HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **ALLIANZ AUSTRALIA INSURANCE LIMITED**

Appellant

and

DELOR VUE APARTMENTS CTS 39788

Respondent

APPELLANT'S REPLY

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1. These submissions are in a form suitable for publication on the internet. They reply to Delor's submissions dated 2 June 2022 (**RS**).

Facts (cf RS [8]–[26])

2. Contrary to RS [12], the 9 May 2017 email did not confirm reliance on subrogated rights. It sought *co-operation* from Delor which could be provided without any exercise of subrogation rights.[1] The correspondence issued by Holman Webb making demands on behalf of Delor (RFM 37–38, 48–49) is consistent with the requested co-operation. Allianz never exercised any right of subrogation. The same email did not refer or even allude to the insurers "exercising its rights" to "access the property" or
20 "control repair work". Further, no such "rights" were ever exercised.[2]

3. The fact that SCI agreed to pay for "some roof sheeting" blown away in the cyclone (RFM 39; also AFM 91) does not alter the fact, clearly conveyed in the 9 May 2017 email (AFM 91), that the overwhelming bulk of the repairs to the roof – required as a result of defective materials and construction – needed to be paid for by Delor, and would need to occur first: cf RS [13]–[14].

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1 "We ask that the Body corporate *cooperates with our office as and when required*, to ensure we have the best chance possible of a successful recovery from the responsible party/ies": AFM 92.

2 Clause 3(e) imposed a duty on Delor to allow inspection of the property (AFM 18), but there is nothing to suggest that any inspection of the premises was other than consensual. Clause 4 required Delor to obtain Allianz's approval to commence repairs, but approval was never sought. Allianz had a right to nominate the repairer or supplier (cl 5), but that right was never exercised.

4. Delor's summary of the facts concerning its capacity to pay for repairs at RS [18]–[20] is misleading. The quote for repairs referred to at RS [18] was from Ambrose Building for $553,207.90 dated 10 May 2017 and did not include work to repair the roof arising from pre-existing defects: AFM 92. In June 2017, Delor's broker was informed that the rectification costs would be "in the millions": AFM 157. At the end of February 2017, Delor had just under $220,000 in its sinking fund and $135,000 in its administration fund: RFM 18–19. By March 2018, Delor's sinking fund had barely increased to $250,000 (AFM 231), but Delor had organised a $750,000 loan facility. However, by then the quote from Ambrose was that the cyclone damage would cost approximately $2.9 million to repair and the additional cost for repairing the roof defects was over $2.1 million: AFM 230. This latter figure was lower than a quote from another builder which put the cost for repairing the roof defects at over $3.2 million. The possibility of a substantially cheaper repair option (cf RS [23]) was rejected by both Morse Consulting and Ambrose: AFM 230–231.

Election (cf RS [27]–[48])

5. Delor's summary at RS [28]–[31] of the law before the introduction of the ICA is inaccurate. At common law, the insurer's only remedy for material non-disclosure (or misrepresentation) which induced the making of a contract of insurance was avoidance of the contract; avoidance by the insurer had the effect of rescinding the contract *ab initio*.[3] A consequence of avoidance *ab initio* was that all premiums and losses paid were required to be repaid.[4] Where the contract contained a basis of contract "warranty" – the word "warranty" being peculiarly used in insurance law to refer to a condition precedent of the insurer's liability[5] – breach of the warranty traditionally resulted in the automatic discharge of the insurer from liability.[6] Thus, in that context,

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3 *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622 (***Khoury***), 634, 636 (Mason, Brennan, Deane and Dawson JJ). See also *The Star Sea* [2003] AC 469, [51]–[52] (Lord Hobhouse) and *Marine Insurance Act 1909* (Cth), s 24(1). The law originated in cases on marine insurance (*Carter v Boehm* (1766) 3 Burr 1905; 97 ER 1162) but was extended to all classes of insurance: see *London Assurance v Mansel* (1879) 11 Ch D 363, 367 (Sir George Jessel MR).

4 *Cornhill Insurances Co v Assenheim* (1937) 58 Lloyd's Rep 27, 31 (Mackinnon J).

5 *Deaves v CML Fire and General Insurance Co Ltd* (1979) 143 CLR 24, 63 (Mason J).

6 *De Hahn v Hartley* (1786) 1 TR 343, 345–346; 99 ER 1130, 1131; *Thomson v Weems* (1884) 9 App Cas 671, 683; *The Good Luck* [1992] 1 AC 233, 262–263 (Lord Goff); *Marine Insurance Act 1909* (Cth), s 39(3). Even if discharge was not automatic, the insurer's right was to avoid the contract: see *Yorkville Nominees Pty Ltd v Lissenden* (1986) 160 CLR 475, 485–486 (Wilson and Deane JJ).

the doctrine of common law election only applied in circumstances where the insurer had a right to avoid the policy – a clear case of alternative inconsistent rights. To say that the doctrine now applies in circumstances where the insurer has no such right, but is faced with "inconsistent positions", is to radically alter the doctrine: cf RS [31].

6. The suggestion that the respondent's position is supported by "at least 140 years of case law" (RS [32]) is untenable and ignores the body of authority cited and analysed at AS [21]–[30]. *Scarf v Jardine* was plainly a case of inconsistent rights: the plaintiff could sue to recover a debt from the former partners of a partnership or the new partners, but not both: cf RS [33]. The submission at RS [34] concerning *Immer* makes no attempt to answer AS [29]. RS [36] selects one passage from the Privy Council's reasoning in *Delta Petroleum*, but fails to refer to the Board's endorsement of the proposition that election arises "in a situation where a person is entitled to alternative rights inconsistent with one another".[7]

7. The submissions at RS [41]–[48] relating to the respondent's Notice of Contention that Allianz elected between inconsistent rights on 9 May 2017 have a number of difficulties. *First*, as Derrington J explained in the Full Court, election between inconsistent rights involves the exercise of a power which, of itself, alters the legal rights of the parties: FC [556]–[557]. Here, all that occurred was a unilateral and voluntary indication by the insurer not to insist on its existing legal rights. *Secondly*, the "rights" alleged to have been exercised were simply aspects of, and conditions upon, the insured making and the insurer dealing with (i.e. considering and assessing) the insured's claim. Dealing with a claim in accordance with the policy terms is not inconsistent with rejecting liability for indemnifying in respect of it.[8] *Thirdly*, the argument is not consistent with the proposition that an election occurred on 9 May 2017. At that point Allianz plainly had not exercised any contractual rights adversely to Delor's interests. *Fourthly*, Allianz never exercised the alleged contractual "rights": see [2] above and AS [32].

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7 [2021] 1 WLR 5741, [18].

8 *Kosmar Villa Holidays v Trustees of Syndicate 1243* [2008] Lloyd's Rep IR 489, [69]–[70] (Rix LJ). See also *Soole v Royal Insurance Company Ltd* [1971] 2 Lloyd's Rep 332, 342 (Shaw J); *Lexington Insurance Co v Multinacional de Seguros SA* [2009] Lloyd's Rep IR 1, [61]–[68] (Clarke J).

Waiver (cf RS [49]–[54])

8. Contrary to RS [49]–[51], the discussion of "waiver" in *Craine* clearly concerned common law election. This Court has said as much on five occasions.[9] Further, as explained at AS [32], the facts of the present case are far divorced from *Craine*. Allianz gained no advantage in intimating its acceptance of the claim; it paid out more than $190,000 to Delor: cf RS [52].

Estoppel (cf RS [55]–[68])

9. Tellingly, the respondent makes no attempt to answer AS [36]. The respondent does not identify any witness who said that Delor changed its position in reliance on a representation or promise by Allianz. That alone is sufficient to dispose of the estoppel plea. The respondent's repeated assertion that it is "self-evident" that there was a detrimental change of position (RS [61], [64]) cannot make up for the lack of evidence. If it was self-evident, it would have been easy for a witness to say it.

10. The submissions at RS [56]–[59] ultimately amount to the propositions that (a) it is sufficient to establish an estoppel to show it was *possible* that the promisee changed its position in reliance on the promise and it is *possible* the promisee was worse off because of the *possible* change in position and (b) the promisee's inability to establish a counterfactual, and therefore detriment, is itself detriment that establishes an estoppel. Neither proposition can be accepted. The first is inconsistent with basic principle: see AS [34]. The second is circular.

11. The new counterfactual described at RS [60]–[63] is not within the case disclosed by Delor in its amended concise statement[10] and was not addressed by any witness. A far less detailed proposition was raised for the first time in the respondent's closing submissions to the primary judge,[11] which all members of the Full Court agreed was

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9 *Sargent* (1974) 131 CLR 634, 642, 647 (Stephen J; McTiernan ACJ agreeing); *Khoury* (1984) 165 CLR 622, 633 (Mason, Brennan, Deane and Dawson JJ); *Verwayen* (1990) 170 CLR 394, 406–407 (Mason CJ), 451 (Dawson J; Deane J agreeing), 491 (McHugh J); *Agricultural & Rural Finance* (2008) 238 CLR 570, [56], [58] (Gummow, Hayne and Kiefel JJ; Heydon J agreeing); *Visscher v Giudice* (2009) 239 CLR 361, [49] (Heydon, Crennan, Kiefel and Bell JJ).

10 CAB 225, FC [393], [395].

11 CAB 173, [186].

well outside the case disclosed at trial: CAB 178, FC [196] (3), (4), [197]–[203]; CAB 256, [488].

12. As to the new suggestion of detriment in the form of the loss of the chance of obtaining a potential settlement from Allianz (RS [66]), Delor never lost that chance. Delor could have sought to settle with Allianz at any time after May 2018.

Good faith (cf RS [69]–[78])

13. The fact that Delor is disappointed by Allianz's change of position is not a reason to conclude that Allianz breached the implied term requiring utmost good faith: cf RS [74].

14. Contrary to RS [76], a property insurer's fundamental obligation is to indemnify the insured (i.e. to hold the insured harmless from loss) in accordance with the terms of the policy. When an insurer is in breach of its promise to indemnify,[12] the insured's cause of action is one for unliquidated damages for breach of contract.[13] In some circumstances, the duty of good faith might require an insurer to communicate its position in relation to the insured's claim. However, there is nothing to support Delor's submission that good faith prevents a party to an insurance contract changing its position. Contracts of insurance have long been regarded as one involving utmost good faith. Yet it has never been suggested that this has the consequence that neither insured nor insurer can resile from a position taken by them in respect of their rights under the policy. If it was the case, there would be no need for estoppel or election in insurance cases.

Dated: 23 June 2022

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12 See *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2017] AC 1, [24] (Lord Sumption JSC; Lords Clarke, Hughes and Toulson JJSC agreeing) and the cases cited there.

13 See, eg, *Luckie v Bushby* (1853) 13 CB 864; 138 ER 1443; *Alexander v Ajax Insurance Co Ltd* [1956] VLR 436, 445–450 (Scholl J); *British American Tobacco Australia Ltd v Eagle Star Reinsurance Co Ltd* [2006] NSWCA 156, [33] (Giles JA; Hodgson and Tobias JJA agreeing).