidentiary analysis be undertaken for the first time in this Court.

50 The appropriate disposition of this appeal, in those circumstances, is by the making of the following orders:

(1) Appeal allowed.

(2) Set aside paragraphs 2, 3, 4 and 5 of the order of the Court of Appeal of the Supreme Court of New South Wales made on 21 July 2014.

(3) Remit the matter to the Court of Appeal to determine the issue raised by the respondent's notice of contention in this Court.

(4) The respondent pay the appellant's costs of the appeal to this Court and of the appeal to date in the Court of Appeal.

51 NETTLE J. In 2010, the Fair Work Ombudsman instituted a proceeding in the Federal Court of Australia ("the Fair Work proceeding") against the respondent ("Ramsey Food") in which the Ombudsman ultimately succeeded. In giving judgment in favour of the Ombudsman, Buchanan J found, inter alia, that at relevant times Ramsey Food was the appellant's employer and that Ramsey Food had failed to pay the appellant amounts due to the appellant as an employee.

52 The question for determination in this appeal is whether the appellant was estopped by those findings from contending in a later District Court proceeding between the appellant and Ramsey Food that, at relevant times, Tempus Holdings Pty Ltd ("Tempus") was the appellant's employer.

53 For the reasons which follow, it should be concluded that the appellant was not.

The facts

54 On 4 October 2006, Greenwood J handed down judgment in *McIlwain v Ramsey Food Packaging Pty Ltd (No 4)*[67] ("the McIlwain proceeding"). His Honour found that three of the companies in what was called "the Ramsey Group" had breached s 298K of the *Workplace Relations Act* 1996 (Cth) by terminating the employment of 12 employees for reasons that were prohibited under the Act. Greenwood J imposed penalties for breach of the Act totalling $84,000 and ordered that compensation be paid to the employees.

55 In August 2010, the Fair Work Ombudsman instituted the Fair Work proceeding against Ramsey Food and Mr Stuart Ramsey pursuant to s 682(1)(d) of the *Fair Work Act* 2009 (Cth) and s 719 of the *Workplace Relations Act*. The claim alleged that Ramsey Food had acted in breach of the Federal Meat Industry (Processing) Award 2000 ("the Award") and thus the *Fair Work Act* by failing to pay the appellant and ten other former employees of Ramsey Food payments of wages in lieu of notice, severance pay, accrued annual leave and interest on those entitlements.

56 Buchanan J handed down judgment in the Fair Work proceeding on 19 October 2011[68]. In his reasons for judgment, his Honour described the issue for determination as being whether Ramsey Food as the employer of 11 "complainant employees" failed to pay those employees amounts due to them under the Award and s 235 of the *Workplace Relations Act* (as it then stood). He defined the principal question in the proceeding as being whether the employees had been employed by Ramsey Food (as the Ombudsman contended) or by

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67 (2006) 158 IR 181; [2006] FCA 1302.

68 *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174.

Tempus, a company which had been "inter-positioned between [Ramsey Food] and the employees" (as Ramsey Food contended). There was also a related question of whether Mr Ramsey was knowingly concerned in the conduct of Ramsey Food[69].

57 Buchanan J found that, at all relevant times since 1998, Mr Ramsey had been in effective control of the management and operation of an abattoir in Grafton, New South Wales, and had so exercised control through a number of companies established by him or at his request which were called the Ramsey Group[70]. Then, shortly after Greenwood J made final orders in the McIlwain proceeding, Mr Ramsey arranged for the acquisition of a new shelf company (Tempus) to be added to the Ramsey Group and at the same time for the winding up of each of the three employing companies[71]. Then, having instigated those arrangements, Mr Ramsey directed that letters dated 16 October 2006 be sent by Tempus to each of the 11 complainant employees, as follows[72]:

> "On the 4th October last the Federal Court of Australia made orders against your employer. These orders fined, penalised and awarded costs against your employer causing it to be insolvent and accordingly, your employer cannot continue to incur wage commitments whilst insolvent. Accordingly, your employment with your employer is at an end.
>
> You are at liberty to approach Tempus Holdings Pty Limited who may have a position for you, and who may be willing to honour your entitlements."

58 In consequence of those measures, nine of the 11 complainant employees, including the appellant, "were transferred to the books of Tempus at about this

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69 *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174 at 176 [1].

70 *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174 at 177 [4].

71 *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174 at 179 [12], 181 [21].

72 *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174 at 179 [13].

time"[73] but, apart from that alteration, "nothing changed for employees who were allowed to remain in employment"[74]:

> "The result of the practices followed at the direction of Mr Ramsey was that money passed through the Tempus account only so often and to such an extent as was necessary to shortly thereafter discharge the obligations assumed by Tempus. Those were in truth nothing more than clerical arrangements. For all practical purposes the Tempus bank account was treated as an account within the Ramsey Group. I am satisfied, on the whole of the evidence, that those arrangements were adopted so as to give colour to the proposition that it was Tempus, rather than [Ramsey Food], which was legally liable for those payments. The effect of Mr Ramsey's evidence was that similar practices had earlier been followed with respect to the four companies within the Ramsey Group used to employ labour at the abattoir before late 2006."[75]

59 Buchanan J found that application of relevant legal principle to the facts so found led to three possible conclusions in support of the Ombudsman's case. The first was that, despite the interposition of Tempus between Ramsey Food and the complainant employees, Tempus did not become or act as the employer of the complainant employees as a matter of "real substance"[76]:

> "First, despite the [arrangements], Tempus never became, nor acted as, the employer of the complainant employees. Tempus did not exercise any form of control over the engagement, performance of work, payment or ultimate termination of employment of any of the complainant employees. All such responsibilities were borne by some different legal entity ... [Ramsey Food], in whose business the complainant employees worked and on whose behalf all the functions referred to above were carried out."[77]

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73 *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174 at 184 [27].

74 *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174 at 184 [28].

75 *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174 at 183 [26].

76 *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174 at 199 [94].

77 *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174 at 204 [119].

60 The second was that, if the arrangements were effective, Tempus acted as Ramsey Food's agent[78]:

> "[I]f any steps taken to inter-position Tempus between the complainant employees and [Ramsey Food] are to be regarded as having any effect at all it is abundantly clear that everything which was done in the name of Tempus was done by Tempus (or others) acting on behalf of [Ramsey Food]."

61 The third was that "everything done in the name of Tempus was ... a sham"; but his Honour added that it was unnecessary to say so and that the conclusion that it was a sham "supports and reinforces the earlier two, although [it is] not necessary for either"[79].

62 In the result, Buchanan J concluded that the Ombudsman's case succeeded and he made orders accordingly, including orders pursuant to s 719 of the *Workplace Relations Act* that Ramsey Food pay the appellant the amount by which his entitlements had been underpaid.

The District Court proceeding

63 Subsequently, the appellant instituted a proceeding against Ramsey Food in the District Court of New South Wales for damages for personal injuries suffered in 2008 in the course of his employment at the abattoir ("the District Court proceeding").

64 By his statement of claim in the District Court proceeding, the appellant alleged that, at relevant times, he had been an employee of Tempus and that, pursuant to a labour hire agreement (of the particulars of which it was stated he was unaware), Tempus had made him available to Ramsey Food to perform work in the abattoir. The appellant further alleged that, by reason thereof, Ramsey Food had become the appellant's employer *pro hac vice* and, as such, Ramsey Food had negligently failed to take sufficient care of the appellant as employee, whereby the appellant had been injured.

65 In its defence, apart from denying negligence and in the alternative alleging contributory negligence, Ramsey Food pleaded that, by reason of Buchanan J's finding in the Fair Work proceeding that the appellant was at relevant times employed by Ramsey Food, the appellant was estopped from

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78 *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174 at 204 [120].

79 *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174 at 204-205 [121].

contending that he was at those times employed by Tempus. It was also pleaded that the appellant had not made a claim against Ramsey Food for lump sum compensation, or been paid lump sum compensation, in accordance with ss 280A and 280B of the *Workplace Injury Management and Workers Compensation Act* 1998 (NSW) and s 151C of the *Workers Compensation Act* 1987 (NSW) and had not served a pre-filing statement on Ramsey Food or referred the claim to mediation in accordance with ss 315 and 318A of the *Workplace Injury Management and Workers Compensation Act*; and, consequently, that the appellant was precluded by those provisions from bringing the District Court proceeding.

Relevant legislation

66 At relevant times s 280A of the *Workplace Injury Management and Workers Compensation Act* provided that a claim for work injury damages in respect of an injury cannot be made unless a claim for "lump sum compensation"[80] is made before or at the same time as the claim for damages. Section 280B provided that damages cannot be recovered from "the employer liable to pay compensation under this Act" unless and until any permanent impairment compensation to which the worker is entitled has been paid.

67 Section 151C of the *Workers Compensation Act* provided that "[a] person to whom compensation is payable under this Act" is not entitled to commence proceedings for damages in respect of work injury "against the employer liable to pay that compensation" until six months after giving notice of the injury to "the employer".

68 Sections 315 and 318 of the *Workplace Injury Management and Workers Compensation Act* provided inter alia that, before a claimant may commence court proceedings for recovery of work injury damages, the claimant must serve a "pre-filing statement" on the defendant and for the claim pleaded to be limited to the claim made in the pre-filing statement. Section 318A provided that a claimant must refer a claim for work injury damages to mediation before commencing court proceedings.

69 The appellant's claim was in common law negligence rather than for compensation under the *Workplace Injury Management and Workers Compensation Act* and the *Workers Compensation Act*. He had thus not complied with the statutory requirements set out in those Acts in respect of

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80 "Lump sum compensation" was defined in s 4 of the *Workplace Injury Management and Workers Compensation Act* as meaning compensation under Pt 3, Div 4 of the *Workers Compensation Act*. In substance, lump sum compensation is compensation payable for permanent impairment suffered by an injured worker.

Ramsey Food. If, therefore, the appellant were found to have been employed by Ramsey Food, the claim would necessarily fail. It was, however, common ground between the parties in the District Court that, if the appellant were found to have been an employee of Tempus, the action would be governed by the *Civil Liability Act* 2002 (NSW) and thus the pre-action requirements in the *Workplace Injury Management and Workers Compensation Act* and the *Workers Compensation Act* would not apply.

The District Court's judgment

70 At the outset of the District Court proceeding, counsel for Ramsey Food applied to have the plea of estoppel dealt with as a preliminary issue but the judge rightly chose to defer consideration of the point until after the evidence had been heard[81]. In his reasons for judgment following trial, the judge defined the estoppel issue as being whether he was:

> "bound by the judgment of Buchanan J in the [Fair Work proceeding] to the effect that the Plaintiff was employed by the defendant at the time of his injury. The defendant contends that that finding creates an issue estoppel."

71 The judge concluded that the finding did not create the issue estoppel alleged, for three reasons. The first was that he considered that a natural person or corporation may be an employer for one purpose and not another. Although the judge did not say so in terms, it appears that what his Honour meant to convey was that, although Tempus was not regarded as the employer for the purposes of the Fair Work proceeding, it did not follow that Tempus could not be regarded as the employer for the purpose of the District Court proceeding; and, in view of the way in which Tempus had acted, it should be regarded as the employer for the purposes of the District Court proceeding. In that connection, the judge referred to the fact that the letter of 16 October 2006 made it clear that the appellant's employment by one of the employing companies had been terminated. From that point on, the appellant had believed that he was employed by Tempus. Tempus provided labour to the abattoir and the appellant was one of the employees so provided. Tempus paid those employees. Tempus took out workers' compensation insurance and made claims for employees on its workers' compensation policy. And Tempus issued group certificates to its employees and had tax office accounts in its name and credited super guarantee charge in respect of its employees.

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81 See *Wickstead v Browne* (1992) 30 NSWLR 1 at 5-6 per Kirby P in dissent; affirmed by this Court (1993) 10 Leg Rep SL2.

72 The second reason was based on the reasoning of Lee J in *Young v Public Service Board*[82]. The judge held that, because the appellant was not party to the Fair Work proceeding and had no control over the Fair Work proceeding, and because the subject matter of the Fair Work proceeding was in substance different from the issues raised in the District Court proceeding, there was no privity of interest between the appellant and the Ombudsman.

73 The third reason was that, if there were privity of interest, it was apparent that Ramsey Food was seeking to take advantage of an arrangement which Buchanan J had labelled a "sham" and, in the judge's view, equity would intervene to prevent Ramsey Food placing reliance on the arrangement[83].

74 Ultimately, therefore, the judge gave judgment for the appellant in the amount of $155,069 for damages for work injury suffered in the course of his employment at the abattoir, with no reduction for contributory negligence.

The appeal to the Court of Appeal

75 The Court of Appeal held that the judge erred in rejecting Ramsey Food's plea that the appellant's claim was barred by reason of the issue estoppel alleged.

76 Emmett JA delivered the principal judgment. His Honour reasoned that the only question litigated in the Fair Work proceeding so far as the appellant was concerned was whether Ramsey Food was liable to pay the amounts to which the appellant was entitled on the termination of his employment, and that the only basis on which Ramsey Food could be liable to pay those amounts was that Ramsey Food was the appellant's employer during the relevant period. Buchanan J had finally determined that Ramsey Food was the employer at that time. Hence, to assert the contrary was to assert that Buchanan J's judgment was erroneous.

77 Emmett JA observed that privity of interest is a matter of substance, not form, and that the necessary degree of identity of interest may arise where "the relationship is mutual"[84]. But his Honour recognised that, because the Ombudsman was carrying out the function set out in s 682(1)(d) of the *Fair Work Act*, the mere fact of the Fair Work proceeding was not enough to make the Ombudsman the appellant's privy. Nevertheless, his Honour said, the facts were that the Ombudsman had asserted the appellant's claim against Ramsey Food; the appellant had participated in the claim by providing affidavit evidence in support

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82 [1982] 2 NSWLR 456.

83 Cf *Linsley v Petrie* [1998] 1 VR 427 at 443-446 per Callaway JA.

84 *Ramsey Food Processing Pty Ltd v Tomlinson* [2014] NSWCA 237 at [83].

of it; declarations and orders had been made for the appellant's benefit; and thus "an inference is clearly available that [the appellant] authorised the Fair Work Ombudsman to make the claim on his behalf"[85]. It followed, his Honour concluded, that, although the Ombudsman was acting in the public interest in seeking penalties against Ramsey Food, the Ombudsman was also making claims under s 719 of the *Workplace Relations Act* "on behalf of the claimant employees", including the appellant[86]. That meant that the Ombudsman was the appellant's privy for the purposes of issue estoppel[87].

78 Meagher JA delivered a concurring judgment in which he added short reasons of his own. He said that, because of the nature of the relief which was sought in the Fair Work proceeding, it was necessary for the Ombudsman to establish that Ramsey Food was the appellant's employer at the relevant time. That fact was so established and Buchanan J so finally determined. The claim for the orders which Buchanan J made in favour of the appellant was made on behalf of and for the benefit of the appellant, and with his consent. Hence, the claim was, in the language of Barwick CJ in *Ramsay v Pigram*, made by the Ombudsman "under or through the person of whom he is said to be a privy"[88].

79 Ward JA agreed with Emmett JA and Meagher JA.

The appellant's contentions

80 Before this Court, the appellant contended that the Court of Appeal erred by failing to consider the decisions in *Young v Public Service Board*[89] and *Eljazzar v BHP Iron Ore Pty Ltd*[90], and thus in failing to hold that, because the appellant's position was relevantly no different from those of the claimants in those cases, there was no issue estoppel.

81 In *Young*, a professional association had previously brought an Industrial Commission proceeding for interpretation of an industrial award covering the association's members. None of the members of the association was party to that

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85 *Ramsey Food Processing Pty Ltd v Tomlinson* [2014] NSWCA 237 at [90].

86 *Ramsey Food Processing Pty Ltd v Tomlinson* [2014] NSWCA 237 at [91].

87 *Ramsey Food Processing Pty Ltd v Tomlinson* [2014] NSWCA 237 at [91].

88 (1968) 118 CLR 271 at 279; [1968] HCA 34, quoted in *Ramsey Food Processing Pty Ltd v Tomlinson* [2014] NSWCA 237 at [19].

89 [1982] 2 NSWLR 456.

90 (1996) 65 IR 40.

proceeding. In the Supreme Court, Lee J held that the members of the association were not bound by findings essential to the Commission's interpretation of the award. His Honour reasoned that there was no privity of interest between the members and their association because the proceeding had been brought by the association for relief on an "industry" basis and the individual employees had no control over it[91]. Most importantly, his Honour said, the proceeding before him had not been brought "through or under"[92] the association.

82 In *Trawl Industries of Australia Pty Ltd (In liq) v Effem Foods Pty Ltd*[93], Gummow J referred to *Young* with apparent approval as having followed the principles illustrated by *Ramsay v Pigram*[94].

83 In *Eljazzar*[95], a union had entered into an industrial agreement with an employer that obliged the employer to refer any unresolved industrial dispute to the Western Australian Industrial Relations Commission. Pursuant to that agreement, the union instituted a proceeding in the Commission for determination of whether the dismissal of two employees had been unfair. The Commission found that it had not been. In separate proceedings brought by one of the employees in the Industrial Relations Court of Australia, Madgwick J held that the employee was not estopped by that finding from later instituting proceedings on his own behalf for unfair dismissal. His Honour reasoned that the union "had legitimate interests of its own to consider, which may or may not entirely have coincided" with the interests of the claimant[96]. Although the claimant was one of the intended beneficiaries of the union's application to the Commission, in a practical sense the claimant had a relatively limited capacity to control the way his case was put and the extent to which it was advanced, still less to ensure that only his own interests were taken into account[97]. Thus, his Honour concluded, it could not be said that the claimant had de facto assumed

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91 *Young* [1982] 2 NSWLR 456 at 466.

92 *Young* [1982] 2 NSWLR 456 at 466; see *Ramsay v Pigram* (1968) 118 CLR 271 at 279 per Barwick CJ.

93 (1992) 36 FCR 406 at 414.

94 (1968) 118 CLR 271.

95 (1996) 65 IR 40.

96 (1996) 65 IR 40 at 43.

97 (1996) 65 IR 40 at 43.

the role of an "actual party"[98] or that there was otherwise a sufficient degree of identification between the union and the claimant to make it just to hold that the decision should be binding against the claimant[99]. Hence, there was no privity of interest.

Analysis

84 There appears to be some justification for the appellant's complaint that the Court of Appeal did not refer to *Young* or *Eljazzar*. Counsel for the appellant placed heavy reliance on both decisions in his submissions before the Court of Appeal and yet none of the judges of appeal mentioned either decision, still less explained why they considered each to be inapposite.

85 Possibly, the Court of Appeal considered that *Young* was distinguishable on the basis that the relief which the professional association sought in that case was the interpretation of an award on an industry-wide basis. The true substance of the dispute was thus considered to be a dispute between the union and the employer rather than between the employer and individual members. It was not open to individual members of the professional association to be joined as parties to the proceeding or otherwise to influence the conduct or outcome of it.

86 In contrast, what the Ombudsman sought in the Fair Work proceeding included orders for payment to the so-called complainant employees of the amounts which Ramsey Food had underpaid on account of the employees' statutory entitlements. As Emmett JA remarked, the true substance of the dispute was to that extent whether Ramsey Food was obligated to the employees in the amounts which they claimed. As Emmett JA also observed, the appellant was involved in the proceeding to the extent of swearing an affidavit in support of the claim[100].

87 *Eljazzar* is perhaps also distinguishable on the basis that, in that case, although the union's claim was specifically addressed to the lawfulness of the termination of the employment of two of its members, there was no opportunity for the two members to be joined to the proceeding and no opportunity for them to influence the conduct or outcome of the proceeding. There was as well a clear

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98 (1996) 65 IR 40 at 44; cf *Trawl* (1992) 36 FCR 406 at 413-417 per Gummow J; *Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd (Receivers and Managers Appointed, In Liquidation)* (1993) 43 FCR 510 at 520-528 per Northrop and Lee JJ, 534-543 per Burchett J.

99 Cf *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510 at 515 per Megarry VC; [1977] 3 All ER 54 at 60.

100 *Ramsey Food Processing Pty Ltd v Tomlinson* [2014] NSWCA 237 at [89]-[91].

actual or potential conflict of interest between the two members, and, therefore, a potential conflict of interest between each member and the union.

88 In contrast, in this case there was undisputed evidence that the appellant went to the Ombudsman seeking assistance in recovering his unpaid entitlements. To that extent, the appellant was an initiator of the Fair Work proceeding. As Emmett JA said, the appellant gave evidence in the Fair Work proceeding. And as was conceded in argument before this Court, the appellant could have been joined as a party to the Fair Work proceeding. There was also less chance of an actual or potential conflict of interest between the Ombudsman and the appellant in the Fair Work proceeding.

89 Even allowing for those differences, however – why should they be considered enough to require the conclusion that the appellant was bound to the outcome of the claim made by the Ombudsman in respect of the appellant and such findings of fact as were essential to its outcome?

The elements of issue estoppel

90 In *Kuligowski v Metrobus*[101], this Court adopted Lord Guest's formulation of the elements of issue estoppel in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)*. That was as follows[102]:

> "(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised *or their privies*."

91 The notion of privies was earlier essayed by Barwick CJ in an oft-cited passage of his judgment in *Ramsay v Pigram*. In that case, the respondent had been involved in a motor accident with a vehicle driven by a police officer. In an earlier action brought by the police officer against the respondent for damages caused by the respondent's negligence, the respondent had pleaded contributory negligence and it had been held that the police officer was without negligence. The respondent subsequently brought an action against the government for damages suffered as a result of the accident, and once again alleged that the accident was caused by the police officer's negligence. In response, the government pleaded that the respondent was estopped from controverting the determination in the previous proceeding that the police officer was without

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101 (2004) 220 CLR 363 at 373 [21] per Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ; [2004] HCA 34.

102 [1967] 1 AC 853 at 935 (emphasis added).

negligence[103]. It was held that there was no estoppel because there was no privity of interest. The government were not claiming under or through the police officer. The police officer had not sued the respondent on behalf of the government. The government had no interest in his claim. Hence the government had no claim *under or through* him to the benefit of the determination that he was without negligence.

92 Barwick CJ expressed the position thus[104]:

> "Of the three classes of privies of blood, of title and of interest, the only one which is submitted and indeed could be submitted to be relevant is that of a privy in interest. ... The basic requirement of a privy in interest is that the privy must claim *under or through* the person of whom he is said to be a privy. Here it is quite clear that the Government had no interest in the action between the respondent and the police officer: nor can it be said that the action brought by the police officer was brought by him in any sense on behalf of the Government or that in relation to the defence of contributory negligence the respondent could have been treating the Government as the real 'defendant' to that claim. In every respect the action between the respondent and the police officer was personal to each of them, neither being in any sense in relation to the action or any of the issues involved in it, representative of another. Nor can it be said that the Government in any sense claims under or in virtue of the police officer or of any right of his, or that it derives any relevant interest through him."

Claim "under or through" a privy

93 The concept of a claim *under or through* a privy goes back a long way. To begin with, a final decision of a court of competent jurisdiction was only binding between parties to the proceeding. But, by at least the early nineteenth century, it had been extended to a party claiming under or through a party to the proceeding. Lord Penzance so explained the development of it in *Spencer v Williams*[105], as follows:

> "The decision in *Barrs v Jackson*[106] was founded on a true principle, and supported by a sound judgment. If two parties have once, before a court

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103 (1968) 118 CLR 271 at 275.

104 (1968) 118 CLR 271 at 279 (emphasis added).

105 (1871) LR 2 P & D 230 at 235-237 (one footnote omitted).

106 (1845) 1 Ph 582 [41 ER 754].

> of competent jurisdiction, litigated any question of fact, and that question has been finally decided, it is not reasonable that either of them, in any other court, should re-open it. ... Such was the case of *Barrs v Jackson*, in which the Court of Chancery held the parties were barred. It is material to observe, in passing, that in the Court of Chancery, in that case, the parties were actually, one a party to the suit in the Ecclesiastical Court, and the other a party claiming under the party to the original suit. So that the principle is carried one degree further, and not only is the suit barred where the parties are the same, but where they claim under the original parties. Can the doctrine in these cases be extended any further? In the suit before me the parties are not the same as in the suits in the Court of Chancery, nor do they claim under the same. The parties in the suits of Chancery were Sarah Spencer, Samuel Williams, and others. Here the plaintiffs are the children of Sarah Spencer, but they do not claim through their mother as such ... they rest their claim on the ground that Mary Emsley died intestate ...
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> It is proper, therefore, where the question is raised between the same parties, or those claiming under them, that they should be estopped; but the decisions give no authority for a proposition of a wider character".

94 Unsurprisingly, the expression "under or through" is redolent of the party's claim either deriving from or otherwise depending upon the privy's title. Clearly enough, however, it now goes further than that. In *Carl Zeiss*, Lord Reid described the sufficiency of connection as existing where the putative privy of a party to a subsequent proceeding has sued or defended in a previous proceeding "on account of or for the benefit of" the party to the subsequent proceeding[107]. The difficulty is that the precise content of that concept is not yet settled.

95 It is established by the decided cases that privity of interest exists where party and privy share the same interest, in the sense that they are equally entitled to assert a discrete legal right; or where they share an interest by reason of an established legal or equitable relationship, such as agency or trusteeship; or, in some of the more recently decided cases, where the privy claims "under or through" or "on account of or for the benefit of" the party in a manner which is sufficiently analogous to one or other of the same interest or established legal or equitable relationship cases to warrant its inclusion. But the problem is in deciding what is sufficiently analogous.

96 Plainly, "on account of or for the benefit of" includes cases where a trustee has sued or defended on behalf of a beneficiary and where a party to a proceeding relies on the putative privy's title. But it also extends to cases where

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107 [1967] 1 AC 853 at 911-912.

a party has employed a servant or agent in an attempt to re-litigate an issue already determined against the principal in a previous proceeding[108] and where an action has been brought by a party at the direction and with the authority of the putative privy[109]; and, in England, it has been held to extend to a case where a party to litigation is "the corporate embodiment" of a natural person in the sense that the natural person made decisions and gave instructions on behalf of the corporation[110].

97 In England, it has also been said that it is enough that there be "a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party"[111]. But in contrast, in this country, that formulation has been judicially criticised for its evident circularity[112] – it is what Lord Wright might perhaps have denigrated as "idem per idem"[113] – and, in any event, it is subject to the limitations of any category of indeterminate reference[114].

98 The approach in this country, therefore, remains one of identifying characteristics of a relationship between party and privy which, although not amounting to a shared same interest or established legal or equitable relationship like agency or trusteeship, are sufficiently analogous to the established categories of sufficient connection to warrant inclusion in the concept. And, for present purposes, the important characteristics of the established forms of representation which emerge from the decided cases appear to be that a principal is generally able to control the conduct of an agent, and that the imposition of fiduciary duties on certain kinds of representatives has the effect of guiding the representative's conduct and providing remedies to the principal on default.

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108 *Wenman v Mackenzie* (1855) 5 El & Bl 447 [119 ER 547]; *Nana Ofori Atta II v Nana Abu Bonsra II* [1958] AC 95 at 101-102 per Lord Denning.

109 *Kinnersley v Orpe* (1780) 2 Dougl 517 [99 ER 330].

110 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 32 per Lord Bingham of Cornhill.

111 *Gleeson* [1977] 1 WLR 510 at 515 per Megarry VC; [1977] 3 All ER 54 at 60.

112 *Trawl* (1992) 36 FCR 406 at 416 per Gummow J.

113 Lord Wright of Durley, *Legal Essays and Addresses*, (1939) at 259; see also Stone, *Legal System and Lawyers' Reasonings*, (1964) at 258.

114 Stone, *Legal System and Lawyers' Reasonings*, (1964) at 263-267.

Was the Fair Work Ombudsman a privy of the appellant?

99 It follows from what was said in *Ramsay v Pigram* that, in order for Ramsey Food to succeed in its contention that the appellant was bound by issue estoppel to the result of Buchanan J's findings in the Fair Work proceeding, Ramsey Food had to establish that the appellant had an interest in the Ombudsman's claim in the Fair Work proceeding or that the Ombudsman's claim in the Fair Work proceeding was brought on behalf of the appellant.

100 For the following reasons, it should be concluded that the appellant did not have an interest in the Ombudsman's claim in the Fair Work proceeding and that the relationship between the appellant and the Ombudsman was not such that the Ombudsman should be regarded as having brought the Fair Work proceeding "on account of or for the benefit of" the appellant.

No identity of interest

101 Dealing first with whether the appellant had an interest in the Ombudsman's claim in the Fair Work proceeding, it is necessary to begin with the terms of the *Fair Work Act* and the *Workplace Relations Act*.

102 As Emmett JA observed[115], there were two powers available to the Ombudsman under the *Fair Work Act* to obtain an order for the appellant to be paid his entitlements. The first was the power under s 682(1)(f) to represent employees who are or may become a party to proceedings in a court under the Act or a fair work instrument. If the Ombudsman had invoked that power, it might have been that the claim for an order in favour of the appellant would have been made "on behalf of" the appellant. But that power was not invoked because the appellant was not a party to the proceeding and it was not contemplated that he might become party to the proceeding.

103 The other power was under s 682(1)(d) of the Act, to commence proceedings in a court to enforce a fair work instrument, and that was the power which was invoked. Emmett JA appears to have accepted that the invocation of that power was not enough in itself to establish privity of interest. With respect, his Honour was correct.

104 The order which the Ombudsman sought and which was made under s 719 of the *Workplace Relations Act* was for payment to the appellant of "the amount of the underpayment". To the extent that Ramsey Food complied with the order, Ramsey Food's obligations to the appellant were *pro tanto* discharged. But it does not follow that the appellant had an interest in the Ombudsman's claim.

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115 *Ramsey Food Processing Pty Ltd v Tomlinson* [2014] NSWCA 237 at [85]-[88].

105 As has been seen, in this country, "interest" for the purposes of issue estoppel means a legal interest. As Gummow J stressed in *Trawl*, a mere economic interest is not regarded as a sufficient indicium of privity in successive or mutual relationships[116]. For that reason, in *Trawl* it was held to be insufficient to raise an issue estoppel against Trawl's guarantors that, if Trawl had succeeded in its earlier claim against Effem, its success would have resulted in an award of damages which might have gone in reduction of Trawl's indebtedness to its bank and thereby ameliorated the guarantors' liabilities to the bank. The applicant and the guarantors shared a mutual economic interest in the success of Trawl's earlier claim but mutual economic interests were not enough to amount to privity of interest for the purposes of issue estoppel[117].

106 Equally, to establish that a party has an interest in a putative privy's claim, it is not enough to establish that the party and putative privy have different legal interests productive of a unity of outcome. It is necessary that they share the same legal interest[118]. Here, despite the fact that the appellant had an entitlement to be paid by Ramsey Food and the Ombudsman claimed an order that the appellant be paid his entitlement, the appellant and the Ombudsman did not have the same legal interest in the Ombudsman's claim.

107 Comprehension of that point may perhaps be assisted by reference to a more prosaic example of its application. If for good consideration A covenants with B, and also for good consideration covenants severally with C, that A will pay benefits to C, B obtains a contractual entitlement to performance of A's covenant with B and a legal interest in performance of that covenant which is separate and distinct from C's contractual entitlement to performance of A's covenant with C and C's legal interest in the performance of the latter covenant. Thus, despite the evident mutuality of B and C's economic interests in the performance of A's covenants with B and C, they do not have the same interest for the purposes of issue estoppel[119]. And, in those circumstances, if A fails to pay C, and B brings a proceeding for specific performance of A's covenant with B to pay C[120], then, unless C is joined as party to the

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116 (1992) 36 FCR 406 at 414-415.

117 Cf *Bank of Montreal v Mitchell* (1997) 143 DLR (4th) 697 at 740; affd (1997) 151 DLR (4th) 574. See Handley, *Spencer Bower and Handley: Res Judicata*, 4th ed (2009) at 151-152 [9.45].

118 *Spencer v Williams* (1871) LR 2 P & D 230 at 236 per Lord Penzance.

119 *Trawl* (1992) 36 FCR 406 at 413-414.

120 *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460 at 479 per Barwick CJ, 499-503 per Windeyer J; [1967] HCA 3.

proceeding[121], C will not be bound by the outcome of the proceeding or by any of the essential issues decided in the proceeding.

108 Arguably, it would be different if, instead of entering into several covenants with B and C, A covenanted with B and C jointly. In the case of a joint covenant, there is only one covenant, to the benefit of which each of the covenantees is jointly entitled, and it might be said that there is sufficient mutuality of interest to render each of the covenantees privies in interest[122]. If so, C would be bound by the outcome of B's proceeding against A, regardless of whether C were joined as party to the proceeding, at least if C had notice of the proceeding and chose not to become involved[123]. But where covenants are several, the legal interest of each of the covenantees is separate and distinct.

109 Here, the Ombudsman's entitlement to seek an order under ss 682(1)(d) and 719 was analogous to B's entitlement to seek an order for specific performance of A's covenant with B to pay C. Just as B's contractual entitlement to require A to pay C arises separately and distinctly from C's contractual entitlement to be paid by A, the Ombudsman's statutory entitlement to seek an order under ss 682(1)(d) and 719 arose separately and distinctly from the appellant's statutory and contractual entitlement to be paid by Ramsey Food. Just as B's equitable entitlement to seek an order for specific performance of A's covenant with B to pay C is predicated on A's failure to pay C the amount which is due to C, the Ombudsman's statutory entitlement to seek an order that Ramsey Food pay the underpayment to the appellant was predicated on Ramsey Food's failure to pay the appellant what was due to the appellant. Just as there is mutuality of economic interests between B and C, there was mutuality of economic interests between the Ombudsman and the appellant. But, just as the separate and distinct legal entitlements of B and C mean that there is no privity of interest between them, the separate and distinct statutory entitlements of the Ombudsman and the appellant were insufficient to constitute privity of interest between them.

Claim not on behalf of the appellant

110 It remains to deal with whether the Ombudsman's claim was made "on behalf of" the appellant. For the following reasons, it was not.

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121 Cf *Sandtara Pty Ltd v Abigroup Ltd* (1997) 42 NSWLR 5 at 8-9 per Gleeson CJ, Meagher and Handley JJA.

122 *Coulls* (1967) 119 CLR 460 at 493 per Windeyer J.

123 *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241 at 254.

111 It will be recalled that Emmett JA went on to identify a number of factors which he considered led to the conclusion that the Ombudsman was acting on behalf of the appellant. The relevant section of his Honour's reasoning was as follows[124]:

> "While the Fair Work Ombudsman may have been acting in the public interest in seeking penalties from Ramsey Food in the Federal Court Proceedings, there can be no doubt that *the Fair Work Ombudsman was also making claims under s 719 of the* Workplace Relations Act *on behalf of the claimant employees, including Mr Tomlinson*. The Fair Work Ombudsman had no entitlement to moneys payable by the employer of the claimant employees upon the termination of their employment. It was seeking to enforce, and did enforce, the rights vested in the employees, including Mr Tomlinson, under the Award. *In so far as the Fair Work Ombudsman was enforcing Mr Tomlinson's entitlement, under the Award, to a payment in lieu of notice and a severance payment, the Fair Work Ombudsman was doing so on behalf of Mr Tomlinson*. The Fair Work Ombudsman was Mr Tomlinson's privy for the purposes of the application of the doctrine of issue estoppel."

112 As can be seen, there are two critical links in that reasoning, namely: (1) that the Ombudsman was making claims under s 719 "on behalf of ... Mr Tomlinson"; and (2) that "[i]n so far as the Fair Work Ombudsman was enforcing Mr Tomlinson's entitlement ... the Fair Work Ombudsman was doing so on behalf of Mr Tomlinson". With respect, neither is correct.

113 The reference to s 719 appears to be a reference to s 719(6) and (7), which at relevant times provided as follows:

> "(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

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124 *Ramsey Food Processing Pty Ltd v Tomlinson* [2014] NSWCA 237 at [91] (emphasis added).

> 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."

The orders which were made in favour of the appellant in the Fair Work proceeding were made in pursuance of those sub-sections.

114 Since the proceeding was brought under s 682(1)(d) of the *Fair Work Act* and s 719 of the *Workplace Relations Act*, it logically cannot be that the Ombudsman's claim in relation to the appellant was made by the Ombudsman as representative of the appellant or otherwise "on behalf of" the appellant. The Ombudsman was not representing the appellant in a claim under s 719 but acting in exercise of the Ombudsman's own statutory right of action to enforce the *Fair Work Act*. The Ombudsman was not making the appellant's claim "on behalf of" the appellant but making the Ombudsman's own claim pursuant to s 682(1)(d) of the *Fair Work Act* under s 719 of the *Workplace Relations Act* for an order to compel the enforcement of the *Fair Work Act*.

115 Nor is the claim by the Ombudsman under s 719 otherwise of such a nature that it should be regarded as made "on behalf of" the appellant. The relationship between the appellant and the Ombudsman did not fall into one of the established categories of legal and equitable relationships earlier described. The appellant did not engage the Ombudsman as his agent to litigate the question of whether Ramsey Food was his employer and as such had failed to pay his entitlements.

116 As far as can be told, the appellant did not have any control over the conduct of the Ombudsman's claim. The highest the evidence went in that regard was that the appellant placed the facts of his predicament before the Ombudsman and asked the Ombudsman if there was anything which the Ombudsman could do to procure for the appellant his entitlements.

117 There is nothing about the power conferred on the Ombudsman by s 682(1)(d) of the *Fair Work Act* or on the court by s 719 which could be viewed as imposing anything in the nature of a fiduciary duty on the Ombudsman in favour of the appellant.

118 The Ombudsman could not realistically be regarded as the corporate embodiment of the appellant – even for just the purposes of recovery of the appellant's unpaid entitlements – in the sense of the appellant being the person who made decisions and gave instructions on behalf of the Ombudsman as to how the Fair Work proceeding should be conducted. On the evidence, the scope of the appellant's involvement was limited to being a witness.

119 Further, because of the Ombudsman's statutory responsibilities to enforce the Act generally, it is not possible to exclude the potential for at least some conflict of interest between the Ombudsman's objectives in and manner of conducting the Fair Work proceeding and the appellant's interests in recovering his entitlements.

120 It follows that, even on an expansive view of "on behalf of" of the kind suggested by some of the English authorities, there was not here such a degree of identification between the Ombudsman and the appellant that the decision in the Fair Work proceeding should be taken to bind the appellant for the purposes of the District Court proceeding.

Consequences of no estoppel

121 Counsel for Ramsey Food submitted that so to hold would lead to the "scandal" that, despite an order being made under s 719 and satisfied by payment in full, an employer would then be at liberty to institute a fresh proceeding against the employee for recovery of the amount so paid as money paid under a mistake as to the employment relationship. Counsel acknowledged that there might be other solutions to that problem but contended that the most logical and appropriate manner in which to respond to it was by recognising that where orders are made under s 719, they result in issue estoppels.

122 The submission is not persuasive. The short answer to it is that, in the circumstances postulated, the payment would not be a payment under mistake of fact or law but rather in satisfaction of a binding legal obligation constituted of the order made under s 719. As such, it would be a payment made for good consideration[125].

123 Counsel did not make the point but it might also be thought "scandalous" if an employee, having taken the benefit of an order under s 719 against one entity as employer, could then turn around and bring a fresh proceeding against another entity as employer for payment of the amount already paid and received pursuant to the order. The avoidance, however, of potential difficulties of that kind does not necessitate the application of issue estoppel in relation to s 719 orders. In such circumstances, the employee would be bound to bring the amounts received under the s 719 order to account on the basis that, although paid by a third party, they were paid in intended reduction of the underpayment

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125 *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 695 per Robert Goff J; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 380 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; [1992] HCA 48.

of the employee's entitlements *qua* employee and thus *pro tanto* discharged the underpayment[126].

124 There might be still further circumstances in which, having taken the benefit of an order under s 719 and thus the benefit of the findings on the basis of which it was made, it would appear unjust that an employee should be permitted to contend that the entity ordered to make the payment under s 719 was not in fact the employer. If so, however, that would likely be so because the employee has so conducted himself or herself in taking the benefit of the payment ordered and other parties have so acted in reliance upon the assumed state of affairs thereby created that it would be unconscionable for the employee to depart from that basis of assumption[127]. In such circumstances, the employee would be estopped from departing from the assumed state of affairs and therefore estopped from contending that the entity ordered to make the payment under s 719 was not in fact the employer. But, in that event, the estoppel would be an estoppel in pais, not an issue estoppel, and in this case estoppel in pais was not relied upon. Ramsey Food did not allege an estoppel in pais. Had it sought to do so, it would have had to deliver a very different pleading and to prove the assumed basis of dealing between the parties and circumstances which were said to render it unconscionable for the appellant to depart from the assumption. No such thing was attempted.

Notice of contention

125 Under cover of notice of contention[128], counsel for Ramsey Food argued that, if the Court of Appeal were wrong in holding that issue estoppel applied, the appeal to this Court should nevertheless be dismissed on the basis that it was open to the Court of Appeal to adopt Buchanan J's findings, and that this Court should similarly adopt Buchanan J's findings, that Ramsey Food was at all relevant times the appellant's employer.

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126 *Graham v Baker* (1961) 106 CLR 340 at 349-351 per Dixon CJ, Kitto and Taylor JJ; [1961] HCA 48; *Fox v Wood* (1981) 148 CLR 438; [1981] HCA 41; cf *The National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569 at 571-574 per Dixon CJ; [1961] HCA 15.

127 *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 674-675 per Dixon J; [1937] HCA 58; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 410 per Mason CJ, 444-446 per Deane J; [1990] HCA 39; *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 88 ALJR 552 at 576-577 [85]-[89] per Hayne, Crennan, Kiefel, Bell and Keane JJ; 307 ALR 512 at 539-540; [2014] HCA 14.

128 Filed with leave out of time.

126 That contention should also be rejected. Even if Buchanan J's findings could be followed or adopted as a matter of precedent or comity, as it was submitted they could be, the only thing which his Honour relevantly determined was that Ramsey Food remained the employer for the purposes of the *Workplace Relations Act*. As Buchanan J said, that was a question of "substance and reality" as opposed to legal form[129]. In contrast, the issue for the District Court judge involved a question of statutory construction of whether Tempus was "the employer liable to pay ... compensation" under the *Workers Compensation Act* within the meaning of s 151C of that Act (*scil* whether Tempus was bound to obtain a workers' compensation policy in respect of the appellant in accordance with s 155 of the *Workers Compensation Act*). That was a different question, which was predominantly one of legal form. As the District Court judge appreciated, it by no means follows from the fact that Ramsey Food was the employer for the purposes of the *Workplace Relations Act* that Tempus was not "the employer liable to pay ... compensation" under the *Workers Compensation Act* within the meaning of s 151C of that Act.

127 Perhaps it might be said that Buchanan J also decided that Tempus may have acted as agent for Ramsey Food, and possibly that the arrangements between Ramsey Food and Tempus were a "sham"[130]. But those findings do not assist Ramsey Food either. If Tempus contracted as agent for Ramsey Food then, based on the District Court judge's findings[131] that Tempus was nominally the employer in all relevant legal respects and that, at all relevant times, the appellant believed that he was employed by Tempus, it is to be inferred that Tempus contracted as agent for Ramsey Food as undisclosed principal. As such, Tempus was personally liable for performance of the obligations thus created[132] and, therefore, personally liable as the employer liable to pay compensation under the *Workers Compensation Act*.

128 If by a "sham" Buchanan J meant that the arrangement between Tempus and Ramsey Food was devoid of legal effect, the result might well be different. But, given that his Honour said that it was unnecessary to decide whether the arrangement between Tempus and Ramsey Food was a sham and more

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129 *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174 at 190 [57].

130 *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174 at 204-205 [120]-[121].

131 Against which there was no appeal.

132 *Higgins v Senior* (1841) 8 M & W 834 at 844 per Parke B [151 ER 1278 at 1282]; *Perpetual Trustee Co (Ltd) v Bligh* (1940) 41 SR (NSW) 33 at 40 per Jordan CJ for Jordan CJ, Bavin and Roper JJ.

significantly that, if it were a sham, it would support the conclusion that Tempus acted as agent for Ramsey Food, he cannot have meant that the arrangement was a sham in the sense of being devoid of legal effect[133]. Rather, it appears that when his Honour spoke of the arrangement as a "sham" he conceived of it as one which, although apparently productive of legal rights and obligations according to their terms, did not detract from the conclusion that, in real substance, Ramsey Food remained the employer for the purposes of the Fair Work proceeding.

129 To that may be added that, on the basis of the evidence and findings made below, there seems little reason to doubt that Tempus was bound to obtain a workers' compensation policy in accordance with s 155 of the *Workers Compensation Act* and, therefore, was the employer liable to pay compensation under that Act. On the facts as found by the District Court judge (against which there was no appeal) Tempus was the nominal employer who was responsible for group tax and superannuation obligations. Tempus did obtain a workers' compensation insurance policy. And the insurer under that policy paid compensation under the Act in respect of the injuries the subject of the appellant's work injury claim. Buchanan J did not hold to the contrary or even have reason to consider the point.

130 Finally, Ramsey Food did not plead in the District Court proceeding or otherwise suggest that the appellant failed to give Tempus a notice under s 151C of the *Workers Compensation Act* or that the appellant did not make a claim for lump sum compensation against Tempus under s 280A of the *Workplace Injury Management and Workers Compensation Act*, or that that claim had not been paid under s 280B of that Act. Nor was it pleaded or otherwise suggested that, despite Tempus being liable to pay compensation under the *Workers Compensation Act*, and its insurer having paid compensation under that Act, Ramsey Food remained the employer liable to pay compensation under the Act in respect of those injuries. Ramsey Food only ever pleaded or otherwise contended that it was enough to bar the appellant's work injury claim that the appellant was bound by Buchanan J's findings.

131 Of course, so to observe is not necessarily to exclude the possibility that Ramsey Food might also have been required to take out cover or be covered under a workers' compensation policy. Sub-sections (1B) and (2) of s 155 of the *Workers Compensation Act* suggest that it might have been so. Nor is it to deny the possibility that, if the appellant had made a claim for compensation against Ramsey Food in respect of the injury the subject of the work injury claim, Ramsey Food would have been liable to pay compensation under the *Workers*

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133 *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449 at 453-454 per Lockhart J, 468 per Beaumont J; *Raftland Pty Ltd v Federal Commissioner of Taxation* (2008) 238 CLR 516 at 531-532 [34]-[36]; [2008] HCA 21.

Compensation Act in respect of that injury. But there has been no consideration or determination of those issues at any level, still less of whether Tempus would thus have ceased to be liable to pay compensation under the *Workers Compensation Act* and so ceased to be "the employer liable to pay ... compensation" under the *Workers Compensation Act* within the meaning of s 151C of that Act. The sole question for Buchanan J was whether Ramsey Food was as a matter of "substance and reality" the appellant's employer for the purposes of the *Fair Work Act*.

Conclusion and orders

132 In the result, the District Court judge was right to hold that Buchanan J's finding that Ramsey Food was the employer for the purpose of the Fair Work proceeding did not estop the appellant from contending that Tempus was his employer for the purpose of the District Court proceeding.

133 Accordingly, the appeal should be allowed with costs. Orders 2 to 5 of the Court of Appeal dated 21 July 2014 should be set aside. In their place it should be ordered that the appeal to the Court of Appeal be dismissed with costs.