

RECENT DEVELOPMENTS

Jane Buncl, 'Is a reference date a precondition to the validity of a payment claim?'

Southern Han Breakfast Point Pty Ltd (in liquidation) v Lewence Construction Pty Ltd & Ors [2016] HCA 52'

Endnotes

1. Section 17(1) of the Act.
2. Section 22 of the Act.
3. *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* [2015] NSWSC 502 at [40].
4. *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288 at [46]-[62], [118]-[120], [127]-[142].
5. *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288 at [74]-[82].
6. At [46].
7. At [61].
8. At [52]-[54]; New South Wales, Department of Public Works and Services, *Review Discussion Paper: Operations for Enhancing the Building and Construction Industry Security of Payment Act 1999* (2002) at 19.
9. At [54], *Building and Construction Industry Security of Payment Amendment Act 2002* (NSW), Sched 1 [1], [22].
10. At [54]-[57].
11. At [60]-[63].
12. At [62] citing *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190 at 194 [14].
13. At [9].
14. At [73]-[74].
15. Section 8(2)(a) of the Act.
16. At [78].
17. At [76], citing Ball J in the primary judge decision *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* [2015] NSWSC 502 at [46].
18. At [79], citing *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476-477; [1933] HCA 25; *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd* (1936) 54 CLR 361 at 379; [1936] HCA 6.
19. At [80].

Anshun estoppel and representative proceedings

Louise Hulmes reports on *Timbercorp Finance Pty Ltd (in liquidation) v Collins & Anor; Timbercorp Finance Pty Ltd (in liquidation) v Tomes* [2016] HCA 44

Overview

The appellant in both appeals (Timbercorp) was part of the Timbercorp Group of companies and invested in agribusiness schemes on behalf of investors. Each respondent in each appeal (Mr and Mrs Collins and Mr Tomes) was an investor and a party to a loan agreement.

The respondents were group members in a proceeding commenced under Part 4A of the *Supreme Court Act 1986* (Vic) (Act) against Timbercorp, among others, in relation to the agribusiness schemes. The group proceeding was unsuccessful and Timbercorp subsequently commenced recovery proceedings against each of the respondents, alleging the respondents were in default of their loan agreements.

The issue for determination by the High Court was whether the respondents were precluded from relying on certain defences in the recovery proceedings, on the basis that the respondents did not raise those issues in the group proceeding, or opt out of the group proceeding. Timbercorp appealed to the High Court from the Court of Appeal of the Supreme Court of Victoria, submitting that the respondents should be so precluded, either because an *Anshun*¹ estoppel arose against them, or because relying on the defences was an abuse of process.

The High Court unanimously dismissed the two appeals, French CJ, Kiefel, Keane and Nettle JJ delivering a joint judgment and Gordon J delivering a separate judgment.

Facts

In 2009, companies comprising the Timbercorp Group went into liquidation and then administration. In October 2009, a group proceeding was commenced in the Supreme Court of Victoria by a lead plaintiff, Mr Woodcroft-Brown, as plaintiff on his own behalf and on behalf of group members including the respondents. The group members were defined as all persons who at any time during the period 6 February 2007 to 23 April 2009 acquired and/or held an interest in a managed investment scheme of which Timbercorp Securities was the responsibility entity. The respondents did not opt out of the group proceedings.

Common questions of fact or law were identified in relation to the group proceeding. The allegation in the group proceeding was essentially that Timbercorp Securities had failed to disclose information about risks, which it was required to disclose in compliance with its statutory obligations. The group proceeding was unsuccessful at trial and on appeal.

Timbercorp then commenced the two recovery proceedings, and Mr and Mrs Collins and Mr Tomes filed their respective defences. Mr and Mrs Collins' defence contains two principal claims: that they did not acquire an interest in the project in which they sought to invest through Timbercorp Securities, and that no loan was advanced to them by Timbercorp for that purpose. They contend, in the alternative, that the loan offers constituted unconscionable conduct.

Mr Tomes, in his defence, alleged that no loan agreement was concluded between him and Timbercorp, because the person

Louise Hulmes, 'Anshun estoppel and representative proceedings: *Timbercorp Finance Pty Ltd (in liquidation) v Collins & Anor*; *Timbercorp Finance Pty Ltd (in liquidation) v Tomes* [2016] HCA 44'

who purported to execute the loan documentation on his behalf had not been appointed his attorney. He also pleaded that a series of representations was made to him by a person who was an agent of Timbercorp and Timbercorp Securities, to the effect that Timbercorp would not seek recourse against Mr Tomes in the event of his default, as the value of the lots acquired by him would exceed the amount of the loan and those lots could simply be re-sold.

The arguments before the High Court

Timbercorp's first argument was based on the principle of *Anshun* estoppel. *Anshun* estoppel operates to preclude in a later proceeding 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 so as to have made it unreasonable in the context of the first proceeding for the claim not to have been made or the issue not to have been raised in the first proceeding.²

Timbercorp contended, in two different ways, that it was unreasonable, in the context of the group proceeding, for the respondents not to have raised the issues they now sought to raise:

- Timbercorp contended that the group members were privies in interest of the lead plaintiff, including with respect to their individual claims, and that it was unreasonable for the lead plaintiff not to raise the issues in the group proceedings on behalf of the respondents; and
- Timbercorp contended that it was unreasonable for the respondents themselves to have not either raised the issue in the context of the group proceeding, or opted out of the group proceeding.

Timbercorp's second argument was that the respondents' defences constituted an abuse of process, even if the group proceedings did not give rise to an estoppel.

The High Court's decision in relation to *Anshun* estoppel

In relation to the first limb of the *Anshun* argument (that the group members were privies in interest of the lead plaintiff and that it was unreasonable for the lead plaintiff not to raise the issues in the group proceedings on behalf of the respondents), the joint judgment accepted that a person who seeks to make a claim in later proceedings (the 'second party') may be bound by an action of a party in earlier proceedings if the party in those proceedings represented the second party such that they could be described as the privy in interest of the second proceeding.³

In considering Timbercorp's arguments, both judgments in the High Court considered in some detail the statutory scheme relating to group proceedings in the Supreme Court of Victoria. Against that background, the High Court determined that the

lead plaintiff in the group proceeding was not a privy in interest of the respondents.⁴ Sections 33C(1) and 33H of the Act, in particular, were considered in the judgment of French CJ, Kiefel, Keane and Nettle JJ. Those provisions identify the subject matter of a group proceeding as a claim which gives rise to common questions of law and fact. Their Honours held that the plaintiff represented the group members with respect to their interests in that regard and the group members claimed through the plaintiff to the extent of those interests. Their relationship is therefore that of privies in interests with respect to that claim, but not with respect to their individual claims.⁵ In addition, their Honours held that other provisions of the Act made it clear that group members may have other, individual, claims which do not form part of the subject matter of the group proceeding.⁶

In Gordon J's separate judgment, her Honour stated that the legal interests of a group member and the lead plaintiff only aligned to the extent that each had an interest in the resolution of the common questions.⁷

In relation to the second limb of the argument (that it was unreasonable for the respondents themselves not to have raised the issue in the context of the group proceeding, or to have opted out of the group proceeding), French CJ, Kiefel, Keane and Nettle JJ emphasised that *Anshun* makes clear that 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'.⁸ Their Honours said that it could not have been expected that the respondents would raise their individual issues about their loan agreements in the group proceeding, where the common issues were undisclosed risk and misrepresentations affecting the entry of investors into the schemes.

Further, their Honours held that even if the respondents' claims were relevant to those in the group proceeding, it is not clear that they should have been raised. There can be a variety of circumstances which may justify a party refraining, reasonably, from litigating an issue in the earlier proceeding.⁹ Timbercorp's submission that the respondents should have opted out of the group proceeding was also not accepted, as it was based on the assumption that the lead plaintiff represented the respondents with respect to their unpleaded claims as well as the common claims.¹⁰

Gordon J stated that the circumstances which pointed away from an *Anshun* estoppel arising against the respondent included the scope of the group proceeding as determined by the definition of the group members and the common questions, the role of the group members in a group proceeding, the counterclaim and its management in this group proceeding and the nature of the opt out procedure.¹¹

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The High Court's decision in relation to abuse of process

French CJ, Kiefel, Keane and Nettle JJ referred to the fact that *Tomlinson v Ramsey Food Processing Pty Ltd*¹² had recognised that an abuse of process may exist even in circumstances which did not give rise to an *Anshun* estoppel. This is because abuse of process is inherently broader and more flexible than estoppel and is capable of application in any circumstance in which the use of a court's procedure would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute.¹³

Timbercorp submitted that an abuse of process arose because the Supreme Court was denied the opportunity, in the group proceeding, to determine how best to manage the issues raised in the defences, in the context of all the common claims.

The High Court disagreed. French CJ, Kiefel, Keane and Nettle JJ noted that Part 4A of the Act provided the Court with overall management of group proceedings, however, it could not be said that the failure to bring the respondents' claims to the attention of the Court affected the case management decisions open to the Court.¹⁴ Similarly, Gordon J stated that there was nothing in either the statutory scheme or the group proceeding that suggested that the respondents should have raised their claims in the context of the group proceedings. In fact, Part 4A recognised that individual claims may need to be resolved in separate proceedings. Accordingly, raising the defences in the recovery proceedings did not amount to an abuse of process.¹⁵

Endnotes

1. After *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 148 CLR 589; [1981] HCA 45.
2. per French CJ, Kiefel, Keane and Nettle JJ at [97], referring to *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 89 ALJR 758 at 756-757 [22]; 323 ALR 1 at 7-8; [2015] HCA 28 and *Anshun* at 598, 602-603.
3. French CJ, Kiefel, Keane and Nettle JJ at [36].
4. French CJ, Kiefel, Keane and Nettle JJ at [39]; Gordon J at [142].
5. French CJ, Kiefel, Keane and Nettle JJ at [49] and [53].
6. French CJ, Kiefel, Keane and Nettle JJ at [50].
7. French CJ, Kiefel, Keane and Nettle JJ at [141].
8. French CJ, Kiefel, Keane and Nettle JJ at [56], referring to *Anshun* at 602.
9. French CJ, Kiefel, Keane and Nettle JJ at [59] and [65]-[66].
10. French CJ, Kiefel, Keane and Nettle JJ at [67].
11. Gordon J at [115].
12. (2015) 89 ALJR 758 at 757-758 [25]-[26]; 323 ALR 1 at 8-9.
13. French CJ, Kiefel, Keane and Nettle JJ [69].
14. French CJ, Kiefel, Keane and Nettle JJ at [72]-[73].
15. Gordon J at [144]-[145].

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