



High Court of Australia Determines Extent to which Class Members Are Bound by Class Action Judgment

Key Points

- The High Court of Australia in *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] HCA 44 determined that a class member in an unsuccessful class action, who later raised individual defences against a claim from a defendant to the original class action, was not precluded from raising them by reason of *Anshun* estoppel, nor were the defences an abuse of process.
- The statutory class action regimes in Australia are structured so that a representative party represents class members only with respect to the claim that is the subject of the class action—the common issues—but not with respect to their individual claims.
- The decision highlights the importance of framing the common questions in the class action, as they will determine the scope and extent of any claims that may survive the determination of a class action proceeding.

Background

A class action proceeding was brought against members of the Timbercorp Group in the Supreme Court of Victoria under Part 4A of the *Supreme Court Act 1986*

(Vic), following the collapse of that group in 2009. The class action was brought on behalf of about 18,500 investors who had invested in horticultural and forestry managed investment schemes (“MISs”) operated by the Timbercorp Group during the relevant period. The claims in the class action proceeding concerned allegations of false or misleading statements and breaches of disclosure obligations under the *Corporations Act 2001* (Cth).

A member of the Timbercorp Group, Timbercorp Finance Pty Ltd (“Timbercorp Finance”), had made loans to some, but not all, of the investors who later comprised members of the class action so that they could invest in the MISs during the relevant period. After being placed into liquidation, the liquidators of Timbercorp Finance commenced proceedings against some borrowers to recover the loan amounts. Modest progress was made before the class action was filed. Timbercorp Finance then filed a counterclaim against the representative party in the class action for the recovery of loan amounts. Before hearings began, that Court directed that the counterclaim be tried separately and after the determination of the issues the subject of the class action proceeding.¹

The class action proceeding was unsuccessful at first instance and on appeal.²

In 2014, with the counterclaim still unresolved, Timbercorp Finance commenced proceedings in the Supreme Court of Victoria against other borrowers, including Mr and Mrs Collins and Mr Tomes, to recover alleged loan amounts and interest. Mr and Mrs Collins and Mr Tomes had been members of the class action proceeding (but neither were the representative party or “lead plaintiff”). In the proceedings brought by Timbercorp Finance, Mr and Mrs Collins and Mr Tomes each sought to raise claims and defences challenging the validity and enforceability of the loan agreements that had not been raised in the class action proceeding.

By order of the Court, the question whether Mr and Mrs Collins and Mr Tomes were precluded from raising any, and if so which, defences pleaded by them by reason of their participation as class members in the class action proceeding, was heard as a separate question.

At first instance, Robson J held that the defendants were not precluded, by reason of *Anshun* estoppel, abuse of process or otherwise, from raising those defences.³ His Honour’s decision was confirmed on appeal, but for different reasons.⁴

By grant of special leave, Timbercorp Finance appealed to the High Court of Australia.

Reasoning

The primary question for the High Court was whether an *Anshun* estoppel arose to prevent Mr and Mrs Collins and Mr Tomes from raising their respective defences.⁵ An *Anshun* estoppel “preclude[s] the assertion of a claim or of an issue of law or fact if the claim or issue was so connected to the subject matter of the first proceeding as to make it unreasonable, in the context of the first proceeding, for the claim or issue not to have been made or raised in it”.⁶ It is an extension of “cause of action estoppel” (which operates to preclude assertion in a subsequent proceeding of a claim to a right or obligation which was asserted in the proceeding and which was determined by the judgment) and “issue estoppel” (which operates to preclude the raising in a subsequent proceeding of an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in the judgment). Neither cause of action estoppel nor issue estoppels was raised.

Neither Mr and Mrs Collins nor Mr Tomes had been primary participants in the class action proceeding. However, a “person (the “second party”) who seeks to make a claim in a later proceeding may be bound by the actions of a party in earlier proceedings if the party in those proceedings represented the second party such that they could be described as the privy in interest of the second party”.⁷

The High Court had previously observed, albeit *obiter*, that a representative party and other members of a class in class action proceedings may be privies in interest for the purposes of estoppels.⁸

Nonetheless, the Court held that it still remained to be determined “the extent to which the plaintiff [representative party] in [class action] proceedings may be taken to represent the legal interest of the [class] members”.⁹

The Court looked to the legislative scheme for class actions provided under Part 4A of the *Supreme Court Act 1986* (Vic). In general, the Court observed that the statutory regime for class actions contemplated delineation of common and individual issues. The Court noted that sections 33C(1) and 33H provide a process for bringing class actions by which essential commonalities, including questions of law and fact common to the claims of the class members, needed to be specified.

The Court also referred to another of its decisions, in which the Court held that “it was not necessary for a [class action] proceeding to be likely to resolve wholly, or even to any significant degree, the claims of all [class] members”.¹⁰

The Court further noted that Part 4A recognises that class members may have other individual claims which do not form part of the subject matter of the class action. In that regard, the Court observed ss 33Q, 33R and other provisions provide for situations where there are non-common issues. The Court also remarked that Part 4A “creates its own kind of statutory estoppel” by which “[class] members are bound by the determination of the claims giving rise to the common questions”.¹¹

Accordingly, the Court held:

The provisions of Pt 4A therefore confirm that a plaintiff in [class action] proceedings represents [class]

members only with respect to the claim the subject of that proceeding, but not with respect to their individual claims. The lead plaintiff is not a privy in interest with respect to the respondents' [Mr and Mrs Collins' and Mr Tomes'] claims. This is so regardless of whether they should have been raised in the [class action] proceeding. That leaves for consideration the question whether the respondents themselves are estopped from raising them in these proceedings.¹²

Throughout the judgment, the Court was also minded by the relative lack of control that could be exercised by class members over the course of a class action proceeding.

The Court went on to conclude that there was not the required connection between the common issues in the class action proceeding and the loan agreements the subject of Timbercorp Finance's recovery actions.¹³ The fact that directions were made at the beginning of the class action proceeding removing Timbercorp Finance's cross-claim for later determination served to reinforce the separateness of the issues the subject of each proceeding.¹⁴

As such, Mr and Mrs Collins and Mr Tomes were not privies in interest with the representative party in the class action proceeding in respect of their defences and were therefore not precluded from raising them by reason of *Anshun* estoppel. There was no need for them to have opted out of the class action¹⁵ or to have raised them separately in the course of the class action under s 33R at their own risk of cost.¹⁶

Finally, the Court briefly addressed Timbercorp Finance's submissions made in the alternative that the defences constituted an abuse of process.¹⁷

Consistently with the Court's reasoning regarding estoppel, the Court held that the statutory scheme for class actions contemplated the separation of common and individual issues and in doing so, efficiency in the court's processes was achieved. Accordingly, hearing of individual claims did not stand in the way of achieving judicial economy so as to act as a "damage to the administration of justice", and there was no abuse of process.

The High Court dismissed the appeals with costs.

Ramifications

The High Court's decision in *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] HCA 44 highlights the significance of the common questions in a class action proceeding to both sides of the dispute and the class members.

For the representative party, the common questions need to be adequately framed in order for it to satisfy the requirements for the commencement of a class action in ss 33C and 33H. The importance of the common questions, at least to the representative party, has been reiterated many times.¹⁸ For class members, the common issues will define the extent to which the representative party is their privy and the extent to which they will be bound by the judgment in the class action. The significance for the class members is mirrored by the significance for the defendant; the common questions will define the claims or issues on which the defendant loses or wins, which in turn informs liability.

Courts may play a role in defining the common questions and can determine which issues are common.¹⁹ However, it will be in the interests of both sides of the dispute that the questions are properly framed.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

John M. Emmerig

Sydney
+61.2.8272.0506
jemmerig@jonesday.com

Michael J. Legg

Sydney
+61.2.8272.0720
mlegg@jonesday.com

Joshua Kang, an associate in the Sydney Office, assisted in the preparation of this Commentary.

Endnotes

- 1 *Timbercorp Finance Ltd (in liq) v Collins* [2016] HCA 44, [8] and [21] (French CJ, Kiefel, Keane and Nettle JJ), [89]-[90] (Gordon J).
- 2 *Woodcroft-Brown v Timbercorp Securities Ltd (in liq)* [2011] VSC 427; 85 ACSR 354; *Woodcroft-Brown v Timbercorp Securities Ltd (in liq)* [2013] VSCA 284; 96 ACSR 307. See *Jones Day Commentary*, “[The Timbercorp Class Action Appeal: Product Disclosure Statement Obligations and Misleading Conduct in Australia](#)” (October 2013).
- 3 *Timbercorp Finance Pty Ltd (in liq) v Collins and Tomes* [2015] VSC 461. See *Jones Day Commentary*, “[Group Members and Unsuccessful Class Actions in Australia—Anshun Estoppel and Abuse of Process](#)” (November 2015).
- 4 *Timbercorp Finance Ltd (in liq) v Collins and Tomes* [2016] VSCA 128.
- 5 *Timbercorp Finance Ltd (in liq) v Collins* [2016] HCA 44, [5], [27] (French CJ, Kiefel, Keane and Nettle JJ), [77] (Gordon J).
- 6 *Timbercorp Finance Ltd (in liq) v Collins* [2016] HCA 44, [27] (French CJ, Kiefel, Keane and Nettle JJ), citing *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28; 89 ALJR 750, 757. The name of the estoppel derives from the case of *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.
- 7 *Timbercorp Finance Ltd (in liq) v Collins* [2016] HCA 44, [36] (French CJ, Kiefel, Keane and Nettle JJ), citing *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28; 89 ALJR 750, 758.
- 8 *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28; 89 ALJR 750, 760-761 (French CJ, Bell, Gageler and Keane JJ).
- 9 *Timbercorp Finance Ltd (in liq) v Collins* [2016] HCA 44, [47] (French CJ, Kiefel, Keane and Nettle JJ).
- 10 *Timbercorp Finance Ltd (in liq) v Collins* [2016] HCA 44, [50] (French CJ, Kiefel, Keane and Nettle JJ), citing *Wong v Silkfield Pty Ltd* [1999] HCA 48; 199 CLR 255, 267-268.
- 11 *Timbercorp Finance Ltd (in liq) v Collins* [2016] HCA 44, [52] (French CJ, Kiefel, Keane and Nettle JJ).
- 12 *Timbercorp Finance Ltd (in liq) v Collins* [2016] HCA 44, [53] (French CJ, Kiefel, Keane and Nettle JJ).
- 13 *Timbercorp Finance Ltd (in liq) v Collins* [2016] HCA 44, [58] and [63] (French CJ, Kiefel, Keane and Nettle JJ).
- 14 *Timbercorp Finance Ltd (in liq) v Collins* [2016] HCA 44, [65] (French CJ, Kiefel, Keane and Nettle JJ), [133] (Gordon J).
- 15 *Timbercorp Finance Ltd (in liq) v Collins* [2016] HCA 44, [67] (French CJ, Kiefel, Keane and Nettle JJ), [124]-[137] (Gordon J).
- 16 *Timbercorp Finance Ltd (in liq) v Collins* [2016] HCA 44, [66] (French CJ, Kiefel, Keane and Nettle JJ).
- 17 *Timbercorp Finance Ltd (in liq) v Collins* [2016] HCA 44, [69]-[73] (French CJ, Kiefel, Keane and Nettle JJ), [145] (Gordon J).
- 18 See, for example, *Bright v Femcare Ltd* [2002] FCAFC 243; 195 ALR 574 at [14].
- 19 See, for example, *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2009] FCAFC 26.