

CAN CLASS ACTION GROUP MEMBERS RELY ON INDIVIDUAL DEFENCES?

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Legal Briefings - By **Peter Holloway**

On 1 June 2016, the Victorian Court of Appeal determined that a group member in a class action is not precluded by Anshun estoppel from raising separate defences in claims against them.

SHORT HISTORY OF THE TIMBERCORP PROCEEDINGS

The Timbercorp group of companies operated managed investment schemes. The group went into liquidation in June 2009, at which time there were more than 14,500 outstanding loans to over 7,500 borrowers, totalling more than \$450m.

In October 2009, a class action was commenced in the Supreme Court of Victoria against various companies in the Timbercorp group, including Timbercorp Finance. The claims made in the proceeding related to alleged deficiencies in various product disclosure statements issued in respect of the managed investments schemes. The class action was ultimately unsuccessful.

Subsequently, Timbercorp Finance commenced separate proceedings against three individuals. Each of them were within the definition of group members in the earlier class action, and had not opted out. Each individual sought to defend the recovery proceedings by raising defences based upon facts and circumstances peculiar to each of them. Timbercorp Finance asserted that the individuals were precluded from raising these defences because they were a group member in the class action and were estopped from raising those defences, and that the defences should be stayed as an abuse of process.

At first instance, Justice Robson held that the individuals were not precluded from raising any of these defences, either by Anshun estoppel or by the principles of abuse of process. This finding was appealed by Timbercorp Finance, and the Court of Appeal determined on 1 June 2016 that leave to appeal should be granted, but the appeal should be dismissed.

COURT OF APPEAL DECISION

Interestingly, the Court of Appeal found that:

- if the conditions contained in section 33C(1) of the *Supreme Court Act* are met there is nothing to prevent plaintiffs from raising issues for determination in which they have no interest,
- the Court has power to permit any group member to draw remaining questions to its attention (s 33Q(1), *Supreme Court Act*),
- 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;
- it does not follow that the failure by a group member to opt-out and/or to use section 33Q to draw the Court’s attention to any claim that is peculiar to that individual means that they will be automatically precluded from raising that claim in later proceedings,
- while part 4A of the *Supreme Court Act* expressly provides for a statutory estoppel in respect of any determination of the common questions of law and fact, it does not provide for any estoppel in respect of claims peculiar to a group member that were not advanced in the group proceeding;
- whether there will be an Anshun estoppel depends upon a ‘merits-based’ assessment, taking into account all the circumstances of the case,
- group members are not to be taken as having abandoned their individual defences by reason of not having raised them in the group proceeding, or not having opted out of the group proceeding, and
- there is nothing in Part 4A of the *Supreme Court Act* that supports the contention that where a group member has not opted out, that individual will be taken to have accepted that the determination of the group proceeding will be the complete resolution of all or any claims that person has in respect of the group claim or any similar or related claim.

COMMENT

At first blush, the Court of Appeal's decision suggests a deficiency in the structure and operation of class actions, in that it suggests that the finalisation of all disputes in relation to the subject matter are not necessarily achieved. However, in our view the decision is a reflection of the fact that the group procedure is directed at resolution of common questions and issues and is not always intended to be, nor is, the vehicle by which all claims of individual group members are to be decided.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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