

CLASS ACTIONS CANNOT RESOLVE ALL CLAIMS AGAINST DEFENDANTS, HIGH COURT RULES

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Legal Briefings - By **Amelia Edwards**

A unanimous recent decision of the High Court increases the risk of defendants facing a multiplicity of separate proceedings by individual group members following the resolution of a class action.

The Court's judgement in *Timbercorp Finance Pty Ltd (in liq) v Collins & Timbercorp Finance Pty Ltd (in liq) v Tomes* [2016] HCA 44 has important implications for the pleading, case management and settlement of class actions and will be a matter of concern to defendants seeking to achieve finality in the resolution of proceedings.

THE HIGH COURT'S DECISION

The case concerned recovery proceedings commenced by Timbercorp Finance against more than 1,200 group members following the failed Timbercorp class action. In a further attempt to avoid their loan obligations, a number of borrowers sought to raise individual claims and defences not raised in the class action.

The High Court unanimously rejected the submission by Timbercorp Finance that the principles of *Anshun* estoppel and abuse of process precluded defendants in the recovery proceedings raising individual defences which could have been, but were not, raised in or resolved by the earlier class action.

IMPLICATIONS FOR DEFENDANTS

The High Court's decision allows group members to pursue individual claims not covered by the common questions in the class action, provided it was reasonable for them not to have raised those matters in the earlier proceeding.

The standard of reasonableness applied by the High Court was high and it appears that it will be necessary for a claim to have been expressly pleaded and answered by the court in the class action if it is to prevent subsequent litigation. It will not be sufficient for a subsequent claim to be similar to the common questions or to seek the same relief. Defendants must therefore give careful consideration to the scope of the pleaded case and seek to define the common questions to incorporate as many potential claims as possible. Where appropriate, consideration should be given to the adoption of sample groups to capture and ventilate a broader set of claims.

While the High Court's decision did not expressly deal with settlements, it will be relevant to defendants in structuring settlements and seeking court approval. It is not uncommon for class action defendants to seek releases and discharges at settlement which are broader than the pleaded claim and which extend to the underlying subject matter of the proceeding (therefore capturing causes of actions and defences which may not have been pleaded). As a consequence of the High Court's decision, this practice may now be the subject of greater scrutiny by the court or challenge by group members during the settlement approval process.

Where defendants are uncertain about the conclusive effect of judgments or settlements and are concerned about potential liability in a multiplicity of future proceedings, it may ultimately inhibit or reduce the price of commercial settlements. Defendants will also need to consider their exposure to further related or 'satellite' litigation in complying with their disclosure and reporting obligations.

CONCLUSION

By clarifying the operation of the principles of *Anshun* estoppel and abuse of process to group members in class actions, the High Court highlights that defendants cannot assume that a class action will resolve all claims against them. The scope of the pleadings and common questions addressed in class actions will be determinative of the extent to which group members are bound by the outcome of judgments.

To date, the application of *Anshun* estoppel and abuse of process has mainly arisen in connection with failed class actions where group members have been dissatisfied with the outcome or have been subject to subsequent recovery proceedings. Going forward, these issues are likely to have broader relevance to a defendant's case strategy, pleadings, case management and settlement. It will be particularly relevant in class actions arising out of individual contractual arrangements where specific representations may have been made or multiple alternative individual claims or defences may arise.

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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