

Case Note: High Court of Australia confirms group members free to pursue individual defences in MIS loan recovery claims.

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On 9 November 2016 the High Court of Australia determined that certain “test case” borrowers were not precluded from raising defences to loan recovery proceedings commenced by Timbercorp Finance by reason of their involvement as group members in a group proceeding under Part 4A of the *Supreme Court Act 1986* (Vic) (**Act**).

The question was first considered by Robson J in April 2015 ([2015] VSC 461) and by the Court of Appeal of the Supreme Court of Victoria in November 2015 ([2016] VSCA 128). In both proceedings, the respective Courts found that borrowers were not so precluded.

The lead plaintiff in the group proceeding was an investor in certain managed investment schemes. His claims concerned a failure by the responsible entity of those schemes to adequately disclose risks to investors in the schemes’ PDSs.

Timbercorp Finance loaned money to some group members to invest in the schemes. It was a defendant in the group proceeding. The lead plaintiff sought, among other things, a declaration that he was not liable to repay his loans, due to the matters alleged against the responsible entity. Importantly, the group proceeding did not concern the validity of the loan agreements beyond the scope of the lead plaintiff’s claims against the responsible entity. Timbercorp Finance’s counterclaim against the lead plaintiff to enforce his loan agreement was stayed before trial of the group proceeding and is yet to be determined.

In their individual loan recovery proceedings, the respondents pleaded matters in defence that were not directly considered in the group proceeding.

Chief Justice French and Justices Kiefel, Keane and Nettle delivered a joint judgment (**Joint Judgment**).

In the Joint Judgment, their Honours restated the orthodox position that Anshun Estoppel arises where the matter relied upon as a defence in the second action is so relevant to the subject matter of an earlier action that it would have been unreasonable not to rely on the defence in the first.

Were the respondents unreasonable because they were privies of the lead plaintiff in the Group Proceeding?

The appellant’s first contention was that group members are privies of the lead plaintiff in relation to the respondents’ defences and that the lead plaintiff would now be Anshun estopped from running the respondents’ defences.

In the Joint Judgment, their Honours determined that group members were not privies of the lead plaintiff in relation to matters sitting outside the “common issues” identified in accordance with Part

4A of the Act. In particular, they were not privies in relation to the claims of individual group members that might have been raised, but were not pleaded by the lead plaintiff.

In drawing this conclusion, their Honours referred to the relevant provisions in Part 4A of the Act which:

- (a) define the relevant group and the common issues of fact and law;
- (b) allow for the separate determination of individual group members' issues and the costs consequences of such disclosure;
- (c) give the Court discretion as to the creation of sub-groups and management of the resolution of individual issues; and
- (d) provide a statutory estoppel in relation to the common issues of fact and law.

As a result, the scope of the "*unreasonableness*" question was restricted to the individual group members' action or inaction in the group proceeding. The lead plaintiff's conduct was not relevant.

Her Honour Justice Gordon, writing separately, reached a similar conclusion.

Were the respondents unreasonable in failing to raise their individual issues in the group proceeding?

Their Honours determined that the respondents were not unreasonable in failing to raise their individual defences in the Group Proceeding. In doing so they noted that:

- (a) the validity of the loan agreements was unrelated to the common issues in the group proceeding;
- (b) there was no risk of inconsistent findings between the group proceeding and the loan recovery proceedings;
- (c) his Honour Judd J made no positive finding in the group proceeding about the validity of the loan agreements;
- (d) the absence of any such issue had no effect on his Honour's substantive determination of the common issues in the group proceeding;
- (e) His Honour expressly postponed the determination of the lead plaintiff's liability under the loan agreements by staying the counterclaim in the group proceeding before trial;
- (f) had the defendants raised their own issues for determination in the group proceeding, they would have suffered significant costs consequences under s 33R of the Act;
- (g) his Honour knew, from an early stage of the group proceeding, that group members had individual issues to be resolved and did not make directions for their determination; and
- (h) the group members had limited control over the management and conduct of the group proceeding.

In her separate judgment, Gordon J reached a similar conclusion, emphasising:

- (a) the lack of any risk of inconsistent findings in relation to the loan agreements;
- (b) the provisions in Part 4A of the Act that allow for the separate determination of individual issues;
- (c) the lack of control or active involvement of group members over the conduct of the group proceeding;
- (d) the fact that s 33S of the Act contemplates that, before individual issues are determined in a group proceeding, the Court has decided that such determination is proper and convenient;

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- (e) the absence of any legislative obligation (as opposed to an opportunity) for Group Members to seek directions in relation to their individual matters;
- (f) the exercise of Judd J's discretion not to resolve the counterclaim against the lead plaintiff in the group proceeding; and
- (g) the absence of any express legislative requirement for group members to 'opt out' of a group proceeding if they wish to raise an individual claim.

Was the defendants' failure to raise individual matters in the Group Proceeding an abuse of process?

Their Honours determined that the group members' failure to raise individual matters in the group proceeding was not an abuse of process. In their view, Judd J had the power to manage the conduct of the group proceeding. He was aware of the individual claims. Their Honours inferred that:

- (a) Justice Judd did not consider the resolution of individual claims necessary for the management of the group proceeding; and
- (b) had the group members raised their claims before his Honour, there was no reason to suggest his Honour would have conducted the group proceeding any differently.

This decision is likely to have a significant impact on the management of future group proceedings in this State; and on the aftermath of group proceedings which have already been resolved.

In the first instance, judges managing group proceedings will need to consider the possibility of a large number of future proceedings when approving opt-out notices and making directions in relation to the management of their group proceeding.

It is also possible that group proceeding settlements may follow a different path. In the common course, a lead plaintiff commences a group proceeding which is settled and resolved by way of a settlement deed. Such settlement deeds often contain releases of the defendants by the lead plaintiff on behalf of group members. One might now argue that, as the lead plaintiff is not a privy of group members in relation to un-pleaded claims outside the common issues of fact and law, the lead plaintiff cannot bind the group members to such releases.