

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 17/02/2021 5:31:35 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: SAD105/2020  
File Title: CHRISTOPHER PETER THOMAS v ROMEO LOCKLEYS ASSET PARTNERSHIP BEING THE PARTNERSHIP OPERATED BY LOCKLEYS FOODLAND PTY LTD & ROMEO LOCKLEYS HOLDINGS PTY LTD & ORS  
Registry: SOUTH AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA



*Sia Lagos*

Dated: 17/02/2021 5:31:41 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.



Federal Court of Australia  
South Australia Registry  
Fair Work Division

No. SAD105 of 2020

**Christopher Peter Thomas**  
Applicant

**'Romeo Lockleys Asset Partnership', being the partnership operated by Lockleys Foodland Pty Ltd & Romeo Lockleys Holdings Pty Ltd (ABN 12 244 067 815)**

First Respondent

**Lockleys Foodland Pty Ltd (ACN 108 166 276)**

Second Respondent

**Romeo Lockleys Holdings Pty Ltd (ACN 108 157 928)**

Third Respondent

## Reply

1. The Applicant replies to the Defence filed by the Respondents on 23 December 2020 and adopts the defined terms therein.
2. The Applicant:
  - (a) adopts the admissions and deemed 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:

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|  |                                      |
|--|--------------------------------------|
| Filed on behalf of (name & role of party)                  | Thomas, Applicant                    |
| Prepared by (name of person/lawyer)                        | Rory Markham                         |
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- (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 / were not Group Members; and
- (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 Amended Statement of Claim the Applicant confirms that the claim is also brought on behalf of such employees.

4. With respect to paragraphs 7, 9 and 11 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 and Third Contract contained the Set-Off Clause, 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) 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) in response to paragraph 7.3.9 of the Defence (in respect of the First Contract), repeated at paragraphs 9.5 and 11.5 of the Defence (in respect of the Second and Third Contracts), the Applicant denies the term of the First Contract, Second Contract and Third Contract (Clause 6) is as set out in the Defence;

**PARTICULARS**

The full term reads "*You must ensure that you do not work more than 5 continuous hours without an hour or a half hour (unpaid) meal break, the duration of which will remain at the discretion of the employer.*" (emphasis added)

- (c) with respect to the balance of paragraphs 7, 9 and 11 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
  - (d) the Applicant repeats and relies upon the common and general practices of the Respondents as alleged in the Amended Statement of Claim.
5. In response to paragraph 20.9 of the Defence:

(a) the Applicant denies paragraph 20.9.3, 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 20.9.4, and repeats and relies upon the Actual Hours, Additional Sunday Hours, Additional Evening Hours, Public Holiday Hours, as pleaded in the Amended Statement of Claim; and

(c) the Applicant denies paragraph 20.9.5 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 Amended 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, is unlawful and has no effect; and
- v) in the premises, there was no breach of contract.

6. The Applicant denies paragraphs 21.7 and 23.7 of the Defence and repeats and relies on paragraph 5 of this Reply in respect of the Second Modbury Period and Salisbury East Period.

7. The Applicant denies paragraph 26 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. The Applicant denies paragraphs 30.3.1 and 30.3.2 of the Defence and says further that store wage budgets were set by Regional Managers, such budgets being 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.
9. In response to paragraph 61.2 of the Defence the Applicant denies that the Set-Off Clause operates as alleged in the Defence and says further:
- (a) refers to paragraph 4(a) of this Reply; and
  - (b) specifically, in response to paragraph 61.2.2, that at all material times clause 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 contravened 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).

- 10. The Applicant denies paragraph 62.4 of the Defence and refers to paragraph 9 of this Reply.
- 11. The Applicant denies paragraph 64 of the Defence and refers to paragraph 4(a) of this Reply.
- 12. The Applicant denies paragraph 69 of the Defence and refers to paragraph 4(a) of this Reply.
- 13. The Applicant denies paragraph 74 of the Defence and refers to paragraph 4(a) of this Reply.
- 14. In response to paragraph 82 of the Defence, the Applicant denies that the Set-Off Clause in the First, Second or Third Contract, nor the Award, operated as alleged in the Defence, and repeats and relies upon paragraph 4(a) of this Reply.
- 15. The Applicant denies paragraph 92.2 of the Defence and refers to paragraph 5 of this reply, and says further that:
  - (a) whether or not the Applicant did not, or was unable to, accurately record his start and finish times via Time Target is irrelevant, as the Record Keeping Obligation as alleged in paragraph 76 of the Amended Statement of Claim was borne by the Respondents not the Applicant and Group Members; and
  - (b) to the extent that the Respondents did not keep records as alleged in Paragraph 78 of the Amended Statement of Claim and subsequently seeks to rely upon a contractual term to abrogate the Record Keeping Obligation, such reliance cannot succeed on the basis that it is inconsistent with the statutory Record Keeping Obligation.
- 16. The Applicant denies paragraph 96.4 of the Defence and refers to paragraph 4(a) of this Reply.
- 17. The Applicant denies paragraph 103.3 of the Defence and refers to paragraph 4(a) of this Reply.
- 18. The Applicant denies paragraph 120 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 Amended 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: 17 February 2021

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

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Signed by Rory Markham  
Lawyer for the Applicant