

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 9/03/2021 5:50:59 PM ACDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged: Reply - Form 34 - Rule 16.33  
File Number: SAD169/2020  
File Title: MARTIN SHINA v 'ROMEO NSW PARTNERSHIP', BEING THE PARTNERSHIP OPERATED BY ROMEO NSW INVESTMENTS PTY LTD & THE TRUSTEE FOR ROMEO NSW HOLDING TRUST (ABN 11 807 080 683)  
Registry: SOUTH AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA



*Sia Lagos*

Dated: 9/03/2021 5:51:04 PM ACDT

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



## Reply

Federal Court of Australia  
South Australia Registry  
Fair Work Division

No. SAD 169 of 2020

**Martin James Shina**

Applicant

**'Romeo NSW Partnership', being the partnership operated by Romeo NSW Investments Pty Ltd & The Trustee for Romeo NSW Holding Trust (ABN 11 807 080 683)**

First Respondent

**Romeo NSW Investments Pty Ltd (ACN 156 756 544)**

Second Respondent

**Trustee for Romeo NSW Holding Trust (ACN 156 757 809)**

Third Respondent

1. The Applicant replies to the Defence filed by the Respondents on 22 February 2021 and adopts the defined terms therein.
2. The Applicant:
  - (a) adopts those admissions made by the Respondents; and
  - (b) joins issue with those allegations which were either not admitted, or denied, in the Defence.
3. In response to paragraph 5.2.3 of the Defence, the Applicant says:
  - (a) the fact that some employees were engaged in the position 'manager in training' and were not, according to the Respondents, employed in management positions does not necessarily mean that such employees are not and/or were not Group Members; and

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- (b) further that if employees engaged as 'managers in training' otherwise meet the elements of the definition of Group Member in paragraph 5(b) of the Statement of Claim the Applicant confirms that the claim is also brought on behalf of such employees.

4. With respect to paragraphs 7, 9, 11, 12, and 14 of the Defence:

- (a) in response to paragraph 7.3.2 of the Defence, the Set-Off Clause and other parts of the Defence which refer to the Set-Off Clause, the Applicant acknowledges that the First Contract, Second Contract, Third Contract and Fourth Contract contained the Set-Off Clause, but denies that the Set-Off Clause operates as alleged in the Defence and says further:

- i) that the Set-Off Clause, to the extent it is inconsistent with the FW Act and Award, is unlawful and ineffective;
- ii) that the FW Act and Award require amounts payable in relation to the performance of work to be paid in each weekly pay period;
- iii) in addition to the matters alleged at paragraph 8 of this Reply, that neither the Set-Off Clause, FW Act or Award contemplate or allow the Respondents to set off over award payments made in one pay period against underpayments arising in another pay period, nor was there any designation made by the Respondents in any given pay period in which an over award payment was made that such payment related to an award entitlement arising in a different pay period;
- iv) that the Set-Off Clause only purports to allow the set off of over award payments made 'against amounts payable under the Award as a result of the hours you work', which does not include amounts payable by reason of the conditions or circumstances of work, including allowances under the Award.

- (b) with respect to the balance of paragraphs 7, 9, 11, 12 and 14 of the Defence, the Applicant says that, to the extent that the clauses of the First Contract, Second Contract and Third Contract relied upon by the Respondents are inconsistent with the FW Act and the Award, they are unlawful and ineffective; and

- (c) the Applicant repeats and relies upon the common and general practices of the Respondents as alleged in the Statement of Claim.

5. The Applicant denies paragraphs 19.9.3 and 22.4.3 of the Defence, and repeats and relies upon paragraph 22 of the Statement of Claim to the extent that where wage budgets were set by Regional Managers, such budgets were restrictive to the effect that:

- (a) Store Managers were denied the opportunity and ability to hire new staff or to engage non-salaried staff for further shifts; and
- (b) there was pressure on Store Managers to cover shifts of absent employees to ensure that the store wage budgets were met.

6. The Applicant denies paragraph 19.10 of the Defence, and says that:

- i) all hours recorded in Time Target by the Applicant were hours worked by the Applicant on any single day; and

- ii) all hours recorded in Time Target by any Group Member, were hours worked by such a Group Member on any single day;

### **PARTICULARS**

The Applicant recorded his daily working hours by signing on to Time Target immediately before starting, and immediately after concluding, his work on any single day.

It was a common and general practice of the Respondents to require Group Members to record their actual hours worked by signing on to Time Target immediately before starting, and immediately after concluding, their work on any single day.

- (b) the Applicant denies paragraph 19.10.4, and repeats and relies upon the Actual Hours, Additional Sunday Hours, Additional Evening Hours, Public Holiday Hours, as pleaded in the Statement of Claim; and
  - (c) the Applicant denies paragraph 19.10.5 and says further that in circumstances where his daily hours of work were not automatically recorded by the Time Target system:
    - i) he would enter his arrival or departure time manually into the Time Target system;
    - ii) that it was a common and general practice of the Respondents that a Store Manager or Assistant Store Manager was to manually enter the start and finish times into the Time Target system should any Group Member fail to, or be unable to, record their time automatically using Time Target in the ordinary fashion;
    - iii) in any event, the FW Act and the Award required the Respondents to pay the Applicant and Group Members for all hours worked as alleged in the Statement of Claim (irrespective of whether or not such hours worked were recorded in the Time Target system);
    - iv) to the extent the Respondents seek to rely upon Clause 7 of either the First, Second or Third Contract to avoid paying the Applicant and Group Members for all hours worked, such a clause is inconsistent with the FW Act and Award and is unlawful and has no effect; and
    - v) in the premises, there was no breach of contract.
7. The Applicant denies paragraph 22 of the Defence and says further that the Respondent's expectation that work could be completed in a particular amount of time is not relevant to the Respondent's obligation under section 323 of the FW Act and the Award to pay its employees in full for all hours of work performed.
8. In response to paragraphs 49.2.2, 49.2.3, 50.4.2, 50.4.3 of the Defence the Applicant denies that the Set-Off Clause operates as alleged in the Defence and:
- (a) refers to paragraph 4(a) of this Reply; and
  - (b) says further that at all material times cl 2.2 of the Award did not comply with s 136 of the FW Act and, by virtue of s 137 of the FW Act, had no effect.

### **Particulars**

Clause 2.2 of the Award contravenes s 136 of the FW Act because it was not permitted or required by any of the provisions of the FW Act referred to in s 136(1)(a) - (d).

9. The Applicant denies paragraph 52 of the Defence, and repeats and relies upon paragraph 4(a) of this Reply.
10. The Applicant denies paragraph 63.2 of the Defence and repeats and relies upon paragraph 6 of this Reply in respect of each of the Martin Place Period, Darlinghurst Period, Mortdale Period and Sutherland Period.
11. The Applicant denies paragraph 67.4 of the Defence and repeats and relies upon paragraph 4(a) of this Reply.
12. The Applicant denies paragraph 89 of the Defence and says further that both the FW Act and Part IVA of the *Federal Court of Australia Act 1976* (Cth) allow the Applicant to bring the proceeding as pleaded in the Statement of Claim.

**Certificate of lawyer**

I Rory Markham certify to the Court that, in relation to the reply filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 5 March 2021

A handwritten signature in black ink, appearing to be 'RM', with a long horizontal flourish extending to the right.

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Signed by Rory Markham  
Lawyer for the Applicant