

August 2016

Pressure mounts on Timbercorp as investors entitled to plead defences despite having participated in class action

The Victorian Court of Appeal has held in *Timbercorp Finance Pty Ltd (In Liquidation) ('Timbercorp') v Collins ('Collins') and Tomes ('Tomes') [2016] VSCA 128* that parties who participated in the unsuccessful class action against Timbercorp are not precluded from pleading their individual defences in response to recovery proceedings instituted by Timbercorp.

The result is that Timbercorp now face the prospect of defending over 1000 individual claims.

BACKGROUND

Between 1992 and its collapse in 2009 the Timbercorp Group invested more than \$2 billion in agribusiness projections on behalf of over 18,500 investors. Many investors borrowed moneys from Timbercorp to finance their investments in the schemes.

After Timbercorp went into liquidation, thousands of borrowers failed to meet their loan repayment obligations and Timbercorp issued final demand notices to borrowers in respect of those loans. In June 2009 Timbercorp commenced proceedings against 20 defaulting borrowers to recover loan moneys.

In October 2009 Timbercorp investors commenced a group proceeding in the Victorian Supreme Court against Timbercorp seeking an order that the group members were not liable for repayment of loans from Timbercorp. It was alleged that

Timbercorp had failed to disclose in its product disclosure statements information about risks that might have had a material influence on the decision to invest, in breach of its disclosure obligations under the *Corporations Act 2001* (Cth). It was also argued that the product disclosure statements given to investors and declarations made by the directors in scheme financial reports contained false and misleading statements in breach of the *Corporations Act 2001* (Cth), *Australian Securities and Investments Commission Act 2001* (Cth) and the *Fair Trading Act 1999* (Vic).

Timbercorp suspended its loan recovery project once the group proceeding commenced.

Judgement was handed down by Judd J in 2011, dismissing the group proceedings. In 2013 the Court of Appeal dismissed an appeal against the decision. In 2014, an application for special leave to appeal to the High Court was refused.

LOAN RECOVERY PROCEEDINGS BY TIMBERCORP

Following the dismissal of the group proceeding, Timbercorp recommenced proceedings against individual investors seeking recovery of outstanding principal and interest on the moneys that it had lent them, including proceedings against Collins and Tomes, both of whom had participated in the group proceedings.

Mr & Mrs Collins defended the claim on the basis that no loan had been advanced to them and they did not acquire an interest in the project relevant to them. Tomes's defence alleged that it had been represented to him that, in the event of a default under a loan agreement, Timbercorp's only recourse would be against the investment in the scheme.

Timbercorp pleaded that each respondent was precluded from raising the pleaded defences because they were members of the group proceeding and so were subject to the doctrines of Anshun estoppel and abuse of process which operated to prevent them from raising the defences because:

1. They had failed to opt out of the group proceedings and so had renounced their individual claims and had determined that the common claims would represent the totality of all their claims.
2. They had not sought to have their individual claims 'case managed' in the group proceeding and so were barred from raising those claims in later proceedings.

The primary judge, Robson J, rejected Timbercorp's arguments and held that the respondents were not precluded by either *Anshun* estoppel or by the principles of abuse of process from raising any of the defences pleaded to the claims of Timbercorp. Timbercorp appealed the decision to the Court of Appeal.

COURT OF APPEAL DECISION

On 1 June 2016, Warren CJ, Santamaria J and McLeish JJA unanimously upheld the findings of the primary judge and found that the respondents were allowed to advance their individual defences despite having already participated in the unsuccessful group proceeding.

The Court made the following findings:

1. A group member in a group proceeding has no opportunity to exercise any control over the way in which a plaintiff conducts the group proceeding, what evidence was adduced and what arguments were propounded.
2. Where a group member has failed to opt out, the group member would not necessarily be taken to have accepted that the determination of the group proceeding will be the complete resolution of all or any claims that the group member has in respect of the group claim or any similar or related claim.
3. A failure by a group member to opt out does not give rise to an estoppel in respect of the individual claims of a group member.

4. The defences pleaded by Collins and Tomes were, in large part, matters personal to them and different to the allegations raised in the group proceeding. For example, Collins alleged that the licence agreement did not name Mr & Mrs Collins as persons allocated lots in the project and therefore Timbercorp could not reasonably satisfy itself that a grove lot licence agreement was in place to manage Collins' investment and so the application moneys could not be used by Timbercorp Securities. Tomes relied on representations he says were made specifically to him.
5. There is little prejudice caused to Timbercorp by having to respond to individual defences in these proceedings as they would have had to respond to them either as part of the group proceeding or in a separate proceeding. Accordingly maintaining their individual defences is not an abuse of process.
6. The ability of group members to individually participate in the group proceedings depended upon the favourable exercise of discretion by the Court, and this discretion may have been refused.
7. In all the circumstances it was not unreasonable of the respondents to defer reliance on their individual claims until such time as Timbercorp sought to enforce the loan agreements against them.

WHAT THIS MEANS FOR INVESTORS

Timbercorp now faces the prospect of over 1000 individually defended claims. This should provide a strong incentive to Timbercorp to settle claims rather than face lengthy and expensive court proceedings and to consider the commercial implications of not doing so.

We act for a number of investors who Timbercorp have commenced proceedings against and can assist you to defend your claim against Timbercorp.

Please click [here](#) for further information regarding our experience on similar matters.

Please contact us if you wish to receive advice personal to your circumstances.

Authors:

[Ella van der Merwe](#), Lawyer

[Mary Nemeth](#), Partner