IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M98 of 2016

BETWEEN

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

and

DOUGLAS JAMES COLLINS
First Respondent

JANET ANN COLLINS
Second Respondent

No. M101 of 2016

BETWEEN

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

and

JOHN CHARLES TOMES
Respondent

APPELLANT'S SUBMISSIONS

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Filed on behalf of: The Appellant
Prepared by:
Mills Oakley
Level 6, 530 Collins Street
Melbourne VIC 3000

Solicitors Code: 10479
DX 558 Melbourne
Telephone: +61 3 9670 9111
Fax: +61 3 9605 0933
Ref: Darren James

I: CERTIFICATION

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

II: CONCISE STATEMENT OF ISSUES

2. Are the Respondents' defences so connected to the subject matter of proceeding SCI 9807 of 2009 (the **group proceeding**) that, having neither raised them within nor opted out of the group proceeding pursuant to the mechanisms available under Part 4A of the *Supreme Court Act* 1986 (Vic) (the **Act**), they are now precluded from raising them due to an *Anshun* estoppel or principles of abuse of process?

3. Are group members privies of the lead plaintiff in a group proceeding, including in respect of unpleaded defences?

4. Would the lead plaintiff in the group proceeding now be precluded from raising the Respondents' pleaded defences in a subsequent proceeding?

III: CERTIFICATION AS TO SECTION 78B OF THE *JUDICIARY ACT*

5. The Appellant certifies that it does not consider that any notice need be given under s 78B of the *Judiciary Act* 1903 (Cth).

IV: REPORTS OF DECISIONS BELOW

6. The decisions are not reported, but have the medium neutral citations [2015] VSC 461 for the judgment of Robson J (**VSC Judgment**) and [2016] VSCA 128 for the Court of Appeal (Warren CJ, Santamaria and McLeish JJA) (**VSCA Judgment**).

V: NARRATIVE STATEMENT OF FACTS

7. The Appellant was one of the Timbercorp Group of companies, which invested more than $2 billion in agribusiness managed investment schemes on behalf of some 18,500 investors. Timbercorp Securities Ltd (**TSL**) was the responsible entity of these schemes. The Appellant provided finance to investors.[1]

8. Mr and Mrs Collins applied for, and held an interest in, 10 grovelots in the 2008 Olive Scheme, and they borrowed money from the Appellant to finance their investment.[2] Mr Tomes applied for, and held an interest in, 74 almondlots in the 2007 Almond Scheme and 77 grovelots in the 2008 Olive Scheme (together the **Schemes**), and he borrowed money from the Appellant to finance his investments.[3]

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1 *Woodcroft-Brown v Timbercorp Securities Ltd* (2011) 253 FLR 240 at 243 [1] (Judd J) (**VSC Group Proceeding Judgment**); Affidavit of Joanne Louise Hardwick, 24 April 2015 at [10]-[15].

2 VSC Judgment at [88].

3 VSC Judgment at [160]-[161].

9. On 29 June 2009, liquidators were appointed to the Timbercorp Group companies.[4] The liquidators of the Appellant started recovery actions against borrowers who stopped making repayments.[5]

The group proceeding

10. (**Lead plaintiff and commencement of the group proceeding**) Allen Rodney Woodcroft-Brown invested in the Schemes, as well as the 2007/08 Timberlot Scheme, and had borrowed money from the Appellant to finance these investments.[6] On 27 October 2009, he commenced a group proceeding pursuant to Part 4A of the Act against the Appellant, TSL and three of their directors.[7]

10 11. (**Group members**) Mr Woodcroft-Brown brought his claims personally and on behalf of group members defined as including all persons who, subject to exceptions, at any time between 6 February 2007 and 23 April 2009 held an interest in a managed investment scheme of which TSL was the responsible entity.[8]

12. (**Common issues of fact and law**) Mr Woodcroft-Brown identified common issues of fact and law in his statement of claim.[9] Those common questions related to the existence and scope of alleged statutory duties and obligations, the existence of certain risks for investors, whether product disclosure statements were defective and whether certain representations were made and if made were false or misleading.

20 13. (**Pleaded non-disclosure case**) Mr Woodcroft-Brown claimed that s 1013D or s 1013E of the *Corporations Act* 2001 (Cth) required TSL and/or the Appellant to have disclosed to Mr Woodcroft-Brown and to group members the "structural risk" to which the schemes were said to be exposed (namely, if the Timbercorp Group failed, the schemes failed) and certain "adverse matters" that heightened the schemes' exposure to failure, which were not disclosed.[10]

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4 Affidavit of Joanne Louise Hardwick, 24 April 2015 at [19].

5 See Affidavit of Joanne Louise Hardwick, 24 April 2015 at [32].

6 Particulars to Sixth Further Amended Statement of Claim at [3], being page 448 of Exhibit JH-1 to the Affidavit of Joanne Louise Hardwick, 24 April 2015.

7 Affidavit of Joanne Louise Hardwick, 24 April 2015 at [48], [53].

8 Statement of Claim at [2(a)], being page 72 of Exhibit JH-1 to the Affidavit of Joanne Louise Hardwick, 24 April 2015. The definition was not materially changed during the life of the group proceeding: see Sixth Further Amended Statement of Claim at [2(a)], being pages 447-448 of Exhibit JH-1 to the Affidavit of Joanne Louise Hardwick, 24 April 2015. There were other elements to the definition of the group members which are not presently relevant.

9 Sixth Further Amended Statement of Claim at [76], being pages 518-521 of Exhibit JH-1 to the Affidavit of Joanne Louise Hardwick, 24 April 2015.

10 Sixth Further Amended Statement of Claim at [12A]-[12O], [75G]-[75J], being pages 459-464, 513-514 of Exhibit JH-1 to the Affidavit of Joanne Louise Hardwick, 24 April 2015; VSC Group

14. (**Pleaded misrepresentation case**) Mr Woodcroft-Brown also claimed that TSL and the Appellant made misrepresentations about the financial strength of the Timbercorp Group and the way that investors' scheme contributions would be applied.[11] As to the latter, he pleaded that by certain parts of the PDSs, TSL represented that, in respect of the relevant scheme, "(a) the scheme contributions equalled or exceeded the true costs of the establishment and ongoing management of that recent scheme; (b) the scheme members' payment of the scheme contributions would be applied to fund the relevant recent scheme; (c) the scheme contributions would be sufficient to fund the relevant recent scheme";[12] and by the same parts of the PDSs and by offering loans to finance the scheme contributions, the Appellant represented likewise.[13] These were said to be false or misleading. At trial, representation (b) was "to the effect that all funds contributed by him would be *ring fenced* for his scheme, and would not be pooled with other funds of the group".[14]

15. (**Other pleaded claims**) Mr Woodcroft-Brown also pleaded a collection of other allegations.[15] In total, Mr Woodcroft-Brown pleaded "more than a dozen principal claims, before accessorial liability was brought to account".[16]

16. (**Causation**) Mr Woodcroft-Brown pleaded that by reason of the non-disclosures and/or misrepresentations, he "acquired interests in the relevant schemes" and "entered into loan agreements with [the Appellant] or another lender"[17] and that, but for that conduct, "each of the plaintiff and the Group Members would not have acquired interests in any of the recent schemes" and "each of the plaintiff and the

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Proceeding Judgment at 248-249 [30]-[31]; *Woodcroft-Brown v Timbercorp Securities Ltd* (2013) 96 ACSR 307 at 313-314 [29]-[36] (**VSCA Group Proceeding Judgment**).

11 Sixth Further Amended Statement of Claim at [60]-[61], [75O], being pages 499-500, 516-517 of Exhibit JH-1 to the Affidavit of Joanne Louise Hardwick, 24 April 2015; Group Proceeding Judgment at 249 [31]; VSCA Group Proceeding Judgment at 319 [61].

12 Sixth Further Amended Statement of Claim at [48], being pages 493-494 of Exhibit JH-1 to the Affidavit of Joanne Louise Hardwick, 24 April 2015.

13 Sixth Further Amended Statement of Claim at [51], being page 494 of Exhibit JH-1 to the Affidavit of Joanne Louise Hardwick, 24 April 2015.

14 VSC Group Proceeding Judgment at 286 [202].

15 See, eg, Sixth Further Amended Statement of claim at [27]-[29A], being pages 474-475 of Exhibit JH-1 to the Affidavit of Joanne Louise Hardwick, 24 April 2015.

16 VSC Group Proceeding Judgment at 246 [23].

17 Sixth Further Amended Statement of Claim at [71(a) and (b)], being page 504 of Exhibit JH-1 to the Affidavit of Joanne Louise Hardwick, 24 April 2015.

Group Members would not have entered into any loan agreement with [the Appellant] in 2007 and/or 2008 ... to fund any scheme project payments".[18]

17. It was further said that had certain risks been disclosed "before they acquired an interest in a TSL scheme then (a) none of the plaintiff or the Group Members would have acquired an interest in the scheme; and (b) none of the plaintiff or the Group Members would have borrowed from [the Appellant]."[19] And it was said that certain contraventions had the result that "the plaintiff and each Group Member: (a) acquired an interest in a TSL scheme or TSL schemes in the longer period" and (b)(i) "each scheme member has paid contributions to the TSL schemes of which he or she became a member, and has paid interest on any loans from [the Appellant" and (b)(ii) "may be liable for further payments of principal and interest to [the Appellant] in respect of any TSL scheme for which the member borrowed scheme contributions from [the Appellant]".[20]

18. **(Loss or damage)** Mr Woodcroft-Brown alleged that his loss or damage was the payment of scheme fees from the proceeds of loans from the Appellant[21] and "past and ongoing liability for principal and/or interest on the loans L0021798 and L0025400" from the Appellant.[22] The loss or damage of each group member was not identified. Instead, it was pleaded that "[p]articulars of loss for individual Group Members will be provided following the trial of common questions or otherwise as the Court may direct."[23]

19. **(Relief sought)** Mr Woodcroft-Brown sought, inter alia, relief to the effect that he and group members not be liable for any loans, fees or costs in connection with any schemes.[24]

20. **(Solicitors on the record)** M+K Lawyers were retained as the solicitors on the record for Mr Woodcroft-Brown.[25] On 13 May 2009, M+K Lawyers had published

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18 Sixth Further Amended Statement of Claim at [72(a) and (b)], being page 505 of Exhibit JH-1 to the Affidavit of Joanne Louise Hardwick, 24 April 2015.

19 Sixth Further Amended Statement of Claim at [75Q], being page 517 of Exhibit JH-1 to the Affidavit of Joanne Louise Hardwick, 24 April 2015.

20 Sixth Further Amended Statement of Claim at [75R], being pages 517-518 of Exhibit JH-1 to the Affidavit of Joanne Louise Hardwick, 24 April 2015.

21 See Particulars to Sixth Further Amended Statement of Claim at [36], being pages 484-485 of Exhibit JH-1 to the Affidavit of Joanne Louise Hardwick, 24 April 2015.

22 Particulars to Sixth Further Amended Statement of Claim at [36], being pages 485-486 of Exhibit JH-1 to the Affidavit of Joanne Louise Hardwick, 24 April 2015.

23 Particulars to Sixth Further Amended Statement of Claim at [36], being page 486 of Exhibit JH-1 to the Affidavit of Joanne Louise Hardwick, 24 April 2015.

24 See Prayer for Relief in the Sixth Further Amended Statement of Claim, being pages 521-524 of Exhibit JH-1 to the Affidavit of Joanne Louise Hardwick, 24 April 2015.

a circular to investors in TSL managed schemes stating, among other things, that they had:

> a strategy which will provide welcome relief, especially for growers, who took out loans from [the Appellant] in 2008 (and possibly even 2007). The strategy will allow you to hold on to your cash that you would otherwise be using to meet repayments on those loans.
>
> ...
>
> **Expected benefits of pursuing your legal rights**
>
> - You could lawfully withhold making any loan repayments to [the Appellant] while claims are processed.
> - You would assert a right to be paid all money you have already paid under the loans you obtained in 2008.
> - To the extent you paid the 2008 invoices from your own money you would assert a right to be refunded that money.
>
> ...
>
> - You can put to better use the money you would save by not having to keep up payments to [the Appellant].[26]

21. In the months prior to the commencement of the group proceeding, M+K Lawyers issued further circulars and provided quotes to various media publications about the proposed strategy.[27]

22. On 24 July 2009, at a directions hearing before Judd J, counsel acting for a number of clients represented by M+K Lawyers informed the Court that M+K Lawyers had some 1,400 clients with respect to the Timbercorp Group, and foreshadowed the commencement by a client of a group proceeding against the Appellant and TSL.[28] On 25 August 2009, M+K Lawyers provided a draft statement of claim in the foreshadowed group proceeding.[29] On 27 August 2009, at a further directions hearing, counsel for a number of clients of M+K Lawyers informed the court "we don't yet have the identity of the leading plaintiff".[30] On 12 October 2009, at a further directions hearing, counsel for a client of M+K Lawyers informed the Court that there was difficulty "pinning down the lead plaintiff" but that his instructors

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25 Affidavit of Joanne Louise Hardwick, 24 April 2015 at [51]
26 VSC Judgment at [25]; Affidavit of Joanne Louise Hardwick, 24 April 2015 at [22].
27 Affidavit of Joanne Louise Hardwick, 24 April 2015 at [24]-[44].
28 Affidavit of Joanne Louise Hardwick, 24 April 2015 at [37], Exhibit JH-1 at 17ff.
29 Affidavit of Joanne Louise Hardwick, 24 April 2015 at [41].
30 Affidavit of Joanne Louise Hardwick, 24 April 2015 at [42].

told him they were "close".[31] In mid-September 2009, each of the Respondents retained M+K Lawyers to represent their interests in the group proceeding.[32]

23. (**Discovery**) During the group proceeding, TSL and the Appellant gave extensive discovery of documents to Mr Woodcroft-Brown and M+K Lawyers, comprising both electronic and paper discovery.[33] The licence agreements absent schedules upon which Mr and Mrs Collins' pleaded defences are based were included in that discovery.[34] In relation to the Mr and Mrs Collins' deployment of the licence agreements in the present proceeding, M+K Lawyers obtained the licence agreements by writing to TSL, as responsible entity of the scheme, and paying TSL's reasonable costs for providing the documents.[35]

24. (**Opt out notice**) On 11 October 2010, Judd J approved the form of an opt-out notice and ordered that it be published and sent to investors.[36] On 11 March 2011, Judd J approved a revised opt-out notice and ordered that it be published and sent to specified investors.[37] The notices conformed to the Act and were approved by the Court.[38] None of the Respondents opted out of the group proceeding,[39] or raised their defences within it.

25. (**Length and complexity of the group proceeding**) The pleadings were amended on several occasions to expand the claims pressed by Mr Woodcroft-Brown to sustain the relief which he sought on his own behalf and on behalf of group members.[40] Amendments to the statement of claim were made on or about 12 February 2010, 30 April 2010, 2 August 2010, 13 August 2010, 5 October 2010 and 10 February 2011.[41] The trial judge observed that "the case was pleaded in a *scatter gun* approach to litigation. It was complex, involving numerous separate

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31 Affidavit of Joanne Louise Hardwick, 24 April 2015 at [46].

32 Affidavit of Joanne Louise Hardwick, 24 April 2015 at [114]; Affidavit of Douglas James Collins, 15 April 2015 at [14]; Affidavit of Douglas James Collins, 20 April 2015 at [3]; Affidavit of John Charles Tomes, 8 April 2015 at [6]; VSC Judgment at [100].

33 Affidavit of Maureen Adele Duffy, 24 April 2015 at [11]-[23].

34 Affidavit of Maureen Adele Duffy, 24 April 2015 at [25], [30]. See also at Exhibits MAD10 and MAD11 to the Affidavit of Maureen Adele Duffy, 24 April 2015.

35 Exhibit MAD9 to the Affidavit of Maureen Adele Duffy, 24 April 2015; Second Affidavit of Ron Willemsen, 29 April 2015 at [2]-[3].

36 Affidavit of Ron Willemsen, 27 April 2015 at [3]; Affidavit of Joanne Louise Hardwick, 24 April 2015 at [75]-[76].

37 Affidavit of Ron Willemsen, 27 April 2015 at [6]; Affidavit of Joanne Louise Hardwick, 24 April 2015 at [90]-[91].

38 VSCA Judgment at [201].

39 Affidavit of Joanne Louise Hardwick, 24 April 2015 at [94].

40 VSC Group Proceeding Judgment at 246 [22], 259 [80], 259 [82].

41 Affidavit of Joanne Louise Hardwick, 24 April 2015 at [56], [60], [68], [70], [78], [87].

claims for primary and accessorial liability. Every conceivable combination or permutation of statutory duty and remedy was explored."[42] His case continued to evolve during the hearing, which took place over 24 days in 2011.

26. **(Determination of the group proceeding)** On 1 September 2011, Judd J delivered judgment in the group proceeding. Judd J provided the parties with an opportunity to make submissions on what should follow from his reasons and on 6 October 2011, Judd J heard submissions.[43] On 27 October 2011, his Honour made final orders dismissing Mr Woodcroft-Brown's claim in his individual and representative capacities.[44] Mr Woodcroft-Brown was unsuccessful in his appeal to the Court of Appeal and application for special leave to appeal to this Court.[45]

27. **(Commencement of recovery proceedings)** After the refusal of special leave, the Appellant commenced separate proceedings against the Respondents in which it sought recovery of outstanding principal and interest on moneys that it had lent to them. In addition to the Appellant's claims against the Respondents, the Appellant has commenced over 1,200 recovery proceedings against defaulting borrowers.[46]

Mr and Mrs Collins' pleaded defences

28. By writ dated 13 June 2014, the Appellant commenced this proceeding against Mr and Mrs Collins, claiming moneys outstanding under loan agreement L0026087 in respect of the 2008 Olive Scheme for the sum of $51,300.[47] Mr and Mrs Collins filed a perfunctory defence of 12 August 2014 together with a counterclaim alleging various breaches of statutory and fiduciary duties, among other things.

29. By an amended defence dated 12 February 2015, Mr and Mrs Collins sought to avoid their loan on the asserted bases that:

    a. the Appellant never paid the loan amount to TSL as required under the loan (**no loan defence**);[48]

    b. TSL never allotted Mr and Mrs Collins their 10 grovelots, because there was a formal defect in TSL's execution of the scheme licence agreements, in that there was no schedule attached and hence it did not name them, and properly

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42 VSC Group Proceeding Judgment at 259 [82].
43 Affidavit of Joanne Louise Hardwick, 24 April 2015 at [105].
44 Affidavit of Joanne Louise Hardwick, 24 April 2015 at [108].
45 *Woodcroft-Brown v Timbercorp Securities Ltd* [2014] HCATrans 85; Affidavit of Joanne Louise Hardwick, 24 April 2015 at [111]-[112].
46 Affidavit of Joanne Louise Hardwick, 24 April 2015 at [124]-[125].
47 VSC Judgment at [131].
48 Amended Defence, 12 February 2015 at [3AS]-[3AV].

construed the loan was contingent upon that allocation having occurred (**no investment defence**);[49]

c. by its negligence the Appellant caused Mr and Mrs Collins pure economic loss;[50]

d. on the same facts relied upon in (a)-(c) above, the Appellant's conduct is unconscionable in contravention of s 12CB of the *Australian Securities and Investments Commission Act* 2001 (Cth) (**ASIC Act**).[51]

30. Mr and Mrs Collins now rely upon an amended defence dated 13 July 2016.

31. By these amendments, Mr and Mrs Collins have abandoned the defences in (c) and (d) above. They now seek to avoid their loan on the bases of the no loan defence,[52] the no investment defence,[53] and the following:

a. if the payment to TSL's custodian satisfies the Appellant's obligation to pay TSL under the loan agreement,[54] the Appellant's characterisation of that payment as being payment in accordance the loan agreement is unconscionable in contravention of s 12CB of the ASIC Act (**unconscionability defence**);[55]

b. if the payment by the Appellant to TSL by way of entries in the general ledgers of the books of account of the Appellant and TSL satisfies the Appellant's obligation to pay TSL under the loan agreement,[56] then the Appellant "has not at any time made an 'actual' money payment" and has suffered no loss from Mr and Mrs Collins' failure to make repayment, such that recovery would cause the Appellant to be unjustly enriched (**unjust enrichment defence**).[57]

32. These four defences ultimately involve two substantive issues. First, whether the Appellant made payment to TSL as required by the loan agreement (and if it did, whether Mr and Mrs Collins can still avoid repayment).[58] Second, whether the efficacy of the loan agreement was conditional upon or required TSL to allocate

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49 Amended Defence, 12 February 2015 at [3I]-[3K], [3AA]-[3AH].
50 Amended Defence, 12 February 2015 at [3AW]-[3BF].
51 Amended Defence, 12 February 2015 at [18].
52 Defence to Further Amended Statement of Claim, 13 July 2016 at [12].
53 Defence to Further Amended Statement of Claim, 13 July 2016 at [10].
54 Further Amended Statement of Claim in the Collins proceeding at [10(b)].
55 Defence to Further Amended Statement of Claim, 13 July 2016 at [84].
56 Further Amended Statement of Claim in the Collins proceeding at [10(b)].
57 Defence to Further Amended Statement of Claim, 13 July 2016 at [85]-[89].
58 The no loan, unconscionability and unjust enrichment defences.

lots, and if so whether Mr and Mrs Collins were in fact allocated lots given the scheme licence agreements had no schedule attached.[59]

33. Mr and Mrs Collins' defences are of general application both to the 2008 Olive Scheme and other schemes. Hundreds of other borrowers have raised the same defences.[60]

Mr Tomes' defences

34. By writ dated 12 September 2014, the Appellant claimed against Mr Tomes moneys outstanding under loan agreement L0025296 and loan agreement L0028248 in respect of the 2007 Almond Project and the 2008 Olive Project for the sum of $994,410.[61] Mr Tomes filed a defence and counterclaim on 10 February 2015 and an amended defence and counterclaim on 25 February 2015.

35. Mr Tomes admits that he affixed his signature to the loan applications, but he now seeks to avoid liability on the bases that:

a. TSL was to hold the loan moneys on trust to be applied only for the relevant scheme, TSL applied the loan moneys to the purposes of the Timbercorp Group in breach of the *Corporations Act* 2001 (Cth), and the Appellant was involved in that contravention;[62]

b. the loan agreements required the loan moneys to fund payment of amounts owing in relation to Mr Tomes' lots and loan fees, but the loan moneys actually went to the purposes of the Timbercorp Group, and the Appellant repudiated the loan agreement by taking no, or inadequate, steps to ensure the loan moneys were applied to the required purpose; [63]

c. on the same facts as (b) above, the Appellant would be unjustly enriched if it were to retain the loan repayments, either because Mr Tomes made those repayments under a mistake of fact or because there had been a total failure of consideration;[64]

d. an agent of the Appellant made misleading or deceptive representations to Mr Tomes about the loans, which contravened s 12DA(1) of the ASIC Act and/or

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59 The no investment defence.

60 Affidavit of Joanne Louise Hardwick, 24 April 2015 at [125]; VSC Judgment at [83]; Affidavit of Ronald Gerard Willemsen, 6 July 2016 at [14].

61 VSC Judgment at [184]-[185].

62 Amended Defence and Counterclaim at [32]-[41].

63 Amended Defence and Counterclaim at [8], [22].

64 Amended Defence and Counterclaim at [11], [25].

was unconscionable conduct contravening s 12CA(1) or s 12C(1) of that Act;[65] and

e. no loan agreement was in fact made between the Applicant and the Respondent, as the person who purported to execute documentation on his behalf had not been appointed as his attorney.[66]

36. In relation to the defence in (d), Mr Tomes relies upon five separate representations, each said to be false:[67]

a. that he would never be pursued for the loan as the lots would always exceed the value of the loan and the Timbercorp Group would simply take back the lots if he defaulted on the loan (**representation one**);

b. that the Appellant would apply the funds borrowed by him solely to pay the application money for the lots (**representation two**);

c. that "the projects were stand-alone, fully funded and sustainable because the upfront application money … and rent and management fees for subsequent years were applied only to the relevant project" (**representation three**);

d. that "the projects would continue even without TSL as the responsible entity" (**representation four**); and

e. that he "was obtaining finance for a fully funded investment" (**representation five**).

37. Mr Tomes' defences raises three principal issues. One concerns the use to which TSL and/or the Appellant could put Mr Tomes' borrowed funds.[68] Another concerns the structure and performance of the Timbercorp Group.[69] And the last concerns whether Mr Tomes obtained a loan from the Appellant at all.[70]

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65 Amended Defence and Counterclaim at [5], [19].
66 Amended Defence and Counterclaim at [7].
67 Amended Defence and Counterclaim at [5(b)].
68 Defences (a) to (c) and Representation Two.
69 Representations One, Three, Four and Five.
70 Defence (e).

Determination of separate question

38. The Appellant filed replies pleading, inter alia, that the Respondents were precluded from raising their defences. On 1 April 2015 Judd J ordered that the following question be determined as a separate question under rule 47.04 of the *Supreme Court (General Civil Procedure) Rules* 2005:

> Are the defendants precluded from raising any and if so what defences pleaded by them in this proceeding by reason of their participation as group members within the meaning of [Part 4A] of the *Supreme Court Act* 1986 (Vic) in proceeding S CI 9807 of 2009?

10 39. Robson J gave the answer that the Respondents were not precluded from raising their defences,[71] and this answer was confirmed by the Court of Appeal.[72]

VI: ARGUMENT

The scope of *Anshun* estoppel in Australia: Connection or relevance

40. In *Mobil Oil Australia Pty Ltd v Victoria* (***Mobil Oil***), the plurality accepted that general law principles of preclusion apply to representative proceedings. Gaudron, Gummow and Hayne JJ observed, in relation to representative proceedings, that "[b]y this kind of action the claims that are made, or *could be* made, against the defendant by all those in the 'class' or 'group' that is identified in the proceeding would be decided."[73]

20 41. General law principles of preclusion comprise *res judicata*, issue estoppel, *Anshun* estoppel and abuse of process. This Court restated the principle in *Port of Melbourne Authority v Anshun Pty Ltd* (***Anshun***) most recently in *Tomlinson v Ramsey Food Processing Pty Ltd* (***Tomlinson***).[74] In *Tomlinson*, a majority of the Court described the principle as "preclud[ing] the assertion of a claim, or the raising of an issue of fact or law, if that claim or issue was so connected with the subject matter of the first proceeding as to have made it unreasonable in the context of that first proceeding for the claim not to have been made or the issue not to have been raised in that proceeding."[75]

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71 Orders of the Supreme Court of Victoria (Robson J) made on 2 September 2015 in Proceeding S CI 2014 02972 (Collins); Orders of the Supreme Court of Victoria (Robson J) made on 2 September 2015 in Proceeding S CI 2014 04921 (Tomes).

72 Order of the Court of Appeal made on 1 June 2016 in Proceeding S APCI 2015 0104 (Collins); Order of the Court of Appeal made on 1 June 2016 in Proceeding S APCI 2015 0105 (Tomes).

73 (2002) 211 CLR 1 at 30 [34] (emphasis in original) (Gaudron, Gummow and Hayne JJ).

74 (2015) 89 ALJR 750.

75 (2015) 89 ALJR 750 at 757 [22] (French CJ, Bell, Gageler and Keane JJ).

42. *Anshun* itself focused on the connection between or the relevance of the respective subject matters of the two proceedings. Gibbs CJ, Mason and Aickin JJ asked whether the issue "was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it" earlier,[76] and their Honours concluded that the Authority was estopped from raising a defence under a contract of indemnity because "[i]t was so closely connected with the subject matter of that [first] action that it was to be expected that it would be relied upon as a defence to that claim".[77]

43. An issue might be so connected to the subject matter of a prior proceeding that it can be concluded, without more, that it was unreasonable not to have raised it in that earlier proceeding. As Allsop P explained in *Champerslife Pty Ltd v Manojlovski*, "[t]he question of unreasonableness is derived significantly from the matter being so relevant to the subject matter of the first proceeding."[78] The connection will plainly be close where there is a prospect that the subsequent proceedings "will result in a judgment which conflicts with an earlier judgment" in the sense that they "appear to declare rights which are inconsistent in respect of the same transaction."[79]

44. Allsop P also explained that "[t]here are at least two related assessments that have to be made: was the matter *so relevant* that it can be said to have been *unreasonable* not to rely upon it in the first proceeding?"[80] The Court must take into account the context of the first proceeding,[81] including of course any statutory context. Subject to an evaluation of the statutory context, other considerations may include "the character of the previous proceeding, the scope of any pleadings, the length and complexity of any trial, any real or reasonably perceived difficulties in raising the relevant claim earlier, and any other explanation for the failure to raise the claim previously."[82] Ultimately, a determination about unreasonableness involves a "value judgment to be made referable to the proper conduct of modern

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76 (1981) 147 CLR 589 at 602 (Gibbs CJ, Mason and Aickin JJ).

77 (1981) 147 CLR 589 at 604 (Gibbs CJ, Mason and Aickin JJ).

78 (2010) 75 NSWLR 245 at 246 [3] (Allsop P).

79 *Anshun* (1981) 147 CLR 589 at 603-604 (Gibbs CJ, Mason and Aickin JJ). See also *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 346 (Brennan and Dawson JJ); *Gibbs v Kinna* [1999] 2 VR 19 at 27 [25] (Kenny JA); *Habib v Radio 2UE Sydney Pty Ltd* [2009] NSWCA 231 at [83] (McColl JA); *Solak v Registrar of Titles* (2011) 33 VR 40 at 55 [74] (Warren CJ); *De Gelder v Rodger* [2014] NSWSC 872 at [116] (Rothman J).

80 (2010) 75 NSWLR 245 at 246 [3] (Allsop P).

81 *Tomlinson* (2015) 89 ALJR 750 at 757 [22] (French CJ, Bell, Gageler and Keane JJ).

82 *Gibbs v Kinna* [1999] 2 VR 19 at 28 [28] (Kenny JA).

litigation",[83] including reforms to civil litigation such as those wrought by the *Civil Procedure Act* 2008 (Vic).[84]

45. Connection or relevance is the touchstone of *Anshun* estoppel because, as Gaudron J explained in *Dow Jones and Co Inc v Gutnick*,[85] the principle "stems from the nature of judicial power. The purpose of judicial power is the final determination of justiciable controversies and such controversies are not finally determined unless all issues involved in a controversy are submitted for determination or, if they are not, are treated as no longer in issue."[86] This explanation recalls the following classic passage in *Henderson v Henderson*:

> where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.[87]

Connection between and relevance of the pleaded defences and the group proceeding

Subject matter of the group proceeding

46. In the group proceeding, Mr Woodcroft-Brown attempted, on his own behalf and on behalf of people with interests in the schemes and loans from the Appellant, to avoid loan repayment obligations in respect of the schemes managed by TSL.[88] The identification of the subject matter of that group proceeding must focus upon the "factual matrix [that] generated the controversy which is given legal form in the ...

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83 *Champerslife Pty Ltd v Manojlovski* (2010) 75 NSWLR 245 at 247 [3] (Allsop P).

84 See *C G Maloney Pty Ltd v Noon* [2011] NSWCA 397 at [157]-[158] (Handley AJA); *HM Hire Pty Ltd v National Plan and Equipment Pty Ltd* [2014] 2 Qd R 44 at 50 [13] (Applegarth J).

85 (2002) 210 CLR 575.

86 (2002) 210 CLR 575 at 611 [63] (Gaudron J). See also *Rogers v The Queen* (1994) 181 CLR 251 at 275 (Deane and Gaudron JJ).

87 (1843) 3 Hare 100 at 115; 67 ER 313 at 319.

88 See VSC Group Proceeding Judgment at 243 [3]. See also Affidavit of Joanne Louise Hardwick, 24 April 2015 at [22], [26]-[35].

pleadings".[89] That factual matrix included the making of loans from the Appellant to Mr Woodcroft-Brown and group members to fund their investment in schemes managed by TSL, and the use of those funds by TSL and the Appellant in the operations of the Timbercorp Group. The factual matrix also included what was said or not said in product disclosure statements as to risks confronting the schemes and the way in which funds would be deployed.

Connection with Mr and Mrs Collins' pleaded defences

47. Mr and Mrs Collins now seek to achieve the same result as Mr Woodcroft-Brown in the group proceeding: to avoid the repayment of loan obligations. As will be explained further, they seek to do so in a manner that raises factual matters which were integral to the factual matrix of the group proceeding. As a consequence, there is a risk of a judgment being rendered in this proceeding that is inconsistent with the determination of the group proceeding.

48. Mr and Mrs Collins now plead that they were never actually allocated an interest in the 2008 Olive Project.[90] Yet the group proceeding was determined on the assumption that Mr Woodcroft-Brown and group members, including Mr and Mrs Collins, held interests in the managed investment schemes of which TSL was the responsible entity. That assumption "went to the root of the matter on the prior occasion" in the same way that an assumption that the beneficiaries were joint owners in *Hoystead v Commissioner of Taxation* was central to the earlier decision in that litigation.[91] The Privy Council held that the Commissioner was estopped from subsequently traversing that assumption, explaining that:

> the same principle — namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that

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89 See, in the context of res judicata, *Trawl Industries of Australia Pty Ltd (in liq) v Effem Foods Pty Ltd* (1992) 36 FCR 406 at 422 (Gummow J); *Zavodnyik v Alex Constructions Pty Ltd* (2005) 67 NSWLR 457 at 463 [30] (Handley JA). See also *Rahme v Commonwealth Bank of Australia* (Unreported, Court of Appeal of the Supreme Court of New South Wales, 20 December 1991); *Ling v Commonwealth* (1996) 68 FCR 80 at 183-184 (Wilcox J); *Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd* (1996) 40 NSWLR 543 at 559 (Clarke JA); *BC v Minister for Immigration and Multicultural Affairs* (2001) 67 ALD 60 at 68 [24] (Sackville J); *DP World Australia Ltd v Fremantle Port Authority* [2009] WASCA 16 at [84] (Newnes AJA); *Kadkhudayan v British American Tobacco (Australia) Services Ltd* (2009) 263 ALR 568 at 575 [27] (Nyland J); *Stewart v Diodiesel Producers Ltd* [2009] WASC 145 at [61] (Beech J).

90 See paragraph [29(b)] above (the no investment defence).

91 *Hoystead v Commissioner of Taxation* [1926] AC 155 at 171 (Privy Council).

> subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs.[92]

If Mr and Mrs Collins are right, no one (including Mr Woodcroft-Brown who so admitted it) held an interest in the 2008 Olive Scheme and there are thus no members of that scheme. In evident recognition of this conundrum, Mr and Mrs Collins have admitted for the purpose of these proceedings that they are group members,[93] but that decision cannot avoid the logical consequence of their argument. The two proceedings will "appear to declare rights which are inconsistent in respect of the same transaction"[94] because one proceeding determined rights and liabilities based on a particular assumption as to interests in a particular transaction while the other proceeding will determine whether the assumption as to interests in that transaction was correct.

49. Mr and Mrs Collins also plead that no loan was made to them because the Appellant made no payment to TSL of borrowed funds in accordance with the terms of the purported loan agreement.[95] Yet the loan agreement was "a subject of the group proceeding and included in the claim by the plaintiff on behalf of the group members (including Mr & Mrs Collins) that the loan agreement was 'void or otherwise unenforceable'."[96]

50. The final substantive issue which Mr and Mrs Collins raise concerns the use to which their investment funds could be put by the Appellant and/or TSL, consistently with various alleged duties and obligations.[97] This subject matter was well traversed in the group proceeding, in which Mr Woodcroft-Brown alleged that TSL and the Appellant represented in the scheme product disclosure statements that monies would only be used on the relevant scheme whereas they were used for the Timbercorp Group companies' purposes and pooled into a central account.[98] At trial, it was alleged that TSL and/or the Appellant had misrepresented to Mr Woodcroft-Brown that all funds contributed by him would be *ring fenced* for his

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92 *Hoystead v Commissioner of Taxation* [1926] AC 155 at 166 (Privy Council).
93 Pages 817-819 and 861 of Exhibit JH-1 to the Affidavit of Joanne Louise Hardwick, 24 April 2015.
94 (1981) 147 CLR 589 at 604 (Gibbs CJ, Mason and Aickin JJ).
95 See [29(a)] above (the no loan defence).
96 VSC Judgment at [111].
97 See paragraphs [29(a)], [31] (the no loan, unconscionability and unjust enrichment defences).
98 See paragraph [14] above (issue (b)); VSC Group Proceeding Judgment at 286-287 [201]-[205].

scheme, and would not be pooled with other funds of the group". [99] The trial judge explained:

> The basis for these allegations seemed to involve the assumption that each scheme would be economically isolated from the fortunes of other schemes and the Timbercorp Group as a whole. The plaintiff's assumption seemed to imply that contributions would not form part of the income revenue stream of the Timbercorp Group, but would be retained, perhaps earmarked or even held upon trust, to be devoted only to the support and maintenance of his scheme objectives.[100]

The trial judge held that the representation was inconsistent with the content of the PDSs and generally available information,[101] and the Court of Appeal affirmed that holding.[102]

51. While the Respondents now put their defences within a different legal framework, the underlying factual matrix about how the Timbercorp Group operated is the same. Gibbs CJ, Mason and Aickin JJ recognised in *Anshun* that contrariety and inconsistency may arise even though the same cause of action is not relied upon in the two proceedings.[103] The Court of Appeal's observation that the Respondents' pleaded defences have different "legal foundations"[104] from the claims in the group proceeding is for *Anshun* estoppel immaterial.

Connection with Mr Tomes' pleaded defences

52. Like Mr and Mrs Collins, Mr Tomes seeks the same end as Mr Woodcroft-Brown in the group proceeding, namely the avoidance of his loan repayment obligations. And like the defences raised by Mr and Mrs Collins, his defences are closely connected to the subject matter of the group proceeding.

53. Two of the substantive issues which Mr Tomes raises relate to the use of borrowed funds and the structure of the Timbercorp Group. As explained at paragraph [49] above, these matters were well traversed in the group proceeding. Mr Tomes' misrepresentation claim[105] has close parallels to the scheme contributions misrepresentation claim in the group proceeding,[106] save that Mr Tomes' says the representation was made personally whereas in the group proceeding, reliance was

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99 VSC Group Proceeding Judgment at 286 [202] (Judd J).
100 VSC Group Proceeding Judgment at 286 [203] (Judd J).
101 VSC Group Proceeding Judgment at 286-287 [204] (Judd J).
102 VSCA Group Proceeding Judgment at [221].
103 (1981) 147 CLR 589 at 604 (Gibbs CJ, Mason and Aickin JJ).
104 VSCA Judgment at [198].
105 See paragraph [36] above.
106 See paragraph [14] above (issue (b)).

placed on written PDSs to found the representation. Furthermore, in relation to representations one, three, four and five pleaded by Mr Tomes,[107] it was held in the group proceeding that there was no discernable risk that the Timbercorp Group could not manage the schemes whether until they became self-supporting by years 4 – 6 or for their life.[108] The prospect of inconsistent findings is real.

54. The other substantive issue which Mr Tomes raises is whether or not he had a valid loan at all. Yet the making of a loan agreement with the Appellant was a premise upon which the group proceeding was founded, and integral to its factual matrix. Specifically, one of the things which Mr Woodcroft-Brown pleaded would have occurred had disclosure been made was that "each of the plaintiff and the Group Members would have not entered into any loan agreement with [the Appellant] in 2007 and/or 2008 or any other lender to fund any scheme project payments".[109]

Unreasonableness in the context of the group proceeding

55. For any claim or defence of a group member that is connected or relevant to the subject matter of a group proceeding, it is "unreasonable in the context of that first proceeding",[110] in the language of *Tomlinson*, for the group member not to have opted out of, or raised that claim or defence within, the group proceeding.

56. A central purpose for the enactment of Part 4A was "to enable a proceeding to be brought by a substantial number of victims of an alleged wrong committed by the same wrongdoer, thereby pooling their resources, and to ensure that the Court's resources are used efficiently and expeditiously".[111] As the Law Reform Commission, whose report led to the enactment of the Federal Court statutory regime upon which Part 4A is based, explained, the "[e]fficient use of judicial resources and fairness to respondents requires that lawyers and individuals be encouraged to bring similar or related claims in one set of proceedings."[112] It undermines this purpose for group members not to raise their defences for consideration and case management, especially (but not only) when their defences are ones of general application.

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107 See paragraph [36] above.

108 VSCA Group Proceeding Judgment at [92]-[106], [218].

109 Sixth Further Amended Statement of Claim at [72], being page 505 of Exhibit JH-1 to the Affidavit of Joanne Louise Hardwick, 24 April 2015.

110 *Tomlinson* (2015) 89 ALJR 750 at 757 [22] (French CJ, Bell, Gageler and Keane JJ).

111 *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd [No 3]* [2001] VSC 372 at [32]. See also Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 1988) 10 [19], 24 [58], 33 [66], 80 [185], 99 [238], 117 [283] (**Law Reform Commission Report**).

112 Law Reform Commission Report at 117 [283].

57. The statutory mechanisms under Part 4A of the Act provide group members with choices about how their claim is litigated. Group members can bring forward issues not raised by the lead plaintiff under s 33Q, or they can opt out under s 33J and litigate apart from the group proceeding, thereby maintaining full autonomy over their claim.[113] Those statutory powers are there to be used, and it is unreasonable not to have done so because they are express statutory safeguards against the preclusionary implications of judgment in the group proceeding.[114] (It may be observed that many group members in the group proceeding did opt out.[115])

58. Neither Mr and Mrs Collins nor Mr Tomes opted out of the group proceeding, and neither the Respondents nor M+K Lawyers raised these pleaded defences within the group proceeding. Because they did not make use of the mechanisms provided by the Act to maintain these defences, *Anshun* estoppel applies to preclude them from now doing so.

Unreasonableness on the approach of the Court of Appeal

59. If, contrary to paragraphs 55 to 58 above, the statutory context of Part 4A is not determinative of the inquiry as to unreasonableness in these proceedings, nevertheless for the following reasons it was unreasonable for the Respondents not to have raised their pleaded defences within the group proceeding.

60. ***First***, the Respondents' defences were known, or could readily have been known, to M+K Lawyers, who were retained on behalf of both Mr Woodcroft-Brown and each of the Respondents and who, circulars show, was the driving force behind the group proceeding.[116]

61. Mr Tomes informed M+K Lawyers of the alleged facts underpinning his defences in an email sent on 20 November 2009.[117] Mr Tomes received an update from M+K on 29 October 2010 which said that "[f]or everyone who remains a client of Macpherson + Kelley and who does not send an opt-out notice to the Court we will

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113 *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545 at 565-566 [59] (Phillips JA); *Femcare Ltd v Bright* (2000) 100 FCR 331 at 352 [86] (Black CJ, Sackville and Emmett JJ); *Mobil Oil* (2002) 211 CLR 1 at 35 [51] (Gaudron, Gummow and Hayne JJ).

114 See *Clarke v Great Southern Finance Pty Ltd (in liq) [No 2]* [2012] VSC 338 at [7] (Croft J); *Clarke v Great Southern Finance Pty Ltd (in liq)* [2014] VSC 569 at [46], [49]-[51] (Judd J).

115 Affidavit of Joanne Louise Hardwick, 24 April 2015 at [81], [94].

116 See Affidavit of Joanne Louise Hardwick, 24 April 2015 at [22], [30], [31], [34], [35], [38], [39], [40], [44], [54], [55], [57], [58], [61], [62], [69], [73], [77], [80], [82], [85], [88], [92], [99]. Cf *Kirby v Centro Properties Ltd* (2008) 253 ALR 65 at 67 [4] (Finkelstein J).

117 Affidavit of John Charles Tomes, 8 April 2015 at [8]-[9]; VSC Judgment at [167]-[168].

continue handling their individual file and the ancillary class action file."[118] At the time he read this update, Mr Tomes took that sentence to mean that his own specific case was being looked after, including what he had raised in his email on 20 November 2009.[119] In fact, M+K Lawyers did nothing to bring these matters to the attention of the Court on Mr Tomes' behalf during the group proceeding.[120]

62. In relation to the defences raised by Mr and Mrs Collins, TSL discovered to Mr Woodcroft-Brown some of the same documents about the payment from TFPL to TSL that Mr and Mrs Collins now rely upon.[121] Further, TSL discovered to Mr Woodcroft-Brown copies of the executed licence agreements for the 2008 Olive Scheme, which had no schedule attached.[122] But Mr Woodcroft-Brown, by his solicitors M+K Lawyers, did not raise in the group proceeding any issue with TFPL's payment to TSL, nor with the absence of the schedule from the scheme licence agreements.

63. ***Second***, the frequency with which Mr Woodcroft-Brown expanded his case to subsume all possible arguments to avoid the group's loan repayment obligations is not unimportant. The group proceeding was a capacious vehicle for agitating claims to avoid investors' loan repayment obligations.[123] That these defences were not raised is unreasonable when measured against the ample opportunity for them to have been raised within the group proceeding.

64. ***Third***, because of the close connection and underlying similarity between the present defences about the use of borrowed funds, on the one hand, and the scheme contribution representation in the group proceeding, on the other, it is likely that the Appellant will lead much the same evidence from many of the same witnesses in opposition to those defences. As a result of not raising these defences for consideration within the group proceeding, the Appellant will be required to present some of the same evidence twice. This repetition, and the consequential wasting of court and party resources, is the very antithesis of the Part 4A regime and civil procedure reforms in Victoria and elsewhere. As the Law Reform Commission

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118 Affidavit of John Charles Tomes, 8 April 2015 at [13]; VSC Judgment at [176].

119 Affidavit of John Charles Tomes, 8 April 2015 at [14]; VSC Judgment at [177].

120 Affidavit of John Charles Tomes, 8 April 2015 at [10]; VSC Judgment at [173].

121 Affidavit of Maureen Adele Duffy, 24 April 2015 at [25]-[35].

122 Affidavit of Maureen Adele Duffy, 24 April 2015 at [25], [30]. See also at Exhibits MAD10 and MAD11 to the Affidavit of Maureen Adele Duffy, 24 April 2015.

123 For the history of the amendments to Mr Woodcroft-Brown's Statement of Claim, see Affidavit of Joanne Louise Hardwick, 24 April 2015 at [56], [60], [68], [70], [78], [87]. For Judd J's assessment of the group proceeding, see VSC Group Proceeding Judgment at 246 [22], 259 [80], 259 [82].

observed, the "[e]fficient use of judicial resources and fairness to respondents requires that lawyers and individuals be encouraged to bring similar or related claims in one set of proceedings."[124]

65. ***Fourth***, there is no reason to think that these pleaded defences would not have been determined within the group proceeding. There is a substantial factual overlap with the group proceeding. More importantly, many of the defences now pleaded are of wider if not general application. In relation to Mr and Mrs Collins, the Appellant is now having to face the same defence in hundreds of separate proceedings.[125] Mr Tomes' defences at paragraph [35(a) and (b)] are of general application to all scheme members. Given that the same trial judge continues even now to manage these proceedings, there is no reason to doubt that his Honour would have managed these particular defences within the group proceeding.[126] Of one thing there is certainty; by not informing the trial judge of these issues, his Honour was denied the opportunity to consider how best to deal with them.

66. Two final points should be made. ***First***, the Court of Appeal appears to have placed some weight on the fact that the Appellant accepted that there was not inconsistency of a kind grounding an issue estoppel. The Court of Appeal pointed to this twice. But the absence of an issue estoppel does not demonstrate that subsequent proceedings are not sufficiently close to establish an *Anshun* estoppel. To conclude otherwise is to collapse these different preclusionary principles into each other.

67. ***Second***, the Court of Appeal emphasised that the opt out notice in the group proceeding did not alert group members to the risk of *Anshun* estoppel precluding them from later raising other defences.[127] This misunderstands the statutory function of opt out notices. While it serves to inform group members of their right to exit the group proceeding, absence of knowledge about the group proceeding does not ultimately excuse a group member from the operation of s 33ZB or other preclusionary principles.[128] Similarly, Sir James Wigram VC declared in

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124 Law Reform Commission Report at 117 [283].

125 Affidavit of Joanne Louise Hardwick, 24 April 2015 at [125]; VSC Judgment at [83]; Affidavit of Ronald Gerard Willemsen, 6 July 2016 at [14].

126 Cf *Kirby v Centro Properties Ltd* (2008) 253 ALR 65 at 68 [9] (Finkelstein J).

127 VSCA Judgment at [201].

128 See *Mobil Oil* (2002) 211 CLR 1 at 39 [65] (Gaudron, Gummow and Hayne JJ).

Henderson v Henderson that "negligence, inadvertence, or even accident"[129] provide no safe harbour from what is now known as *Anshun* estoppel. The Court of Appeal overlooked the fact that the opt out notice in this group proceeding conformed to the requirements of the Act, was approved by the Court, and was not misleading.[130] It also overlooked the fact that each of the Respondents had retained M+K Lawyers to represent their interests in the group proceedings.

68. Applying ordinary principles of *Anshun* estoppel, the Court of Appeal should have concluded that the Respondents cannot now run their pleaded defences.

Group members are privies of the lead plaintiff in a group proceeding

69. Preclusionary principles (*res judicata*, issue estoppel, *Anshun* estoppel and abuse of process) apply not only between parties to previous litigation but also to and between their privies, whether in blood, title or interest.[131] A party to a later proceeding (A) is a privy in interest with a party to an earlier proceeding (B) if A "had some legal interest in the outcome of the earlier proceeding which was represented by B".[132]

70. Group members have a legal interest in the outcome of a group proceeding. Their legal interest derives from the fact that group members are, by reason of s 33ZB of the Act, bound by the judgment in the group proceeding.

71. This legal interest of group members is represented in the group proceeding by the lead plaintiff.[133] The lead plaintiff, as one of the "seven or more persons [who] have claims against the same person", commences and pursues the group proceeding "representing some or all of them" (s 33C). Section 33A defines a "group member" to mean "a member of a group of persons on whose behalf a group proceeding has been commenced" (emphasis added), and the word "plaintiff" is defined to mean "a person who commences a group proceeding as a representative party".

72. It is because the lead plaintiff represents the legal interest of group members that the Court will take care to ensure that group members' interests are being adequately taken into account by the lead plaintiff.[134] The Court is equipped with

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129 (1843) 3 Hare 100 at 115; 67 ER 313 at 319 (Sir James Wigram VC).

130 VSCA Judgment at [201].

131 *Ramsey v Pigram* (1968) 118 CLR 271; *Tomlinson* (2015) 89 ALJR 750.

132 *Tomlinson* (2015) 89 ALJR 750 at 759 [33] (French CJ, Bell, Gageler and Keane JJ).

133 See *Peterson v Merck Sharpe & Dohme (Australia) Pty Ltd [No 3]* [2009] FCA 5 at [50] (Jessup J); *Cohen v Victoria [No 2]* [2011] VSC 165 at [35] (J Forrest J).

134 *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398 at 408 (Brennan J); *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 266 [25] (Gleeson CJ, McHugh, Gummow, Kirby and

the power, for example, to replace the lead plaintiff, upon application, should he or she inadequately represent the interests of group members (s 33T), and to order that notice be given to group members of any matter at any stage (s 33X(5)).

73. The relationship between group members and the lead plaintiff is analogous to traditional examples of privies in interest because there is a "fiduciary element"[135] to the relationship between the lead plaintiff in a group proceeding and group members. Care must be taken, by not only the lead plaintiff's lawyers but also the lead plaintiff, not to act contrary to the interests of group members.[136]

74. For these reasons, the majority in *Tomlinson* was correct to conclude that group members are privies in interest of the lead plaintiff,[137] and in declining to follow that dictum, the Court of Appeal erred.[138]

75. Group members are privies of the lead plaintiff not only in respect of pleaded claims, but also in respect of unpleaded claims that should have been raised in the group proceeding. As the majority identified in *Tomlinson*, "one principle must govern the identification of privies for the purpose of all forms of estoppel which result from the rendering of a final judgment in an adversarial proceeding".[139] Unless it is concluded that *Anshun* estoppel can never apply to preclude the raising of issues in proceedings brought after a group proceeding, it follows that a conclusion that group members are privies of the lead plaintiff in respect of pleaded claims (*res judicata*) demands the like conclusion that they are privies in respect of unpleaded but connected claims (issue estoppel and *Anshun* estoppel).

76. There is no unjustness in this being so. The lead plaintiff represents the legal interests of group members; but those group members are hardly passive or helpless in the running of the case. To the contrary, Gaudron, Gummow and Hayne JJ in *Mobil Oil* observed that "to say that such persons had 'no control' over their part in the proceeding falls well short of fully describing the way in which Pt 4A

Callinan JJ); *Mobil Oil* (2002) 211 CLR 1 at 27 [21] (Gleeson CJ); *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168 at 183 [51] (Sackville J); Law Reform Commission Report at 70 [157], 75 [169], 131 [320], 137 [333].

135 Law Reform Commission Report at [176].

136 See *Courtney v Medtel Pty Ltd* (2002) 122 FCR 167-168 [57] (Sackville J); *King v AG Australia Holdings Ltd* (2002) 121 FCR 480 at 489 [27] (Moore J); *Bray v F. Hoffman-La Roche Ltd* [2003] FCA 1505 at [15] (Merkel J); *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19 at [8] (Stone J); *Kelly v Willmott Forests Ltd (in liq) [No 4]* [2016] FCA 323 at [308]-[309] (Murphy J).

137 (2015) 89 ALJR 750 at 760-761 [40] (French CJ, Bell, Gageler and Keane JJ).

138 VSCA Judgment at [173].

139 *Tomlinson* (2015) 89 ALJR 750 at 757 [23] (French CJ, Bell, Gageler and Keane JJ).

works".[140] The Court may make directions in respect of individual group members under ss 33Q, 33R and 33S, and group members may seek that the Court make such directions. Group members may apply to have the lead plaintiff replaced if he or she is not adequately representing their interests under s 33T. And group members may opt out of the group proceeding entirely under s 33J and litigate their claim apart from the group proceeding. The Court of Appeal was wrong to conclude that "group members had no control over the conduct by the plaintiff of the group proceeding".[141]

Mr Woodcroft-Brown would be precluded from raising the Respondents' defences

77. (**Mr and Mrs Collins' defences**) Mr Woodcroft-Brown would be precluded by an *Anshun* estoppel from claiming that, as Mr and Mrs Collins have done, he held no interest in the schemes and that no loan was ever made to him. The connection between such claims and the group proceeding are stark. Mr Woodcroft-Brown proceeded on the basis that he had interests and that he obtained loans. It was on that basis that he had standing to commence the proceeding and it was on that basis that he particularised his own loss or damage. It would not lie in his mouth now to suggest to the contrary.

78. (**Mr Tomes' defences**) Mr Tomes' defences are close variations on the scheme contribution representation raised by Mr Woodcroft-Brown in the group proceeding. Any party in subsequent proceedings would not be permitted to clothe the same argument in different legal refinery.

79. Because Mr Woodcroft-Brown would be precluded by an *Anshun* estoppel from raising these pleaded defences, it follows that the Respondents, as his privies, are likewise estopped.

Abuse of process

80. Abuse of process "is inherently broader and more flexible than estoppel" and "is capable of application in any circumstances in which the use of a court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute."[142] The courts have long regarded "multiple or successive proceedings which cause or are likely to cause improper vexation or

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140 (2002) 211 CLR 1 at 34 [50] (Gaudron, Gummow and Hayne JJ).

141 VSCA Judgment at [213].

142 *Tomlinson* (2015) 89 ALJR 750 at 757 [25] (French CJ, Bell, Gageler and Keane JJ). See also *Walton v Gardiner* (1993) 177 CLR 378 at 394 (Mason CJ, Deane and Dawson JJ).

oppression" as a category of case constituting an abuse of process.[143] Cases brought following a representative action can be precluded on this basis.[144]

81. All the matters above in relation to *Anshun* estoppel are relevant to and supportive of a conclusion that the Respondents' pleaded defences abuse the judicial process. Indeed, because a subsequent proceeding can "constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel",[145] the Court may conclude that the Respondents cannot plead their defences even if those defences lack the precise degree of connection or unreasonableness needed to found an *Anshun* estoppel. For example, even if the Court were to conclude that Mr Tomes had cast his claims in sufficiently different language from the scheme contribution representation claim determined in the group proceeding, that would not be determinative.

82. The damage to the administration of justice lies in the Court being denied the opportunity, during the group proceeding, to determine how best to manage these defences within the context of all the other claims made to avoid the loan repayment obligations. M+K Lawyers, and through them the lead plaintiff and the Respondents, made that choice for the Court by not raising these defences for consideration. It is not, however, for a group member or a lead plaintiff to determine unilaterally how claims are to be sequenced. As the Law Reform Commission remarked, "[i]f all group members have an unfettered right to pursue their claims individually, the goal of judicial economy will not be fulfilled".[146]

83. Part 4A was enacted to facilitate the bringing of claims by group members while strengthening the courts' case management powers to ensure that justice is done in an efficient manner, given the burdens which such complex litigation can put on the judicial system and on other parties.[147] For group members to take the benefit of Part 4A while withholding information from the Court about group members' claims is to undermine the Court's power to manage the litigation effectively. For

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143 *Jeffery & Katauskas Pty Ltd* (2009) 239 CLR 75 at 93 [27] (French CJ, Gummow, Hayne and Crennan JJ), quoting Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems* 23 at 43.

144 See *Barker v Walters* (1844) 8 Beav 92 at 97-98; 50 ER 36 at 39; *Cox v Dublin City Distillery Co Ltd [No 2]* [1915] 1 IR 345 at 372 (Palles CB).

145 *Tomlinson* (2015) 89 ALJR 750 at 758 [26] (French CJ, Bell, Gageler and Keane JJ). See also *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 193 [33] (French CJ); *Sheraz Pty Ltd (as trustee for the Terranora Family Trust) v Vegas Enterprises Pty Ltd* (2015) 319 ALR 709 at 712 [11] (Buss JA).

146 See Law Reform Commission Report at 80 [185].

147 Law Reform Commission Report at 70 [157]. See also at 75 [169], 131 [320], 137 [333].

example, it stultifies the Court's exercise of power under s 33N to withhold information from it about group members' claims. Without that knowledge, the Court cannot accurately assess whether the group proceeding will, within the meaning of s 33N, "provide an efficient and effective means of dealing with the claims of group members". Without that knowledge, the Court cannot accurately assess the value of expending cost and effort in determining a group proceeding by reference to its likelihood of finally resolving all issues in dispute.

84. Clarke MR observed in *Stuart v Goldberg Linde (a firm)* that "[t]he proper course is for parties to put their cards on the table so that no one is taken by surprise and the appropriate course in case management terms can be considered by the judge."[148] That observation is especially apt for group proceedings. It is in recognition of the complexities and burdens of group proceedings that Part 4A equips courts with extensive case management powers. Nothing in Part 4A entitles group members to be passive,[149] and they should not be permitted to take the benefit of Part 4A while withholding information from the Court that would allow it properly to assess for itself how best to manage the litigation.

VII: APPLICABLE STATUTORY PROVISIONS

85. The relevant statutory provisions are set out in the Annexure.

VIII. ORDERS SOUGHT

86. The Appellant seeks the orders set out in the Notice of Appeal for each appeal.

IX. TIME ESTIMATE

87. The Appellant estimates that it requires 2 hours to present its oral argument, with 15 minutes in reply.

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Philip Solomon
Chancery Chambers
Tel: 03 8600 1711
Fax: 03 8600 1725
solomon@chancery.com.au

Charles Parkinson
Aickin Chambers
Tel: 03 9225 6852
Fax: 03 9225 7446
cparkinson@vicbar.com.au

Christopher Tran
Castan Chambers
Tel: 03 9225 7458
Fax: 03 9225 8395
christopher.tran@vicbar.com.au

Counsel for the Appellant

148 [2008] 1 WLR 823 at 850 [96].
149 *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469 at 479 [32] (Beach J).