



HIGH COURT OF AUSTRALIA

9 November 2016

TIMBERCORP FINANCE PTY LTD (IN LIQUIDATION) v COLLINS & ANOR;
TIMBERCORP FINANCE PTY LTD (IN LIQUIDATION) v TOMES

[2016] HCA 44

Today the High Court unanimously dismissed two appeals from the Court of Appeal of the Supreme Court of Victoria. The High Court held that it was not unreasonable, in the *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; [1981] HCA 45 ("*Anshun*") sense, for the respondents in each appeal not to have raised issues specific to them in a group proceeding. Accordingly, the respondents were not estopped from raising these issues in subsequent proceedings, nor was it an abuse of process to do so.

The appellant in both appeals was part of the Timbercorp Group. Its purpose was to provide loans to investors in managed investment schemes operated by another company in the Timbercorp Group. Each of the members of the Timbercorp Group was placed in liquidation in June 2009. A group proceeding was commenced against members of the Timbercorp Group and certain of their directors in the Supreme Court of Victoria in October 2009 under Pt 4A of the *Supreme Court Act* 1986 (Vic) by Mr Woodcroft-Brown ("the lead plaintiff"), on his own behalf and on behalf of persons who held an interest in certain managed investment schemes, including the respondents ("the group proceeding"). The respondents had previously applied for loans from the appellant to fund their investments in the schemes. The respondents each received and read "opt out notices", but chose not to opt out of the group proceeding. The lead plaintiff's case was essentially that Timbercorp Securities, another member of the Timbercorp Group, had failed to comply with its statutory obligations to disclose information about risks and had made certain misrepresentations, and that the appellant was involved in that conduct. The group proceeding was not successful at trial or on appeal.

The appellant subsequently commenced separate proceedings against Mr and Mrs Collins and against Mr Tomes, in which it alleged that the respondents had defaulted under their respective loan agreements and sought recovery of the outstanding principal and interest. Mr and Mrs Collins, in their defence, contended that they did not acquire an interest in the project in which they sought to invest through Timbercorp Securities and that no loan was advanced to them by the appellant for that purpose. Mr Tomes' defence included allegations that no loan agreement was concluded between him and the appellant, that the monies he paid were not properly applied, and that an agent of the appellant had represented that, in the event of his default under the loan, the appellant would not seek recourse against him.

The appellant claimed that the respondents were precluded, by reason of *Anshun* estoppel or abuse of process, from raising their defences because they should have raised them for determination in the group proceeding, or alternatively they should have opted out of the group proceeding. The primary judge held that the respondents were not precluded from raising their defences. The Court of Appeal dismissed the appeals from that decision. By grant of special leave, the appellant appealed to the High Court.

The High Court unanimously dismissed both appeals. The High Court held it was not unreasonable for the respondents not to have raised their individual issues concerning the loan agreements in the group proceeding, in circumstances where: the issues in the group proceeding concerned undisclosed risks and the making of misrepresentations; there was no issue in the group proceeding as to the validity of the loan agreements; and the respondents had limited control over the group proceeding. Nor was it unreasonable in the circumstances of the case for the respondents not to have opted out of the group proceeding. Further, the respondents' failure in the group proceeding to bring their claims to the attention of the Court did not affect the case management decisions open to the Court, and thus raising the defences in these proceedings did not amount to an abuse of process.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*