ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M98 of 2016

BETWEEN:

TIMBERCORP FINANCE PTY LTD (IN LIQUIDATION) (ACN 054 581 190)
Appellant

10 and

DOUGLAS JAMES COLLINS
First Respondent

JANET ANN COLLINS
Second Respondent

20

RESPONDENTS' SUBMISSIONS

Filed on behalf of the Respondents
M+K Lawyers Group
40-42 Scott Street
DANDENONG VIC 3175

Telephone: 03 9794 2600
Fax: 03 9794 2560
Email: ron.willemsen@mk.com.au
Ref: RGW:241159

Part I: Certification

1. These submissions[1] are in a form suitable for publication on the Internet.

Part II: Concise statement of issues

2. Is it just to deny Mr and Mrs Collins, who did not opt out of the group proceedings, the opportunity to make good their no loan defence[2] by presenting "*evidence and arguments to establish the facts and law*"?[3]

Part III: Section 78B of the *Judiciary Act 1903*

3. Mr and Mrs Collins certify that they consider that notice is not required to be given under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Facts in addition to appellant's narrative of facts

4. Mr and Mrs Collins were group members.[4] At first instance, Mr and Mrs Collins' retained M+K Lawyers to represent their interests in the class action when dealing with the issues common to all participants. At the same time, they also retained M+K Lawyers to deal with their unique issues within the framework of the class action.[5] Mr and Mrs Collins' contribution to the legal costs of the group proceeding was $3,170.[6] They did not assume any liability for the legal costs of the defendants to the group proceeding.

5. The evidence at trial was that they did not receive copies of the pleadings in the group proceeding nor any separate advices,[7] and were denied any reports of or updates about the mediation discussions.[8] Further, they did not provide instructions to the lead plaintiff, Mr Woodcroft-Brown, and the solicitors acting for Mr Woodcroft-Brown did not seek instructions from them.[9]

---

1 The terms defined in Timbercorp Finance's submissions dated 5 August 2016 are adopted for ease of reference.
2 Refer "Defence to Further Amended Statement of Claim dated 23 June 2016" dated 13 July 2016, [3A] – [12] and VSCA Judgment [86] – [89] (**the no loan defence**).
3 *Tomlinson,* [38] (French CJ, Bell, Gageler and Keane JJ).
4 VSC Judgment, [632], [659] – [660].
5 VSC Judgment, [100].
6 VSC Judgment, [108].
7 VSC Judgment, [107].
8 VSC Judgment, [107].
9 Affidavit of Douglas James Collins sworn 20 April 2015, [12].

6. The opt-out notice approved by the Court[10] suggested to the group members that the Court *"would only be resolving the identified common claims."*[11] The opt out notice did not warn group members that they would be bound beyond the answers to the common questions, to accede to future demands of indebtedness made by Timbercorp Finance. The opt out notice did not warn group members that if they failed to opt out they would have given up their common law right to defend Timbercorp Finance's demands for payment.[12]

7. Thirty-three common questions were decided in the group proceeding which dealt with:

> ... the disclosure obligations of Timbercorp Securities in respect of various managed investment schemes that had been established by it between 2001 and 2008, including the scheme[s] in which Mr and Mrs Collins ... had invested, and allegations that members of the Timbercorp Group had engaged in misleading or deceptive conduct. Generally speaking, the disclosure obligations were said to arise from the facts that: (a) the cash-flows to the Timbercorp Group were uncertain and its funding may be inadequate; (b) a tax decision was announced in February 2007 that had the potential to jeopardise the continued willingness of people to invest in non-forestry managed investment schemes; (c) a substantial deterioration in credit and financial markets occurred in late 2007; and (d) the Timbercorp Group was in breach of certain loan covenants in its bank facilities.[13]

8. At the time of the group proceeding, Mr Collins was not aware of any issues concerning himself and Mrs Collins that were not covered by the common questions in the group proceeding. As a result, Mr Collins did not opt out.[14]

9. There was no evidence that the lead plaintiff, or M+K, were aware of the circumstances giving rise to Mr and Mrs Collins' no loan defence while the group proceeding was being pursued.[15] The evidence failed to establish when the no loan defence "*....could, let alone should, have been identified.*"[16]

10. Mr and Mrs Collins' no loan defence contends that Timbercorp Finance has failed to perform the loan agreement[17] as it did not pay TSL (the responsible entity of the

---

10 VSC Judgment, [124] and [126].
11 VSCA Judgment, [215].
12 VSC Judgment, [124] and [126]; Affidavit of Ronald Gerard Willemsen sworn 27 April 2015, [3] and [6], and Exhibits RW-1 and RW-4'. See also *The Cloverdell Lumber Company Pty Ltd v Abbott* (1924) 34 CLR 122, 129, 124 and 135 (Isaacs J), and *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256, [63]-[64] (Gleeson CJ, Gummow, Hayne and Crennan JJ).
13 VSCA Judgment, [76].
14 VSCA Judgment, [26].
15 VSCA Judgment, [218].
16 VSCA Judgment, [222].
17 Timbercorp Finance's standard loan terms provided in cl 1: "*We (sic) agree to lend to you the loan amount by paying it to Timbercorp Securities Limited AFSL 235653 (or as it directs) as*

scheme) the balance of the application monies payable to purchase an interest in 10 olive grovelots. In the alternative, Mr and Mrs Collins contend that Timbercorp Finance knew, by reason of common directors, that TSL was not receiving any payment made to it by Timbercorp Finance as payment of the balance of their application moneys.[18] Timbercorp Finance asserts payment was by way of book entry.[19]

11. The question of whether Timbercorp Finance actually provided finance to Mr and Mrs Collins by paying to TSL the balance of their application money for lots in the 2008 Olive Scheme is currently being tried by the Supreme Court of Victoria.[20]

12. Mr and Mrs Collins do not seek now to re-litigate issues in the group proceeding.[21]

10 **Part V: Statutes and regulations**

13. Timbercorp Finance's statement of applicable constitutional provisions, statutes and regulations is accepted.

Part VI: Argument

14. The principle that Mr and Mrs Collins should have the opportunity to present evidence and arguments to establish the facts and law on which their denial of indebtedness to Timbercorp Finance is predicated, is central to the Australian legal system.[22] Timbercorp Finance contends that because Mr and Mrs Collins failed to opt out of the group proceeding[23] they are now estopped from denying Timbercorp Finance's claims of indebtedness. Neither the question of indebtedness of group members, nor of the

---

payment for the balance of your application money for lots...as described in the loan application form..." See affidavit of Douglas James Collins sworn 15 April 2015, Exhibit DC-18, see cl 1; See also Exhibit DC-1, item 6.

18 See also Defence to Further Amended Statement of Claim dated 13 July 2016, [3A] – [11A].

19 Refer [10] of Statement of Claim dated 22 June 2016.

20 SCI 2014 2972 Timbercorp Finance Pty Ltd (In liquidation) (ACN 054 581 190) v Douglas James and Janet Ann Collins; which is being heard together with S ECI 2014 00419 Timbercorp Finance Pty Ltd (In liquidation) (ACN 054 581 190) v Peter John White.

21 Refer *Rippon v Chilcotin Pty Ltd & Ors* (2001) 53 NSWLR 198, [27]-[28] (Handley JA, with whom Mason P and Heydon JA agreed); see also *VSC Judgment*, [626], [688]; *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332, 346 (Brennan and Dawson JJ); *Solak v Registrar of Titles & Ors* (2011) 33 VR 40, [70] (Warren CJ with whom Neave JA and Hargrave AJA agreed).

22 *Tomlinson*, [38] (French CJ, Bell, Gageler and Keane JJ).

23 The failure to opt out is critical to Timbercorp Finance's "*privy*" contention and asserted concomitant estoppel.

representative plaintiff, was the subject matter of the common questions determined in the group proceeding.[24]

15. As the Court of Appeal observed *"...the only essential conditions that must be satisfied for the commencement of a group proceeding are those contained in s 33C(1) of the Act"*.[25] This observation accords with the observations of this Court that the primary object of the group proceeding legislation is to avoid a multiplicity of actions, while enabling a means for multiple claimants to have their claims heard together *"consistently with the requirements of fairness and individual justice"*.[26]

16. Whilst the objective of facilitating group proceedings includes the avoidance of a multiplicity of litigation, the achievement of that objective is limited by the parameters of the common questions of law and fact determined in each group proceeding. Those common questions may well resolve a substantial number of the issues generated by the underlying events, but leave many other issues not dealt with.[27] Ultimately, the utility of the group proceeding in dealing with the legal consequences of the events giving rise to that group proceeding is largely to be determined by the representative plaintiff.[28]

17. Part 4A does not express any prohibition on group members later exercising their right to defend claims which did not arise on the common questions determined by the group proceeding.[29] Timbercorp Finance's contention that Mr and Mrs Collins are precluded from now defending claims of indebtedness, which were not part of the common questions determined in the group proceeding, cannot be reconciled with Part 4A and is want to cause injustice. It is a contention consonant with a legislative stipulation not pursued by the Parliament: that persons who fail to opt out of a class would be bound by

---

24 *Woodcroft-Brown v Timbercorp Securities Limited (in liq) & Ors (No 2)* [2011] VSC 526, [10] (Judd J); VSC Group Proceeding Judgment, [24] – [41]; See also Affidavit of Joanne Louise Hardwick sworn 24 April 2015, Exhibit JLH-1 pages 770 to 790.

25 *Supreme Court Act 1986 (Vic)*; VSCA Judgment, [13].

26 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, [12], (Gleeson CJ). See also *Wong v Silkfield* (1999) 199 CLR 255, [20] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ).

27 *Bright v Femcare* (2002) 195 ALR 574, [153]; (Finkelstein J); *Matthews v SPI Electricity Pty Ltd (Ruling No 12)* [2012] VSC 549, [19] (J Forrest J).

28 Supreme Court Act 1986 (Vic) ss 33C-33D; *Mobil Oil Australia Pty Ltd v The State of Victoria* (2002) 211 CLR 1, [40] (Gaudron, Gummow and Hayne JJ); refer also Finkelstein J in *P Dawson Nominees (No 2)* [2010] FCA 176, [16]; VSCA Judgment, [127]-[129].

29 *The Cloverdell Lumber Company Pty Ltd v Abbott* (1924) 34 CLR 122, 129, 124 and 135 (Isaacs J). In *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 Gleeson CJ, Gummow, Hayne and Crennan JJ spoke of the impermissibility of a court denying a defendant its right to raise a defence by imputing to the legislature an intent not expressed in the words of the statute at [63] – [64].

answers to the common questions, and precluded from litigating other defences.[30] It is a contention not supported by principle,[31] adopts a "*narrow or artificial approach*"[32] and ignores the demand that a finding of *Anshun* estoppel not be lightly made.[33]

Anshun estoppel

18. After surveying the relevant authorities,[34] the Court of Appeal concluded that the test for application of the *Anshun* principle is not a formulaic one. The application of *Anshun* in this context requires consideration of the whole of the circumstances.[35] In this case, it requires an assessment of the conduct of Mr and Mrs Collins and in particular whether it was unreasonable[36] of Mr and Mrs Collins not to have advanced the no loan defence in the group proceeding.[37]

19. When evaluating the application of *Anshun* estoppel as a result of a group proceeding, the procedural rules applying to group proceedings must be taken into account. Once they became members of the group, Mr and Mrs Collins' options were limited by the Act. Part 4A Group members may: (a) "opt-out" by a prescribed cutoff date;[38] (b) make

---

30 Cf *Clarke v Great Southern Finance Pty Ltd (in liq)* [2014] VSC 569, [51] (Judd J).

31 "*One fundamental error in the approach of the respondent was to build on the proposition that because the matter could have been raised in the first proceeding to draw a conclusion, it should have been*" per Allsop P (as he then was) in *Champerslife Pty Ltd v Manojlovski* (2010) 75 NSWLR 245, [4]; "*The invocation of the Anshun principle is a serious step and a power which should not be exercised without a scrupulous examination of all the circumstances. It is to be applied only in the clearest of cases as it ends a litigant's right to have the merits of a claim adjudicated and may result in a serious injustice if applied too readily*" per Marshall J in *Primus Telecommunications Pty Ltd v Kooee Communications Pty Ltd* [2008] FCA 1027, [5], quoted with approval by Warren CJ in *Solak v Registrar of Titles* (2011) 33 VR 40, [73]; *Gibbs v Kinna* [1999] 2 VR 19, [33] (Kenny JA, Ormiston and Phillips JJA agreeing); *Ling v Commonwealth* (1996) 68 FCR 180, 182 (Wilcox J), approved in *Bazos v Doman* [2001] NSWCA 347, [45] (Stein JA, Priestly and Beazley JJA agreeing); *Brisbane CC v Attorney-General (Qld)* [1979] AC 411, 425 (Lord Wilberforce). See also the observations of Forrest J in *Matthews v SPI Electricity Pty Ltd (Ruling No 12)* [2012] VSC 549, [19] "*...class action provisions do not seek to cover the field in terms of litigation arising out of a single event or closely interrelated events*".

32 Being the approach which cannot be taken, see *Champerslife Pty Ltd v Manojlovski* (2010) 75 NSWLR 245, [112] – [115] (Handley AJA).

33 *Solak v Registrar of Titles & Ors* (2011) 33 VR 40, [73] (Warren CJ); *Gibbs v Kinna* (1999) 2 VR 19, [5] (Ormiston JA), [6] (Phillips JA), [34] (Kenny JA). Likewise, where abuse of process principles are invoked refer *Kermani v Westpac Banking Corporation* (2012) 36 VR 130, [93] – [114] (Robson AJA).

34 VSCA Judgment, [130] – [139].

35 VSCA Judgment, [187].

36 VSCA Judgment, [140].

37 VSCA Judgment, [151]. See also *Tomlinson*, [22], [38]-[39] (French CJ, Bell, Gageler and Keane JJ); *Gibbs v Kinna* [1999] 2 VR 19, [1] (Ormiston JA), and [28] (Kenny JA).

38 *Supreme Court Act 1986* (Vic), s 33J.

application seeking to substitute the class action plaintiff;[39] (c) subject to having standing to do so, object to a settlement;[40] (d) pursue individual claims if the court concludes that it should allow individual class members to do so;[41] and (e) accept appointment as a sub-class representative.[42] Group members do not have standing to seek their own removal from the group.[43]

20. The Court of Appeal correctly held that no support for Timbercorp Finance's preclusion contention can be found in the provisions of Part 4A.[44] The words of that Part are to be given the meaning the legislature is taken to have intended them to have,[45] which ordinarily corresponds with their grammatical meaning.[46] Approached in that manner, nothing in Part 4A supports Timbercorp Finance's preclusion contention.

21. In any case, where *Anshun* estoppel is sought to be used to deny a litigant access to the exercise of judicial power in the quelling of controversies,[47] it remains necessary to scrutinise the facts. The Court of Appeal's conclusion is consistent with the position adopted by this Court in *Tomlinson* concerning persons whose legal interests might have benefitted from another person's claim in an earlier proceeding. This Court has held that it would be unjust for such persons to be precluded from asserting their case if they did not have an opportunity to exercise control over the presentation of evidence and the making of arguments in the earlier proceeding.[48]

---

39 *Supreme Court Act 1986* (Vic), s 33T.

40 *Supreme Court Act 1986* (Vic), s 33W.

41 *Supreme Court Act 1986* (Vic), ss 33S and 33R.

42 *Supreme Court Act 1986* (Vic), s33Q.

43 *Supreme Court Act 1986* (Vic), s33KA.

44 VSCA Judgment, [183] – [187]

45 Refer *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, [47] (Hayne, Heydon, Crennan and Kiefel JJ) referring to *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72,77 [9] (Gaudron, Gummow, Hayne and Callinan JJ), 89 [46] (Kirby J); *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193, 206 [30] (Gleeson CJ, Gummow, Hayne and Heydon JJ); 240-241 [167]-[168] (Kirby J); *Carr v Western Australia* (2007) 232 CLR 138, 143 [6] (Gleeson CJ); *Director of Public Prosecutions (Vic) v Le* (2007) 232 CLR 562, 586 [85] (Kirby and Crennan JJ); and *Northern Territory v Collins* (2008) 235 CLR 619, 642 [99] (Crennan J).

46 *Project Blue Sky v ABC* (1998) 194 CLR 355, [78] (McHugh, Gummow, Kirby and Hayne JJ); *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Alphapharm Pty Ltd v H Lundbeck A/S* (2014) 254 CLR 247, [42] (Crennan, Bell and Gageler JJ).

47 *D'Orta-Ekenaike v Victoria Legal* Aid (2005) 223 CLR 1, [32] and [45] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

48 *Tomlinson*, [39] (French CJ, Bell, Gageler and Keane JJ). See also *Young v Public Service Board* [1982] 2 NSWLR 456, 465 – 466 and *Eljazzar v BHP Iron Ore Pty Ltd* (1996) 65 IR 40 cited in *Tomlinson*, [36] – [39].

22. A party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings for myriad reasons.[49] *Anshun* requires that the Court evaluate what a litigant ought reasonably to have done in an earlier proceeding.[50]

23. By failing to opt out of the class, Mr and Mrs Collins have not in this instance acted with such a degree of unreasonableness as could deny them their rights to have a court examine whether Timbercorp Finance ever made the asserted loan.

The Anshun test is not satisfied when applied to Mr & Mrs Collins

24. Mr and Mrs Collins were not subjected to a loan recovery proceeding until after the conclusion of the class action.[51] Their interests in keeping available such defences, beyond the common questions in the group proceeding,[52] to defend any claim of indebtedness made against them by Timbercorp Finance cannot be questioned.

25. A higher degree of unreasonableness[53] is required becuase Mr and Mrs Collins' no loan defence raises no risk of inconsistent judgments (as was conceded[54]). The Court of Appeal correctly concluded that it was not unreasonable in the circumstances for Mr and Mrs Collins to defer their individual claims until Timbercorp Finance commenced recovery action against them under the loan agreements.[55]

26. Likewise, the Court of Appeal was correct to find that Mr and Mrs Collins' failure to seek directions under s 33Q, regarding the unpleaded no loan defence, was just one of the matters to take into account in assessing their conduct.[56] Of itself, that failure did not render Mr and Mrs Collins' conduct so unreasonable as to attract *Anshun* estoppel.

---

49 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 602 – 603 (Gibbs CJ, Mason and Aickin JJ).

50 *Spalla v St George Motor Finance Ltd (No 6)* [2004] FCA 1699, [65] (French J).

51 See cross-examination of Ms Joanne Hardwick T11.1-3; T19.31-T20.2; T17.10-15; T17.22-25; T19.12-30.

52 Refer paragraph 7 above.

53 *Redowood Pty Ltd v Link Market Services Pty Ltd Limited (Formerly Known As Asx Perpetual Registrars Limited)* [2007] NSWCA 286, [45] (Hodgson JA, Mason P and Bryson AJA agreeing).

54 VSCA Judgment at [209]. See also *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332, 346 (Brennan and Dawson JJ); *Solak v Registrar of Titles & Ors* (2011) 33 VR 40, [70] (Warren CJ with whom Neave JA and Hargrave AJA agreed).

55 VSCA Judgment, [175] and [183] – [211].

56 VSCA Judgment, [188] – [192] and [203] – [206].

The Privy issue

27. Part 4A has made group members statutory privies of the representative plaintiff, to the extent of the judgment.[57] This says nothing of the scope of that relationship, nor whether it can extend beyond the common questions at the heart of any group proceeding.[58] This relationship, being a creature of statute does not require a harmony of interests between the representative plaintiff and the group members. That relationship is not analogous to a traditional privy relationship.

28. Outside the common questions, it might be speculated that group members are to be considered privies of the representative plaintiff. But the boundary of that extension must find foundation in principle. Doing so must limit any privity to no further than unpleaded issues so closely connected to the common issues that, the failure to raise them in the group proceeding would ordinarily attract the *Anshun* test. When examined in this manner, the utility of seeking to find that group members are privies of the representative plaintiff is doubtful. A more sound approach is to recognise that *Anshun* estoppel can apply to persons neither party to, nor a privy of, a party involved in the earlier proceeding.[59] To this extent the manner in which Timbercorp Finance seeks to frame the issues on this appeal is apt to disguise the real issue.

29. Any privity between group members and a representative plaintiff, could only be for the purposes of claims or defences within the parameters of the common questions.[60] This is consistent with the primary purpose of Part 4A[61] and consistent with the fact that group proceedings will not necessarily resolve all issues in dispute.[62] The Court of Appeal's analysis and conclusion that "*group members in the group proceeding were not privies of the plaintiff in respect of unpleaded claims and defences*" is sound.[63]

---

57 Refer 33ZB of the *Supreme Court Act 1986* (Vic).

58 Refer *Tomlinson,* [40] (French CJ, Bell, Gageler and Keane JJ); *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384 at 399 – 406; and *Supreme Court Act 1986* (Vic), ss 33D(2), 33C(2)(a)(iv), 33C(2)(b)(i) and 33C(2)(b)(ii).

59 Refer VSCA Judgment, [174].

60 *Tomlinson*; [36], [37], [39], [40], [41], [42], [45], [46] (French CJ, Bell, Gageler and Keane JJ).

61 *Mobil Oil Aust Pty Ltd v Victoria* (2002) 211 CLR 1, [12] (Gleeson CJ).

62 *Bright v Femcare* (2002) 195 ALR 574, [153] (Finkelstein J); refer also *Philip Morris v Nixon* (2000) 170 ALR 487, [136] (Sackville J, with whom Spender and Hill JJ agreed) and *Matthews v SPI Electricity Pty Ltd (Ruling No 12)* [2012] VSC 549, [19] (Forrest J).

63 VSCA Judgment, [213].

30. Group members, such as Mr and Mrs Collins, had no control over the representative plaintiff's conduct of the group proceeding.[64] Group members do not "participate" in a group proceeding. They cannot dictate or require the representative plaintiff to do anything. Group members merely obtain the benefit (or burdens) flowing from the findings on common questions.[65] The legislative scheme for group proceedings is designed to have group members simply embark on the bus driven by the representative plaintiff.

31. Timbercorp Finance seeks pronunciation of a formula: group members = representative plaintiff's privy = estopped from litigating any matter arising from circumstances giving rise to the group proceeding. There is no foundation in principle for pronouncing such a formula.[66]

32. Furthermore, in the context of Part 4A it is not possible to conclude that the representative plaintiff has ever represented the group members with respect to unpleaded claims. Those unpleaded claims are unknown. It cannot be accepted that the representative plaintiff, in not pleading those claims, was representing the legal interests of the group members in the group proceeding.[67] For this reason, the privy principle cannot be applied to unpleaded claims of group members.

33. Group members who seek to make claims or to take defences following determination of a group proceeding may be estopped in accordance with *Anshun* principles. This is not because they are a privy of the representative plaintiff in respect of unpleaded claims, but because their failure to raise the claims in the group proceeding was attended with the requisite lack of reasonableness.[68] It is not a prerequisite of *Anshun* that a group member be a privy of the representative plaintiff.

The representative plaintiff

34. Whether the representative plaintiff would now be precluded from raising the no loan defence is a hypothetical scenario.[69] The Court of Appeal correctly held that

---

64 Appellant's Submissions dated 5 August 2016, [76].

65 *P Dawson Nominees v Brookfield Multiplex Limited* (No 2) [2010] FCA 176, [16] (Finkelstein J).

66 *Tomlinson*, [39] (French CJ, Bell, Gageler and Keane JJ).

67 *Tomlinson*, [37].

68 VSCA Judgment, [174]. *Tomlinson*, [22] (French CJ, Bell, Gageler and Keane JJ); *Spalla v St George Motor Finance Ltd (No 6)* [2004] FCA 1699, [64] – [65] (French J); *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 602-603 (Gibbs CJ, Mason and Aickin JJ).

69 VSCA Judgment, [214].

Timbercorp Finance failed to discharge its burden to make out this hypothetical case.[70]

No abuse of process

35. Timbercorp Finance has failed to discharge the burden[71] of establishing that Mr and Mrs Collins' pursuit of the no loan defence amounts to an abuse of process.[72]

36. Further, as Gummow J has observed, close attention must be paid to the relevant statutory setting in determining any claims of abuse of process.[73] Here the provisions of Part 4A reveal:

    (a) no provision prohibiting a group member who has not opted out of a group proceeding pursuing all and any claims (not being claims determined by the common issues litigated in the class action) which that group member might have, by way of a cause of action or a defence, qua any defendant to a class action;

    (b) recognition of the probability that individual group members may have claims that do not arise for determination in the group proceeding;[74]

    (c) control of the group proceeding is ceded to the representative plaintiff only;[75]

    (d) protection of group members from any liability for the defendant's costs and exposure of the representative plaintiff to liability for those costs;[76] and

    (e) no provision according group members a right to give instructions as to the conduct of the group proceeding.

37. This statutory setting denies any conclusion that, in now pursuing their no loan defence, Mr and Mrs Collins are acting in abuse of the process of the court.

Conclusion

38. In the circumstances it would work an injustice upon Mr and Mrs Collins to deny them the opportunity to make good their no loan defence by presenting evidence and arguments to establish the facts and law.

---

70 VSCA Judgment, [214] – [224].
71 *Williams v Spautz* (1992) 174 CLR 509, 529 (Mason CJ, Dawson, Toohey and McHugh JJ).
72 See *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, [10] (Gummow ACJ, Hayne, Crennan and Bell JJ); *Tomlinson* [24]-[26].
73 *Re Pollard; Ex parte Lensing Management Co Pty Limited* (1991) 33 FCR 284.
74 *Supreme Court Act 1986* (Vic), s 33H(2)(c), 33Q(1), s 33R, s 33S.
75 See for example, *Supreme Court Act 1986* (Vic), s33K(1), s 33T.
76 *Supreme Court Act 1986* (Vic), s 33ZD.

Part VII: Argument on notice of contention

39. Not applicable.

Part VIII: Estimate

40. It is estimated that 2 hours will be required for presentation of Mr and Mrs Collins' oral argument.

Dated: 19 August 2016

Michael D Wyles
Aickin Chambers
Tel: 03 9225 8868
Fax: 03 9225 8480
michaeldwyles@vicbar.com.au

Fleur L Shand
Aickin Chambers
03 9225 6389
03 9225 8668
fleur.shand@vicbar.com.au

Dion Fahey
Aickin Chambers
03 9225 6837
03 9225 8668
dion.fahey@vicbar.com.au

Counsel for the Respondents