HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: ALLIANZ AUSTRALIA INSURANCE LIMITED
Appellant

and

DELOR VUE APARTMENTS CTS 39788
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Concise statement of the issues arising

2. The questions as framed by the appellant in its submissions contain contentious factual assumptions. That being so, it is respectfully suggested that the issues may better be identified as follows.

3. *First*, under the doctrine of election, is an election made by an insurer where it communicates to the insured that it has decided not to reject the insured's claim for indemnity by reason of the insured's pre-contractual non-disclosure and section 28(3) of the *Insurance Contracts Act* **(Act),** and to instead accept the claim in line with policy terms, and in doing so asserts (and proceeds to exercise) rights under those terms in respect of the accepted claim?

4. *Second*, has the insurer in such a case waived its entitlement to rely on an insured's pre-contractual non-disclosure and section 28(3) of the Act?

5. *Third*, on the facts of this case, did the respondent suffer detriment sufficient for the purposes of establishing promissory estoppel?

6. *Fourth*, on the facts of this case, did the appellant breach its duty of utmost good faith?

Part III: Section 78B notices

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

Part IV: Facts

8. The respondent identifies the following facts in addition to, or by way of challenge to the accuracy of, the description of facts set out in Part V of the appellant's submissions.

9. The buildings the subject of the policy cover included 11 blocks of residential apartments, referred to as blocks A to K.[1] Each block contained between 4 and 6 residential lots, there being 62 home units in total.

10. After the cyclone and the submission of the respondent's claim for indemnity, the appellant identified that there appeared to be a pre-contractual non-disclosure issue with respect to defective soffits and eaves. The appellant then confirmed that it would investigate that issue further "before making a determination" on the claim.[2]

11. After carrying out those investigations, the appellant communicated its determination in respect of the claim to the respondent as it said it would. It told the respondent that there had been non-disclosure, but stated that it was "pleased to confirm that we will honour the claim and provide indemnity to the Body Corporate, in line with all other relevant policy terms, conditions and conclusions", and added that it trusted the respondent "will be happy with our decision to grant indemnity".[3]

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[1] Appellant's Book of Further Material 151

[2] Respondent's Book of Further Material 23

[3] Appellant's Book of Further Material 90, at 91 and 92.

12. In that same email, the appellant relied upon certain policy exclusions concerning prior defects, confirmed its reliance upon subrogated rights it held as insurer to an accepted claim to take action against the builder of the buildings,[4] and made it clear it would be exercising its rights to access the property,[5] and its right to control repair work.[6] Shortly stated, the appellant's acceptance of the claim carried with it not only necessarily, but expressly by its communicated terms, the acceptance and exercise by it of this set of rights.

13. The appellant also stated in the email that the works to be performed would be broken into repairs for prior defects (which the appellant said it would not pay for) and repairs for resultant damage (which the appellant accepted it would pay for). Contrary to its submissions, the appellant did *not* state that repairs to the roof would all fall within the former category and not the latter. The appellant's own assessment as to the extent to which roof repairs would fall in one or other category was ongoing, and the respondent had yet to become involved in that process at all.

14. Pausing here, the appellant's recurring submission that it fell to the respondent to fix the roof and the appellant to pay for internal repairs is wrong.[7] The subsequent correspondence between the parties made it plain that, contrary to what the appellant now suggests, the appellant accepted that it would have to meet the cost of some of the roof repairs under the policy terms.[8] Indeed this was even expressly recognised in the appellant's controversial letter of 28 May 2018, in which it threatened to depart from its acceptance of the claim.[9] What the appellant did state in its 9 May 2017 email and thereafter, was that, as a matter of works scheduling, it wanted roof works to precede repairs to resultant internal damage that had been occasioned.

15. For these reasons, the appellant's attempt to suggest that the works did not progress during the relevant 12 month period because the respondent did not undertake the roof repairs should not be accepted. The appellant was not sitting back waiting for the respondent to fix the roof. Rather, the appellant's own assessment of what roof

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[4] This right was provided for in clause 8, Appellant's Book of Further Material 19, clause 8.

[5] This right was provided for in clause 6(d), Appellant's Book of Further Material 19.

[6] This right was provided for in clauses 4 and 5, Appellant's Book of Further Material 19.

[7] See for example appellant's submissions at [41]-[42]

[8] Respondent's Book of Further Material 39, mid para commencing "The Insurer has advised…"

[9] Appellant's Book of Further Material 247 at para 2.5(c).

works would be covered and not covered under policy terms dragged on throughout that period. Given this, and further given clauses 4 and 5 of the policy which gave the appellant control over the repair works and who would undertake them,[10] the respondent naturally did not begin works itself. The respondent expressed agitation about that delay in mid 2018, and pressed the appellant to finalise its position on this issue.[11] It was in response to this that the appellant sent its controversial letter of 28 May 2018[12] (addressed further below).

16. Returning to the narrative, consistent with the appellant having asserted and embraced the rights bound up with its acceptance of the claim in the 9 May 2017 email, the appellant thereafter maintained reliance upon the policy exclusions,[13] caused solicitors retained by it (Holman Webb) to issue demands to the builder in the name of the respondent,[14] and had its assessors and other experts enter upon the respondent's land and into the respondent's buildings and the homes of the residents.

17. The cyclone damage to the buildings comprised damage to the eaves, soffits and other roof elements on all buildings, to various parts of the interior of the buildings, and to the trusses in the roofs of three lots. Of these trusses, the worst affected was that in the roof of unit 36 (in block G), although the truss in the roof of units 26 and 31 (in blocks E and G respectively) also had some damage to it.[15]

18. On 10 May 2017, a building company called Ambrose provided a quote to repair the cyclone damage for $553,207.90 inclusive of GST.[16] Importantly, the repair works covered by that quote included fixing or replacing eaves, repair to the facia, sheeting and other parts of the roofs of all buildings, the repair to the damaged truss in Block G (where unit 36 was located), and internal building damage that impacted on a large number of the individual residential units.

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[10] Appellant's Book of Further Material 19

[11] Respondent's Book of Further Material 63

[12] Appellant's Book of Further Material 247

[13] For example, Respondent's Book of Further Material 35

[14] For example, Respondent's Book of Further Material 30, 37, 48

[15] Appellant's Book of Further Material 160 at top of 165

[16] Appellant's Book of Further Material 95

19. Given the applicant's acceptance of the claim, the respondent did not take control of the works to be undertaken and seek to progress the repairs to the buildings itself. However in the year which then followed, no substantive repair works to the buildings were undertaken. The respondent's buildings remained in essentially the same damaged state for over a year.

20. The evidence established that, in and after May 2017, the respondent's financial capacity was such as to enable it to source funds to undertake substantial repair works, if it had needed to. In this regard:

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(a) in this period, and in recognition of the fact that it would have to meet some repair costs itself given the limits of cover under policy terms, the respondent was authorised to enter into and execute a loan agreement with StrataCash for a loan of $750,000 for repair costs;[17]

(b) the fact the respondent had very substantial borrowing capacity was unsurprising having regard to the fact the insured value of the buildings and common property was in excess of $36 million;[18]

20 (c) in this same period, the respondent also had, as it had historically maintained, a substantial set of cash accounts and term deposits, provided by lot owners through levy payments, to meet expenses such as building repairs. As at late 2016 it held over $300,000,[19] which sum had increased to over $350,000 by 28 February 2017;[20]

(d) consistent with the above matters, in about March 2018 the respondent had organised to have $1 million available to it to fund repairs, comprising the $750,000 loan facility plus $250,000 from its cash resources.[21]

30 21. During the period of the appellant's acceptance of the claim, the appellant asserted there were pre-existing defective trusses in the roofs of the buildings and further

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[17] Respondent's Book of Further Material 51

[18] Appellant's Book of Further Material 57

[19] Respondent's Book of Further Material 8

[20] Respondent's Book of Further Material 18

[21] Appellant's Book of Further Material 229 at 231.

asserted that the cost of rectification of those defects was not covered due to policy exclusions. As noted above, other than in respect of units 26, 31 and 36, the trusses were not damaged by the cyclone. The issue with the vast majority of trusses, therefore, was not cyclone damage, but allegedly defective workmanship.

22. Although having no policy entitlement to do so, the appellant took the position that truss rectification works of the kind it contended had to be undertaken, and that this work was to be undertaken together with cyclone damage repair work. In this regard, it went about seeking and obtaining a scope of works that covered both defect rectification and cyclone repair works, obtaining quotes from builders to undertake all works (whether covered by the policy or not), and attempting to apportion the quoted costs between those which were covered and those which were excluded under policy terms.[22]

23. In response, the respondent sought and obtained its own advice, to the effect that any issues concerning the trusses could be addressed in a different way to that contemplated by the appellant, by way of insertion of a support to the existing trusses (rather than the complete removal and replacement of the existing trusses). This would substantially reduce the scope of works and be less expensive.[23]

24. On 28 May 2018, having accepted and then adjusted the claim for over a year, and having exercised the set of rights earlier described, the appellant sent the respondent a letter in which it stated that it would pay $918,709.90 for certain cyclone damage repair works (including various roof and other repairs), but would not pay for other cyclone damage repair works or for defect remediation works, which works it asserted would cost $3.579 million.[24] Critically for present purposes, the appellant went on to state that if the respondent did not agree to accept the $918,709.90 figure the appellant's offer to pay that sum would lapse and it "will pay $nil pursuant to

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[22] See for example Respondent's Book of Further Material 45, third paragraph

[23] Respondent's Book of Further Material 57, under the heading "Roof Truss Repairs"

[24] It is unclear how the two figures set out in the 28 May 2018 letter was arrived at by the appellant. It appears to have taken the view that the cyclone damage repairs would cost more than the Ambrose quote of May 2017. It is also unclear what portion of the defect rectification works figure was thought to be attributable to the truss rectification work scope of the appellant. Whatever that figure was, the evidence was that the respondent had advice that it could be done in a much simpler and cheaper way. The evidence did not establish the cost of that alternative truss remediation scope.

section 28 of the Insurance Contracts Act 1984 on the basis of the Body Corporate's non-disclosure as referred to in [the 9 May 2017] email".[25]

25. The appellant describes this statement in its submissions as a "reservation of right" to rely on the non-disclosure.[26] This is not a fair characterisation. It was an unequivocal statement to the effect that unless the respondent accepted the appellant's figure, whether or not the respondent agreed with it, the appellant would rely on the non-disclosure and pay nothing for the claim. The threat was made to pressure the respondent into conceding the appellant's figure, whatever the respondent's own view about the validity of that figure might have been.

26. When the respondent indicated it did not agree with the appellant's assessment of the amount payable under the policy, and by letter dated 22 August 2018 from Holman Webb (the same solicitors who had been acting for the respondent on instructions from the appellant acting as subrogated insurer), the respondent purported to deny liability in respect of the claim by reason of the non-disclosure the subject of the 9 May 2017 email.[27]

Part V: Argument

Issue 1 - Election

27. It is not controversial that the appellant made and communicated a fully informed decision to its insured, the respondent, that it would accept the claim and provide indemnity in line with policy terms, instead of rejecting the claim by reason of the insured's non-disclosure. In doing so, the appellant was complying with its contractual obligation to consider the insured's claim for indemnity under the policy and positively make and communicate a decision as to whether the claim was accepted or rejected. This was an incident of its duty to act in the utmost good faith, implied into the contract by s 13 of the Act.[28]

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[25] Appellant's Book of Further Material 247

[26] Appellant's submissions at [16].

[27] Appellant's Book of Further Material 247

[28] *CIC Insurance Limited v Bankstown Football Club Ltd* [1997] HCA 2; 187 CLR 384 at [58]

28. Prior to the introduction of the Act, in such a case the insurer had a common law right to avoid the contract and reject the claim by reason of non-disclosure.[29] Further, and frequently, the insurer could contend that, by the entry of the parties into the policy in the context of the information given in the insurance proposal form, the insured warranted the position to be as set out in the proposal and not materially otherwise (sometimes referred to as a "basis of contract" warranty). Breach of that warranty entitled the insurer to reject the claim or avoid the policy.[30]

29. At common law, a decision by an insurer to exercise or not exercise such a right in the event of non-disclosure – that is, to either accept a claim notwithstanding non-disclosure, or alternatively to reject the claim or avoid the policy altogether – fell squarely within the domain of the doctrine of election.[31]

30. Part IV of the Act was introduced to ameliorate the effect of the common law on insureds, so as to ensure that insurers were not able to obtain a disproportionate benefit from non-disclosure or misrepresentation. It still enabled an insurer, however, on the facts of a case such as the present, to refuse to pay a claim by reason of those matters.

31. In circumstances where a decision by an insurer under the common law to reject a claim or avoid a policy by reason of non-disclosure amounted to an election, it would be passing strange if a decision by an insurer to reject a claim by reason of non-disclosure and the provisions of the Act did not have the same legal effect. For reasons which follow, no such oddity arises. An election was made in this case.

32. The first and most significant error in the appellant's attack on the Full Court majority's reasoning is the appellant's contention that this Court should confine the scope of election's application to a case where the choice to be made is between inconsistent rights. That contention is an invitation to this Court to change the common law by significantly limiting the doctrine's scope, contrary to the position established by at least 140 years of case law. While election frequently involves a

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[29] *Dalgety & Co Ltd v Australian Mutual Provident Society* [1908] VLR 481; *Joel v Law Union & Crown Insurance Company* [1908] 2 KB 863

[30] *Deaves v CML Fire and General Insurance Co Ltd* (1979) 23 ALR 539; *Dawsons Ltd v Bonnin* [1922] 2 AC 413.

[31] *Nigel Watts Fashion Agencies Pty Ltd v GIO General Ltd* (1994) 8 ANZ Ins Cas 61-235 (NSWCA).

choice between inconsistent rights, and many authorities are concerned with that circumstance, the doctrine's application has never been limited to that circumstance.

33. A convenient starting point in the analysis of the anatomy of election is *Scarf v Jardine*.[32] There, after observing the uniformity in the prior decisions on the principle, Lord Blackburn identified the principle as follows: "where a man has an option to choose one or other of two inconsistent *things*, when once he has made his election it cannot be retracted, it is final and cannot be altered", and that "once there has been an election to do *one of the two things* you cannot retract it and do *the other thing*; the election once made is finally made" (emphasis added).[33]

34. That exposition of the doctrine's terms resonates with this Court's confirmation of the "true nature of election" in *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)*.[34] There, it was recognised that "it is of the essence of election that the party electing shall be 'confronted' with two mutually exclusive *courses of action* between which he must, in fairness to the other party, make his choice" (emphasis added).[35] This was restated and confirmed by this Court in *State of Victoria v Sutton*.[36]

35. This true nature of election arises because election's concern, ultimately, is to address the "interests of certainty", and "because it has been thought to be fair as between the parties that the person affected is entitled to know where he stands".[37] A paradigm example of such an occasion is an insured who has submitted a claim for indemnity under a policy. Indeed its entitlement to know whether the claim is accepted or rejected is the corollary of the insurer's obligation to bring such certainty through a timeous decision as to that matter (see above).

36. The true nature of election, as described above, was recently confirmed by the Privy Council in *Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electricity Corporation*.[38] There, the Board recognised that what is "fundamental" to election,

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[32] (1882) 7 App Cas 345.

[33] Ibid, at 360.

[34] (1993) 182 CLR 26 per Deane, Toohey, Gaudron and McHugh JJ at 41.

[35] Ibid at 41.

[36] (1998) 195 CLR 291 per Gaudron, Gummow and Hayne JJ at [40].

[37] *Sargent v ASL Developments Limited* (1974) 131 CLR 634 per Mason J at 656.

[38] [2021] 1 WLR 5741.

and what renders it capable of application, is the existence of circumstances under which "a choice must be made between two alternative and inconsistent (in the sense of mutually exclusive) *courses of action*, such that adopting one of them necessarily entails forsaking the other" (emphasis added).[39]

37. As earlier observed, it is not controversial that such circumstances will exist in a case where a party to a contract has before it alternative and inconsistent rights, most typically a right to terminate or affirm in the face of a fundamental breach. The fact that this is the most frequent circumstance in which election is considered, and that in such cases courts have spoken of election in terms of a choice between inconsistent rights, does not mean that the doctrine is limited to such a choice. None of the authorities the appellant relies upon stands for the proposition that election arises *only* in that context.

38. The decisions referred to above, dating back to 1882, including decisions of this Court, confirm that election is not so limited. Further, in cases where the particular election has been concerned with a choice between inconsistent rights, it has been recognised that "election itself is a concept which may be relevant in more than one context", with the particular context before it in that case being an election between inconsistent rights, and a choice between termination and affirmation merely being one example of the doctrine's application, with the doctrine ultimately concerned with "inconsistent courses of action".[40]

39. For these reasons, contrary to the appellant's contention that the Full Court majority adopted a dangerous new approach to election, the majority's approach was conventional and in accordance with long established principle. It is the appellant who invites this Court to bring about a substantial and unwarranted change to the common law so as to reduce the scope of the doctrine's application.

40. There is a further reason why the appeal fails, even if, contrary to the current state of the law, election is now to be confined to a choice between inconsistent rights.

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[39] Ibid at 5748F

[40] See for example the passage of the judgment of Lord Goff of Chieveley in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corpn of India* [1990] 1 Lloyd's Rep 391, 398, set out in *Delta Petroleum* at [19], 5747G.

41. Both at first instance and in the Full Court, the respondent contended that the appellant's decision did amount to the making of a choice between inconsistent 'rights' and thus constituted an election. It maintains that contention on this appeal, and for the avoidance of doubt, will seek leave at the hearing to file and serve a notice of contention addressing this point in the terms attached to these submissions.

42. On the one hand, the appellant had the right to decline the claim. This was a right, because it reflected an entitlement conferred upon the appellant by virtue of the application of a law (namely s 28(3) of the Act) in the circumstances before the appellant, and further or alternatively, because such action was also the corollary of the appellant's legal duty to make and communicate a decision on the claim made under the policy. It was a right, therefore, on either the narrower or more expansive general meanings of the term 'right' identified by Barwick CJ in *Eaton & Sons Pty Ltd v The Shire of Warringah*.[41]

43. In this regard, the primary judge described s 28(3) of the Act correctly as arming the insurer with a body of substantive rights.[42] This conclusion, and the submissions set out in the previous paragraph, are supported by the fact that the policy itself speaks naturally of the appellant having an "entitlement" to reduce its liability in the event of non-disclosure.[43] His Honour's later statement that s 28(3) did not give rise to a choice between rights[44] was inconsistent with that conclusion, and erroneous. In his dissenting judgment in the Full Court, Derrington J observed this inconsistency.[45]

44. The respondent contended below, and contends again in this Court, that the set of rights that existed, which were alternative and inconsistent with the right to decline the claim, and which the appellant positively exercised, were those provided for under the policy in the event the claim was accepted rather than rejected. The policy had not been, and could not have been, avoided. It continued to exist. It made provision for the rights of the parties in the event a claim was accepted, whether or not the appellant insurer was obliged to accept the claim.

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41 (1972) 129 CLR 270 at 293-294.

42 CAB at 91 para [311].

43 Appellant's Book of Further Material 13, clause headed "non-disclosure" in right hand column.

44 CAB at 92 para [317].

45 CAB at 272 para [544].

45. In the very email through which it communicated its decision not to rely on non-disclosure, the appellant not only indicated acceptance of the claim, but asserted and relied upon rights under policy terms. As described in Part IV above, those rights included, for example, its right to take subrogated action against the builder,[46] and its right to access the property,[47] its right to control repair work,[48] and it thereafter exercised all of those rights it had claimed for itself on 9 May 2017.

46. The appellant could not, on the one hand, exercise its right to decline the claim, and on the other hand, rely on this set of rights arising in consequence of its acceptance of the claim. The appellant was faced with a choice between the exercise of alternative and inconsistent rights. It elected for the latter.

47. The primary judge and Derrington J appear to have been reluctant to accept that election can apply here because of the fact that s 28(3) of the Act and the non-disclosure and its consequences for the appellant created a "state of affairs" under which the appellant had no liability in respect of the claim for cover. The reasoning appears to be that, if the appellant had no liability, the acceptance by it of the claim could not amount to the exercise of a 'right' (and thus there was no 'right' inconsistent with the right to decline the claim such as would enable the doctrine of election to operate).

48. Considering the matter in this way fails to address the above matters. It also proceeds on the erroneous basis that the principle is only concerned with two individual (i.e. singular) opposing rights (such as termination or affirmation), when in fact the doctrine is equally concerned with inconsistent "*sets of rights*".[49] In the present case, the rights inconsistent with the insurer's right to deny the claim arising in consequence of s 28(3) of the Act is not said to be a 'right' to accept the claim *per se*. Rather, what existed was a "set of rights" that applied under the policy where an insurer accepted a claim (whether obliged to or not). Embracing and exercising that set of rights was fundamentally inconsistent with denying the claim.

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[46] Appellant's Book of Further Material 19, clause 8.

[47] Appellant's Book of Further Material 19, clause 6(d).

[48] Appellant's Book of Further Material 19, clauses 4 and 5.

[49] *Sargent v ASL Developments Limited* (1974) 131 CLR 634 per Stephen J at 641; *Khoury v Government Insurance Office* (NSW) (1984) 165 CLR 622 at 633

Waiver

49. If the choice available to an insurer between handling a claim in accordance with its policy rights and the rejection of the claim is no longer able to be accommodated within the doctrine of election due to the impact of the language of s 28 of the Act and limits imposed by the doctrine's taxonomy, the making of a choice between those mutually exclusive courses of action is nevertheless addressed by the species of waiver recognised by this court in *Craine v Colonial Mutual Fire Insurance Co Ltd*.[50]

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50. In *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305 at 326, the Court identified a species of waiver, which operates in a case where a party by distinct act, intentionally and with knowledge, waives the benefit of a position it is entitled to take and by doing so obtains an advantage it would not otherwise have been entitled to. The principle operates to prevent a party who has approbated from later reprobating.

51. The appellant has contended that, although speaking in terms of waiver, the Court in *Craine* (at 326) was instead dealing with the doctrine of election. That contention is
20 incorrect. The doctrine with which the Court was concerned was stated to be one "of some arbitrariness introduced by the law to prevent a man in certain circumstances from taking up two inconsistent positions". On the appellant's own contentions, this is not a description of election. It is also inherently improbable that this Court would have described the doctrine of election as one of some arbitrariness. Most notably, the characteristics of the species of waiver expounded in *Craine* differ from those of election. In particular, the focus of the doctrine being addressed by the Court was conduct in the form of a taking of position and obtaining something "to which he would not otherwise have been entitled". No such requirement exists in the case of an election.

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52. In the present case, in accepting the claim in line with policy terms, the appellant exercised entitlements it would not have had if it had rejected the claim, and obtained an advantage it would not otherwise have been entitled to. Commercially, it avoided the risk of adverse publicity in the insurance marketplace in the immediate aftermath

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[50] (1920) 28 CLR 305.

of a natural disaster. And more directly with respect to the respondent, the appellant gained extensive and ongoing access to the respondent's land and buildings (which it would have had no entitlement to do had it rejected the claim), and had its own solicitors write to the builder in the respondent's name (which again it could not have done had it rejected the claim).

53. This Court has more recently recognised that there are cases in which the word "waiver" has been used in senses other than those embraced by the principles of election or estoppel: *Agricultural & Rural Finance v Gardiner*.[51] There, after acknowledging the many cases where the common law recognises the abandonment or some right or entitlement, the plurality observed that it "is not necessary to consider whether such classifications are useful. Rather, it is important to identify the principles that are said to be engaged in the particular case".[52]

54. In the present case, the principles that are engaged are those identified by the Court in *Craine*. Their application in the present case do not give rise to concern, either legally or commercially. Historically, the making of a decision about whether to accept or reject a claim by reason of an insured's pre-contractual non-disclosure or misrepresentation has been treated by the law as the making of a binding election or waiver. No authority since the introduction of the Act has indicated that an insurer's decision should be treated differently by reason of that legislation. That is unsurprising given that (a) the insurer is obliged by the contract to make and communicate a decision about whether to accept a claim, (b) acceptance of a claim carries with it an acceptance of the policy rights relating to the claim, (c) just as a party can waive a provision in a contract that exists for its sole benefit,[53] so too can a party waive the benefit that accrues to it under statute – with that waiver, in the context of a claim for indemnity under a policy, necessarily falling to be made or not at the time of accepting or rejecting the claim.

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[51] [2008] HCA 57; 238 CLR 570 at per Gummow, Hayne and Kiefel JJ at [52].

[52] Ibid, at [52]-[54].

[53] *Gardiner* at [52].

Estoppel

55. There is no controversy as to the principles to be applied in relation to the respondent's estoppel case. They have been settled by this Court, and were recognised by the primary judge and the members of the Full Court. The only controversy in this case was as to the application of those principles to the facts.

56. The respondent's estoppel case was based on the proposition that its detriment was constituted by its adoption of a position, as an insured whose claim was accepted on policy terms, in reliance upon the appellant's promise. By adopting that position, it lost opportunities attached to the alternative position able to be taken in the counterfactual in which the appellant declined the claim. Those lost opportunities included, as both the primary judge and Full Court majority found: (a) the opportunity to challenge the appellant for indemnity in May 2017 and potentially resolve the conflict within that challenge, and (b) the opportunity to take steps to carry out repair works itself rather than being left with a damaged property for over a year, and all of the distress and inconvenience attending that situation. It mattered not that the respondent could not prove a counter-factual on the balance of probabilities. The inherent difficulties in attempting to do so was detriment in itself.

57. There was nothing controversial, at the level of principle, with an estoppel case so framed. Loss of a chance that is not remote or fanciful is not a foreign concept. It is sufficiently robust to be recognised as actual damage suffered by a party, founding an entitlement to substantial awards of damages in contractual, tort and statutory claims. There is no reason why the concept of loss of a chance would be treated differently in an estoppel suit, and every reason why it would comfortably be recognised as detriment in the relevant sense, given that detriment for estoppel purposes need not consist of the expenditure of money or other quantifiable financial detriment.

58. The respondent's estoppel case was in accordance with the well settled principles referred to in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*,[54] including that the adoption of a position may be identified as the detriment or source of prejudice for estoppel purposes. It was also consistent with the principles

[54] (2014) 253 CLR 560 per Hayne, Crennan, Kiefel, Bell and Keane JJ at [84]-[88]

set out by Allsop P (as his Honour then was) in *Delaforce v Simpson-Cook*,[55] which this Court expressly cited approvingly in *Hills*.[56]

59. In the present case, the primary judge and Full Court majority were correct to conclude that the opportunities bound up in the respondent's adoption of position consequent upon the appellant's acceptance of the claim were sufficiently real to enable the adoption of that position to be characterised as detriment.

60. The correctness of that conclusion is borne out by the facts set out in Part IV above. Before addressing their application here, the respondent observes by reference to those facts that, although the appellant took a certain position in relation to roof trusses in the actual scenario, in the counterfactual scenario, in which one assumes the appellant had denied the claim, there would have been no such assertion for the respondent to address. It would have been a matter for the respondent to decide for itself whether the trusses were defective, and if so, what (if anything) had to be done about it, how much to spend on such activity, and when it would undertake such works and incur such costs. On the counter-factual, subject to the question of financial limitations, the respondent would not have been prevented from proceeding to: (a) repair the cyclone damage only, or (b) attend to damage repairs first and undertake a staged programme of defect rectification works over time, or (c) attend to cyclone damage and its simpler and cheaper defects rectification works in tandem.

61. As to the loss of opportunity for the respondent to progress repair works from May 2017, the fact such opportunity existed on the counterfactual is self-evident from the nature of the counterfactual – that is, the assumed declinature and the fact the building was cyclone damaged. There is no merit in the suggestion that the respondent did not have the financial capacity to undertake repairs to the cyclone damage. The facts summarised in Part IV above demonstrated the respondent did have that capacity. They demonstrated that a quote to repair cyclone damage could have been obtained in May 2017 for a price that the respondent could afford to pay. Even if one could assume that there was other damage beyond that which was the subject of that quote, the fact remains that the respondent could have undertaken very

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[55] (2010) 78 NSWLR 483 at [5].

[56] (2014) 253 CLR 560 per Hayne, Crennan, Kiefel, Bell and Keane JJ at [84] and footnote (230).

extensive repairs to the damaged property and freed itself of the burdens and inconvenience of subsisting with the whole of the cyclone damage for over a year.

62. There is uncertainty as to whether the respondent could have also paid for all of the defect rectification works at that time, if it had wanted to. The evidence did not clearly demonstrate what those actual costs would have been, including in particular if the respondent's simpler and cheaper method was used. However the evidence did establish that the funds then available to the respondent would have permitted some rectification works to be undertaken in addition to cyclone damage repair, and further demonstrated the respondent owned valuable assets and had an established history of being able to raise substantial funds when required.

63. Importantly, however, whatever be the degree of uncertainty attending the affordability of defect rectification works, that does not detract from the fact that the respondent had the capacity and real opportunity to proceed with and undertake a very substantial programme of cyclone damage repair from May 2017, rather than having the property sit in its damaged state with no meaningful repairs undertaken in the following 12 months. That real opportunity on the counter-factual would not only have given the respondent a sense of progress and the use and enjoyment of a far more habitable set of buildings at an earlier point; it would also have removed the anxiety and stress associated with a year of repair work inactivity, and the shock of the abrupt about-face of the insurer at the end of that period.

64. As to the loss of the opportunity to challenge the appellant in May 2017 if it had decided to reject the claim at that time based on non-disclosure, the fact such an opportunity existed on the counterfactual is again self-evident from the nature of the counterfactual – that is, the assumed declinature and the existence of an entitlement to take action to challenge such a decision. There is no suggestion in the evidence that the respondent would have taken a decision to decline in May 2017 lying down, and the fact of the respondent's subsequent conduct in bringing this proceeding demonstrates it would not have.

65. The fact that the respondent cannot now prove what would have happened had a hypothetical declinature been challenged back in May 2017 (rather than much later in time, long after the natural disaster and the publicity attending it, and after so much had happened and the parties' relationship had soured) does not mean that one

cannot recognise as a realistic possibility, an outcome of that hypothetical challenge, made in an earlier and quite different context, more favourable than a complete failure.

66. In this regard, and to start with, it is difficult to imagine the respondent being much worse off than it was in the actual scenario – that is, subsisting with a cyclone damaged and unrepaired property for over 12 months, and all of the inconvenience and stress associated with that state of affairs and the appellant's sudden about-face at the end of that period. The possibility of some outcome better than this relatively gloomy reality is not difficult to accept. One then adds to this the potential for a settlement of the hypothetical challenge, which again cannot be dismissed as remote or fanciful, particularly given the fact that the challenge would have occurred in the immediate aftermath of a publicised natural disaster and thus present as a real threat to the appellant's brand appeal and goodwill.

67. For the above reasons, the opportunities that existed within the counter-factual and which were lost as a result of the respondent's reliance upon the appellant's acceptance of the claim were real ones, and the loss of them constituted detriment for the purposes of making out the estoppel.

68. The appellant's contention that the estoppel was not pleaded is wrong, and the respondent repeats and relies upon the considered analysis of both the primary judge and the Full Court majority on this issue.

Utmost good faith

69. For the reasons found by the primary judge and the Full Court majority, the appellant's conduct complained of constituted a breach of its implied contractual duty of utmost good faith.

70. Again, as with estoppel, the relevant legal principles are not controversial. The primary judge and the Full Court majority correctly recognised the relevant principles to be applied as those established by this Court in *CGU Insurance Ltd v AMP Financial Planning Pty Ltd*.[57] The duty of utmost good faith required the

[57] (2007) 235 CLR 1 at [15] per Gleeson CJ and Crennan J and at [257] per Callinan and Heydon JJ: [PJ 342-343].

appellant to act fairly, reasonably and in accordance with community standards of decency and fair dealing, with propriety, and with due regard to the legitimate interests of the respondent.

71. The appellant's conduct exhibited none of these features. Having established certainty as to its position on acceptance of the claim, and then having conducted itself for so long on that certain basis, extensively accessing its own insured's land and property and using its own insured's name, the sudden and late destruction of that certainty, and the taking of an entirely different position, constituted a breach by the application of its obligation of utmost good faith.

72. As earlier submitted, an aspect of the obligation of utmost good faith is for an insurer to make a clear and timeous decision in respect of a claim. What underpins that obligation is a recognition that the insured is entitled to know what the insurer's position is in relation to a claim, rather than being left in an ongoing state of uncertainty.

73. It runs counter to this premise for an insurer to contend that, having discharged its obligation to deliver certainty and having acted on that certain state of affairs for over a year, it nevertheless remains open to it to reverse its position on the claim. On the appellant's case, while certainty is required at the time of the decision to accept or reject a claim, that certainty need not exist thereafter. This is illogical.

74. Not only does the appellant's position run counter to the need for certainty at the time of deciding whether a claim is accepted, the proposition contended for by the appellant leaves it open to an insurer to inflict on its insured and those standing behind it, including in this case a large number of natural persons who are residents of apartments, all of the trauma that comes with them being initially comforted by an acceptance of claim only to be told much later that the claim will be rejected and they will receive nothing from their insurer.

75. In the present case, the appellant's breach of utmost good faith was compounded by it putting its departure from its acceptance of the claim in a "take it or leave it" indemnity position to the respondent. As described in Part IV above, it threatened to resile from its promise to indemnify in accordance with policy terms if the respondent did not accept a particular sum in complete answer to the accepted claim.

This threatening behaviour, to back out on its clear promise of the previous year unless the respondent accepted the appellant's view of how the policy responded to the claim, regardless of whether the respondent agreed with that view, was high handed and inconsistent with the notion of utmost good faith.

76. The appellant appears to be arguing that because it accepted the claim in May 2017 in circumstances where it was not obliged to, the appellant should be at liberty to change its position later. That proposition should be rejected for the reasons given above. The fact that the appellant's acceptance of the claim was not attended by an obligation to do so does not alter the analysis. There remained a policy, a relationship of insurer and insured, a claim submitted for assessment under the policy, and one which the appellant was duty bound to consider and respond to in accordance with all of its obligations under that contract, including its obligation of good faith. It was obliged, as an aspect of that obligation, to bring certainty to the position as to whether it would accept or reject the claim. To speak of the acceptance being "gratuitous" is to distract attention away from what matters, namely the fact and purpose of the insurer's obligations which attend its acceptance or rejection of a claim, and to ignore the way in which those obligations and the purpose behind them would be eroded (indeed eviscerated) if the insured could change its mind a year later.

77. The obligation of utmost good faith has real work to do if, contrary to the above submissions, election or waiver have no role to play. This is a case of the kind described by Mason J in *Sargeant* as set out in [35] above. The insured was a party entitled to know where it stood. And the insurer was obliged to make and communicate a decision on the claim for cover.

78. The appellant also appears to suggest that the respondent suffered no detriment by reason of the appellant's reversal of its decision to accept the claim, and as such, there cannot have been a breach by it of its obligation of utmost good faith and no remedy is available. This is incorrect. The notion that there can be no breach of the contractual obligation (here to act with utmost good faith) unless the breach causes loss is one that offends fundamental principle. An assessment of breach involves an assessment of what the appellant did. And the declaration as to the substantive content of the obligation was an appropriate and sufficient remedy. The Court and the insured would expect the appellant to act in accordance with declared obligations.

Part VI: Argument on notice of contention/cross-appeal

79. This is addressed in paragraphs [40]-[48] above.

Part VII: Time estimate for the presentation of the respondent's oral argument

80. The respondent estimates it will need between 3 to 4 hours for the presentation of its oral argument.

10

Dated 2 June 2022

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ANNEXURE

***Insurance Contracts Act 1984* (Cth)**

(Compilation No. 24 in force from 1 July 2016)

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.