

TO WHAT EXTENT ARE GROUP MEMBERS BOUND BY THE OUTCOME OF CLASS ACTIONS?

21 March 2016 | Australia, Brisbane, Melbourne, Perth, Sydney
Legal Briefings - By **Ruth Overington** and **Amelia Edwards**

The extent which a group member is bound by the outcome of a [class action](#) is a significant issue for defendants who are concerned to know if a class action will resolve all claims against them.

Yet uncertainty prevails because of a lack of clarity around how principles laid down by the High Court, which came to be known as *Anshun* estoppel, are applied to class actions.

These principles seek to prevent the subsequent litigation of claims and defences that could, or should, have been determined in earlier litigation. Applying these principles to complex and large-scale class actions, where group members are assumed to participate unless they have actively opted out (and consequently may not take an active role in the proceeding or even know about it), raises challenging questions, both when proceedings go to judgment and when they settle.

STATUTORY REGIME

Section 33ZB in Part 4A of the *Supreme Court Act 1986* (Vic) (which is identical to the provision applicable under the Federal legislation) provides that group members who have not opted out of a class action are bound by the judgment delivered in the proceeding. It is acknowledged by the courts, most recently in the Timbercorp class action that this operates as a statutory bar to issues resolved by a judgment of the Court being re-litigated in separate proceedings.

However, s 33ZB does not deal with application of *Anshun* estoppel and abuse of process principles to individual issues not pleaded or resolved by judgment in a proceeding.

RECENT SIGNIFICANT CASES

Three decisions in the last 18 months have considered the application of *Anshun* estoppel and abuse of process principles in class actions.

Great Southern class action:

First, in separate decisions in the Supreme Court of Victoria dated October and November 2014, Judd J and Croft J in litigation relating to the Great Southern Class Action said that group members are prevented by the doctrines of *Anshun* estoppel and abuse of process from raising individual defences in subsequent proceedings as a consequence of not opting out of the group proceeding.

Their Honours held that the underlying purpose of *Anshun* estoppel and abuse of process align with the application of limitations on the ability of group members in class actions to re-litigate matters that could or should have been determined in the main class action proceeding. By not opting out, group members are presumed by the operation of the class action regime to assume the risk, the *quid pro quo* for which is the benefit of the claim or defence made on behalf of the group member by the lead plaintiff. Consequently, they affirmed that the appropriate protection of individual claims is achieved through the opt out process. Justice Croft further stressed that group members are protected by judicial oversight and approval of class action settlements.

Ramsey Food Processing:

While not a class action proceeding, in August 2015, the High Court in *Tomlinson v Ramsey Food Processing Pty Ltd*, examined Australian law on estoppel and abuse of process. The Court identified that a plaintiff in a class action may be a "privy in interest" to the group members for the purpose of the application of estoppel. In a joint judgment, French CJ, Bell, Gageler and Keane JJ said that in a "modern class action" the risk of the detriment from estoppel is safeguarded by the ability of group members to opt out, and by the Court's procedural oversight (including settlement approval). This is consistent with the conclusions of Judd J and Croft J in *Great Southern*.

Timbercorp:

Most recently, in another Supreme Court of Victoria case handed down in September 2015, Robson J in *Timbercorp* found that group members are not estopped of individual issues not pleaded. He found that while group members cannot re-litigate matters which were expressly decided or were issues determined in the course of the judgment on the cause of action, group members are free to raise in fresh proceedings those issues which could have been, but were not, litigated in the earlier proceeding.

IMPLICATIONS

The conflicting findings in relation to whether the ancillary rights of group members were extinguished by the main class action, and the application of the preclusionary principles of *Anshun* estoppel and abuse of process, creates uncertainty for participants in class actions. This is of particular concern to defendants who may be faced with the prospect of a multiplicity of proceedings dealing with the same subject matter. The scale, cost and complexity of class actions escalates these concerns.

Ultimately, however, these cases, with similar circumstances, demonstrate the fluidity of the law in relation to group proceedings. The decisions in *Great Southern* and *Timbercorp* are single judge decisions and they have not, to date, been tested in a higher court.

KEY CONTACTS

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



ANTE GOLEM
PARTNER, PERTH

+61 8 9211 7542
Ante.Golem@hsf.com



RUTH OVERINGTON
PARTNER,
MELBOURNE

+61 3 9288 1946
ruth.overington@hsf.com



DAMIAN GRAVE
PARTNER,
MELBOURNE

+61 3 9288 1725
Damian.Grave@hsf.com



JASON BETTS
PARTNER, GLOBAL
CO-HEAD OF CLASS
ACTIONS, SYDNEY

+61 2 9225 5323
Jason.Betts@hsf.com



CAMERON HANSON
PARTNER, SYDNEY

+61 2 9225 5224
cameron.hanson@hsf.com

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