HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S42/2022
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Important Information

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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

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part 1: Certification

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

Part 2: Outline of Propositions that the Respondent intends to advance in oral argument

Salient Facts (Respondent's Submissions [8]-[28])

2. On 27.4.17, SCI identified the non-disclosure issue and the need to investigate further before making a determination: RFM 23. That was done on 9.5.17 with the benefit of full information (Allsop CJ CAB 43 [122]), confirming indemnity but also relying on exclusions, rights of subrogation, rights of cooperation, and rights of control over the works: AFM 92; policy terms at AFM 19.

3. SCI did not state that all repairs to the roofs were for the insured to pay for, as some roof repairs were accepted as cyclone damage which the insurer undertook to replace: RFM 39; AFM 252-3. On 10.5.17, Ambrose gave a quote to repair the cyclone damage, including various roofing items, for $553,207: AFM 95, 97 and 99.

4. From 24.5.17, the insurer's solicitors, Holman Webb, issued demands and made claims to the builder in the name of Delor Vue pursuant to the insurer's rights of subrogation: RFM 30, 37, 48. The insurer's loss adjuster (Exigo), consulting engineers (Morse) and two builders (Ambrose and Advanced) all enjoyed rights of access to the premises pursuant to the policy terms.

5. By 29.8.17, Delor Vue had received two scope of works reports by Morse, commissioned by the insurers, one for insured work and the other for non-insured work, but without costings: RFM 45. A disagreement arose between Morse and GHD (Delor Vue's engineer): Morse required all roof trusses to be removed and replaced, whereas GHD favoured the less expensive method of fitting companion trusses adjacent to the existing trusses (RFM 57). The cyclone damage to the roof trusses was minor, and limited to two units: AFM 164-5. An available option for Delor Vue if SCI had not confirmed indemnity was to repair the cyclone damage initially, and defer rectifying the pre-existing defects. Delor Vue had cash and a loan facility to meet those repair costs: RFM 18, 51, AFM 229 at 231.

6. On 3.5.18, Delor Vue's solicitors complained about SCI failing to progress the claim expeditiously, noting that Delor Vue could not undertake any repairs without SCI's approval: RFM 60 at 65. The appellant's criticism of Delor Vue for not carrying out roof repairs by 28.5.18 is unjustified.

On 28.5.18, made the ultimatum to reverse its confirmation of indemnity, clearly intending to pressure Delor Vue into conceding the appellant's figure and method for uninsured repairs: AFM 247. The appellant carried out that threat on 22.8.18 through its solicitors, Holman Webb: AFM 273.

Election and Waiver (Respondent's Submissions [27]-[54])

7. Before s 28 of the *ICA*, the insurer had a common law right to avoid the contract and reject the claim for non-disclosure. If, having the requisite knowledge of the facts, it asserted rights which would only exist if the policy was in force and covered the claim, it was taken to have elected to treat the policy as valid and applicable to the claim: *Nigel Watts*, JBA 4/665-6.

8. S 28(3) ameliorated the position of the insured, while still entitling an insurer to reduce its liability to nil or some other amount. The provision arms the insurer with a body of substantive rights which it can raise in defence to the contractual claim for indemnity under the policy: Allsop CJ at CAB 92[311]. The policy correctly referred to this as an "entitlement": AFM 13. It is also a right or set of rights (*Eaton*, JBA 3/417), the exercise of which is inconsistent with rights of subrogation, continuing access to the property and control of the repair work. The concept of "sets of rights" was recognised in *Sargent* JBA 3/465 and *Khoury* JBA 3/449. Whether the asserted right to reduce liability is "arguable" or contestable (rather than absolutely certain) cannot be a relevant ground of distinction for election, but seems to inform the false dichotomy in [311] at CAB 92.

9. In any event, election is not confined to a choice between "inconsistent rights". The essence of election is a party being confronted with two mutually exclusive "courses of action" which in fairness require a choice: *Inmer* JBA 3/434-5; *Sutton* JBA 3/527; *Delta* JBA 4/585; *Scarf* JBA 4/687 ("inconsistent things").

10. *Craine* JBA 3/369 is either an illustration of that broader view of election (as *ARF* v *Gardner* suggests: JBA 2/34) or a case of waiver beyond the narrower view of election which insists on inconsistent rights. The insurer was not liable under the policy because the claim was not made in time, ie a condition expressed in the form of a "state of affairs" (and thus akin to s 28(3)), as distinct from actual decision-making by the insurer in choosing between inconsistent rights. But the insurer waived the benefit of that position by inconsistently obtaining advantages under the policy with knowledge of the facts. A party is thus precluded from exercising a right by conduct inconsistent with that right. Allsop CJ correctly recognised the "stark similarity" with the present case: CAB 100 [339].

Estoppel (Respondent's Submissions [55]-[68])

11. Ground 3 of the Notice of Appeal (CAB 324) misfires, in that the detriment found by Allsop CJ (CAB 97-99 [333]-[336]) and the Full Court (CAB 181-186 [206]-[225]) was a loss of a chance or opportunity that was not fanciful. Similarly, the Appellant's written submissions are misdirected to arguments on the balance of probabilities as to whether Delor Vue would have been better off in a counterfactual scenario of earlier repair work or earlier proceedings.

12. *Delaforce* JBA 4/565 [5] was expressly approved in *AFSL* v *Hills* JBA 2/110-111. Instead of the actual circumstance of Delor Vue being left with a damaged property for over a year and not having taken proceedings at a time when the relationship had not soured, Delor Vue could have acted for itself in repairing the property to the extent it was financially able to do so (the

"obvious objective facts" per Allsop CJ at [334]) and could have sued the insurer. It was impossible to tell the outcome because the parties conducted themselves on an entirely different basis (Allsop CJ at [333]; Full Court [207], [215]). The loss of the ability to prove a matter by available evidence is well-recognised as a detriment, eg it is typically relied on in a defence of laches. The loss of a chance which was not fanciful could readily be inferred without subjective evidence of reliance by Delor Vue. Self-serving speculation would not have been helpful: Allsop CJ at [334]; Full Court at [215].

Utmost Good Faith (Respondent's Submissions [69]-[78])

13. There was ample basis for Allsop CJ's conclusion (upheld by the Full Court: CAB 192 [252]) that Allianz did not act consistently with commercial standards of decency and fairness: CAB 104-5 [346]-[350]. In particular,

    (a) the considered position expressed on 9.5.17 was clear on an important matter to ordinary people who had suffered cyclone damage and who had been open and cooperative, in circumstances where a clear, timely and certain decision on indemnity and repair was required;

    (b) Allianz obtained benefits of access and co-operation for 12 months as a result of its confirmation of indemnity, to which should be added the benefits of making a subrogated claim and of controlling the repair work;

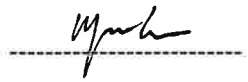
    (c) no explanation or purported justification was given for resiling from its decision to indemnify a year after it was first communicated and for making a take-it-or-leave-it ultimatum; and

    (d) the threat and the carrying out of an approach previously disavowed involved strain and financial risk to the ordinary people involved in Delor Vue.

14. Reliance on the subsequent ultimate finding on the application of s 28(3) in May 2020 is unjustified hindsight, given that the duty must be applied to the conduct of Allianz in May 2018: Full Court at CAB 191-2 [247]-[249].

15. A breach of the duty of utmost good faith does not require proof of loss. The appropriate remedy was Declarations 5 and 6: CAB 111-112. Any claim for damages thus became otiose.

Dated: 8 August 2022



I.M. Jackman