ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No M101 of 2016

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

and **JOHN CHARLES TOMES**
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Issues

2 Is the respondent, who was a group member in proceeding SCI 9807 of 2009 ("**group proceeding**"), now precluded by an *Anshun* estoppel from raising some or all of the defences he has pleaded in answer to the appellant's claims against him in proceeding SCI 2014 04921 ("**the loan defences**")?

3 In a proceeding brought under Part 4A of the *Supreme Court Act 1986* (Vic) ("**the Act**"), is a group member bound to bring to the attention of the court all his or her unique claims or defences which relate to the subject matter of the litigation in addition to the common claims brought by the lead plaintiff?

4 Does an *Anshun* estoppel automatically arise in respect of all claims or defences, excluding common claims, which were not pleaded by the lead plaintiff if group members fail to do so?

5 Is the respondent a privy of the lead plaintiff in the group proceeding in respect of the loan defences, and if so, is he now precluded on that basis from raising them?

Part III: Notice under sec 78B of the *Judiciary Act 1903*

6 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

Part IV: Facts

7 The respondent supplements and disputes, where indicated, the appellant's narrative and refers the Court to the following matters.

Filed on behalf of the Respondent
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The group proceeding

8 *Background*: Between 1992 and 2009, approximately 18,500 persons invested in schemes operated by Timbercorp Securities Ltd ("**TSL**"), about 7,500 of which had purported to borrow funds from the appellant. On 27th October 2009, Rodney Woodcroft-Brown commenced a proceeding under Part 4A of the Act on his own behalf and on behalf of group members, who were defined to include persons who acquired and/or held an interest in the schemes between 6th February 2007 and 23rd April 2009 and who had incurred a liability for management fees as a scheme member. Entry into loan agreements with the appellant was ***not*** a qualifying factor for participating in the action {PJ [52]}.

9 There is no evidence about the precise number of group members or how many of them purportedly entered into loans with the appellant. About 2,100 of the group members, including the respondent, retained the same solicitors as the lead plaintiff ("**M+K**"). The remainder were not represented. About 900 group members opted out of the proceeding. The respondent retained M+K to represent his interests in relation to the common issues, in the first instance, and then once they were resolved, in relation to his unique issues in the framework of the group proceeding.

10 *Claims in the group proceeding*: The allegations in the group proceeding principally focused on deficiencies in the various product disclosure statements issued in respect of the schemes formerly operated by TSL{PJ [7], CA [7]}. The primary judge noted that no aspect of the loans themselves was challenged and the group members claimed that the loan agreements were void or unenforceable as a consequence, only, of the misrepresentations alleged to be made in the various product disclosure statements ("**PDSs**") {PJ {6]}. The only representations relied upon were said to be those in the PDSs. Issues relating to misrepresentations made to group members individually by financial advisers or authorised representatives of Timbercorp were not the subject of the common questions.

11 The appellant filed a counterclaim against Mr and Mrs Woodcroft-Brown. In the counterclaim, the appellant made allegations about the terms of the particular loan agreement, the advance of funds and Mr and Mrs Woodcroft-Brown's default thereunder. A defence was filed to the counterclaim. It put in issue the terms of the loan agreement entered into by Mr and Mrs Woodcroft-Brown, the validity of the exercise of the power of attorney and whether monies had been advanced to them. Despite the fact that that defence denied any liability to repay any monies allegedly advanced to Mr and Mrs Woodcroft-Brown, the appellant did not file a reply challenging their right to do so. Further, no claim was made against the respondent in the group proceeding, nor was any attempt made to identify whether the claims

between TSL and Mr and Mrs Woodcroft-Brown constituted the universe of issues involving the group members. On 9th February 2011, Judd J ordered that the counterclaim and third party proceedings be tried separately from the main proceeding, after the determination of the common questions in the group proceeding {CA [48], [61]}. The Court is referred to paras [15]-[16] below as to the disposition of the counterclaim.

12 *Opt out notices*: On 11th October 2010, the parties attended a hearing before Judd J, at which the appellant was represented by senior counsel, to settle and approve the terms of an opt out notice. The appellant had participated in drafting the draft opt out notice provided to the court. The draft opt out notice said nothing as to what would occur if the group proceeding was unsuccessful and the appellant later sought to sue individual investors on their loans. The opt out notice sets out {CA [49]-[52]} a very brief summary of the allegations made by the lead plaintiff, namely that the defendants failed to disclose various matters that affected, or were likely to materially affect, investments made in the schemes and that he and group members suffered financial loss because the defendants made false, misleading or deceptive representations to him and to group members. The consequences of not opting out were then stated:

> … you will be taken not to have opted out and will, under Australian law, be bound by the outcome of the class action and any judgment or determination made in it. If the class action is unsuccessful or is not as successful as you might have wished, you will **not be able to make the same claim** in any other proceedings. [emphasis added]

A revised opt out notice was sent out to group members as a result of further orders made on 11th March 2011, which was relevantly in the same terms as the first notice {CA [62]}. Again, it was approved by the appellant.

13 The respondent's unchallenged evidence {PJ [159]} is that he was a passive participant in the conduct of the group proceeding {PJ {167]}. Within a few weeks of the commencement of the group proceeding, he contacted M+K by email and informed the firm about representations which had been made to him by a financial advisor, including that Timbercorp would not take legal action to recover funds in the event he fell on bad times and that Timbercorp would take back the asset the subject of the investment, which Timbercorp would be able to sell for a profit {PJ [169]-[172]}. As a result of inquiries made by his present solicitors, the respondent is now aware that M+K did nothing to bring any of these matters to the attention of the court in the group proceeding. Having read the opt out notices sent in the proceeding, the respondent chose not to opt out {PJ [175]-[178]}. The respondent was never informed as to how the matters relied upon by the lead plaintiff in the group proceeding might impact upon his own personal circumstances {PJ [179]}, nor was he told

about the counterclaim or Mr Woodcroft-Brown's defence to it {PJ [183]}. If at any stage the respondent had been told by M+K of the risks that his ability to defend any recovery proceeding brought by Timbercorp could be affected by his role as a passive participant in the group proceeding, or if either of the opt out notices contained such a warning, he would have sought independent legal advice {PJ [180]}. The respondent was not informed of the appellant's intention to sue him until 2nd May 2014.

14 *Trial and judgment*: On 23rd May 2011, the trial of stage 1 commenced, ie, the trial of Mr Woodcroft-Brown's personal claim and the common questions. On 1st September 2011, Judd J delivered reasons for his judgment on the common questions (*Woodcroft-Brown v Timbercorp Securities* [2011] VSC 427, (2011) 253 FLR 240).

15 On 27th October 2011, his Honour made orders dismissing Mr Woodcroft-Brown's claim, in both his individual and representative capacity, against the defendants. His Honour made further orders, including that the making of directions with respect to the further conduct of the appellant's counterclaim against Mr & Mrs Woodcroft-Brown stand reserved and be adjourned *sine die* and he approved the sending of a notice to group members for the purpose of providing notice about the court's decision (in accordance with sec 33ZH of the Act) {PJ [78], CA [75]}.

16 Mr Woodcroft-Brown and the appellant agreed to stay the further hearing of the counterclaim against him {PJ [79]}. The appellant has not sought to re-enliven its counterclaim. The defences of Mr and Mrs Woodcroft-Brown - which are similar to some of the defences pleaded by the respondent - remain undetermined. The court was *not* asked to send any notice to group members, including those who were unrepresented, inviting them to seek directions in respect of any other claims, including those against third parties, or defences which they may have which were personal to them and not the subject of the common claims.

The proceeding below

17 The respondent's loan defences (as set out in his amended defence and counterclaim filed 25th February 2015) are several:

(a) *First*, the appellant did not enter into the loan agreements as alleged for various reasons, including (a) the invalidity of the power of attorney and (b) that the written terms and conditions which the appellant now alleges form part of the purported loan agreements were not in fact incorporated into the contract (Amended Defence and Counterclaim, paras 4(c)(iv), 18(c)(iv)).

(b) *Second*, an authorised financial representative of TSL made misrepresentations to him, on the instructions of managers in the Timbercorp group, and also acted unconscionably in connection with the signing of the loan documentation. The misrepresentations relate specifically to the alleged loans, namely *(1)* whether Timbercorp would have recourse to the respondent in the event he defaulted on the loans, *(2)* the sufficiency of the value of the underlying security (being the almond lots and grove lots in which he was to take an interest), *(3)* the purpose of the advance of moneys under the loans and *(4)* the continuity of the schemes in the event of Timbercorp failing and hence the purpose of the loan continuing to be fulfilled.

(c) *Third*, the respondent alleges that the loan moneys purportedly advanced on his behalf were not applied for the stipulated purpose, with the result that the appellant acted in breach of trust.

18 The appellant's amended reply asserted that Mr Tomes was precluded from raising what it termed the pleaded defences. It thus challenged Mr Tomes' entitlement to rely upon *any* of his defences. The primary judge noted {PJ [667]} that the appellant had not advanced submissions about all of the individual defences pleaded by the respondent, even though it bore the onus of establishing there was an *Anshun* estoppel. He also noted {PJ [668]} that the appellant conceded that the defences now raised by the respondent were not adjudicated on in the group proceeding and, for the greater part, the common questions determined in the group proceeding did not encompass them.

19 The appellant's contentions concerning *Anshun* estoppel and abuse of process are thus made in the following circumstances:

(a) until 15th September 2014, no claim had been pleaded against the respondent;

(b) at the time of the commencement of the group proceeding, no steps had been taken by the appellant to identify what claims it had against any group member, apart from 20 of them;

(c) at all times the appellant knew that M+K had been retained by up to 1,600 group members {PJ [40]};

(d) the group proceeding was commenced to facilitate the determination of common issues identified by the lead plaintiff;

(e) the opt out notices, which the appellant had participated in drafting, asserted that the group members would not be able to sue in any subsequent proceedings on the 'same claim' as that advanced in the group proceeding; and

(f) the appellant never asserted to Judd J that group members would be estopped from asserting individual claims or defences, nor adverted to what would occur if the group's claim was unsuccessful {PJ [621]}.

20 The primary judge found {PJ [618]-[620]} that:

(a) neither the opt-out notices nor the notice under sec 33ZH(1) gave adequate or proper notice to the respondent that, unless he opted out, he would be or may be precluded from raising any defences to the claims of the appellant under his loan agreements;

(b) the notice given under sec 33ZH(1), after the common questions were answered, did not warn the respondent that unless he sought directions from the court in respect of his defences to any future claim by the appellant under the purported loan agreements, he may be precluded from raising those defences in any action by the appellant to recover the loans and that he should seek legal advice about his position; and

(c) the appellant did not see fit to inform the group members that they would or may be precluded from defending the claims it intended to make against group members if the group proceeding failed to have the loan agreements declared void and unenforceable.

21 The primary judge also made findings concerning Mr Tomes' understanding as to the nature of the group proceeding, and what was in issue therein. Mr Tomes had invested in almond lots in 2007 and grove lots in 2008 - whereas Mr Woodcroft-Brown had invested in the 2008 early olive project and the 2008 timberlot project. Mr Tomes was a passive participant in the conduct of the group proceeding {PJ [167]}. He understood from M+K that his own specific case was being looked after, including the specific complaints he had brought to M+K's attention {PJ [177]}.

Other loan recovery proceedings commenced by the appellant

22 During the course of this case, the appellant has claimed it faces between 1,000 and 1,109 "defended" debt recovery proceedings. The appellant has chosen to issue those proceedings outside the context of the group proceeding.

23 The appellant is presently participating in a number of trials of the defended debt recovery proceedings in the Supreme Court of Victoria, in which some of the defendants, including Mr and Mrs Collins, are relying upon defences which the appellant is asserting in this Court they are precluded from raising.

Part V: Legislation

24 The respondent accepts the appellant's statement of applicable statutes.

Part VI: Argument

Anshun estoppel principles

25 The principle articulated in *Henderson v Henderson* (1873) 3 Hare 100 at 115, 67 ER 313 at 319 requires a party to bring forward its whole case in respect of a given matter which has becomes the subject of litigation. As the plurality in *Port of Melbourne Authority v Anshun* (1981) 147 CLR 589 at 602 ("***Anshun***") put it, there can be 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. So understood, the doctrine requires precise identification of the matter which is the subject of dispute.

26 For *Anshun* estoppel to apply to preclude a party from raising a matter in subsequent litigation, it must be shown that the matter was so connected with or relevant to the subject matter of the first action that it would have been unreasonable not to rely upon it, or have raised it: *Anshun* 147 CLR 589 at 602 per Gibbs CJ, Mason and Aickin JJ, *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28, (2015) 89 ALJR 750 at 756 [22] per French CJ, Bell, Gageler and Keane JJ ("***Tomlinson***").

27 The claims pleaded by Mr Woodcroft-Brown identified questions common to all group members. They did not purport to anticipate every defence and claim of the individual group members, and no *party* appearing before Judd J required that this be done. The subject of the dispute was, in short, the questions common to all group members, and nothing else. It was not unreasonable for a group member in Mr Tomes' position not to seek, during the group proceeding, to plead matters which fell outside the ambit of the group claim.

28 Further, as the plurality in *Anshun* reasoned, the principle expressed in *Henderson* was informed by issues of convenience. Their Honours recognised (147 CLR 589 at 603) that there are a variety of circumstances why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings. The plurality expressly rejected the proposition that it was an abuse of process to raise in subsequent proceedings a matter which could, and therefore should, have been raised in the earlier proceedings. The plurality considered that that criterion explained why a party was not precluded from subsequently raising matters which could be pleaded as a counter-claim or set-off. They also instanced expense and the importance of the particular issue as matters which might preclude the operation of the doctrine; they expressly referred to the judgment of the United Supreme Court in *Cromwell v County of Sac* (1876) 94 US [24 Law Ed at 199] to the effect that proper justification might be found in the party's situation at the time.

29 *Anshun* estoppel thus looks to the particular circumstances surrounding why a party in later proceedings refrained from litigating a matter in earlier proceedings: *Gibbs v Kinna* [1999] 2 VR 19 ("***Gibbs***") at 27 [23] per Kenny JA {PJ [208], [641]} which depends not so much on legalities as practicalities: *Gibbs* at 20 [1] per Ormiston JA. It involves a broad, merits-based judgment: {CA [141]}, *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31 per Lord Bingham, *Champerslife v Manojlovski* [2010] NSWCA 33; (2010) 75 NSWLR 245 ("***Champerslife***") at 247 [3] per Allsop P, at 260 [79] per Giles JA, at 264 [111]–[112] per Handley AJA. A mechanistic approach should not be taken, in the nature of identifying some common facts and finding an estoppel because they twice arise: *Champerslife* at 255 [52] per Giles JA.

30 As shutting out a defence is a serious step, the power ought not be exercised except after a scrupulous examination of all of the circumstances: *Yat Tang Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 at 590. The gist of *Anshun* estoppel is not that a matter technically could have been relied upon: *Gibbs v Kinna* [1999] 2 VR 19 at 20 [1] per Ormiston JA. Rather, as Ormiston JA noted at 20 [1], with the approval of the Court of Appeal below {CA [14]}, only if deferring reliance can be shown to be unreasonable, will the party be shut out.

31 The reasonableness of a party's position can also be informed by the fact that it has to rely upon the favourable exercise of judicial discretion to raise a point or that there may be a doubt about the Court's jurisdiction to decide it: see *Ling v Commonwealth* (1996) 68 FCR 180 ("***Ling***"), and *Meriton Apartments v Industrial Court (NSW)* [2009] NSWCA 434; (2009) 263 ALR 556.

32 It is of note that the Authority in the *Anshun* case offered no explanation as to why it refrained from bringing forward all of its case: 147 CLR 589 at 604. It was a clear case of failure to plead a point that was plainly relevant, where no rules of court threw up obstacles to raising an issue: *Ling* at FCR 195. For reasons which will be advanced, the situation is quite different here; not only has Mr Tomes provided a reasonable explanation for not raising his defences and claims but the provisions of the Act did not confer upon him, as a non-party, any right, or obligation, to articulate those matters. Further the appellant never alerted the respondent to the consequences of not asserting, in some form, the loan defences.

Anshun estoppel in the context of group proceedings

33 *Barrow v Bankside Agency Ltd* [1996] 1 WLR 257, [1996] 1 All ER 981 ("***Barrow***") demonstrates why the rule in *Henderson v Henderson* may lack application in the case of a class action, or proceedings akin to such an action. The English Court of Appeal refused to

strike out a claim regarding negligent portfolio selection where the plaintiff had been one of 3000 or so co-plaintiffs in a claim involving allegations of negligent underwriting by the first defendant, and had already succeeded in recovering some of his damages pursuant to the group claim. Sir Thomas Bingham MR accepted that the rule had no application where it was common ground that part of a plaintiff's claim, whether it is brought forward or not, would not be ruled upon until later; this was because the basis of the rule was that a plaintiff's whole claim should be brought forward *and finally decided* at the same time. This was so even though the arguments Mr Barrow sought to propound were in part inconsistent with those which had been advanced by the group: [1996] 1 WLR 264; All ER 987.

10 **34** Consistently with this, old style representative proceeding bound the represented person only in respect of the judgment acceding to or rejecting the claim for relief as held in in *Carnie v Esanda Finance Corporation* (1995) 182 CLR 398 ("***Carnie***") at 424 per Toohey & Gaudron JJ, at 403 per Mason CJ, Deane & Dawson JJ agreeing. Judgment in a representative action brought under the relevant NSW rule by a borrower alleging that a loan was made in breach of credit lending legislation would not affect *other* rights the borrowers might have against the lender, eg, a class member who had entered into a contract as a result of misrepresentation or false and misleading conduct: *Carnie* 182 CLR 398 at 424 per Toohey & Gaudron JJ.

35 When Part 4A was enacted *Anshun* estoppel was an established feature of the judicial
20 landscape. The legislature did not expressly or by necessary intendment modify the operation of the doctrine. Equally, Part 4A of the Act contains no provision to the effect that, where a group member has not opted out, that member will be taken to have accepted that the determination of the group proceeding will be the complete resolution of all or any claims that the he or she has in respect of any claim which might be similar or related to the group claim {CA [183]}.

36 There are good reasons for this. Section 33ZE(2) specifically contemplates that a group proceeding may not "finally dispose" of a group member's claim (see *Mobil Oil Aust v Victoria* [2002] HCA 27, (2002) 211 CLR 1 at 63 [137], fn 266 per Kirby J ("***Mobil Oil***")). Further, the notice provisions have the potential to work substantial injustice upon group
30 member's non-common claims if the extended principle in *Henderson v Henderson* applied automatically. Section 33X(2) provides that the court may dispense with giving notice if the relief sought does not include damages; thus, if the lead plaintiff does not seek damages but only declaratory relief, a group member may know nothing of the proceeding and yet, on the appellant's construction, have his or her personal rights, causes of action or defences curtailed

or eradicated. Likewise, the court's power under sec 33Y(4) to dispense with personal notice if it considers the provision of notice to be reasonably practicable or unduly expensive could have similarly unjust effects. Having regard to such provisions, Gaudron, Gummow and Hayne JJ noted in *Mobil Oil* 211 CLR 1 at 31 [39] that there was a real possibility that some group members would remain perfectly ignorant of the proceedings and of what was really going on.

37 Again, there is no *right* for a group member to propound questions which are not common to all {CA [126]}. Section 33Q confers a discretion on the Court to give directions in relation to all remaining questions. The section draws a distinction between the questions which remain to be determined and the claims of the group members; it accepts the possibility that not all questions will resolve all claims, thus leaving matters to be determined in other proceedings. Section 33S provides the mechanism for giving directions for the commencement of such further proceedings: *Mobil Oil* 211 CLR 1 at 20-21 [5] per Gleeson CJ, {CA [191]}. Again, the Act confers a discretion on the court.

38 Modern practice is for the common claims to be dealt with first: *Kelly v Willmott Forests (No 4)* [2016] FCA 323 at [72], [214] per Murphy J ("***Willmott***"). The reason for this is obvious in this case: if the resolution of the common claims might have the practical effect of disposing of all group member's individual issues, as would have been the case if Mr Woodcroft-Brown had succeeded, there may be no need for further, individual actions.

Application of unreasonableness analysis

39 The group proceeding was intended only to resolve common questions. The parties must have appreciated the existence of individual claims, which presumably would have unique aspects. The capacity for any particular group member to identify those particular aspects depended, in both procedural and practical terms, on the appellant pleading its claims against them. The appellant did not do this. The mechanism for informing group members of the consequences attending the failure of the group claim was the circulation of the opt out notices, but these did not identify the consequences now asserted by the appellant. The findings of the primary judge in this regard are recorded in paragraph 20 above; it is sufficient to say that the notices did not give adequate or proper notice of these consequences, and the appellant did not see fit to embark upon this task. That finding was well-justified where such notices were directed to a wide class of persons who could not read them with the eyes of a lawyer: *Willmott* [2016] FCA 323 at [158]-[159]. The occasion for the respondent to assert the loan defences did not arise in the group proceeding. The implicit possibility that the appellant might sue the respondent in debt remained just that, and provides an insufficient

basis to give effect to a preclusionary defence. Put another way, nothing occurred which could have indicated to the respondent that he would be barred from running those loan defences. Indeed, the fact that Mr and Mrs Woodcroft-Brown were permitted to plead defences to the appellant's case founded on the loan contracts (which were not determined in the group claim) would have indicated to any reasonable person in Mr Tomes' position that the time to anticipate a claim against him had not arrived.

40 The appellant's submission (paras 58 & 60-61) that the respondents are estopped because they could have invoked the opt out procedures is a variation of the argument expressly rejected by the plurality in *Anshun* that a party should raise a contention if it could have. That particular submission was raised in circumstances - unlike here - which did not call on the exercise of judicial discretion conferred by legislation. In this context the opinions of the Australian Law Reform Commission are irrelevant; the Commission's expectations as to what *ought* to occur in practice are no substitute for the consideration of what *did* occur in the group proceeding.

41 The appellant's submissions do not address the question which arises as to what would have occurred had Mr Tomes sought directions under sec 33Q. It is likely that Mr Tomes' case would not have been accommodated within the group proceeding precisely because it did raise separate issues. The court would have had to accommodate, in addition, the possibility that other persons within the set of group members might have to ventilate their own discrete claims. The possibility of that occurring would have undermined the practical utility of the group proceeding itself.

42 The very experienced primary judge plainly thought that the group proceeding would not have accommodated any such process {PJ [524]-[526]}. The Master of the Rolls in *Barrow* had such difficulties in mind when he referred to the fact that the cohesion (and, probably, the economics) of group suits depended on their being single-issue, or common-issue, proceedings; and that the court's procedural objectives would plainly have been frustrated had the trial of determinative issues become bogged down in detailed inquiry into the personal circumstances of the thousands of named plaintiffs: [1996] 1 WLR 261; All ER 985. The fact that the parties did not advert to this possibility in the drafting of the opt out notices also suggests that no one intended the group process to be a vehicle for individual claims. The issue, however, need only be determined by the test formulated in *Anshun* itself: it cannot be said to have been unreasonable for Mr Tomes not to have sought leave given the practical consequences adverted to.

43 Further, the lack of any substantive prejudice to the appellant caused by the respondent now relying upon the loan defences is telling {CA [202]}. The appellant is no worse off now than it was during the group proceeding, in relation to facing defences to its unadjudicated debt claims {CA [229]}. The appellant would be in no different position had it had to face these unique claims or defences had sec 33Q, sec 33R and 33S been invoked after Judd J made his determination under sec 33ZB. Since the respondent's loan defences would not have been decided in the group action, he is not causing there to be two trials where there would have been one. In addition, the Court of Appeal noted that that the appellant did not contend that the loan defences might result in there being judgments inconsistent with that in the group proceeding {PJ [636], [688], CA [209]}.

44 The appellant now seeks to contend in this Court that it may have to present the same evidence twice (paragraph 64). That submission is unadorned by evidence as to the extent of the duplication, or the cost. It is pressed in a vacuum, without regard to the fact that Mr Tomes would have had to adduce evidence in support of his own claim in circumstances where, if the group proceeding had been successful, that claim would have fallen away in whole or in part. It disregards the matters referred to by the Master of the Rolls in *Barrow* cited in paragraph 33 above. In all events, the appellant *is* defending claims similar to those relied upon by the respondent in other proceedings - see paragraph 23 above. Indeed the curious position has arisen that Mr and Mrs Woodcroft-Brown's defences to the appellant's counterclaim remain undetermined and without the appellant asserting that they are shut out from doing so.

45 The gist of the appellant's claims concerning Mr Tomes is found at paras 52-54 of its submissions. The preliminary observation that Mr Tomes seeks the same end as Mr Woodcroft-Brown does not address the precise question formulated in *Anshun*. Mr Barrow's claim for damages was not barred even though he had sought the same end through the group proceeding. But this broad contention must be made good by the appellant if it is to succeed in its bald assertion that Mr Tomes is precluded (*without exception*) from raising the defences pleaded by him. The reply filed by it denied Mr Tomes' entitlement to plead *any* defence, even though it conceded {PJ [688]} that those defences had not been adjudicated on in the group proceeding and for the greater part the common questions determined in the group proceeding did not encompass them.

46 The appellant's case can be rejected for the reason that it has not identified why all of Mr Tomes' defences should be struck out, in circumstances where it bears the onus of establishing this preclusionary defence.

47 Turning to the matters of specific complaint, the primary judge noted that the appellant conceded that no issue estoppel arose in relation to the 'no loan' defence {PJ [701]} and that it was unable to identify any specific findings in the group proceeding which might contradict the defence raised by Mr Tomes {PJ [707]}. This is hardly surprising in circumstances where entry into a loan contract was ***not*** a criterion for joining the group action, with the result that it could not become the vehicle for determining common questions. Whilst Mr Woodcroft-Brown challenged the efficacy or enforceability of the loan agreement, that challenge was founded on his representation case alone. No inconsistency emerges merely because Mr Tomes - in relation to his particular investment - asserts a state of affairs which the group proceeding did not challenge, and about which no findings have been made. In any event, however, inconsistency *per se* does not engender an *Anshun* estoppel.

48 The submission that Mr Tomes' representation case has 'close parallels' to the scheme misrepresentation claim overlooks the fact that the former is founded on communications other than the PDSs that were the basis for the latter {PJ [201]}. Neither the oral statements nor the cashflow spreadsheet relied upon by Mr Tomes in this regard were the subject of any adjudication in the group proceeding. Further, whilst the primary judge made certain findings concerning the financial standing of Timbercorp Group, the representations relied upon by Mr Tomes are not directed to that issue specifically. Thus:

(a) representation one was concerned as to whether Mr Tomes would ever be sued for the loans having regard to the value of the lots and the intentions of Timbercorp Group;

(b) representations three and four addressed the sustainability of the projects Mr Tomes would be investing in, and (as regard the former) the future use of the rent and management fees;

(c) representation five concerned, again, the state of the finances for the particular projects.

49 Further, the loan defences were not the same as the common claims, as the factual connections are largely superficial and the legal foundations fundamentally different {CA {197]-[198]}: the representation claims rely upon explicit representations made to the respondent personally; the void ab initio argument depends upon the construction of the relevant documents; all are based upon quite different causes of action or defences to those advanced in the group proceeding.

Application of privity doctrine to group members

50 In *Tomlinson* 89 ALJR 750 at 756 [22] per French CJ, Bell, Gageler and Keane JJ recognised that the justice of binding a non-party to an estoppel is a theory which has its

limitations. Those limitations are exemplified by the respondent's circumstances which were aptly foreshadowed by the majority at 89 ALJR 750, 760 [39]:

> It would be quite unjust for ... a person to be precluded from asserting what the person claims to be the truth if the person did not have an opportunity to exercise control over the presentation of evidence and the making of arguments in the earlier proceeding and if the potential detriment to the person from creating such an estoppel was not fairly taken into account in the decision to make or defend the claim in the earlier proceeding or in the conduct of the earlier proceeding.

51 In *Tomlinson*, both the plurality at 755-6 [17], 757-9 [24]-[33] and Nettle J at 768-9 [90]-[98] endorsed the principle enunciated by Barwick CJ in *Ramsay v Pigram* (1968) 118 CLR 271 at 279 that the basic requirement of a privy in interest is that the privy must claim under or through the person of whom he or she is said to be privy. The respondent was perhaps a kind of privy of the lead plaintiff in relation to the common claims, and no more. He was a person who did not have an opportunity to exercise control over the presentation of evidence or the making of arguments in the group proceeding. In his separate reasons, Nettle J noted (at 89 ALJR 750, 769 [98]) that two important characteristics of the established forms of representation which may give rise to a privy relationship emerge from the decided cases. Those characteristics are, first, that a principal is generally able to control the conduct of an agent, and secondly, that the imposition of fiduciary duties on certain kinds of representatives has the effect of guiding the representative's conduct and providing remedies to the principal on default. Neither of those characteristics is present in the relationship between the respondent and Mr Woodcroft-Brown in respect of the loan defences: see {CA [160]}.

52 The Court of Appeal concluded that *Tomlinson* did not decide that a group member is a privy of the representative party, "such that they are bound by any *Anshun* estoppel which applies to the representative party" {CA [155], [172]-[174]}; but see {CA [213]} where the court found that group members were not privies of Mr Woodcroft-Brown in respect of unpleaded claims and defences.

Abuse of process

53 For the variety of reasons advanced above as to why there is no *Anshun* estoppel, it cannot be said that any abuse of process arises if the respondent is permitted to advance the loan defences in answer to the appellant's debt recovery proceeding against him. The principle only applies, in this context, where the propounding of a claim or defence would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings: *Tomlinson* at 89 ALJR 757-8 [26],

citing *Walton v Gardiner* (1993) 177 CLR 378 at 393. For the reasons given, this has not has occurred here: the loan defences were not determined by the group proceeding.

54 If the appellant had alerted Judd J in the group proceeding to the fact it intended to issue proceedings against the respondent, then many of the complaints it now makes would fall away. In this regard, the appellant is the author of its own problems. It was not for the respondent to second guess whether he would be sued personally.

Part VII: Time estimate

55 The respondent would seek no more than 2 hours for the presentation of the respondent's oral argument.

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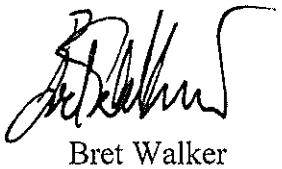
19th August 2016



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