

Nicolas Kirby, 'When foreign state immunities and foreign judgments collide'

to be determined concerned Nauru's claimed immunity against execution against its Westpac accounts. This is where Firebird's success ended.

The High Court found that the Westpac accounts were not commercial property.⁷ Some of the funds were used for purposes which, *prima facie*, had a commercial character (such as operating an airline, selling residents fuel, providing electricity and water and lending to small businesses). But the court took into account that Nauru is a small, remote nation of small population. It has no central bank (and seemed to be using Westpac as a *de facto* treasury). Most of the ostensibly commercial transactions were, in fact, conducted on a non-profit basis. Each of these was, in fact, a government providing goods and services to a small population which would not otherwise receive them due to the remote location and tiny population.

In a separate judgment, Firebird, despite some measure of success with respect to the jurisdictional immunity and service points, was ordered to pay the respondents' costs.⁸

Endnotes

1. French CJ and Kiefel J at [36] and [49]; Gaegeler (who agreed with the judgment and reasons of French CJ and Kiefel J in all matters except as to service) at [131]; Nettle and Gordon JJ at [187].
2. French CJ and Kiefel J at [44].
3. French CJ and Kiefel J at [70], [71.]
4. Nettle and Gordon JJ at [213].
5. French CJ and Kiefel J at [94].
6. French CJ and Kiefel J at [96].
7. French CJ and Kiefel J at [118]ff; Nettle and Gordon JJ at [226]ff.
8. *Firebird Global Master Fund II Ltd v Republic of Nauru [No 2]* [2015] HCA 53; 90 ALJR 270; 327 ALR 192.

Identification of privies in interest for the purpose of issue estoppel

Tarik Abdulhak reports on *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28.

In this case, the High Court clarified the circumstances in which a person may be subject to an issue estoppel by virtue of being a privy in interest with a party to prior court proceedings. In summary, where the person's legal interests were represented by a party to the prior proceedings, he or she will be treated as a privy in interest with that party if he or she had an opportunity to control the conduct of the previous proceedings, and the potential detriment to him or her from creating such an estoppel was taken into account in the conduct of those proceedings.¹

The first and second proceedings

In 2010, the Fair Work Ombudsman (the 'Ombudsman') took enforcement action in the Federal Court of Australia against Ramsey Food Processing Pty Ltd ('Ramsey'). The Ombudsman alleged that, as an employer, Ramsey had breached an applicable award² by failing to pay a number of its employees, including Mr Tomlinson, certain amounts to which they were entitled. Mr Tomlinson was not a party to, but did give evidence in, the proceedings. The Federal Court determined that Ramsey (and not Tempus, a labour services company) was the employer. The Court ordered Ramsey to pay Mr Tomlinson and the other employees the outstanding amounts.

Mr Tomlinson subsequently brought an action against Ramsey in the District Court of New South Wales, seeking damages at common law for injuries alleged to be the result of Ramsey's negligence. In this action, Mr Tomlinson alleged that Tempus, and not Ramsey, was his employer, and that Ramsey was liable as the entity in control of the workplace.³ Following a trial on the merits, the District Court held that Tempus was indeed the employer. The court found that Mr Tomlinson established his cause of action, and awarded damages against Ramsey. It rejected Ramsey's argument that the Federal Court judgment gave rise to an issue estoppel which would bar Mr Tomlinson from alleging that Ramsey had not been his employer.

Court of Appeal Judgment

The New South Wales Court of Appeal upheld an appeal by Ramsey from the judgment of the District Court, holding that the Federal Court's declaration and orders gave rise to an issue estoppel as to who was Mr Tomlinson's employer.⁴ The Court of Appeal found that there was privity of interest between Mr Tomlinson and the Ombudsman because the latter had made the claim in the Federal Court 'under or through', or on behalf of, Mr Tomlinson.⁵

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High Court Judgment

The High Court unanimously upheld Mr Tomlinson’s appeal (French CJ, Bell, Gageler and Keane JJ in a joint judgment; Nettle J in separate reasons). The court held that Mr Tomlinson was not a privy in interest with the Ombudsman in the Federal Court proceedings, and that an issue estoppel could therefore not operate against him.

Applying Barwick CJ’s analysis of the privity principle in *Ramsay v Pigram*,⁶ the plurality explained that a privity of interests may arise in, *inter alia*, the following circumstances:⁷

Where a party to later proceedings (‘A’) had a legal interest⁸ in the outcome of the earlier proceedings, which interest was represented by B, or B has a legal interest in the outcome of the later proceedings, which is represented by A (the ‘representation scenario’); and

Where A may have acquired some legal interest from B, which is affected by an estoppel, and which interest A then relies on in later proceedings (the ‘derivation of interest scenario’).

In *Tomlinson*, the court was primarily concerned with the representation scenario. Both the plurality and Nettle J recognised that there are a number of traditional forms of representation which bind those represented to an estoppel.⁹ But outside those relationships, the issue estoppel will not arise in a *representation scenario* unless:

- A had an opportunity to exercise control over the presentation of evidence and the making of arguments in the earlier proceedings; and
- The potential detriment to A from creating an estoppel was fairly taken into account in the decision to make / defend the earlier proceedings, or in the conduct of the earlier proceedings.¹⁰

The restriction of the concept of privies in interest in these terms represents the balancing of two sets of considerations: the principle that a party who claims the existence of a right or obligation should have an opportunity to present its arguments and evidence; and the considerations of finality and fairness, including maintaining the certainty of adjudicated outcomes.¹¹

In the instant case, the Ombudsman had instituted the Federal Court proceedings in the exercise of his powers to seek enforcement of awards under the *Workplace Relations Act 1996*.¹² He was not acting under, through or on behalf of Mr Tomlinson. He was therefore not representing Mr Tomlinson’s legal interests in the sense which gives rise to an estoppel. Nor was his power derived from Mr Tomlinson. The fact that the

proceedings resulted from a complaint by Mr Tomlinson was of no consequence.¹³

The court further observed that, unlike the traditional forms of representation, an enforcement action by a statutory entity does not usually entail a consideration of the wider interests of the person whose entitlements may be advanced by the action.¹⁴ In such circumstances, allowing the conduct of the statutory authority to give rise to an estoppel against the affected person would have the real potential to occasion injustice.¹⁵

Nettle J came to the same ultimate conclusion on the bases that there was no identity of legal interest between the Ombudsman and Mr Tomlinson,¹⁶ and the Ombudsman did not act as a representative / on behalf of Mr Tomlinson.¹⁷

The same privity principle applies to all forms of ‘issue estoppel’

The principles explained in *Tomlinson* govern the identification of privies in interest for the purposes of all forms of estoppel resulting from a final judgment.¹⁸ Those forms of estoppel are:¹⁹

- The cause of action estoppel, which precludes, *inter alia*, the assertion of a right or obligation which was determined by a prior final judgment;²⁰
- The issue estoppel, which precludes the raising of an ultimate issue which was necessarily resolved in the reaching of the prior final judgment; and
- The *Anshun* estoppel, which precludes the assertion of a claim that was so connected with the prior proceeding to have made it unreasonable for the claim not to have been made in that proceeding.

Comments on the Doctrine of Abuse of Process

The Court’s judgment in *Tomlinson* is also of interest to the extent that it discusses the difference between issue estoppel and abuse of process. While the same circumstances can give rise to the application of both principles, abuse of process is inherently broader and more flexible. It may apply in any circumstances in which the use of the court’s procedures would be ‘unjustifiably oppressive to a party or would bring the administration of justice into disrepute.’²¹ It may thus prevent the making of a claim or the raising of an issue (for example, where the issue should have been raised in prior proceedings), even where the elements of issue estoppel are not satisfied.²²

Conclusion

The case is significant because it clarifies the circumstances in which the fact that a person’s legal interests were represented in

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a prior proceeding can give rise to an issue estoppel by operation of the privity principle. While the case dealt with a situation in which the earlier proceedings were conducted by a statutory authority exercising its enforcement powers, the principles set out above are of broader application.

The judgment explains that a person may also be subject to issue estoppel in the derivation of interest scenario, which was not explored in detail as it was not applicable on the facts.

Endnotes

1. *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28 ('Tomlinson Judgment'), at para 39.
2. Under the *Workplace Relations Act 1996* (Cth).
3. As the High Court explained, if Ramsey was found to be Mr Tomlinson's employer, the claim against it would have failed due to the plaintiff's non-compliance with the requirements of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) and the *Workers Compensation Act 1987* (NSW): see Tomlinson Judgment, paras 10 and 65–69.
4. *Ramsey Food Processing Pty Ltd v Tomlinson* [2014] NSWCA 237.
5. *Ibid*, per Meagher JA at [19], Emmett JA at [83], [90]–[91], Ward JA concurring at [22].
6. (1968) 118 CLR 271, at 279: 'The basic requirement of a privity in interest is that the *privy must claim under or through the person* of whom he is said to be a privity. Here it is quite clear that the Government [a party to the later proceedings] had no interest in the action between the respondent and the police officer [parties to the earlier action]: 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...the respondent could have been treating the Government as the real 'defendant'... In every respect the action between the respondent and the police officer was personal to each of them, neither being in any sense...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' (emphasis added).
7. Tomlinson judgment, para 32–34. The court did not suggest that the categories are closed.
8. The court stressed that the interest must be a legal one: paras 35 and 105.
9. Those include representation by trustee, agent, tutor, guardian, a person representing others under rules of court where multiple persons have the same interest in the outcome, and the modern class action: see paras 40 and 95.
10. Tomlinson judgment, para 39. The plurality also approved of a formulation in these terms: A will be considered a privity in interest with B if he / she authorised the claim by B, or if the representation of A's legal interests by B was of such a nature as to have protected A from a subsequent unfair application of the issue estoppel: Tomlinson judgment, para 37, citing with approval *Young v Public Service Board* [1982] 2 NSWLR 456. Nettle J approached the matter by analogy to established forms of representation (having the elements of control by the principal and imposition of fiduciary duties on the representative) - see para 98.
11. Tomlinson Judgment, para 38. See also the comments at [28]: The concept of privies in interest is based on the 'higher-level principle' *qui sentit commodum sentire debet et onus* ('who takes the benefit ought also to bear the burden').
12. Relevantly, the Ombudsman had not proceeded under an alternative provision, which empowered him to represent employees who 'are or may become parties to proceedings:' Tomlinson Judgment, paras 44–45, 102.
13. Tomlinson Judgment, paras 44–46.
14. *Ibid*, paras 41 and 42. This was also true in the instant case: see para 45.
15. *Ibid*, para 43.
16. *Ibid*, paras 99–100, 106 and 109.
17. *Ibid*, paras 112, 114–116, 119.
18. *Ibid*, para 23.
19. *Ibid*, para 22.
20. This is largely redundant where the final judgment was rendered in a judicial proceeding and where *res judicata* in the strict sense operates (i.e., where the rights and obligations have merged in the final judgment). See Tomlinson Judgment, paras 20 and 22.
21. Tomlinson Judgment, para 24–25.
22. *Ibid*, para 26.