TIMBERCORP FINANCE PTY LTD (IN LIQUIDATION) v COLLINS & ANOR (M98/2016);
TIMBERCORP FINANCE PTY LTD (IN LIQUIDATION) v TOMES (M101/2016)

Court appealed from: Court of Appeal, Supreme Court of Victoria
[2016] VSCA 128

Date of judgment: 1 June 2016

Date special leave granted: 20 July 2016 (M98/2016)
28 July 2016 (M101/2016)

The applicant, ('Timbercorp Finance'), was a member of the Timbercorp Group of companies, which between 1992 and its collapse in 2009, invested more than $2 billion in agribusiness projects on behalf of 18,500 investors. Many investors, including the respondents in the present proceedings ("Mr and Mrs Collins" and "Mr Tomes") borrowed money from Timbercorp Finance to finance their investments in the schemes. After administrators were appointed to the Timbercorp Group borrowers under approximately 8470 loans failed to meet their repayment obligations and Timbercorp Finance issued final demand notices in respect of approximately 1480 of those loans.

On 27 October 2009, a proceeding was commenced in the Supreme Court of Victoria by Allen Woodcroft-Brown as plaintiff on his own behalf and on behalf of group members as defined ('the group proceeding'). Timbercorp Finance was a defendant to the proceeding. Broadly, the allegations in the statement of claim related to deficiencies in the various product disclosure statements issued in respect of the schemes. On 27 October 2011, Judd J made final orders dismissing the group proceeding. The Court of Appeal dismissed an appeal from the judgment and orders made by Judd J and an application for special leave to appeal to this Court was refused.

Subsequently, Timbercorp Finance commenced proceedings against Mr and Mrs Collins and Mr Tomes in which it sought recovery of outstanding principal and interest on the moneys that it had lent them. Neither Mr and Mrs Collins nor Mr Tomes had opted out of the group proceeding. However, each sought to defend their respective recovery proceeding on various bases including (a) that no loan had been advanced to them and that they did not acquire an interest in the project relevant to them (in the case of Mr and Mrs Collins) and (b) that it had been represented that, in the event of default under a loan agreement, Timbercorp Finance's only recourse would be against the investment in the scheme (in the case of Mr Tomes). Timbercorp Finance pleaded that each respondent was precluded from raising the pleaded defences by reason of the fact that they were a group member in the group proceeding. In effect, Timbercorp Finance contended that each of the respondents was subject to *Anshun* estoppel. In addition, it contended that each of their defences should be stayed as an abuse of process.

Judd J ordered that the question whether the respondents were precluded from raising any and, if so, what defences pleaded by them be determined as a preliminary question. On 2 September 2015, Robson J held that the respondents

were not precluded either by *Anshun* estoppel or by the principles of abuse of process from raising any of the defences.

Timbercorp Finance's appeal to the Court of Appeal (Warren CJ, Santamaria and McLeish JJA) was dismissed. The Court found that a group member in a group proceeding 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. In considering the question of unreasonableness in this case, the Court found that it was important to consider the opt out notices that were sent to the parties. They noted that the notices contained nothing that would have warned a group member that, in addition to being bound by the determination of the plaintiff's claim, they would be precluded from bringing their individual defences, if they did not apply to have those defences case managed as part of the group proceeding.

The Court considered that the question of reasonableness must also be informed by considering what prejudice could have been caused to Timbercorp Finance as a result of the respondents not having taken the steps in the group proceeding which were open to them as group members. They concluded that the potential for prejudice was very low. Assuming that the respondents had made an application that their individual defences be case managed as part of the group proceeding, and that the trial judge had agreed to do so, it was highly likely, if not inevitable, that the individual defences would have had to be heard and determined separately from the hearing and determination of the common claims. Timbercorp Finance would still have had to respond to the individual claims either as part of the group proceeding or in a separate proceeding. Timbercorp Finance was therefore not materially worse off and it could not be said that the conduct of the respondents was unfairly prejudicial to it.

The Court also found that the connections between the claims advanced in the group proceeding and the individual claims of the respondents were not substantial or fundamental in nature. It followed that it was not unreasonable of the respondents to defer reliance on their individual claims until such time as Timbercorp Finance sought to enforce the loan agreements against them.

With respect to the argument that the respondents' defences were an abuse of process, the Court found that Timbercorp Finance had not established to its satisfaction that, by maintaining their defences, the respondents were acting oppressively or bringing the administration of justice into disrepute. Timbercorp Finance had to meet the allegations contained in the defences either as part of the group proceeding or in separate proceedings and was no worse off than if the respondents had sought to introduce their defences into the group proceeding.

The grounds of appeal include:

- The Court of Appeal erred in concluding that the Respondents are not precluded by reason of an *Anshun* estoppel from raising their pleaded defences when, as group members within the meaning of Part 4A of the *Supreme Court Act* 1986 (VIC), they did not opt out of, and did not raise those defences within, proceeding SCI 9807 of 2009.