

## “ORANGE” IS THE NEW “BLACK”?

By Krishneel Nath, Associate

Thankfully, neither an orange nor the TV show “Orange is the new Black” has any relevance to this paper. The point of this paper is to consider the principles of finality, certainty and predictability in our legal system through a recent case study.

But first, say a Judge in the Federal Court finds the colour of an orange to be orange in 2011. Would a Judge in the District Court in subsequent and separate proceedings in 2013 when asked the same question be bound to also find that the colour of an orange is orange? One might immediately think, yes. After a few minutes, self-doubt might creep in and then the cliché lawyer like response may be “it depends”. Only this time it also (among other things) depends on who is asking.

### The case

The High Court considered the above principles in *Tomlinson v Ramsey Food Processing Pty Ltd*<sup>1</sup> delivered on 17 August 2015. A short summary of the facts is set out below:

2005 – 2009	<i>Ramsey Food Processing Pty Ltd (“Ramsey”) operated an abattoir at South Grafton</i>
2005	<i>Mr Tomlinson commenced work at the abattoir</i>
October 2006	<i>Mr Tomlinson and other workers at the abattoir were told that their employment was at an end. From then on, Mr Tomlinson was employed by Tempus Holdings Pty Ltd (“Tempus”). Tempus provided labour to Ramsey.</i>
June 2008	<i>Mr Tomlinson sustained personal injury</i>
November 2008	<i>Mr Tomlinson and 11 other employees were told that Tempus stopped providing labour to Ramsey and therefore, was unable to offer them ongoing employment. Mr Tomlinson complained to the Fair Work Ombudsman that his entitlements had not been paid.</i>
2011	<i>The Federal Court delivered a judgment in proceedings commenced by the Fair Work Ombudsman against Ramsey (“Federal Court proceedings”). Buchanan J held “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”<sup>2</sup>. An order was also made that Ramsey pay Mr Tomlinson’s outstanding entitlements.</i>

1 [2015] HCA 28  
2 [9]

- 2013 *Mr Tomlinson subsequently commenced proceedings against Ramsey and a judgment was delivered in relation to the matter in 2013. Mr Tomlinson claimed that Ramsey was not his employer and therefore sought common law damages in the District Court for his injuries. It was not in dispute that if Ramsey was found to be Mr Tomlinson's employer then by reason of the legislation governing the management of and limiting recovery of workplace injuries, Mr Tomlinson's claim would fail because he had failed to comply with the pre-requisites. Consequently, Ramsey defended the proceedings relying on "issue estoppel" arising from the findings and declarations made in the earlier Federal Court proceedings. The District Court found that issue estoppel did not apply and ultimately entered a verdict in favour of Mr Tomlinson.*
- 2014 *Ramsey successfully appealed in the Court of Appeal of the Supreme Court of New South Wales. The Court of Appeal found that Mr Tomlinson had been estopped arguing that Ramsey was not his employer by reason of the declarations made in Federal Court proceedings.*
- High Court's view: The High Court unanimously allowed the appeal from the Court of Appeal.

### **Principles of finality, certainty and predictability of outcome explained by common law estoppels**

The point of a Judge exercising judicial power is said to include "as a general rule, a decision settling for the future, as between defined persons or class 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 the future to be decided as between those persons or classes of persons"<sup>3</sup>. Simple enough to understand in that once a matter is decided between the parties, then there is a public policy in not allowing those matters to be re-litigated.

The Court considered three broad categories of estoppel at common law applicable in Australia, these were<sup>4</sup>:

1. Cause of action estoppel – operates to preclude assertion in a subsequent proceeding of a claim to a right or obligation which was asserted in the proceedings and was determined by the judgment<sup>5</sup>
2. Issue estoppel – operates to preclude the raising in a subsequent proceedings of an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in the judgment; and
3. Anshun estoppel – operates to preclude the assertion of a claim, or the raising of an issue of fact or law, if that claim or issue was so connected with the subject matter of the first proceedings so as to have made it unreasonable in the context of that first proceedings for the claim not to have been made or the issue not to have been raised in that proceeding.

The above categories of estoppel plainly advance the principles of finality, certainty and predictability of adjudicated outcomes. They "quell" all controversy between the parties and discourage multiplicity of proceedings.

As to who exactly is to be precluded by the estoppels is said to be defined by the "basic requirement of a privity in interest... that privity must claim under or through the person of whom [he/she/it] is said to be a privity"<sup>6</sup> ("the privity principle"). In other words, the person precluded by the estoppel is the person who had an interest in and participated in the earlier proceedings or participated/contributed through another in the earlier proceedings.

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3 R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361 at 374 (as cited in Tomlinson v Ramsey Food Processing Pty Ltd)

4 [22]

5 [22]

6 [17]

## What does the privity principle mean?

The type of interest required was described by the Court as follows:

1. it must be a legal interest, being an interest recognised by law such as a legal title in property or a right to seek damages;
2. economic or other interest in the outcome of the earlier proceedings is not sufficient; and
3. absent a legal interest, such influence as a privy might have over earlier proceedings is irrelevant, even if it amounts to control

To be precluded by reason of Mr Tomlinson's interest in earlier proceedings, "*the representation*" by the Ombudsman in earlier proceedings "*must at least have been of such a nature as to have protected [him] from being unjustifiably subjected to an unwanted estoppel.*"<sup>7</sup> The Court explained:

*"[38]...It is a principle at the core of our legal system that a party claiming or denying the existence 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 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...*

*[39]... It would be quite unjust for such a person to be precluded from asserting what the person claims in truth if the person did not have an opportunity to exercise control over the presentation and if the potential detriment to the person from creating such an estoppel was not fairly taken into account to make or defend the claim in earlier proceedings or in the conduct of the earlier proceedings."*

Emphasis added

How does the above principle apply to modern class actions? How does the principle apply to representation by a trustee, tutor or a guardian? To explain the application to these forms of representations, the Court observed that each "representation is typically the subject of fiduciary duties imposed on the representing party or of procedures overseen by the court... or ... both, which guard against collateral risks of representation, including the risk to a represented person of the detriment of an estoppel..."<sup>8</sup> Therefore, it is expected that by reason of the fiduciary duties and measures imposed by the Court, the representing party is able to make a holistic assessment of the risks to those whose interest it represents.

In contrast, for a statutory office holder such as an Ombudsman, duties, responsibilities and considerations are generally mandated by the statutory instrument. Those duties may not necessarily include more holistic considerations of the interests of those represented<sup>9</sup>.

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7 [37]

8 40

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## The Result

The Fair Work Ombudsman in discharging his statutory duty in the course of the Federal Court proceedings was not necessarily concerned with the implication of estoppel which might arise against Mr Tomlinson. The Ombudsman's functions were prescribed by the Fair Work Act which was devoid of any consideration as to risk to Mr Tomlinson's interest in subsequent proceedings.

Therefore, Mr Tomlinson was not prevented from asserting that Ramsey was not his employer in subsequent proceedings.

The Court reconciled any issues arising from the money received by Mr Tomlinson in the Federal Court proceedings by relying on the common law rule against being able to recover more than the actual loss suffered. Therefore in the subsequent proceedings, Mr Tomlinson could not make another claim for his unpaid entitlements which he was awarded by the Federal Court.

## Concluding remarks

While the principles of justice in resolving the question of when estoppel applies are sound, their application and ultimate outcome in this case is rather odd. The Federal Court **declared** that Ramsey was the employer of Mr Tomlinson. The District Court when asked the same question, disagreed. What weight should be given to considerations like finality, certainty and predictability of adjudicated outcomes? What is the utility of a declaration? Should a Court give declaratory relief in proceedings brought by statutory office holders which may risk rights of others so "involved" in the proceedings?

Would the outcome had been different if a person appointed under an act enjoyed powers and responsibilities which allowed for broader consideration of the risk to those representatives, for example, a liquidator's duty to the creditors?

Evidently, the difference in the presentation of evidence in the District Court and Federal Court proceedings *coloured* the conclusion reached by each of the Court. Ordinarily, by reason of the rules of estoppel, one cannot get a second bite at the orange but in exceptional circumstance it may be possible, provided the person re-agitating the issue is sufficiently divorced from the earlier proceedings

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