HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S42 of 2022

BETWEEN: **ALLIANZ AUSTRALIA INSURANCE LIMITED**
Appellant

and

DELOR VUE APARTMENTS CTS 39788
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Statement of issues

2. The appeal raises four principal issues.

3. *First*, does the doctrine of common law election require a choice between two sets of alternative and inconsistent rights, or is it enough for a party to choose between "inconsistent positions"?

4. *Secondly*, to establish a promissory estoppel is it sufficient for the party setting up the estoppel to point to speculative and conjectural possibilities about what might have happened but for the relevant promise?

5. *Thirdly*, is there a doctrine of waiver in Australian law separate from common law election and estoppel?

6. *Fourthly*, does the term requiring utmost good faith implied by s 13 of the *Insurance Contracts Act 1984* (Cth) require parties to perform non-binding gratuitous promises?

Part III: Section 78B notices

7. No notices under s 78B of the *Judiciary Act 1903* (Cth) are required.

Part IV: Reasons for judgments below

8. The reasons of the Full Court are reported at *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2021) 396 ALR 27; [2021] FCAFC 121 (**FC**). The reasons of the primary judge are reported at *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd (No 2)* (2020) 379 ALR 117; [2020] FCA 588 (**PJ**).

Part V: Facts

9. This appeal arises from damage to a complex of apartment buildings in far north Queensland caused by Tropical Cyclone Debbie on 28 March 2017. The respondent (**Delor**) is the body corporate for the apartment buildings. The appellant (**Allianz**) insured the premises under a composite policy of insurance (**Policy**)[1] issued by Strata Community Insurance (**SCI**) as Allianz's agent. Cover under the Policy commenced on 23 March 2017, only 5 days before the cyclone: CAB 38, PJ [102]. On 30 March 2017, Delor notified loss ("roof damage from cyclone") under the Policy: CAB 38, PJ [103].

10. The unchallenged finding of the primary judge (Allsop CJ) was that prior to entry into the Policy Delor breached its duty of disclosure under s 21(1)(b) of the *Insurance Contracts Act 1984* (Cth) (**ICA**): CAB 81, PJ [264]; declaration 1 made on 24 July 2020 (CAB 108). Relevantly, Delor knew the building had "serious non-structural defects of badly affixed and constructed soffits and eaves" which "were a danger to persons and property if they dislodged, as a number had done" (CAB 80, PJ [261]). That matter was relevant to the public liability cover provided in the Policy and had not been disclosed: CAB 81, PJ [263]–[264].

11. The primary judge also found that SCI (as agent for Allianz) would not have accepted the risk had that matter been disclosed: CAB 87, PJ [289]. That finding was also not challenged in the Full Court. Consequently – subject to Delor's pleas

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[1] SCI Residential Strata PDS & Policy Wording (AFM 5) and Policy Schedule (AFM 57).

of estoppel, election, waiver and lack of good faith – Allianz was entitled to reduce Delor's insurance claim to nil under s 28(3) of the ICA: declaration 2 made on 24 July 2020 (CAB 108).

12. Events in the critical period between 9 May 2017 and 28 May 2018 are described chronologically at CAB 43, PJ [122]–[193]. Key communications are (i) an email sent by SCI to Delor's broker, BCB, on 9 May 2017;[2] (ii) a letter sent by Delor's solicitors, LMI Legal, to SCI on 3 May 2018;[3] and (iii) a letter sent by SCI to LMI Legal on 28 May 2018.[4]

13. Parts of the **9 May 2017 email** are extracted at CAB 44, PJ [123]–[126]. After referring to non-disclosure, the email stated that SCI would "honour the claim": CAB 44, PJ [124]. The email then set out SCI's position on what would and would not be covered. In particular, SCI stated that it would not cover repairs to the defective materials and construction of the roof, but merely resultant damage: CAB 44, PJ [125]. The email also addressed the co-ordination of repair works: CAB 45, PJ [126].

14. Following that email and prior to 3 May 2018, both Allianz and Delor separately retained engineers and builders to advise in relation to the extent of the works.[5] Allianz paid $192,471 for temporary repairs, compensation to unit owners for loss of rent, alternative accommodation expenses and professional fees for the engineers.[6] At no stage prior to the 28 May 2018 letter did Delor carry out any roof repairs.

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2 Email from Heather Lander of SCI to Kim Macaulay of BCB dated 9 May 2017 (AFM 90).

3 Letter from LMI Legal to SCI dated 3 May 2018 (AFM 240).

4 Letter from SCI to LMI Legal dated 28 May 2018 (AFM 247).

5 Emails from Exigo to BCB dated 5 April and 8 April 2017 (AFM 67–68); Reports of Morse Consulting dated 21 April 2017, 23 May 2017 and 28 March 2018 (AFM 69, 122, 233); Email from Paterson to Webb dated 12 June 2017 (AFM 155); Ambrose Building quotation dated 10 May 2017 (AFM 94); Exigo Report 8 dated 23 March 2018 (AFM 229); Reports of GHD dated 21 August 2017 and December 2017 (AFM 160 and 181).

6 Email from Patterson to Macaulay dated 19 June 2017 (AFM 156); Exigo Report 4 dated 3 November 2017 (AFM 177); Exigo Report 8 dated 23 March 2018 (AFM 229).

15. On 3 May 2018 LMI Legal sent a letter to SCI complaining that SCI had not stated its position on indemnity with any clarity and requesting that SCI articulate its position (**3 May 2018 letter**): CAB 63, PJ [182].

16. On 28 May 2018 SCI responded. The **28 May 2018 letter** is described at CAB 64, PJ [183]–[187]. In it, SCI offered to pay for resultant damage (assessed at $917,709.90) but not pre-existing defects (assessed at $3,579,432.71). If the offer was not accepted within 21 days, SCI reserved its rights to reduce the claim to nil under s 28 of the ICA relying on non-disclosure and alleged misrepresentation: CAB 66, PJ [187].

17. In relation to Delor's "defences", the primary judge found that the 9 May 2017 email contained a clear representation or promise that cover was confirmed and Allianz was estopped from relying on s 28(3) of the ICA: CAB 100, PJ [338]. His Honour also found that Allianz had "waived" the benefit of s 28(3) (CAB 101, PJ [341]) and breached its duty of good faith: CAB 104, PJ [346]–[347], [349]. The primary judge rejected the allegation that Allianz was bound by an election: CAB 93, PJ [317].

18. On appeal, the Full Court (McKerracher and Colvin JJ; Derrington J dissenting) found no error in the primary judge's reasons in relation to estoppel, waiver and good faith. However, the majority also found that Delor was entitled to succeed based on an election: see summary at CAB 140, FC [45].

Part VI: Appellant's argument

Election (Ground 1)

19. The majority in the Full Court noted that common law[7] election was the primary basis upon which the case was advanced before the primary judge, and although it only arose in the Full Court by way of notice of contention it was appropriate to deal with it first: CAB 139, FC [42]–[43].

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7 The doctrine of equitable election is separate: see *Agricultural & Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, [57] (Gummow, Hayne and Kiefel JJ; Heydon J agreeing).

20. Both the primary judge and Derrington J rejected the asserted election on the orthodox ground that s 28(3) did not give rise to the exercise of a power between two alternative, mutually exclusive and inconsistent rights: CAB 93, PJ [317]; CAB 276, FC [550]–[551], [557]. In contrast, the majority in the Full Court said that election was not confined in that way and arises where "as a matter of fairness" the "law imposes an obligation to choose rather than proceed keeping two inconsistent positions open": CAB 160, FC [135]. For the reasons below, the primary judge and Derrington J were correct.

21. The classic statement in Australian law of the nature of common law election is found in the reasons of Stephen J (with whom McTiernan J agreed) in *Sargent v ASL Developments Ltd* (***Sargent***):[8]

> The doctrine of election as between two inconsistent legal rights is well established but certain of its features are not without their obscurities. The doctrine only applies if the rights are inconsistent the one with the other and it is this concurrent existence of inconsistent sets of rights which explains the doctrine; because they are inconsistent neither one may be enjoyed without the extinction of the other and that extinction confers upon the elector the benefit of enjoying the other, a benefit denied to him so long as both remained in existence.

22. This passage was approved by the whole Court in *Ciavarella v Balmer*.[9] The other member of the Court in *Sargent* – Mason J – stated a similar principle: "A person is said to have a right of election when events occur which enable him to exercise alternative and inconsistent rights".[10] The reference to election involving a choice between alternative inconsistent rights was repeated in *Khoury v Government Insurance Office (NSW)*[11] and *Agricultural & Rural Finance Ltd v Gardiner* (***Agricultural & Rural Finance***).[12]

23. As the passage from Stephen J indicates, the explanation for the doctrine is that by exercising its power of choice in respect of inconsistent rights, the elector extinguishes one set of rights in favour of another. The elector may choose to

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8 (1974) 131 CLR 634, 641.

9 (1983) 153 CLR 438, 448 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ).

10 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 655.

11 (1984) 165 CLR 622, 633 (Mason, Brennan, Deane and Dawson JJ).

12 (2008) 238 CLR 570, [56], [58] (Gummow, Hayne and Kiefel JJ; Heydon J agreeing).

extinguish its existing rights in favour of a new set of rights, or to affirm its existing rights and thereby extinguish the possibility of the new rights coming into existence. Essential to the doctrine are two sets of mutually inconsistent rights. Handley summarises it, in a passage quoted by Derrington J at CAB 276, FC [551] as follows: "An election does not involve a choice between two sets of rights which presently co-exist but between an existing set of rights and a new set which does not yet exist".[13] The simplest example is where a contracting party is faced with a choice, following a repudiation or breach of condition by the other party, to affirm the contract or to terminate it.

10 24. Accordingly, there is a fundamental difference between a choice not to exercise an existing legal right and a common law election. Contracting parties always have the ability to choose whether or not to enforce their existing legal rights.[14] For example, a contracting party who has a right to claim damages for the other party's breach has a choice whether or not to sue the other party. No doubt, the party's choice to sue or not to sue is a choice between inconsistent *positions*: one cannot do both. Yet there is not a choice between two sets of inconsistent *rights* – one presently in existence and one which does not yet exist – and hence no common law election arises.

25. To conclude that a common law election arises whenever a choice between
20 inconsistent positions arises would be a radical and incoherent alteration of the law. It would mean that, contrary to longstanding authority,[15] any intimation of an intention not to enforce a right would be enforceable without a need for consideration necessary to support a contract or detrimental reliance necessary to support an estoppel. It is a step which, under the label of "waiver", a majority of this Court said "should not be taken" in *Agricultural & Rural Finance Pty Ltd v*

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13 K Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell, 2nd ed, 2016) 255 [14–002].

14 See *Freshmark v Mercantile Mutual (Australia) Ltd* [1994] 2 Qd R 390, 403 (Dowsett J); see also 395 (McPherson JA).

15 See *O'Connor v SP Bray Ltd* (1936) 36 SR (NSW) 248, 257 (Jordan CJ; Street and Maxwell JJ agreeing) and the cases cited there; *Commonwealth v Verwayen* (1990) 170 CLR 394, 406 (Mason CJ).

Gardiner (see [50] below). The addition of a requirement that "fairness" must require a choice between inconsistent positions adds nothing of substance.

26. The majority in the Full Court sought to support their reasoning by reference to previous cases (CAB 141, FC [50]–[113]), particularly *Craine v Colonial Mutual Fire Insurance Co Ltd* (***Craine***),[16] *Commonwealth v Verwayen* (***Verwayen***),[17] *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (***Immer***)[18] and *Nigel Watts Fashion Agencies Pty Ltd v GIO General Ltd* (***Nigel Watts***).[19] None of those cases supported the majority's approach.

27. As to *Craine*, contrary to the majority's statement at CAB 143, FC [60], that case was decided solely on the basis of estoppel, not common law election.[20] By way of *dicta*, Isaacs J (for the Court) discussed "waiver". As later cases have made clear,[21] the reference to "waiver" in *Craine* was to common law election. In the summary of relevant principles,[22] "waiver" was described as a doctrine "to prevent a man *in certain circumstances* from taking up to inconsistent positions" (emphasis added). Those circumstances were then described: where the elector "has elected to get some advantage *to which he would not otherwise have been entitled*, so as to deny to him a later election to the contrary" (emphasis added). From this statement and other parts of the Court's reasons[23] it is apparent that the Court considered that the doctrine of common law election applied where a contracting party exercised

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16 (1920) 28 CLR 305.

17 (1990) 170 CLR 394.

18 (1993) 182 CLR 26.

19 (1994) 8 ANZ Ins Cas 61-235 (NSWCA).

20 See (1920) 28 CLR 305, 316–319, 324, 325, 328, accurately reflected in the headnote. Estoppel was essential because the policy contained a provision (cl 19) that no provision of the policy could be "waived" except expressly in writing. The clause was an answer to the argument based on "waiver" (i.e. common law election), but not estoppel: see 328.

21 See, eg, *Verwayen* (1990) 170 CLR 394, 407 (Mason CJ), 424 (Brennan J), 451 (Dawson J); *Agricultural & Rural Finance* (2008) 238 CLR 570, [58] (Gummow, Hayne and Kiefel JJ; Heydon J agreeing).

22 (1920) 28 CLR 305, 326.

23 See also (1920) 28 CLR 305, 319 ("so long as the Company distinctly and unequivocally retained the attitude … that the contract according to its terms had, by reason of the breach of clause 11, *terminated the contractual obligations of the parties* – it was safe"), 320 ("it forms a clear starting point from which to consider how far the [insurer] was intending [to rely on the breach of condition] as a definite termination of its contractual obligation").

rights under a contract which were inconsistent with the contract having *terminated*. That understanding is confirmed by the majority's reasons in *Agricultural & Rural Finance,* where *Craine* was said to support the proposition that "the exercise, despite knowledge of a breach entitling one party to be discharged from its future performance, of rights available only if the contract subsists, will constitute an election to maintain the contract on foot."[24]

28. As to *Verwayen*, it is well known that the case has no ratio given the conflicting views among the four justices in the majority. However, assessing the "balance of persuasion",[25] each of Mason CJ,[26] Brennan J,[27] Toohey J[28] and Gaudron J[29] expressly referred to election as involving a choice between inconsistent or mutually exclusive rights. Further, both Dawson J[30] (with whom Deane J agreed) and McHugh J[31] quoted with approval Lord Diplock's speech in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd*[32] where election was described in terms of a choice between alternative inconsistent rights.

29. In *Immer*, there was no issue about the need for inconsistent rights: the election there involved a choice between termination or affirmation of a contract. The majority in the Full Court (CAB 150, FC [92]) saw significance in the quotation in the joint reasons in *Immer*[33] of a passage from Spencer Bower which referred to "mutually exclusive *courses of action* between which he must, in fairness to the other party, make his choice" (emphasis added). However, apart from the fact that the distinction between inconsistent rights and positions was not in issue, the majority in the Full Court ignored that the joint reasons in *Immer* also quoted the

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24 (2008) 238 CLR 570, [58] (Gummow, Hayne and Kiefel JJ; Heydon J agreeing).

25 *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303, 314 (Mason CJ, Wilson, Dawson and Toohey JJ).

26 (1990) 170 CLR 394, 406–407.

27 (1990) 170 CLR 304, 421.

28 (1990) 170 CLR 304, 472.

29 (1990) 170 CLR 304, 481.

30 (1990) 170 CLR 304, 452.

31 (1990) 170 CLR 304, 496.

32 [1971] AC 850, 882–883.

33 (1993) 182 CLR 26, 41 (Deane, Toohey, Gaudron and McHugh JJ).

earlier statements from Stephen J and Mason J in *Sargent* requiring a choice between inconsistent rights.[34]

30. Finally, the majority relied on a *dictum* of Handley JA in *Nigel Watts*: CAB 155, FC [109], [112]. Both the primary judge (CAB 93, PJ [317]) and Derrington J (CAB 275, FC [548]) correctly reasoned that, properly understood, Handley JA's *dictum* concerned the situation of inconsistent rights where an insurer has a choice to affirm or terminate the contract. As the English Court of Appeal has explained,[35] whilst (consistently with *Craine* and *Agricultural & Rural Finance*) an insurer who purports to exercise rights under a contract may be acting inconsistently with *terminating it*, purporting to exercise rights under a contract (e.g. defending a claim on behalf of the insured) is not necessarily inconsistent with refusing to accept liability for a particular claim. Adopting Rix LJ's words, the doctrine of election is "ill-fitting" and "unneeded".

31. In the present case, there were not two sets of alternative and inconsistent rights, one of which would be extinguished or created by the exercise of a power of election. Allianz simply had a right to rely on the benefit of s 28(3) of the ICA. On orthodox legal principles, a unilateral and voluntary indication by Allianz not to rely on that right could not give rise to a binding common law election: CAB 93, PJ [317]; CAB 278, FC [557].

32. Finally, to the extent that the Full Court majority's reasons rest on a special doctrine peculiar to insurers that there is an election where an insurer exercises rights that can only be exercised if the insurer accepts "indemnity" (CAB 156, FC [113], [118], [136]), for the reasons above such a doctrine is not consistent with *Craine*, as explained in *Agricultural & Rural Finance*, or general principles. In any event, in the present case, nowhere did the majority identify what Allianz did by way of the *exercise* of rights that could only be exercised if indemnity was accepted. Allianz never exercised a right of subrogation (cf CAB 158, FC [131]), nor is there any

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34 (1993) 182 CLR 26, 38–39; see also 40.

35 *Kosmar Villa Holidays Plc v Trustees of Syndicate 1243* [2008] Lloyd's Rep IR 489, [69]–[70] (Rix LJ; Jacob LJ and Forbes J agreeing). See generally *Colinvaux's Law of Insurance* (Sweet & Maxwell, 12th ed, 2019) [21–135].

evidence to suggest that it entered Delor's property without its voluntary consent. The factual circumstances are far divorced from those in *Craine* where the insurer entered, and the insured was excluded from, possession of the insured business premises for more than 3 months, and the insured could only access the premises with the insurer's consent.[36]

33. For all of those reasons, Delor's plea of election should have failed.

Estoppel (Ground 3)

34. Although the primary judge referred to both promissory estoppel and estoppel by convention, for the reasons explained by Derrington J at CAB 261, FC [501]–[504] only the former was a live issue at trial. In any event, to establish either estoppel it is necessary for the party raising the estoppel[37] to prove that (1) in reasonable reliance on the promise (or convention) (2) the party materially changed its position and (3) if the promise (or convention) were departed from the party would suffer material detriment as a result of the change in position.[38] Each of these elements raises a separate question of *fact*. Each must be distinctly pleaded and proved by evidence. Estoppel is not an exercise in conjecture or speculation about what detriment might have existed. It is question depending on what detriment in fact existed.

35. The primary judge and the majority in the Full Court found that in reliance on the 9 May 2017 email, Delor changed its position to its detriment by (a) not suing Allianz sooner and (b) not taking steps for itself to carry out the repairs: CAB 96, PJ [331], [333]; CAB 181, FC [205]–[225]. For the reasons below, the Full Court ought to have found that Delor had failed to establish any estoppel.

36. At the outset, the estoppel should have failed for the reason that the estoppel as found was beyond the pleaded case. *First*, neither of the alleged acts of reliance

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36 *Yorkshire Insurance Co Ltd v Craine* [1922] 2 AC 541, 548 (Lord Atkinson, for the Board).

37 *Sidhu v Van Dyke* (2014) 251 CLR 505, [55], [58], [61] (French CJ, Kiefel, Bell and Keane JJ), [90], [92] (Gageler J).

38 *Grundt v Great Boulder Pty Gold Mine Ltd* (1937) 59 CLR 641, 674 (Dixon J); *Sidhu v Van Dyke* (2014) 251 CLR 505, [79]–[80] (French CJ, Kiefel, Bell and Keane JJ).

were pleaded in Delor's amended Concise Statement:[39] see FC [390]–[400]. *Secondly*, no witness said that by reason of the 9 May 2017 Delor changed its position in the ways identified by the Full Court: FC [401]. *Thirdly*, it was not until the last day of the trial in written submissions that Delor advanced the alleged detriment found by the primary judge and the majority.[40] But given the evidence adduced, those submissions were pure speculation because the matter was not in issue. In those circumstances, Derrington J was correct to conclude that for this reason alone the estoppel case should have failed: CAB 231, FC [417], [425]–[432]. As his Honour stated "Delor Vue led the learned trial judge into error by advancing a case in its submissions which it had neither pleaded, raised in the course of the hearing, nor established by evidence": CAB 236, FC [432].

37. In any event, even if the estoppel as found had been open, it failed on the evidence at every stage of the detrimental reliance analysis.

Not suing Allianz sooner?

38. As noted, no witness gave evidence that as a result of the 9 May 2017 email, Delor refrained from suing Allianz and that but for the email it would have sued earlier. This is not an absence of mere "self-serving evidence" (cf CAB 97, PJ [334]). It is an absence of evidence critical to establish detrimental change of position in reliance on the alleged promise. The failure to adduce such evidence gives rises to a clear inference that nothing that Delor could have said could have assisted its case.[41]

39. Moreover, the available documentary evidence shows the unlikelihood of a relevant change of position in reliance on the 9 May 2017 email. The 3 May 2018 letter from Delor's lawyers stated that SCI had failed to state its position as to indemnity, and called upon it to articulate its position on indemnity. Those assertions in the letter are inconsistent with Delor changing its position in reliance on the 9 May 2017 email. Further, the letter stated that interest was now accruing under s 57 of

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39 Amended Concise Statement, [12] (AFM 290–291).

40 Delor's Closing Submissions, [124], [126] (AFM 324).

41 *Jones v Dunkel* (1959) 101 CLR 298; *Commercial Union Insurance Co of Australia Ltd v Fercom Pty Ltd* (1991) 22 NSWLR 389.

the ICA. It may be inferred that Delor was content with the protection of statutory interest (3% above the 10-year bond rate)[42] rather than commencing early proceedings. The 30 July 2018 letter from Delor's lawyers – sent after the 28 May 2018 letter from SCI in which SCI indicated that if the offer were not accepted it would rely on s 28(3) – makes no mention of any change of position or that Delor would have sued Allianz earlier but for the 9 May 2017 email.

40. In any event, even if Delor did change its position in reliance on the 9 May 2017 email by refraining from suing Allianz earlier, that decision did not lead to any material detriment. In fact, it put Delor in a better financial position. As Derrington J noted at CAB 248, FC [463], here the legal outcome of earlier commenced litigation is known – Allianz would have been entitled to rely on s 28(3) – and there is nothing other than conjecture and speculation to suggest that the outcome of litigation would have any different result if commenced earlier: cf the conjecture at CAB 182, FC [208]. The overwhelming likelihood is that if Delor had sued earlier, it would still have lost the litigation. But if Delor had sued earlier it would, in addition to foregoing possible interest under s 57 of the ICA, have expended legal costs earlier thereby losing the benefit of the use of its money earlier and being required to pay an adverse costs order earlier. By suing later, Delor actually saved money.

Not taking steps to carry out the repairs?

41. Again, no witness gave evidence that as a result of the 9 May 2017 email, Delor refrained from carrying out repairs on the premises. The failure to adduce such evidence ought to have been fatal.

42. Even if such evidence had been given, it would have lacked all credibility. The 9 May 2017 email expressly stated that "the roof repairs will need to be carried out first [by Delor], before the internal resultant damage repairs can proceed".[43] Thus, Delor always knew that it needed to pay for the roof repairs for itself. Yet, apart from commissioning a report about the works, it took no steps to carry out repairs.

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42 *Insurance Contracts Regulations 2017* (Cth) r 38.

43 9 May 2017 email (AFM 92).

Secondly, the available evidence suggests that Delor could not have engaged in the repairs itself. Delor was advised on 22 June 2017[44] that the cost of rectifying the defects not covered by the policy would be "in the millions", yet by January 2018 Delor's committee had done nothing to raise the funds other than borrow up to $750,000.[45] As Derrington J explained at CAB 256, FC [488] although Delor submitted that the repair work might have been undertaken in stages, there was no evidence to support that possibility or how it might occur.

43. On the evidence, Delor clearly failed to prove any relevant change of position. Further, even if Delor had immediately taken charge of the works on 9 May 2017, and had the funds to do the work, there is no reason to conclude that the work would have been completed any earlier. The work needed to remedy the defects was extensive, complex and expanded over time.[46] It took competent engineers and builders the best part of 12 months to diagnose the problems and plan repairs.

44. The primary judge and all members of the Full Court agreed that Delor did not seek to demonstrate a counterfactual, or any specific way that it had been prejudiced by relying on the 9 May 2017 Email: CAB 180, FC [203]. All members of the Full Court agreed that Delor's case did not include a complaint that Allianz had unduly delayed the repairs or damaged Delor's ability to undertake them: CAB 182, FC [213], [225]; CAB 249, [467], [468], [470].

45. In summary, Delor fell "well short" of establishing any detrimental reliance: CAB 257, FC [490]; see also CAB 254, [484]–[489]. The Full Court majority's adoption of the primary judge's reasoning that it was "impossible to tell" what would have happened had Delor undertaken the repairs (CAB 183, FC [214]; CB 97, PJ [333]) effectively reversed the onus of proof. If (contrary to the submissions above) it was impossible to tell what would have happened, that is because Delor failed to establish detrimental reliance necessary to establish an estoppel.

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44 Email from Heather Lander to Robyn Webb dated 22 June 2017 (AFM 157).

45 Minutes of an Extraordinary General Meeting of the Body Corporate dated 18 January 2018 (AFM 226).

46 See, eg, email from Heather Lander to Robyn Webb dated 22 June 2017 (AFM 157).

Waiver (Ground 2)

46. The existence of a separate doctrine of "waiver" only arises if there was no operative election or estoppel: if there was an election or estoppel there is no need to consider "waiver".

47. The primary judge and the majority in the Full Court said that *Craine* supported the conclusion that Allianz had "waived" its right to rely on s 28(3): CAB 100, PJ [339], CAB 190, FC [245].

48. *Craine* provides no support for that conclusion. As discussed at [27], *Craine* was decided solely on the ground of estoppel, and the discussion of "waiver" clearly concerned common law election. Thus, it can provide no foundation for the existence of a doctrine of waiver separate from common law election or estoppel.

49. Further, as noted at [32] above the insured in *Craine* had clearly suffered substantial detriment in reliance on the insurer's representation and the insurer had obtained the benefit of possession of the premises for more than 3 months. As explained above, no such detriment exists in the present case. To the extent that Allianz sent engineers and builders to the premises, this was to carry out temporary repairs and plan major repairs. All of this was at Allianz's expense and for Delor's advantage.

50. Accordingly, the Full Court majority's conclusion concerning "waiver" can only be supported if it is accepted that there is a separate doctrine in Australian law that a unilateral representation or promise which does not constitute a common law election is binding even where unsupported by consideration or detrimental reliance. In *Agricultural & Rural Finance* a majority of this Court refused to take that step:[47]

> But if, as is the case here, there was no election between inconsistent rights, there was no variation of the contract, and there was no detrimental reliance upon the representation, no reason is given for holding the party concerned to its earlier expressed attitude beyond the fact that the representation was made. To hold that the making of the representation, without more, suffices to alter the rights and obligations for which the parties stipulated by their contract is a step that should not be taken.

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47 (2008) 238 CLR 570, [95]–[96] (Gummow, Hayne and Kiefel JJ).

> It should not be taken for two reasons. First, to hold that the making of a representation, without more, alters the rights and obligations of parties to a contract would be to supplant accepted principles governing whether an estoppel is established and whether a contract has been varied. It would supplant those principles by dispensing with the need to show detrimental reliance to establish an estoppel and by discarding as irrelevant the need to show consideration for an agreement to vary an existing contract. The second reason, which in a sense is no more than the obverse of the first, is that no reason is proffered to hold the person making the representation to it. The person to whom the representation is made has not relied on it; it is not demonstrated that departure from the representation would be unjust; there was no consideration to support a bargain.

51. There is no reason for the Court to depart from that approach. Nor is there any difference in principle because the right in question here – the benefit of s 28(3) of the ICA – is statutory as opposed to contractual. As the various reasons in *Verwayen* explain, statutory rights that are solely for the individual benefit of a person, and do not further some wider public purpose, are often said to be capable of being "waived".[48] Whether the statutory right is in the former or latter category is a question of statutory construction. But if the right is of a kind which is "waivable" the principles about what constitutes a "waiver" (e.g. a contract, release, estoppel, election) do not relevantly differ because the right is statutory as opposed to contractual.

52. More generally, as Roscoe Pound noted, "waiver" is one of a number of "solving words" which are "but substitutes for thought".[49] "Waiver" is often used as a synonym for common law election, estoppel or the existence of a binding contract. There is also a line of cases where a party is said to have "waived" the benefit of a contractual[50] or statutory[51] condition precedent to future performance intended solely for their benefit. Such cases are sometimes put under the label of "forbearance" or "renunciation".[52] In addition, in *Verwayen* Toohey J[53] and

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48 See, eg, *Verwayen* (1990) 170 CLR 394, 405–406 (Mason CJ), 425 (Brennan J). See also *Brown v The Queen* (1986) 160 CLR 171, 178 (Gibbs CJ), 208 (Dawson J) (s 80 of the *Constitution* not waivable); *Price v Spoor* (2021) 270 CLR 450, [12]–[13] (Kiefel CJ and Edelman J).

49 Foreword to Ewart, *Waiver Distributed* (1917) v, noted in *Agricultural & Rural Finance* (2008) 238 CLR 570, [50] (Gummow, Hayne and Kiefel JJ; Heydon J agreeing).

50 See, eg, *Sandra Investments Pty Ltd v Booth* (1983) 153 CLR 153, 157, 159 (Gibbs CJ; Mason, Murphy and Brennan JJ agreeing).

51 See *Verwayen* (1990) 170 CLR 394, 497 (McHugh J) and the cases cited there.

52 See the discussion in *Agricultural & Rural Finance* (2008) 238 CLR 570, [70], [77], [83]–[87], [88], [90] (Gummow, Hayne and Kiefel JJ; Heydon J agreeing).

53 (1990) 170 CLR 394, 472–473.

Gaudron J[54] identified a species of "waiver" where a party in litigation renounces the benefit of a defence.

53. In relation to the cases concerning waiver of conditions precedent, the reasons in *Agricultural & Rural Finance* cast doubt on whether those cases really involve a doctrine separate from estoppel, election or ordinary contractual principles.[55] Many of those cases may also be explained as a matter of construction.[56] Whatever the correct analysis, those issues do not arise in this case. The present case does not involve "waiver" of a condition precedent to future performance.

54. As to the reasoning of Toohey and Gaudron JJ in *Verwayen*, the Court in *Agricultural & Rural Finance* emphasised that the species of waiver their Honours were concerned with was confined to conduct within litigation and "depended upon considerations founded in the nature of the adversarial litigious process" (e.g. finality).[57] Accordingly, even assuming the correctness of Toohey and Gaudron JJ's views (which at least Mason CJ, Dawson, Deane and McHugh JJ did not accept) they do not assist Delor here.

55. The proposition that in a case such as present there is a separate doctrine of waiver was correctly rejected by the Queensland Court of Appeal in *Freshmark Ltd v Mercantile Mutual Insurance (Australia) Ltd*.[58] As Derrington J noted in dissent at CAB 273, FC [540], that decision should have been followed here.

Duty of good faith (Ground 4)

56. The primary judge (and the majority in the Full Court) found that by seeking to resile from the 9 May 2017 email and in seeking to rely upon Delor's non-disclosure, Allianz breached the term of utmost good faith implied in the Policy by

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54 (1990) 170 CLR 394, 484–485.

55 *Agricultural & Rural Finance* (2008) 238 CLR 570, [83] (estoppel), [84] (election), [84]–[86] (ordinary principles of contract) (Gummow, Hayne and Kiefel JJ; Heydon J agreeing).

56 See the reasoning in *Sandra Investments Pty Ltd v Booth* (1983) 153 CLR 153, 158 (Gibbs CJ; Mason, Murphy and Brennan JJ agreeing).

57 *Agricultural & Rural Finance* (2008) 238 CLR 570, [60] (Gummow, Hayne and Kiefel JJ; Heydon J agreeing).

58 [1994] 2 Qd R 390, 395 (McPherson JA), 404 (Dowsett J).

s 13 of the ICA: declaration 5 made on 24 July 2020; CAB 104, PJ [346]–[347]; CAB 193, FC [255].

57. The premise for argument on this ground is that Allianz is successful on Grounds 1 to 3. In other words, at its highest, the 9 May 2017 email was a gratuitous promise which Delor did not rely on to its detriment, which caused it no loss and which, subject to the term implied by s 13, Allianz was free to withdraw at any time.

58. To act with utmost good faith did not require Allianz to honour a non-binding promise so as to avoid Delor's disappointment. Whilst the duty of utmost good may require a party to an insurance contract to act with due regard to the legal interests of the other party,[59] it does not require a party to sacrifice its legal rights to the other: CAB 284, FC [581]; CAB 290, [600]. Section 13 does not require a party to an insurance contract to meet every gratuitous promise made to the other party. Section 13 cannot be used to make a finding of liability against the insurer as a punitive sanction.[60]

59. In any event, for the reasons given by Derrington J at CAB 288, FC [591]–[600], in the particular circumstances of this case there was no breach of the term implied by s 13.

60. The premise of the 9 May 2017 email was that the insurer was prepared to make a payment to Delor when it was under no legal obligation to do so. That email involved the insurer paying for resultant damage and Delor paying for rectifying the roof defects, which would need to occur first. At no stage did Delor do any work to rectify the roof defects. Nor was it ever in a position to do so. On 3 May 2018, Delor's solicitors wrote to SCI asking for SCI to state its position on coverage. On 28 May 2018, SCI on behalf of Allianz made an offer to Delor reflecting the proposal in the 9 May 2017 email. As Derrington J noted at CAB 290, FC [599], in circumstances where the insurer's actual liability was nil, the offer contained in the 28 May 2018 letter – being in addition to the approximately

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59 *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1, [15] (Gleeson CJ and Crennan JJ).

60 *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1, [15]–[16].

$192,000 already paid – was not parsimonious, unfair or unethical. SCI also extended the time in which Delor might accept the offer.

61. On 30 July 2018, Delor flatly rejected the offer and said that SCI should pay the *entire loss*.[61] No counteroffer was made. Delor insisted on its strict legal rights. SCI had never represented or promised that it would pay the entire loss. SCI was thus faced with an insured who was unwilling to compromise and wanted to claim more than SCI had ever represented it would voluntarily pay. In those circumstances, faced with an insured who claimed its asserted legal rights, there was nothing unfair or unethical in SCI's lawyers informing Delor on 22 August 2018 that SCI was also relying on its legal rights.[62]

62. For these reasons, there was no breach of the duty of utmost good faith.

63. Delor claimed damages for breach of the duty of utmost good faith. It led no evidence of its loss, other than to say that following the 28 May 2018 letter, Allianz made no further payment for the claim. In the absence of loss, Delor was not entitled to damages. The primary judge's suggestion that an injunction might have been ordered was not raised during the hearing: CAB 105, PJ [349]; CAB 194, FC [258]; CAB 291, [602].

Part VII: Orders sought

64. Allianz seeks the following orders:

(a) Appeal allowed with costs.

(b) Set aside the orders of the Full Court of the Federal Court of Australia made on 9 July 2021 and in lieu thereof, order:

(i) Appeal allowed with costs.

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61 Letter from LMI Legal to SCI dated 30 July 2018 (AFM 262).

62 Letter from Holman Webb to LMI legal dated 22 August 2018 (AFM 273).

(ii) Set aside the orders of the Federal Court of Australia made on 24 July 2020 and in lieu thereof, order that proceeding be dismissed with costs.

Part VIII: Estimate of time required

65. Allianz estimates that it will need 4 hours for oral argument

Dated: 5 May 2022

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ANNEXURE

Insurance Contracts Act 1984 **(Cth), s 13(1)**

(compilation 24 in force in the period 1 July 2016 to 12 March 2019)

13 The duty of the utmost good faith

(1) A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.

(2) A failure by a party to a contract of insurance to comply with the provision implied in the contract by subsection (1) is a breach of the requirements of this Act.

(3) A reference in this section to a party to a contract of insurance includes a reference to a third party beneficiary under the contract.

(4) This section applies in relation to a third party beneficiary under a contract of insurance only after the contract is entered into.

…

28 General insurance

(1) This section applies where the person who became the insured under a contract of general insurance upon the contract being entered into:

(a) failed to comply with the duty of disclosure; or

(b) made a misrepresentation to the insurer before the contract was entered into;

but does not apply where the insurer would have entered into the contract, for the same premium and on the same terms and conditions, even if the insured had not failed to comply with the duty of disclosure or had not made the misrepresentation before the contract was entered into.

(2) If the failure was fraudulent or the misrepresentation was made fraudulently, the insurer may avoid the contract.

(3) If the insurer is not entitled to avoid the contract or, being entitled to avoid the contract (whether under subsection (2) or otherwise) has not done so, the liability of the insurer in respect of a claim is reduced to the amount that would place the insurer in a position in which the insurer would have been if the failure had not occurred or the misrepresentation had not been made.