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COMMENTARY

Group Members and Unsuccessful Class Actions in Australia–Anshun Estoppel and Abuse of Process

Key Issues

- The issue to be resolved was whether a defendant in debt recovery proceedings, who was previously a group member in an unsuccessful class action, could raise individual defences that were not raised in the earlier class action to claims brought by a plaintiff that had previously been a defendant in the class action.
- The Supreme Court of Victoria, applying the law on Anshun estoppel and abuse of process, found that the defendant/group members could raise their individual defences.
- The outcome creates a potential conflict with earlier decisions, leaving Australian law uncertain.

Background

The Timbercorp Group was in the business of operating horticultural and forestry managed investment schemes ("MISs"). It invested in excess of $2 billion on behalf of about 18,500 investors. In addition, Timbercorp Finance Pty Ltd ("Timbercorp Finance") made loans to investors so they could invest in the MISs. In 2009, the Timbercorp Group was placed into liquidation, leading to the majority of MISs being of limited or no value. At the time the Timbercorp Group collapsed, Timbercorp Finance's loan book had more than 14,500 outstanding loans to more than 7,500 borrowers totalling $477.8 million.

The liquidators of Timbercorp Finance commenced proceedings against some borrowers but before these proceedings were able to advance very far, a group proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic), also called a class action, was commenced on behalf of those who invested in the MISs. The representative party was Mr Woodcroft-Brown. The defendants to the proceeding were Timbercorp Securities Ltd (responsible entity for the MISs), Timbercorp Finance and the three persons who, at the relevant times, were directors of Timbercorp Securities, Timbercorp Finance and Timbercorp Ltd (the holding company of the Timbercorp Group) (the "Directors").

The claims made in the group proceedings were:

- Timbercorp Securities failed to disclose in its Product Disclosure Statements ("PDSs") information about significant risks, or risks that might have had a material influence on the decision to invest, in breach of its disclosure obligations under ss 1013D or 1013E of the *Corporations Act 2001* (Cth).
- The PDSs given to investors contained false or misleading statements.

- Declarations made by the Directors in two scheme financial reports were false or misleading.

The group proceedings were unsuccessful at first instance and on appeal.[1]

On 13 June 2014, Timbercorp Finance commenced proceedings against Mr and Mrs Collins to recover an alleged loan of $90,501.68 plus interest. On 12 September 2014, Timbercorp commenced proceedings against Mr Tomes to recover alleged loans of $1,760,378.34 and $448,260.00 plus interest. Mr and Mrs Collins and Mr Tomes sought to raise claims and defences challenging the validity and enforceability of the loan agreements not raised in the group proceeding.

On 1 April 2015, Judd J ordered in each of the two proceedings that the following question be determined as a separate question under rule 47.04 of the *Supreme Court (General Civil Procedure) Rules 2005*:

> Are the defendants precluded from raising any and if so what defences pleaded by them in this proceeding by reason of their participation as group members within the meaning of [Part 4A] of the *Supreme Court Act 1986* (Vic) in proceeding S CI 9807 of 2009 [the group proceeding]?

The separate question was heard by Robson J.

Anshun Estoppel and Abuse of Process

Timbercorp Finance argued that the defendants were precluded as a matter of law from raising their pleaded defences, by Anshun estoppel, and/or because raising the defences constituted an abuse of process.

Timbercorp Finance did not seek to rely on res judicata or issue estoppel. It was also accepted that if Mr and Mrs Collins and Mr Tomes had opted out of the group proceedings, then they would not be denied the ability to plead their defences.

The High Court in *Tomlinson v Ramsey Food Processing Pty Limited* [2015] HCA 28 ("*Tomlinson*") explained that Anshun estoppel "operates to preclude the assertion of a claim, or the raising of an issue of fact or law, if that claim or issue was so connected with the subject matter of the first proceeding as to have made it unreasonable in the context of that first proceeding for the claim not to have been made or the issue not to have been raised in that proceeding".[2]

The High Court added that "[c]onsiderations similar to those which underpin [Anshun] estoppel may support a preclusive abuse of process argument".[3] Abuse of process is broader and more flexible than estoppel. The High Court explained that although the situations in which it may be invoked cannot be clearly delimited, abuse of process is "capable of application in any circumstances in which the use of a court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute".[4]

Timbercorp Finance's Argument

The requirements for commencing a class action under Part 4A of the *Supreme Court Act* are set out in s 33C and are:

- Seven or more persons have claims against the same person; and
- The claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
- The claims of all those persons give rise to a substantial common question of law or fact.

Timbercorp Finance contended that Anshun estoppel or an abuse of process arose because once there is a substantial common question of law or fact, the group proceeding becomes the vehicle for the determination of all issues that arise from the same, similar or related circumstances. Group members were also said to be subject to the same preclusionary principles as the representative party because s 33ZB provides:

> A judgment given in a group proceeding—
> (a) must describe or otherwise identify the group members who will be affected by it; and
> (b) subject to section 33KA, binds all persons who are such group members at the time the judgment is given.

Further, Part 4A of the *Supreme Court Act* provides "statutory mechanisms" that enable a group member to avoid the preclusionary effect of the judgment in the group proceeding

by seeking case management of their question or claim. Timbercorp Finance referred to three statutory mechanisms: the right to opt out under s 33J, the ability of a group member to seek to replace an inadequate representative pursuant to s 33T, and the provisions allowing for directions as to the conduct of the proceedings in ss 33Q, 33R, 33S and 33ZF.[5] Timbercorp Finance did not contend that a group member had a right to have their individual claim determined in the group proceeding, but rather that the group member had a right to seek direction from the court as to how its claim would be dealt with, either in the group proceeding or in another proceeding.

Reasoning of Supreme Court of Victoria

Statutory Mechanisms for Group Members' Defences to be Case Managed. Robson J stated that the essence of the plaintiff's case was "whether a group member in the defendants' circumstances was able or, indeed, required to avail themselves of the statutory mechanisms put forward by Timbercorp Finance as the means by which all issues arising in connection with the 'same, similar or related circumstances' should have been brought forward to the court for case management".[6]

Robson J found that based on a close reading of the *Supreme Court Act*, the statutory mechanisms were not available to the group members.

Section 33ZF allows for the court to "make an order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding" but only on the court's own motion or by application of a party. Robson J observed that the text does not provide for group members to be able to make an application.

Section 33Q states: "If it appears to the Court that determination of the question or questions common to all group members will not finally determine the claims of all group members, the Court may give directions in relation to the determination of the remaining questions." Timbercorp Finance interpreted "the claims of all group members" referred to in s 33Q as extending to all issues arising from the same, similar or related circumstances, including claims that the plaintiff has not put forward in the group proceeding, but otherwise arise from the same, similar or related circumstances as the claims that the plaintiff has put forward in the group proceeding. Robson J reasoned that the text refers to making directions in relation to "remaining questions". The power in s 33Q applies to those issues that have been raised by the plaintiff but not fully determined in the common issues trial. It does not apply to issues that have not been raised. Sections 33R and 33S follow on from the power in s 33Q and also apply only to remaining questions.

Section 33T allows for an application by a group member but it is limited to replacing a plaintiff that is not able to adequately represent the interests of the group members. Robson J stated that the focus is group interests, not the individual defences or claims of a group member.

Robson J also considered submissions dealing with Chancery practice that allowed for representative actions in equity, the 1988 Australian Law Reform Commission report on group proceedings, the supposed purpose behind the introduction of Part 4A and the overarching purpose in the *Civil Procedure Act 2010* (Vic). None were found to advance Timbercorp Finance's argument.

Representative Party and Group Members—Privies? Robson J also considered more generally the question of the application of relevant preclusionary principles to group members in the context of group proceedings under Part 4A.

Anshun estoppel, like cause of action estoppel/res judicata and issue estoppel, may preclude assertion of a right or obligation, or the raising of an issue of fact or law, between parties to a proceeding or their privies. The question raised by the current proceedings was whether a representative party and a group member were privies.

The High Court in *Tomlinson* explained who was a privy through various illustrative relationships:[7]

> Traditional forms of representation which bind those represented to estoppels include representation by an agent, representation by a trustee, representation by a tutor or a guardian, and representation by another person under rules of court which permit representation of numerous persons who have the same interest in a proceeding. *To those traditional forms of representation*

> *can be added representation by a representative party in a modern class action*. Each of those forms of representation is typically the subject of fiduciary duties imposed on the representing party or of procedures overseen by the court (of which opt-in or opt-out procedures and approval of settlements in representative or class actions are examples), or of both, which guard against collateral risks of representation, including the risk to a represented person of the detriment of an estoppel operating in a subsequent proceeding outweighing the benefit to that person of participating in the current proceeding. (emphasis added)

Robson J found that, in the context of Part 4A, the concept of a privy is narrowly drawn (and the compass of preclusionary principles is similarly limited) and there is otherwise insufficiently clear evidence of a legislative intent to abrogate the fundamental common law right of an individual to seek a hearing in respect of their rights and obligations.[8]

His Honour chose not to follow the High Court's statement as there had been no detailed examination of Part 4A or application of the common law principles applicable to determining when one party is a privy of another party—it was not "seriously considered obiter".[9] Robson J interpreted the High Court as using the label of privy because of the operation of s 33ZB of the Supreme Court Act. Robson J found that s33ZB did not create common law privies but rather "s 33ZB privies" which has an application similar to issue estoppel but not Anshun estoppel.[10] Another way of explaining the above reference by the High Court was put forward in the submissions of Mr & Mrs Collins—estoppel on the common issues.

Great Southern Class Action. Robson J also considered the reasoning in *Clarke v Great Southern* [2014] VSC 516 (*Great Southern*) despite not hearing any argument on the decision. In Great Southern, there were 21,000 group members, 1,545 of whom objected to a settlement being approved, including objections by 167 group members based on the settlement causing prejudice to their alternative defences in subsequent debt recovery proceedings. Nonetheless, Croft J found that a group member who had not opted out would be precluded on the basis of issue estoppel, Anshun estoppel and abuse of process from pursuing individual proceedings. In relation to Anshun estoppel, Croft J stated:[11]

> any group members with purported claims or defences different to those pleaded in the group proceedings, and who wished to pursue those claims or defences, could have and should have opted out. By not opting out, as submitted by the Bank Parties, group members must be taken to have accepted that the claims as pleaded in the group proceedings represent all of the claims reasonably available to them. This is the reality of the way the class action regime operates. That being so, it follows that the Bank Parties are entitled to assume that the only challenges to the enforceability of the Loan Deeds group members wished to pursue were those made in the group proceedings.

In *Great Southern*, opting out was the only way to avoid Anshun estoppel. Here, Timbercorp Finance accepted that group members could avoid the preclusionary effect of the judgment in the group proceeding by seeking "case management" of their question or claim. Group members did not need to opt out. Robson J did not follow *Great Southern* because Timbercorp Finance did not pursue the argument before him.[12] However, later in his judgment, Robson J states categorically that "the failure of the [group members] to opt out does not preclude the defendants from raising their individual defences".[13]

Unreasonableness. Robson J then turned to whether it was unreasonable for Mr and Mrs Collins and Mr Tomes to not have raised their individual defences in the group proceeding. Robson J found that if the defences had been raised, it was likely that that the court would have directed that the defences be dealt with if and when Timbercorp Finance brought proceedings. Further, the opt out notices and notice under s 33ZH(1) advising of the decision on liability did not warn that group members could not bring individual defences if they were not raised in the group proceedings. Lastly, there was no risk of inconsistent judgments as the group proceeding did not raise the group members' defences.

Avoiding a Multiplicity of Proceedings. Timbercorp Finance advanced an argument that Anshun estoppel was supported by a need to avoid a multiplicity of proceedings. Robson J explained that Anshun estoppel may not achieve this goal because once the effect of being a group member was explained, there may be an increase in opt outs, or group

members would seek to have their individual claims/defences included in the class action, or there may be a need to determine the application of Anshun estoppel on a case-by-case basis when group members sought to raise their individual claims/defences. Robson J's reasoning also suggests that group proceedings may cease to be effective if group members opted out or sought to include individual issues.

No Abuse of Process. Robson J found that the group members' subsequent defences did not constitute an abuse of process.

Principle of Legality. The principle of legality is that there is a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language. Statutes are interpreted with this principle in mind so that a statute will be construed to minimise the encroachment on common law rights and freedoms, to the extent such an interpretation is open.

The ability to bring or defend proceedings, including the opportunity to present evidence and argument, is a common law right according to Robson J. As Part 4A does not in clear and unequivocal language convey an intention to encroach on the common law right, the legislation should be interpreted in a manner that does not encroach.

Ramifications

The extent to which a group member is bound by the outcome in a class action is of great significance to group members, defendants and the justice system generally. Group members will want to know whether their claims are completely subsumed by a class action or they are only bound by the resolution of the common issues, as this will be a central consideration as to whether they opt out of the class action, or take other steps to protect their interests. Equally, defendants will be concerned to know if the class action will resolve all claims against them, except for those group members that opt out, or whether they may face further litigation. More generally, the fairness of the class action regime hinges on all participants knowing the extent to which their rights are to be determined or not.

The current state of the law is that s 33ZB makes it clear that group members are bound by the judgment in a class action. The judgment will be the formal order as to the court's finding on the common issues. Res judicata to the extent of the judgment clearly applies, and issue estoppel would also be applicable. The judgments in the Timbercorp and Great Southern class actions, as well as the obiter comments of four justices of the High Court of Australia in *Tomlinson*, are all in agreement.

However, on Anshun estoppel, the Timbercorp and Great Southern class actions appear to be in conflict. Further, the decision of Robson J is contrary to the very recent obiter remarks in *Tomlinson*.

Lawyer Contacts

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Endnotes

1 *Woodcroft-Brown v Timbercorp Securities Ltd (in liq)* [2011] VSC 427; *Woodcroft-Brown v Timbercorp Securities Ltd (in liq)* [2013] VSCA 284. *See* Jones Day *Commentary*, "The Timbercorp Class Action Appeal: Product Disclosure Statement Obligations and Misleading Conduct in Australia" (October 2013).

2 *Tomlinson v Ramsey Food Processing Pty Limited* [2015] HCA 28 at [22].

3 *Tomlinson v Ramsey Food Processing Pty Limited* [2015] HCA 28 at [22].

4 *Tomlinson v Ramsey Food Processing Pty Limited* [2015] HCA 28 at [25].

5 *Timbercorp Finance Pty Ltd (In Liq) v Collins and Tomes* [2015] VSC 461 at [384]-[393].

6 *Timbercorp Finance Pty Ltd (In Liq) v Collins and Tomes* [2015] VSC 461 at [399].

7 *Tomlinson v Ramsey Food Processing Pty Limited* [2015] HCA 28 at [40].

8 *Timbercorp Finance Pty Ltd (In Liq) v Collins and Tomes* [2015] VSC 461 at [402].

9 *Timbercorp Finance Pty Ltd (In Liq) v Collins and Tomes* [2015] VSC 461 at [566]-[569].

10 *Timbercorp Finance Pty Ltd (In Liq) v Collins and Tomes* [2015] VSC 461 at [583]-[585].

11 *Clarke v Great Southern* [2014] VSC 516 at [132].

12 *Timbercorp Finance Pty Ltd (In Liq) v Collins and Tomes* [2015] VSC 461 at [609]. *See also* [676].

13 *Timbercorp Finance Pty Ltd (In Liq) v Collins and Tomes* [2015] VSC 461 at [652]. *See also* [679]