

Timbercorp Finance Pty Ltd (in liq) v Collins; Timbercorp Finance Pty Ltd (in liq) v Tomes

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The High Court has dismissed two appeals against a decision of the Victorian Court of Appeal on the operation of *Anshun estoppels* — which prevents a party asserting a claim or raising an issue of fact or law if that claim/issue was so connected to the subject matter of an earlier proceeding that it was unreasonable in the context of that first proceeding to not have raised it then — in the context of individual members of an unsuccessful group proceeding. (On the statutory scheme for group proceedings see *Supreme Court Act 1986* (Vic) [pt 4A](#).) The appellants are liquidators of companies that were part of the Timbercorp Group and were incorporated to provide loans to investors in forestry projects. The respondents applied for these loans between in 2008, became part of a group proceeding brought by investors after Timbercorp collapsed in 2009. When the group proceeding was rejected, the appellant liquidators commenced proceedings against the respondents, contending that they had defaulted on their loans. The respondents sought to rely on several defences to the recovery claims, and the appellants contended the respondents were precluded from relying on those defences because each was a member in the group proceeding and thus subject to an *Anshun* estoppel, or because relying on those defences constituted an abuse of process. The VCA agreed with the first instance judge that the borrowers were not precluded from raising any of their defences, which were that no loan was made (Collins) and that the loan was agreed to in reliance on a misrepresentation made at the time of the loan (Tomes) (see at [23]–[26]).

The High Court rejected the liquidator's appeals. The plurality judges (French CJ, Kiefel, Keane and Nettle JJ) rejected the appellant's submission that the lead plaintiff was the privy in interest of the respondents regarding their individual claims and defences because of their involvement in the group proceeding (see [36]ff). While the lead plaintiff represents group members in claims that give rise to common questions of law or fact, that does not extend to their individual claims, 'regardless of whether those claims should have been raised in the group proceeding' (see [41]–[54]). Turning to the relevance and reasonableness elements of *Anshun* estoppels, the plurality, quoting from *Anshun*, noted that there is no estoppel 'unless it appears that the matter relied upon as a defence in the second action was *so relevant* to the subject matter of the first action that it would have been *unreasonable* not to rely on it' (emphasis added by the Court, at [56]). Here, it could not be expected that the respondents would raise individual issues within the group proceedings because the common issues focused on undisclosed risks and misrepresentations affecting the entry of investors: 'The only connection between those matters and their loan agreements was the relief sought regarding the enforceability of the loan agreements. There was no issue in the group proceeding about the validity of the loan agreements which would have made the claims in the respondents' defences relevant in the group proceeding.' (at [58]). The plurality similarly rejected the appellant's contention that the respondents should have opted out of the group proceedings to pursue their claims because, again, this rested on the erroneous assumption that the lead plaintiff represented both the group claims as well as any

claims (see at [67]) there was nothing t issues raised by the manage and deterr could be said that t suggested that affe differently (at [73]).

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Gordon J also dismissed respondents to not proceedings (at [113]). *Timbercorp v Collins* operates as not operate mechanically, and must be examined in the context of each case, a range of factors suggested that it does not arise here (at [113]–[115]): the scope of the group proceeding was not too wide, as suggested by the appellants (at [116]ff); the respondents had no real active role or control over the course of the group proceedings (at [124]ff); and there can be no suggestion that in refusing to use the opt out procedure a group member prevents themselves from bringing other proceedings that are in some way connected to the group proceedings (at [135]ff). Gordon J also rejected the appellant’s contention that group members are privies in interest of the lead plaintiff: under the statutory scheme, the legal interest of each group member and the lead plaintiff ‘only align to the extent that each has an interest in the resolution of the common question’, and the lead plaintiff does not act for the group for all purposes (at [138]ff). Finally, Gordon J held that the appellant’s abuse of process claim fails for similar reasons: raising the defences was not an abuse of process because nothing in the statutory scheme or the nature of group proceedings suggests the respondents should have raised their claims then: at [145].

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| High Court Judgment | [2016] HCA 44 | 9 November 2016 |
| Result | Appeals dismissed | |
| High Court Documents | Timbercorp v Collins | |
| | Timbercorp v Tomes | |
| Full Court Hearing | [2016] HCATrans 193 | 1 September 2016 |
| Special Leave Hearing | [2016] HCATrans 159 | 20 July 2016 |
| Appeal from VSCA | [2016] VSCA 128 | 1 June 2016 |
| Trial Judgment, VSC | [2015] VSC 461 | 2 September 2015 |

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About Martin Clark

Martin Clark is a PhD Candidate and Judge Dame Rosalyn Higgins Scholar at the London School of Economics and Political Science and Research Fellow at Melbourne Law School. He holds honours degrees in law, history and philosophy from the University of Melbourne, and an MPhil in Law from MLS. While at MLS, he worked as a researcher for several senior faculty members, was a 2012 Editor of the Melbourne Journal of International Law, tutor at MLS and various colleges, a Jessie Legatt Scholar, and attended the Center for Transnational Legal Studies Program.

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