

HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, KEANE, NETTLE AND GORDON JJ

Matter No M98/2016

TIMBERCORP FINANCE PTY LTD (IN
LIQUIDATION)

APPELLANT

AND

DOUGLAS JAMES COLLINS & ANOR

RESPONDENTS

Matter No M101/2016

TIMBERCORP FINANCE PTY LTD (IN
LIQUIDATION)

APPELLANT

AND

JOHN CHARLES TOMES

RESPONDENT

Timbercorp Finance Pty Ltd (in liquidation) v Collins
Timbercorp Finance Pty Ltd (in liquidation) v Tomes
[2016] HCA 44
9 November 2016
M98/2016 & M101/2016

ORDER

Matter No M98/2016

Appeal dismissed with costs.

Matter No M101/2016

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria



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Representation

P H Solomon QC with C O H Parkinson and C J Tran for the appellant in both matters (instructed by Mills Oakley)

M D Wyles QC with D J Fahey for the respondents in M98/2016 (instructed by M+K Lawyers Group Pty Ltd)

B W Walker SC with M K Condon SC and L H Kirwan for the respondent in M101/2016 (instructed by Somerset Ryckmans Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



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CATCHWORDS

Timbercorp Finance Pty Ltd (in liquidation) v Collins **Timbercorp Finance Pty Ltd (in liquidation) v Tomes**

Estoppel – *Anshun* estoppel – Where appellant provided loans to investors to fund investments in managed investment schemes – Where appellant placed in liquidation – Where group proceeding against appellant under Pt 4A of *Supreme Court Act 1986 (Vic)* by lead plaintiff on behalf of himself and group members alleging misrepresentations and failure to disclose information about risks – Where respondents group members in group proceeding – Where group proceeding unsuccessful – Where subsequent proceedings by appellant against respondents seeking recovery of outstanding principal and interest – Where respondents pleaded number of defences in recovery proceedings – Whether lead plaintiff in group proceeding respondents' privy – Whether defences precluded by reason of estoppel which arises by reference to principle in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

Practice and procedure – Whether defences sought to be raised in recovery proceedings an abuse of process.

Words and phrases – "abuse of process", "*Anshun* estoppel", "control", "estoppel", "group member", "group proceeding", "lead plaintiff", "opt out notice", "privy", "unreasonable".

Supreme Court Act 1986 (Vic), Pt 4A.

1 FRENCH CJ, KIEFEL, KEANE AND NETTLE JJ. The appellant, Timbercorp Finance Pty Ltd (in liquidation) ("Timbercorp Finance"), is a subsidiary of Timbercorp Ltd (in liquidation) ("Timbercorp Ltd"). Its purpose was to provide loans to investors in horticultural and forestry projects which were operated as managed investment schemes by Timbercorp Ltd from about 1992. Timbercorp Securities Ltd (in liquidation) ("Timbercorp Securities") replaced Timbercorp Ltd as the responsible entity of the schemes. Each of the companies was a member of the "Timbercorp Group", and was placed in liquidation in June 2009.

2 A group proceeding was commenced in the Supreme Court of Victoria in October 2009 under Pt 4A of the *Supreme Court Act* 1986 (Vic) by Mr Woodcroft-Brown ("the lead plaintiff") against Timbercorp Finance, Timbercorp Securities and certain of their directors ("the group proceeding"). The group proceeding was brought on Mr Woodcroft-Brown's behalf and on behalf of persons who, at any time during the period between 6 February 2007 and 23 April 2009 ("the relevant period"), acquired or held an interest in a managed investment scheme of which Timbercorp Securities was the responsible entity. The relief sought by the lead plaintiff against Timbercorp Finance included orders declaring that it was involved in contraventions of a number of the provisions of the *Corporations Act* 2001 (Cth), the Corporations Law (set out in s 82 of the *Corporations Act* 1989 (Cth)), the *Fair Trading Act* 1999 (Vic), the *Trade Practices Act* 1974 (Cth) and the *Australian Securities and Investments Commission Act* 2001 (Cth); damages under provisions of those statutes; and a declaration that the lead plaintiff and the group members not be liable for any loans, fees or costs in connection with the schemes in question. The group proceeding was not successful at trial¹ or on appeal².

3 Some, but not all, of the members in the group proceeding had applied for loans from the appellant to fund their investments, in whole or in part, or costs associated with the schemes. The respondents in the present appeals – Mr and Mrs Collins and Mr Tomes – were group members who had applied for loans in the period between May and October 2008. In the proceedings the subject of these appeals, which were brought by the liquidators in 2014, it is alleged that agreements for loans were concluded between the appellant and the respondents and that the respondents defaulted on their payments under those agreements in July 2009.

1 *Woodcroft-Brown v Timbercorp Securities Ltd* (2011) 253 FLR 240.

2 *Woodcroft-Brown v Timbercorp Securities Ltd (in liq)* (2013) 96 ACSR 307.

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4 The respondents have filed defences in these proceedings. In its reply to each of those defences, the appellant pleads that the respondents are precluded from raising their defences on account of their membership in the group proceeding. The preclusion is said to arise as a matter of law. The appellant contends that either the respondents are estopped from raising the matters in their defences or the defences constitute an abuse of process.

5 The estoppel to which the appellant refers is not an issue estoppel, but rather one which arises by reference to the principle in *Port of Melbourne Authority v Anshun Pty Ltd*³ ("Anshun"). In essence, the appellant contends that the respondents should be estopped from pursuing their defences because they could and should have raised them for determination in the group proceeding. In their rejoinders filed in the proceedings, the respondents take issue with these allegations.

6 The question as to what defences may now be pursued by the respondents was ordered to be determined as a separate question⁴, framed in these terms:

"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 [Pt 4A] of the *Supreme Court Act* 1986 (Vic) in [the group proceeding]?"

The answer given to that question, by Robson J⁵, was that the respondents are not precluded from raising any of their defences. Leave was granted by the Court of Appeal of the Supreme Court of Victoria to appeal that decision, but the appeals were dismissed⁶.

The group proceeding

The claims and common questions

7 Mr Woodcroft-Brown was the lead plaintiff in the group proceeding. Before the trial of the proceeding another person, Mr Van Hoff, was appointed to

3 (1981) 147 CLR 589; [1981] HCA 45.

4 Pursuant to Supreme Court (General Civil Procedure) Rules 2005 (Vic), r 47.04.

5 *Timbercorp Finance Pty Ltd (In Liq) v Collins* [2015] VSC 461.

6 *Timbercorp Finance Pty Ltd (In Liquidation) v Collins* [2016] VSCA 128.

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represent a sub-group. It would appear that it became necessary to consider separately group members who were involved in recent schemes, that is, the schemes subscribed to during the relevant period, and those who were involved in early schemes, being the schemes which pre-dated the relevant period. The lead plaintiff had invested in the recent schemes, and Mr Van Hoff had invested in both the recent schemes and the early schemes.

8 The appellant in these proceedings, Timbercorp Finance, was the fifth defendant in the group proceeding. Timbercorp Securities was the first defendant and the principal focus of the lead plaintiff's case. Timbercorp Finance became a plaintiff by counterclaim in the group proceeding when it sought to recover monies alleged to be owed by Mr and Mrs Woodcroft-Brown under their loan agreement with it.

9 The lead plaintiff's case was pleaded in a complex, confusing way despite being the subject of a series of amendments. However, as the trial judge, Judd J, observed⁷, the case 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 overall theme of the lead plaintiff's case was that the fortunes of the schemes were linked to the viability of the Timbercorp Group.

10 There were said to have been risks associated with Timbercorp Securities' financial structure. It was alleged that they should have been disclosed because they were significant or material to a decision to invest in the schemes. This was described as a "structural risk", a risk that the group might fail due to insufficient cash and having a consequent impact on the viability of the schemes managed by Timbercorp Securities. The lead plaintiff alleged that the structural risk should have been disclosed in the Product Disclosure Statement which Timbercorp Securities was required to give with any invitation to invest.

11 The lead plaintiff also argued that there were two critical events which occurred on and after 6 February 2007 which put the Timbercorp Group at a heightened risk of failure and which should have been disclosed. One was an announcement about a proposal by the Australian Taxation Office to change its position with respect to the deductibility of certain fees paid by investors. The other was the global financial crisis, which had an impact upon the availability of credit. These were described as the "adverse matters". The lead plaintiff also

7 *Woodcroft-Brown v Timbercorp Securities Ltd* (2011) 253 FLR 240 at 247 [24].

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alleged that the failure to disclose these matters when they occurred constituted misleading and deceptive conduct by silence.

12 The misrepresentations alleged by the lead plaintiff fell into two categories: "financial representations", which were to the effect that the Timbercorp Group was sufficiently strong such that investors could expect Timbercorp Securities to manage the schemes to their end, and that the principal risks had been fully disclosed; and "scheme contributions representations", which were to the effect that investors' contributions would be applied only to the particular scheme in which they had invested, which is to say they were to be quarantined from the group as a whole and not pooled with other funds.

13 Judd J found that either there was no need to disclose the matters identified in the lead plaintiff's pleading or the matters were not material to a decision by group members to invest⁸. With respect to the alleged misrepresentations, his Honour found⁹ that the first of them was either too vague or too uncertain to be actionable and that there were in any event reasonable grounds for confidence in the strength of the Timbercorp Group at the time. The second set of representations was inconsistent with the Product Disclosure Statements and other generally available information and was not consistent with the lead plaintiff's claims concerning reliance on the strength of the Timbercorp Group¹⁰. His Honour also found¹¹ that the lead plaintiff's and Mr Van Hoff's cases on reliance lacked credibility and were implausible.

14 Following delivery of his reasons Judd J made orders dismissing the lead plaintiff's claims and the claim of Mr Van Hoff, which had been heard at the same time. His Honour made an order declaring the persons who were bound by the orders, for the purposes of s 33ZB in Pt 4A, and made orders as to the notices to be given to group members. His Honour annexed a list of 33 common questions in the group proceeding, the terms of which had been the subject of argument, and answered them. It is not necessary to set them out. They were directed to the disclosure obligations of Timbercorp Securities and the

8 *Woodcroft-Brown v Timbercorp Securities Ltd* (2011) 253 FLR 240 at 312 [552]-[553].

9 *Woodcroft-Brown v Timbercorp Securities Ltd* (2011) 253 FLR 240 at 251 [42].

10 *Woodcroft-Brown v Timbercorp Securities Ltd* (2011) 253 FLR 240 at 252 [45].

11 *Woodcroft-Brown v Timbercorp Securities Ltd* (2011) 253 FLR 240 at 258 [75]-[77].

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allegations that companies in the Timbercorp Group had engaged in misleading and deceptive conduct.

The course of the group proceeding and the respondents' participation in it

15 The respondents agreed to participate in a group proceeding at an early point, before it was constituted with a lead plaintiff and a pleading settled. They had received a circular from the solicitors for the lead plaintiff and certain group members, who had carriage of the foreshadowed group proceeding ("the solicitors"). The circular identified non-disclosure by Timbercorp Securities as the basis for the action and advised that investors could withhold loan repayments and claim repayment of monies already paid if they joined the group proceeding. A later circular confirmed the advice to withhold further loan payments and stated that, if the matter proceeded to court, it would be argued that the loans were invalid.

16 After the group proceeding had been instituted Mr Tomes sent an email to the solicitors in which he explained how he had come to make his investments. He gave details of representations which had been made to him about what would occur if he fell on hard times. It would appear that the solicitors did not bring these matters to the attention of the Court during the group proceeding. These alleged misrepresentations form part of the defence which Mr Tomes seeks to pursue against the appellant.

17 A couple of months after the commencement of the group proceeding, the solicitors provided a report to investors about a directions hearing which had taken place in the Supreme Court. They advised that the Court wished to hear submissions about whether the existing claim would be expanded to include any other claims based on misleading and deceptive conduct in connection with the promotion and sale of the schemes. The solicitors advised that they were examining projects which might result in new claims.

18 An "opt out" notice was approved by Judd J and sent to investors. It identified the allegations made by the lead plaintiff concerning the non-disclosures and misrepresentations. Investors were advised that they could be bound by the outcome of the action if they did not opt out and that "you will not be able to make the same claim in any other proceedings". Shortly thereafter, the solicitors sent a circular to investors advising that for those investors who did not opt out the solicitors would "continue handling their individual file and the ancillary class action file". They said that individual issues "on an investor-by-investor basis" would be worked through on the basis of the Court's findings on the issues that were common to everyone.

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19 Both Mr Collins and Mr Tomes read the opt out notice. Mr Tomes said that he took the reference to individual files to mean that his specific case was being looked after. Mr Collins did not consider that there were any individual issues which concerned him and his wife which were not covered by the common questions. The respondents did not elect to opt out. Some investors did.

20 A revised opt out notice was provided to group members. It was occasioned by some amendments which had been made by the lead plaintiff. Group members were advised that if they did not opt out the "class action" would determine their rights. They would be bound by the judgment in it and would "not be able to make the same claim in any other proceedings". The respondents did not opt out.

21 At a directions hearing some months prior to the commencement of the hearing of the group proceeding, Judd J ordered that the counterclaim, together with some third party proceedings not presently relevant, be tried separately from the main proceeding and after the determination of the group proceeding questions.

22 Apart from the claims of the lead plaintiff and Mr Van Hoff, no other individual claims by group members were the subject of directions as to their determination by Judd J. There is no suggestion that any of the parties to the group proceeding suggested any such course of action. The hearing proposed and actually undertaken was concerned only with the common questions raised in the group proceeding.

The respondents' defences in these proceedings

The Collins' defence

23 The amended defence of Mr and Mrs Collins in the proceedings brought by the appellant, Timbercorp Finance, against them 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 the appellant for that purpose. The first-mentioned claim is based largely on the requirements of the constitution of the project and Timbercorp Securities' inability to comply with it. As a result, it could neither release application monies for the purpose of an allotment of any interest in the project nor allot such an interest to them. As to the second, it is alleged that it was a condition of the loan agreement that the appellant pay monies to Timbercorp Securities on their behalf. However, upon receipt of their application for a loan the appellant paid monies to a trust company, which in turn paid them to Timbercorp Ltd, which then used them in the conduct of its business.

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24 Mr and Mrs Collins contend, in the alternative, that the loan offers were unconscionable conduct, in contravention of the *Australian Securities and Investments Commission Act 2001* (Cth). They further allege that if they are required to pay loan monies to the appellant, it would be unjustly enriched by reason that it has not made an actual monetary payment and has therefore suffered no loss.

Mr Tomes' defences

25 In his amended defence Mr Tomes alleges that no loan agreement was concluded between him and the appellant, by reason that the person who purported to execute the loan documentation on his behalf had not been appointed as his attorney. He also contends that monies were not applied to fund payments he owed with respect to his interests and loan fees, as the loan agreement required, but rather for the purposes of the Timbercorp Group. The application of these funds to the Timbercorp Group contravened the *Corporations Act 2001* (Cth) in that Timbercorp Securities was required to hold the monies as trustee for him and the appellant was involved in that contravention. If the appellant is entitled to retain the payments, it would be unjustly enriched, either because the monies were paid under a mistake of fact or because there has been a failure of consideration.

26 Mr Tomes also pleads that a series of representations were made to him by a person who was an agent of both the appellant and Timbercorp Securities concerning his first loan agreement. The effect of these representations was that the appellant would not seek recourse against Mr Tomes in the event of his default under the loan agreement, as it would not need to do so because the value of the lots acquired by him would always exceed the amount of the loan and it could simply resell them; all funds borrowed by him would be applied solely to pay for the relevant lots; the projects were sustainable and would continue even if Timbercorp Securities ceased to be the responsible entity; and the project for which he was obtaining finance was a fully funded investment.

Estoppel

27 It was mentioned at the outset of these reasons that the appellant does not contend that an issue estoppel arises with respect to the claims that the respondents now seek to pursue. That is to say, it is not argued that they involve an issue of fact or law which was necessarily involved as a step in reaching the

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determination of the group proceeding¹². Rather, it is contended that these claims ought to have been raised and determined in that proceeding. An estoppel of this kind, an "Anshun estoppel"¹³, will preclude the assertion of a claim or of an issue of law or fact if the claim or issue was so connected to the subject matter of the first proceeding as to make it unreasonable, in the context of the first proceeding, for the claim or issue not to have been made or raised in it¹⁴.

The appellant's arguments

28 The appellant submits that an obvious connection between the respondents' defences and the group proceeding is that they seek to achieve the same result, namely avoiding repayment of the loan obligations. The respondents' loan agreements were the subject of the group proceeding in the sense that they were sought to be rendered void or unenforceable by reason of the claims there made.

29 The appellant further submits that the fact that the group members held interests in the schemes was a fundamental assumption upon which the group proceeding was based. It went to the root of the matter in the way discussed in *Hoysted v Federal Commissioner of Taxation*¹⁵. Likewise it was assumed for the purposes of the group proceeding that loan agreements between the appellant and the respondents were actually entered into. Now the respondents seek to argue to the contrary – that there were no concluded agreements for loans and thus no loans. This has the potential that the two proceedings could produce declarations of inconsistent rights.

30 As to the representations upon which Mr Tomes seeks to rely, the appellant says that they closely match those in the group proceeding.

12 See *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 89 ALJR 750 at 757 [22]; 323 ALR 1 at 7; [2015] HCA 28; *Hoysted v Federal Commissioner of Taxation* (1925) 37 CLR 290; [1926] AC 155.

13 Also referred to as the "extended principle" in *Henderson v Henderson* (1843) 3 Hare 100 [67 ER 313]; *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 89 ALJR 750 at 757 [22]; 323 ALR 1 at 7.

14 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 89 ALJR 750 at 757 [22]; 323 ALR 1 at 7-8; *Hoysted v Federal Commissioner of Taxation* (1925) 37 CLR 290; [1926] AC 155.

15 (1925) 37 CLR 290; [1926] AC 155.

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In particular, the lead plaintiff in the group proceeding pleaded a misrepresentation that his funds would effectively be quarantined and not pooled with other funds. This led to a finding by Judd J¹⁶ that the lead plaintiff's assertion in this regard was not consistent with what had been stated in the Product Disclosure Statements.

31 The appellant submits that it was unreasonable of the respondents not to use the statutory safeguards provided for by opting out of the group proceeding or by raising the matters of defence as claims in that proceeding. An aim of the statutory provisions for group proceedings is the efficient use of judicial resources and this requires that lawyers and individuals be encouraged to bring similar or related claims in the one set of proceedings¹⁷.

32 The relevant question, the appellant submits, is whether the defences in these proceedings are so similar to issues in the group proceeding that the respondents should be precluded from pursuing them. The enquiry begins and ends with similarity, regardless of whether it was practicable to have litigated the claims in the group proceeding. Were it otherwise, framing a claim as personal to the particular plaintiff would always provide an answer to an *Anshun* estoppel.

33 In any event, the appellant submits that there is no reason to think that the matters raised in the defences could not have been determined in the group proceeding. The ever-expanding claims in the group proceeding could have accommodated them. Instead the appellant now faces hundreds of separate proceedings which are to be determined on much of the same evidence which was led in the group proceeding.

34 The appellant submits that there is no injustice in precluding the respondents from raising their defences. They were not helpless or passive as group members. To say that they did not have control over their part in the proceeding does not fully describe the way Pt 4A works and does not take account of the powers which the Court may exercise. In that regard, the Court could have made directions for the determination of the respondents' claims in the group proceeding had it been asked to do so.

16 *Woodcroft-Brown v Timbercorp Securities Ltd* (2011) 253 FLR 240 at 286-287 [204]-[205].

17 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46, (1988) at 117 [283].

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35 The appellant's arguments also focus on another aspect of a group proceeding, namely, the representative capacity of the lead plaintiff in that proceeding. It is submitted that group members are privies in interest with the lead plaintiff in a group proceeding, because that person represents their legal interest. In the appellant's submission, recognition of that shared interest "narrows inevitably the relevant considerations on reasonableness" in connection with estoppel. It is convenient to deal with that aspect of the appellant's arguments first.

Group members as privies

36 A person (the "second party") who seeks to make a claim in later proceedings may be bound by the actions 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 party. The same principle which is applied to determine when a party in earlier proceedings may be said to be a privy in interest of the second party applies with respect to all forms of estoppel¹⁸. The interest in question is required to be a legal one.

37 If the appellant is correct in its submissions concerning the privy relationship between the lead plaintiff in the group proceeding and the respondents as group members, the enquiry becomes whether the lead plaintiff would have been estopped. The nature of the enquiry does not alter. It remains whether the respondents' claims were so connected to the subject matter of the group proceeding as to make it unreasonable for their claims not to have been made. However, the question is directed at whether the lead plaintiff in the group proceeding should have done so, rather than the respondents in these proceedings. (The question whether the respondents, acting reasonably, should themselves have raised their claims will be addressed later in these reasons.)

38 The reason for the appellant's focus on the position of the lead plaintiff in a group proceeding may be understood by reference to the level of involvement or control that the lead plaintiff has, compared with a group member. The argument must be that, since the lead plaintiff has the carriage of the proceedings and, subject to the Court's case management powers, determines what claims are to be put forward, there is good reason for the lead plaintiff to include for determination in the group proceeding claims by group members which are connected to the group proceeding.

18 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 89 ALJR 750 at 757 [23], 758 [28]; 323 ALR 1 at 8, 9.

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39 The question whether the lead plaintiff in the group proceeding should himself have sought to have the respondents' claims included in the group proceeding is a question which is reached only if the appellant is correct in its submission that the lead plaintiff was the privy in interest of the respondents with respect to their individual claims. For the reasons which follow, he was not.

40 The appellant submits that the representation of group members' interests by a lead plaintiff in a group proceeding is not limited to the legal interest in the common questions in that proceeding. It submits that group members, such as the respondents, are privies in interest of the lead plaintiff not only with respect to the claims pleaded in that proceeding, but also with respect to unpleaded claims of individual group members that should have been raised. It would follow that if the lead plaintiff in that proceeding did not bring forward those claims for determination, the group members will be unable to pursue them later. The appellant submits that if the lead plaintiff in a group proceeding is not viewed in this way, the principle in *Anshun* could never apply to individual claims in a group proceeding. But the appellant does not explain why the principle should apply in this way.

41 If the appellant's argument was correct it would give estoppels a wide operation in the context of a group proceeding, on account of it being a proceeding of that nature. It is therefore necessary to consider the nature and subject matter of group proceedings under Pt 4A, the role of the lead plaintiff in them and the legal interests which the lead plaintiff represents.

42 Representative proceedings have, in some form, historically been permitted under the Rules of the Supreme Court of Victoria at least since 1916¹⁹. They were modelled on the English rules and can be traced back to the practice of the Chancery Court. The old rule of the Chancery Court was that, in order to achieve finality, the presence before the Court of all the parties interested in the matter was required. However, the rule did not apply where the parties were too numerous. It was said that "[i]t was originally a rule of convenience: for the sake of convenience it was relaxed"²⁰.

43 The Victorian Rules were modified over the years. It is not necessary to detail that history. Part 4A took effect from 1 January 2000 and was based on

¹⁹ See *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 ALR 111 at 121 [43] per Finkelstein J.

²⁰ *Duke of Bedford v Ellis* [1901] AC 1 at 8 per Lord Macnaghten.

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federal legislation for representative proceedings²¹. The report of the Australian Law Reform Commission ("the ALRC")²², which preceded the enactment of the federal legislation, envisaged that grouping procedures in cases of multiple wrongdoing might reduce costs and inefficiencies and other barriers which impede access to legal remedies. Gleeson CJ was later to observe²³ that, although there may be differences of opinion about the legislative policy underlying group proceedings, the primary object of Pt 4A is clear enough:

"It is to avoid multiplicity of actions, and to provide a means by which, where there are many people who have claims against a defendant, those claims may be dealt with, consistently with the requirements of fairness and individual justice, together."

As his Honour pointed out, the State has an interest in preventing relitigation of common issues of fact and law so far as it can be done consistently with the requirement of justice to all parties.

44 For the purposes of Pt 4A, s 33A relevantly defines a "plaintiff" of a group proceeding as "a person who commences a group proceeding as a representative party" and a "group member" as "a member of a group of persons on whose behalf a group proceeding has been commenced". It may be observed that group membership under Pt 4A does not require any choice to be exercised. There is no "opt in" procedure provided. A group member can "opt out"²⁴. More importantly for present purposes, there can be little doubt that the plaintiff in the group proceeding has a representative role.

45 In a passage in the joint reasons in *Tomlinson v Ramsey Food Processing Pty Ltd*, upon which the appellant relies, it was observed²⁵ that traditional forms

21 *Federal Court of Australia Act 1976* (Cth), Pt IVA.

22 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46, (1988) at 8 [13], 34 [69].

23 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 24 [12]; [2002] HCA 27.

24 *Supreme Court Act 1986* (Vic), s 33J.

25 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 89 ALJR 750 at 760-761 [40]; 323 ALR 1 at 12, citing *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398; [1995] HCA 9, which concerned Supreme Court Rules 1970 (NSW), Pt 8.

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of representation which bind those represented to estoppels include representation by an agent, by a trustee, by a tutor or guardian and "representation by another person under rules of court which permit representation of numerous persons who have the same interest in a proceeding". The joint reasons went on to say that "[t]o those traditional forms of representation can be added representation by a representative party in a modern class action"²⁶. These latter forms of representation, it was observed²⁷, are the subject of procedures such as opt in or opt out which guard against the collateral risks of representation, such as an estoppel.

46 The joint reasons in *Tomlinson* referred to representative proceedings for the purpose of comparison with the proceedings there in question, which were commenced by a statutory office-holder in the exercise of a power conferred by statute. Proceedings of that kind may result in the enforcement of another person's legal entitlement, but the office-holder may not be concerned with the interests of that person in the discharge of the statutory function. By implication, plaintiffs in representative proceedings may be so concerned, not the least because they share the same interest as group members in the matter litigated. It was not necessary in *Tomlinson* to decide that a group member might be a privy in interest of the plaintiff in group proceedings, but it may be taken to acknowledge that such a relationship may arise.

47 That acknowledgement does not, however, answer the question as to the extent to which the plaintiff in group proceedings may be taken to represent the legal interest of the group members. The answer to that question lies in the nature of a group proceeding and the commonality of interest that may be pursued in it. Section 33C(1) provides:

"Subject to this Part, if –

- (a) seven or more persons have claims against the same person; and
- (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and

26 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 89 ALJR 750 at 761 [40]; 323 ALR 1 at 12, citing *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384, which concerned *Federal Court of Australia Act 1976* (Cth), Pt IVA.

27 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 89 ALJR 750 at 761 [40]; 323 ALR 1 at 12-13.

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(c) the claims of all those persons give rise to a substantial common question of law or fact –

a proceeding may be commenced by one or more of those persons as representing some or all of them."

48 Section 33H provides that the indorsement on the writ, by which the group proceeding must be commenced, must identify the group members to whom the proceeding relates; specify the nature of the claims made on behalf of the group members and the relief claimed; and "specify the questions of law or fact common to the claims of the group members".

49 These provisions identify the subject matter of a group proceeding as a claim which gives rise to common questions of law or of fact. The plaintiff represents the group members with respect to their interests in that regard and the group members claim through the plaintiff to the extent of that interest. Their relationship is therefore that of privies in interest²⁸ with respect to that claim.

50 However, other provisions of Pt 4A also make plain that group members may have other, individual, claims which do not form part of the subject matter of the group proceeding. Group members' claims were also the subject of discussion by the ALRC in its report. The ALRC, whilst recognising that the grouping of many claims into one proceeding involving at least one common question of law or fact might have benefits, also recognised that there may be issues which must be decided separately in relation to each group member²⁹. And in *Wong v Silkfield Pty Ltd*³⁰, this Court held that it was not necessary for a representative proceeding to be likely to resolve wholly, or even to any significant degree, the claims of all group members.

51 Section 33Q provides that where it appears to the Court that the determination of the questions common to all group members will not finally determine the claims of all group members, the Court may give directions in relation to the determination of the remaining questions and for that purpose may establish sub-groups. Section 33R allows the Court to permit an individual group member to take part in the proceeding for the purpose of determining a question

28 See *Ramsay v Pigram* (1968) 118 CLR 271 at 279; [1968] HCA 34.

29 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46, (1988) at 75 [169].

30 (1999) 199 CLR 255 at 267 [28], 267-268 [30]; [1999] HCA 48.

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that relates only to the claim of that group member. In this circumstance, however, the group member is liable for the costs associated with the determination of that question, a liability which does not generally arise in the group proceeding itself.

52 Part 4A creates its own kind of statutory estoppel. Section 33ZB requires that a judgment in a group proceeding identify the group members affected by it and, subject to a provision not presently relevant, provides that that judgment "binds all persons who are such group members at the time the judgment is given". In order to understand that to which the group members are bound, it is necessary to read s 33ZB in the context of Pt 4A as a whole and ss 33C(1) and 33H in particular. By that process it will be seen that group members are bound by the determination of the claims giving rise to the common questions.

53 The provisions of Pt 4A therefore confirm that a plaintiff in group proceedings represents group members only with respect to the claim the subject of that proceeding, but not with respect to their individual claims. The lead plaintiff is not a privy in interest with respect to the respondents' claims. This is so regardless of whether they should have been raised in the group proceeding. That leaves for consideration the question whether the respondents themselves are estopped from raising them in these proceedings.

54 A conclusion that the representative capacity of a plaintiff in a group proceeding is limited to the claims giving rise to common questions is consistent with principles which underlie the concept of a privy in legal interest. The basic requirement of a privy in interest is that the privy "must claim under or through the person of whom he is said to be a privy"³¹. The principle underlying the concept of privies is that "one who claims through another is, to the extent of his claim, subject to ... all estoppels affecting the person through whom he claims"³². That principle is in turn informed by the theory that a person who takes a benefit ought also to bear a burden³³. With the benefit of the claim comes the detriment

31 *Ramsay v Pigram* (1968) 118 CLR 271 at 279 per Barwick CJ.

32 *Ramsay v Pigram* (1968) 118 CLR 271 at 273-274 reflecting Everest, *Everest and Strode's Law of Estoppel*, 3rd ed (1923) at 55, cited in *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 89 ALJR 750 at 758 [28]; 323 ALR 1 at 9.

33 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 89 ALJR 750 at 758 [29]; 323 ALR 1 at 10.

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of the estoppel. But, as explained in *Tomlinson*³⁴, it is a theory which has its limitations. It would be quite unjust for a person whose legal interests stood to benefit by making a legal claim to be precluded if they did not have some measure of control of the proceedings in question. As has been observed earlier in these reasons, the control of group members such as the respondents is limited.

Relevance and reasonableness

55 The appellant's submission, that an *Anshun* estoppel is made out by reference to similarities between the matters raised in the two proceedings, regardless of whether the matters sought to be raised in the present proceedings could practicably have been raised in the group proceeding, is contrary to authority on two levels.

56 An *Anshun* estoppel is not based upon degrees of similarity, which may be a matter of impression. It was made clear in *Anshun*³⁵ that there could 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" (emphasis added). It was further explained³⁶:

"Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding."

57 In *Anshun* the owner of the crane which was involved in an accident was prevented from pursuing separate proceedings in which it sought an indemnity from the hirer of the crane, when it had only claimed contribution from the hirer in the first proceeding. It would have been expected that the owner would have sought an indemnity in the first proceeding and litigated the questions of law and fact relevant to it.

58 By way of contrast, in these proceedings, it could hardly be said to have been expected that the respondents would raise their individual issues about their

34 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 89 ALJR 750 at 760 [39]; 323 ALR 1 at 12.

35 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 602.

36 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 602.

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loan agreements referred to above in the group proceeding, where the common issues were undisclosed risks and misrepresentations affecting the entry of investors into the schemes. The only connection between those matters and their loan agreements was the relief sought regarding the enforceability of the loan agreements. There was no issue in the group proceeding about the validity of the loan agreements which would have made the claims in the respondents' defences relevant in the group proceeding.

59 Even if the respondents' claims were relevant to those in the group proceeding, there remain, contrary to the appellant's submissions, questions as to whether they could, and should, have been raised in that proceeding. In *Anshun* it was acknowledged³⁷ that there may be a variety of circumstances which may justify a party refraining, reasonably, from litigating an issue in the earlier proceedings.

60 The appellant's argument – that the group proceeding was litigated on the basis of assumptions of fact – does not rely upon any similarity between the proceedings but rather the potential for there being inconsistent findings. In *Anshun* it was regarded³⁸ as generally accepted that a party will be estopped from bringing an action where, if it succeeds, it would result in a judgment which conflicts with an earlier judgment. In such a circumstance the litigation should be regarded as concluded by the earlier proceedings.

61 *Anshun* itself provides an example of how such an inconsistency might arise. A finding had been made that the hirer was liable to provide contribution to the owner with respect to the injuries; and a finding that the hirer was liable to provide a complete indemnity was later sought. But in these proceedings there is no question of inconsistency arising with respect to findings as to the respondents' claims. No issue was raised, and no finding was made, in the group proceeding about these matters. There was no particular assumption about the loan agreements upon which the group proceeding was based, apart from their existence.

62 Contrary to the appellant's submissions³⁹, this is not a case like *Hoysted*³⁹, where the Commissioner was estopped from raising an issue of mixed fact and law which had been the subject of admission by him in the earlier proceeding.

37 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 602-603.

38 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 603.

39 *Hoysted v Federal Commissioner of Taxation* (1925) 37 CLR 290; [1926] AC 155.

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It was there said⁴⁰ that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and fresh litigation started with a view to obtaining a judgment based upon a different assumption of facts. If this were permitted, litigation would not have the finality deemed desirable. But the present case involves no such admission.

63 In *Hoysted* it was said⁴¹ that the same principle, that of setting to rest the rights of litigants, applies to a case where a point, fundamental to the decision, has not been traversed. But, in this case, it cannot be said that the lead plaintiff's failure to raise in the group proceeding the issues now raised by the respondents in these proceedings was fundamental to Judd J's decision in the group proceeding. The lead plaintiff's claim in the group proceeding alleged the existence of the loan agreements and that was the assumption on which the claim proceeded. The lead plaintiff sought relief from obligations under the loan agreements on the basis of the contraventions of the Corporations Law, the *Corporations Act 2001* (Cth), the *Fair Trading Act 1999* (Vic), the *Trade Practices Act 1974* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) which were alleged in the group proceeding. But, for all intents and purposes of the group proceeding, the efficacy of the loan agreements was not adverted to. Judd J made no determination as to whether they were efficacious. In effect, his Honour determined only that, assuming the existence of the loan agreements, the borrowers were not entitled to the relief from their obligations under the loan agreements on the basis of the misrepresentations alleged in the group proceeding. The bases for seeking to avoid the loan agreements were entirely different from the matters now sought to be agitated.

64 It is correct that one of the representations upon which Mr Tomes seeks to rely is similar to that made by the lead plaintiff in the group proceeding, to the effect that he was led to believe that his funds would be quarantined from other funds and applied only to his investments. Judd J found⁴² that such a representation was inconsistent with information provided in the Product Disclosure Statements. However, unlike the representation relied on by the lead plaintiff in the group proceeding, the representation relied upon by Mr Tomes

40 *Hoysted v Federal Commissioner of Taxation* (1925) 37 CLR 290 at 299; [1926] AC 155 at 165.

41 *Hoysted v Federal Commissioner of Taxation* (1925) 37 CLR 290 at 299; [1926] AC 155 at 166.

42 *Woodcroft-Brown v Timbercorp Securities Ltd* (2011) 253 FLR 240 at 252 [45].

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does not stand alone; it is said to have been made in the context of other representations which were entirely personal to him.

65 Moreover, although, as has been observed, it appears that the solicitors did not bring the representations alleged by Mr Tomes to the attention of the Court during the group proceeding, it may be inferred from the fact that Judd J made an order postponing the determination of the counterclaim in the group proceeding that his Honour was not disposed to determine any claim other than those in the group proceeding.

66 Further, Mr Tomes would have been exposed to a liability for costs of the determination of his individual claim with the group proceeding⁴³. In *Anshun*⁴⁴ the expense of litigating was given as an example of a circumstance which might justify a person not raising an issue in earlier proceedings.

67 The appellant's submission that the respondents should have opted out of the group proceeding⁴⁵ takes its case no further. It is necessarily based upon the notion that the lead plaintiff in the group proceeding represented the respondents with respect to their unpleaded claims as well as those common claims which were the subject of that proceeding. This contention has been dealt with above. There was no need for the respondents to opt out in order to preserve their position with respect to the claims now the subject of the defences.

68 More generally, the appellant's submissions respecting the control that the respondents had in relation to the group proceeding appear to be based upon a misapprehension of the ability of a group member to have his or her individual claim decided and, more particularly, a misunderstanding of the case management powers given by Pt 4A to the Court to determine what is to be heard and when. Those powers are considerable. They include the power to decide whether the proceeding continues as a group proceeding⁴⁶; whether the lead plaintiff needs to be substituted to provide better representation⁴⁷; as to the determination of questions which remain after the resolution of the common

43 Pursuant to *Supreme Court Act* 1986 (Vic), s 33R.

44 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 603.

45 Pursuant to *Supreme Court Act* 1986 (Vic), s 33J.

46 *Supreme Court Act* 1986 (Vic), s 33N.

47 *Supreme Court Act* 1986 (Vic), s 33T.

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questions⁴⁸; and, most relevantly, whether the claim of a group member can be determined in the group proceeding⁴⁹. These powers have further relevance with respect to the other limb of the appellant's argument, that the defences are an abuse of process.

Abuse of process?

69 The appellant submits that the respondents' defences may constitute an abuse of process even if the group proceeding does not give rise to an estoppel. So much was recognised in *Tomlinson*⁵⁰, where it was pointed out that 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.

70 The damage to the administration of justice which the appellant identifies is said to lie in the Supreme Court being denied the opportunity, in the group proceeding, of determining how best to manage the issues raised in the defences in the context of all the common claims. The appellant points to what was said by the ALRC with respect to the then proposed federal legislation for representative proceedings⁵¹, namely that it was intended to facilitate claims and strengthen case management powers, given the burdens that complex litigation can put on the judicial system and the parties. If all group members have an unfettered right to pursue their claims individually, the goal of judicial economy would not be fulfilled⁵².

71 The latter reference is taken out of context. The ALRC was not suggesting that a group member should not be permitted to pursue an individual claim outside the group proceeding. Part 4A itself acknowledges that this will

48 *Supreme Court Act* 1986 (Vic), s 33Q.

49 *Supreme Court Act* 1986 (Vic), s 33R.

50 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 89 ALJR 750 at 757-758 [25]-[26]; 323 ALR 1 at 8-9.

51 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46, (1988) at 70 [157], 131 [320], 137 [333].

52 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46, (1988) at 79-80 [185].

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occur. Rather it was saying that where claims were such that they could be determined as a group, they should be. That will arise where there is a common question or issue.

72 Consistently with the issues of efficiency and better use of court resources, Pt 4A provides the Court with overall management of a group proceeding, with powers to determine how and when individual claims might be heard either in connection with, or separately from, the group proceeding⁵³. These powers are to be exercised consistently with the aims of Pt 4A, as no doubt they were when Judd J postponed the counterclaim to after the determination of the claims in the group proceeding. His Honour was no doubt aware of the possibility, if not the fact, that there were other claims, as is evident from the discussions reported from the early directions hearing. But there is nothing to suggest that their determination was considered by his Honour to be necessary to the management and determination of the group proceeding. To the contrary, it may reasonably be inferred that they were not.

73 At most it may be said that the respondents' claims were not brought to the attention of the Court. It could not be said that the failure to do so affected the case management decisions open to the Court. There is no reason to suppose that knowledge of the respondents' claims would have altered the course that the Court took. In these circumstances, raising the defences in these proceedings can in no way be said to amount to an abuse of process. To the contrary, the preclusion of the respondents' defences to the appellant's claims would be unwarranted in principle and therefore unjust.

Orders

74 The appeals should be dismissed with costs.

53 *Supreme Court Act* 1986 (Vic), ss 33Q, 33R, 33S.

75 GORDON J. The appellant in both appeals, Timbercorp Finance Pty Ltd (in liq), was part of the Timbercorp Group of companies, which invested in agribusiness managed investment schemes on behalf of some 18,500 investors. Many, but not all, investors in the schemes entered into loan agreements to finance their investments. Each respondent in each appeal was an investor and a party to a loan agreement.

76 The respondents were group members in a group proceeding commenced under Pt 4A of the *Supreme Court Act* 1986 (Vic) ("the Act") against several defendants, including the appellant, in relation to the schemes. The group proceeding was unsuccessful. The appellant then commenced recovery proceedings against each of the respondents, alleging that the respondents were in default of their loan agreements.

77 Are the respondents precluded from relying on certain defences in the recovery proceedings on the basis that they did not raise the issues in the group proceeding or opt out of the group proceeding, either because (1) an "*Anshun* estoppel"⁵⁴ arises against them; or (2) relying on the defences is an abuse of process?

78 Neither basis precludes any of the respondents from raising the defences they propose to raise. Each appeal should be dismissed with costs.

Facts

Mr and Mrs Collins

79 On 12 June 2008, the respondents in M98 of 2016, Mr and Mrs Collins, applied to the appellant for a loan for the acquisition of 10 grove lots in the "2008 Olive Early Project" ("the 2008 project"), a registered managed investment scheme operated by Timbercorp Securities Ltd (in liq), another member of the Timbercorp Group. On 15 June 2008, Mr and Mrs Collins were advised that their applications for the lots and for finance had been accepted.

80 The appellant alleges that the loan was paid to Trust Company of Australia Ltd as custodian and agent for Timbercorp Securities and that thereby the appellant made a loan to Mr and Mrs Collins in accordance with the terms of the loan agreement.

54 After *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; [1981] HCA 45.

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Mr Tomes

81 On or about 8 May 2008, the respondent in M101 of 2016, Mr Tomes, applied to the appellant for a loan to fund part of the cost of his initial investment in the 2008 project as well as another registered managed investment scheme operated by Timbercorp Securities, the "2007 Almond Post June Project". On or about 31 October 2008, Mr Tomes applied to the appellant for a further loan to fund the payment of amounts relating to his investment in the two projects.

82 The appellant alleges that the loan amounts were paid under two separate loan agreements – the first amount being paid to the custodian and agent for Timbercorp Securities and the second to Timbercorp Securities – and that thereby the appellant made loans to Mr Tomes in accordance with the terms of those agreements.

Collapse of the Timbercorp Group and the subsequent group proceeding

83 In April 2009, the companies comprising the Timbercorp Group went into administration and then, in June 2009, were put into liquidation. At that time, the appellant's loan book totalled \$477.8 million comprising over 14,500 outstanding loans to over 7,500 borrowers, including the loans to the respondents.

84 On 27 October 2009, a proceeding was commenced in the Supreme Court of Victoria under Pt 4A of the Act by Mr Allen Rodney Woodcroft-Brown ("the lead plaintiff") as plaintiff on his own behalf and on behalf of group members against Timbercorp Securities, the appellant and various directors of those companies ("the group proceeding").

85 The group members were defined as all persons who:

"(a) at any time during the period between 6 February 2007 and 23 April 2009 (**the relevant period**) acquired and/or held an interest in a managed investment scheme of which [Timbercorp Securities] was the responsible entity (**the schemes**) (**scheme member**);

...

(b) suffered loss or damage by the conduct of the defendants alleged herein; and

(c) are not:

(i) defendants to the [group] proceeding;

(ii) parents, siblings, spouses or children of defendants;

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- (iii) bodies corporate of which a defendant was an officer or majority shareholder (**defendant's company**) at any time during the relevant period; or
- (iv) beneficiaries of any trust, the trustee of which is or at any time during the relevant period was a defendant or defendant's company". (emphasis in original)

86 The respondents did not opt out of the group proceeding.

87 Against the appellant, the lead plaintiff and each group member sought, amongst other things, damages, and orders declaring that the lead plaintiff and group members were not liable for fees or costs in connection with any of the schemes from February 2007, and that any loans entered into with the appellant in this period as a result of a breach of statutory duty be declared void or otherwise unenforceable.

88 Consistent with Pt 4A of the Act, common questions of fact or law were identified. Broadly, they were divided into two categories: "Alleged non-disclosure in relation to financial structure and operations of Timbercorp Group" and "Duties and alleged breaches".

89 The appellant filed a counterclaim against the lead plaintiff and his wife in the group proceeding, which included allegations about the terms of the particular loan agreement, the advance of funds and the defaults of the lead plaintiff and his wife. By way of defence to the counterclaim, the lead plaintiff and his wife denied they had any liability to repay any of the moneys allegedly advanced to them.

90 Judd J ordered that the counterclaim be tried separately from the group proceeding, after the determination of the common questions in the group proceeding. That order was not the subject of appeal. It is important to recognise that the counterclaim was brought against the lead plaintiff and his wife personally and not in any representative capacity. It follows, of course, that there was no claim made in that counterclaim against any other group member.

91 The group proceeding was dismissed by Judd J⁵⁵. After delivering reasons for judgment, Judd J answered the common questions in accordance with his reasons. An appeal to the Court of Appeal of the Supreme Court of Victoria was dismissed⁵⁶.

55 *Woodcroft-Brown v Timbercorp Securities Ltd* (2011) 253 FLR 240.

56 *Woodcroft-Brown v Timbercorp Securities Ltd (in liq)* (2013) 96 ACSR 307.

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92 The counterclaim and the defences raised in response to it remain unresolved.

The recovery proceedings

93 After the conclusion of the group proceeding, the appellant commenced separate proceedings against Mr and Mrs Collins and against Mr Tomes, in which the appellant alleges that they defaulted under their respective loan agreements. The appellant seeks recovery of outstanding principal and interest on the moneys it lent to them ("the recovery proceedings").

94 The respondents sought to defend the recovery proceedings on various bases. For Mr and Mrs Collins, those bases included that no loan had been advanced to them and that they did not acquire an interest in the 2008 project. For Mr Tomes, those bases included that it had been represented to him that, in the event of default under a loan agreement, the appellant's only recourse would be against his investment in the associated scheme.

95 In the recovery proceedings, the appellant pleaded that the respondents were precluded from relying on those defences because (1) each was a group member in the group proceeding and was therefore subject to an *Anshun* estoppel; or (2) relying on those defences was an abuse of process. In substance, the appellant contended that those principles were engaged because the respondents had not opted out of the group proceeding and had not sought to have their individual claims "case managed" in the group proceeding.

96 The question of whether the respondents were precluded from relying on those defences in the recovery proceedings was referred to Robson J for determination as a separate question under r 47.04 of the Supreme Court (General Civil Procedure) Rules 2005 (Vic). Robson J concluded that the respondents were not precluded from relying on the defences they raised⁵⁷. The Court of Appeal (Warren CJ, Santamaria and McLeish JJA) granted leave to the respondents to appeal against the orders of Robson J but dismissed the appeals⁵⁸.

Anshun estoppel and the issue

97 *Anshun* estoppel is an extended form of "cause of action estoppel" and "issue estoppel" that "operates to preclude 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

57 *Timbercorp Finance Pty Ltd (in liq) v Collins* [2015] VSC 461.

58 *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] VSCA 128.

that first proceeding for the claim not to have been made or the issue not to have been raised in that proceeding"⁵⁹.

98 The first proceeding was the group proceeding. Was it "unreasonable", in the context of the group proceeding, commenced under Pt 4A of the Act, for the respondents to not have raised the issues they now seek to raise in the recovery proceedings? Once the provisions of Pt 4A of the Act are examined, it is clear that, in the circumstances of these cases, the answer must be "no".

99 The appellant contends to the contrary in two different ways. First, the appellant contends that the group members are privies in interest of the lead plaintiff, including with respect to their individual claims, and that it was unreasonable for the lead plaintiff to not raise the issues in the group proceeding on behalf of the respondents. If the lead plaintiff, in his representative capacity, tried to raise the issues now, he would be estopped, and therefore the respondents should also be estopped. The second way is more direct – that it was unreasonable for the respondents themselves to have not either raised the issues in the context of the group proceeding, or opted out of that proceeding.

100 Either way, put simply, the appellant's argument starts at the wrong point. The appellant examines the nature of the group proceeding and its connection with the recovery proceedings and only then, once that connection is supposedly established, does the appellant engage with the statutory scheme. That approach fails to recognise that the nature of the group proceeding is, at a fundamental level, shaped by Pt 4A of the Act and examination of the proceeding's nature, and any subsequent analysis, cannot be undertaken in isolation from that statutory scheme.

Part 4A of the Act

101 The appellant accepts that the statutory context is relevant to the question of unreasonableness. Indeed, its primary submission is that it is determinative of the inquiry. But the provisions of Pt 4A of the Act do not support the appellant's contentions; they are contrary to them.

102 In Pt 4A of the Act, a "group proceeding" means a proceeding commenced under that Part⁶⁰. A "plaintiff" is relevantly a "person who commences a group proceeding *as a representative party*", and a "group

⁵⁹ *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 89 ALJR 750 at 756-757 [22]; 323 ALR 1 at 7-8; [2015] HCA 28 (footnotes omitted). See also *Anshun* (1981) 147 CLR 589 at 598, 602-603.

⁶⁰ s 33A of the Act.

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member" is a "member of a group of persons *on whose behalf* a group proceeding has been commenced"⁶¹ (emphasis added).

103 Section 33C sets out the conditions that must be satisfied before a group proceeding may be commenced. First, there must be seven or more persons who have claims against the same person⁶². Second, the claims of all those persons must be "in respect of, or arise out of, the same, similar or related circumstances"⁶³. And third, those claims must "give rise to a *substantial common question of law or fact*"⁶⁴ (emphasis added). If those conditions are met, then s 33C(1) goes on to provide, importantly, that "a proceeding may be commenced by one or more of those persons as representing some or all of them". Put simply, the effect of those conditions is that the proceeding can only be representative to the extent of the commonality.

104 Indeed, Pt 4A expressly contemplates and provides for the individuality of claims within a group proceeding. For example, a group proceeding may be commenced "whether or not the relief sought ... is the same for each person represented"⁶⁵ and whether or not the proceeding "is concerned with separate contracts or transactions between the defendant and individual group members"⁶⁶, or "involves separate acts or omissions of the defendant done or omitted to be done in relation to individual group members"⁶⁷.

105 These conditions in s 33C are central to the scheme set out in Pt 4A. The purpose of commencing a group proceeding is so that a substantial common question of law or fact can be decided for at least seven persons whose claims involve the same, similar or related circumstances. Section 33C expressly recognises that each group member may, as an individual, have different claims against the defendant, but the foundation of the group proceeding is that they all have an interest in the resolution of a substantial common question of law or fact.

61 s 33A of the Act.

62 s 33C(1)(a) of the Act.

63 s 33C(1)(b) of the Act.

64 s 33C(1)(c) of the Act.

65 s 33C(2)(a)(iv) of the Act.

66 s 33C(2)(b)(i) of the Act.

67 s 33C(2)(b)(ii) of the Act.

106 That the focus of the group proceeding is on answering a common question of law or fact and is representative is reinforced by other provisions in Pt 4A. Section 33D(2) provides that if a person has commenced a proceeding on their own behalf as well as on behalf of other persons who satisfy s 33C(1), that person retains a sufficient interest to continue the proceeding (and bring an appeal from a judgment in that proceeding) "even though the person ceases to have a claim against the defendant". Section 33E provides that the consent of a person to be a group member is not required.

107 What is required is that the essential elements stipulated in s 33C are satisfied and, if they are, then s 33H(2) of the Act requires that the following three connecting limbs be indorsed on the writ commencing the group proceeding – the description or identification of the group members; the specification of the nature of the claims made on behalf of the group members and the relief claimed; and, finally, the specification of the questions of law or fact *common* to the claims of the group members. These are not only the minimum requirements but also the outer limit of the connection between the group members.

Group proceedings may not resolve all claims

108 A judgment given in a group proceeding binds all group members who are described or otherwise identified in the judgment as being affected by the judgment⁶⁸. But that judgment will not necessarily resolve all of the individual claims of each group member. In addition to s 33C, other provisions in Pt 4A recognise that there may be differences between the circumstances of individual group members and that, as a consequence, a group proceeding may not resolve all of the individual claims of each group member.

109 Section 33Q – titled "Where not all questions common" – addresses the situation where the determination of the common questions "will not finally determine the claims of all group members". In that situation, "the Court *may* give directions in relation to the determination of the remaining questions" (emphasis added). Practically, depending on whether and how the court exercises the power, the group proceeding may proceed to judgment in relation to some or all of the common questions, but the claims of group members beyond the scope of those questions may remain undetermined⁶⁹.

110 Further, s 33S provides that if a question cannot properly or conveniently be dealt with within the group proceeding, the court "may give directions for the commencement and conduct of *another proceeding*, whether or not a group

⁶⁸ s 33ZB of the Act.

⁶⁹ See also s 33ZE(2) of the Act.

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proceeding" (emphasis added). This provision recognises that another proceeding may be commenced that has some connection with claims raised in the group proceeding.

Respondents' conduct not unreasonable

111 It is within that statutory context that the question of unreasonableness for the purposes of *Anshun* estoppel falls to be considered. Whether an *Anshun* estoppel arises depends on the particular circumstances of the case⁷⁰.

112 Although it was put in the alternative to the privies contention during oral argument, it is convenient first to deal with the contention that it was unreasonable for the respondents themselves not to raise the issues in the group proceeding, or opt out of that proceeding.

113 The underlying premise of that contention is that, if a group member does not either opt out of a group proceeding or seek directions in relation to their individual claim, then it will automatically be "unreasonable in the context of that first proceeding" for them not to have done so, such that an *Anshun* estoppel will arise.

114 That premise is wrong. It cannot account for the particular circumstances of each case and instead urges a mechanical approach to the application of *Anshun* estoppel in group proceedings⁷¹.

115 Relevant circumstances in these cases include the scope of the group proceeding as determined by the definition of the group members and the common questions; the role of group members in a group proceeding; the counterclaim and its management; and the nature of the opt out procedure. None of those circumstances is determinative, but all of them point away from an *Anshun* estoppel arising against the respondents.

Scope of the group proceeding

116 One important circumstance that may weigh in favour of an *Anshun* estoppel arising is whether raising an issue in the second proceeding (here, the recovery proceedings) would create a risk of there being inconsistent judgments on that issue. In the courts below, the appellant did not contend that there was such a risk.

70 See *Anshun* (1981) 147 CLR 589 at 603; *Gibbs v Kinna* [1999] 2 VR 19 at 26-27 [23], 28 [28].

71 cf *Champerslife Pty Ltd v Manojlovski* (2010) 75 NSWLR 245 at 247 [3]-[4], 255 [52], 262 [89].

117 The appellant's position changed in this Court. However, that change was
misguided. It was based on a misunderstanding of the scope of the group
proceeding.

118 Central to both of the appellant's contentions regarding *Anshun* estoppel
was the supposed closeness of the connection between the group proceeding and
the relevant recovery proceeding, as identified by reference to the "factual
matrix" that generated the controversy underlying the group proceeding.
The appellant submitted that the factual matrix included the making of loans
from the appellant to the lead plaintiff and group members to fund their
investments in schemes managed by Timbercorp Securities, and the use of those
funds by Timbercorp Securities and the appellant in the operations of the
Timbercorp Group.

119 That submission pays insufficient attention to the definition of the group
members for the purpose of the group proceeding. Broadly speaking, that
definition extended to those persons who acquired or held an interest in the
relevant schemes during a particular period of time and incurred a liability for
management fees as a scheme member. Critically, those persons may *or may not*
have also had loan agreements with the appellant in relation to their investment
in the schemes. But that fact is irrelevant to whether they were group members.
It is therefore unsurprising that the common questions in the group proceeding
did not raise any issues about the validity or enforceability of the loans arising
out of the lending process or the advancement of moneys under the loans.
Rather, as Robson J noted, the loan agreements were challenged "merely as a
consequence of the investor entering into the schemes and, in particular, being
induced to do so allegedly as a result of misleading information or of the
investors not being properly informed"⁷².

120 For the same reason, it is also wrong to suggest, as the appellant did in
relation to Mr Tomes, that 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.

121 Also in relation to Mr Tomes, the appellant submitted that the factual
matrix 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.
However, there is a distinction between representations made personally to
individuals such as Mr Tomes and those representations made in the product
disclosure statements. That distinction is glossed over by the appellant. But the
distinction is important, as it goes to the substance of what was in issue in the
group proceeding. Critically, the "case was confined to defects in the Product

⁷² *Timbercorp Finance Pty Ltd (in liq) v Collins* [2015] VSC 461 at [6].

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Disclosure Statements and whether they omitted information or contained misleading information"⁷³.

122 By ignoring the essential details of the scope of the group proceeding, the appellant masks the true scope of that proceeding and makes it appear to be much wider than it was in fact. This, in turn, distorts the unreasonableness analysis undertaken by the appellant. In this context, it must be recalled that a group proceeding may be commenced whether or not the proceeding involves separate acts or omissions of the defendant done or omitted to be done in relation to individual group members⁷⁴. The group proceeding is only representative to the extent of the commonality⁷⁵.

123 In truth, these matters point away from the existence of any unreasonableness on the part of the respondents. They go to the heart of the scope of the group proceeding, as defined by reference to s 33C. It may be accepted that the respondents' claims are in respect of, or arise out of, similar or related circumstances. But as explained above, the Act does not envisage that all of those claims will be resolved by answering the common questions. Rather, s 33C acknowledges that the answers to the common questions might assist in the resolution of other claims of group members in later proceedings.

No active role for respondents in group proceeding

124 There is no basis to say that a group member must avail themselves of the case management powers under s 33Q or s 33S to litigate any individual claims. The appellant submits that those 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 a judgment in the group proceeding. That submission mischaracterises the nature of those powers and their role in the statutory scheme.

125 The first observation is that, as noted above, the consent of a person to be a group member is not required⁷⁶. A person may become a group member simply because they match the description of group members included on the indorsement on the writ that commenced the group proceeding. In some circumstances⁷⁷, group members may remain "perfectly ignorant of the

73 *Timbercorp Finance Pty Ltd (in liq) v Collins* [2015] VSC 461 at [7].

74 s 33C(2)(b)(ii) of the Act.

75 See [102]-[110] above.

76 s 33E of the Act.

77 See ss 33X(2) and 33Y(4) of the Act.

proceedings, and of what is really going on"⁷⁸. That a group member's consent is not needed is reflected in s 33ZD, which provides that, except in limited circumstances, only the lead plaintiff or the defendant to the group proceeding may be ordered to pay costs.

126 There are few provisions in Pt 4A that contemplate an active role for, or give control to, group members in a group proceeding. Section 33T is one of them. Section 33T(1) provides that if, "*on an application* by a group member, it appears to the Court that the plaintiff is not able adequately to represent the interests of the group members, the Court may substitute another group member as plaintiff and may make such other orders as it thinks fit" (emphasis added). It contemplates a group member making an application in the context of a group proceeding⁷⁹. Words to that effect are conspicuously absent from ss 33Q and 33S.

127 Section 33Q is enlivened based on what "appears to the Court". Here, it is also worth noting s 33R(1). Under that provision, in giving directions under s 33Q, the "Court may permit an individual group member to take part in the proceeding for the purpose of determining a question that relates only to the claim of that member"⁸⁰. Section 33R clearly contemplates a role for a group member in a group proceeding in some circumstances. But s 33R supplements s 33Q, which makes no mention of an application being made by a group member.

128 Similarly, s 33S contemplates the court making a judgment about whether a question can be determined "properly or conveniently".

129 None of the above should be taken to suggest that the Act prevents a group member from seeking directions; rather, the simple point is that the Act does not oblige a group member to seek directions in relation to each and every issue that relates to their specific claim, nor is there any indication that the Act expects them to do so.

130 Section 33T and like provisions can also be contrasted against other provisions in Pt 4A, which explicitly contemplate applications being made,

⁷⁸ *Powell v Wright* (1844) 7 Beav 444 at 446-447 [49 ER 1137 at 1138] quoted in *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 31 [39]; [2002] HCA 27.

⁷⁹ See also ss 33J(3), (6) and 33W(3) of the Act.

⁸⁰ See also ss 33ZC(4) and 33ZD(b) of the Act.

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variously, by the lead plaintiff, the defendant, or a party to the group proceeding⁸¹.

131 The appellant challenges the Court of Appeal's conclusion that the group members "had no control over the conduct by the [lead] plaintiff of the group proceeding"⁸². But that conclusion was correct: except in limited circumstances, the statutory scheme does not contemplate group members having an active role in, or control over, *the conduct by the lead plaintiff* of a group proceeding. Having no active role in, or control over, the conduct by the lead plaintiff of a group proceeding is distinct from what Gaudron, Gummow and Hayne JJ were referring to in *Mobil Oil Australia Pty Ltd v Victoria* when their Honours explained that it was inaccurate to say that group members have no control "over their part in the proceeding"⁸³. A group member does have control over *their part* in a group proceeding; if they do not wish to be a part of it, they can opt out in accordance with s 33J.

132 A group proceeding under Pt 4A is conducted by the lead plaintiff on behalf of the group members. Aside from the few limited exceptions considered above, Pt 4A is not designed to encourage active participation by group members in the course of a group proceeding. It is therefore difficult to accept the contention that the respondents' failure to take an active role points in favour of their conduct being unreasonable.

Counterclaim and its management

133 The counterclaim was addressed earlier in these reasons. It was brought against the lead plaintiff and his wife personally, and not in any representative capacity, and there was no claim made against any other group member within the group proceeding. Its existence and the manner in which Judd J managed it was and remains important. It suggests that Judd J was inclined to exercise the discretions conferred on him by ss 33Q and 33S in a manner that would have resulted in the position of the parties being similar to, if not the same as, what it is now. That is, the individual claims would have been left to be resolved after the resolution of the common questions. That approach accords with modern practice⁸⁴. To the extent that the exercise of the court's discretion feeds into the

81 See, eg, ss 33K(1), 33KA(1), 33M(b), 33N(1), 33ZA(5), 33ZF, 33ZJ(1) of the Act.

82 See *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] VSCA 128 at [213].

83 (2002) 211 CLR 1 at 34 [50].

84 See *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 112 ACSR 584 at 629 [214] citing *Bright v Femcare Ltd* (2002) 195 ALR 574 at 580 [18]. See also *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2009] FCAFC 26 at [7].

unreasonableness analysis⁸⁵, the above facts point away from any conclusion that the respondents' conduct in not raising the issues in the group proceeding was unreasonable.

134 Similarly, while s 33Q(2) contemplates that directions may be given to establish a "sub-group" consisting of those group members who have questions common to them but not to all of the group members, there is no requirement that a sub-group be established. Significantly, the question of sub-groups was the subject of a ruling made by Judd J on 30 July 2010. After recording the appellant's contention that the group proceeding was defensive in nature, as it was an attempt by group members indebted to the appellant to resist payment of outstanding loans, the ruling records that the appellant unsuccessfully sought the establishment of four sub-groups so that any trial would effectively dispose of most, if not all, issues. The orders made in consequence of that ruling were not the subject of appeal. Again, this points away from a conclusion that the respondents' conduct was unreasonable.

Opt out procedure

135 Section 33J of the Act provides that a group member may opt out of the group proceeding by notice in writing, so long as they do so before the date fixed by the court before which a group member may opt out.

136 The appellant's reliance on the right of a group member to opt out of a group proceeding is misplaced. A group member may wish to remain in a group proceeding to obtain the benefit of a judgment that resolves the common question or questions in issue. There is nothing in the express terms of s 33J or inherent in the opt out procedure that suggests that, by not opting out, a group member is signing away their ability to bring any proceedings that are in some way connected to the group proceeding. As the Court of Appeal recognised, if the appellant's understanding of the opt out provisions were correct, the effect would be to "homogenise" all claims of all group members involved in a group proceeding⁸⁶. Not only would that consequence be dramatic, it would also be expressly at odds with ss 33C(2)(b), 33Q and 33S. As with each of the other circumstances identified, this circumstance points away from the respondents' conduct being unreasonable.

137 The appellant's contention that it was unreasonable for the respondents themselves not to raise the issues in the group proceeding, or opt out of that proceeding, must therefore fail.

85 See *Ling v Commonwealth* (1996) 68 FCR 180 at 193-194; *Meriton Apartments Pty Ltd v Industrial Court (NSW)* (2009) 263 ALR 556 at 558 [4], 567 [78].

86 *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] VSCA 128 at [185].

Privies

138 The appellant's contention that group members are privies in interest of the lead plaintiff in a group proceeding does not assist the appellant's case. The crux of this contention was that the lead plaintiff should have himself raised the relevant issues in the group proceeding on behalf of the respondents.

139 In *Tomlinson v Ramsey Food Processing Pty Ltd*, French CJ, Bell, Gageler and Keane JJ recognised that *Anshun* estoppel "has the potential to preclude ... the raising of an issue of fact or law, between parties to a proceeding or their privies"⁸⁷ and that "representation by a representative party in a modern class action" is a form of representation that binds those represented to estoppels⁸⁸, including *Anshun* estoppel.

140 As a general proposition that is correct. The question is: to what extent are the legal interests of a group member represented by the lead plaintiff? And that again requires close consideration of the statutory scheme.

141 As outlined above, under Pt 4A group proceedings are a procedure that may be used to resolve a "substantial common question of law or fact". A lead plaintiff commences such a proceeding "on behalf of" group members so that the substantial common question or questions can be resolved. However, the legal interests of a group member and the lead plaintiff only align to the extent that each has an interest in the resolution of the common question or questions.

142 Once that is understood, it is apparent that the appellant's contention that the respondents should be precluded from raising the issues because the lead plaintiff would be so precluded is misconceived. It is contrary to the statutory scheme and, in particular, impermissibly seeks to go beyond the outer limit of the connection between the group members created by s 33C for the purposes of the group proceeding. It assumes, wrongly, that the group members are privies in interest of the lead plaintiff *for all purposes*, including in relation to their individual claims. That is not the case.

143 The effect of the statutory scheme is that the respondents "did not have an opportunity to exercise control over the presentation of evidence and the making of arguments in the earlier proceeding" and, due to the nature and scope of the group proceeding, the lead plaintiff could not have been expected to take into account the possibility that an *Anshun* estoppel may arise in a later proceeding to

⁸⁷ (2015) 89 ALJR 750 at 757 [23]; 323 ALR 1 at 8.

⁸⁸ (2015) 89 ALJR 750 at 760-761 [40]; 323 ALR 1 at 12 citing *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384 at 399-406.

the detriment of the respondents in relation to their individual claims⁸⁹. It would be "quite unjust" for an *Anshun* estoppel to arise in those circumstances⁹⁰.

144 Accordingly, the appellant's contention based on the premise that the group members are privies in interest of the lead plaintiff must fail.

Abuse of process

145 The appellant's abuse of process claim fails for similar reasons. The raising of the defences cannot be described as an abuse of process because there is nothing in either the statutory scheme or the nature of the group proceeding that suggests the respondents should have raised their individual claims in the context of the group proceeding. To the contrary, Pt 4A recognises that individual claims may need to be resolved in separate proceedings. In the present circumstances, raising the defences in separate proceedings is not an abuse of process.

Orders

146 Each appeal should be dismissed with costs.

⁸⁹ *Tomlinson* (2015) 89 ALJR 750 at 760 [39]; 323 ALR 1 at 12.

⁹⁰ See *Tomlinson* (2015) 89 ALJR 750 at 760 [39]; 323 ALR 1 at 12.

