

Court of Appeal gives green light to Timbercorp individual defences

Timbercorp Finance Pty Ltd (In liquidation) v Collins and Anor; Timbercorp Finance Pty Ltd (In liquidation) v Tomes
[2016] VSCA 128 (the Timbercorp Appeals)

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Summary

The Timbercorp Appeals allow group members to pursue separate and individual claims and defences notwithstanding a group proceeding, of which they were a part, earlier being decided against them by the Supreme Court.

Background

Timbercorp Companies (Timbercorp) were in the business of promoting, managing and financing agribusiness investment schemes. Many investors funded their investments via loans from Timbercorp Finance. After Timbercorp's collapse in 2009, investors claimed, inter alia, the loans were void and unenforceable under particular grounds (the Group Proceeding).

In 2011, the Supreme Court of Victoria dismissed the Group Proceeding.¹ Subsequently, Timbercorp Finance commenced individual recovery proceedings against many investors.² These investors were group members in the Group Proceeding.

Some investors, including Mr and Mrs Collins and Mr Tomes (the Respondents), defended individual recovery proceedings on the basis that Timbercorp Finance submitted were not permitted. Timbercorp Finance claimed the investors were estopped from relying on certain defences because such defences, claims or allegations ought to have been raised in the Group Proceeding and were not.

At first instance, Justice Robson of the Supreme Court of Victoria determined the investor defendants were entitled to raise such defences as they could not have raised them in the Group Proceeding, and a failure to opt out of the Group Proceeding did not preclude these defences subsequently being raised. Timbercorp Finance appealed.

On 1 June 2016, the Supreme Court of Victoria Court of Appeal (the Court) handed down its decision in the Timbercorp Appeals.

Timbercorp Finance had argued the Respondents were estopped by reason of the principle in *Anshun* from raising certain individual defences because:

- they failed to opt out of the Group Proceeding; and/or
 - they failed to use the available mechanisms provided for in the group proceeding provisions of the *Supreme Court Act 1986* (Vic) to bring their individual claims to the attention of the court hearing the Group Proceeding; and/or
 - they were privies of the representative party (lead plaintiff in the Group Proceeding), and therefore were bound by any estoppels binding that party.³
- the limited nature and content of the Group Proceeding opt out notices in regard to individual claims;⁹ and
 - the lack of prejudice caused to Timbercorp Finance as a result of the Respondents not having taken steps open to them in the Group Proceeding regarding their individual claims.¹⁰

Timbercorp Finance further argued each of the Respondents' defences should be stayed as an abuse of process because the Respondents' conduct was "unjustifiably oppressive to it and had the tendency to bring the administration of justice into disrepute."⁴ It claimed it would be unjust and oppressive for it now to have to face over 1000 defended debt claims having already litigated their enforceability against those same defendants in the Group Proceeding.⁵

Decision

The Court granted leave to appeal but went on to dismiss the appeal, finding the Respondents were entitled to raise the disputed individual defences, and those defences should not be stayed.

The Court held that "[a] group member may be *Anshun* estopped only if it was unreasonable for him or her *not* to have raised, during the group proceeding, some claim other than the common questions of law or fact in that proceeding."⁶ The Court considered that determining whether there will be *Anshun* estoppel should not be formulaic or mechanical,⁷ and depends upon a "merits-based" assessment taking into account all the circumstances of the case.⁸

The Court found the application of *Anshun* estoppel principles was, in essence, no different in a group proceeding context. It found the Respondents were able to raise their individual claims in the Group Proceeding, but found it was not unreasonable for them not to have done so (this formulation being the estoppel test). The Court was particularly swayed by:

- the limited nature and content of the Group Proceeding opt out notices in regard to individual claims;⁹ and
- the lack of prejudice caused to Timbercorp Finance as a result of the Respondents not having taken steps open to them in the Group Proceeding regarding their individual claims.¹⁰

The Court considered failure by a group member to opt out and/or use the available mechanisms to bring individual claims to the attention of the Court in a group proceeding does not automatically give rise to an *Anshun* estoppel. This is contrary to the position regarding opt out set out in the settlement approval judgment in the Great Southern Group Proceedings.¹¹

The Court also held that "the group members were not privies of the plaintiff in respect of their unpleaded claims and defences and are not to be taken as having abandoned their individual defences by reason of the plaintiff not having raised them as claims in the group proceeding."¹²

Moreover, the Court further found the Respondents were not acting oppressively or otherwise bringing the administration of justice into disrepute by maintaining their individual defences.¹³ It held Timbercorp Finance "had to meet the allegations contained in the present defences either as a part of the group proceeding or in separate proceedings," and it "is no worse off as matters stand than if the respondents had sought to introduce their individual defence into the group proceeding."¹⁴

Comment

The effect of the decision is that *Anshun* estoppel will, in most circumstances common to group proceedings where judgment has been obtained, have no effect in precluding group proceeding members¹⁵ from raising individual defences in subsequent recovery proceedings.

The Timbercorp Appeals decision will have, at least, the following consequences should it remain good law:

1. It will be more difficult to resolve group proceedings if there is uncertainty as to whether any judgment or settlement resolves all claims (should that be the intent), as distinct from a limited category; and

2. There may be complex technical arguments in individual recovery proceedings as to what constitutes individual claims, as distinct from, in substance, common claims being re-litigated, noting factual circumstances can easily traverse both categories of claims.

The Court said it disagreed with the comments made in the Great Southern Settlement Approval Judgment that a failure to opt out of a group proceeding would mean no individual claims could be subsequently raised. However, it also indicated that each set of circumstances must be assessed on its own merits.

It may be that the different circumstances of an individual recovery proceeding in another managed investment scheme that is group proceeding related causes another court to come to a different view than that in the Timbercorp Appeals.

An application for special leave to appeal the Timbercorp Appeals decision was filed in the High Court of Australia on 28 June 2016 and is yet to be determined.

¹ *Woodcroft-Brown v Timbercorp Securities Ltd* [2011] VSC 427. On 10 October 2013, the Court of Appeal of Victoria dismissed an appeal from the judgment and orders of Judd J, following which the High Court of Australia refused special leave to appeal: *Woodcroft-Brown v Timbercorp Securities Ltd* [2013] VSCA 284; *Woodcroft-Brown v Timbercorp Securities Ltd* [2014] HCATrans 85.

² *Timbercorp Finance Pty Ltd (In liquidation) v Collins and Anor*; *Timbercorp Finance Pty Ltd (In liquidation) v Tomes* [2016] VSCA 128 at [9].

³ *Ibid* at [175].

⁴ *Ibid* at [10] and [225].

⁵ *Ibid*.

⁶ *Ibid* at [13] and [140].

⁷ *Ibid* at [151].

⁸ *Ibid* at [13].

⁹ *Ibid* at [201].

¹⁰ *Ibid* at [202].

¹¹ *Ibid* at [13] and [200].

¹² *Ibid* at [13].

¹³ *Ibid* at [229].

¹⁴ *Ibid*.

¹⁵ Brought pursuant to Part 4A of the *Supreme Court of Victoria 1986* (Vic).

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