





I M Jackman SC with M R Elliott SC and P Mann for the respondent  
(instructed by LMI Legal)

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## CATCHWORDS

### **Allianz Australia Insurance Limited v Delor Vue Apartments CTS 39788**

Insurance – Contract of insurance – Where insured body corporate knew that apartment buildings had serious non-structural defects which it did not disclose to insurer – Where cyclone caused substantial damage to apartment buildings and exposed defects – Where insurer advised insured that it would provide indemnity despite non-disclosure – Where extent of indemnity ambiguous – Where dispute arose as to sequence of repair works and distribution of costs – Where insurer proposed settlement on particular terms and advised that, if insured did not accept, it would rely on s 28(3) of *Insurance Contracts Act 1984* (Cth) and reduce liability based on non-disclosure – Whether insurer bound by representation of indemnity due to waiver, election or estoppel – Whether insurer failed to act with utmost good faith.

Words and phrases – "completed exercise of a legal power", "detriment", "duty of utmost good faith", "election", "election by affirmation", "estoppel", "extinguishment of rights", "full satisfaction of alternative rights", "inconsistent sets of rights", "indemnity", "irrevocable waiver", "non-disclosure", "policy of insurance", "revocation", "waiver".

*Insurance Contracts Act 1984* (Cth), ss 13, 14, 28(3).



**Introduction**

1           A body corporate brings a claim for indemnity under an insurance policy following damage to apartment buildings by a cyclone. The cyclone damage exposes the existence of pre-existing defects in the apartment buildings which the body corporate had not disclosed to the insurer. Some of those defects need to be repaired concurrently with the cyclone damage. The insurer sends the body corporate an email containing a gratuitous representation that the insurer will grant indemnity despite its power to reduce its liability arising from the body corporate's non-disclosure. But the email is ambiguous as to the extent of indemnity offered. In particular, the insurer denies liability for defective materials and construction, and requires the body corporate to pay for rectification repairs to the roof, with the scope and costs of those works yet to be determined. The insurer also states that the roof repairs will need to be carried out before internal damage repairs can proceed.

2           Over the course of the next year, investigations by the insurer reveal further pre-existing defects. A dispute eventually arises between the insurer and the body corporate. After having incurred nearly \$200,000 of costs, the insurer informs the body corporate with greater precision about the extent of its offer to grant indemnity for repairs and replacements, to an estimated cost of around \$918,709.90, with other repairs to be undertaken by the body corporate. The insurer informs the body corporate that, unless the body corporate agrees to the proposed terms within 21 days (later extended to more than three months), the insurer will rely on its power not to pay anything due to the non-disclosure. The body corporate refuses the offer. The insurer denies indemnity.

3           At trial, the body corporate argued that the insurer was bound by its gratuitous representation that it would grant indemnity because the insurer: (i) had irrevocably elected not to exercise its power to rely on the defence arising from non-disclosure; (ii) had waived its right to rely on the defence arising from non-disclosure; (iii) was estopped from resiling from its representation that it would grant indemnity; and (iv) had failed to act with the utmost good faith. In the Federal Court of Australia, the primary judge (Allsop CJ) upheld the body corporate's claims on (ii), (iii), and (iv). A majority of the Full Court of the Federal Court of Australia (McKerracher and Colvin JJ, Derrington J dissenting) dismissed an appeal, finding that all four claims by the body corporate were established.

4           The appeal to this Court should be allowed. In the law of contract there are limited circumstances in which a gratuitous waiver of rights becomes irrevocable.

*Kiefel*     *CJ*  
*Edelman*   *J*  
*Steward*    *J*  
*Gleeson*     *J*

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In this case, where the body corporate did not establish that it had suffered any detriment in reliance upon the insurer's representation, none of those limited circumstances is present. And the insurer did not breach its duty of utmost good faith when, acting lawfully and honestly, it clarified the extent of its offer of indemnity, but required that offer to be accepted for it to waive the defence based on non-disclosure.

## **Background**

5           The respondent, Delor Vue Apartments CTS 39788 ("Delor Vue"), is the body corporate for a complex of 11 apartment buildings, each containing approximately six residential lots. The apartment buildings are in Cannonvale in north Queensland.

6           On 28 March 2017, Tropical Cyclone Debbie struck north Queensland. The cyclone caused substantial damage to the Cannonvale apartment buildings. Five days before the cyclone, Delor Vue had obtained a policy of insurance ("the Policy") for public liability and property damage with the appellant, Allianz Australia Insurance Ltd ("Allianz"). Allianz acted through its subsidiary underwriting agency, Strata Community Insurance ("SCI"). Other than where the communication referred to was specifically to or from SCI, these reasons generally refer to Allianz rather than its agent, SCI.

7           Prior to its entry into the Policy, Delor Vue knew that the Cannonvale apartment buildings had serious non-structural defects. The soffits and eaves were badly constructed and badly affixed. A number of them had dislodged. They were a danger to people and to property, although some steps had been taken to ameliorate the danger and to plan for repairs. These defects were not disclosed to Allianz by Delor Vue prior to its entry into the Policy.

8           Almost immediately after the cyclone, Delor Vue notified a claim under the Policy. On 27 April 2017, following Delor Vue's provision of all relevant documents to SCI, an officer of SCI sent an email to Delor Vue's insurance broker referring to this non-disclosure and advising that SCI would need to investigate it further before making a determination.

9           On 9 May 2017, an officer of SCI sent a further email to Delor Vue's insurance broker referring to the non-disclosure and to a building inspection report prepared for Delor Vue dated 1 April 2015 which had referred to the defects in the soffit panels. The email also referred to a "more precise synopsis" of the issue in an engineer inspection report dated 1 December 2016. SCI then said:

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"Despite the non-disclosure issue which is present, [SCI] is pleased to confirm that we will honour the claim and provide indemnity to [Delor Vue], in line with all other relevant policy terms, conditions and exclusions."

SCI described its decision as one to "grant indemnity" but said that there were two categories of damage: "1. Defective materials and construction of the roof, including but not limited to tie downs, rafters and timbers and soffit"; and "2. Resultant damage including but not limited to internal water damage, fascia, guttering and roof sheeting (for those buildings which lost roof sheeting only)". SCI advised that it would cover the repair costs associated with the second category, but not the first category. The language used by SCI was imprecise and the parties ultimately disagreed on the scope of application of the second category. In particular, there was a dispute about the meaning of the phrase "for those buildings which lost roof sheeting only".

10 In the 9 May 2017 email, SCI also explained the further steps that were then contemplated. Lawyers had been engaged to assist with potential recovery from the original builder and developer, and an engineering report had been sought to assist in relation to this recovery. SCI asked that Delor Vue cooperate with it to ensure the best chance of recovery. SCI was also awaiting a scope of works for the roof repairs which it said would be broken down into two parts: (i) the defective repairs to be paid for by Delor Vue; and (ii) the resultant damage repairs to be paid for by SCI. SCI explained that roof repairs would need to be carried out before internal repairs for those buildings with roof damage or with water entering through the roof.

11 The scope of the resultant damage for which Allianz, through SCI, had undertaken to arrange repairs in the 9 May 2017 email was, and is, unclear. It included damage to roof sheeting, but it was not clear whether it included damage to roof sheeting where the damage was also the result of defective materials and construction of the roof. It included internal water damage, fascia and guttering damage, but it was not clear whether those items were included for all of the buildings which suffered such damage or only those buildings which lost roof sheeting.

12 On appeal to this Court, Allianz submitted that 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". That submission is

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contrary to the reasoning of a majority of the Full Court<sup>1</sup> and is unsupported by any ground of appeal. It also misrepresents the 9 May 2017 email. That email was not suggesting that the roof repairs needed to be carried out first *by Delor Vue*. It was making the much more mundane, and obvious, point that the roof repairs needed to be undertaken first to ensure the buildings were watertight before internal repairs could commence. The terms of the 9 May 2017 email left unclear whether Allianz contemplated that it would be necessary for Delor Vue and Allianz to reach agreement as to the roof repairs for which each would pay before those repairs were undertaken.

13 During May 2017, the solicitors for Allianz, as the insurer of Delor Vue, wrote to the Australian Securities and Investments Commission ("ASIC") noting that there was a "strike off action in progress" for the corporation which was responsible for building the Cannonvale apartment buildings and requesting that ASIC defer the deregistration of the corporate builder. The solicitors for Allianz also wrote to a director of the corporate builder, contemplating litigation on behalf of Delor Vue against the corporate builder and advising the director that, if the corporation were deregistered before Delor Vue's subrogated claim was finalised, then Delor Vue would hold the director personally liable. In June and October 2017, the solicitors for Allianz, on behalf of Delor Vue, wrote further letters to the director of the corporate builder. The first letter expressed conditions upon which Delor Vue would be prepared to allow the corporate builder to deregister that were designed to preserve any claims Delor Vue had upon the insurance policy held by the corporate builder. The second letter complained of the corporate builder's deregistration and raised the prospect of an action by Delor Vue to reinstate the registration of the corporate builder.

14 Both Allianz and Delor Vue retained engineers and builders to advise in relation to the nature and cost of the repairs. Allianz then discovered that there were more defects with the roof construction relating to the roof trusses, including defects in the trusses themselves and the manner in which they had been tied down to the building. The trusses were structurally inadequate and could not be salvaged. The vast majority, but not all, of the defective trusses were undamaged by the cyclone. Therefore, in addition to the two categories of repairs for damage to the Cannonvale apartment buildings contemplated in the 9 May 2017 email, there was a third category of repairs, outside the scope of that email. That category was

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1 *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2021) 287 FCR 388 at 394-395 [15].

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described by the majority in the Full Court as "remedial work to the roof in respect of defects that had not yet manifested in any damage"<sup>2</sup>.

15 Since it was necessary for all the work to be commissioned at the same time, Allianz and Delor Vue needed to agree on the sequence of work and the costs they would each incur. But a dispute arose as to those matters. During 2017 and early 2018, no substantial contract for repair works was entered into, although engineering and building reports were obtained and "make safe" repairs were undertaken on the Cannonvale apartment buildings at Allianz's expense.

16 Part of the dispute concerned the defects in the roof trusses that Allianz had discovered. Engineers retained by Delor Vue had produced a report that was not as critical of the state of the roof trusses as the reports prepared by Allianz's engineers. But, at that time, Delor Vue and its engineers had not been given the report produced by Allianz's engineers. In August 2017, Delor Vue asserted to Allianz that the roof trusses did not need to be replaced. But, after Delor Vue and its engineers were provided with the report produced by Allianz's engineers, Delor Vue obtained another report from its engineers. The conclusions of that second report included: the roof trusses required extensive repairs, including significant strengthening repairs in order to be certified; and the tie-down capacity of the roof trusses was not sufficient to withstand the wind loads for the region.

17 On 18 January 2018, Delor Vue resolved to enter into and execute a loan agreement for the maximum amount of \$750,000 "for the purposes of defect repairs to the building essential to permit the insurance repairs to be undertaken to the building following Cyclone Debbie". But Delor Vue had been advised by SCI as early as 22 June 2017 that "the costs involved in rectifying the defective related items will be in the millions". At that time, SCI told Delor Vue that Delor Vue would need to raise funds in order for the rectification works to proceed.

18 In February 2018, the body corporate manager for Delor Vue suggested an option, said to be "considerably simpler and therefore less expensive", which would involve fitting new trusses alongside the existing trusses. That option was considered by Allianz's loss adjusters who concluded that "[t]here may be some savings, but there will be additional difficulties and costs as the works will take longer pushing the cost up". Ultimately, Allianz's loss adjusters concluded that it was not "cost effective".

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2 *Allianz Australia Insurance Ltd v Delor Vue Apartments* CTS 39788 (2021) 287 FCR 388 at 395 [17].

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19 In March 2018, Allianz invited Delor Vue to renew its insurance policy for 12 months. The premium offered was an increase of about 50 per cent, namely \$128,830.05. And renewal was conditional upon works relating to the roof defects being completed within six months of the renewal date. After some frustration, Delor Vue ultimately renewed the policy for six months.

20 On 3 May 2018, Delor Vue's solicitors wrote to Allianz in what the primary judge described as a "direct, and to a degree, combative (though not rude) tone"<sup>3</sup>. The letter set out a number of complaints: the failure to provide documents; a lack of transparency in the adjustment process; and delay. They said that the failure by Allianz to state its position on indemnity "with any clarity" had caused delays in the progression of the claim and in the repairs. Allegations were made that Allianz: had breached its duty of good faith; might be in breach of contract; and might be liable for damages.

21 On 28 May 2018, Allianz (through SCI) responded in detail to the letter from Delor Vue's solicitors. Allianz set out the contents of its 9 May 2017 email in full and noted that Delor Vue had described Allianz's position on indemnity as "unclear". Amongst other things, Allianz reiterated the non-disclosure by Delor Vue, proposed what it described as a "settlement", and made the following points:

1. All of the costs for rectifying defects were excluded by cl 1(d) of the Policy which provided that Allianz would not pay for loss or damage caused by non-rectification of a defect that Delor Vue was "aware of, or should reasonably have been aware of".
2. Despite the non-disclosure by Delor Vue, Allianz would pay for the cost of repairing: (i) internal damage to the Cannonvale apartment buildings from the cyclone that had nothing to do with the pre-existing defects; (ii) resultant damage for the one building which lost roof sheeting only – being the second category of damage described in the 9 May 2017 email, which Delor Vue did not agree was limited to one building only – despite that damage arising from the defective materials and construction of the roof; and (iii) damage to the roofs of the other buildings, but only where the damage did not result from a pre-existing defect or the cost did not have to be incurred in any event to rectify faulty work or materials.
3. Delor Vue must otherwise pay for and arrange the repair of pre-existing defects. But Allianz would only "work with [Delor Vue] to rebuild, replace

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3 *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd [No 2]* (2020) 379 ALR 117 at 161 [182].

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and/or repair the damage that is covered by the Policy" if Delor Vue rebuilds, replaces or repairs the pre-existing defects by 23 September 2018, under a building contract entered into by Delor Vue and approved by Allianz.

4. Allianz's loss adjusters had quantified Allianz's costs of repair or replacement arising from cyclone damage at \$918,709.90 and Delor Vue's costs of repair or replacement of pre-existing defects at \$3,579,432.72.
5. If Delor Vue does not agree to proceed on the terms outlined within 21 days, then Allianz's "offer in relation to indemnity will lapse" and Allianz will not pay anything "pursuant to section 28 of the *Insurance Contracts Act 1984* on the basis of [Delor Vue's] non-disclosure".

22 After requesting an extension of time for any acceptance of the offer, which Allianz granted to 31 August 2018, Delor Vue's solicitors later responded. Amongst other matters, Delor Vue denied that Allianz could reduce its liability by reference to s 28 of the *Insurance Contracts Act 1984* (Cth) due to principles described as "election" or "waiver". The solicitors for Allianz replied, asserting that its liability had been reduced to nil. By this time, Allianz had paid to Delor Vue amounts totalling \$192,471.74 for building repairs, compensation to unit holders for loss of rent, alternative accommodation expenses, and professional fees.

### **The decisions of the primary judge and the Full Court**

23 In conclusions that were not challenged on appeal, the primary judge held that: (i) the failure by Delor Vue to disclose the known defects in the buildings to Allianz prior to entry into the Policy amounted to a breach of Delor Vue's duty of disclosure under s 21(1)(b) of the *Insurance Contracts Act*; (ii) Allianz (through its agent, SCI) would not have accepted the risk had the disclosure been made by Delor Vue; and (iii) subject to any waiver, estoppel, or failure to act with the utmost good faith, Allianz was entitled, under s 28(3) of the *Insurance Contracts Act*, to reduce its liability to nil for the claim made by Delor Vue for property damage consequent upon the cyclone.

24 The primary judge rejected the submission by Delor Vue that Allianz was bound by an election not to rely upon the defence under s 28(3) of the *Insurance Contracts Act*, but found that Allianz was unable to rely upon s 28(3) for reasons of waiver, estoppel, and the duty of utmost good faith. The primary judge made declarations to that effect. An injunction to "hold the insurer to its stated position"

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arising from the breach of the duty of utmost good faith would have been ordered but for the making of the declarations<sup>4</sup>.

25 A majority of the Full Court dismissed an appeal by Allianz. Although their Honours refused to make an additional declaration, McKerracher and Colvin JJ accepted Delor Vue's submissions on its notice of contention to the effect that Allianz was bound by an election not to rely on the defence under s 28(3) of the *Insurance Contracts Act*. The appeal was otherwise dismissed.

26 In dissent in the Full Court, Derrington J would have allowed the appeal. His Honour considered that Allianz was not precluded from revoking its promise by any doctrine of election, waiver, or estoppel and that Allianz had not failed to act with the utmost good faith in revoking the waiver of its right to rely on the defence under s 28(3) of the *Insurance Contracts Act*. For the reasons below, Derrington J was correct.

### **The *Insurance Contracts Act*: ss 13, 14, 28**

27 Sections 13, 14 and 28 of the *Insurance Contracts Act* relevantly provide as follows:

#### **"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.

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4 *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd [No 2]* (2020) 379 ALR 117 at 193 [349].

**14 Parties not to rely on provisions except in the utmost good faith**

- (1) If reliance by a party to a contract of insurance on a provision of the contract would be to fail to act with the utmost good faith, the party may not rely on the provision.
- (2) Subsection (1) does not limit the operation of section 13.

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**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."

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### Allianz's waiver of the s 28(3) defence

#### *The nature of an irrevocable waiver*

28 It has been repeatedly said that "waiver" is a term that is used in many different senses<sup>5</sup>. Perhaps the most common usage of waiver is to describe an unequivocal decision by a party, communicated to the other party, not to insist upon a right or not to exercise a power<sup>6</sup>.

29 By itself, a waiver of a right is rarely irrevocable. For that reason, it has sometimes been said that the general rule concerning a waiver of a right, "in the sense of an intimation of an intention not to enforce it", is that the mere act of representing that a right has been waived is "of itself inoperative"<sup>7</sup>. Similarly, it has been said that "the mere statement of an intention not to insist on a right is not effectual unless made for consideration ... A mere waiver signifies nothing more than an expression of intention not to insist upon the right"<sup>8</sup>. Perhaps more accurately, the legal position is that although a waiver does have legal effect in that "the waiver is binding on the waiving party, unless the waiver is effectively retracted"<sup>9</sup>, the waiver can generally be revoked at any time with reasonable notice<sup>10</sup>.

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5 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 406, 422, 467; *Mann v Carnell* (1999) 201 CLR 1 at 13 [28]; *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at 587-588 [51]-[54]; *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at 882-883; *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch 12 at 28-29.

6 See *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at 315 [30]; *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch 12 at 29. See also Stoljar, "The Modification of Contracts" (1957) 35 *Canadian Bar Review* 485 at 489-490.

7 *O'Connor v S P Bray Ltd* (1936) 36 SR (NSW) 248 at 257.

8 *Mulcahy v Hoyne* (1925) 36 CLR 41 at 50, quoting *Stackhouse v Barnston* (1805) 10 Ves 453 at 466 [32 ER 921 at 925].

9 *Restatement of the Law of Liability Insurance* §5, Comment h.

10 Stevens, "Not Waiving but Drowning", in Dyson, Goudkamp and Wilmot-Smith (eds), *Defences in Contract* (2017) 125 at 126.

30 Nevertheless, exceptions or "special cases"<sup>11</sup> exist where a unilateral waiver cannot be revoked. One exception is where the strength of the interest of finality in litigation can sometimes mean that a waiver of particular rights related to litigation is irrevocable. For instance, the waiver of legal professional privilege will be irrevocable "where the actions of a party are plainly inconsistent with the maintenance of the confidentiality which the privilege is intended to protect"<sup>12</sup>. A similar approach, which also "depended upon considerations founded in the nature of the adversarial litigious process" that are "not relevant to the identification of the rights and obligations of parties to contracts"<sup>13</sup>, was taken in *The Commonwealth v Verwayen*<sup>14</sup> by Toohey J and Gaudron J. Their Honours concluded that an undertaking not to plead a limitations defence had become irrevocable. But, even then, that view did not command the support of a majority of the Court. Brennan J, by contrast, considered that the "ordinary principles of estoppel"<sup>15</sup> applied to the waiver in that case so that it could be revoked at any time before it had been relied upon to the detriment of the other party, or otherwise until judgment was entered so that no amendment to the pleading was possible<sup>16</sup>.

31 Outside the context of litigation, and in the law of contract, the circumstances in which a waiver cannot be revoked have always been exceptional. If such circumstances were not both exceptional and justified they would undermine other contractual rules, including those generally requiring that variation of a contract be in the form of a deed or supported by consideration. Hence, aside from circumstances where a legal right can no longer be enforced due to entry into a deed, a fresh agreement for consideration, or expiry of a limitation period, the general rule is that, despite a "mere naked promise ... not founded upon

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11 *O'Connor v S P Bray Ltd* (1936) 36 SR (NSW) 248 at 257.

12 *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at 315 [30].

13 *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at 589-590 [60], 600 [89].

14 (1990) 170 CLR 394 at 472-473, 484-485.

15 (1990) 170 CLR 394 at 428.

16 (1990) 170 CLR 394 at 427-428.

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any consideration"<sup>17</sup> not to enforce a legal right, the legal right may continue to be enforced until it is fully satisfied<sup>18</sup>.

32 For the same reasons, the development of loose legal rules for an irrevocable waiver would undermine formalities where they are required for written contracts. Indeed, writing after the decision of Denning J in *Central London Property Trust Ltd v High Trees House Ltd*<sup>19</sup>, Cheshire and Fifoot observed that "in their efforts to circumvent this objection ... the courts have excelled themselves in ingenuity, if not in wisdom"<sup>20</sup>.

33 Consistently with the stance of parties in previous litigation concerning waiver in this Court<sup>21</sup>, Delor Vue properly did not, at any stage in this litigation, submit that there was any independent doctrine precluding revocation of a waiver based on concepts such as "unfairness"<sup>22</sup> or based on any assertion of notions of waiver peculiar to insurance contracts. Such submissions would require revision of our understanding of basic principles of contract, even if confined to insurance contracts. At the very least, such an approach should not be taken by a court without argument. Delor Vue's submissions were more modest but, if accepted, would nevertheless undermine the integrity of established contractual rules by expanding the principles of election by affirmation, or extinguishment of rights, in such a way as to make irrevocable a unilateral waiver of a defence to liability by a party to a contract, outside the context of litigation.

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17 *Barns v Queensland National Bank Ltd* (1906) 3 CLR 925 at 937, referring to *Williams v Stern* (1879) 5 QBD 409.

18 *O'Connor v S P Bray Ltd* (1936) 36 SR (NSW) 248 at 257. See also *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 406; Seddon and Bigwood, *Cheshire and Fifoot Law of Contract*, 11th Aust ed (2017) at 93-94 [2.29].

19 [1947] KB 130.

20 Cheshire and Fifoot, "*Central London Property Trust Ltd v High Trees House Ltd*" (1947) 63 *Law Quarterly Review* 283 at 291.

21 *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at 585 [46].

22 But compare *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2021) 287 FCR 388 at 409-410 [96], [98]-[99], 413-414 [122].

*The waiver and its revocation by Allianz*

34 As described above, the extent to which Allianz undertook to grant indemnity in the 9 May 2017 email was ambiguous. Allianz undertook in the email to cover the costs associated with "[r]esultant damage including but not limited to internal water damage, fascia, guttering and roof sheeting (for those buildings which lost roof sheeting only)" but not for the overlapping category of "[d]efective materials and construction of the roof". Nevertheless, Allianz made no submission in this Court that the ambiguities in its 9 May 2017 email, and the lack of any reference to s 28(3) of the *Insurance Contracts Act*, precluded an interpretation of that email as containing an unequivocal waiver of Allianz's defence under s 28(3)<sup>23</sup>.

35 Putting aside its ambiguities, and on the assumption that the 9 May 2017 email contained a waiver of Allianz's defence under s 28(3), Allianz did not express the extent of the defence that would otherwise have applied. It did not express in the 9 May 2017 email, and could not have been certain of, the extent to which it would have been entitled under s 28(3) to reduce its liability in respect of Delor Vue's claim.

36 Although the primary judge made a carefully worded declaration that Allianz was entitled to a remedy that would reduce its liability to nil "for the claim made consequent on damage caused to [Delor Vue's] property", this did not mean that Allianz was free from all liability to Delor Vue. Assuming that Allianz was entitled to reduce its liability under s 28(3) on the basis that it would not have issued any policy if the disclosure had been made<sup>24</sup>, it may be that the "amount which would place the insurer in the position it would have been in" but for the non-disclosure would have required Allianz to have refunded to Delor Vue all premiums paid by Delor Vue<sup>25</sup>.

37 It is not entirely accurate to describe the waiver by Allianz as having been revoked by Allianz's letter to Delor Vue's solicitors on 28 May 2018. In that letter,

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23 Compare *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26 at 39.

24 *Twenty-First Maylux Pty Ltd v Mercantile Mutual Insurance (Australia) Ltd* [1990] VR 919 at 927-928. Compare *Advance (NSW) Insurance Agencies Pty Ltd v Matthews* (1989) 166 CLR 606 at 621-622.

25 See Australian Law Reform Commission, *Insurance Contracts*, Report No 20 (1982) at 284.

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Allianz undertook to grant indemnity, subject to conditions, for estimated costs of \$918,709.90. The only sense in which Allianz could be said to have "revoked" its waiver on 28 May 2018 was that the continued operation of the waiver was made conditional upon acceptance of terms, in order to resolve the dispute between the parties, within a reasonable time (21 days, later extended to more than three months). It is only in that sense that the waiver can be described as having been revoked.

### **Election by affirmation**

38 In the law of contract, a party can act in a manner that affirms the existence of a contractual right or rights, by exercising what is commonly described as an election between inconsistent sets of rights<sup>26</sup>. The usual reference to the sets of rights includes all claim rights, privileges, powers, and immunities<sup>27</sup>.

39 Although many of the older cases of election by affirmation (including in this Court<sup>28</sup>) described the principle as one of "waiver", and although it might be possible to express modern cases involving affirmation of a contract in terms of irrevocable waiver of a power to terminate the contract, the language of "waiver" can distract in this area. As three members of this Court observed in *Agricultural and Rural Finance Pty Ltd v Gardiner*<sup>29</sup>, the "[c]ircumstances in which there is an election between inconsistent rights are radically different from some others in which there is said to be a waiver of rights". In the law of contract, the better description of this doctrine is election by affirmation<sup>30</sup>.

40 The majority of the Full Court in this case, and Delor Vue's submissions in this Court, sought to expand the application of this doctrine of election by

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26 See, eg, *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at 589 [58].

27 Handley, *Estoppel by Conduct and Election*, 2nd ed (2016) at 241 [13-035], 253 [14-001].

28 *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305 at 326, relied on in *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 658; *Owendale Pty Ltd v Anthony* (1967) 117 CLR 539 at 556-557.

29 (2008) 238 CLR 570 at 589 [60]. See also at 588 [56].

30 See *Elder's Trustee and Executor Co Ltd v Commonwealth Homes and Investment Co Ltd* (1941) 65 CLR 603 at 616-618; *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 644, 647-649.

affirmation in order to create a new principle that would make irrevocable the waiver by Allianz of the defence under s 28(3) of the *Insurance Contracts Act*. As the majority in the Full Court expressed the point, the doctrine of election would be applied to require an insurer "not to adopt inconsistent positions under the same policy of insurance in circumstances where one of those positions was consistent only with accepting liability under the policy and the other position was consistent only with denying liability"<sup>31</sup>. In short, an insurer can never revoke a waiver of a statutory defence that would permit the insurer to reduce its liability under a contract of insurance.

*The historical origins of election by affirmation*

41 Historically, an election by affirmation of a contractual term arose in circumstances in which the performance of an obligation by one party was seen as a condition precedent to the existence of an obligation of the other party<sup>32</sup>. As Denning MR explained, "[u]nder the old forms of pleading, a plaintiff had to aver and prove that [they] had performed all conditions precedent or that [they were] ready and willing to perform them"<sup>33</sup>. If the condition precedent failed, the counterparty could, nevertheless, affirm the corresponding obligation.

42 One example was where a tenant breached a leasehold covenant that was a condition precedent to the landlord's obligation to afford quiet possession. The landlord could nevertheless affirm the obligation to ensure quiet possession by accepting rent with knowledge of the circumstances amounting to the breach of the condition precedent: it was "a contradiction in terms" to treat a person as a tenant and also as a trespasser<sup>34</sup>.

43 Another example was where the price payable under a contract of sale was conditional upon an obligation to be fulfilled by the seller, such as the delivery of the promised goods, but the obligation was not fulfilled because the goods were seriously defective. The performance of the obligation substantially in the manner

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31 *Allianz Australia Insurance Ltd v Delor Vue Apartments* CTS 39788 (2021) 287 FCR 388 at 412 [112].

32 *Hurst v Bryk* [2002] 1 AC 185 at 193. See also Wilmot-Smith, "Termination after Breach" (2018) 134 *Law Quarterly Review* 307 at 307-308.

33 *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] QB 44 at 57. See also *Pordage v Cole* (1669) 1 Wms Saund 319 at 320 [85 ER 449 at 452].

34 *Finch v Underwood* (1876) 2 Ch D 310 at 316.

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promised by the seller was seen as "a condition precedent to [the seller's] right of action" for the price and hence a "condition precedent to the purchaser's liability"<sup>35</sup>. But if the buyer chose to keep the defective goods, the buyer's obligation would be affirmed, and it was said that the buyer had "waive[d] the condition" by accepting the goods<sup>36</sup>. The rationale was that the buyer could not act inconsistently by purporting to keep both the goods and the price: "you cannot have the egg and the halfpenny too"<sup>37</sup>.

44 The use of "waiver" in these older cases has the potential to mislead. In the example of acceptance of defective goods, the legal effect of any election was not to waive the seller's obligation to deliver the goods as promised. An action for damages could still be brought by the buyer for breach of that obligation by the seller.

45 The language of "waiver" in these older cases did, however, direct attention to the revocability of the "waiving" party's position where an inconsistency had not arisen by the affirmation. In *Panoutsos v Raymond Hadley Corporation of New York*<sup>38</sup>, a seller continued to ship flour under a contract that was divided into separate shipments, despite the buyer's failure to comply with a condition precedent to delivery, namely obtaining a confirmed bankers' credit. The seller later sought to revoke that "waiver" of the condition precedent for future deliveries of flour. The seller was unable to revoke the "waiver", but only because reasonable notice had not been given. As Viscount Reading CJ said in the leading judgment in the Court of Appeal, when the sellers "intended to change [their] position it was incumbent on them to give reasonable notice of that intention to the buyer so as to enable him to comply with the condition which up to that time had been waived"<sup>39</sup>.

46 By contrast, an approach of irrevocable election by affirmation following failure of a condition precedent was taken in relation to conditions in some contracts of insurance. Hence, in 1911 it was said that in "policies of insurance

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35 *Wallis, Son & Wells v Pratt & Haynes* [1910] 2 KB 1003 at 1017-1018. See also *Behn v Burness* (1863) 3 B & S 751 at 759 [122 ER 281 at 284]; *Bentsen v Taylor, Sons & Co [No 2]* [1893] 2 QB 274 at 279, 280-281, 284.

36 *Sale of Goods Act 1893* (56 & 57 Vict c 71), s 11. See English, "The Nature of 'Promissory Conditions'" (2021) 137 *Law Quarterly Review* 630 at 637-638.

37 *O'Connor v S P Bray Ltd* (1936) 36 SR (NSW) 248 at 257.

38 [1917] 2 KB 473.

39 [1917] 2 KB 473 at 478.

against fire it is commonly stipulated that the assured shall give notice and deliver particulars of the loss within a limited time, as a condition precedent to [the assured's] claim on the policy"<sup>40</sup>. There was "no reason why [the insurer] may not waive or extend the time"<sup>41</sup>. As will be seen below, the decision of this Court in *Craine v Colonial Mutual Fire Insurance Co Ltd*<sup>42</sup>, which was also expressed in the language of "waiver", might best be explained on the basis of this historical approach to the doctrine of election by affirmation, namely the circumstances in which an irrevocable election by affirmation will have occurred after the failure of a condition precedent. But there may be doubt as to whether that interpretation would cohere with the common law in its modern state, and there are large questions concerning whether this historical approach of liberal recognition of irrevocable affirmation following failure of any condition precedent should apply generally today, other than where it has been impliedly preserved by statute<sup>43</sup>.

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If a contractual term is today properly interpreted as a condition precedent to counter-performance, it is strongly arguable that upon the failure of such a condition precedent a party's decision to affirm its obligation of counter-performance will generally only be irrevocable after detrimental reliance by the other party<sup>44</sup>. Hence, in *Gardiner*<sup>45</sup>, Gummow, Hayne and Kiefel JJ, with whom Heydon J agreed, said that the older decision in *Panoutsos* "may be better identified as one of estoppel". This echoed the view expressed more than half a century ago by Cheshire and Fifoot who, after discussing *Panoutsos*, described

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40 Randall, *Leake's Law of Contracts*, 6th ed (1911) at 466. See *London Guarantie Co v Fearnley* (1880) 5 App Cas 911 at 915-916; *Hiddle v National Fire and Marine Insurance Co of New Zealand* [1896] AC 372 at 373.

41 Porter, *The Laws of Insurance*, 5th ed (1908) at 218.

42 (1920) 28 CLR 305.

43 See *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1992] 1 AC 233 at 262-263, discussing *Marine Insurance Act 1906* (UK), ss 33 and 34.

44 See *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] 2 All ER (Comm) 14 at 34-35 [65]-[66].

45 (2008) 238 CLR 570 at 597 [84].

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estoppel in comparison with common law "waiver" as "a simpler and more satisfactory doctrine"<sup>46</sup>.

*The modern approach to election by affirmation*

48 The historical approach to election by affirmation treated the most important contractual obligations of one party as conditions precedent to the obligation of the other party to perform corresponding obligations. If the condition precedent failed, then the corresponding obligation would also fail unless the counterparty "waived" the condition precedent to performance by acting in a manner that affirmed their corresponding obligation. During the twentieth century, that analysis, sometimes strained in the treatment of terms as conditions precedent, generally gave way to an approach which treated a serious breach of contract – a breach that undermines the "root" or basis of the contractual undertakings – as giving rise to a legal power for the innocent party to terminate the entirety of the contract for the future<sup>47</sup>.

49 With the modern approach to termination of contract, the doctrine of election by affirmation came to be applied consistently to instances in which the innocent party elected not to exercise a power to forfeit a lease or to terminate a contract. Hence, if a tenant breached a covenant in a lease entitling the landlord to forfeiture and re-entry, but the landlord, with knowledge of all the circumstances, elected to affirm the lease by a communicated act such as the acceptance of rent, this was an "unequivocal recognition of the continued existence of the lease" which would "amount to a waiver of that [power]" to forfeit the lease<sup>48</sup>. The landlord was treated as having a power, by conduct, to "elect to affirm the lease"<sup>49</sup>.

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46 Cheshire and Fifoot, "*Central London Property Trust Ltd v High Trees House Ltd*" (1947) 63 *Law Quarterly Review* 283 at 300.

47 *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 469-470, 476-477; *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 454; *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 642; *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 31; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 427; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 341; *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at 135-140 [43]-[56].

48 *Owendale Pty Ltd v Anthony* (1967) 117 CLR 539 at 556-557.

49 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 657.

50 The same is true of election to affirm any contract. In *Sargent v ASL Developments Ltd*<sup>50</sup>, Stephen J (with whom McTiernan A-CJ agreed) applied the same principle to a party who had a power to terminate a contract but "cho[se] instead to keep the contract on foot and sue for damages rather than [terminate] for breach". The election to affirm the contract kept extant the set of contractual rights which were necessarily and immediately inconsistent with those that would arise upon termination of the contract. The inconsistent rights that would arise upon termination of the contract, such as loss of bargain damages, were lost. As Stephen J explained, the doctrine of election only applies where the nature of the sets of rights is such that "neither one may be enjoyed without the extinction of the other"<sup>51</sup>. Even then, however, an election to affirm will only be an irrevocable waiver of the power to terminate where the election was made with knowledge of the circumstances giving rise to the alternative, inconsistent set of rights<sup>52</sup>.

51 This doctrine of election by affirmation of a contract has been recognised by decisions, including in this Court, for almost a century. The dominant rationale is that the "the mere fact of intimating [a] choice" in relation to these alternative rights makes it "inevitable, or necessary in the interests of justice, that the choice, when once made, should be irrevocable"<sup>53</sup>. In other words, the choice between maintaining one right or set of rights and extinguishing an alternative, immediately inconsistent right or set of rights<sup>54</sup> is one that must be irrevocable "because [the sets of rights] are inconsistent [so that] neither one may be enjoyed without the extinction of the other and that extinction confers upon the elector the benefit of

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50 (1974) 131 CLR 634 at 642.

51 (1974) 131 CLR 634 at 641.

52 *O'Connor v S P Bray Ltd* (1936) 36 SR (NSW) 248 at 259; *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 645, 649, 658; *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622 at 633-634; *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26 at 42-43.

53 *O'Connor v S P Bray Ltd* (1936) 36 SR (NSW) 248 at 257-258. See also *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 647; *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at 883.

54 See, eg, *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at 589 [58].

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enjoying the other"<sup>55</sup>. The very nature of the states of legal existence and non-existence of a contract is that both states cannot subsist, like Schrödinger's cat, at the same time.

52 The dominant rationale is not without difficulty<sup>56</sup>. It fails to explain the necessity for knowledge of the circumstances giving rise to a power to terminate before an election by affirmation will be irrevocable. There may also be difficulty in identifying the alternative, inconsistent set of rights to the affirmed contractual rights because the absence of contractual rights is not itself a set of rights. There is an inconsistency in continuing the legal "positions" (namely the existence and non-existence of a contract) but there are not two separate sets of rights. This difficulty is not fully resolved even in the careful refinement by the Hon K R Handley KC, who said that the "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"<sup>57</sup>. Apart from possible secondary rights such as loss of bargain damages, it is difficult to identify a new set of rights that would exist following termination of a contract.

53 These difficulties in justification, combined with the difficulty in finding "a case where an irrevocable election to affirm was found in the absence of facts supporting a promissory estoppel", have led one author to suggest replacement of the doctrine of election with the doctrine of estoppel<sup>58</sup>. Such a step may be too large for the common law now to take, requiring a party to prove detriment to establish irrevocable election by affirmation of the other party<sup>59</sup>. But the common law certainly should not take the opposite step of vastly expanding the operation of election by affirmation in the manner submitted by Delor Vue.

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55 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 641. See also *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 423; *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26 at 42.

56 Compare *BP Exploration Co (Libya) Ltd v Hunt [No 2]* [1979] 1 WLR 783 at 811: a "need for finality in commercial transactions".

57 Handley, *Estoppel by Conduct and Election*, 2nd ed (2016) at 255.

58 Liu, "Rethinking Election: A General Theory" (2013) 35 *Sydney Law Review* 599 at 618-619.

59 Compare *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 646-647; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 423.

*Election by affirmation cannot be applied to Allianz's waiver*

54 By its proposed notice of contention in this Court, Delor Vue sought leave to support the conclusion of the majority of the Full Court on the basis that Allianz's representation that it would not rely on s 28(3) of the *Insurance Contracts Act* was a choice between alternative and inconsistent sets of rights. Delor Vue should be given leave to file its notice of contention but its submission that the doctrine of election by affirmation applied to make Allianz's waiver irrevocable is, nevertheless, unsustainable.

55 As to the historical application of election by affirmation, s 28(3) does not operate to make disclosure by the insured a condition precedent to any obligation of the insurer. Different views about the operation of s 28(3) have been expressed<sup>60</sup>. On one view, s 28(3) operates on the basis of the existence of an insurance policy by reference to the additional premium that would have been charged if there had been full disclosure<sup>61</sup>. On another view, s 28(3) can operate on the basis that the insurer would not have accepted the policy at all, so that liability may be reduced as low as the amount of the premium paid<sup>62</sup>. On either view, however, s 28(3) operates only as a defence to reduce the amount of the insurer's liability by reference to a counterfactual assumption. It does not operate as a condition precedent, extinguishing a corresponding contractual obligation. It is therefore unnecessary to consider whether, in the modern law, a waiver of a condition precedent is irrevocable without detrimental reliance<sup>63</sup>.

56 As to the modern approach to election by affirmation, s 28(3) does not give the insurer any power to elect to affirm the contract rather than to avoid or terminate its contractual obligations. There is no sense in which a decision by an insurer to waive the defence under s 28(3) involves an election between alternative

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60 See *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603 at 621 [47].

61 *Advance (NSW) Insurance Agencies Pty Ltd v Matthews* (1989) 166 CLR 606 at 622.

62 *Twenty-First Maylux Pty Ltd v Mercantile Mutual Insurance (Australia) Ltd* [1990] VR 919 at 927-928. See Australian Law Reform Commission, *Insurance Contracts*, Report No 20 (1982) at 284.

63 See, eg, *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] 2 All ER (Comm) 14 at 36-37 [70]; *Lexington Insurance Co v Multinacional de Seguros SA* [2009] 1 All ER (Comm) 35 at 47-51 [50]-[68].

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and inconsistent sets of rights (or even an immediate inconsistency between continuing legal positions). With or without waiver, the insurance contract remains on foot and reliance on the defence under s 28(3) is not immediately inconsistent with any of the contractual rights. In its operation in relation to rights, s 28(3) stands in stark contrast with s 28(2), which is a statutory recognition of the power of an insurer to avoid a contract from its inception<sup>64</sup> for a fraudulent non-disclosure or a fraudulent misrepresentation. An insurer that elects to waive the power under s 28(2) elects to affirm the set of continuing rights under the relevant contract of insurance rather than to exercise the immediately inconsistent power to avoid the contract from inception.

57 Indeed, the submissions of Delor Vue and the decision of the majority of the Full Court to the contrary are directly inconsistent with the reasoning and unanimous result in this Court in *Gardiner*<sup>65</sup>. Although numerous facts were disputed in that case, Gummow, Hayne and Kiefel JJ proceeded on the assumption that a lender and an indemnifier had represented to an indemnified party that the indemnity "remained effective and enforceable, despite past defaults"<sup>66</sup>. The defaults concerned failures to make punctual performance under separate agreements with the lender. Despite that representation, their Honours said that "there was no election between inconsistent rights" and that to hold the lender and indemnifier to the representation would "supplant accepted principles governing whether an estoppel is established and whether a contract has been varied"<sup>67</sup>.

58 The submission of Delor Vue that Allianz had irrevocably elected not to rely on the defence under s 28(3) can be aptly expressed in the words of Rix LJ in *Kosmar Villa Holidays plc v Trustees of Syndicate 1243*<sup>68</sup> as a submission that "goes far wider than the doctrine of election has ever been previously explained or applied":

"While a contract is in operation, it is important to know, in circumstances where it lies in the choice of a party, whether the contract lives or dies (or at least whether purported performance under it, such as a delivery of goods, is accepted or not); and, whether the option is for life or death, acceptance

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64 See *Insurance Contracts Act 1984* (Cth), s 11(1) definition of "avoid".

65 (2008) 238 CLR 570.

66 (2008) 238 CLR 570 at 601 [95].

67 (2008) 238 CLR 570 at 601 [95]-[96].

68 [2008] 2 All ER (Comm) 14 at 35 [66].

or rejection, the choice is unilateral and irrevocable. But when it is merely a defence to a claim that is in question, there would not seem to be the same necessity to choose timeously and irrevocably between reliance or not on the defence in question."

### **Extinguishment of rights**

#### *Completed exercise of a legal power or full satisfaction of all alternative rights*

59 The primary judge and the majority of the Full Court concluded that, in the alternative to "election", Allianz's waiver of the defence under s 28(3) was irrevocable due to the operation of the general rules of "waiver". In this Court, Delor J repeated a submission, which was accepted by the majority of the Full Court, that there are cases of irrevocable waiver not falling within the doctrines of "election" or estoppel. That submission should be accepted. In particular, there are two relevant categories in which a person's rights are extinguished as a result of their conduct, which have sometimes been referred to as "waiver"<sup>69</sup> or as "election"<sup>70</sup>, but which involve different principles<sup>71</sup>.

60 One category is where a person completes the exercise of a legal power to extinguish a right or set of rights, such as a power to terminate a contract for the future or to rescind a contract from the beginning. Lord Goff described this as the "abandonment of a right", contrasting it with "forbearance from exercising a right"<sup>72</sup>. The second category is where a person takes a course of action that is inconsistent with the continued existence of the right or set of rights and the person pursues that course of action until all alternative rights arising from the course of action are wholly satisfied. An accurate description of both of these categories is extinguishment of rights.

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69 *Price v Dyer* (1810) 17 Ves 356 at 364 [34 ER 137 at 140]; *Mulcahy v Hoyne* (1925) 36 CLR 41 at 53; *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at 587 [52].

70 See *O'Connor v S P Bray Ltd* (1936) 36 SR (NSW) 248 at 260-261: "frequently referred to as an instance of the principle of election".

71 *O'Connor v S P Bray Ltd* (1936) 36 SR (NSW) 248 at 261; *Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electricity Corp'n* [2021] 1 WLR 5741 at 5748 [21].

72 *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The "Kanchenjunga")* [1990] 1 Lloyd's Rep 391 at 397-398.

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61 Where a party exercises a power to terminate a contract, and fulfils the requirements for termination, the effect is to extinguish all, or nearly all<sup>73</sup>, of the contractual rights and obligations for the future<sup>74</sup>. And where a party exercises a power to rescind a contract from the beginning for fraud or misrepresentation or any other vitiating factor, and the requirements for rescission are satisfied (including obtaining a court order where necessary<sup>75</sup>), the effect is to extinguish a right or set of rights for both the future and the past<sup>76</sup>.

62 Alternatively, a party can extinguish rights by taking a course of action, with knowledge of all relevant circumstances, such that an alternative set of rights is fully satisfied. Full satisfaction of all of the alternative rights is essential. An example is the decision of the Supreme Court of New South Wales (Full Court) in *O'Connor v S P Bray Ltd*<sup>77</sup>. In that case it was held that by exercising all of his rights under the *Workers' Compensation Act 1926* (NSW), including by litigation, such that all entitlements under that Act had been satisfied, the plaintiff no longer had a right to common law damages. The plaintiff had "obtained such satisfaction of one of his alternative rights as [to make] the other no longer available"<sup>78</sup>. Importantly, it was not sufficient to extinguish the alternative right to common law damages that the plaintiff had taken steps towards obtaining compensation, and indeed had obtained some compensation, under the *Workers' Compensation Act*<sup>79</sup>. It was necessary that the statutory rights were fully satisfied before the alternative common law rights were extinguished.

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73 See, eg, *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1980) 144 CLR 300 at 306-307; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 365; *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 at 235.

74 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 642.

75 *Alati v Kruger* (1955) 94 CLR 216 at 223-224. Cf O'Sullivan, Elliott and Zakrzewski, *The Law of Rescission*, 2nd ed (2014) at 263 [11.109].

76 *Abram Steamship Co v Westville Shipping Co* [1923] AC 773 at 781; *O'Connor v S P Bray Ltd* (1936) 36 SR (NSW) 248 at 261.

77 (1936) 36 SR (NSW) 248 at 265.

78 (1936) 36 SR (NSW) 248 at 264.

79 (1936) 36 SR (NSW) 248 at 264-265, referring to *Harbon v Geddes* (1935) 53 CLR 33.

63 The decision in *O'Connor* was overturned in this Court, but the requirement of full satisfaction was endorsed by Starke J and Dixon J<sup>80</sup>. Indeed, despite having obtained "complete discharge of all liability subsisting under the Act" which would otherwise have led to the exhaustion of "one of the two sets of rights", the alternative, inconsistent rights at common law were nevertheless not extinguished because the jury's verdict assumed that the plaintiff did not have knowledge of those alternative rights<sup>81</sup>.

64 Another example of the requirement for complete satisfaction of alternative rights before a right will be extinguished is the set of rules concerning "election" between inconsistent remedies, such as compensatory damages and disgorgement of profits<sup>82</sup> or compensatory damages and restitutionary damages<sup>83</sup>. A plaintiff can take numerous steps consistent only with the choice of one remedy and not the other, but the election will generally only be irrevocable after one remedy is fully satisfied by the entry of judgment<sup>84</sup>. In all these instances<sup>85</sup>, as Jordan CJ explained in *O'Connor*<sup>86</sup>:

"one of the alternative rights must have been satisfied. Merely to take some step towards obtaining the benefit of one of them is not necessarily irrevocable if the step stops short of obtaining satisfaction. One may be permitted to change one's mind".

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80 *O'Connor v S P Bray Ltd* (1937) 56 CLR 464 at 474, 476.

81 *O'Connor v S P Bray Ltd* (1937) 56 CLR 464 at 476-477. See also at 489-490.

82 *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at 588 [56].

83 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 18, 30, 34. See Wright, "*United Australia Ltd v Barclays Bank Ltd*" (1941) 57 *Law Quarterly Review* 184 at 189.

84 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 569-570; *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 at 521-522.

85 See *Fullers' Theatres Ltd v Musgrove* (1923) 31 CLR 524 at 546-547; *O'Connor v S P Bray Ltd* (1936) 36 SR (NSW) 248 at 258.

86 (1936) 36 SR (NSW) 248 at 257.

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*The vast expansion proposed by Delor Vue*

65 Putting to one side questions of knowledge, in the two categories above, a person's rights are extinguished as a consequence of either the completed exercise of a power to extinguish the rights, or the full satisfaction of alternative and inconsistent rights. Delor Vue sought to create a novel third category where a person's rights are extinguished by the person merely taking steps which clearly evidence a choice between two inconsistent courses of action. Delor Vue submitted that Allianz's unilateral waiver of the defence under s 28(3) became irrevocable, extinguishing the defence, by actions that not only fell far short of full satisfaction of alternative rights, but which involved no more than Allianz taking steps that were not necessarily inconsistent with, or alternative to, reliance on the defence.

66 Delor Vue relied upon the following actions of Allianz, taken after Allianz's waiver of the s 28(3) defence in the 9 May 2017 email: (i) asserting contractual rights to take subrogated action against the builder; (ii) asserting contractual rights to access the property; and (iii) asserting contractual rights to control repair work. But without the waiver in Allianz's email on 9 May 2017, none of those actions was necessarily inconsistent with Allianz maintaining a defence under s 28(3). Those actions could have been consistent with Allianz maintaining a defence under s 28(3) that extended only to a partial reduction of its liability to grant an indemnity. Indeed, as the majority of the Full Court recognised, at the time of taking those actions Allianz could not have been certain of the extent of its entitlement to reduce its liability under s 28(3)<sup>87</sup>. The actions upon which Delor Vue relied are no more than actions consistent with, but not necessarily conclusive of, Allianz maintaining a continued intention to waive the defence under s 28(3).

67 In any event, Delor Vue's submission, and the approach of the majority of the Full Court – that taking a course of action that is inconsistent with a right can extinguish the right – is in direct conflict with long-standing authority that requires the completed exercise of a power to extinguish rights or full satisfaction of alternative rights before a right or set of rights is extinguished. Delor Vue relied on the statement by Lord Blackburn in *Scarf v Jardine*<sup>88</sup> that where a person "has an option to choose one or other of two inconsistent things", the choice between them "cannot be retracted, it is final and cannot be altered". But, as Jordan CJ

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87 *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2021) 287 FCR 388 at 439 [242].

88 (1882) 7 App Cas 345 at 360.

explained in *O'Connor*<sup>89</sup>, that "sweeping dicta" of Lord Blackburn "cannot be supported as a general proposition".

68 The only authority in the last century that Delor Vue could point to in support of an expanded principle of extinguishment of rights was the judgment of Isaacs J in *Craine*<sup>90</sup>. Due to the considerable attention and emphasis placed upon this decision by the parties, it is necessary to consider that case in some detail. Two points must be made. First, although the basis for the decision is not entirely clear, its force today derives from its consistency with the fabric of modern decisions. Unsurprisingly, it has been understood by this Court in light of the modern approach to termination of contracts. Secondly, on any interpretation of the decision, it does not assist Delor Vue.

*The decision in Craine*

69 In the primary appeal considered by the Court, Mr Craine held a policy of insurance with Colonial Mutual Fire Insurance Co Ltd that provided for fire insurance in respect of motor cars. Clause 11 of the policy required written notice forthwith upon the occurrence of loss or damage and written notification of a claim within 15 days of the loss or damage, and provided that "[n]o amount shall be payable under this policy unless the terms of this condition have been complied with". Clause 19 prohibited the waiver of this requirement other than by writing endorsed on the policy document.

70 A fire occurred in Mr Craine's premises on 30 September 1917 in circumstances that fell within the policy. It was admitted that the time for providing written notification of the claim had been extended until noon on 26 October 1917. But, contrary to the strict terms of cl 11, Mr Craine only provided written notification of the claim at 3 pm on 26 October 1917. The insurer, by its agent, wrote to Mr Craine pointing out the non-compliance but requesting further information about the claim and indicating an intention to sell or dispose of all salvage stock that was the subject of the general claim, except the specifically insured motor cars. In the meantime, the insurer had already taken possession of Mr Craine's premises and all the property in the building. The trial judge found that the insurer subjected Mr Craine to "a great deal of inconvenience, delay,

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89 (1936) 36 SR (NSW) 248 at 258-259.

90 (1920) 28 CLR 305.

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business trouble and loss"<sup>91</sup>. After four months, the insurer gave up possession, having completed its salvage operations.

71 At trial, the insurer sought to rely on cl 11 to deny liability to pay the claim. Such a defence would today be met by the terms of s 54(3) of the *Insurance Contracts Act*. Without the benefit of that provision, Mr Craine relied upon "waiver" and estoppel. The jury was asked a question in the following terms: "Did the defendants represent to the plaintiff that they did not intend to rely upon the claims having been put in too late?" The jury answered: "Yes; they did waive their claim". In giving judgment, the trial judge disregarded all but "Yes" as not responsive to the question. The trial judge held that there was no evidence either of election or of estoppel and that, if there was, cl 19 was an answer. Accordingly, judgment was entered for the defendants.

72 On appeal to this Court, Isaacs J (giving the judgment of the Court) observed that at trial the insurer had not contested the elements of an estoppel – being inducement and prejudice – and that the insurer could not contest those elements on appeal<sup>92</sup>. An issue was whether the evidence was sufficient in law to support the jury's finding that the representation was made. This Court upheld the defence of estoppel and dismissed the claim of "waiver". The claim of "waiver" was dismissed only on the basis that cl 19 precluded waiver without express written endorsement on the policy document. Apart from cl 19, "waiver" would have been established "since [the insurer], with full knowledge of the breach of condition, retained possession of the premises containing the goods for about three months after knowledge, and exerted rights which they could only exercise on the assumption that their obligation still existed"<sup>93</sup>.

73 Although Isaacs J held that the "waiver" was precluded by cl 19, his Honour did not otherwise clearly separate "waiver" from estoppel in his reasoning. On this appeal, however, Delor Vue relied heavily on a passage of Isaacs J's reasoning that followed a statement that "the only contested element of estoppel having been found against the defendant, the question is whether the evidence was sufficient in

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91 (1920) 28 CLR 305 at 317.

92 (1920) 28 CLR 305 at 318-319.

93 (1920) 28 CLR 305 at 325.

law to support the finding of the jury"<sup>94</sup>. In the passage relied upon by Delor J, Isaacs J said<sup>95</sup>:

"Now, so long as the [insurer] distinctly and unequivocally retained the attitude of total non-liability on its part, because such a breach of clause 11 by the plaintiff as occurred put an end to all obligation by the [insurer] to pay a penny—in other words, that the contract according to its own terms had, by reason of the breach of clause 11, terminated the contractual obligations of the parties—it was safe. If, maintaining that attitude consistently, it further intimated that it was prepared to consider an *ad misericordiam* appeal by the plaintiff, supported by whatever proofs and testimony he might voluntarily submit, whether as suggested by the [insurer] or not, we should think the position of the [insurer] would still be unassailable. But insurers are not at liberty to mislead. They are not at liberty, at least apart from special provision in their contract, to do what is forcibly termed in Scotch law 'approbate and reprobate.' They are not at liberty to deny to the insured rights given to him under the contract and at the same time insist on and exercise as against him *in adversum* correlative rights given to them by the contract, as a qualification or a safeguard, on the basis that the rights of the insured are in full operation."

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It may be arguable that, in this discussion, Isaacs J was concerned with election in its historical sense and was not using termination in the modern sense of a power to terminate a contract and bring all obligations to an end. His Honour considered that "the contract according to its own terms had ... terminated the contractual obligations of the parties"<sup>96</sup>. In this way, his Honour was describing the historical approach by which election by affirmation precluded contractual obligations being automatically extinguished by the failure of a condition precedent. That view might also be supported by Isaacs J's reliance upon the decision of Parker J in *Matthews v Smallwood*<sup>97</sup>, in which it was held, consistently with the older authorities on election discussed earlier in these reasons, that the landlord's receipt of rent, with knowledge of the tenant's breach that forfeited the lease, would waive their right of re-entry.

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94 (1920) 28 CLR 305 at 319.

95 (1920) 28 CLR 305 at 319-320.

96 (1920) 28 CLR 305 at 319.

97 [1910] 1 Ch 777 at 786-787.

75 On the other hand, later decisions of this Court provide strong support for Allianz's submission that Isaacs J should be treated as being concerned with election in the modern sense. For instance, in several later decisions concerning the modern approach to waiver by election, members of this Court have described a later discussion in *Craine*<sup>98</sup>, including references to "approbating" and "reprobating", as being concerned with election in the modern sense<sup>99</sup>. In two decisions, this Court also cited *Craine* as an example of the modern approach to election concerning a choice to affirm the contract as a whole rather than merely to affirm the particular obligations that would otherwise have been extinguished by the failure of a condition precedent. Thus, in *Gardiner*<sup>100</sup> three members of this Court described *Craine* as supporting 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". And in *Visscher v Giudice*<sup>101</sup> four members of this Court cited *Craine* in support of a proposition concerning "an election ... to treat the contract as discharged by ... breach".

76 There is a third possible interpretation of the reasons of Isaacs J in *Craine*: namely, that his Honour was contemplating that any waiver of cl 11 by the insurer would require detrimental reliance by Mr Craine before it could be irrevocable. In *Mulcahy v Hoyne*<sup>102</sup>, Isaacs J explained that the expression "approbating and reprobating" was used to describe an estoppel, which requires detrimental reliance:

"[A]ny notion of estoppel, ... though distinct from waiver (in any sense) as a principle (see *Craine v Colonial Mutual Fire Insurance Co ...*), frequently runs parallel with waiver, and is sometimes used as an exchangeable term for waiver in relation to what is known as 'approbating and reprobating'."

And, later in the reasons in *Craine*, Isaacs J explained that the acts "*in adversum*", to which he had previously referred, were those taken against the interests of

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98 (1920) 28 CLR 305 at 326.

99 See *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 642, 647; *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622 at 633; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 406-407, 424, 451, 472.

100 (2008) 238 CLR 570 at 589 [58].

101 (2009) 239 CLR 361 at 377-378 [49].

102 (1925) 36 CLR 41 at 56-57. See also *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at 592-593 [70]-[71].

Mr Craine: for "practically four months... [the insurer], with full knowledge of the facts as to condition 11, had retained possession of the premises and cars, and all property in the premises, *in adversum*, and in right of clause 12 of the conditions of the contract"<sup>103</sup>.

77 The decision of the Privy Council on the appeal from this Court's decision in *Craine* was concerned only with, and based only upon, the waiver being irrevocable due to estoppel<sup>104</sup>. Delivering the advice of the Privy Council, Lord Atkinson held that estoppel had been established by the conduct of the insurer in taking possession of the premises without authority of cl 12 of the contract, and to the conceded detriment of Mr Craine<sup>105</sup>.

78 It is, ultimately, both unproductive and unnecessary to resolve which of these views is the best interpretation of *Craine*. It is unproductive because the precedential force of the reasoning of early common law authorities will depend in part upon the extent to which those authorities are consistent with the common law mosaic of the present. Here, this includes the modern approach to termination of a contract as described in *Gardiner*<sup>106</sup> and *Visscher v Giudice*<sup>107</sup>. It is unnecessary because, on any view, the remarks of Isaacs J cannot assist Delor Vue. As explained above, s 28(3) is a defence to a claim for indemnity. It does not give rise to a power for an insurer to terminate a contract. Nor is it a condition precedent that must be satisfied before Allianz could be under any obligation to pay. And, for the reasons below, Delor Vue's submission that Allianz was estopped from revoking its waiver cannot be accepted.

### **Irrevocable waiver by estoppel**

79 The third basis upon which the majority of the Full Court held that Allianz's waiver had become irrevocable was by operation of an estoppel. In this Court, there was no dispute concerning the nature of the estoppel, such as whether it was a promissory estoppel or an estoppel by convention. Nor was there any dispute that Delor Vue was required to establish that it had suffered detriment to succeed in its

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**103** (1920) 28 CLR 305 at 322.

**104** *Yorkshire Insurance Co v Craine* [1922] 2 AC 541.

**105** [1922] 2 AC 541 at 549-550, 552-553.

**106** (2008) 238 CLR 570.

**107** (2009) 239 CLR 361.

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claim that Allianz was estopped from revoking its waiver<sup>108</sup>. The only issue was whether Delor Vue had established any detriment.

80 It can immediately be accepted that the detriment with which estoppel is concerned is not limited to loss that can be measured in monetary terms. It is concerned with "the consequences that would enure to the disadvantage of a person who has been induced to change his or her position if the state of affairs so brought about were to be altered by the reversal of the assumption on which the change of position occurred"<sup>109</sup>. In short, Delor Vue needed to establish that it would suffer adverse consequences, or "a source of prejudice"<sup>110</sup>, if Allianz were entitled to revoke its waiver, in the sense of placing conditions upon the waiver.

81 It can also be accepted that Delor Vue could have established detriment by showing that it had lost an opportunity that was of real and substantial value, even if it could not prove that the opportunity would have realised a benefit<sup>111</sup>. But Delor Vue had to prove that the opportunity was lost and that it was something of value<sup>112</sup>.

82 Delor Vue submitted in this Court, consistent with the conclusions of the primary judge and the majority of the Full Court<sup>113</sup>, that detriment had been established by two opportunities lost by Delor Vue during the year between the waiver (on 9 May 2017) and the "revocation" (on 28 May 2018): (i) an opportunity "to challenge [Allianz] for indemnity in May 2017 and potentially resolve the conflict within that challenge"; and (ii) an 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".

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**108** See McFarlane, *The Law of Proprietary Estoppel*, 2nd ed (2020) at 226-229 [4.22]-[4.30].

**109** *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 at 598-599 [84].

**110** *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 675.

**111** *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483 at 486 [5].

**112** See *Talacko v Talacko* (2021) 272 CLR 478 at 495-496 [42].

**113** See *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd [No 2]* (2020) 379 ALR 117 at 187 [333]; *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2021) 287 FCR 388 at 432 [204(8)].

83 The first alleged lost opportunity was, essentially, for Delor Vue to compromise litigation concerning the operation of s 28(3) on terms that were more favourable than Allianz's offer of 28 May 2018 to incur costs estimated at \$918,709.90, in addition to costs already incurred of almost \$200,000. But no case based on this type of detriment was ever run at trial. No such detriment was set out in Delor Vue's Amended Concise Statement, the case to which the primary judge properly held Delor Vue, despite attempts late in the trial to expand its case.

84 There is also no basis to infer that there was any real or substantial prospect of Delor Vue obtaining, in a mediation, a more favourable settlement than that offered by Allianz in May 2018. Since no such case was ever run at trial, no evidence was called by Delor Vue as to whether it might have commenced litigation between May 2017 and May 2018. Delor Vue did not call any evidence concerning the relationship between the parties during that year that might have shown that there was a prospect of a more favourable settlement in a mediation if litigation had been commenced. Nor was there evidence before the Court concerning any informal offers to resolve the dispute made by either party during that period, or the attitude of either party to such offers. And, in the absence of any case concerning the loss of a prospect of a more favourable outcome by a mediation, Allianz did not waive privilege or seek to tender any legal correspondence in relation to offers to resolve the dispute between May 2017 and May 2018.

85 In this Court, Delor Vue submitted that there was a "souring" of the relationship between the parties after 12 months. It can be accepted that relations had indeed soured by the time of the correspondence on 3 May 2018. But it is too late for Delor Vue to construct a case for the first time, in this Court, that a souring of relations at an unspecified time between May 2017 and May 2018 deprived it of the prospect of a more favourable outcome, by a mediation, than that offered by Allianz in May 2018. An example of one of the many issues that might have been explored had such a case been run at trial is whether, even without litigation or mediation, Allianz had made informal offers to Delor Vue to resolve the dispute which were at the limits of what it was ever prepared to offer.

86 The second alleged lost opportunity was for Delor Vue to take steps to carry out the repair works itself. The majority of the Full Court concluded, after a careful and detailed analysis of the case before the primary judge, including Delor Vue's late attempts to expand its case, that Delor Vue's case was confined to "a claim that

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as a matter of fact, because of the May 2017 Email, [Delor Vue] did not take matters into its own hands, undertake the work and pursue Allianz"<sup>114</sup>.

87 As the majority of the Full Court correctly concluded, this was not a claim that "Delor [Vue] pursued *some other course* ... such as by applying its available funds to something else such that they could not be used to repair the relevant damage"<sup>115</sup>. Nor was it a claim that "it was to be more difficult or more costly or more burdensome to undertake the repairs" in May 2018 than it was in May 2017<sup>116</sup>. Indeed, as the majority added, Delor Vue "identified no consequence beyond the fact that it had left things to Allianz and therefore had not done anything to pursue things for itself"<sup>117</sup>.

88 Although Delor Vue did take some action between May 2017 and May 2018, including commissioning engineering and building reports, it is not sufficient proof of detriment for Delor Vue to assert that, as a consequence of the 9 May 2017 email, it refrained from taking unspecified additional action that it would otherwise have taken. The nature of any action that Delor Vue might have taken is important given that: (i) Delor Vue's available funds, including the proposed loan, fell vastly short of the cost of repairs; and (ii) Delor Vue never specified any of the work that it could have undertaken.

89 Further, even if it is assumed that Delor Vue had refrained from taking some additional action, refraining from that action might not necessarily have been detrimental. If the cost of taking the additional action fell, then, all other things being equal, the decision to refrain would have been beneficial. Or, if the cost remained the same, the decision to refrain might still have been beneficial if the effect was to allow all repair works to be done concurrently, after the additional defects in the roof trusses had been discovered.

90 In summary, Delor Vue did not prove any "acts, facts or circumstances"<sup>118</sup> from which any detriment could be inferred due to the loss of an opportunity to engage in repair works itself between May 2017 and May 2018. Indeed, the facts

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**114** *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2021) 287 FCR 388 at 431 [202].

**115** (2021) 287 FCR 388 at 422 [162] (emphasis in original).

**116** (2021) 287 FCR 388 at 423 [166].

**117** (2021) 287 FCR 388 at 423 [168].

**118** *The Commonwealth v Clark* [1994] 2 VR 333 at 380.

established only a clear benefit to Delor Vue during this period from the money spent by Allianz, including on repairs.

91 Perhaps in order to address this obstacle, Delor Vue submitted in this Court that, "subject to the question of financial limitations", Delor Vue could have attended to "simpler and cheaper defects rectification works" in tandem with cyclone damage repairs. But, as explained above, the majority of the Full Court correctly concluded that Delor Vue had not run a case at trial that it could have undertaken works more cheaply itself between May 2017 and May 2018. In any event, such a submission is not supported by the evidence. The reference to "simpler and cheaper defects rectification works" appears to be to the uncosted option of fitting new trusses alongside the existing trusses, as suggested by Delor Vue's body corporate manager. That option was considered by Allianz's loss adjusters who concluded that it was not cost effective.

### **Allianz's duty of utmost good faith**

#### *The nature of the duty of utmost good faith*

92 Section 13(1) of the *Insurance Contracts Act*, set out earlier in these reasons, is an instantiation of the centuries-old common law "duty of utmost good faith" in commercial contracts. Like the common law duty, the duty in s 13(1) is not a free-standing or "independent general duty to act in good faith"<sup>119</sup>. Rather, as s 13(1) provides, the duty has two aspects: (i) it is a principle upon which a contract of insurance is "based" and thus assists in the recognition of particular implied duties<sup>120</sup>; and (ii) it is an implied condition on existing rights, powers, and duties, governing the manner in which each contracting party must act towards the other party "in respect of any matter arising under or in relation to" the contract of insurance.

93 Each of these two aspects of the duty of utmost good faith applies equally to the insurer and to the insured. Indeed, it has long been recognised that the duty of utmost good faith applies symmetrically to both parties to an insurance

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119 *Re Zurich Australian Insurance Ltd* [1999] 2 Qd R 203 at 218 [82].

120 *Carter v Boehm* (1766) 3 Burr 1905 at 1911 [97 ER 1162 at 1165]: to "vary the nature of the contract".

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contract<sup>121</sup>. This symmetrical operation was generally incorporated into s 13(1) of the *Insurance Contracts Act*<sup>122</sup>.

94 The first aspect of the duty of utmost good faith, as the principle on which the contract of insurance is based, requires various implied duties to be recognised. The most widely recognised of these is the duty of full disclosure. As early as 1766, Lord Mansfield said in the insurance context in *Carter v Boehm*<sup>123</sup>, albeit in remarks intended to apply to all contracts, that "[g]ood faith forbids either party by concealing what [they] privately know[], to draw the other into a bargain" where the other is ignorant of the concealed fact. The duty of disclosure by an insured is now the subject of a detailed statutory regime in Divs 1 and 3 of Pt IV of the *Insurance Contracts Act*.

95 The second aspect of the duty of utmost good faith, as an implied condition, requires each party "to have regard to more than its own interests when exercising its rights and powers under the contract of insurance"<sup>124</sup>. This condition upon the exercise of rights and powers and the performance of obligations is not fiduciary<sup>125</sup>. It does not require a party to an insurance contract to exercise rights or powers or to perform obligations only in the interests of the other party. But nor is the condition limited to honest performance. The duty to act honestly, or not deceitfully, has been said to be "a duty of universal obligation"<sup>126</sup>. Section 13(1) would add nothing to the conditions on the exercise of those contractual rights and

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**121** Wood, *A Treatise on the Law of Fire Insurance* (1886) at 464; Phillips, *A Treatise on the Law of Insurance* (1823) at 81.

**122** See Australian Law Reform Commission, *Insurance Contracts*, Report No 20 (1982) at xxi-xxii. See also *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1 at 41 [125].

**123** (1766) 3 Burr 1905 at 1910 [97 ER 1162 at 1164].

**124** *Distillers Co Bio-Chemicals (Aust) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 CLR 1 at 31. See also *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1 at 12 [15].

**125** *CGU Workers Compensation (NSW) Ltd v Garcia* (2007) 69 NSWLR 680 at 693 [60].

**126** *Nocton v Lord Ashburton* [1914] AC 932 at 954; *Magill v Magill* (2006) 226 CLR 551 at 561 [17], 615-616 [207].

powers, and the performance of obligations, if it merely required the exercise or performance to be honest.

96 It has therefore been said that rights and powers must be exercised, and duties must be performed, "consistently with *commercial* standards of decency and fairness"<sup>127</sup> as distinct from standards of decency and fairness more generally. Several examples can be given of how the duty of utmost good faith conditions the exercise of contractual rights and powers and the performance of obligations. The refusal to cooperate with another contractual party in the exercise of a power can involve a lack of utmost good faith<sup>128</sup>. The failure, "within a reasonable time of the receipt of the claim"<sup>129</sup>, to perform the obligation to accept or refuse a claim can involve a lack of utmost good faith. And, as s 14 of the *Insurance Contracts Act* provides, reliance upon a power specifically provided to one party in the contract will be precluded if the reliance would involve a lack of utmost good faith.

*The suggested content of Allianz's duty of utmost good faith*

97 The majority of the Full Court gave no particularised content to the duty of utmost good faith, treating it only as an open-textured contractual obligation, such as to act "consistently with commercial standards of decency and fairness", requiring "an evaluative decision to be made by reference to all of the circumstances of the case"<sup>130</sup>. That approach was in error for the reasons set out above. There is no free-standing general obligation upon an insurer, independent of its contractual rights, powers, and obligations, to act in a manner which is decent and fair. The obligation to act decently and with fairness is a condition on how existing rights, powers, and duties are to be exercised or performed in the commercial world.

98 The primary judge, by contrast, relied upon the duty of utmost good faith in its first aspect, as a principle that gives rise to particular implied duties, concluding that the duty of utmost good faith precluded Allianz from "resiling from the clear

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127 *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1 at 12 [15] (emphasis added).

128 *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1 at 79 [260].

129 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 401-402.

130 *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2021) 287 FCR 388 at 441 [252]-[253].

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representation, in effect a promise, in the 9 May 2017 email" or "resiling from a considered position ... of a claim of significant financial dimension"<sup>131</sup>.

99 The particular implied duty postulated by the primary judge could not have been intended, and was not expressed, as an absolute duty upon parties to an insurance contract never to resile from any representation. An insurer and an insured do not owe a duty never to depart from representations made to each other. For instance, even if a representation is made unequivocally, it might be reasonable to depart from that representation if it was insignificant, or if circumstances change and departure would occasion no prejudice to the other party. If such a novel duty were to be recognised, and if it were to add anything to the doctrine of estoppel, it could only be a duty not to depart, without a reasonable basis, from significant representations concerning a claim.

100 In this Court, Delor Vue focused on the second aspect of the duty of utmost good faith. Delor Vue referred to the obligation of an insurer "to make a clear and timeous decision in respect of a claim" and submitted that the need for certainty that underpins this obligation applies equally to prevent an insurer from "revers[ing] its position on the claim" in circumstances in which the insurer had "acted on that certain state of affairs for over a year".

101 This submission is a mischaracterisation of the facts. Allianz did not "reverse" its position on Delor Vue's claim in the 28 May 2018 letter. The highest the submission could be expressed is that Allianz reversed its position on one legal aspect of Delor Vue's claim in stating that Allianz would rely on s 28(3) if its offer was not accepted. Ultimately, however, Delor Vue's submission effectively requires recognition of the same novel duty identified by the primary judge, namely that Allianz was under a duty not to resile, without a reasonable basis, from any significant representation to Delor Vue concerning a claim made by Delor Vue.

*Allianz did not breach its duty of utmost good faith*

102 By whichever approach this novel duty of a party to an insurance contract is sought to be derived, it cannot be accepted. It is not fatal to the existence of this novel duty that Delor Vue was unable to point to a single case identifying a remotely similar duty over the period of more than 250 years since a duty of utmost good faith in insurance contracts was recognised. Nor is it fatal that the Australian Law Reform Commission did not contemplate anything like it in the report which

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**131** *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd [No 2]* (2020) 379 ALR 117 at 192-193 [346]-[347].

formed the basis of the *Insurance Contracts Act*<sup>132</sup>. But, in a context in which insurers have been operating for nearly 40 years on the basis of a particular understanding of the operation of the *Insurance Contracts Act*, these matters are not a promising start.

103           What is fatal to the recognition of this novel duty is that it would not be coherent either with the operation of existing legal doctrines, whose existence was well established at the time of the *Insurance Contracts Act*, or with the *Insurance Contracts Act* itself. In relation to insurers, it would have the effect of subsuming much of the operation of the doctrines of election, waiver, and estoppel into a broader positive duty not to unreasonably depart from significant representations. No reliance or detriment would be required.

104           The recognition of such a duty would also have radical consequences for an insured that would not be coherent with the generally symmetrical operation of the *Insurance Contracts Act*. Div 2 of Pt IV of the *Insurance Contracts Act* is concerned with misrepresentations by an insured. Suppose that, following the occurrence of an insured event, an insured party, carelessly assuming that the damage was minimal, made a representation to their insurer that no claim would be brought under the policy. The factual aspect of that representation – the "state of affairs" – being the present state of mind of the insured party<sup>133</sup> would not be a misrepresentation by the insured within s 24 of the *Insurance Contracts Act*. But if it were a breach of the duty of utmost good faith for the insured to depart unreasonably from their representation concerning a claim, then the insurer could cancel the contract under s 60(1)(a) if a claim was subsequently brought by the insured.

105           These matters are sufficient to conclude that there is no basis to find that Allianz breached its duty of utmost good faith by imposing conditions upon its representation that it would not rely on s 28(3) of the *Insurance Contracts Act*. In any event, however, even if there were a duty of the kind suggested by the primary judge or by Delor Vue, that duty would not have been breached by Allianz.

106           Delor Vue's submission that Allianz's conduct amounted to a breach of a duty not to resile, without a reasonable basis, from its representation is based on the premise that it is possible to fillet the representation by Allianz that it would not rely on s 28(3) of the *Insurance Contracts Act* from the remainder of the 9 May

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132 Australian Law Reform Commission, *Insurance Contracts*, Report No 20 (1982).

133 *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483; *Meehan v Jones* (1982) 149 CLR 571 at 578-579; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 410.

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2017 email. That premise is incorrect. Any assessment of whether the conduct of a party to an insurance contract has breached the duty of utmost good faith, in either of its aspects, requires consideration of the whole of the context of that party's conduct.

107           When the representation in the 9 May 2017 email is read in its full context, it is clear that Allianz was not accepting liability for the whole of Delor Vue's claim. Allianz's representation that it would not rely on s 28(3) was inseparable from Allianz's limited offer of indemnity that excluded "[d]efective materials and construction of the roof, including but not limited to tie downs, rafters and timbers and soffit" and required Delor Vue to pay for roof repairs of a scope yet to be defined, but to be undertaken prior to internal repairs.

108           And when the representation in the 28 May 2018 letter is read in its full context, which included almost a year of dispute about the terms of Allianz's limited offer of indemnity, it is clear that Allianz was endeavouring to give more detailed and precise content to the terms of its 9 May 2017 email (which were set out in full). That included greater precision about the repairs and replacements that Allianz would undertake, to an estimated cost of around \$918,709.90, in addition to costs of nearly \$200,000 that it had already incurred.

109           When the 9 May 2017 email and the 28 May 2018 letter are both read in context, the appropriate characterisation of the 28 May 2018 letter, in the words of Derrington J in dissent in the Full Court, is that Allianz was giving content to its offer "to pay a large gratuitous amount in respect of a liability which did not exist"<sup>134</sup>, albeit with a limited time for acceptance (ultimately, around three months). Even if the novel duty proposed by Delor Vue were accepted, the 28 May 2018 letter could not be a breach of the duty of utmost good faith.

110           For these reasons, Allianz did not breach its duty of utmost good faith. It is, therefore, unnecessary to consider any of Allianz's submissions concerning the utility or availability of a declaration if a breach had occurred, including submissions that Delor Vue: (i) did not seek any declaration of a breach of s 13; (ii) sought only damages for breach of s 13, in place of which a declaration was made; (iii) led no evidence of any consequential loss suffered from the alleged breach of the duty of utmost good faith and obtained no award of damages from the primary judge; and (iv) did not seek or obtain any injunction to enforce the duty alleged to have been breached.

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**134** *Allianz Australia Insurance Ltd v Delor Vue Apartments* CTS 39788 (2021) 287 FCR 388 at 512 [577].

## **Conclusion**

111            Allianz's waiver of the defence under s 28(3) of the *Insurance Contracts Act* was revocable and was revoked. Delor Vue did not establish that Allianz was precluded from revoking its waiver by reason of "election", "waiver", estoppel, or the duty of utmost good faith. Orders should be made as follows:

1.        The appeal be allowed with costs.
2.        The orders of the Full Court of the Federal Court of Australia made on 9 July 2021 be set aside and, in their place, it be ordered that:
  - (a)      the appeal be allowed with costs; and
  - (b)      the declarations and orders of the Federal Court of Australia made on 24 July 2020 be set aside and, in their place, it be ordered that proceeding NSD 2094 of 2018 be dismissed with costs.

112 GAGELER J. Part IV of the *Insurance Contracts Act 1984* (Cth) ("the Act") codifies the pre-contractual duty of disclosure of an insured<sup>135</sup> and the consequences of an insured failing to comply with that duty<sup>136</sup>. The pre-contractual duty of the insured is to make known to the insurer every matter known to the insured that the insured knows, or that a reasonable person in the circumstances could be expected to know, to be relevant to the decision of the insurer whether to accept the risk insured and, if so, on what terms<sup>137</sup>. Failure to comply with that duty, unless fraudulent<sup>138</sup>, does not entitle the insurer to avoid the contract of insurance. Instead, "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"<sup>139</sup>.

113 The statutory reduction in the liability of an insurer consequent upon an insured's failure to comply with the pre-contractual duty of disclosure, although expressed in self-executing terms, takes effect as a statutory right conferred on and for the benefit of the insurer<sup>140</sup>. The insurer can choose to rely, or not to rely, on that statutory right in answer to a claim made by the insured under the contract of insurance.

114 This appeal concerns the basis or bases on which an insurer can be bound to adhere to a unilateral choice communicated to the insured not to rely on that statutory right in answer to a claim.

115 The appeal is from a judgment of the Full Court of the Federal Court<sup>141</sup> which, by majority (McKerracher and Colvin JJ, Derrington J dissenting),

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**135** *Advance (NSW) Insurance Agencies Pty Ltd v Matthews* (1989) 166 CLR 606 at 615.

**136** Section 33 of the Act.

**137** Section 21(1) and (2) of the Act.

**138** Section 28(2) of the Act.

**139** Section 28(3) of the Act.

**140** See *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 405-406; *Westfield Management Ltd v AMP Capital Property Nominees Ltd* (2012) 247 CLR 129 at 143-144 [46].

**141** *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2021) 287 FCR 388.

dismissed an appeal from a first instance judgment of Allsop CJ<sup>142</sup>. None of the findings of fact made by Allsop CJ was disturbed in the Full Court. None is sought to be disturbed in this Court. The following is a sufficient summary.

116 Delor Vue Apartments CTS 39788, the respondent insured, is the body corporate for an apartment complex built in 2008 and 2009 in Cannonvale near Airlie Beach in North Queensland. In March 2017, Delor Vue entered into a composite policy of insurance issued by Strata Community Insurance ("SCI") as agent for Allianz Australia Insurance Ltd, the appellant insurer. The risks covered by the policy included property damage and public liability.

117 Before entering into the policy, Delor Vue was aware that the apartment complex had badly affixed and constructed soffits and eaves which were dangerous if they dislodged. Delor Vue failed to disclose that matter to SCI. The matter was not relevant to the risk of property damage covered by the policy but was relevant to the risk of public liability covered by the policy. SCI as agent for Allianz would not have accepted the risk of public liability and so would not have issued the composite policy had the matter been disclosed<sup>143</sup>. Delor Vue accordingly failed to comply with its pre-contractual duty of disclosure and Allianz accordingly had in consequence a statutory right to reduce its liability in respect of any claim Delor Vue might make under the policy to nothing<sup>144</sup>.

118 Less than a week after the insurance cover commenced under the policy, Tropical Cyclone Debbie severely damaged the apartment complex. Delor Vue made a claim under the policy for property damage. During the investigation of that claim, Delor Vue's failure to comply with its pre-contractual duty of disclosure became apparent. Delor Vue promptly provided all relevant information in its possession to SCI and Allianz<sup>145</sup>.

119 On 9 May 2017, SCI as agent for Allianz sent an email to Delor Vue stating that "[d]espite the non-disclosure issue which is present, [SCI] is pleased to confirm that we will honour the claim and provide indemnity to [Delor Vue], in line with all other relevant policy terms, conditions and exclusions". "The email

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**142** *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd [No 2]* (2020) 379 ALR 117.

**143** *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd [No 2]* (2020) 379 ALR 117 at 122 [22]-[23], 179 [288].

**144** *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd [No 2]* (2020) 379 ALR 117 at 175-176 [267]-[268].

**145** *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd [No 2]* (2020) 379 ALR 117 at 145 [122], 189 [338].

was the expression of a measured, informed and apparently final position" which "on its face was intended to be acted on by Delor Vue". The position of Allianz so expressed was that "[t]he factual and legal state of affairs between insurer and insured would proceed on the basis of the policy without any reliance by SCI on any rights it may have had arising from non-disclosure"<sup>146</sup>. It was "in effect a promise, to adjust the claim on policy terms"<sup>147</sup>.

120 Just over a year later, on 28 May 2018, Allianz resiled from that position. Allianz wrote to Delor Vue making a take-it-or-leave-it offer to settle the claim. In default of acceptance by Delor Vue of the offer it then made, Allianz purported to reserve its statutory right to reduce payment of the claim to nothing because of Delor Vue's pre-contractual non-disclosure<sup>148</sup>.

121 In the meantime, although the parties were in dispute about the extent to which work needed to repair the apartment complex was covered by the policy, the parties had proceeded on the basis that SCI was adjusting Delor Vue's claim in accordance with the policy on behalf of Allianz. SCI had been given unfettered access to the apartment complex in accordance with the terms of the policy, had engaged engineers to investigate the scope of necessary repair works, had obtained quotations, and had threatened to commence subrogated proceedings against the builder<sup>149</sup>. Delor Vue for its part had facilitated SCI undertaking those activities, had refrained from itself rectifying the property to the extent it was financially able to do so, had refrained from commencing proceedings against Allianz to enforce the claim, and had sought and been granted a six-month renewal of the policy for a substantial premium<sup>150</sup>.

122 Delor Vue rejected the take-it-or-leave-it offer to settle the claim and ultimately commenced a proceeding to enforce the claim against Allianz in the Federal Court. In that proceeding, Allianz sought to rely on its statutory right to

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**146** *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd [No 2]* (2020) 379 ALR 117 at 147 [127].

**147** *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd [No 2]* (2020) 379 ALR 117 at 123 [26].

**148** *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd [No 2]* (2020) 379 ALR 117 at 123 [26], 161-163 [183]-[185].

**149** *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd [No 2]* (2020) 379 ALR 117 at 120 [10].

**150** *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd [No 2]* (2020) 379 ALR 117 at 159 [175], 187 [333].

reduce to nothing its liability in respect of the claim under the policy by reason of Delor Vue's failure to comply with its pre-contractual duty of disclosure.

123 The conclusion reached by Allsop CJ at first instance was that Allianz was precluded from relying on its statutory right to reduce its liability in respect of the claim under the policy for three distinct reasons. First, Allianz had waived that right by its email of 9 May 2017<sup>151</sup>. Second, as of 28 May 2018, Allianz was estopped from departing from the position stated in that email<sup>152</sup>. Third, Allianz's attempt then to depart from the position so stated breached the provision implied into the policy by the Act<sup>153</sup> which required it to act with the "utmost good faith"<sup>154</sup>.

124 In the Full Court, McKerracher and Colvin JJ discerned no error in any of those conclusions. Their Honours differed from Allsop CJ only in that they preferred to explain the preclusion which arose from the email of 9 May 2017 in terms of election rather than waiver. Derrington J disagreed with each conclusion.

125 For the following reasons, I agree with McKerracher and Colvin JJ that each conclusion reached by Allsop CJ was correct. Differing from McKerracher and Colvin JJ only as to taxonomy and terminology, I share Allsop CJ's preference for explaining the preclusion which arose from the email of 9 May 2017 in terms of waiver rather than election.

### Waiver

126 Delivering the judgment of this Court (constituted by Knox CJ, Isaacs and Starke JJ) in *Craine v Colonial Mutual Fire Insurance Co Ltd*<sup>155</sup>, Isaacs J explained waiver to be a distinct legal doctrine. The explanation was given in an insurance context. Under one provision of a contract of insurance, written notification of a claim by the insured to the insurer within a specified time of the occurrence of an insured loss was made a condition precedent to the liability of the insurer to pay the claim<sup>156</sup>. Under another, the insurer was not to be taken to

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151 *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd [No 2]* (2020) 379 ALR 117 at 190-191 [341].

152 *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd [No 2]* (2020) 379 ALR 117 at 189-190 [337]-[338].

153 Section 13(1) of the Act.

154 *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd [No 2]* (2020) 379 ALR 117 at 192-193 [346]-[349].

155 (1920) 28 CLR 305 at 326.

156 (1920) 28 CLR 305 at 306 (clause 11).

"waive" a condition of the contract unless the insurer stated in writing that the condition was waived<sup>157</sup>. The insured failed to make timely written notification of a claim. The insurer nevertheless proceeded to adjust the claim, and for that purpose to exercise powers under the contract<sup>158</sup>. The insurer was found by a jury at trial to have thereby represented to the insured that the insurer did not rely on the condition precedent to deny liability to pay the claim<sup>159</sup>.

127 Citing nineteenth century and earlier twentieth century English cases, Isaacs J explained "waiver" to have a "strict legal connotation"<sup>160</sup>:

"A waiver must be an intentional act with knowledge'. First, 'some distinct act ought to be done to constitute a waiver'; next, it must be 'intentional', that is, such as ... indicates intention to treat the matter as if the condition did not exist or as if the ... breach of condition had not occurred; and, lastly, it must be 'with knowledge'".

128 Of the conceptual basis on which the doctrine of waiver operates, Isaacs J said<sup>161</sup>:

"Waiver' is a doctrine of some arbitrariness introduced by the law to prevent a man in certain circumstances from taking up two inconsistent positions. It is a conclusion of law when the necessary facts are established. It looks, however, chiefly to the conduct and position of the person who is said to have waived, in order to see whether he has 'approved' so as to prevent him from 'reprobating' – in English terms, whether he 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. His knowledge is necessary, or he cannot be said to have approved or elected."

129 Going on to explain the doctrine of estoppel consistently with the explanation which would later be given in *Thompson v Palmer*<sup>162</sup>, *Newbon v City Mutual Life Assurance Society Ltd*<sup>163</sup> and *Grundt v Great Boulder Pty Gold Mines*

**157** (1920) 28 CLR 305 at 307 (clause 19).

**158** (1920) 28 CLR 305 at 306-307 (clause 12).

**159** (1920) 28 CLR 305 at 311.

**160** (1920) 28 CLR 305 at 326 (citations omitted and cleaned up).

**161** (1920) 28 CLR 305 at 326 (citations omitted).

**162** (1933) 49 CLR 507 at 520, 547.

**163** (1935) 52 CLR 723 at 734-735.

*Ltd*<sup>164</sup> and taken up in subsequent cases, Isaacs J pointed out that estoppel differs from waiver in important respects<sup>165</sup>. First, estoppel looks chiefly to the situation of the person relying on the conduct which gives rise to the estoppel, making the knowledge and intention of the person sought to be estopped immaterial. Second, estoppel can arise from conduct of the person sought to be estopped which falls short of a positive act.

130           What Isaacs J held in *Craine* was that the insurer would have waived its right to rely on the condition precedent to liability had the contract of insurance not required waiver to be only in writing<sup>166</sup>. However, in circumstances where the only element of estoppel contested at trial had been the making of the representation<sup>167</sup>, the insurer was estopped from relying on the condition<sup>168</sup>.

131           The outcome that the insurer was estopped from relying on the condition precedent to liability was upheld on appeal to the Privy Council, where only estoppel was in issue<sup>169</sup>. In *Mulcahy v Hoyne*<sup>170</sup>, Isaacs J subsequently cited the decisions of this Court and the Privy Council in *Craine* as illustrating the proposition that estoppel is "distinct from waiver (in any sense) as a principle" though it "frequently runs parallel with waiver".

132           Four points are to be noted about the doctrine of waiver as so explained by Isaacs J in *Craine*. First, waiver was said to be a conclusion of law which follows when the necessary facts are established<sup>171</sup>.

133           Second, the legal conclusion of waiver was not said to follow from the mere fact of an intimation of an intention not to enforce a right<sup>172</sup>. The conclusion was

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164 (1937) 59 CLR 641 at 657.

165 (1920) 28 CLR 305 at 327.

166 (1920) 28 CLR 305 at 325.

167 (1920) 28 CLR 305 at 318-319.

168 (1920) 28 CLR 305 at 328-329.

169 *Yorkshire Insurance Co Ltd v Craine* [1922] 2 AC 541.

170 (1925) 36 CLR 41 at 56-57.

171 *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305 at 326. See also *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41 at 55.

172 cf *O'Connor v S P Bray Ltd* (1936) 36 SR (NSW) 248 at 257.

said to follow from the communication of an informed and fully formed intention to relinquish or abandon a right – to treat the right as if it "did not exist"<sup>173</sup>.

134 Third, the explanation in *Craine* was confined to waiver in the sense of unilateral relinquishment or abandonment of an accrued right inuring solely for the benefit of the party relinquishing or abandoning it. The accrued right relinquished or abandoned by the insurer in *Craine* was a right to rely on a past non-compliance by the insured with a condition precedent to the past accrual of a contractual liability on the part of the insurer to pay the claim which had been made by the insured<sup>174</sup>. The explanation was not concerned with "waiver" in the distinct sense of a unilateral abandonment of, or promise not to enforce, a right to performance of a condition of an executory contract. Waiver in that distinct sense, sometimes referred to as "forbearance"<sup>175</sup>, did not arise for consideration in *Craine* and does not arise for consideration in this appeal. Waiver in that distinct sense did arise subsequently to *Craine* in *Mulcahy*. There, Knox CJ<sup>176</sup>, Isaacs J<sup>177</sup>, and Starke J<sup>178</sup> each adhered to the long-established principle<sup>179</sup> that a promise not to enforce a contract is legally inoperative and cannot excuse a breach of contract unless it is supported by consideration or unless it gives rise to an estoppel.

135 Finally, but not least importantly, whilst communication of an informed intention to abandon an accrued right was explained in *Craine* as the making of an "election", the election referred to was not a choice between inconsistent rights. It was a choice between the inconsistent "positions" of retaining the right and relinquishing the same right<sup>180</sup>.

136 The doctrine of waiver as so explained by Isaacs J in *Craine* accords with the description of waiver as the unilateral abandonment of a right which has

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173 *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305 at 326.

174 *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305 at 322-323.

175 *The "Kanchenjunga"* [1990] 1 Lloyd's Rep 391 at 397-398; *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at 592-599 [68]-[87].

176 (1925) 36 CLR 41 at 50.

177 (1925) 36 CLR 41 at 53-56.

178 (1925) 36 CLR 41 at 58-59.

179 See earlier *Barns v Queensland National Bank Ltd* (1906) 3 CLR 925 at 938, quoting *Stackhouse v Barnston* (1805) 10 Ves 453 at 466 [32 ER 921 at 925-926].

180 *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305 at 326.

appeared in successive editions of *Halsbury's Laws of England*<sup>181</sup>. That description of waiver was adopted by Latham CJ in *Grundt*<sup>182</sup>, by members of the House of Lords in *Banning v Wright*<sup>183</sup>, by Brennan J in *The Commonwealth v Verwayen*<sup>184</sup> and by Finn and Sundberg JJ in *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd*<sup>185</sup>.

137 The explanation of the conceptual basis for the doctrine of waiver given by Isaacs J in *Craine* is also consistent with the explanation of how waiver operates given by Lord Hailsham in *Banning*<sup>186</sup>, as adopted and elaborated on by Brennan J in *Verwayen*<sup>187</sup>. The explanation is that waiver "is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted"<sup>188</sup>. Waiver, properly so understood, is not a doctrine by operation of which a right is extinguished. Like estoppel, it is a doctrine by operation of which assertion of a right is precluded.

138 *Craine* was argued and decided after and without reference to the publication in 1917 of a treatise entitled *Waiver Distributed* by Canadian author, Mr John Ewart KC<sup>189</sup>. Unfortunately, the argument in *Craine* was presented without reference to the treatise and the reasoning of Isaacs J therefore had no occasion to engage with Mr Ewart's thesis. Mr Ewart's thesis, in short, was that waiver should not be understood as a distinct doctrine of law and that the numerous

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181 *Halsbury's Laws of England*, 1st ed (1910), vol XIII (Equity) at 165 [197]; *Halsbury's Laws of England*, 2nd ed (1934), vol XIII (Equity) at 207 [197]; *Halsbury's Laws of England*, 3rd ed (1956), vol 14 (Equity) at 637 [1175]; *Halsbury's Laws of England*, 4th ed (1976), vol 16 (Equity) at 992 [1471]; *Halsbury's Laws of England*, 4th ed (1992 reissue), vol 16 (Equity) at 824 [922]; *Halsbury's Laws of England*, 4th ed (2003 reissue), vol 16(2) (Equity) at 390 [907]; *Halsbury's Laws of England*, 5th ed (2021), vol 47 at 228 [251].

182 (1937) 59 CLR 641 at 658.

183 [1972] 1 WLR 972 at 979, 982, 990; [1972] 2 All ER 987 at 998, 1001, 1007-1008.

184 (1990) 170 CLR 394 at 423.

185 (2006) 149 FCR 395 at 421 [113].

186 [1972] 1 WLR 972 at 978-979; [1972] 2 All ER 987 at 997-998.

187 (1990) 170 CLR 394 at 423.

188 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 423, quoting *Banning v Wright* [1972] 1 WLR 972 at 979; [1972] 2 All ER 987 at 998.

189 Ewart, *Waiver Distributed* (1917).

cases (in England and in the United States) which had until the time of publication been explained in terms of waiver could all be "distributed" and explained more satisfactorily as instances of the operation of one or other of the distinct "departments" of estoppel, election, contract and release. "Waiver", according to Mr Ewart, was not itself a "department" but "an empty category"; the word was "used indefinitely as a cover for vague, uncertain thought"<sup>190</sup>.

139 Mr Ewart's thesis became influential – so influential that it soon became customary for judicial references to waiver in Australia<sup>191</sup>, as in England<sup>192</sup>, to contain an acknowledgement of uncertainty as to the content of the term. By 1977, it was being said in the leading English text on the law of estoppel that "whereas a fairly successful attempt may be made to state with precision what is meant by 'estoppel' and by 'election', the term 'waiver' when used in a similar connotation is not capable of exact definition in the light of the authorities"<sup>193</sup>.

140 Mr Ewart's distribution of waiver was reflected in the holding of the Court of Appeal of England and Wales in *Kosmar Villa Holidays plc v Trustees of Syndicate 1243*<sup>194</sup> that a statutory reference to a contractual precondition to liability arising under an insurance contract being able to be "waived" by the insurer referred to "waiver by estoppel" as distinct from "waiver by election"<sup>195</sup>. The language of "waiver by election" was more recently picked up by the Privy Council in *Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electricity Corpn*<sup>196</sup>.

141 Whether waiver should continue to be recognised as a distinct legal doctrine in Australia was touched on in *Agricultural and Rural Finance Pty Ltd v*

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**190** Ewart, *Waiver Distributed* (1917) at 4-5.

**191** See, eg, *Bysouth v Shire of Blackburn and Mitcham [No 2]* [1928] VLR 562 at 579; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 658; *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 655.

**192** See, eg, *Ross T Smyth & Co Ltd v TD Bailey, Son & Co* [1940] 3 All ER 60 at 70; *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at 883.

**193** Spencer Bower and Turner, *The Law Relating to Estoppel by Representation*, 3rd ed (1977) at 319-320 [314].

**194** [2008] 2 All ER (Comm) 14 at 24-26 [36]-[38].

**195** See to similar effect Carter, *Contract Law in Australia*, 7th ed (2018) at 171-173 [7-26]-[7-29].

**196** [2021] 1 WLR 5741 at 5748 [21].

*Gardiner*<sup>197</sup>. Noting Mr Ewart's thesis and subsequent judicial expressions of uncertainty<sup>198</sup>, Gummow, Hayne and Kiefel JJ found it "unnecessary to determine whether such a residual category or general principle exists in the common law of Australia"<sup>199</sup>. Kirby J alone was prepared to acknowledge waiver as a distinct doctrine having an operation beyond instances of contractual variation, estoppel and election<sup>200</sup>. Professor Carter subsequently observed that "[i]t remains an open question whether the law recognises the unilateral disclaimer of a right as binding independently of agreement, election or estoppel"<sup>201</sup>.

142 Under the common law of New York, in contrast, waiver has continued to be recognised and applied as a distinct legal doctrine. That has been so despite Cardozo J having been apparently attracted to Mr Ewart's thesis<sup>202</sup>. Under New York law, the doctrine has been repeatedly reaffirmed in much the same terms as Isaacs J explained it in *Craine*<sup>203</sup>. According to one frequently cited encapsulation of the doctrine<sup>204</sup>:

"A waiver is an intentional abandonment or relinquishment of a known right or advantage which, but for such waiver, the party would have enjoyed. It is the voluntary act of the party, and does not require or depend upon a new contract, new consideration, or an estoppel. It cannot be recalled or expunged."

143 The uncertainty engendered here and elsewhere by *Waiver Distributed* warrants close attention to Mr Ewart's thesis. The thesis seems to me to have a problem. The "department" of election, to which Mr Ewart sought to allocate many cases of waiver, was not subjected to the same degree of scrutiny as he applied to

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197 (2008) 238 CLR 570 at 586-587 [50]-[51].

198 (2008) 238 CLR 570 at 586-588 [50]-[54], 602 [100].

199 (2008) 238 CLR 570 at 602 [98].

200 (2008) 238 CLR 570 at 605 [110]-[111].

201 *Carter's Breach of Contract*, 2nd ed (2019) at 461 [10-43] fn 355.

202 See *Beatty v Guggenheim Exploration Co* (1919) 225 NY 380 at 388-389.

203 See *Nassau Trust Company v Montrose Concrete Products Corp* (1982) 56 NY 2d 175 at 184 (and the cases there cited); *State of New York v Amro Realty Corporation* (1991) 936 F 2d 1420 at 1431-1432; *Fundamental Portfolio Advisors Inc v Tocqueville Asset Management LP* (2006) 7 NY 3d 96 at 104.

204 *Alsens American Portland Cement Works v Degnon Contracting Co* (1917) 222 NY 34 at 37.

deny waiver the status of a "department". Distinguishing election from waiver, he said that waiver "implies that you have something, and that you are throwing it away", whereas election "implies that you have a right to get one of two things, or to occupy one of two positions, by choosing between them"<sup>205</sup>. Accordingly, "[i]f you had a choice between a horse and a mule, and you chose the horse, you would not say that you 'waived' the mule"; "[f]or you did not"<sup>206</sup>. What Mr Ewart did not explore was why, having chosen the horse, you should not be permitted to change your mind and have the mule instead.

144 Had Mr Ewart gone down that path, he would have seen that election can itself be "distributed"<sup>207</sup>. He might even have come to accept that, in some manifestations, the irrevocability of an election is best explained in terms of throwing away or relinquishing a right.

145 Take by way of example the paradigm case of an innocent party to a contract, having knowledge of a breach by another party, being confronted at common law with what is routinely said to be an "election" either to "terminate" or "affirm" the contract. The election can be described, as it was by Deane, Toohey, Gaudron and McHugh JJ in *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)*<sup>208</sup> and by Gaudron, Gummow and Hayne JJ in *Victoria v Sutton*<sup>209</sup>, as a choice between two mutually exclusive courses of action – to terminate the contract or to keep the contract on foot. The election can be described, as it was by Stephen J in *Sargent v ASL Developments Ltd*<sup>210</sup>, as a choice between two mutually exclusive sets of rights – those rights which would come into existence if the contract is terminated and those rights which would continue to exist if the contract is kept on foot. Or the election can be described, with equal if not greater accuracy, as a choice as to whether or not to exercise an existing right (in the nature of a power) – the right to terminate the contract. Mr Handley KC has cogently made that point, emphasising that no action on the part of the innocent

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205 Ewart, *Waiver Distributed* (1917) at 13.

206 Ewart, *Waiver Distributed* (1917) at 7.

207 cf Reynolds, "Election Distributed" (1970) 86 *Law Quarterly Review* 318 at 323; Liu, "Rethinking Election: A General Theory" (2013) 35 *Sydney Law Review* 599 at 625.

208 (1993) 182 CLR 26 at 41, quoting Spencer Bower and Turner, *The Law Relating to Estoppel by Representation*, 3rd ed (1977) at 313. See also *Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electricity Corp'n* [2021] 1 WLR 5741 at 5748 [21].

209 (1998) 195 CLR 291 at 306 [40].

210 (1974) 131 CLR 634 at 641-642.

party is needed for the contract to be kept on foot because that is the default position<sup>211</sup>. The description of the election as a choice as to whether or not to exercise an existing right to terminate the contract is consistent with the description of election given by Lord Goff in *The "Kanchenjunga"*<sup>212</sup> to which further reference will be made.

146 If the innocent party makes and unequivocally communicates a choice to exercise that party's right to terminate the contract, the communicated choice itself operates in law to bring about that result. The contract is at an end. If the innocent party by positive conduct or prevarication induces the party in breach to rely to its detriment on the contract continuing, the innocent party can be estopped from later exercising the right so as to bring the contract to an end. Jordan CJ explained all that in *O'Connor v S P Bray Ltd*<sup>213</sup>, where he demonstrated that no principle of election is needed to produce the result for which the law provides in either of those scenarios. The explanation given by Jordan CJ was accepted by Stephen J in *Sargent*<sup>214</sup> and by Brennan J in *Immer*<sup>215</sup>.

147 If, on the other hand, the innocent party, having knowledge of facts which give rise to the right to terminate the contract, makes and unequivocally communicates a choice not to exercise that right but instead to affirm the contract, the innocent party will be precluded from later exercising the right to terminate the contract. That will be so even without any detrimental reliance by the party in breach. The legal consequence of a knowing and unequivocally communicated choice to affirm a contract being to preclude later exercise of the right to terminate was accepted in *Wendt v Bruce*<sup>216</sup> and *Tropical Traders Ltd v Goonan*<sup>217</sup> and was

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211 Handley, *Estoppel by Conduct and Election*, 2nd ed (2016) at 253-254 [14-001]-[14-002].

212 [1990] 1 Lloyd's Rep 391 at 398.

213 (1936) 36 SR (NSW) 248 at 258-262. See also *Larratt v Bankers and Traders Insurance Co Ltd* (1941) 41 SR (NSW) 215 at 226-227.

214 (1974) 131 CLR 634 at 642.

215 (1993) 182 CLR 26 at 31-32. See also *Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electricity Corp'n* [2021] 1 WLR 5741 at 5748 [21].

216 (1931) 45 CLR 245 at 253.

217 (1964) 111 CLR 41 at 55.

confirmed by Stephen J<sup>218</sup> and Mason J<sup>219</sup> in *Sargent*, where the operative doctrine was said to be election. *Sargent* was followed in *Immer*<sup>220</sup>.

148 Between *Sargent* and *Immer* was *The "Kanchenjunga"*. There Lord Goff referred to waiver as a term capable of referring to "a forbearance from exercising a right or to an abandonment of a right" and described the House of Lords as in that case "concerned with waiver in the sense of abandonment of a right which arises by virtue of a party making an election"<sup>221</sup>. Lord Goff described "the principle of election" as applying "when a state of affairs comes into existence in which one party becomes entitled to exercise a right, and has to choose whether to exercise the right or not"<sup>222</sup>. He said that "perhaps because a party who elects not to exercise a right which has become available to [that party] is abandoning that right, [the party] will only be held to have done so if [the party] has ... communicated [their] election to the other party in clear and unequivocal terms"<sup>223</sup>. Deane, Toohey, Gaudron and McHugh JJ cited that exposition of principle in *Immer* for the proposition that "election involves the abandoning of a right that is available"<sup>224</sup>.

149 By way of further example of how Mr Ewart's "department" of election can be "distributed", closer to the circumstances of the present case, take the analogous case of an insurer having at common law a right (now excluded by operation of Pt V of the Act) to avoid a contract of insurance for material non-disclosure by an insured. In *Khoury v Government Insurance Office (NSW)*<sup>225</sup>, which was decided after *Sargent* but before *The "Kanchenjunga"*, Mason, Brennan, Deane and Dawson JJ cited *Sargent* for the proposition that "[a] person confronted by two truly alternative rights or sets of rights, such as the right to avoid or terminate a contract and the right to affirm it and insist on performance, may lose one of them by acting 'in a manner which is consistent only with [that person] having chosen to rely on [the other] of them'". Their Honours added with reference to *Craine* that

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218 (1974) 131 CLR 634 at 641.

219 (1974) 131 CLR 634 at 655-656.

220 (1993) 182 CLR 26 at 31-32.

221 [1990] 1 Lloyd's Rep 391 at 397-398.

222 [1990] 1 Lloyd's Rep 391 at 399.

223 [1990] 1 Lloyd's Rep 391 at 398.

224 (1993) 182 CLR 26 at 39.

225 (1984) 165 CLR 622 at 633, quoting *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at 883.

"[w]here an insurer is confronted with such alternative rights and elects to affirm the contract of insurance, [the insurer] is commonly said to have 'waived' the right to avoid or terminate [the contract]".

150 The terminology and structure of reasoning adopted in *Immer* with reference to *The "Kanchenjunga"*, and the terminology and structure of reasoning adopted in *Khoury* with reference to *Craine*, support both: (1) characterisation of the choice that an innocent party has as to whether or not to exercise a right to terminate or avoid a contract as an "election"; and (2) characterisation of the legal effect of a knowing and unequivocally communicated election to affirm the contract as an abandonment or "waiver" of the right to terminate or avoid the contract. The reason why the right to terminate or avoid cannot be exercised after affirmation is because the affirmation operates in law to waive the right to terminate or avoid and therefore to preclude the later exercise of that right.

151 The question yet to be answered is: why in principle should an informed and unequivocally communicated intention to affirm a contract, which has not been relied on by the party to whom it is made and which is not supported by consideration, operate in law to preclude an innocent contracting party from thereafter exercising the right to terminate or avoid the contract? The answer given by Mason J in *Sargent*<sup>226</sup> was "because it has been thought to be fair as between the parties that the person affected is entitled to know where he stands and that the person electing should not have the opportunity of changing his election and subjecting his adversary to different obligations". The same answer was given in different words in an earlier American case<sup>227</sup>, cited by Stephen J in *Sargent*<sup>228</sup>, where it was said that "[t]he basic concept of the doctrine of election is that a party shall not be permitted to insist at different times upon the truth of two inconsistent and repugnant positions, according to the promptings of [that party's] own interest". Professor Farnsworth gave very much the same answer when he said that even an innocent party should not be permitted to engage in "opportunistic behavior"<sup>229</sup>.

152 Each of those versions of the answer is an expression of the same basic notion of fairness as Isaacs J expressed in *Craine*<sup>230</sup> when he said that a party who

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226 (1974) 131 CLR 634 at 656.

227 *Myers v Ross* (1935) 10 F Supp 409 at 411 [6].

228 (1974) 131 CLR 634 at 647.

229 Farnsworth, *Changing Your Mind: The Law of Regretted Decisions* (1998) at 185. See also Bigwood, "Fine-Tuning Affirmation of a Contract by Election: Part 1" [2010] *New Zealand Law Review* 37 at 80-82.

230 (1920) 28 CLR 305 at 326.

has "approved" should not afterwards be permitted to "reprobate", and as Gavan Duffy CJ and Starke J expressed in *Wendt v Bruce*<sup>231</sup> when they said that a party "cannot blow hot and cold". Whatever the form in which it might be expressed, the core of the answer is that fairness to the other party makes it "in the interests of justice, that the choice, when once made, should be irrevocable"<sup>232</sup>.

153 Having recognised the "distributability" of election in a contractual context, the appropriateness of characterising a knowing and unequivocally communicated choice of an innocent party to affirm a contract as a waiver of that party's right to terminate the contract, and the commonality of the underlying principle of preclusion, two taxonomical and definitional approaches to waiver and election can be seen to be open.

154 One approach is to view election, much as did Mr Ewart, as a doctrine applicable whenever a party faces a choice between occupying one or other of two positions which cannot be occupied simultaneously (or between pursuing one or other of two courses of action which cannot be pursued simultaneously). On that broad view of the scope of the doctrine of election, waiver can be treated as a species of election applicable where the choice is simply between the position (or course of action) of retaining a right and the position (or course of action) of abandoning that same right. That, in essence, was the approach indicated by Handley JA in *Nigel Watts Fashion Agencies Pty Ltd v GIO General Ltd*<sup>233</sup> and adopted in the present case by McKerracher and Colvin JJ<sup>234</sup>.

155 Another approach is to adopt the schema mapped out by Brennan J in *Verwayen*<sup>235</sup>. The schema involves treating election as a doctrine which applies where the law confers on a person a choice between inconsistent rights or sets of rights and which "ensures that there is no inconsistency in the enforcement of [the] person's rights". The schema further involves treating waiver as a distinct doctrine which "recognizes the unilateral divestiture of certain rights"<sup>236</sup>. The schema necessarily admits of overlap between waiver and election in the case of an

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231 (1931) 45 CLR 245 at 253. See also *Lissenden v CAV Bosch Ltd* [1940] AC 412 at 429.

232 *O'Connor v S P Bray Ltd* (1936) 36 SR (NSW) 248 at 258.

233 (1995) 8 ANZ Insurance Cases ¶61-235 at 75,649-75,650.

234 *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2021) 287 FCR 388 at 415-416 [132]-[136].

235 (1990) 170 CLR 394 at 421-424.

236 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 423.

affirmation of a contract. That, in essence, was the approach adopted in the present case by Allsop CJ<sup>237</sup>.

156 Of the two approaches, I prefer the second. It matches up better than the first with the language and structure of reasoning adopted in *Craine* (in relation to waiver) and *Sargent* (in relation to election) and *Khoury* (in relation to both waiver and election). It recognises waiver as the operative legal doctrine which precludes exercise of a right to terminate or avoid a contract after affirmation. And it recognises that the considerations of justice which inform the application of the doctrine to preclude the exercise of a right in such a case are capable of having a broader operation.

157 Whichever of the two approaches is adopted, however, the trigger for a waiver to occur where a person is faced with a choice between keeping an accrued right and abandoning that same right is the same: knowledge of the facts giving rise to the right and unequivocal communication of a choice to abandon that right. And the legal operation of waiver where so triggered is the same: the right abandoned is not extinguished but assertion of the abandoned right is thereafter precluded.

158 Brennan J was cautious in *Verwayen* in describing waiver as a doctrine applicable only to "the unilateral divestiture of certain rights". No doubt, there are accrued rights which inure solely for the benefit of the right-holder which, for reasons of legal principle or legal policy or legal history, are incapable of unilateral divestiture or abandonment. Longstanding authority indicates that a right to payment of a debt or a fixed sum of money is one of them<sup>238</sup>. The statutory right of an insurer to reduce its liability consequent upon an insured's failure to comply with the pre-contractual duty of disclosure is not. Substituting as it does for the common law right of an insurer to avoid a contract of insurance for material non-disclosure<sup>239</sup>, which an insurer could waive (or elect) to abandon, the statutory right is one which the insurer must similarly be able to waive (or elect) to abandon.

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**237** *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd [No 2]* (2020) 379 ALR 117 at 182-183 [308]-[310], 190 [339].

**238** *Foakes v Beer* (1884) 9 App Cas 605. See *Heydon on Contract* (2019) 178-183 [5.820]-[5.900]. But see Dixon, "Concerning Judicial Method", in Crennan and Gummow (eds), *Jesting Pilate and Other Papers and Addresses*, 3rd ed (2019) 112 at 118-122.

**239** See *Advance (NSW) Insurance Agencies Pty Ltd v Matthews* (1989) 166 CLR 606 at 615; *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603 at 620 [47].

159 That is what occurred here. With knowledge of the facts giving rise to its statutory right to reduce its liability by reason of Delor Vue's failure to comply with its pre-contractual duty of disclosure, SCI on behalf of Allianz made and, by its email of 9 May 2017, unequivocally communicated to Delor Vue a choice not to rely on that statutory right in answer to the claim which Delor Vue had by then made for property damage arising from Tropical Cyclone Debbie. Allianz thereby and thereupon waived that right, in consequence of which Allianz was thereafter precluded from attempting to reassert it.

### Estoppel

160 Turning from waiver to estoppel, the critical question is whether Delor Vue so acted or abstained from acting on the faith of SCI's representation in its email of 9 May 2017 that Allianz would not rely on its statutory right in answer to Delor Vue's claim during the period from 9 May 2017 until 28 May 2018 as to have made it unjust or unconscionable<sup>240</sup> for Allianz on 28 May 2018 to resile from the position stated in that representation.

161 Allsop CJ at first instance<sup>241</sup> and McKerracher and Colvin JJ in the Full Court<sup>242</sup> concluded that it was unjust for Allianz then to resile from the position stated in the representation in the circumstances where Delor Vue during the prior year-long period had in reliance on the representation: (1) refrained from taking legal action to enforce the claim against Allianz; and (2) refrained from itself taking steps to repair the damage to the apartment complex.

162 On its appeal to this Court, Allianz challenges that conclusion on two principal grounds. One is procedural. The other is substantive.

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**240** *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723 at 734; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 674-675; *Giumelli v Giumelli* (1999) 196 CLR 101 at 123-124; *Sidhu v Van Dyke* (2014) 251 CLR 505 at 530 [85], 531 [92]; *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 at 598-600 [84]-[88], 623-624 [152]-[154]; *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 260 CLR 1 at 48-49 [158].

**241** *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd [No 2]* (2020) 379 ALR 117 at 189 [337].

**242** *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2021) 287 FCR 388 at 432-433 [206]-[212], 433-436 [213]-[225].

163 The procedural ground is that the reliance found was neither pleaded nor the subject of testimony by any witness. For the reasons given by Allsop CJ<sup>243</sup> and reiterated by McKerracher and Colvin JJ<sup>244</sup> in response to similar procedural complaints, I reject that ground. The want of pleading gave rise to no procedural unfairness. The reliance found was properly inferred from objective conduct.

164 The substantive ground is that the detrimental reliance found did not justify the conclusion that Allianz's departure on 28 May 2018 from the position stated in the representation of 9 May 2017 was sufficiently detrimental or prejudicial to Delor Vue to be characterised as unjust. Allianz points out that, by refraining from taking legal action to enforce the claim against Allianz during the year-long period, Delor Vue lost neither the opportunity to take legal action to enforce the claim nor the opportunity to settle the claim. Delor Vue in fact later seized the opportunity to take legal action to enforce the claim – giving rise to the present case. Allianz further points to the absence of any finding that, had Delor Vue not refrained from taking steps to repair the damage to the apartment complex during the year-long period, the damage to the apartment complex would have been repaired faster, better, or cheaper.

165 For much the same reasons as those given by Allsop CJ<sup>245</sup> and reiterated by McKerracher and Colvin JJ<sup>246</sup> when similar arguments were put to and rejected by them, I also reject that substantive ground of challenge. Allianz's approach to assessing the injustice arising from its change of position is too granular and takes insufficient account of the temporal dimension of Delor Vue's reliance on the position SCI had represented.

166 In *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*<sup>247</sup>, Hayne, Crennan, Kiefel, Bell and Keane JJ emphasised that "[d]etriment has not been considered to be a narrow or technical concept in connection with estoppel", that "[s]o long as [detriment] is substantial, it need not consist of expenditure of money or other quantifiable financial detriment" and that detriment "must be approached as 'part of a broad inquiry as to whether repudiation of an

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**243** *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd [No 2]* (2020) 379 ALR 117 at 187 [334].

**244** *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2021) 287 FCR 388 at 431 [201]-[203].

**245** *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd [No 2]* (2020) 379 ALR 117 at 187 [333].

**246** *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2021) 287 FCR 388 at 432-433 [206]-[212], 433-436 [213]-[225].

**247** (2014) 253 CLR 560 at 600 [88], citing *Gillett v Holt* [2001] Ch 210 at 232-233.

assurance is or is not unconscionable in all the circumstances". Their Honours also cited with approval<sup>248</sup> the important statement of principle by Allsop CJ, then Allsop P, in *DeLaforce v Simpson-Cook*<sup>249</sup>, to the effect that the importance of keeping a party to a prior representation is especially strong in circumstances where reliance on the representation has led another party to refrain from taking action which might realistically have led to a better outcome for that party. As his Honour there put it:

"That the party encouraged cannot show that he or she would have been better off in the posited alternative reality is not fatal to the making out of the estoppel. Indeed, the inability to prove such things reveals a central aspect of the detriment: being left, now, in that position."

167 Much the same point had been made by Isaacs J in *Hawkins v Gaden*<sup>250</sup>. In the context of determining whether proven detrimental reliance on a prior representation made departure from the representation unjust, his Honour had there said<sup>251</sup>:

"The pecuniary amount of the prejudice is not the test ... If it were the test, the remedy might often be worse than the disease. The Court might be compelled to try a series of intricate collateral issues."

168 For an entire year, during which time the damage to the apartment complex from Tropical Cyclone Debbie remained substantially unrepaired, Delor Vue refrained from pursuing opportunities for self-help which were obviously available to it. Delor Vue refrained from pursuing opportunities during that year-long period on the faith of Allianz's representation. Delor Vue did not need to prove that it would in fact have been better off if it had pursued one or other of those opportunities during that period in order to justify the conclusion that Allianz's subsequent departure from the position represented was unjust.

### **Utmost good faith**

169 The Act provides that "[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

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248 (2014) 253 CLR 560 at 598-599 [84].

249 (2010) 78 NSWLR 483 at 486 [5].

250 (1925) 37 CLR 183.

251 (1925) 37 CLR 183 at 202.

in relation to it, with the utmost good faith"<sup>252</sup>. Without limiting the operation of that provision, the Act goes on to provide that "[i]f reliance by a party to a contract of insurance on a provision of the contract would be to fail to act with the utmost good faith, the party may not rely on the provision"<sup>253</sup>.

170 Those provisions together spell out that the duty of utmost good faith ("*uberrima fides*"), which had long been acknowledged to exist between an insured and an insurer at common law but the precise scope and status of which had remained uncertain, now and by force of statute: (1) is mutual; (2) is implied into the contract of insurance; (3) requires the insurer and the insured each to act towards the other with the utmost good faith "in respect of any matter arising under or in relation to" the contract of insurance; and (4) can be breached by reliance on a contractual right.

171 Enactment of the provision implemented a recommendation of the Australian Law Reform Commission ("the ALRC") in its report titled *Insurance Contracts*. The ALRC explained the background to the recommendation as follows<sup>254</sup>:

"The common law requirement that insurer and insured act in the utmost good faith towards each other forms the basis of their relationship. This requirement has usually been recognised in connection with the duty of disclosure. In principle, it should apply equally to other aspects of the insurance relationship. That view was adopted by Mr Justice Stephen in *Distillers Bio-Chemicals (Australia) Pty Ltd v Ajax Insurance Co Ltd*<sup>255</sup>. However, there is no reported decision in Australia applying the duty to the payment of claims. The position must, therefore, remain in some doubt. That doubt should be resolved. Legislation should make it clear that the duty of good faith applies to all aspects of the relationship between insurer and insured, including the settlement of claims. An insured should be entitled to recover damages for loss suffered by him as a result of the insurer's breach of the duty of good faith in relation to the settlement of a claim."

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252 Section 13(1) of the Act, originally enacted as s 13 of the Act.

253 Section 14(1) of the Act.

254 Australian Law Reform Commission, *Insurance Contracts*, Report No 20 (1982) at 202 [328] (footnote omitted).

255 (1974) 130 CLR 1 at 31.

The ALRC also explained<sup>256</sup>:

"Both parties to an insurance contract are subject to the requirement of *uberrima fides*. This should be restated as a contractual duty between the parties. Neither party should be entitled to rely on a contractual provision when to do so would involve a breach of the duty of utmost good faith. That should provide sufficient inducement to insurers and their advisers to be careful in drafting their policies and to act fairly in relying on their strict terms."

172 The explanations contained in those paragraphs of the ALRC's report, both as to the need for the statutory implication and as to the intended scope of the operation of the implied contractual requirement, were specifically taken up in the Explanatory Memorandum to the Bill for the Act. The "rationale" for the statutory implication there given was as follows<sup>257</sup>:

"The extent and application of the duty of good faith should be clarified to ensure that parties are aware of their obligations. For example, it will be clear that the duty extends to the insurer in relation to the payment of a claim. The clause will ensure that insurers and their advisers are careful in drafting their policies and that they act fairly in relying on their strict terms."

173 The content of the implied contractual requirement that an insurer act towards an insured with the utmost good faith has been expounded conformably with those indications of the legislative purpose underlying its statutory implication. In *AMP Financial Planning Pty Ltd v CGU Insurance Ltd*<sup>258</sup>, Emmett J (with whom Moore J agreed) said that acting with the utmost good faith requires more than merely acting in good faith and that the content of the implied contractual requirement is informed by "notions of fairness, reasonableness and community standards of decency and fair dealing". He said that the implied contractual requirement is breached by conduct on the part of an insurer towards an insured in relation to a claim made under a contract of insurance that is "capricious or unreasonable" when gauged by reference to those notions<sup>259</sup>. That

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256 Australian Law Reform Commission, *Insurance Contracts*, Report No 20 (1982) at 32 [51].

257 Australia, House of Representatives, *Insurance Contracts Bill 1984*, Explanatory Memorandum at 23 [35], citing Australian Law Reform Commission, *Insurance Contracts*, Report No 20 (1982) at 32 [51], 202 [328].

258 (2005) 146 FCR 447 at 475 [87]-[89].

259 (2005) 146 FCR 447 at 475 [89].

exposition of the content of the implied contractual requirement was specifically endorsed on appeal to this Court<sup>260</sup>.

174 Express statutory inclusion of relying on a contractual right within the scope of the acts governed by the implied contractual requirement to act with the utmost good faith is reason enough to consider that the contractual requirement is breached where an insurer relies on a contractual right to defeat a claim or to reduce its liability in respect of a claim in circumstances which make the insurer's reliance on the right capricious or unreasonable when gauged by reference to the informing notions of fairness, reasonableness, and community standards of decency and fair dealing. There is no reason to consider that the implied contractual requirement is not similarly breached where an insurer's reliance on its statutory right to reduce its liability in respect of a claim, by reason of an insured's failure to comply with the insured's pre-contractual duty of disclosure, is capricious or unreasonable when gauged by reference to the same informing notions.

175 Breach of the implied contractual requirement by the insurer in either of those circumstances could be restrained at the suit of the insured by an injunction restraining the insurer's reliance on the right, issued in what is sometimes referred to as the "auxiliary jurisdiction" of equity to safeguard a legal right<sup>261</sup>. Damages at common law could hardly be an adequate remedy for the breach. The Federal Court being a court of law and equity with jurisdiction to grant all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward in a matter before it<sup>262</sup>, the availability of injunctive relief in equity has the consequence that the insurer's breach can be raised in that Court by the insured in direct answer to the insurer's assertion of a contractual or statutory right to defeat or reduce a claim<sup>263</sup>. That is what has occurred here, leading to the framing by Allsop CJ of appropriate declaratory relief.

176 The notions of fairness and reasonableness which inform the assessment of the reasonableness or unreasonableness of an insurer's assertion of a contractual or statutory right inherently encompass considerations of the kind traditionally understood to underpin the general "preclusionary" doctrines of waiver and

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**260** *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1 at 12 [15], 45 [139]. See also at 77-78 [257].

**261** *JC Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282 at 292; *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 575 [129].

**262** Sections 5 and 22 of the *Federal Court of Australia Act 1976* (Cth).

**263** *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605 at 632-633; *Price v Spoor* (2021) 270 CLR 450 at 470-471 [51].

estoppel. That must be so whether or not waiver is to continue to be recognised as a distinct doctrine in Australia. The considerations accordingly include: that an insured is in principle entitled to know where the insured stands in respect of a claim made under the insurance contract; that an insurer, having made and unequivocally communicated a fully informed choice not to assert a right in answer to a claim should in principle be held to that choice; and that an insured having relied to its detriment on a communicated choice of an insurer not to assert a right should not in principle be subjected to prejudice by the insurer changing its position.

177 The peculiar dependence of an insured on an insurer in circumstances of the insured having suffered loss means that those considerations, drawn from general principles of law, apply in an insurance context to a heightened degree. The continuing obligations of an insured to an insurer under the contract of insurance and the vulnerability of an insured to the exercise of contractual and other powers by an insurer in the course of adjusting a claim add a further dimension. Though uttered in the context of estoppel a century ago, remarks by Lord Atkinson in the Privy Council on appeal from the decision of this Court in *Craine* are on point and have contemporary resonance. Speaking about the propriety of the insurance company in that case relying on the unperformed condition precedent ("condition 11") to deny liability to pay the claim made by the insured after having exercised contractual powers ("condition 12") in the adjustment of the claim, Lord Atkinson said<sup>264</sup>:

"The penalty inflicted upon the assured in case all the terms of condition 11 be not complied with is that no amount should be payable to the assured under the policy of insurance. The company are thus free to take an objection to the non-performance of any of these terms and refuse to pay anything to the insured. The important question remains, can the company do this after they have availed themselves and while they are availing themselves of the powers conferred upon them by condition 12? Those powers are vast, they are far-reaching, and might in their operation and results inflict serious pecuniary loss on the assured. It may well be that it would be just and fair and businesslike to empower each company to exercise all or any of those powers while the amount of the claim of the assured was not adjusted; but it would be most oppressive and unbusinesslike to enable them after they had exercised these or any of these powers to say to [the] assured, your claim did not comply with all the terms of condition 11, therefore, though we have taken possession of your premises and sold your property, we will pay you nothing under the policies."

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264 *Yorkshire Insurance Co Ltd v Craine* [1922] 2 AC 541 at 545-546. See to similar effect *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305 at 320.

178 Allianz accepted in argument on the appeal that the requirement that it act towards Delor Vue with the utmost good faith necessitated that it make and communicate to Delor Vue in a timely manner a decision as to whether or not it would accept or reject Delor Vue's claim so as to accept or reject responsibility to adjust the claim under the contract of insurance. That is what SCI as agent for Allianz did by the email of 9 May 2017. With full knowledge of the facts giving rise to Allianz's statutory right to reduce its liability in respect of the claim, SCI as agent for Allianz unequivocally announced in that email that it would not be relying on that right. Whether or not that fully informed and unequivocally communicated choice constituted a legally operative waiver, in my opinion, the statutorily implied contractual requirement that Allianz act towards Delor Vue with the utmost good faith entailed that Allianz was from then on bound to adhere to the position it had announced. Allianz was not entitled to go back on its word. It was not entitled to blow hot and cold.

179 Even if Allianz were not in that way bound by the implied contractual requirement of utmost good faith never to depart from the position announced in the email of 9 May 2017, the fact that a year then passed, during which Delor Vue relied on the announcement to its detriment and during which SCI as agent for Allianz went on to adjust the claim in accordance with the terms of the contract of insurance, is sufficient to render Allianz's reassertion of the statutory right on and from 28 May 2018 unreasonable, indeed capricious. In the words of Lord Atkinson, what it then did was "oppressive and unbusinesslike".

### **Disposition**

180 The appeal should be dismissed.