



# Précis Paper

## Issue Estoppel and Privies

David Bennett AC QC and Ross Goodridge discuss the High Court of Australia decision in *Tomlinson v Ramsey Food Processing Pty Limited* [2015] HCA 28 which raised interesting issues relating to the breadth and application of issue estoppel where an initial proceeding is brought on behalf of an individual or group who do not have control over the proceedings.

### Discussion Includes

- Background facts and procedural history
- Who is a privy for the purpose of issue estoppel?
- Breadth of the doctrine of issue estoppel
- Cases brought on behalf of an individual or group
- Sham arrangements in the employment context
- Abuse of process
- The term "employer": Different meanings in different contexts

# Précis Paper

## Issue Estoppel and Privies

1. In this edition of BenchTV, David Bennett AC QC (5 Wentworth Chambers, Sydney) and Ross Goodridge (Barrister – Denman Chambers, Sydney) discuss *Tomlinson v Ramsey Food Processing Pty Limited* [2015] HCA 28 in which they appeared for the appellant, Mr Tomlinson.

### Background Facts and Procedural History

2. Tomlinson was a worker at an abattoir operated by Ramsey Food Processing. Due to financial difficulties, Ramsey's directors were reluctant to incur financial obligations and therefore transferred its entire workforce to another company, Tempus Holdings Pty Limited. Ramsey's employees were informed that they were henceforth the employees of Tempus. All of their paychecks and entitlements were from then on paid by Tempus and relevant insurance policies were taken out on behalf of Tempus.
3. Approximately two years after this occurred, Tomlinson and several other employees were made redundant by Tempus. They complained to the Fair Work Ombudsman that their entitlements had not been paid on redundancy.
4. The Fair Work Ombudsman, who has a range of statutory functions, commenced proceedings in the Federal Court of Australia against Ramsey, alleging that Ramsey was the true employer of the redundant workers, including Tomlinson, and seeking an order that Ramsey pay the workers the amount of the underpayment. Ramsey's defence, in effect, was that the employees were employed by Tempus at the relevant time. In response, the Fair Work Ombudsman contended that the arrangement concerning the change of employer were a sham. Tomlinson took no active part in the proceedings but was called as a witness by the Ombudsman.
5. Justice Buchanan in the Federal Court accepted the Ombudsman's argument, and determined that the employees were employed by Ramsey, not Tempus, at the relevant time. He therefore ordered Ramsey to make the relevant payments: *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* [2011] FCA 1176. In his final orders, Buchanan J made a declaration that Tomlinson was an employee of Ramsey.
6. Shortly after Ramsey's workforce was transferred to Tempus, Tomlinson had been injured at work. Following the Federal Court decision, Tomlinson sued Ramsey in the District Court, seeking compensation for his injuries. Because of the provisions of the *Workers Compensation Act 1987* (NSW), he could not succeed against Ramsey if Ramsey was

considered his employer at the time of the injury. If, however, Tempus was his employer, and had simply made the employees available to Ramsey and its business, then Ramsey would be considered a "quasi employer" and the provisions of the *Workers Compensation Act* would not prevent Tomlinson's action against it.

7. In the District Court, Tomlinson therefore argued that Tempus, not Ramsey, was his employer. In response, Ramsey, the defendant to the proceedings, argued that issue estoppel applied. Specifically Ramsey submitted that the Federal Court proceedings commenced by the Fair Work Ombudsman had determined that Ramsey was Tomlinson's employer, not Tempus, and that Tomlinson was estopped from arguing the opposite in these proceedings.
8. The estoppel argument failed, and the District Court accepted that on the evidence before it, there was no sham and Tempus was the true employer. Ramsey was thus liable as the person in charge of the workplace and the various statutory defences under the *Workers Compensation Act* did not assist: *Grant Tomlinson v Ramsey Food Processing Pty Limited* [2013] NSWDC 64.
9. Ramsey appealed to the NSW Court of Appeal, who allowed the appeal solely on the basis of issue estoppel: *Ramsey Food Processing Pty Ltd v Tomlinson* [2014] NSWCA 237. The Court of Appeal held that Tomlinson and the Fair Work Ombudsman were privies, and therefore as the Federal Court proceedings were brought in the interest of Tomlinson, amongst others, he was bound by the result and an issue estoppel arose.

#### High Court of Australia Proceedings

10. Tomlinson appealed to the High Court. One of the primary arguments was whether there was an issue estoppel in circumstances where Tomlinson could not control the Federal Court proceedings. Similar cases of this nature had arisen in the past where unions had represented workers in proceedings.
11. In his application for special leave, Tomlinson also raised two additional arguments in order to demonstrate to the High Court that the case was part of a wider problem of law to be determined. The first argument raised the question of the breadth of the doctrine of issue estoppel: how wide was the doctrine where the first case had been brought on behalf of a group of people?
12. Tomlinson made reference to a recent case of the U.S. Supreme Court, *Taylor v. Stargell*, 553 U.S. 880 (2008). In that case, one person had made an application under the U.S. Freedom of Information Act, but failed in the application before a federal court. Taylor, a

second person, then made a similar application for the same material. After failing in the application before a federal district court on the ground that issue estoppel precluded the application, the case reached the U.S. Supreme Court. The Supreme Court ultimately determined that this was not a case of issue estoppel,

13. On the special leave application, Tomlinson used the U.S. case to demonstrate that the U.S. Supreme Court had become concerned about the breadth of the doctrine, which was previously becoming wider and wider in its interpretation by American courts, and had found it necessary to put constraints on the doctrine. However, although this point was raised in the special leave application as a mechanism for attracting the attention of the High Court, it was not ultimately pursued in the appeal once special leave had been granted.
14. The second new argument raised in the special leave application concerned the concept of "sham". In the Federal Court proceedings, Buchanan J found that the arrangements entered into by Tempus, as arranged by Ramsey, were sham arrangements. The Court of Appeal adopted these words and also determined that the arrangements were a sham, thereby finding that Tomlinson continued to be employed by Ramsey after the arrangements with Tempus were put in place.

#### Findings on Issue Estoppel

15. The High Court upheld the appeal on the basis that there was no issue estoppel, as Tomlinson and the Fair Work Ombudsman were not privies. The primary reason for this finding was that Tomlinson had no control over the Federal Court litigation. Moreover, the Fair Work Ombudsman's remit under the statute was broad, and he was not acting "on behalf" of Tomlinson, but rather making a claim for an order to compel enforcement of the *Fair Work Act 2009* (Cth). The plurality judgment held at [41]-[43]:

*41. [...] 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.*

### "Sham" Arrangements

16. Tomlinson argued before the High Court that a sham is not a sham in the strict sense if there is a legal effect that has been achieved by the arrangements. That is, although a person may have an intention to engage in a sham and take steps to achieve that end, where there has been a legal consequence that affects third persons, then it is not a sham. English authority established that a victim of a sham arrangement should not be displaced as to rights in law.
17. The plurality of the High Court did not address the issue of sham. Justice Nettle, in a concurring opinion, did make brief mention of sham, and said of Buchanan J's findings in the Federal Court:

*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. (at [128])*

18. It could not, therefore, be said that "the arrangement was a sham in the sense of being devoid of legal effect" (at [128]).

### Abuse of Process

19. One argument that was not raised on the appeal related to the common law doctrine of abuse of process. Mr Bennett AC QC explained that abuse of process applies in circumstances where strict issue estoppel does not. Mr Goodridge also indicated that abuse of process and issue estoppel are part of the same spectrum, and where an issue estoppel case may fail, an abuse of process case may succeed. The issue was never raised

by the defendant, however had it been raised, it may have created an obstacle for Tomlinson in succeeding on appeal.

### Meaning of "Employer"

20. In the High Court proceedings, Ramsey also argued by way of Notice of Contention that the judgment of the District Court that Tempus was the true employer was incorrect. The plurality of the High Court did not need to address this argument, however Nettle J in his concurring judgment made clear that the meaning of the word "employer" is flexible, and that someone can be an employer for one reason but not another.
21. The "Crisis Couriers" cases provide an example of this finding. In one case, a declaration was given by the NSW Court of Appeal that the couriers working for Crisis Couriers were not employees and therefore Crisis Couriers were not obliged to pay superannuation under the relevant legislation. In a second case, where a pedestrian was injured by a cyclist working for Crisis Couriers, the pedestrian sought to hold Crisis Couriers vicariously liable for the actions of the cyclist as the employer. The High Court found that the term "employer" can have different meanings in different contexts, and it was not therefore inconsistent for there to be different results in the two cases: *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

### Conclusion

22. Modern legislation is increasingly granting third party group rights to statutory bodies or other organisations to bring claims on behalf of an individual or group of individuals. In this case, the relevant proceeding was commenced by the Fair Work Ombudsman on behalf of Tomlinson. In other circumstances, the Human Rights Commissioner or the Australian Securities and Investment Commission may commence proceedings invoking the rights of certain individuals. This case provides some useful guidance on how proceedings of that nature, commenced on behalf of an individual or group of individuals, are perceived when considering the question of issue estoppel.

## **BIOGRAPHY**

### David Bennett AC QC

5 Wentworth Chambers, Sydney

David was called to the Bar in 1967 and appointed Queens Counsel in 1979. He served two five-year terms as the Solicitor-General of Australia from 1998. His current practice includes appellate, constitutional, administrative, revenue, trade practices and competition law. David has also served as President of the NSW Bar Association and President of the Australian Bar Association.

### Ross Goodridge

Barrister, Denman Chambers, Sydney

Ross was called to the Bar in 1988 and practises in a wide range of complex areas including real property law, Australian consumer law, commercial law, professional and medical negligence, banking law and family provision. He has been particularly influential in the reform of various Australian laws including superannuation law, the administration of compensation laws, and the introduction of Drug Courts in Australia.

## **BIBLIOGRAPHY**

### Focus Case

*Tomlinson v Ramsey Food Processing Pty Limited* [2015] HCA 28

### Benchmark Link

[https://benchmarkinc.com.au/benchmark/banking/benchmark\\_13-08-2015\\_banking.pdf](https://benchmarkinc.com.au/benchmark/banking/benchmark_13-08-2015_banking.pdf)

### Judgment Link

<http://www.austlii.edu.au/au/cases/cth/HCA/2015/28.html>

### Cases

*Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* [2011] FCA 1176

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

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

*Taylor v. Stargell*, 553 U.S. 880 (2008)

*Hollis v Vabu Pty Ltd* (2001) 207 CLR 21

### Legislation

*Workers Compensation Act 1987* (NSW)

*Fair Work Act 2009* (Cth)

