SHORT PARTICULARS OF CASES

AUGUST 2016

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BLANK v COMMISSIONER OF TAXATION (S144/2016)

Court appealed from: Full Court of the Federal Court of Australia
[2015] FCAFC 154

Date of judgment: 29 October 2015

Special leave granted: 16 May 2016

This matter principally concerns the correct characterisation, for tax purposes, of payments in excess of US$160 million ("the Amount") made by Glencore International ("GI") to the Appellant in the 2007 to 2010 income years. These payments were made following the Appellant's resignation on 31 December 2006 from Glencore Australia Pty Limited, a wholly owned subsidiary of GI.

The Amount was calculated pursuant to the Appellant's participation in a series of profit sharing arrangements made during the course of his employment with the Glencore Group of companies. At issue is whether the Amount is to be assessable as ordinary income pursuant to s 6-5 of the *Income Tax Assessment Act* 1997 (Cth) ("ITAA 1997") or s 26(e) of the *Income Tax Assessment Act* 1936 ("ITAA 1936"). Alternatively, is it to be characterised as a capital gain following the execution of a Declaration of Assignment and General Release by the Appellant on 15 March 2007?

The primary judge, Justice Edmonds, held that the payments made to the Appellant in the income years 2007 to 2010 were assessable as ordinary income. His Honour also dismissed the Appellant's application to reopen his case to argue that s 23AG of the ITAA 1936 applied to exempt part of the Amount from tax.

Upon appeal, the Appellant's main challenge was to Justice Edmonds' finding that the payments made by GI were assessable as ordinary income as a reward for services derived when received. He further disputed his Honour's decision that s 23AG of the ITAA 1936 could not apply. In addition the Appellant contended that leave should have been granted to him to re-open his case, with the result being that a substantial part of the payments (if otherwise assessable) should have been held to be exempt from tax under s 23AG(1). For its part, the Respondent filed both a notice of cross appeal and a notice of contention.

On 29 October 2015 a majority of the Full Federal Court (Kenny & Robertson JJ, Pagone J dissenting) agreed with Justice Edmonds' finding that the payments made by GI to the Appellant were assessable as ordinary income. Having come to this conclusion, the majority then dismissed the Respondent's notices of cross appeal and contention. Justice Pagone however held that the instalments were not assessable as ordinary income, and that the Appellant was instead assessable for a capital gain.

The grounds of appeal include:

- The [Full] Court erred in holding that the payments made by GI to the Appellant were assessable as ordinary income as a reward for services and were derived when received by the Appellant.

On 6 June 2016 the Respondent filed a notice of cross-appeal, the grounds of which include:

- The Full Court erred in concluding that there was no derivation by the Appellant of payments by GI in the 2007 income year pursuant to s 6-5(4) of the ITAA 1997: see [2015] FCAFC 154 at [95] per Kenny and Robinson JJ and paragraph [146] per Pagone J.

On 6 June 2016 the Respondent also filed a notice of contention, the grounds of which include:

- That the payments from GI received by the Appellant, or dealt with at his direction, were income according to ordinary concepts pursuant to s 6-5 of the ITAA 1997 in accordance with the principles described in *Federal Commissioner of Taxation v Myer Emporium Ltd* (1986-1987) 163 CLR 199.

BYWATER INVESTMENTS LIMITED & ORS v COMMISSIONER OF TAXATION (S134/2016);
HUA WANG BANK BERHAD v COMMISSIONER OF TAXATION (S135/2016)

Court appealed from: Full Court of the Federal Court of Australia
[2015] FCAFC 176

Date of judgment: 11 December 2015

Special leave granted: 5 May 2016

Bywater Investments Ltd ("BI"), Chemical Trustee Ltd ("CT") and Derrin Brothers Properties Ltd ("DBP") are companies that were each incorporated abroad (BI in the Bahamas, CT and DBP in the United Kingdom). Their ultimate parent companies are two Cayman Islands companies, one of which is JA Investments Ltd ("JAI"). The sole shareholder of both Cayman Islands companies is Mr Peter Borgas, who resides in Switzerland. Mr Borgas has also been a director of BI, CT and DBP since 1998.

Hua Wang Bank Berhad ("HWB") is a company incorporated in Samoa. A bearer debenture issued by HWB that suspends the voting rights of the company's shareholders is held by JAI.

BI, CT, DBP and HWB (together, "the appellants") have made large profits from trading in shares of companies listed on the Australian Stock Exchange. The respondent ("the Commissioner") considered that the appellants were all controlled by Mr Vanda Gould, a Sydney-based accountant. The Commissioner therefore deemed the appellants to be "residents of Australia" within the meaning of s 6(1) of the *Income Tax Assessment Act* 1936 (Cth) ("the Act"), on the basis that their central management and control was in Sydney. The Commissioner then assessed each of them for income tax for various years from 2001 to 2007. The combined total of those tax assessments was more than $13 million. After the Commissioner disallowed objections by the appellants to their respective assessments, the appellants all appealed to the Federal Court.

On 12 January 2015 Justice Perram largely dismissed the appellants' appeals. His Honour rejected the contentions of the appellants that they were effectively controlled by Mr Borgas in countries other than Australia. Justice Perram found that Mr Borgas and the appellants' other directors did not, as the appellants had claimed, merely obtain advice from Mr Gould. Rather, they carried out Mr Gould's wishes in a mechanical fashion and it was therefore Mr Gould who truly controlled each company. His Honour accordingly concluded that Sydney was the place of central management and control and that the Commissioner could therefore treat the appellants as Australian residents for tax purposes.

The appellants all appealed. The Full Court of the Federal Court (Robertson, Pagone & Davies JJ) unanimously dismissed both appeals. Their Honours held that Justice Perram had not erred in concluding that each of the appellants had failed to discharge its burden of proof to establish that it was not a resident of Australia for tax purposes.

In appeal S134/2016, the grounds of appeal include:

- The Full Court erred in failing to overturn the Primary Judge's finding that each of the appellants failed to discharge their burden of proof to establish that each was not a resident of Australia for tax purposes.
- On the findings of fact made by the Primary Judge, the Full Court should have held that the appellants' central management and control was in Switzerland or the United Kingdom, that each of the appellants was not a resident of Australia and should have set aside the Primary Judge's conclusion to the contrary.

In appeal S135/2016, the ground of appeal is:

- The Full Court erred by concluding that the Primary Judge identified and applied the correct principles for determining corporate tax residency. In particular:

  i) on the findings of fact made by the Primary Judge, the Full Court erred by concluding that the appellant's central management and control was located in Australia, and that the appellant was a resident of Australia;

  ii) the Full Court endorsed the view of the Primary Judge that the 'real business' of a company is located with the person who is the controlling mind of the company. This is not correct. The correct principle is that the 'real business' of a company is located at the place where the organs of the company exercise legally effective authority; and

  iii) the Full Court adopted an erroneous view of *Esquire Nominees Ltd v Federal Commissioner of Taxation* (1973) 129 CLR 177.

In each appeal the Commissioner has filed a notice of contention, the grounds in which include:

- The Court below was bound to follow the decision of *Esquire Nominees Ltd v Federal Commissioner of Taxation* (1973) 129 CLR 177.

In appeal S135/2016 the Commissioner has also filed a summons, seeking either that the grant of special leave to appeal be revoked or that judgment be given for the Commissioner, on the basis that even if Hua Wang were to succeed on its sole ground of appeal its liability for tax would not change.

COMCARE v MARTIN (S142/2016)

Court appealed from: Full Court of the Federal Court of Australia
[2015] FCAFC 169

Date of judgment: 30 November 2015

Special leave granted: 16 May 2016

This appeal concerns the meaning of the exclusion of the words "a disease, injury or aggravation suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment" from the definition of "injury" in s 5A of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ("the Compensation Act").

Ms Peta Martin worked at the Australian Broadcasting Corporation ("ABC") from January 2010 through to March 2012. Initially she worked in Renmark under the direct supervision of the Station Manager, Mr Bruce Mellett. In this period she was allegedly bullied and harassed by Mr Mellett. From August 2011 Ms Martin worked under the supervision of Ms Carol Raabus. In 2012 the position of "cross media reporter" under Ms Raabus became available. Ms Martin applied for that position and was interviewed by a selection panel which also included Mr Mellett. Upon being notified that she was unsuccessful and that she would have to return to her previous position (under Mr Mellett), Ms Martin apparently "broke down" and was subsequently diagnosed with an "adjustment disorder". She then claimed compensation pursuant to the Compensation Act. There is no dispute between the parties that Ms Martin suffered from an adjustment disorder at the time she made her compensation claim, or that her psychological condition was contributed to, to a significant degree, by her employment with the ABC.

In December 2012 Comcare rejected any liability to pay Ms Martin compensation, but that decision was overturned by the Administrative Appeals Tribunal ("AAT") on 11 August 2014. On 8 January 2015 Justice Griffith however allowed Comcare's subsequent appeal and dismissed Ms Martin's notice of contention. On the question of causation, his Honour found that the alleged bullying and harassment, and Ms Martin's reaction to the prospect of returning to work under Mr Mellett, were linked issues. The AAT was therefore correct to proceed and consider whether the relevant exclusion applied.

The first aspect of the appeal to the Full Federal Court focused on the words "suffered as a result of" in the exclusion in s 5A(1). At issue therefore is whether the AAT erred in deciding that Ms Martin suffered her adjustment disorder "as a result" of the administrative decision not to appoint her to the permanent position of cross media reporter. The second issue however focussed on the words "taken in a reasonable manner" in the exclusion in s 5A(1). It concerns whether the AAT erred in its approach to the question of whether the administrative action surrounding the decision not to appoint Ms Martin to the cross media reporter position was in fact "taken in a reasonable manner".

On 30 November 2011 the Full Federal Court (Siopis & Murphy JJ, Flick J dissenting) allowed Ms Martin's appeal. With respect to the first issue, the majority held that the AAT's decision was inconsistent with its factual findings, that it misconstrued s 5A(1) of the Compensation Act and that it did not take a proper approach to causation. The appeal was therefore allowed on that ground

alone. With respect to the second issue however, the majority agreed with the reasoning of Justice Griffith. Justice Flick on the other hand would have dismissed the appeal, holding that Justice Griffith was correct in his construction of s 5A(1) and its application to the facts of the present case.

The grounds of appeal include:

- The majority of the Court erred in concluding that the causal connection specified in the concluding part of the s 5A(1) of the Compensation Act ("suffered as a result of") is not satisfied even where:

    i) it is accepted that the injury in question was caused by a particular factor (in the Respondent's case, realisation that having missed out on a promotion, she would have to return to work under the supervision of a particular person); and

    ii) that particular factor was, subjectively and objectively, a consequence of the taking of the administrative action in question (in the Respondent's case, the non-promotion).

AINSWORTH & ORS v ALBRECHT & ANOR (B37/2016)

Court appealed from: Court of Appeal, Supreme Court of Queensland
[2015] QCA 220

Date of judgment: 6 November 2015

Special leave granted: 25 May 2016

The Appellants are among the owners of lots in the Viridian Noosa Residences Community Titles Scheme 34034 ("the Scheme"). Each of the 23 lots in the Scheme is a residence with two small balconies. The First Respondent, Mr Martin Albrecht, owns lot 11. Since 2011, Mr Albrecht has sought permission to join the balconies of lot 11 by the construction of a deck. Such a deck would require the use of approximately five square metres of airspace between the balconies ("the Airspace"). The Airspace is a part of the Scheme's common property, which is owned by all lot owners as tenants in common.

At an extraordinary general meeting in August 2012, the Scheme's body corporate ("the Body Corporate") considered a motion by Mr Albrecht ("the Motion") for the Scheme's community management statement to be amended such that Mr Albrecht would have exclusive use of the Airspace. The Motion did not obtain a majority of votes in favour. There was therefore not a resolution by the Body Corporate without dissent, which is required for the disposal of a part of common property by s 159(2)(a)(i) of the *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 (Qld) ("the Regulation").

Mr Albrecht lodged an application for dispute resolution with the Office of the Commissioner for Body Corporate and Community Management, which referred the matter for adjudication under Chapter 6 of the *Body Corporate and Community Management Act* 1997 (Qld) ("the Act"). An adjudicator then received submissions from nine lot owners (including Mr Albrecht), along with six reports by architects. On 2 September 2013 the adjudicator ordered that the Motion was deemed to have been passed, as the opposition to it was unreasonable in the circumstances. The adjudicator also ordered that the Body Corporate arrange for the Scheme's community management statement to be amended accordingly. The adjudicator found that "*[w]hile the deck does not exactly accord with the original design intent … [no] submission has demonstrated that the extension would have any noticeable detrimental impact on the appearance, structure or functionality of the architecture of the scheme.*" She also found that the most substantive objection was the potential impact on an adjacent lot, but that "*any impact will be so slight that it does not constitute a reasonable basis to refuse the proposal.*"

An appeal by the Appellants was allowed by the Queensland Civil and Administrative Tribunal ("QCAT") on 17 October 2014. QCAT (Member P Roney QC) set aside the adjudicator's orders, upon holding that the adjudicator ought to have found that Mr Albrecht had not established that the Body Corporate had acted unreasonably. The Member firstly recognised a tension between the power of veto given to any lot-holder by s 159(2) of the Regulation in respect of a proposed disposition of common property and the power of an adjudicator to make orders under s 276(3) of the Act upon determining that a body corporate had contravened s 94(2) of the Act by having acted unreasonably. He held that the adjudicator had erred when she found that she was "*not satisfied that the*

Body Corporate acted reasonably", since the adjudicator's role was to determine whether the Body Corporate's decision was objectively unreasonable. The adjudicator had in effect reversed the onus of proof, which was properly borne by Mr Albrecht.

The Court of Appeal (Margaret McMurdo P, Morrison JA & Martin J) unanimously allowed an appeal by Mr Albrecht. Their Honours found that the reasons of the adjudicator made clear that she had not reversed the onus of proof. The Court of Appeal held that the adjudicator "*was required to reach her own conclusion after considering all relevant matters.*" Their Honours found that the adjudicator had, after making findings of fact that were open on the material before her, proceeded to be persuaded by Mr Albrecht that the opposition to the Motion was unreasonable in the circumstances. She had not erred as held by QCAT but had carried out her functions as adjudicator in accordance with the relevant provisions of the Act.

The grounds of appeal include:

- The Court of Appeal erred at [82] in formulating the relevant statutory test by stating that the adjudicator was required to reach her own conclusion as to whether the respondent's motion should have been passed by the body corporate, acting reasonably, after considering all relevant matters.
- The Court of Appeal ought to have accepted the decision of the appeal member of QCAT that the function of the adjudicator was to consider whether the opposition to the motion was objectively unreasonable, and not to embark upon the process that she did, and that the adjudicator erred in law in so doing.

Mr Albrecht has filed a notice of contention, the grounds in which include:

- In addition to concluding at [90] and [92] that QCAT erred in finding that the adjudicator reversed the onus of proof, the Court of Appeal ought to have also concluded that, in any event:

  a) onus of proof is an aspect of the law of evidence;

  b) pursuant to s 269(3)(c) of the Act, the adjudicator was not bound by the rules of evidence;

  c) in deciding the application made by Mr Albrecht under the Act, the adjudicator was not bound by any rule to the effect that Mr Albrecht carried an onus of proof;

  d) accordingly, in deciding the application, the adjudicator could not, and did not, make any error of law relating to any onus of proof rule.

CASTLE v THE QUEEN (A24/2015)

Court appealed from: Court of Criminal Appeal, Supreme Court of South Australia [2015] SASCFC 180

Date of judgment: 3 December 2015

Date special leave granted: 25 May 2015

The appellant was found guilty of the murder of her former partner, Adrian McDonald, after a trial by a jury in the Supreme Court of South Australia. On 3 February 2013 McDonald was shot dead at the Big Bucket Car Wash in Parafield. Shortly before he was shot Mr McDonald got into the front passenger seat of a car parked in the grounds of the car wash. CCTV footage from the carwash showed that the appellant was the driver. The prosecution case was that McDonald was shot by the co-accused, Bucca, who had concealed himself in the rear of the car. At trial, the appellant gave evidence that she was the driver of the car but that another man, Wesley Gange, was the shooter and that she did not know that Gange's intention was to kill McDonald or cause him serious harm. Bucca did not give evidence at trial. Gange died before the trial.

The prosecution case included evidence of telecommunication records which showed that between midnight on 2 February 2013 and the shooting of McDonald, Bucca's mobile phone and the appellant's mobile phone moved around the north eastern suburbs of Adelaide and the vicinity of the Big Bucket Car Wash in "lock step with each other" and that Gange's phone was located almost 16 minutes driving time from the Big Bucket Car Wash, at the time of the shooting. The prosecution also led evidence of what was claimed to be an admission, overheard by a witness, made by Bucca to the witness's father, and evidence of an admission made by Bucca to a police officer that he had been with the appellant for 95% of the 24 hour period preceding 3.30pm on 3 February 2013.

The appellant's appeal to the Court of Criminal Appeal was dismissed. Although the Court found that the trial judge erred in not directing the jury that the purported admissions by Bucca were inadmissible against the appellant, they applied the proviso. The Court was satisfied beyond reasonable doubt that the appellant knew that Bucca was in the car and that he was armed and intended to confront the deceased with a gun in order to detain him, and that she foresaw that the gun might be used to kill McDonald, or cause him grievous bodily harm. This was based on evidence which satisfied the Court that Bucca was the shooter, and on the inherent probability that the appellant would either have seen the gun or would have been told about it in the time she spent with Bucca before arriving at the car wash; the appellant's movements towards the boot of the car while waiting for Mr McDonald; her refusal to meet McDonald in his car; and texts sent and phone call made by her after the shooting.

The Court held that the admissions were a minor part of the evidence and were so overwhelmed by the circumstantial evidence against the appellant that it was unlikely they had any influence on the jury's verdict, so there was no substantial miscarriage of justice. The Court applied the proviso and dismissed the appeal.

The grounds of appeal include:

- The trial judge erred in directing the jury that the appellant could be found guilty of murder in accordance with the principle of extended common purpose (or extended joint enterprise) described in *McAuliffe v The Queen* (1995) 183 CLR 108. The principle of extended joint enterprise is not part of the common law of Australia and the appellant could not lawfully be convicted of murder on the basis of that principle.

- The Court of Criminal Appeal erred in holding that although the trial judge failed to direct the jury that evidence of admissions made by the co-accused Bucca could not be used as evidence in the prosecution case against the appellant, the proviso applied.

BUCCA v THE QUEEN (A26/2015)

Court appealed from: Court of Criminal Appeal, Supreme Court of South Australia [2015] SASCFC 180

Date of judgment: 3 December 2015

Date special leave granted: 25 May 2015

The appellant was found guilty of the murder of Adrian McDonald, after a trial by a jury in the Supreme Court of South Australia. On 3 February 2013 McDonald was shot dead at the Big Bucket Car Wash in Parafield. Shortly before he was shot Mr McDonald got into the front passenger seat of a car parked in the grounds of the car wash. The prosecution case was that McDonald was shot by the appellant, who had concealed himself in the rear of the car, which was driven by the co-accused, Tristan Castle. At trial, Castle gave evidence that she was the driver of the car but that another man, Wesley Gange, was the shooter. The appellant did not give evidence. Gange died before the trial.

The prosecution case included evidence of telecommunication records which showed that between midnight on 2 February 2013 and the shooting of McDonald, Castle's mobile phone and the appellant's mobile phone moved around the north eastern suburbs of Adelaide and the vicinity of the Big Bucket Car Wash in "lock step with each other" and that Gange's phone was located almost 16 minutes driving time from the Big Bucket Car Wash at the time of the shooting. The prosecution also led evidence of what was claimed to be an admission, overheard by a witness (Pascoe), made by the appellant to the witness's father, and evidence of an admission made by the appellant to a police officer that he had been with Castle for 95% of the 24 hour period preceding 3.30pm on 3 February 2013.

In his appeal to the Court of Criminal Appeal the appellant submitted, inter alia, that the Judge misdirected the jury as to whether the Pascoe's evidence was evidence of a confession by him that he had shot McDonald. The Court found that this evidence had no evidentiary value as an admission against interest and should not have been left to the jury as a possible admission. They noted that it is the nature of evidence of an admission that it attracts the attention of a jury and may significantly influence their deliberations. In those circumstances it is not possible to apply the proviso, unless the other evidence rendered the appellant's conviction inevitable or so overwhelmed the evidence of the disputed admission that the jury would not have relied on it in any material way. The Court further noted that in the ordinary course, the proviso could not be applied in a case in which the guilt or innocence of the appellant depended on an assessment of oral evidence. They found, however, that this was an exceptional case, as Castle's evidence was not just implausible and inconsistent with the objective evidence, it was on its face so obviously false that it carried no weight at all.

The Court was satisfied beyond reasonable doubt that the appellant shot the deceased based on: the evidence of the telephone communications; the evidence of motive; evidence that a plan was devised by which Castle was to lure the deceased to a confrontation with the appellant; Castle's text messages to the deceased in apparent execution of that plan; evidence which placed Gange elsewhere at the time of the shooting; and the difficulty which a man with Gange's

injuries would have in hiding in the boot and moving from there into the compartment of the car.

The Court held that the admissions were a minor part of the evidence and were so overwhelmed by the circumstantial evidence against the appellant that it was unlikely they had any influence on the jury's verdict, so there was no substantial miscarriage of justice and the proviso applied.

The grounds of appeal include:

- The Court of Criminal Appeal erred in holding that the learned trial judge correctly admitted evidence of the appellant's past possession of firearms.

- The Court of Criminal Appeal erred in holding that although the learned trial judge misdirected the jury that an out of court statement by the appellant was available as a confession to the crime of murder, the proviso applied.

TIMBERCORP FINANCE PTY LTD (IN LIQUIDATION) v COLLINS & ANOR (M98/2016);
TIMBERCORP FINANCE PTY LTD (IN LIQUIDATION) v TOMES (M101/2016)

Court appealed from: Court of Appeal, Supreme Court of Victoria
[2016] VSCA 128

Date of judgment: 1 June 2016

Date special leave granted: 20 July 2016 (M98/2016)
28 July 2016 (M101/2016)

The applicant, ('Timbercorp Finance'), was a member of the Timbercorp Group of companies, which between 1992 and its collapse in 2009, invested more than $2 billion in agribusiness projects on behalf of 18,500 investors. Many investors, including the respondents in the present proceedings ("Mr and Mrs Collins" and "Mr Tomes") borrowed money from Timbercorp Finance to finance their investments in the schemes. After administrators were appointed to the Timbercorp Group borrowers under approximately 8470 loans failed to meet their repayment obligations and Timbercorp Finance issued final demand notices in respect of approximately 1480 of those loans.

On 27 October 2009, a proceeding was commenced in the Supreme Court of Victoria by Allen Woodcroft-Brown as plaintiff on his own behalf and on behalf of group members as defined ('the group proceeding'). Timbercorp Finance was a defendant to the proceeding. Broadly, the allegations in the statement of claim related to deficiencies in the various product disclosure statements issued in respect of the schemes. On 27 October 2011, Judd J made final orders dismissing the group proceeding. The Court of Appeal dismissed an appeal from the judgment and orders made by Judd J and an application for special leave to appeal to this Court was refused.

Subsequently, Timbercorp Finance commenced proceedings against Mr and Mrs Collins and Mr Tomes in which it sought recovery of outstanding principal and interest on the moneys that it had lent them. Neither Mr and Mrs Collins nor Mr Tomes had opted out of the group proceeding. However, each sought to defend their respective recovery proceeding on various bases including (a) that no loan had been advanced to them and that they did not acquire an interest in the project relevant to them (in the case of Mr and Mrs Collins) and (b) that it had been represented that, in the event of default under a loan agreement, Timbercorp Finance's only recourse would be against the investment in the scheme (in the case of Mr Tomes). Timbercorp Finance pleaded that each respondent was precluded from raising the pleaded defences by reason of the fact that they were a group member in the group proceeding. In effect, Timbercorp Finance contended that each of the respondents was subject to *Anshun* estoppel. In addition, it contended that each of their defences should be stayed as an abuse of process.

Judd J ordered that the question whether the respondents were precluded from raising any and, if so, what defences pleaded by them be determined as a preliminary question. On 2 September 2015, Robson J held that the respondents were not precluded either by *Anshun* estoppel or by the principles of abuse of process from raising any of the defences.

Timbercorp Finance's appeal to the Court of Appeal (Warren CJ, Santamaria and McLeish JJA) was dismissed. The Court found that a group member in a group proceeding may be '*Anshun* estopped' only if it was unreasonable for him or her not to have raised, during the group proceeding, some claim other than the common questions of law or fact. In considering the question of unreasonableness in this case, the Court found that it was important to consider the opt out notices that were sent to the parties. They noted that the notices contained nothing that would have warned a group member that, in addition to being bound by the determination of the plaintiff's claim, they would be precluded from bringing their individual defences, if they did not apply to have those defences case managed as part of the group proceeding.

The Court considered that the question of reasonableness must also be informed by considering what prejudice could have been caused to Timbercorp Finance as a result of the respondents not having taken the steps in the group proceeding which were open to them as group members. They concluded that the potential for prejudice was very low. Assuming that the respondents had made an application that their individual defences be case managed as part of the group proceeding, and that the trial judge had agreed to do so, it was highly likely, if not inevitable, that the individual defences would have had to be heard and determined separately from the hearing and determination of the common claims. Timbercorp Finance would still have had to respond to the individual claims either as part of the group proceeding or in a separate proceeding. Timbercorp Finance was therefore not materially worse off and it could not be said that the conduct of the respondents was unfairly prejudicial to it.

The Court also found that the connections between the claims advanced in the group proceeding and the individual claims of the respondents were not substantial or fundamental in nature. It followed that it was not unreasonable of the respondents to defer reliance on their individual claims until such time as Timbercorp Finance sought to enforce the loan agreements against them.

With respect to the argument that the respondents' defences were an abuse of process, the Court found that Timbercorp Finance had not established to its satisfaction that, by maintaining their defences, the respondents were acting oppressively or bringing the administration of justice into disrepute. Timbercorp Finance had to meet the allegations contained in the defences either as part of the group proceeding or in separate proceedings and was no worse off than if the respondents had sought to introduce their defences into the group proceeding.

The grounds of appeal include:

- The Court of Appeal erred in concluding that the Respondents are not precluded by reason of an *Anshun* estoppel from raising their pleaded defences when, as group members within the meaning of Part 4A of the *Supreme Court Act* 1986 (VIC), they did not opt out of, and did not raise those defences within, proceeding SCI 9807 of 2009.