

## NOTICE OF FILING

### Details of Filing

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File Title: RAYMOND BOULOS v M.R.V.L. INVESTMENTS PTY LTD ACN 000 620 888  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



*Sia Lagos*

Registrar

### Important Information

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 of the filing of the document is determined pursuant to the Court's Rules.



## Amended Reply to Further Amended Defence

NSD 2168 of 2019

Federal Court of Australia  
New South Wales District Registry  
Fair Work Division

**Raymond Boulos**  
Applicant

**M.R.V.L. Investments Pty Ltd (ACN 000 620 888)**  
Respondent

To the Respondent's Further Amended Defence dated 28 July 2023, the Applicant says:

### The Merivale Group

- A. He admits paragraph 1(a),(b),(c)(i), and (d)(i)-(iii).
- B. He says further that on the proper construction of the 2010 Services Agreement, the 2015 Services Agreement, and the HTB Services Agreement (**Services Agreements**), in the event the Court orders the respondent to pay compensation on account of underpaid Award entitlements, the Respondent is entitled to invoice Hemmes Trading and HTB (**related companies**) for the compensation amount by 30 June of the year in which orders are made, and once invoiced, the relevant related party is liable to pay the invoiced amount.

### Particulars

Item 3 to the schedule of each Services Agreement

### Making of the Merivale Agreement

1. He admits paragraph 6(a).
2. He admits paragraph 7(a).

### Applicant's Beliefs

3. As to paragraphs 10D(e) and 10D(l), he admits that in accepting employment and during his employment he conducted himself on the basis that the Merivale Agreement had lawful effect

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but otherwise does not know and cannot admit the allegations.

3A. As to paragraph 10D(k), save to admit that he assumed that the Respondent believed the Agreement was valid, he denies the allegations.

4. As to paragraph 10G(a) and (b), he admits that during his employment he assumed the Merivale Agreement had lawful effect but otherwise does not know and cannot admit the allegations.

4A. He denies paragraph 10E(b) and says that he did not know or believe that the Merivale Agreement was or might be invalid until shortly before these proceedings were commenced in December 2019.

### **Merivale Group's Reliance**

4B. Save to admit that the Respondent and related companies would have operated the Merivale Group's business (**Business**) differently had they proceeded on the basis that the Award applied, rather than the Agreement, he does not know and therefore does not admit paragraph 10D(f)-(i).

4C. He says further that in operating the Merivale Group's business for 10 years (between 12 June 2009 to 4 March 2019) on the basis that the Agreement applied, the Respondent and its related companies enjoyed benefits which they would not have enjoyed had they operated on the basis that the Award applied.

### **Particulars**

- A. The Business was able to sell food and alcohol during evenings and weekends (the peak consumption periods), attracting more income than would otherwise have been the case.
- B. The Business was able to provide a high staff density at each venue, generating a reputation for service, and more custom and income.
- C. The additional income was received by the related companies, and gave the Respondent greater security that its invoiced fees would be paid.
- D. As the Business had lower expenditure on wages, it generated higher profits for a given income.
- E. The profits facilitated the expansion of the Business, which expansion led to greater income and profits for the related companies, and a greater fee income for the Respondent.

**Detriment to Respondent**

4D. As to paragraph 10D(m), save to admit that if the Court were to grant relief, the Respondent would be liable to satisfy the judgment, he denies the allegations, and says inter alia that:

- (a) liability to satisfy a judgment is not a justiciable detriment;
- (b) the Respondent is entitled to defray the cost of satisfying any judgment (aside from interest and penalties) by claiming against the related companies under the Services Agreements;
- (c) since the Respondent has not indemnified the related companies in respect of their liability under the Services Agreements, any cross-claim by the related companies for breach of warranty could not lead to substantial damages being awarded against the Respondent;
- (d) the Court's orders will not cause damage to the reputation of the Respondent (and its officers), since any reputational damage will have been caused by the underpayments found by the Court to have occurred;
- (e) the Court's orders will not deprive the Respondent of any claims in restitution it may have against employees;
- (f) the Court's remedial orders will do justice to the Respondent, taking into account its claimed inability to calculate Award entitlements precisely; and
- (g) the Court's orders will not create any loss of opportunity.

**Detriment to related companies**

4E. He denies paragraph 10D(n) and says inter alia that:

- (a) the Court's orders will not cause any direct detriment to the related companies, who are not parties;
- (b) the Court's orders will not cause any new liability or obligation for the related companies under the Services Agreements, as any liability and obligation already exists;
- (c) the Court's orders will not cause damage to the reputation of the related companies (and their officers), since any reputational damage will have been caused by their association with the underpayments found to have occurred by the Court;
- (d) the Court's orders will not cause any loss of opportunity.

**Estoppel defence**

5. He denies paragraphs 10G(c)-(e)- and says inter alia that:
- (a) an estoppel by convention can only arise on an assumed state of fact;
  - (b) the common assumptions pleaded are assumptions of law;
  - (c) if the Respondent relied on the common assumptions between 2009 and 2019, that reliance was to its benefit, not its detriment, and he repeats paragraph 4C above;
  - (d) if the related companies detrimentally relied on the common assumptions, that is irrelevant to the Respondent's own estoppel defence;
  - (e) unconscionability is irrelevant to estoppel by convention; and
  - (f) it would not be unjust for the Applicant to depart from the common assumptions pleaded.

**Particulars**

The Applicant relies, inter alia, upon:

- A. The fact he did not know or believe the Merivale Agreement was invalid, until shortly before issuing these proceedings.
  - B. The benefits which the Respondent and related parties obtained by acting upon the common assumptions.
  - C. The circumstance that s.45 of the FW Act prohibits an employer from contravening a term of an award, and the public interest in enforcing the prohibition.
6. He says further that no estoppel can be set up against entitlements under s.45 and s.50 of the FW Act.

**Loss or damage**

6A. He denies paragraph 78 and says, inter alia, that:

- (a) the pleaded matters are irrelevant and should not be taken into account; and
- (b) had the Respondent appreciated that the Award applied, it still would have employed him as a commis chef at Felix, on his salary of \$48,000 (or perhaps more), because his was a job which needed to be done.

**Joinder of issue**

7. Save for the express admissions made and referred to above, he joins issue with the Respondent.

K P HANSCOMBE

J FETTER

Date: ~~11 August 2023~~ 3 November 2023



• Signed by Rory Markham  
Lawyer for the Applicant

**Certificate of lawyer**

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

Date: 3 November 2023

A handwritten signature in black ink, appearing to be 'R. Markham', written over a horizontal line.

Signed by Rory Markham  
Lawyer for the Applicant