



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 10 Aug 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: S42/2022
File Title: Allianz Australia Insurance Limited v. Delor Vue Apartments ()
Registry: Sydney
Document filed: Form 27F - Outline of oral argument
Filing party: Appellant
Date filed: 10 Aug 2022

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
 SYDNEY REGISTRY

S42/2022

BETWEEN: **ALLIANZ AUSTRALIA INSURANCE LIMITED**
 Appellant

and

DELOR VUE APARTMENTS CTS 39788

10

Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline of propositions

Ground 1 – election (AS [19]-[33]; Reply [5]-[7])

- 1 The decisions of this Court establish that the category of common law election raised
 20 in this case only applies where a party is required to choose between inconsistent
 rights, such that selection of one extinguishes the other: AS [21] – [23].
- 2 The occasional use in the authorities of cognate expressions such as “inconsistent
 positions” and “inconsistent courses of action” do not describe a different principle
 free from the requirement to establish a choice between mutually inconsistent rights:
 AS [26] – [30].
- 3 The primary judge and all members of the Full Court agreed that s 28(3) of the
Insurance Contracts Act does not create a choice between inconsistent rights. The
 reduction effected by s 28(3) is produced when a certain state of affairs exists: AS
 [24]; PJ CAB 91 [309] – [317]; CAB 158 [130]; CAB 275 [548] – [556].
- 30 4 The conclusion of the majority in the Full Court that the doctrine of election extends
 to inconsistent positions was incorrect. This conclusion was based on a

misunderstanding of *Craine* [JBA3, tab 9] and is contradicted by *Agricultural and Rural* [JBA2, tab 4]. It is also not the law in England: *Kosmar* [JBA4, tab 19].

5 Allianz did not choose between inconsistent rights. In the 9 May 2017 email, it adopted a position of offering to indemnify Delor for certain losses when it was not liable to do. By communicating that position, Allianz did not affirm the contract, because it was never open to avoid it under s 28(3). For the same reason, Allianz's subsequent conduct did not affirm the contract. There was no election.

Ground 2 – estoppel (AS [34]-[45]; Reply [9]-[12])

6 Delor's case was that its detriment was (a) making policy renewal decisions based on
10 the 9 May email; and (b) allowing the repair investigations and works to be handled by Allianz at its own pace: CAB 173 [183]. The claim of detriment in (a) was not upheld.

7 The primary judge and the majority in the Full Court found that Delor suffered detriment by (a) refraining from suing Allianz sooner; and (b) not rectifying the property itself in the 12 months following the 9 May 2017 email: CAB 180 [204] (8).

8 The issue regarding refraining from suing Allianz was not disclosed anytime before closing submissions before the primary judge and was not addressed in the evidence. In any event, the opportunity to sue Allianz was not lost. Delor sued Allianz on the s 28(3) issue and failed. The opportunity to settle that claim was not lost either.

20 9 All members of the Full Court agreed that Delor's case on detriment in relation to the repairs did not include a contention that the work might have been carried out by Delor better, cheaper or faster. In any event, there is no evidence that Delor lost that chance.

Ground 3 – waiver (AS [46]-[55]; Reply [8])

10 In this context, there is no doctrine of waiver independent of election and estoppel: *Agricultural & Rural* [JBA2, tab 4, pg 46, paras [95] – [96]].

11 If there is a doctrine of waiver as held by the primary judge and the majority in the Full Court, the doctrines of election, estoppel and contractual consideration are redundant.

Ground 4 – duty of utmost good faith (AS [56]-[63]; Reply [13]-[14])

12 The duty of utmost good faith in s 13 of the ICA may require a party to an insurance contract to act with regard to the other’s party “legitimate interests”. The court must assess each party’s “legitimate interests” with reference to legal principle, by analogy with previous cases and, where appropriate, to commercial standards of fairness. The content of the duty is not simply whatever a court thinks is commercially fair. *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1, [15] (Gleeson CJ and Crennan J)

13 It is not a breach of the duty of utmost good faith for one party to an insurance contract to seek to resile from a post-contractual representation communicated to the other party unless that other party has a “legitimate interest” in its performance. There is no legitimate interest is merely avoiding disappointment. Unless the other party was induced to act to its detriment upon the representation, the representor will not breach of the duty of utmost good faith by seeking to resile from the representation. *Carter v Boehm* (1766) 3 Burr 1905, 1909–1910 (Lord Mansfield); 97 ER 1162, 1164.

14 If, contrary to 7, the enquiry posed by s 13 is simply whatever the court thinks is commercially fair, the circumstances of the present case show that Allianz did not breach the duty: see Derrington J at FC [589]–[600] (CAB 287–291).

Dated: 10 August 2022



David McLure
(02) 9151 2029
mclure@newchambers.com.au



Thomas Prince
T: (02) 9151 2051
prince@newchambers.com.au