Allianz Australia Insurance Limited v Delor Vue Apartments CTS 39788 [2021] FCAFC 121

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| Appeal from: | *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd (No 2)* [2020] FCA 588; and*Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd (No 3)* [2020] FCA 1281 |
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| File number: | NSD 924 of 2020 |
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| Judgment of: | **MCKERRACHER, DERRINGTON AND COLVIN JJ** |
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| Date of judgment: | 9 July 2021 |
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| Catchwords: | **INSURANCE** - appeal from decision determining separate questions - where primary judge found insurer not entitled to rely upon s 28(3) of *Insurance Contracts Act 1984* (Cth) to reduce liability to nil - where insured notified claim under insurance policy following cyclone damage - where insurer agreed to indemnify despite non-disclosure of prior defects - where insurer took steps consistent with providing indemnity - where insurer subsequently sought to disclaim liability on basis of non-disclosure - whether primary judge erred in finding that insurer estopped from resiling from representation made to insured to indemnify - whether detrimental reliance - whether primary judge erred in finding insurer waived entitlement to assert right under s 28(3) - whether primary judge erred in finding insurer breached duty of utmost good faith - whether decision of primary judge should be upheld on further basis that doctrine of election applies - consideration of circumstances in which doctrine of election applies - whether relief granted by primary judge proper and appropriate - appeal dismissed**PRACTICE AND PROCEDURE** - whether decision of primary judge rested on estoppel case not advanced before primary judge - consideration of nature and purpose of concise statement - consideration of distinction between concise statements and pleadings |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) ss 37M, 37N, Part VB*Insurance Contracts Act 1984* (Cth) ss 13, 21, 27AA, 28, 33, 57 |
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| Cases cited: | *Agricultural & Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; (2008) 238 CLR 570*Ajay v RT Briscoe (Nigeria) Limited* [1964] 1 WLR 1326*Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84*AMP Financial Planning Pty Ltd v CGU Insurance Ltd* [2005] FCAFC 185; (2005) 146 FCR 447*Ashton v Pratt* [2015] NSWCA 12; (2015) 88 NSWLR 281*Attorney-General (NT) v Maurice* (1986) 161 CLR 475*Australian Competition and Consumer Commission v Geowash Pty Ltd (Subject to a Deed of Company Arrangement) (No 3)* [2019] FCA 72*Australian Co-operative Foods Ltd v Norco Co-operative Ltd* [1999] NSWSC 274; (1999) 46 NSWLR 267*Australian Securities and Investment Commission v Westpac Securities Administration Limited* [2019] FCAFC 187; (2019) 272 FCR 170*Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2019] FCA 1284*Banque Commerciale SA, En liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279*Beerens v Bluescope Distribution Pty Ltd* [2012] VSCA 209; (2012) 39 VR 1*Berry v CCL Secure Pty Ltd* [2020] HCA 27; (2020) 94 ALJR 715*Betfair Pty Ltd v Racing New South Wales* [2010] FCAFC 133; (2010) 189 FCR 356*Birmingham and District Land Company v London and North Western Railway Company* (1888) 40 Ch D 268*Bond Corp Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 215*Brodie v Singleton Shire Council* [2001] HCA 29; (2001) 206 CLR 512*CGU Insurance Limited v AMP Financial Planning Pty Ltd* [2007] HCA 36; (2007) 235 CLR 1*CGU Workers Compensation (NSW) Ltd v Garcia* [2007] NSWCA 193; (2007) 69 NSWLR 680*Commonwealth Bank of Australia v Barker* [2014] HCA 32; (2014) 253 CLR 169*Commonwealth v Clark* [1994] 2 VR 333*Commonwealth v Verwayen* (1990) 170 CLR 394*Compass Marinas Australia Pty Ltd v The State of Queensland* [2020] QSC 375*Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305*Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2016] HCA 26; (2016) 260 CLR 1*Delaforce v Simpson-Cook* [2010] NSWCA 84; (2010) 78 NSWLR 483*DHJPM Pty Ltd v Blackthorn Resources Ltd (formerly called AIM Resources Ltd)* [2011] NSWCA 348; (2011) 83 NSWLR 728*Donis v Donis* [2007] VSCA 89; (2007) 19 VR 577*Dyczynski v Gibson* [2020] FCAFC 120*Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; (2013) 250 CLR 303*Farah Constructions Pty Ltd v Say-Dee* *Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89*Federal Commissioner of Taxation v Tasman Group Services Pty Ltd* [2009] FCAFC 148; (2009) 180 FCR 128*Freshmark Ltd v Mercantile Mutual Insurance (Australia) Ltd* [1994] 2 Qd R 390*Giumelli v Giumelli* [1999] HCA 10; (1999) 196 CLR 101*Gollin & Co Ltd v Karenlee Nominees Pty Ltd* (1983) 153 CLR 455*Graham v Ingleby* (1848) 1 Ex 651; 154 ER 277*Grundt v Great Boulder Pty Gold Mines Ltd* [1937] HCA 58; (1937) 59 CLR 641*Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26*Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850*Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622*Lomsargis v National Mutual Life Association of Australasia Limited* [2005] QSC 199; [2005] 2 Qd R 295*Lopeman v WIN Corporation Pty Ltd* [2020] NSWSC 1305*Maksimovic v Royal and Sun Alliance Life Assurance Australia Ltd* [2003] WASC 46; (2003) 12 ANZ Ins Cas 90-115*Mann v Carnell* (1999) 201 CLR 1*Matthews v Smallwood* [1910] 1 Ch 777*Miller Heinman Pty Ltd v Sales Principles Pty Ltd* [2017] NSWCA 106; (2017) 94 NSWLR 500*MLC Limited v Crickitt (No 2)* [2017] FCA 937*Moore v Aubusson* [2020] NSWSC 1466*Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyds Rep 391*Nigel Watts Fashion Agencies Pty Ltd v GIO General Ltd* [1994] NSWCA 365*Nona on behalf of the Badulgal, Mualgal and Kaurareg Peoples (Warral & Ului) v State of Queensland* [2020] FCA 1353*Oztech Pty Ltd v Public Trustee of Queensland* [2019] FCAFC 102; (2019) 269 FCR 349*Prysmian Cavi E Sistemi SRL v Australian Competition and Consumer Commission* [2018] FCAFC 30*Q (A Pseudonym) v E Co (A Pseudonym)* [2020] NSWCA 220*Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5; (2002) 240 CLR 45*Saleh v Romanous* [2010] NSWCA 274; (2010) 79 NSWLR 453*Sargent v ASL Developments Limited* (1974) 131 CLR 634*Sidhu v Van Dyke* [2014] HCA 19; (2014) 251 CLR 505*State of Victoria v Sutton* (1998) 195 CLR 291*Thompson v Palmer* [1933] HCA 61; (1933) 49 CLR 507*Thomson v STX Pan Ocean Co Ltd* [2012] FCAFC 15*Thorner v Major* [2009] 1 WLR 776*Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 1 WLR 761*Tropical Traders Ltd v Goonan* (1964) 111 CLR 41*Van Dyke v Sidhu* [2013] NSWCA 198; (2013) 301 ALR 769*Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7; (1988) 164 CLR 387*Water Board v Moustakas* [1988] HCA 12; (1988) 180 CLR 491*Wilson v McIntosh* [1894] AC 129*Wyzenbeek v Australasian Marine Imports Pty Ltd* [2017] FCA 1460*Zibara v Ultra Management (Sports) Pty Ltd* [2021] FCAFC 4; (2021) 387 ALR 48*Zugic v Vesuvius Australia Pty Ltd* [2020] NSWSC 106McFarlane and Sales 'Promises, Detriment and Liability: Lessons from Propriety Estoppel' (2015) 131 LQR 610Lord Neuberger of Abbotsbury MR 'Thoughts on the law of equitable estoppel' (2010) 84 ALJ 225Barnes M, *The Law of Estoppel* (Hart, 2020)Feltham et al, *Spencer Bower: Reliance-Based Estoppel* (5th ed, Bloomsbury, 2017)Handley KR, *Estoppel by Conduct and Election* (2nd ed, Sweet & Maxwell, 2006)Ong DSK, *Ong on Estoppel* (The Federation Press, 2020)Wilken and Ghaly, *The Law of Waiver, Variation and Estoppel* (3rd ed, Oxford University Press, 2012) |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
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| Number of paragraphs: | 605 |
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| Date of hearing: | 8-9 February 2021 |
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| Counsel for the Appellant: | Mr D McLure SC with Ms K Petch |
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| Solicitor for the Appellant: | Holman Webb Lawyers |
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| Counsel for the Respondent: | Mr MR Elliott SC with Mr P Mann |
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| Solicitor for the Respondent: | LMI Legal |

ORDERS

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|  | NSD 924 of 2020 |
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| BETWEEN: | ALLIANZ AUSTRALIA INSURANCE LIMITED (ABN 15 000 122 850)Appellant |
| AND: | DELOR VUE APARTMENTS CTS 39788Respondent |

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| order made by: | MCKERRACHER, DERRINGTON AND COLVIN JJ |
| DATE OF ORDER: | 9 JUly 2021 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant do pay the respondent's costs of the appeal to be assessed if not agreed.
3. There be liberty to the appellant to apply within 14 days for further declaratory relief to reflect the terms of these reasons.
4. Any application for further declaratory relief shall be made by filing a minute of proposed orders.
5. If a minute of proposed orders for further declaratory relief is filed, then the parties shall confer as to the terms of orders and, if they are unable to agree, then, within 14 days of the filing of the minute of proposed orders, each party shall file written submissions of no more than five pages as to the proposed relief and the question whether there should be any further declaratory relief and, if so, the terms of relief shall be determined on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MCKERRACHER AND COLVIN JJ:

1. Delor Vue Apartments CTS 39788(**Delor**) is the body corporate for a complex of apartment buildings in Cannonvale in far north Queensland. The buildings were constructed in 2008 and early 2009.
2. By late 2014, issues had arisen in relation to the soffit sheeting on the eaves of the apartment buildings. Some sheeting had fallen away from the frame. A risk of further sheets dislodging during high winds had been identified. By August 2016, a quotation had been obtained to remove the soffit sheeting, install battens and fix new sheeting. In December 2016, Delor received a report from a consulting engineer which concluded that the construction of the roof framing along the eaves did not meet Australian standards and the spacing supports for the soffit lining did not comply with the manufacturer's recommendations for installation.
3. By January 2017, the committee of owners had issued a warning to residents to avoid walking or parking in the vicinity of the areas of the defective eaves during storm winds because they were likely to dislodge the soffit sheeting.
4. Before any works were undertaken to repair the defects concerning the soffit sheeting, there was substantial roof damage to the buildings on 28 March 2017 during Tropical Cyclone Debbie with consequential damage to individual apartments some of which were not habitable as a result.
5. Shortly before the Cyclone, Delor had taken out a policy of insurance for public liability and property damage to the buildings with Allianz Australia Insurance Ltd (**Allianz**). The arrangements for the insurance were made through Strata Community Insurance (**SCI**), a specialist strata insurance business owned and controlled by Allianz that acted as the underwriting agency for Allianz. For present purposes, a reference to SCI may be taken to be a reference to Allianz in respect of the matters in issue.
6. Almost immediately after the Cyclone, Delor notified a claim under the policy of insurance. In response to requests from SCI, it then provided fulsome information concerning its investigations of the defective soffits and eaves.
7. On 9 May 2017, SCI sent an email to Delor's strata manager (**May 2017 Email**). It stated that prior to the policy being effected the insurer was not advised of any defects to the property despite these being clearly known to Delor. The email then stated:

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

1. The email then referred to two categories of damage expressed as follows:

1. Defective materials and construction of the roof, including but not limited to tie downs, rafters and timbers and soffit

2. Resultant damage including but not limited to internal water damage, fascia, guttering and roof sheeting (for those buildings which lost roof sheeting only)

1. It is to be noted that there was no mention of defective roof trusses in point 1.
2. Having identified the above two categories, the email stated that costs associated with resultant damage as described in point 2 would be covered despite policy exclusions for loss or damage caused by inherent vice or latent defect or caused by non-rectification of a defect in the insured property and stated that Delor would be responsible for costs associated with that portion of the claim.
3. The email then outlined the steps that were being taken by SCI as insurer in relation to recovery against the builder and developer of the property and that SCI was awaiting an engineer's report to assist in outlining the deficiencies with the roof and who was responsible for the shortcomings in its construction. The email then recorded a request by SCI for Delor to cooperate with SCI as and when required so as 'to ensure we have the best chance possible of successful recovery from the responsible party/ies'. Plainly, SCI contemplated exercising subrogation rights against the builder and developer.
4. The email went on to describe the current position of the claim, stating that SCI was awaiting a quotation including a scope of works for the internal resultant water damage, an engineer's report outlining the deficiencies with the roof and a scope of works from the engineer for the repairs to the roof. It said that the engineer's scope of works would be broken down into two parts described in the following terms:
* Part 1 - defective repairs (to be paid for by the Body Corporate)
* Part 2 - resultant damage repairs (to be paid for by Strata Community Insurance)
1. The email then stated:

In terms of the repairs, for those buildings which have not sustained damage to the roof or water is not entering the building through the roof, once the quotation has been received and approved, the internal repairs will be able to commence.

However, for those buildings which have sustained damage to the roof or water is not [sic] entering the building through the roof, the roof repairs will need to be carried out first, before the internal resultant damage repairs can proceed.

1. Somewhat ambitiously, Allianz maintained that the above words operated as a condition upon the earlier unqualified confirmation of indemnity in line with policy terms. The condition was said to be to the effect that Delor was first required to carry out the repairs. However, the email was describing actions that SCI was taking (and would be taking) in relation to the claim in circumstances where liability to indemnify had been confirmed as to the extent of the loss as described. Further, the email did not indicate any responsibility on the part of Delor to undertake any works. Its responsibility, as described, was to cooperate with SCI to ensure that SCI had the best possibility of recovery from those responsible for the defective materials and construction of the roof and also to pay for those repairs that related to remedying those defects. Also, as has been noted, the email contemplated SCI proceeding to exercise subrogated rights as against the builder and developer.
2. There was no joint endeavour outlined in the May 2017 Email concerning the arrangements for the repair. Rather, the email described a confirmation of indemnity and *actions that SCI was itself taking* (as insurer). In that context, it is clear that the language of the email concerning the need for roof repairs to be undertaken first where there was roof damage and water was entering the building through the roof was simply a statement as to the sequencing of the work. No doubt it made plain the practical reason for deferring work in individual apartments and managed expectations on the part of Delor (and the owners of individual apartments) as to when that work might be undertaken. However, it was not a statement of any conditionality to the confirmation of indemnity nor any expression of an obligation on the part of Delor to arrange any or all of the roof works. It was evident from the rest of the May 2017 Email that it was SCI that was making the necessary arrangements for the work (some of which would be paid for by Delor) and it was SCI as subrogated insurer who would be seeking to make recovery from the builder and developer.
3. For over a year thereafter, the parties proceeded on the basis that SCI had agreed to indemnify. Much was done by SCI by way of adjustment of the loss. It was given unfettered access to the property. It engaged engineers. It arranged for a scope of works and it obtained quotations for repairs. Its lawyers advanced the possibility of a claim against the builder for defective work. It sought to quantify the extent of its liability under the indemnity that it had confirmed in the May 2017 Email.
4. In the course of those steps, it emerged that there were more defects with the construction of the roof, in particular there were defects with the roof trusses and the extent of the deficiencies in the manner in which they were tied down to the building was greater than was initially thought to be the case. An assessment was made that the defects with the trusses required them to be replaced or reconstructed. This complicated the inquiries being made and resulted eventually in Delor itself taking steps to investigate what was required to be done. It also meant that there was a third category of work that was required, namely remedial work to the roof in respect of defects that had not yet manifested in any damage.
5. The third category of work was outside the matters the subject of the May 2017 Email. It was not the subject of any insurance claim against SCI. However, practicalities of undertaking all of the work on the roof areas that had been damaged led, understandably, to engagement with a task of assessing the overall scope of what was required to be done and the most cost effective way of undertaking that work and how the costs should be shared as between SCI and Delor. Obviously enough it did not make sense for the repairs consequent upon damage that occurred at the time of the Cyclone to be undertaken and completed only to be followed by further works to repair other defects (not yet manifesting in any damage) that may require the repaired areas to be pulled down or altered.
6. Eventually, dealings between Delor and SCI as to the extent of the costs to be borne by each of them became strained. This could be seen at least by the time of dealings between the parties in March 2018 concerning the renewal of insurance. At that time, SCI proposed renewal on the basis of a premium that represented an increase of about 50% on the previous year and conditional upon works relating to the roof defects being completed within six months of the renewal date. By this time the latent problem with the roof trusses and related issues with the construction had been exposed by the investigations that had been undertaken in dealing with the adjustment of the claim. In response to questions from Delor as to the reasons for the position adopted by SCI on the renewal, SCI said (amongst other things) that the unrepaired building posed significant physical risk to the insurer and the remaining building was at significantly higher risk of damage by any future event.
7. It appears that the insurance was renewed with SCI on the basis of the condition as proposed thereby requiring works relating to roof defects (that is, all then known defects) to be completed within six months of the renewal date being 23 September 2018. How the satisfaction of this condition was to be achieved given the terms of the May 2017 Email is unclear. However, it seems, at least, to be founded on a recognition that the third categories of works were the responsibility of Delor. By then, the parties were pursuing quotations to undertake the works as covered by the May 2017 Email as well as the third category of works.
8. By May 2018, Delor complained formally that SCI had not made plain the extent of the indemnity available to Delor. It alleged that SCI had breached its duty of good faith by delaying the assessment of the extent of the indemnity. It called upon SCI to articulate its position on indemnity and to release certain documents that had been provided to SCI in the course of its adjustment of the loss that concerned the scope of works and quotations that had been provided to undertake works.
9. A few weeks later, on 28 May 2018, SCI responded by letter in some detail (**May 2018 Letter**). The letter set out the May 2017 Email almost in full. It enclosed a number of documents including reports from an engineer, a scope of works document and building works quotations that had been obtained by SCI. It stated that SCI had needed the additional information contained in the enclosed reports before it could set out its indemnity position. It said that the final scope of works had only recently been received and that SCI was 'therefore now in a position to provide the detail of its position on indemnity'. The letter referred to a quantification by external loss adjusters of the cost of repairing cyclone damage as $918,709.90 and the cost of repairing pre-existing defects/faulty workmanship and materials as $3,579,432.72. SCI stated that it would pay the first amount, but not the second.
10. The May 2018 Letter then set out the following under the heading 'Settlement of Claim':

3.1 Pursuant to the basis of settling claims as set out on page 29 of the Residential Strata PDS & Policy Wording, SCI may choose to either:

(a) Rebuild, replace or repair the damage that is covered by the policy; or

(b) Pay the amount it would cost to rebuilt, replace or repair the damage.

3.2 SCI will work with the Body Corporate to rebuild, replace and/or repair the damage that is covered by the Policy as detailed in the Morse Scope of Works dated 22 May 2018 relating to cyclone damage. However, SCI will only do that provided: -

(a) The Body Corporate rebuilds, replaces and repairs those items that are pre-existing defects / faulty or defective workmanship or materials as set out in the Morse Scope of Works relating to pre-existing defects;

(b) The building contract entered into by the Body Corporate is approved by SCI;

(c) The Body Corporate completes those works relating to the repair of pre-existing defects as set out in the relevant Morse Scopes of Works by 23 September 2018 as per the conditions of renewal of the current Policy of Insurance between SCI and the Body Corporate;

(d) If the Body Corporate fails to undertake the works by that time, then SCI will no longer insure the Body Corporate in respect of the Premises. However, SCI will still undertake the rectification works it is required to do within a reasonable time provided conditions (a) and (b) above are met.

1. It can be seen that the settlement proposal by SCI brought together the issue of the completion of the repairs consequent upon the Cyclone (the subject of the claim for which indemnity was confirmed by the May 2017 Email) as well as the performance of the condition of the insurance renewal that required all works to remedy the defects in the roof to be completed within six months of the insurance renewal, namely by 23 September 2018.
2. The May 2018 Letter then went on to deliver an ultimatum that was expressed in the following terms under the heading 'Reservation of Rights':

If the Body Corporate does not agree to proceed as set out above within 21 days SCI's offer in relation to indemnity will lapse and SCI will pay $nil pursuant to section 28 of the Insurance Contracts Act 1984 on the basis of the Body Corporate's non-disclosure as referred to in Ms Lander's email dated 9 May 2017 and misrepresentation regarding the defective soffit panels as discussed below. It also reserves its rights to rely on relevant exclusion clauses in the policy as set out below.

1. The assertion of a misrepresentation by Delor had not previously been made by SCI. It was a claim that was advanced in this Court before the primary judge, but is no longer maintained. To the extent that it provided a foundation for the position adopted by SCI at the time of the May 2018 Letter it was not a justified foundation. Otherwise, the misrepresentation claim may be put to one side for present purposes. It is only the claim of non-disclosure that has ongoing significance.
2. As to the non-disclosure claim, there is no suggestion that the relevant material was not provided to SCI before the May 2017 Email. Therefore, from before the time of the adoption by SCI of the position outlined in the May 2017 Email, SCI was aware of the matters that had not been disclosed prior to the issue of the policy of insurance by SCI in March 2017. By May 2018 it had known of those matters for over a year.
3. The May 2018 Letter concluded by stating the following under the heading 'Internal Dispute Resolution':

Should you disagree with our decision or you are otherwise dissatisfied, please refer to the attached information in relation to our complaints handling and dispute resolution procedures. Further information in this respect is also available in your policy wording. Alternatively, you may contact the undersigned for further information or if you have any questions.

1. It should be noted that although the body of the letter refers to an offer, it is evident that the letter did not invite a discussion, negotiation or counter-proposal. It was framed in language that manifested the adoption of a take it or leave it position on the part of Allianz. It stated in no uncertain terms that the consequence of not agreeing to proceed in the manner outlined by SCI within 21 days would be that SCI would rely upon s 28 of the *Insurance Contracts Act 1984* (Cth) (**Act**)and would pay $nil on the basis of alleged non-disclosure.
2. Section 28 is in the following terms:

(1) This section applies if a relevant failure occurs in relation to a contract of general insurance, but does not apply if the insurer would have entered into the contract, for the same premium and on the same terms and conditions, even if the failure had not occurred.

(2) If the relevant failure was fraudulent, 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 relevant failure had not occurred.

1. After the May 2018 Letter was received, lawyers acting for Delor asked for an extension of time for any acceptance of the offer. Allianz agreed to an extension. Delor's lawyers then provided a response to the matters stated in the May 2018 Letter and rejected the offer. On 22 August 2018, lawyers acting for SCI indicated that Allianz had reduced its liability to $nil on the basis of alleged non‑disclosure not only of the problems with the eaves and the soffits, but also the trusses (as well as on the basis of the alleged misrepresentation).
2. It appears that during the course of the above events a temporary roof was put in place on each of the apartment buildings where damage had occurred. The dispute concerns the works to be carried out to address the roof damage on a permanent basis.

## Commencement of proceedings by Delor

1. Delor commenced proceedings in the Insurance List of this Court in November 2018. After some preliminary steps, the Chief Justice made orders for two issues to be determined before the other issues raised by the proceedings, namely:
2. whether Allianz was entitled to reduce its liability to nil under the Act; and
3. whether by some operative rule or principle, Allianz was not able to rely upon s 28.
4. Following a hearing before the Chief Justice, his Honour determined the first issue favourably to Allianz. As to the second issue, his Honour found that:
5. Allianz was estopped from resiling from the representation made in the May 2017 Email that the claim by Delor would be honoured and indemnity provided, such that the rights of the parties were to be determined by application of the terms of the policy of insurance and not by reference to an assertion of right under s 28(3) of the Act;
6. Allianz had waived any entitlement to adopt a position based on an assertion of right under s 28(3) of the Act contrary to the position taken by Allianz that the claim by Delor would be honoured and indemnity provided in accordance with the terms of the policy; and
7. in seeking to resile from the representations made by the May 2017 Email and in seeking to rely on the non-disclosure of Delor, Allianz failed to act towards Delor in relation to the resolution of the claim with the utmost good faith contrary to s 13 of the Act.
8. His Honour did not accept Delor's claim that the second issue should be decided favourably to Delor based upon the common law doctrine of election. As to election, his Honour found that the doctrine only applied where there was a 'clear position of competing, inconsistent and mutually exclusive *rights*' and held that such 'a simple choice of inconsistent rights is not present here': at [317].

## Appeal by Allianz

1. Allianz now brings an appeal against each of those three findings. Delor supports the reasoning of the primary judge and also contends that the decision by the primary judge should be upheld on the further basis that Allianz made a binding election by the May 2017 Email that prevented it thereafter from relying on s 28(3) of the Act in respect of the non-disclosure by Delor.
2. Therefore, for Allianz to succeed in its appeal concerning the second question it must demonstrate that none of election, estoppel, waiver or breach of the duty of good faith provides a basis for answering the second question in favour of Delor.
3. Delor does not seek to dispute the determination by the primary judge of the first question.
4. In addition to the issues already identified, a considerable part of the complaint made by Allianz on appeal was to the effect that the decision of the primary judge rested on an understanding of the estoppel case that was not advanced below. It was contended that, in a number of respects, the primary judge upheld a case that was not pleaded or run by Delor before the primary judge. Therefore, in determining the appeal, it will be necessary to consider closely the nature of the estoppel case that was put by Delor before the primary judge.
5. As to election, issues were raised as to whether s 28(3) conferred a right of a kind that could give rise to the application of the doctrine of election or whether it operated independently of any choice to be made by Allianz such that no issue of election arose.
6. As to the finding of breach by Allianz of its duty of utmost good faith, issues were raised as to the nature of the remedy that may be afforded if the finding of breach of that duty was upheld and whether any such remedy could extend to an injunction, in effect, restraining Allianz from acting contrary to the May 2017 Email. There was also an issue as to whether any such breach of duty was a matter to be taken into account in framing the appropriate remedy in the event that the primary judge's finding that there was an estoppel was not disturbed.

## Election was the primary basis for the claim by Delor before the primary judge

1. Election was the primary basis upon which the case was advanced by Delor before the Chief Justice. It was the basis upon which the case was first put when proceedings were commenced against Allianz. Reliance upon election reflects the main character of the complaint made by Delor, namely that SCI wants to go back and remake a choice it made when it responded to the claim by granting indemnity (albeit to a limited extent) in circumstances where, for over a year, it had been exercising all the rights that it enjoyed as an indemnifying insurer including pursuing subrogated claims against the builder and obtaining free access to the property for the purposes of adjusting the loss.
2. Therefore, although the issue of election arises only by way of Delor's notice of contention, it is appropriate that it be considered first as it was the main way that Delor put its case to the primary judge (and was the first aspect dealt by the primary judge in his Honour's reasons concerning the second question).

## Issues on the appeal

1. Therefore, on the appeal, the following issues arise for determination:
2. As a matter of principle, when does the doctrine of election apply?
3. On its proper construction, in what manner does s 28(3) operate?
4. Should the decision of the primary judge be upheld on the basis that the common law doctrine of election applies?
5. What was the nature of the estoppel case advanced by Delor before the primary judge?
6. On what basis did the primary judge uphold the estoppel case?
7. Did the primary judge err in upholding the estoppel case?
8. Did the primary judge err in upholding the waiver case?
9. Did the primary judge err in finding that Allianz breached its duty of utmost good faith?
10. Having regard to the conclusions as to each of the other issues, was the relief granted by the primary judge proper and appropriate?

## Summary of outcome

1. Delor is entitled to relief based upon election and the decision of the primary judge should be upheld on that basis. In addition, the primary judge has not been shown to be in error in upholding the claims of Delor insofar as they were based on estoppel, waiver and utmost good faith. No error has been demonstrated in the declaratory relief granted by the primary judge. No real issue arises concerning the observations by the primary judge as to whether injunctive relief may be appropriate given the finding that Allianz breached its duty of utmost good faith because no such relief was ordered. Therefore, we express no view as to that aspect. It follows that the appeal should be dismissed with costs. We will grant liberty to Delor to apply within 14 days for further declaratory relief to reflect the terms of these reasons should it consider it appropriate to do so.

## Issue (1): As a matter of principle, when does the doctrine of election apply?

### Coherence of principle in a field 'beset with difficulties'

1. In *Sargent v ASL Developments Limited* (1974) 131 CLR 634 at 655, Mason J sounded a note of warning for those who would venture into the thicket of principles that must be traversed in order to determine the merits of the contentions raised by Allianz in the present appeal. As his Honour there stated:

Any discussion of the principles governing the circumstances in which a party's words or conduct may preclude [that party] from exercising a legal right which [it] possesses is beset with difficulties. They have their origin in the differences to be found in the various doctrines (election, waiver and estoppel) which may come into operation and in the differing concepts which each doctrine has at times been thought to embrace.

1. There have been many attempts at taxonomy, dividing the cases into one category or another. In the course of such attempts, many warnings have been sounded about the use of the same terminology to describe different principles. There remain issues about the nature of those differences. Nevertheless, the nettle must be grasped.
2. It is important to begin by recognising that there are different doctrines being given effect in the cases in this area. Therefore, conceptual precision is important. Nevertheless, in identifying the principles that are to be applied, due allowance must be made for the use in the cases of the same labels to describe conceptually distinct principles. Care must also be taken in seeking to extract general principles that are not evident from the decided cases.
3. Indeed, the early decision of the High Court in *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305 is a case in point. It uses the terminology 'waiver' to refer to principles now generally described as election. Issues arise as to the extent to which it states principles of more general application. Nevertheless, it is a convenient starting point not only because it is the foundation for later cases but also because it gave rise to similar issues to those which arise in relation to the claim of election in the present case.

### The decision in Craine v Colonial Mutual Fire Insurance Co Ltd

1. The judgment of the Court in *Craine* concerned a claim under an insurance policy for loss suffered as a result of a fire. Under the policy a claim was required to be made by a specified time. It was made three hours late. It was accepted by the insured that under the terms of the policy this was 'fatal' to the claim. The claim made was summarised by Isaacs J in the following terms (at 315):

the [insurer], by its conduct in investigating the claim and particularly in acting on the contract adversely to him, with full knowledge of the defect now relied on, waived the objection, or alternatively is estopped from relying on it …

1. The nature of the case as advanced is similar to the present case. In the Court below it had been summarised in the following way (at 317):

There is no question whatever that in this case they [the insurer] go on subjecting the other side to a great deal of inconvenience, delay, business trouble and loss, which one would have thought they ought to avoid if they intended to rely on the condition.

1. When the late claim was received by the insurer, the insured was informed that it was received 'without prejudice and without setting up any waiver of any of the provisions or requirements of the policy conditions': at 319. Nevertheless, the insurer went on to exercise rights under the policy of insurance in its dealings with the insured.
2. In those circumstances, in the trial before the then Chief Justice of the Supreme Court of Victoria (who presided with a jury), the insured claimed that the insurer had 'waived the objection [to the late lodgement of the claim], or alternatively is estopped from relying on it'. The following question was put to the jury: 'Did the [insurer] represent to the [insured] that they did not intend to rely upon the claims having been put in too late?'. The jury replied: 'Yes, they did waive their claim'. The answer was treated as being simply 'Yes'. Nevertheless, the Chief Justice directed judgment to be entered for the insurer: at 315.
3. On appeal, it was claimed that upon the answers given by the jury, the insured's claim should have been upheld on the basis of waiver or estoppel. Amongst other things, the insurer claimed that there could be no waiver or estoppel because the policy of insurance required any waiver of rights to be made formally in writing and that had not occurred.
4. In delivering the judgment of the High Court, Isaacs J placed the attempted reservation of rights by the insurer in the following context (at 319):

No doubt the [insurer] was quite within its legal rights in doing this, and thereby insisting on complete absolution after twelve o'clock from all liability under the contract. But to have done that simply and baldly would have been not merely harsh and morally hard to defend, but would have been a bad advertisement. Such an attitude might have been thought, as other arbitrary acts have been said to be, not merely a crime but a blunder. So the same letter, though distinctly intimating that so far no prejudice and no waiver must result, proceeds to open up communication with the [insured] on the subject of the damage [it] has sustained.

1. The reasons of Isaacs J went on to explain that the insurer, after seeking to reserve its rights, then proceeded to call on the insured to answer 'questions and requisitions already made': at 319. As to that course, Isaacs J noted that the insurer could have maintained that the breach of the clause had put to an end all obligation of the insurer to any money 'in other words, that the contract according to its own terms had, by reason of the breach …, terminated the contractual obligations of the parties': at 319. It is to be observed that his Honour did not describe the insurer as being presented with any right to elect to avoid the contract of insurance. Rather, the position was that the breach had brought to an end (terminated) any liability to pay any amount to the insured.
2. Next, Isaacs J noted that the insurer could have intimated that even though it was reserving its rights, it was prepared to receive 'whatever proofs and testimony [the insured] might voluntarily submit' and reconsider its position as to indemnity. In the view of his Honour, had the insurer proceeded in that way its position 'would still be unassailable': at 320.
3. However, that is not what had occurred and his Honour went on to reason as follows (at 320):

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.

The [insurer] did not content itself with inviting or permitting *voluntary* action by the [insured] *outside the contract*. It was equally at liberty to act in a manner consistent with acknowledging a subsisting obligation.

(original emphasis)

1. Again, it is clear that the case is not being dealt with as one in which the insurer was presented with a decision whether to avoid the contract or insist upon performance. The consequence of the late claim is that there is no liability to pay. That outcome arises from the terms of the policy without any conduct by the insurer. The insurer is not contemplating whether to terminate the contract of insurance. Rather, the insurer is contemplating whether to indemnify even though it has a basis upon which it can deny any liability under the policy of insurance.
2. In those circumstances, it was found that there had been an election. By reference to English authority Isaacs J said (at 320), repeating the final words already quoted above:

The [insurer] did not content itself with inviting or permitting *voluntary* action by the [insured] *outside the contract*. It was equally at liberty to act in a manner consistent with acknowledging a subsisting obligation. As Kekewich J. said, in *Hemmings v. Sceptre Life Association Ltd*., of two alternative courses:- 'It was a pure matter of business for the directors to say which of these two courses they would adopt. They elected to adopt the latter.' Here the [insurer] followed a course of action which, having regard to the circumstances, it appears to us it was at least quite open to the jury to say bound the [insurer] to disregard the original breach …

(footnote omitted, original emphasis)

1. His Honour then recounted the extent of the evidence as to the steps that had been taken by the insurer which included taking possession of the fire damaged property and seeking proofs and information from the insured with respect to the claim. As to the taking of possession this was said to be a step that went beyond 'adjustment and appraisement': at 322.
2. Then, his Honour said (at 322):

Without introducing any evidence beyond what we have referred to, it appears to us ample to enable a jury as men of the world to say the plaintiff as a reasonable man was not only likely, but extremely likely, to infer and did in fact infer from the attitude and acts of the [insurer] that, whatever its original intention to deny liability was, it ultimately made up its mind - and gave him to understand that it had made up its mind - that its acts and dealings with him were on the basis of an existing liability, unimpaired by the want of strict compliance with [the relevant clause as to the time for making a claim].

1. Thereafter, Isaacs J relied upon the following passage from *Matthews v Smallwood* [1910] 1 Ch 777 at 786:

It is also, I think, reasonably clear upon the cases that whether the act, coupled with the knowledge, constitutes a waiver is *a question which the law decides*, and therefore it is not open to a lessor *who has knowledge of the breach* to say 'I will treat the tenancy as existing, and I will receive the rent, or I will take advantage of my power as landlord to distrain; but I tell you that all I shall do will be without prejudice to my right to re-enter, which I intend to reserve.' That is a position which he is not entitled to take up. If, *knowing of the breach*, he does distrain, or does receive the rent, then by law he waives the breach, and nothing which he can say by way of protest against the law will avail him anything.

(original emphasis)

1. The above reasoning has since been applied by the High Court as an example of election between two available but inconsistent rights: see, for example, *Sargent*; *Commonwealth v Verwayen* (1990) 170 CLR 394 at 407 (Mason CJ), 424 (Brennan J), 451 (Dawson J), 466-467 (Toohey J); and *Agricultural & Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; (2008) 238 CLR 570 at [56] (Gummow, Hayne and Kiefel JJ). Plainly, the analysis being undertaken by the High Court in *Craine* is on the basis that the facts give rise to an instance of what would now be described as election.
2. Isaacs J then concluded (at 325):

Similarly here - 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 - supposing [the clause requiring formal waiver] were not in the contract, it follows that the first ground of the Chief Justice's judgment cannot be sustained.

1. His Honour then dealt with the insurer's claim that there had been no waiver that conformed with the requirements of the contract which required a formal waiver in writing and that all that had occurred had been subject to the reservation of rights at the outset when the insurer stated that the claim had been received 'without prejudice' to its rights under the contract. As has been noted, his Honour then found that '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', the decision below could not be upheld on the basis that there had been no waiver, unless the express provision in the contract requiring a formal waiver led to a different result.
2. However, it is apparent that but for the existence of that provision, the High Court would have upheld the claim by the insured on the basis of the application of what would now be described as the doctrine of election. It was not the unilateral conduct of the insurer that was the basis for the reasoning; it was the inconsistency between the two positions. Irrespective of whether the insurer meant and intended to act without prejudice to a position that sought to preserve the rights under the contract, the inconsistency between claiming that there was no liability under the policy (on the one hand) and exercising the contractual rights under the policy (on the other hand) meant that could not be done.
3. Importantly, the principle as expounded in *Craine* did not depend upon a voluntary choice being made by the insurer or even the exercise of a right to choose conferred by law (such as a right to choose whether to terminate). Rather, the outcome by which the breach could no longer be relied upon was said to arise 'by law'. The law did not allow the two future possibilities to be preserved. In *Matthews v Smallwood*, confronted with a breach that could bring the tenancy to an end, by law the landlord had to make a choice and protesting against the making of that choice was of no effect. The same reasoning was applied to the insurer in *Craine*.
4. Of significance to the present case is the fact that this conclusion was reached in circumstances where the choice to be made was whether to rely upon a provision of the contract that meant there was no liability to pay any amount or whether to proceed to exercise rights under the contract and adjust the loss. *Craine* was not a case where the insurer was confronted with a basis upon which the contract of insurance may be avoided but nevertheless proceeded as if the contract was on foot. As will become evident that distinction is of considerable importance given the way in which s 28(3) is expressed.
5. In the result, as to waiver (that is, election), Isaacs J reasoned that the clause that required a formal waiver was confined to a case of waiver and did not apply to a claim based upon estoppel and it was on that basis that the appeal was allowed.

### The High Court cases since Craine

1. In *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41, Kitto J (Taylor and Menzies JJ agreeing), observed as follows (at 55):

Not that election is a matter of intention. It is an effect which the law annexes to conduct which would be justifiable only if an election had been made one way or the other.

1. Next, in *Sargent* the Court was concerned with election where a party had alternative rights to terminate an estate or contract or insist upon continuation of the estate or performance of the contract. In that context, Stephen J said at 641:

The doctrine only applies if the rights are inconsistent the one with the other and it is this concurrent existence of inconsistent sets of rights which explains the doctrine; because they are inconsistent neither one may be enjoyed without the extinction of the other and that extinction confers upon the elector the benefit of enjoying the other, a benefit denied to him so long as both remained in existence.

1. Necessarily implicit in that description is the imposition by the law of an obligation to elect in circumstances where there are two rights and neither one can be enjoyed without the extinction of the other.
2. Mason J at 656 described election as a rule that was adopted in the interests of certainty and 'because it has been thought to be fair as between the parties that the person affected is entitled to know where he stands and that the person electing should not have the opportunity of changing his election and subjecting his adversary to different obligations'.
3. However, the issue in *Sargent* was not whether there were inconsistent rights of a kind to which the doctrine applied. Rather, the case was concerned with the circumstances in which a party will be taken to have made the required election, particularly the extent of knowledge of the inconsistent rights that must exist before conduct will amount to an election at common law.
4. After *Sargent* there followed some instances in which the decision in *Craine* was treated as being concerned with waiver properly so-called, that is unilateral conduct by a party to the effect that it would not rely upon a right: see, for example, *Gollin & Co Ltd v Karenlee Nominees Pty Ltd* (1983) 153 CLR 455.
5. However, in *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622, the decision in *Sargent*,together with other authorities, was cited for the proposition: '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 his having chosen to rely on (the other) of them"' (emphasis added): at 633. It is to be noted that the right to avoid or terminate a contract was given as an example of such truly alternative rights.
6. In their reasons, Mason, Brennan, Deane and Dawson JJ, then went on to state: 'Where an insurer is confronted with such alternative rights and elects to affirm the contract of insurance, he is commonly said to have "waived" the right to avoid or terminate it', citing the decision in *Craine*: at 633. This is a further example of the High Court identifying the language of waiver as used in *Craine* as referring to what is now described as election.
7. The decision in *Craine* was also referred to in the context of waiver of legal professional privilege in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475. In that context, waiver seems to be used to refer to conduct that is inconsistent with maintaining the confidentiality in the privileged communication rather than any confrontation of a person with inconsistent alternative rights.
8. Then came the expression of divergent views in *Verwayen*. In that case, the Commonwealth failed to plead the expiration of a limitation period or absence of a duty of care. The case was mainly concerned with estoppel and waiver, but most members of the Court also dealt with the principles of election in elucidating what was meant by waiver and the circumstances in which it may be relied upon to hold a party to a particular choice.
9. Mason CJ said that election required the making of 'an irrevocable choice between two alternative positions': at 408. For his Honour, there needed to be inconsistency such that one 'right' could not be enjoyed without the extinction of the other. The terminology used did not confine the principle to the election between inconsistent rights.
10. Brennan J described election, estoppel and waiver as 'cognate concepts: each relates to the sterilization of a legal right otherwise than by contract': at 421. His Honour made clear that a 'right' may include 'a liberty or an immunity, according to the circumstances'. Subsequent references by Brennan J in *Verwayen* to 'right' should be read accordingly. His Honour described the doctrine of election as serving the purpose of ensuring 'that there is no inconsistency in the enforcement of a person's rights': at 423. However, his Honour earlier described election as consisting of 'a choice between rights which the person making the election knows he possesses and which are alternative and inconsistent rights'. Expressed in those terms it suggests that the doctrine operates on a choice voluntarily made, but his Honour cited the passage from *Tropical Traders* (quoted above) to the effect that election is not a matter of intention but is 'an effect which the law annexes to conduct which would be justifiable only if an election had been made one way or the other'. His Honour also stated that an election 'is binding whether or not others affected by the election have acted in reliance on it': at 421.
11. Dawson J identified instances where election was used 'in the sense of election between mutually exclusive alternatives', citing *Craine* as an example: at 451. His Honour cited with apparent approval passages from *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at 883 in a manner that emphasised the need for 'alternative rights inconsistent with one another' and actions consistent only with a choice to rely on one of those two inconsistent rights: at 452. The term election was used to differentiate other cases which were instances of estoppel or waiver.
12. Toohey J said that it was important to distinguish between the characteristics of election and waiver, noting that most of the time waiver is used in the sense of election. His Honour found that: 'Election implies that a choice must be made between two rights which are mutually exclusive': at 472. The use of language indicative of legal obligation is significant. His Honour is identifying instances where the law requires a party to choose by reason of inconsistency. His Honour differentiates those instances where there can be no such election by quoting from Spencer Bower and Turner: 'Obviously there can be no election, choosing one course to the exclusion of another, when in fact there is only one course to take, or where the two courses are such that the adoption of one of them does not necessarily indicate a final intention to abandon the other': at 472.
13. Gaudron J at 481 referred to *Craine* and distinguished between inconsistent positions and inconsistent rights in the following way:

In *Craine*, Isaacs J … referred to waiver as 'a doctrine of some arbitrariness introduced by the law to prevent a (person) in certain circumstances from taking up two inconsistent positions'. The expression 'taking up two inconsistent positions' is wider than the expression 'asserting two inconsistent rights'. It is the assertion of inconsistent rights that is generally understood to be at the heart of what is called 'election'. See *Sargent v. A.S.L. Developments Ltd.* [1974] HCA 40; (1974) 131 CLR 634, per Stephen J. at p 641; *Lissenden v. C.A.V. Bosch Ltd.* (1940) AC 412, per Lord Wright at pp 435-436. For present purposes the question whether there is a doctrine, be it called 'waiver' or anything else, which operates by reference to the taking of inconsistent positions rather than the assertion of inconsistent rights can be confined to the situation where, in the course of litigation, a person asserts a right to take a position which is inconsistent with one earlier taken in the same litigation.

1. Given the facts in *Verwayen*, her Honour appears to be distinguishing between an instance where a choice is required to be made between inconsistent rights (because the party cannot assert inconsistent rights) and an instance where a party decides not to assert a right. The reasoning is not concerned with precisely what may amount to inconsistent rights for the purposes of the first instance.
2. Finally, McHugh J began by describing *Matthews v Smallwood* (being the decision applied in *Craine*)as a case of election. His Honour reviewed the cases in which it appeared that it had been held that there could be waiver by unilateral action of a statutory right even where there was no need to choose between inconsistent positions. His Honour concluded that those cases were 'to a certain extent, anomalous' and that they should be strictly confined 'so as not to conflict with the more established doctrines of election, contract and estoppel': at 497.
3. Care must be taken as to the conclusions that can be reached from the various views expressed in *Verwayen*. In addition to the issues that arise in discerning whether there is a majority view, as has since been observed, the views expressed in *Verwayen* as to waiver reflect the particular setting in which the issue arose, namely the existence of the litigation between the parties and there is danger in divorcing what was said in that case from its context: *Agricultural & Rural Finance v Gardiner* at [62].
4. Nevertheless, as to election (as distinct from waiver), two things may be said about the reasoning in *Verwayen*. First, Mason CJ, Brennan, Toohey and Gaudron JJ each expressed the doctrine in terms that recognise that the law *requires* a choice to be made. The law does not allow the party to maintain two inconsistent rights (or positions) and requires a choice to be made by the party. The choice may be made by the party or be inferred as a matter of law from the conduct of the party who is required to make the election. Second, Mason CJ, Brennan and Dawson JJ did not confine the doctrine to election between inconsistent rights. Toohey J did use the language of rights without considering expressly whether the doctrine was confined to rights strictly so-called. Gaudron J did distinguish between inconsistent rights and inconsistent positions but only to make clear the unilateral character of waiver compared to election. McHugh J reasoned by applying *Matthews v Smallwood* a decision in which the question whether election only applied as between inconsistent rights was not addressed.
5. Thereafter, in *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26, the language used by Deane, Toohey, Gaudron and McHugh JJ to describe the circumstances in which the doctrine of election may arise echoed the language of fairness used by Mason J in *Sargent* to describe the ambit of the principle. At 41, their Honours described the 'true nature' of election as being brought out in the following passage from Spencer Bower and Turner, The Law Relating to Estoppel by Representation:

It is of the essence of election that the party electing shall be 'confronted' with two mutually exclusive courses of action *between which he must, in fairness to the other party, make his choice*.

(emphasis added)

1. Later at 42, their Honours referred back to the above passage and stated 'at the heart of election is the idea of confrontation which in turn produces the necessity of making a choice'. The notion of there being a necessity that the choice be made reflects the fact that election concerns those circumstances where the law requires a party to choose.
2. The issue in *Immer* arose because there was an ongoing right to rescind and the question was whether a choice had been made to abandon that right. Consequently, the focus was upon what was required in order to make the election rather than the circumstances in which an election may arise. That is understandable given that the case concerned an instance where it was well established that an obligation to elect would arise. Nevertheless, it is significant that the Court chose to use language that focussed upon instances where fairness between the parties required a party to choose between 'two mutually exclusive courses of action'. The principle was not expressed in terms that confined the doctrine of election to cases where a party had two different rights that could be exercised.
3. The language used in *Immer* was deployed in *State of Victoria v Sutton* (1998) 195 CLR 291 at [40] (Gaudron, Gummow and Hayne JJ) in describing the true nature of election as 'the confrontation of the person electing with two mutually exclusive courses of action between which a choice must be made, for example, to terminate or keep a contract on foot'. The language of 'mutually exclusive courses of action' appears to be significant and consistent with the views of many of the members of the Court in *Verwayen*.
4. In *Mann v Carnell* (1999) 201 CLR 1, the Court was again concerned with a claim of waiver of legal professional privilege. In that context, emphasis was placed upon the manner in which waiver may arise by operation of law. Gleeson CJ, Gaudron, Gummow and Callinan JJ put the matter in the following was at [29]:

Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is 'imputed by operation of law' [citing *Goldberg v Ng* [1995] HCA 39; (1995) 185 CLR 83 at 95]. This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege … What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.

1. To similar effect is *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; (2013) 250 CLR 303 at [30]‑[31] (French CJ, Kiefel, Bell, Gageler and Keane JJ), but citing *Craine*.
2. Finally, in *Agricultural & Rural Finance Pty Ltd v Gardiner* at [63], Gummow, Hayne and Kiefel JJ (Heydon J agreeing) dealt with an instance where a lender had a right to accelerate the payment of the balance outstanding under a loan agreement in the event of a failure by the borrower to make payment punctually. The lender accepted the subsequent tender of unaccelerated performance the lender. It was claimed that there was 'an election between inconsistent rights': at [49]. The lender was held to have elected not to exercise the option to accelerate payment of the balance. This was described as 'an orthodox application of the doctrine of election between competing rights': at [63]. However, other aspects of the claim were not upheld because the borrower's lateness in main payment gave rise 'to no choice between competing rights': at [64]. It is to be noted that the language reflects the terms in which the claim was put, namely election between inconsistent rights. The Court was not invited to consider whether the doctrine was confined to inconsistencies between rights properly so-called. However, as has been noted, in *Verwayen* a majority of the Court expressed the doctrine in broader terms and since then the Court has explained that the doctrine applies where the law regards it as unfair for a party to be allowed to maintain two inconsistent positions.

### A significant attribute of the contractual right to elect

1. Where the common law doctrine of election is applied in a contractual context, care must be taken to distinguish between two related senses in which the term 'election' is used. First, as a matter of contract law, a party presented with certain types of breach has a right as a matter of contract law the character of which is to make a choice. As a matter of contract law, the choice is conferred on the innocent party. The right conferred is a right to elect to terminate. It is not for the law to choose whether the contract is avoided. The choice is a matter for the innocent party.
2. The second sense in which election is used is to refer to the requirement that arises once the innocent party reaches the point where the contract must either be performed or brought to an end. At that point the law requires the innocent party to elect. The inconsistency that arises is recognised as one that gives rise to the application of the common law doctrine of election. The contractual right to choose whether to terminate can be preserved for a time, but eventually as a matter of law the contracting party is *required* to make a choice because it is unfair to keep open the two options. So, even if the contractual right to make that choice is not exercised by the innocent party, a point will be reached where, as a matter of law, the party will be taken by that party's conduct to have elected one course over another. It is the second 'election' that is an application of the doctrine of election. It is not to be confused with or merged into the first.
3. The doctrine of election is not confined in its application to instances where a party has a right which, of its character, is a right to choose. So much is demonstrated by *Craine*. In that instance, there was not a breach that gave rise to a right on the part of the insurer to elect to terminate. Rather, there was a failure to lodge a claim within time which, by operation of the contract, meant that there was no liability to pay. The insurer did not have a right to choose about how the provision would operate. The liability under the contract in respect of the particular claim came to an endbecause the claim was not made in time. If the insurer did nothing the contract would operate in that way. Nevertheless, the insurer was confronted with two possible futures. One in which the rights conferred by the contract in the event that a valid claim was made could be exercised and one in which those rights did not arise because the claim was out of time. In those circumstances, it was unfair for the insurer to try and keep both options open. Confronted with knowledge of the facts that gave rise to the two alternatives, the common law doctrine of election required a choice to be made as a matter of law.
4. Therefore, care must be taken in not confining the doctrine of election to instances where a party has a right to make a choice, such as the right to choose whether to terminate a contract. It extends to instances where the party has no such right but nevertheless the law requires a choice to be made between inconsistent alternatives.

### The decision in Freshmark

1. On the issue of election, Allianz placed reliance upon the decision in *Freshmark Ltd v Mercantile Mutual Insurance (Australia) Ltd* [1994] 2 Qd R 390. It was a simple case. A trailer was damaged while being towed by a prime mover driven by a person aged 22 years. By the terms of the policy, the insurer was not liable if the trailer was in the charge of a person under the age of 25 years. A claim was made under the policy. The claim made clear the age of the driver. Nevertheless, the insurer approved repairs which commenced the following day. A few days later, part way through the repairs, the insurer notified the insured that indemnity was declined because of the age of the driver. The insured brought a successful claim against the insurer for payment of all of the repair costs. The insurer appealed.
2. The President held that the doctrine of election applied and the insurer was confronted with two mutually exclusive courses of action and was required to make a choice, which it did. Having made that choice with knowledge of the material facts it was bound by that choice. However, the other members of the Court of Appeal disagreed.
3. McPherson JA agreed with the reasons of Dowsett J (which are considered below) and, relevantly for present purposes, added the following (at 395):

Here there was no liability under the terms of the policy except in certain specified circumstances that were not present in this case. The defendant was therefore not in the position of a person who, having the option of choosing between alternative and inconsistent rights, elects to adopt one of them and so places it beyond his power to revert to the other. Under section 1 of the policy the defendant as the insurer had the right to elect between repairing a vehicle and paying the amount of the loss or damage to it. The defendant elected to repair. Had the policy been applicable according to its terms, the election to repair might well have precluded the defendant from later asserting its alternative right under section 1 of simply paying the amount of the loss or damage.

But that is not this case. The defendant was not confronted with the option of choosing between two alternative and inconsistent rights, nor did it elect to pursue one of those rights to the exclusion of the other. There was no choice between a right to accept liability under the policy, and a right to reject liability. That is so because there never was any liability under the policy, and consequently no right or even power under the policy to reject that liability.

1. This reasoning rests upon the absence of any inconsistency between a right to accept liability under the policy and a right to reject liability. As will emerge, that is not the present case. The statutory right upon which Allianz places reliance is said to lead to the consequence that there is no liability under the policy. In addition, the reasoning appears to confine the doctrine of election to those cases where there were inconsistent rights as to future performance that were available to one party. It rests upon a view that the doctrine of election is limited in its application to those instances where a party has a right to choose. It is a view that fails to properly frame the question in terms of whether the circumstances are such that the law requires a choice to be made. In that respect, it is contrary to the decision in *Craine* which has been consistently approved by the High Court and therefore cannot be correct.
2. After reviewing the separate reasons of the members of the High Court in *Verwayen*, Dowsett J concluded at 403 as follows:

The better view is that a mere indication of an intention not to rely upon contractual rights will not generally constitute a waiver sufficient to bar a future action to enforce such rights. Waiver should not be seen as an alternative weapon to estoppel in the war against the doctrine of consideration. However, where a party elects between alternative rights available under a contract, such election will usually be final.

… Obviously, a contracting party always has the right to insist or not insist upon his rights and conversely, to accept or not accept alleged liability. Such a choice is not accurately described as an election in the sense intended in *Verwayen*.

1. This approach must also be compared to the approach in *Craine*. In both cases, the insurer had the right under the policy to deny liability. In both cases, the insurer proceeded, with knowledge of the relevant position, to take steps consistent only with there being liability under the policy. In both cases, after taking those steps, the insurer sought to disclaim any liability.
2. However, there is an important point of distinction. In *Craine*, but not in *Freshmark*,the insurer denied liability, but then proceeded to exercise rights under the policy of insurance. In *Freshmark* it was the insured who arranged the repairs and there was no inconsistent action by the insurer in the meantime. Therefore, the reasoning of Dowsett J should be understood on that basis. The reason there was no election in *Freshmark* was because the point was never reached where there would be inconsistency between the positions asserted as to the rights that the insurer enjoyed. Unlike the insurer in *Craine*, the insurer in *Freshmark* did not reach a point where it was contemplating both the exercise of rights under the policy and maintaining that there was no liability under the policy. It was at that point that the doctrine of election applied to require a choice to be made, not before.

### The decision in Nigel Watts

1. In *Nigel Watts Fashion Agencies Pty Ltd v GIO General Ltd* [1994] NSWCA 365, an employee of Nigel Watts was injured when entering a lift at the office premises of Nigel Watts. He received workers compensation and also sued the landlord at common law for negligence. The landlord joined the employer as a third party to the proceedings. The third party claim was based on alternatives, one of which was covered by the workers compensation policy and the other of which was not (being a claim under the lease). Relying on the policy, the workers compensation insurer took over the conduct of the defence of the third party proceedings. The third party claim succeeded, but only on the basis not covered by the policy. It was claimed that by taking over the conduct of the third party proceedings the insurer had elected to cover the whole of the claim the subject of the third party proceedings irrespective of the basis on which it was upheld.
2. In the appeal, the only member of the Court to consider the election claim was Handley JA. His Honour began by stating a general description of the doctrine of election in its application to contracts of insurance in the following terms at 1:

The doctrine, in its application to contracts of insurance, prevents an insurer from adopting inconsistent positions under the same policy. An insurer receiving a claim who is entitled to avoid the policy or reject the claim for breach of condition must make an election. In the first case the insurer must either affirm or avoid the policy and in the second it must waive the breach and accept the claim or rely on the breach and reject it. If, having the requisite knowledge of the facts, it asserts rights which would only exist if the policy was in force and covered the claim it will be taken to have elected to treat the policy as valid and applicable to the claim

1. The authorities cited for that proposition included *Khoury v Government Insurance Office (NSW)* to which reference has already been made in these reasons. The relevant passage in *Khoury* relied upon both *Craine* and *Sargent*.
2. Having stated the general proposition, Handley JA concluded that there had not been an election to accept liability by the insurer taking over the conduct of the defence of the third party proceedings because it did so in reliance upon the policy in circumstances, in effect, where it could continue to maintain a denial of liability if the claim was upheld on the basis that was not covered. Important to that process of reasoning was the absence of any procedural mechanism by which the insurer could only take over the conduct of that part of the third party proceedings for which liability would arise under the workers compensation policy if the claim was upheld. In effect, the conduct of the insurer throughout was consistent only with covering the claim to which the policy would respond.
3. Given the High Court decisions to which reference has already been made, the general statement of principle by Handley JA was correctly expressed. It reflected the legal position as developed in those cases which required an insurer in particular (being a party who must act in good faith) 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. This was not a matter of choice for the insurer. Where a point was reached where future steps were to be taken by an insurer and those steps could be consistent only with the acceptance of liability then as a matter of fairness to the insured, the law required the insurer to make an election.
4. Issues may arise as to the extent to which such a principle extends, as a matter of fairness, outside the insurance context. But, insurers, at least, stand in that position when dealing with an insured in respect of a claim made under a policy of insurance. It is a position that arises from the nature of an insurance contract. As was described by Isaacs J in *Craine*, insurers'*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*'(emphasis added): at 320. Such has been the state of the law since *Craine* as was properly recognised by Handley JA in *Nigel Watts*.

### Conclusions as to circumstances in which the doctrine of election may apply

1. When used as a word devoid of special meaning imposed by legal principle, election is the act of choosing (by action or inaction) between two alternatives. However, for the purposes of seeking to elucidate the nature and scope of the common law doctrine to which the descriptor 'election' is most often applied, it is helpful to distinguish between three different cases.
2. First, those where the law requires a party to make a binding choice between two alternatives.
3. Second, those where a party, having made a choice, will be bound to adhere to that choice.
4. Third, those where a party, having made a choice, will be allowed by the law to change position.
5. For reasons that have been expressed, the common law doctrine of election is concerned with the first type of case, namely the circumstances in which a party is required by law (not by an enforceable bargain) to make a binding choice. In the case of an insurance contract it applies at least where the insurer has a right to disclaim liability but proceeds to exercise rights conferred by the contract of insurance. In such a case, the insurer cannot reserve its position. It can disclaim liability and request the insured to take steps of the kind that would be taken if there was liability under the policy as part of a process of considering whether the insured may reverse its decision to disclaim. But the insurer, knowing the relevant facts, cannot seek to exercise rights under the contract of insurance whilst at the same time denying liability under the policy. In such a case, having regard to the nature of an insurance contract, as a matter of fairness, the law requires the insurer to elect between disclaiming any liability and seeking to rely upon the rights conferred by the policy.
6. Of course, the position is different in those instances where the insurer is investigating the claim and is yet to uncover the relevant facts or is seeking clarity as to position. It is well established that there is no obligation to elect unless and until the relevant party is aware of the relevant facts. In the present case, that aspect is not in issue. The insurer in the May 2017 Email refers to the non-disclosure that Allianz now seeks to rely upon.
7. The second case described above is the territory where principles of estoppel assume significance.
8. The third case is where consideration must be given to principles of abandonment, acquiescence and waiver.
9. The important aspect of the doctrine of election and what differentiates it from the other two cases is that it concerns those instances where the law requires a binding choice to be made. It is well established that when it comes to the way an election will occur, it may result 'from a matter of conscious choice with knowledge of the existence of the alternative right and in other cases it may occur when the law attributes the character of an election to the conduct of a party': *Sargent* at 656 (Mason J). In the latter instance, the law treats the party as having made a choice because the law will not allow the party to keep open both possibilities. However, the key aspect to the doctrine of election is that a party *must* make a choice and will be treated as having done so if a conscious choice is not made by the party with inconsistent rights. A point is reached where it is unfair for a party with knowledge of the relevant facts to keep both options open and at that point the law will treat the party as having made a choice based upon its conduct undertaken with that knowledge.
10. Many of the cases concerned with common law election deal with *how* an election will occur rather than the circumstances in which the doctrine applies. In consequence, the nature and scope of the common law doctrine is not in focus. In such cases, it is accepted that the doctrine applies and the question is how the election is to be made.
11. However, in the present case, it is the issue of *when* the doctrine applies that is of key importance.

## Issue (2): On its proper construction, in what manner does s 28(3) apply?

1. The right that Allianz claims to be able to exercise despite the period of about a year in which it dealt with Delor on the basis that indemnity would be provided, is the statutory right conferred by s 28(3) of the Act.
2. Section 28 applies if a relevant failure occurs in relation to a contract of general insurance that affected the insurer's decision to enter into the contract. A 'relevant failure' is defined in terms that include a failure by the insured to comply with a duty of disclosure: s 27AA(1)(b)(i). As has been noted, the primary judge found that there was such a failure by Delor. It is a finding that is not challenged by Delor in the appeal.
3. By operation of s 28(2), if the relevant failure was fraudulent, the insurer may avoid the contract.
4. Therefore, s 28(2) confers a statutory right to avoid the insurance contract. Plainly, in such a case the doctrine of election would apply. If the insurer was aware of the factual basis upon which the policy might be avoided for fraud by exercising the statutory right it must make a choice. The obligation to do so arises by reason of the application of the doctrine of election.
5. However, s 28(3) operates in a different manner. By way of reminder (and for convenience of reference), it says:

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 relevant failure had not occurred.

1. It can be seen that s 28(3) does not, in terms, give rise to a choice. It simply states the consequence of a relevant failure which is to reduce the liability of the insurer in the manner described. As to the nature of the provision, the primary judge said at [311]:

The provision arms the insurer with a body of substantive rights which it can raise in defence or answer to the contractual claim for indemnity under the policy … [Here the] insurer is not to be seen as giving up a right, but as representing that it will not run an arguable defence to a claim and that it will deal with the claim on policy terms. The ability or entitlement to resile from that position naturally falls to be considered by reference to whether it is just or fair that it should be permitted in due course to resile from that position and adopt an entirely contrary position, in all the relevant circumstances.

1. Nevertheless, the provision has significance in those instances, like the present case, where the insurer might rely upon the provision to disclaim any liability. In such a case, there is an evident inconsistency between the insurer adopting the position that there is no liability under the policy by reason of a failure to comply with the duty of disclosure (on the one hand) and seeking to enforce rights of subrogation and access to the insured property (on the other hand). Both positions cannot be consistently maintained. The inconsistency is of the same character described in *Craine*, *Khoury* and *Nigel Watts*. For reasons that have been expressed in dealing with issue (1) it is an inconsistency in position that is of a kind that gives rise to the application of the doctrine of election.

## Issue (3): Should the decision of the primary judge be upheld on the basis that the common law doctrine of election applies?

1. The primary judge reasoned by reference to the statement of principle by Handley JA in *Nigel Watts* that the principle as described only applied to 'the clear position of competing, inconsistent and mutually exclusive *rights*'(original emphasis) as the basis for concluding that the simple choice between a right to avoid or affirm a contract and a right to rely on a breach of condition and terminate a contract or affirm it was not present in this case: at [317]. However, as has been explained, Handley JA correctly referred to 'inconsistent positions' rather than inconsistent rights (at least to the extent that such language is to be understood as dealing with a case where an insurer knows of the facts upon which it can disclaim liability but seeks to enforce the insurer's rights under the contract of insurance).
2. In the present case it is not in dispute that SCI knew the relevant facts at the time of the May 2017 Email. Those facts meant that if s 28(3) was to be relied upon by SCI to reduce its liability under the policy to nil (as it now seeks to do) then it would be directly inconsistent with that position to also seek to enforce rights under the policy that could not be resorted to by the insurer if it was to rely on s 28(3) and maintain that there was no liability to pay. For a year it took steps that it could only take if it was an indemnifying insurer. There was a relevant inconsistency between the two positions. It was not a case where the insurer could defer deciding what to do. If the insurer wanted to exercise its rights of subrogation and its rights to enter upon the property for the purpose of adjusting the loss for which it accepted liability (as distinct from for the purpose of determining whether there was liability) it was required to elect between those inconsistent positions. It elected by sending the May 2017 Email. It confirmed that election by its conduct. It cannot now seek to resile from that choice which the doctrine of election required the insurer to make.
3. Allianz placed reliance upon the way in which s 28(3) operated. It may be accepted that, unlike s 28(2), it does not confer a right upon the insurer to make a choice whether to be bound by the policy. Rather, it provides a form of answer to a claim made under the policy, namely to reduce the amount payable. The point at which the benefit of the provision may be called in aid by an insurer is in responding to a claim. In some cases, it may seek to do so as to part only of the claim. In that instance, it may not be relevantly inconsistent to seek also to exercise rights under the contract of insurance.
4. However, where (as here) the insurer is faced with a claim of a kind where the insurer is aware of a 'relevant failure' (in this case the non-disclosure) which will result in the claim being reduced to nil if the clause applies, then the insurer does face inconsistent positions. The inconsistency arises even though there is not a choice conferred by the provision upon the insurer. As has been explained, the doctrine of election is not confined to those instances where the character of the inconsistency arises from the existence of a right to choose whether to avoid a contract (or exercise some other right to choose). Rather, it arises where the law imposes an obligation to choose rather than proceed keeping two inconsistent positions open. The law does so as a matter of fairness.
5. One circumstance in which the law imposes that obligation to choose is where an insurer could deny liability for a claim or proceed to exercise rights under the policy which are of a kind that are only to be exercised if the claim is not denied. In such a case, the insurer must elect. If the insurer makes a conscious decision to elect with knowledge then the insurer will be held to that election. If the insurer does not elect then, on the basis of the insurer's conduct, the law will determine the election that has been made. The insurer cannot reserve its position and cannot, having made its election (or having its election determined as a matter of law), go back and reverse the choice.
6. It follows that the decision of the primary judge should be upheld on the basis that the common law doctrine of election applies.

## Issue (4): What was the nature of the estoppel case advanced by Delor before the primary judge?

1. Having regard to the nature of the argument advanced by Allianz, it is necessary to consider the steps by which Delor's estoppel case was disclosed and the way in which the case was run before the primary judge. In particular, it is necessary to consider (a) the nature of Delor's case as to material detriment as disclosed by the concise statement and how it came to be amended; (b) the written submissions; (c) the opening submissions at the hearing; and (d) the way the estoppel case was dealt with in the course of closing submissions.
2. In order to place matters in context it is appropriate to begin by considering the extent to which a concise statement may be expected to perform the same role in disclosing the nature of Delor's case as a statement of claim. The submissions for Allianz tended to approach the concise statement as if it performed the same role as a statement of claim in those cases where pleadings were required. The distinction is of some general importance because it is becoming increasingly common in this Court for matters to proceed to hearing on the basis of a concise statement, a concise response and bespoke case management directions, especially where efforts are made to have matters dealt with expeditiously. In the present case, the questions stated by the Chief Justice were considered at a hearing that was conducted on the basis of a concise statement by Delor and a concise statement in response by Allianz.

### The nature and purpose of a concise statement

1. The purpose of a concise statement is to enable the applicant to bring to the attention of the respondent and the Court the key issues and key facts at the heart of the dispute and the essential relief sought from the Court before any detailed pleadings. It is not intended to substitute the traditional form of pleading with a shorter form of pleading. Rather, it is a different form of document directed to exposing the real nature of the dispute and the use of a brief narrative form is encouraged where appropriate.
2. The concise statement is intended to facilitate the case management of the proceedings from an early stage. It enables the Court to consider whether it is appropriate for the application to proceed on the basis of the concise statement without pleadings, whether the efficient conduct and disposition of the application is better served by requiring pleadings or whether some other procedure might be followed to expose the issues, such as requiring a statement of issues, the provision of detailed particulars of particular aspects of the claim or the disclosure of certain categories of documents that are of key significance for the resolution of the dispute.
3. The role of a concise statement was described by Allsop CJ in *Australian Securities and Investment Commission v Westpac Securities Administration Limited* [2019] FCAFC 187; (2019) 272 FCR 170 at [185] in the following terms:

The [amended concise statement (**ACS**)] was, of course, not a pleading. It is a document intended by the practice note to give a concise summary of the nature of the case alleged and the central issues involved. Its primary purpose is to facilitate effective case management and preparation for trial or mediation. Here the ACS was supported by a contemporaneous Particulars of Claim (PoC) of some 68 pages providing the detail of the case asserted. The ACS and PoC are to be read together to ascertain the issues tendered for trial.

See also: *MLC Limited v Crickitt (No 2)* [2017] FCA 937 at [4] (Allsop CJ); *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2019] FCA 1284 at [2]‑[8] (Allsop CJ); and *Nona on behalf of the Badulgal, Mualgal and Kaurareg Peoples (Warral & Ului) v State of Queensland* [2020] FCA 1353 at [23]‑[28] (Mortimer J).

1. The Court may require a concise statement in response. It may do so on the basis that the matter should proceed on the basis of the concise statement (without pleadings) or it may do so for the purpose of better understanding the nature of the issues between the parties before deciding the most appropriate procedure for fairly and efficiently exposing the issues in dispute.
2. Where the matter proceeds on the basis of a concise statement and concise response then, unlike pleadings, those documents are not conceived as a comprehensive statement of all the matters that must be established in order for a claim or defence to succeed. In such instances, the concise statement and response serve a broader function of providing a fair disclosure of the nature of the case to be advanced with more precise issues being disclosed by other means and to the extent considered to be appropriate in the interests of fairness. For example, particulars may be required of aspects of the case where more detail is required to fairly disclose the nature of the case being advanced so that forensic preparation may be undertaken, there may be orders for delivery of affidavits or witness statements followed by the preparation of a joint statements of issues or parties may be directed to provided written outlines of opening submissions well in advance of the hearing in order to expose the issues. The concise statement process recognises that issues may be refined as the conduct of the interlocutory stages progress and that there are often benefits to be obtained in bespoke case management orders.
3. The use of concise statements recognises that pleadings (and their attendant rules) can encourage tactical and technical disputation of a kind that is inconsistent with the modern approach of the Courts, particularly in commercial disputes.
4. The modern approach of courts in Australia emphasises case management and relies upon the performance by lawyers of their duty to work cooperatively to expose the real issues in the case. For some time, the courts have required a cards on the table approach that requires parties to disclose in clear terms the nature of their case and not to insist upon proof of matters not genuinely in issue. The modern approach, which emphasises case management, is directed towards limiting the extent to which the Court's own procedures may be used as instruments of unfairness. It recognises that the complexity of modern commerce, the extent of regulation that may bear upon assessments of the propriety of commercial conduct in any particular case, the extent of discovery and disclosure that may be required given the extensive record that is available due to modern technology and the expectation of timely delivery of decisions requires a new approach.
5. Focus upon such matters is now intrinsic to the character of this Court, it being expressed in the legislation by which the Court is established: see Part VB of the *Federal Court of Australia Act 1976* (Cth). The Court must conduct proceedings in the Court on the basis of a practice and procedure that facilitates the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible: s 37M. Likewise, and of fundamental importance, the parties themselves must conduct the proceedings in a way that is consistent with that overarching purpose: s 37N(1). Their lawyers must, in the conduct of a civil proceeding, take account of that duty as imposed on their client and assist the party to comply with that duty: s 37N(2). In addition, the lawyers have a common law duty to the Court to confine the case to the real issues and present the case as quickly and simply as circumstances permit in a manner that is proportionate to the overall subject matter: *Dyczynski v Gibson* [2020] FCAFC 120 at [214]‑[219].
6. So where, as here, a decision is made for the case to proceed on the basis of a concise statement and for the filing of a concise statement in response, the concise statement should not be viewed as if it were a de facto pleading to which the old pleading rules apply unaffected by the new context and character of the concise statement. Nor should the concise statement be seen to serve the same role in the conduct of the proceedings as was (and in appropriate cases still is) served by pleadings. The concise statement and any concise response still serve a role in ensuring the fair disclosure of the nature of the case being advanced by a party, but that role is not confined to the concise statement.
7. If a claim that is at the heart of the case that a party seeks to advance at the final hearing is not to be found in the concise statement then there will need to be an application for leave to amend that will be dealt with in accordance with the established procedural law as to late amendments to alter a case. However, where the nature of a claim is broadly disclosed by the concise statement, it is fundamental to the new approach of case management that a party cannot sit by passively and insist upon some strict curtailment of the case that may be run by reference to pleading rules. Both parties have a duty to expose the real issues. Where an issue is properly raised concerning the particular nature of an aspect of the concise statement then the party relying on that statement must assist in clarifying the position. And where an issue is expressed broadly in a concise statement and the other party considers that it will be unfair to its forensic preparation of the case for the issue to remain stated in such broad terms, then it behoves that party to seek clarification. The request may be met with the response that the clarification will be provided by affidavits and witness statements or the delivery of a statement of issues in due course. However, it may be the case that fairness dictates that earlier disclosure is required in which case the Court will make appropriate orders by way of case management. But what the party cannot do is save up its complaint that the case is stated too broadly until the conduct of the final hearing and then maintain that no detailed case can be run because no such case has been disclosed. To do so is to treat the concise statement as having the same character as a pleading which it is not. It is also to adopt a strategic and technical approach of a kind that is inconsistent with the obligation imposed upon parties and their lawyers by Part VB of the *Federal Court of Australia Act*.
8. It may be accepted that where a case proceeds upon pleadings then the function of those pleadings is to state with sufficient clarity the case that must be met and to ensure that a party has the opportunity to meet that case and also to define the issues for determination: *Banque Commerciale SA, En liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286. However where this Court, in civil proceedings, gives effect to a different procedure in accordance with the overarching purpose to facilitate the just resolution of disputes (and does so in the expectation that the parties to the civil proceeding will conform to their statutory obligation to act in a way that is consistent with that overarching purpose) then the function of clearly stating the case to be met by each party and affording procedural fairness so each party can meet that case is performed by the supervised case management process.
9. So, in instances where there is no pleading, in considering whether a case has been stated with sufficient clarity to ensure that a party has the opportunity to meet that case and to define the issues for determination there must be regard to the whole of that case management process.
10. Even where there are pleadings, the modern approach to determining whether a party is bound to the strict limits of the pleading was explained in *Thomson v STX Pan Ocean Co Ltd* [2012] FCAFC 15 at [13] (Greenwood, McKerracher and Reeves JJ) in the following terms:

It is well-established that the main purposes of pleadings are to give notice to the other party of the case it has to meet, to avoid surprise to that party, to define the issues at trial, to thereby allow only relevant evidence to be admitted at trial and for the trial to be conducted efficiently within permissible bounds: see, eg *Dare v Pulham* (1982) 148 CLR 658 (at 664-665). However, it is also well-established that pleadings are not an end in themselves, instead they are a means to the ultimate attainment of justice between the parties to litigation: see *Banque Commerciale S.A. (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 (at 293) per Dawson J … For these reasons, the courts do not, at least in the current era, take an unduly technical or restrictive approach to pleadings such that, among other things, a party is strictly bound to the literal meaning of the case it has pleaded. The introduction of case management has, in part, been responsible for this change in approach: see the observations of Martin CJ in *Barclay Mowlem Construction Limited v Dampier Port Authority* [2006] WASC 281; (2006) 33 WAR 82 (at [4]-[8]). Even before the widespread use of case management, the High Court reflected this approach in decisions such as *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666 (at 668-669) per Stephen, Mason and Jacobs JJ and *Water Board v Maustakas* (1988) 180 CLR 491 (at 497) per Mason CJ and Wilson, Brennan and Dawson JJ.

1. Nevertheless, a concise statement is not an excuse for laziness in analysis or vagueness or imprecision in expression. In *Oztech Pty Ltd v Public Trustee of Queensland* [2019] FCAFC 102; (2019) 269 FCR 349 at [28]‑[30] (Middleton, Perram and Anastassiou JJ), it was observed:

The question of whether a pleading adequately raises a claim or defence is not concerned with the expression of the pleading as a matter of style, or of phrasing, or the structure of the pleading. Neither is it concerned with the formality of the process by which the issues in the proceeding are identified; be it a statement of claim, statement of contentions, concise statement, points of claim or points of defence. The verbal formulation of the allegations of fact, or the contentions of law, need not conform to a particular style guide or to any pro forma template.

The sole objective of a pleading is to clearly identify matters in dispute and difference by and between the parties to the dispute. This objective necessarily involves expressing the factual basis of each claim or defence. It is necessary that the legal elements of each cause of action or defence are expressed by reference to allegations of fact required to establish each element. It is not necessary to plead the legal conclusions that follow from the facts, but it is often convenient to do so. These are trite propositions but nevertheless vital to ensuring that the pleading serves its purpose.

There should be no doubt about whether any particular cause of action is relied upon. At a minimum, the pleading should be pellucidly clear about the causes of action, or claims, relied upon by the applicant, including any claims made upon an alternative hypothesis. The explicit clarity with which a claim is expressed should ensure that there be no need for the opposite party to closely scrutinise the pleading in a process of textual construction to determine whether a particular fact is relied upon, or the purpose for which it is alleged, much less to decide whether a particular cause of action is raised. The same basic requirement applies to any defence raised in answer to a claim.

1. We observe that, for reasons we have given, where a concise statement is used, the role of exposing the material facts relied upon may be performed by other methods of disclosure of the nature of the case to be advanced that suit the circumstances of the particular case. However, in the case of a formal pleading such as a statement of claim or defence, that role is served by the pleading. Even so, as has been explained, there are instances where the manner in which a case unfolds in running is not exposed by the pleading, but nevertheless the case proceeds without objection or difficulty. In such instances, the failure to observe procedural requirements does not enable an unsuccessful party to complain retrospectively on appeal that the issue as joined in the way the case was conducted was not pleaded.

### The concise statement in the present case

1. The concise statement as filed with the originating application articulated claims based upon election, waiver and breach of the duty of utmost good faith. It did not refer to estoppel.
2. At the first case management hearing which was conducted by the primary judge, his Honour observed that the applicant wanted to focus upon waiver and election, a proposition with which counsel appearing for Delor agreed. The position of Allianz was that it maintained that liability had been reduced to $nil by its reliance on s 28(3) of the Act. Given the history of the dealings between the parties, if Delor did not succeed in its waiver and election claims it was not to be expected that there would be a real issue about non-disclosure.
3. In that context, Senior Counsel appearing for Allianz raised a complaint in relation to the concise statement to the effect that it did not explain whether Delor was relying on an election or an estoppel and if estoppel was raised there was no plea of reliance and detriment. On that basis it was suggested that there should be a reply by Delor to the concise response which Allianz was to be ordered to provide. His Honour then inquired of counsel for Delor whether it alleged any change of position and indicated that if reliance was placed upon any form of estoppel then it should be articulated in an amended concise statement.
4. In the result, directions were made for the filing of any amended concise statement by Delor within seven days. It was plain that the purpose of making that direction was for Delor to articulate any estoppel based claim that it was seeking to advance and, in particular, to specify the nature of the material detriment that was alleged to support that claim.
5. The amended concise statement delivered in accordance with the direction of the primary judge alleged that Allianz represented that it would not rely on matters allegedly not disclosed by Delor (paragraph 9). It also added a claim to the effect that (a) Allianz knew or intended that Delor would rely on the May 2017 Email as well as the grant of indemnity to its potential detriment; (b) Allianz induced Delor to believe that its non-disclosure would not be relied upon; and (c) Allianz is estopped from alleging non-disclosure (paragraph 10). There were other aspects of the estoppel claim that are not relevant for present purposes.
6. The concise statement then went on in paragraphs 11‑12 to allege what Allianz had done and then alleges what Delor had done in reliance on the May 2017 Email in the following terms:

Allianz has taken a number of steps consistent with the Waiver Email [being the May 2017 Email] and agreement to indemnify the Applicant, including:

a. Proceeding to obtain a quotation and scope of works to repair the Premises;

b. Engaging Morse Building Consultants to inspect the Premises, and determine the scope of works for payable damage and the rectification of defects;

c. Making payments to lot owners for lost rent;

d. Engaging legal representation to assist in a potential recovery against the original Developer and Builder of the Premises;

e. Taking steps to preserve the right of recovery against the original Developer and Builder of the Premises, by writing to the Australian Securities and Investment Commission requesting a deferral of deregistration.

The Applicant has taken steps (or otherwise abstained from taking steps) consistent with, and in reliance on, the Waiver Email and the election and representations made by Allianz, including:

a. Providing access to the premises, and individual lots, to enable Morse Building Consultancy to inspect the roofs in order to determine the scopes for claimable damage and rectification of defects.

b. Providing a report to Allianz outlining an alternate method of defect repair to that proposed by Morse Building Consultancy;

c. Procuring a report from GHD to establish the extent of damage to the roofs, the cause of particular damage, and the relationship between the Truss Defects and Soffit Defects and the damage;

d. Abstaining from engaging or seeking scopes of works or quotations relating to damage caused by Cyclone Debbie (including resultant damage); and

e. Cooperating with Allianz with respect to the potential recovery action against the original builder and developer and placing recovery in the hands of Allianz.

1. These factual allegations appear to relate to all claims, namely election, estoppel, waiver and breach of duty of good faith. They disclose the case of Delor as to what happened in the dealings between the parties. As such, the claim should not be fragmented. It is a narrative of what happened. It is saying what has been done by Allianz and what Delor has done. It is stating that after the May 2017 Email it was Allianz that carried out the steps that were required to undertake the repairs. It was Allianz who engaged lawyers to look at possible recovery from the original developer and builder. Delor's actions involved providing Allianz with access to the property and the other matters as described, including abstaining from seeking scopes of works or quotations as to the particular damage *that resulted from the Cyclone*. However, it did provide a report to Allianz as to the defects which were the responsibility of Delor under the terms of the May 2017 Email (being the reference to 'the relationship between the Truss Defects and Soffit Defects and the damage').
2. The claim outlined at this point is that both parties took actions to give effect to the May 2017 Email and, in particular, it was Allianz that was dealing with arranging all of the repairs. There was not a claim that Delor pursued *some other course* beyond giving effect to the email, such as by applying its available funds to something else such that they could not be used to repair the relevant damage. There was no case of an active change of position. Rather, the claim was that for 12 months or so the parties gave effect to the May 2017 Email in the manner and respects identified by Delor.
3. The amended concise statement then went on to express the cause of action in estoppel that was relied upon by Delor in the following terms (paragraph 20):

Further and in the alternative, the Applicant says that Allianz is estopped from acting contrary to the Waiver Email, in that:

a. The Applicant adopted the Waiver Email and the grant of indemnity;

b. Both parties, following the Waiver Email and until the Offer, conducted themselves in a manner consistent with the Waiver Email;

c. Allianz induced or acquiesced in the Applicant's adoption of the Waiver Email;

d. The Applicant acted in a manner consistent with and in reliance on the Waiver Email;

e. Allianz knew or intended that the Applicant would act or abstain from acting in reliance with the Waiver Email; and

f. The Applicant will suffer detriment if the Waiver Email is not fulfilled.

1. The allegations in sub-paragraphs e. and f. are to be read in the context of the earlier description of what Delor was doing in reliance on the May 2017 Email.
2. The case disclosed by the amendments is also to be considered in the context of the earlier case management hearing where the primary judge made clear that the amendment to be made, if any, was to articulate any estoppel case that depended upon an alleged change of position by Delor. The amendment was made to articulate a claim that Delor had changed its position to allow Allianz to have carriage of the repairs and investigate recovery from the builder and developer.
3. How had Delor changed its position? It had changed its position by giving effect to the May 2017 Email. What had it done? It had left everything to Allianz to arrange. Necessarily inherent in those claims was an allegation that Delor had not itself taken steps to pursue its claim against Allianz and arrange the repairs. There was no claim that there was some special consequence that flowed from those steps that was not inherent within them. That is to say it was not claimed that it was to be more difficult or more costly or more burdensome to undertake the repairs.
4. Therefore, the nature of the detrimental reliance alleged by the amended concise statement was tolerably clear. It was a claim that, in reliance on the terms of the May 2017 Email, Delor acted to its detriment by allowing Allianz to act as an indemnifying insurer, a capacity in which it had carriage of the adjustment of the loss and could exercise any subrogated rights against the builder and developer. It was a claim that focussed upon what had been done to give effect to the May 2017 Email rather than some other conduct. However, the obverse of the factual allegations as to what had occurred is that it had not taken steps to advance its claim.
5. It may be accepted that it identified no consequence beyond the fact that it had left things to Allianz and therefore had not done anything to pursue things for itself. There was no claim of any detriment beyond that which was the inherent consequence of giving effect to the May 2017 Email. But it was not the case that the narrative description in the concise statement failed to articulate a case of detriment. It is also not the case that the allegation of detriment was confined to what was said in paragraph 12e. concerning abstaining from engaging or seeking scopes of works or quotations as to the part of the damage that was caused by the Cyclone.

### Allianz' concise statement in response

1. The concise statement in response filed by Allianz denied that the sending of the May 2017 Email constituted an election between inconsistent rights. It relied upon an alleged misrepresentation by Delor in addition to the non-disclosure referred to in the May 2017 Email (a claim that, as has been noted, was not accepted by the primary judge and is not maintained by Allianz on appeal). It alleged that the right conferred by s 28 of the Act could not be waived by election and that the parties never reached agreement to indemnify on the terms set out in the May 2017 Email. It then said simply that the May 2017 Email did not give rise to an estoppel for the same reasons (paragraph 23). Finally, it claimed that it was not unconscionable and not a breach of the insurer's duty of good faith to rely on the non-disclosure (and misrepresentation) because, relevantly for present purposes, (a) Delor had made the non‑disclosure which was alleged to be fraudulent; (b) Delor had commenced proceedings seeking to recover the whole of the cost of rectifying the buildings; (c) Delor did not believe that SCI had made a decision on indemnity (relying on the terms of the May 2018 Letter); and (d) Delor had not suffered material prejudice or detriment (paragraph 24). To the extent that these matters were relevant to estoppel they concerned the relief that ought to be granted if the estoppel claim was made out, not the matters relied upon by Delor to support its estoppel claim.
2. We note that the allegation that the non-disclosure was fraudulent was not accepted by the primary judge and is no longer maintained by Allianz. The claim that Delor did not believe that SCI had made a decision on indemnity was also rejected by the primary judge and is no longer maintained.
3. It can be seen that as to detrimental reliance by Delor, the position of Allianz was that the May 2017 Email did not state a final position and it was free to rely upon s 28 of the Act. There was no express denial of the matters put by Delor as to its detrimental reliance. Rather, the case for Allianz focussed upon the character of what was purportedly communicated by the May 2017 Email and the reasons why it could be departed from (being the new allegations of fraud and misrepresentation and the case that it was not a statement of a kind that involved an election as a matter of law or fact). In particular, there was no disclosure of a claim that the matters alleged did not disclose any detrimental reliance.

### Written opening submissions

1. It appears that having regard to the nature of the separate questions, Allianz went first in the filing of written outlines of opening submissions. Some six weeks before the hearing, Allianz provided its outline. It put its position as to waiver in some detail. As to estoppel, its position was somewhat coyly expressed in the following terms:

In the amended concise statement at [12], the applicant contends that it relied upon the 9 May 2017 email by taking various steps. An issue to be explored at the hearing will be whether the applicant relied to its detriment on any representation by the respondent.

1. Even so, two matters may be noticed concerning this brief exposition of the position of Allianz as to the estoppel claim. First, it correctly recognised that it was paragraph 12 of the amended concise statement that articulated the factual matters relied upon by Delor as to detrimental reliance. Second, Allianz understood that it was required to meet a case advanced by Delor that it relied to its detriment on the May 2017 Email. It did not understand the case to be confined to the bare complaint that Allianz was acting contrary to the statement as to its intended future conduct. Therefore, the submissions advanced for Allianz on appeal to the effect that there was no plea of detrimental reliance and it approached the case of estoppel on the basis that it was a claim that the detriment was in the failure to perform what was, in effect, a promise unsupported by consideration as to what it would do and no more (a submission founded on the terms of paragraph 20 of the amended concise statement) should be rejected.
2. As to good faith, the outline articulated only two contentions. First, the Court was not empowered to make a finding of liability against an insurer for breach of the duty as a punitive sanction for not acting in good faith. Second, the insurer's duty to act with utmost good faith does not govern how the insurer may defend the claim, or in any event, it is not a breach of the duty to raise a defence to the claim.
3. As will be seen, it was certainly not the case that at the hearing Allianz approached the claim of estoppel on the basis that there was no allegation of detrimental reliance.
4. About three weeks before the hearing of the two separate questions, Delor filed its outline of opening submissions. It set out the nature of the claims by Delor as to election, waiver and estoppel in a single narrative of the events as contended for by Delor. It characterised the May 2017 Email as an unequivocal communication by an insurer to an insured of its decision to accept the claim under policy terms and a corresponding decision not to decline cover on the basis that its liability was reduced to $nil under s 28 of the Act.
5. Like Allianz, Delor focussed in its written opening submissions upon the claim of election. The submissions then stated:

Even if one could assume that the respondent had not made the election it did, by its words and conduct summarised above it represented to the applicant that it accepted the claim subject to the 'prior defects' exclusion, and would not rely on the alleged non‑disclosure. The applicant thereafter behaved on that basis. It made policy renewal decisions, and did not seek to negotiate renewed cover as if its position in relation to the claim was otherwise. It allowed for the repair investigations and works to be handled largely by the respondent at its pace. It is not now possible to confer upon the applicant the various opportunities it would have had to conduct itself differently had it not been led to believe that the respondent's position was as represented. As such, it is unconscionable for the respondent to depart from its representation, and it is estopped from doing so.

1. It can be seen that three aspects of detriment were outlined, namely:
2. the renewal of insurance with SCI on the basis that the indemnity outlined in the May 2017 Email had been accepted by SCI;
3. allowing the repair investigations and works to be handled by Allianz largely at its own pace; and
4. loss of unspecified 'various opportunities' by Delor to conduct itself differently had it not been led to believe that indemnity had been accepted as outlined in the May 2017 Email.
5. As to the second aspect of detriment, to say that Delor allowed Allianz to handle the repair investigations and works must be to say, in general terms, that Delor did not take steps as to those investigations and works.
6. The third aspect of detriment, expressed in general terms, did not open a case that there was some specific opportunity that was forgone. Rather, it was a claim that Delor would have acted in the intervening period (of over a year) on the basis that indemnity was denied by SCI, an opportunity that cannot now be restored to Delor. In effect, it has lost time and cannot go back to do what it would have done to advance the repairs in the period when the parties were acting on the basis of the May 2017 Email.
7. At the hearing it was agreed that Allianz would go first in the presentation of its case. Senior Counsel began by handing up a list of issues. It was provided on the basis that it was not agreed. Senior Counsel for Delor then provided a copy of the list of issues with handwritten variations. In the context of an ensuing discussion with the primary judge as to the merits of dividing the analysis conceptually for the purpose of identifying the issues, his Honour observed that he did not want the breaking up of the notions of election or waiver or estoppel to inhibit proper analysis and he would not be constrained by the list of issues. What was observed to be helpful was the factual issues encapsulated in paragraphs 1 to 6 of the list of issues.
8. Senior Counsel for Allianz then made clear that the list of issues reflected his understanding of the way the case was pleaded and if there was some other way that election, estoppel, waiver or breach of the duty of good faith was to be put then it would be opposed. From there, the case proceeded into evidence.

### The list of issues for determination

1. Under the heading 'Estoppel', the list of issues stated the following issues (incorporating the handwritten changes made by Senior Counsel for Delor):

Did the respondent represent in the 9 May 2017 email that it accepted the applicant's claim subject to the 'prior defects' exclusion, and would not rely on the alleged non‑disclosure? …

Did the applicant rely on the representation to its detriment, by:

a) making policy renewal decisions, and by not seeking to negotiate renewed cover as if its position in relation to the claim was otherwise;

b) allowing for the repair investigations and works to be handled largely by the respondent at its pace? …

Would it be unconscionable for the respondent to depart from the representation in the 9 May email?

1. It can be seen, consistently with the concise statement, that the claim of detriment in b) is expressed in terms that Delor allowed Allianz to handle the investigations and works. As has been observed, implicit in Delor allowing Allianz to handle things was a claim that Delor did not do anything to handle things.
2. Contrary to the submissions advanced for Allianz on the appeal, it was not a case that was confined to the loss of the benefit of the promise to do the things stated in the May 2017 Email. Such a claim would be obviously deficient. It is not the terms in which Allianz itself expressed the issues in the list of issues. Had it been the thought that was genuinely the issue raised as to detriment then, for reasons that have been expressed, there was an obligation for the list of issues to be framed in those terms. They were not.

### Closing submissions by way of response

1. At the time of presenting closing submissions, Senior Counsel for Delor handed up written closing submissions. As to detriment those submissions stated at paragraphs 122‑133:

In this regard, [Delor] approached the renewal on that basis. In doing so, it lost an opportunity to seek to negotiate renewal terms on a basis which expressly recognised the respondent's communicated decision of 9 May 2017 not to rely on non-disclosure.

Further, it allowed for the repair investigations and works to be handled largely by the respondent at its pace, and to that end, permitted inspectors and other experts to enter onto and conduct inspections and give advice to SCI, and for SCI to consider and act on that advice as and when it saw fit.

As the correspondence makes plain (see the factual narrative schedule), there were extensive delays on the part of the respondent in progressing the repair works, such that the works remained largely untouched almost 12 months later. Had the position been otherwise, the applicant could have decided to undertake and pay for the repair work urgently, and to sue the respondent for indemnity or damages later. It did not do so in circumstances where these matters were in the hands of the respondent.

That loss of time is significant, because following the expiry of the 6 month policy with SCI, and in circumstances where the damage has not been repaired, the applicant has found itself unable to obtain the insurances it requires … Had it known from the outset that the respondent was denying the claim, it would have had the opportunity to decide to conduct its affairs differently, taking into account the fact that it would have 12 months with the benefit of the policy before needing to find another, and deciding to ensure the work was done in that period so obtaining insurance would not present a problem at the end of that 12 months.

Further, if SCI had equivocated in its claim response, the body corporate would have had the opportunity to commence and pursue proceedings at a much earlier point in time. It did not given SCI's confirmed position, and as a result, effectively lost over 12 months of time in respect of the progress of the claim and advancing the remediation works.

Further, if the applicant was left to fend for itself from the outset, it could have treated itself as wholly responsible for pursuing the builder, and the need to do so would have been more acute than would be so if at least partly insured. It did not need to do so, as SCI was taking the lead in this regard. It is not now possible to known [sic] what the applicant might have been able to achieve in relation to claims against the builder had it been driving such a process.

Further, the evidence establishes that the applicant commissioned reports and dedicated a substantial amount of time and effort in working with SCI in relation to the assessment, programming and scoping of rectification works on the basis that the claim was at least partly covered. The body corporate commissioned GHD to develop remediation plans, and Mr Key of Aspire also devoted much time and energy into such matters, including himself developing a scope of works for consideration along with SCI. This work product was all openly shared with SCI, on the obvious basis that the two parties were working together on the scoping of the works.

…

The applicant did not seek to lead self-serving evidence of no probative value about what it would have done on a counterfactual. These matters are best assessed objectively. Where inaction is the natural consequence of the assurance, an inference may be drawn that the inaction was caused by the giving of that assurance …

…

It is not now possible to confer upon the applicant the various opportunities it would have had to conduct itself differently had it not been led to believe that the respondent's position was not as set out in the 9 May 2017 email, or to determine what would have happened to the applicant had it been presented with those opportunities.

The authorities recognise that the fact that a person is placed in a position of being unable to demonstrate what would, or even may, have happened in the counterfactual scenario (it being an alternative, complex and now hypothetical body of human conduct) is itself a significant form of detriment.

1. His Honour indicated that he wanted to hear about estoppel and what was said to amount to detriment. In the course of an exchange with the primary judge, counsel indicated that the principal way the submission as to estoppel was advanced was in effect a form of promissory estoppel.
2. In oral closing, Senior Counsel for Delor put the detriment in the following way:

And there is actual detriment here, in the sense that we've lost 12 months. Not just loss of opportunity in its varied forms. We have lost 12 months where, effectively, nothing has been achieved, because we have put our affairs in the hands of the insurer to progress. That's actual detriment, hence the reference in the outline to notions of putting the building works in the hands of the insurer and notions of pace.

1. At the conclusion of oral closing submissions, each party was given an opportunity to put on short written submissions in response to the submissions of the other party. The primary judge indicated that if there was any suggestion that anything that was being advanced as to the nature of the estoppel case that 'hasn't been placed in the ring' then there would be a further hearing to deal with that because a point of that kind was not going to be dealt with on the papers.
2. Allianz put on such written responsive submissions. They maintained that much of the case as articulated in Delor's written closing submissions was 'not pleaded or opened'. Allianz emphasised that Delor must demonstrate detrimental reliance for the purpose of its estoppel claim. It submitted that there could be no real detriment if the party asserting the estoppel would have been in the same position in any event.
3. The responsive submissions were in the following terms (referring to the applicant's closing submissions using the abbreviation ACS):

ACS [122] contends that the applicant 'lost an opportunity to seek to negotiate renewal terms on a basis which expressly recognised the respondent's communicated decision of 9 May 2017 not to rely on non-disclosure'. That case is not pleaded and it is different to the proposition contained in the applicant's opening submissions at [25]. The applicant's witnesses did not give evidence about this and nothing about it was put to Mr Iconomidis. How an opportunity to negotiate renewal on a different basis had the potential to yield a different outcome has not been explained. There is no basis in the evidence to think that the applicant could have negotiated renewed cover with SCI or any other insurer on better terms than those actually adopted. In any event, even if one were to assume that somehow the applicant could have obtained renewed cover for a lower premium, it would be disproportionate to address that detriment (which could not exceed the extra premium paid) by making the respondent liable for a claim arising in the preceding policy period.

ACS [123] refers to the pace of the repair investigation, but goes further to say that inspectors and experts gave advice to SCI, which it considered and acted on when it saw fit. None of that is pleaded, and the issue about advice was not opened. In any event, there is no detriment. The advice SCI received was on how to repair the applicant's premises. That advice has been communicated to the applicant. There is no basis to conclude that receipt of that advice has changed, much less disadvantaged, the applicant's position. This situation is quite different to *Craine*, where the insurer excluded the insured from its own premises.

ACS [124] asserts that the applicant would have undertaken and paid for the repair work urgently and sued the respondent later. That proposition was not pleaded or opened in this way. Neither of the applicant's witnesses gave evidence to suggest these courses of action would have been taken. The applicant should not be permitted to expand its case in closing submissions.

In any event, the evidence does not support the proposition. The applicant was told that its contribution to the repairs would be 'in the millions' (2/687), but instead chose to borrow only $750,000 (2/910). The applicant's case is that the total repair cost is over $6 million. Even if the applicant had wanted to carry out the repairs more quickly and could have funded it, there is no reason to think the work could have been done more quickly. The self-serving assertions of delay by the applicant's body corporate manager do not establish this. There is no reason to assume that work would have started on 9 May 2017. On 23 May 2017, the respondent's engineer advised that the trusses were defective and could not be salvaged (2/631, 651). The applicant initially resisted this advice because it would cost too much to implement (2/719). The applicant sought its own engineering advice on that issue in August and December 2017 (2/741, 860). Finally, even if all the above matters were assumed in the applicant's favour, whatever detriment arises from the elapse of time between 9 May 2017 and 28 May 2018, it would be disproportionate to remedy that delay by making the respondent liable for a $6 million claim, in circumstances where it is otherwise entitled to reduce its liability to nil.

ACS [125] contends that the applicant lost the opportunity to carry out the repairs before the end of 12 months (presumably this means by 23 March 2018) so that the applicant was not left uninsured. This case was not pleaded or opened. The applicant's witnesses did not give evidence about it and it was not put to Mr Iconomidis. In any event, for the reasons given above, the proposition is not supported by the evidence. There is no evidence that the applicant suffered any detriment by being uninsured for a period of time. In the absence of any evidence of uninsured loss, it would be disproportionate to remedy that situation by making the respondent liable for the claim.

ACS [126] contends that the applicant lost the opportunity to commence and pursue these proceedings earlier. This case was not pleaded or opened. The applicant's witnesses did not give evidence about it. This contention does not appear to add anything to those referred to above.

 ACS [127] contends that the applicant could have treated itself wholly responsible for pursuing the builder. This case was not pleaded or opened. The applicant's witnesses did not give evidence about it. No evidence was adduced by the applicant about what was done in response to SCI's recommendation on 22 June 2017 that it should seek legal advice on how to proceed with recovery action against the builder for uninsured losses (2/689). There is no basis in the evidence to think that a recovery that is no longer available could have been made.

ACS [128] refers to the GHD reports commissioned by the applicant. This case was not pleaded or opened. There is no explanation of how that work constitutes detriment to the applicant.

The applicant's omission to plead these matters is not merely a formal irregularity. The applicant chose to proceed by way of concise statement. At the directions hearing on 11 December 2018, the Court urged the applicant to articulate the basis of its estoppel in the concise statement. The respondent made decisions about what evidence to adduce and how to cross examine the applicant's witnesses based on the concise statement and the applicant's affidavits. The respondent cannot be expected to have guessed the applicant would put the case it now does in closing.

1. These complaints are expressed as substantive pleading points. They assume that the case proceeded on the basis of pleadings. For reasons already stated, that is not the correct approach in determining the nature and extent of the case that a respondent party has to meet where the case proceeds on the basis of a concise statement. There must be due regard to other aspects of the procedure adopted in the particular case to ensure fairness in disclosure of the case. Further, in those matters the respondent is not a passive participant. The respondent must join in the task of exposing the real issues and confining the case to them. If there be uncertainty or ambiguity as to the ambit of the case then it is for the respondent to raise them and seek clarification rather than remain silent and seek to obtain some form of tactical advantage. All parties have an obligation to expose the real issues and confine the hearing to the adjudication of those issues.
2. As has been noted, that is the course that Allianz followed. At the initial case management hearing it sought clarification concerning any case in estoppel. Although it was somewhat obscure in its written outline of submissions, once the submissions for Delor were forthcoming, Allianz prepared a list of issues which it understood the case to raise. At that point, Delor joined in that statement of issues. They articulated the points as to detriment for the purposes of the estoppel case. In that regard, they reflected the amended concise statement.
3. There is considerable unfairness for a party in the position of Allianz if the process of such articulation is left to the filing of closing written submissions. All the more so where, as here, the responding party going first on the preliminary questions seeks, quite properly and consistently with the obligations that have been described, to draw out the nature of the case.
4. It is in that context that the responsive submissions of Allianz filed after the conclusion of the hearing are to be considered.
5. As to the matters raised by Allianz, the following matters may be observed:
6. As to ACS [122], the loss of an opportunity to seek to negotiate the policy renewal as if its position in relation to the claim was not covered by the terms of the May 2017 Email was pleaded and was one of the issues stated in the list of issues. To express that point by saying that what might have been negotiated was the incorporation of the terms of the May 2017 Email in the renewal terms is not to raise a new point. Whether it is a point that is supported by the evidence is a different matter. It was a submission that was within the case as disclosed.
7. As to ACS [123], the issue as to whether Delor allowed Allianz to undertake the repair investigations and work at its pace was articulated in the list of issues. To say in closing submissions that Allianz acted on the advice of inspectors and other experts when it saw fit is to articulate that the matter did proceed at Allianz' own pace. It is not to raise a new issue as to the propriety of the conduct of Allianz. It is to say that Allianz proceeded at its own pace.
8. As to ACS [124], this articulates an affirmative case as to specific steps that Delor would have undertaken, namely acted promptly to undertake the repairs more quickly. It is a claim founded on the allegation that there was undue delay by Allianz in undertaking the repairs. A case of that kind would place in issue whether Allianz had in fact taken more time than was reasonable to investigate, assess and obtain quotations. It raises a case that is beyond the case as disclosed by Delor.
9. As to ACS [126], it includes a claim to the effect that there was an actual opportunity to carry out the repairs within 12 months. A claim of that kind gives rise to many factual issues and is well beyond the case disclosed by Delor.
10. As to ACS [127], the claim is to the effect that it is not now possible to know what Delor might have been able to achieve in relation to claims against the builder had it driven the process. There was no specific allegation by Delor that the delay had any consequence for recovery from the builder. A claim of that kind is well beyond the case disclosed by Delor.
11. As to ACS [128], it is a claim that Delor commissioned work and spent a substantial amount of time and effort on the basis that the claim was partly covered. A complaint of that kind raises issues as to whether such things were done and whether they are steps that have been detrimental in the sense that the work has been wasted. It is a claim well outside the case disclosed by Delor.
12. Overall, the complaints raised by Allianz were justified. Delor did seek to expand its case in closing in an impermissible way.
13. However, as to these complaints, his Honour found as follows at [334]:

The respondent submitted that the applicant did not plead or prove any detriment as to loss of opportunity and did not lead evidence as to what it would have done. The applicant's amended concise statement, concise statement in reply and its submissions and the evidence did not go into particularity of some counterfactual. The opening submissions (and the facts themselves plainly) raised the question of loss of opportunity to conduct its affairs on the correct hypothesis. Guesses in self-serving evidence as to what would have been done would not be very helpful. The obvious objective facts are that Delor Vue would have had to have taken on the repair work itself, denying to the insurer any access to the premises. How that would have taken shape in terms of funding and responsibility is impossible to tell. It is impossible because the clear choice was made by the insurer to take responsibility for the adjustment of the claim, and deny the reality of that counterfactual. There was no surprise or unfairness in how the matter was put in submissions and in argument.

1. These findings proceed on the basis that the case advanced by Delor was confined to the complaint of detriment as articulated in the amended concise statement. They reflect the case as disclosed. They do not take up the invitation to consider the specific matters advanced by way of written closing submissions for Delor.
2. In submissions in the appeal, Senior Counsel for Delor sought to support the reasoning of the primary judge by pointing to the same aspects of detriment that were complained about by Allianz before the primary judge as not being 'pleaded or opened'. For reasons already given, those submissions sought to reframe the case on estoppel in a manner that was not opened below and was not contended below before the written closing submissions. The submissions gave rise to factual matters which could have been contested below. For those reasons, on the present appeal, those submissions should not be accepted as raising a case that was in issue before the primary judge and those matters can be put to one side.

### Conclusion as to the nature of the estoppel case advanced by Delor before the primary judge

1. It follows that the case as to detriment advanced by Delor was a confined one. It was to the effect that Allianz was allowed for 12 months at its own pace to have carriage of the required repairs during which time Delor refrained from taking steps as to those matters itself. During that time Delor renewed its insurance with Allianz on the basis that the May 2017 Email governed their dealings as to the claim for damage from the Cyclone. This claim emerges from the pleading as to what happened to give effect to the May 2017 Email. The case as to detriment was articulated by describing what Allianz did during the period of just over a year, thereby pointing to the fact that it was Allianz and not Delor that had the carriage of the relevant works.
2. The claim by Delor was not confined to the plea that it abstained from engaging or seeking scopes of works or quotations itself. That plea was as to what it did on the basis and at a time when Allianz had the carriage of all the works. As has been explained, implicit in the detailed plea as to what Allianz did is a case that Delor did not do those things. In effect, Delor's claim was that there had been a delay of 12 months when it did nothing and left things to Allianz when it came to the works. It is a claim that as a matter of fact, because of the May 2017 Email, it did not take matters into its own hands, undertake the work and pursue Allianz.
3. However, beyond that, it did not seek to demonstrate a counterfactual as to what might have happened if it had not relied upon the matters stated in the May 2017 Email. It certainly did not seek to advance a case as to any particular way in which things may have played out if it had not left matters to Allianz.

## Issue (5): On what basis did the primary judge uphold the estoppel case?

1. The reasoning pathway of the primary judge as to the estoppel claim was as follows:
2. The nature of the estoppel claim was representational (at [320]‑[325]).
3. The representation made by SCI by the terms of the May 2017 Email was a statement of the basis of the relationship between the parties as to the resolution of a claim (at [323]).
4. Although the effect was to adopt a conventional relationship, the claim could be analysed according to equitable principles (which gave significance to the same factors as a common law conventional estoppel) (at [323]‑[326]).
5. Allowing SCI to act on the basis of the represented position gave SCI 'certain rights such as access to the property and the name of the insured in exercising its entitlements and fulfilling its duties under the policy' (at [326]).
6. The relationship established by the represented position lasted for over a year (at [327]).
7. The insurer resiled from the represented position without explanation (at [328]‑[330]).
8. The relationship gave the insurer 'the entitlement … to adjust the claim, to enter the property whenever it needed to, and to propose to sue a third party [the builder] in furtherance of its subrogated rights' (at [331]).
9. The key finding as to detriment was then expressed at [333] as follows:

The arguments of the parties descended to aspects of prejudice in specific respects such as the speed of the works. But the prejudice here was not specific, nevertheless it was real. It involved the passage of 12 months in which Delor Vue could have taken its own fate in its own hands and acted for itself in rectifying the property to the extent it was financially able to do so and in suing the insurer. How that all would have played out is impossible to tell. It is impossible because the parties conducted themselves on an entirely different basis. Allianz gained the benefit of assessing its own position by full access to the property and the full co-operation of Delor Vue, being circumstances that arose because of the continuing relationship in adjusting the claim under the policy.

1. It would be unjust, inequitable and unconscionable to permit Allianz to resile from its stated position in the May 2017 Email and it should be held to its stated position (at [337]).
2. In reaching these conclusions it was relevant that SCI was bound by the duty of utmost good faith in its dealings with Delor (at [331], [337]).
3. The change of position found by his Honour to be productive of detriment on the part of Delor was to refrain from taking its own fate into its hands by (a) acting for itself in rectifying the property to the extent it was financially able to do so; and (b) suing the insurer.

## Issue (6): Did the primary judge err in upholding the estoppel case?

### Detriment by Delor refraining from suing Allianz

1. As to the detriment by refraining from suing Allianz as insurer, Allianz contended that the primary judge was in error in finding detriment because 'once Allianz reasserted its right to rely on s 28(3), Delor's opportunity to challenge Allianz's assertion was unimpaired'. It is true that there was no suggestion that Delor's defence of the claim by Allianz (brought contrary to the conventional relationship the parties had adopted for over a year based on the May 2017 Email) was affected by the delay.
2. However, that is not to say that his Honour was in error in finding that it was 'impossible to tell' how a dispute between Delor and Allianz may have played out if Allianz had denied the claim from the beginning. It is to pose the issue of detriment too narrowly to ask, as Allianz does, whether the result may have been different. Litigation is an uncertain process. Most disputes are resolved rather than determined by a court hearing. The intervening period and change of position on the part of Allianz after the passage of a considerable period of time meant that the parties came to join issue in their dispute after a lot of water had passed under what had been the agreed bridge between them. By then, they had a different dispute. They had a dispute that encompassed issues between them as to responsibilities that arose from the dealings between them when they were acting on the basis of the matters stated in the May 2017 Email.
3. If Allianz had denied the claim from the outset then, unburdened by the subsequent dealings, the claim may have resolved in a particular way. The same sentiment that led the insurer to the position stated in the May 2017 Email which the primary judge described as 'honourable' (at [347]) may well have been reflected in the way any dispute could have been resolved.
4. Further, an inquiry of that kind is not aided by evidence given on a hypothetical basis by the parties. Unlike those instances where a party says that an entirely different course would have been followed, the uncertainty as to what may have occurred does not depend upon the actions that might have been taken by one party or the other. In such instances, it is necessary to receive evidence as to the alternate possibility that one party says it would have pursued. But where, as here, the detriment takes the form of delay in adjudicating the same dispute that would have been adjudicated earlier if there had not been delay (unaffected as to the evidence and arguments that might have been advanced earlier) there is nothing to be added to the Court's understanding by conjecture by the parties as to how the resolution of the dispute may have unfolded.
5. For those reasons, it is not the case that the determination by the primary judge that Allianz was entitled to rely upon s 28(3) of the Act meant that there was no detriment to Delor.
6. For reasons already given, a detriment of the kind found in relation to refraining from taking steps to pursue Allianz was disclosed as part of the claim that Delor allowed Allianz to pursue the investigations, undertake the repairs and look to the developer and builder to recover the costs.
7. This aspect of the contentions advanced by Allianz on appeal does not demonstrate error in the approach of the primary judge.

### Detriment by Delor not taking steps to carry out the repairs

1. As to detriment from delay in Delor carrying out the works, Allianz contended that Delor did not 'plead' that by reason of the May 2017 Email it refrained from commencing the repairs sooner than it otherwise would. However, as has been described, what was disclosed by Delor was a claim that it abstained from taking steps for itself. For reasons already given, to the extent that Delor sought to turn that claim into a complaint that Allianz delayed unduly or had taken more time than was reasonable, such matters were outside the nature of the case that was disclosed to Allianz. However, what the case did include was a complaint that a consequence of Allianz resiling from its representation was that Delor had refrained for a year from taking the steps that it had left to Allianz.
2. It was not found by the primary judge that Delor would have been able to commence the work sooner. Again, his Honour's approach was to find that it was impossible to tell what would have happened. In considering the finding, it is important to bear in mind that the primary judge reviewed all of the dealings between Delor and Allianz and made findings in considerable detail as to how those events unfolded. As a result, his Honour was in an informed position to reach a conclusion from that evidence as to whether there was uncertainty as to how matters might have unfolded if Delor had been responsible for carrying out the repairs. In particular, his Honour was familiar with how the issues in relation to the repairs had emerged and the character of the problems that were to be addressed by remedial works.
3. Contrary to the submissions for Allianz there was no implicit finding by the primary judge that it had been shown that the works will take longer to complete than would have been the case if Allianz had not accepted the claim. Rather, his Honour found that evidence in the form of self-serving guesses as to what would have happened if Delor had been responsible for the repairs from the outset would not have been helpful. Further, his Honour proceeded on the basis that it was impossible to tell how the repair works would have 'taken shape in terms of funding and responsibility': at [334]. This is to recognise the reality that litigation in the form which ensued after Allianz resiled from the terms of the May 2017 Email was not the only possibility as to how events may have unfolded if the May 2017 Email had not been sent and relied upon by Delor for over a year. Quite properly, his Honour recognised that the litigation that eventually unfolded was a future that was influenced by the disputation about giving effect to the May 2017 Email.
4. Allianz took issue with the primary judge finding detriment in this manner. The submission advanced was that in order for Delor to establish its claim it needed to prove a counterfactual. In that regard, as has been noted, Allianz did not state that an issue in the proceeding was whether the detriment as alleged was sufficient as a matter of law to establish detriment. The case was not fought on that basis.
5. In any event, it is not the case that there must always be evidence of a counterfactual. Such a contention is contrary to the considered reasoning by the primary judge expressed as a member of the Court of Appeal in New South Wales (Giles JA agreeing) in *Delaforce v Simpson-Cook* [2010] NSWCA 84; (2010) 78 NSWLR 483. His Honour relied upon that reasoning in the present case at [332]‑[336]. Of particular relevance is the following passage from *Delaforce* as quoted by his Honour:

The importance of keeping a party to a representation or encouragement previously made is all the stronger where, as here, the encouragement or representation has been relied upon by a party to abandon a course of conduct that could possibly have led to a different outcome. This can be described in the language of loss of a chance that is not fanciful or unrealistic, or in the language of proceeding thereafter on the basis of a new or changed convention or conventional basis. Such expression of the matter is not different to how Dixon J put the matter in *Grundt v Great Boulder Proprietary Gold Mines Ltd* [1937] HCA 58; (1937) 59 CLR 641 at 674-675. For instance, if, as here, in reliance upon a representation or encouragement, a court case is abandoned and the representation or encouragement is later sought to be resiled from, the party to whom the representation or encouragement was made and in whom the expectation was raised is left in the position not only of the loss of the entitlement to pursue his or her rights in the case in the past, but also is likely to be in the position of being unable to demonstrate what would, or even may, have happened in the case, it being an alternative, complex and now hypothetical body of human conduct. 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. Of course, if it is self-evident or can be clearly demonstrated that the case was fanciful or otherwise doomed to fail, there may be no real detriment; but that was not the case here. The respondent gave up her right to propound her case in the Family Court on the faith of the deceased's representation. It was not self-evident, or otherwise clearly demonstrated, that she could not have been successful in securing her rights to the subject property after the death of the deceased.

1. In applying that reasoning his Honour stated at [335]:

Apart from anything else, such an approach wrongly assumes that concepts such as detriment, prejudice and injustice that arise out of resiling from a living business relationship are restricted to what can be identified in hindsight. Such an approach also pays insufficient regard (especially in a relationship demanded by statute to evince the utmost good faith) to the concern of equity of keeping parties to their representations or promises.

1. There is no reason to confine this reasoning to a particular type of estoppel case. The insights that inform the approach are of general application.
2. Further, the evidence of a party claiming detrimental reliance could never be determinative and it not always the case that evidence is needed to prove such matters. As was stated by Meagher JA (Leeming and Payne JJA agreeing) in *Q (A Pseudonym) v E Co (A Pseudonym)* [2020] NSWCA 220 at [119]:

In actions for deceit, it has long been recognised that a rebuttable inference of inducement is raised by entry into a contract after a representation was made 'of such a nature as would be likely to induce a person to enter into a contract': *Smith v Chadwick* (1884) 9 App Cas 187 at 196 (Lord Blackburn); *Gould v Vaggelas* (1984) 157 CLR 215 at 236 (Wilson J, Gibbs CJ and Dawson J agreeing), 250 (Brennan J); [1985] HCA 75. As Gummow, Hayne, Heydon and Kiefell JJ [sic] observed in *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25; (2009) 238 CLR 304 at 351; [2009] HCA 25, that proposition concerns the law of deceit, and 'consideration of its application must always attend closely to all of the evidence'. In the law of estoppel, the position remains that there must be reliance in fact, and that the legal burden of proving reliance never shifts: *Sidhu* at [57]-[61]. As a mere factual matter, however, the position also remains that in some cases it may 'fairly be said that, once it is established that the representation was made, the representation together with all the other facts of the case enables the claimant to say that, unless the defendant can elicit some further evidence to the contrary, the claimant will have discharged the onus': *Steria Ltd v Hutchison* [2006] EWCA Civ 1551 at [130] (Neuberger LJ).

1. Therefore, the proposition that Delor was required to prove a counterfactual must be rejected. Rather, the question whether there was detrimental reliance was a factual one. In a case where representational conduct is alleged to give rise to an estoppel, such reliance may be established having regard to the nature of the representational conduct and the evidence as to what actually occurred. Those matters may be sufficient, of themselves, to demonstrate that there was detriment in relying upon the representation and following the course of conduct that was induced by it. In other words, the nature of the reliance may itself manifest the detriment, even though it may not be possible to be precise as to how events may actually have unfolded if there had been no such reliance.
2. The extent of the period when there was reliance in the present case invited such an approach. The longer matters went on the more likely it was that there would be detriment the precise character of which would be uncertain because of the length of time that matters were in the hands of Allianz rather than Delor. They created a legacy of dealings between the parties that would affect how they would address their relationship thereafter. It was simply not possible to go back to the way things were at the time the May 2017 Email was sent by SCI to Delor.
3. The reasoning pathway that was adopted by the primary judge was one that was legally open in the circumstances. It could not be said to have been legally in error to reason in that manner. The factual finding itself is not challenged. A challenge to the factual finding would need a ground of appeal that articulated the factual error and pointed to all of the evidence that may bear on the factual finding (whether for or against). The case for Allianz was not put in that way. It was argued that the primary judge adopted the wrong legal approach. For the reasons that have been given, that argument should not be accepted.
4. Otherwise, Allianz sought to confine the case as disclosed to the particular complaint that Delor abstained from seeking scopes of works or quotations relating to the damage. However, for reasons already given, that is to read the case as disclosed too narrowly.
5. Allianz also submitted that there was no evidence that the steps taken by Allianz were themselves detrimental to Delor. However, that is to raise a straw man because no aspect of the case run by Delor was that Allianz acted in a way that actually damaged the ability to undertake the repairs despite the delay.

### Proportionality

1. Allianz claimed that if there was substantial detriment then the present case was not one where Allianz should be held to the representation. It said that to do so would be to make Allianz responsible for Delor's claim which was said to exceed $6 million when it has been found that Allianz would otherwise have been entitled to reduce its liability to nil by relying on s 28(3) of the Act.
2. The submission may well overstate the position. It appears that Allianz has maintained throughout that the extent of the defect for which it is liable under the terms of the May 2017 Email is for a small part of the overall loss. The parties continue to be in dispute as to the value of the works for which Allianz accepted liability under the May 2017 Email. It appears that Allianz has maintained that its liability is of the order of $1 million only. So much is reflected in the terms of the May 2018 Letter.
3. However, it may be accepted that to hold Allianz to its representation will result in a substantial liability for Allianz which, as matters now stand, it can be confident it could have avoided if it had relied upon s 28(3) from the outset.
4. The difficulty is that the inquiry to be made in considering whether to grant relief that would hold a party to the represented position is broader than the submission would suggest. In order to make the assessment as to what equity would require in all the circumstances there must be regard to the consequence for the party who has relied upon the represented position to its detriment. There must be a focus on the consequence for the relying party if the representing party was allowed to resile. It is not correct to focus solely on the consequence for the representing party in the manner which the submission for Allianz would invite.
5. It was submitted by Allianz that Delor has the reports commissioned by Allianz concerning the repairs as well as its own reports and therefore the time spent has been to the benefit of Delor. However, it is not the case that the detriment is limited to the extent to which Delor refrained from commissioning such reports. As has been explained, the detriment is to be found in the obverse of Allianz having had conduct of the repairs for 12 months.
6. The fact that the legal merit of the claim by Allianz that it could rely on s 28(3) is now known does not mean that the detriment to Delor is to be measured on that basis. As has been explained, the conduct by Allianz meant that it (and not Delor) has had the carriage of the repairs and for the whole of that time Delor has, by reason of the representation, had no reason to pursue Allianz. The opportunity that it lost must take account of the nature of the course that may have been followed if Allianz had sought to rely on s 28(3) *from the outset* (at least from the time of sending the May 2017 Email).
7. Delor cannot be restored to a position where it is dealing with Allianz in respect of its claim unburdened by all that has occurred because the parties followed the course of dealing with the claim on the basis represented by the May 2017 Email. It is by no means clear that if Allianz had adopted the position from the outset that it relied on s 28(3) that the result would have been that litigation would have been pursued to determination by a court. It is the injustice of now putting Delor in a position where it is bound by the decision of the primary judge being an outcome that has ensued because Delor was encouraged to deal with its claim in a particular way with all the consequences for the relationship between insurer and insured that followed. It is apparent from the findings of the primary judge that by the time matters came before the primary judge its dispute with Allianz was very different in character to any dispute that it would have had with Allianz had Allianz denied the claim on the basis of s 28(3).
8. The consideration of the issue of proportionality by the primary judge was orthodox. Once the nature of the detriment to Delor of allowing Allianz to resile at this stage from its representation is properly understood, it is difficult to quantify in any meaningful way what Delor has lost.
9. It is also appropriate for other matters to be taken into account. What may be appropriate relief in an ordinary commercial dealing is not necessarily appropriate as the relief to be granted as against a party who was bound by statute to conduct all of its dealings with an insured in utmost good faith. The primary judge was correct in taking that aspect into account: at [337].
10. The matters raised do not demonstrate legal error in the reasoning of the primary judge as to proportionality.

## Issue (7): Did the primary judge err in upholding the waiver case?

1. It is important to be clear as to the basis upon which the primary judge upheld the claim of waiver. His Honour noted the caution to be observed in the assertion of taxonomical clarity in relation to the terminology of waiver: at [340]. In that respect, his Honour's reasons recognise the reality of the difficulties that arise in this area given the divergence of views expressed in *Verwayen*.
2. His Honour took some care to make clear that the reasoning that was applied was by reference to those cases in which the terminology of waiver was used in the analysis, particularly *Craine* and *Agricultural & Rural Finance v Gardiner*. Rather than reason by reference to abstracted principle, his Honour reasoned by precedent observing the extent to which the circumstances in the present case were similar to the circumstances in *Craine*. In an area where there appear to be cases of waiver that cannot be explained by reference to principles of election or estoppel, such an approach appropriately reflects the manner in which the common law develops. Like cases are followed in subsequent cases until there is a body of case law from which principle may be extracted in order to ensure coherence and consistency. The reasoning of the primary judge was orthodox in this respect.
3. In the face of *Verwayen* it cannot be said that there is no room for the application of waiver outside election and estoppel. Also, the reasoning in *Agricultural & Rural Finance v Gardiner* indicates that considerable care must be exercised in seeking to extract statements of general principle as to any overarching doctrine of waiver from the statements in *Verwayen*. In those circumstances, the methodology used by the primary judge was not only orthodox it was appropriate given the current state of the law.
4. For reasons that have been given, *Craine* has been identified as a case of a kind that illustrates the application of the doctrine of election. For reasons that have been given, it leads to the conclusion that the doctrine applies in this case. However, if one starts on the basis that *Craine* is not a case of election and it is not properly seen to support that conclusion in this case, it would be strange that the consequence would be that Delor as the insured would not succeed when the insured in *Craine* would have succeeded on the basis of waiver but for the finding about the need for any waiver to occur formally. In other words, it is difficult to see how the reasoning in *Craine* would not apply to the facts in the present case.
5. Therefore, it is understandable that his Honour, having concluded that election did not apply, would then reason by reference to the extent to which the present case was on all fours with *Craine*. As his Honour said at [339]:

I turn to the waiver case to which I adverted earlier. In this case, the deliberate and knowing taking and expression of a position confirming cover notwithstanding the existence of rights or an available position as to rights under or in connection with an insurance policy to deny liability for this claim and thereby to obtain the benefit as insurer of rights of full access to the insured property and of the full co-operation of its insured illuminates a stark similarity with the position in *Craine v Colonial Mutual*. The discussion by Isaacs J, in delivering the reasons of the Court (Knox CJ, Isaacs and Starke JJ), emphasised at 326 the intentionality of the distinct act, done with full knowledge, the intention being to treat the relationship as if the condition had not occurred, to prevent two inconsistent positions being taken: approbating to get some advantage to which he would not otherwise be entitled, and later reprobating by the inconsistent position. The drawing closely together of such circumstances exhibiting waiver to the operation of estoppel can be seen in *Thompson v Palmer* [1933] HCA 61; 49 CLR 507 at 547 (per Dixon J) and *Yorkshire Insurance Co v Craine* [1922] 2 AC 541 at 546-547. All the elements of the circumstances that led to a conclusion of waiver in *Craine v Colonial Mutual* were present here: full knowledge, the deliberate act and intention to take a position inconsistent with any assertion of a right under s 28(3), that is the deliberate act to confirm cover, the intention being to treat the relationship as if there had been no non-disclosure, whereby Allianz was thereafter entitled to the advantage (that it thereafter had) of adjusting the claim and thereby assessing its own position by free and full access to the property and the co-operation of Delor Vue, an advantage which it would not have had had it asserted its entitlement under s 28(3) to act on the basis that its liability was nil because it would never have issued the policy. If it had done that the assessment of the damage, its repair and the control of the premises could have all been in the hands of Delor Vue.

1. To these matters, his Honour added the advantage secured by Allianz by its conduct in stating to Delor that it would indemnify on the terms stated in the May 2017 Email. It obtained the benefit of being able to exercise the rights conferred by the insurer by the policy in circumstances where it was an indemnifying insurer. This meant that, like the insurer in *Craine*, if it was allowed to resile from its conscious decision made with knowledge of the facts not to invoke s 28(3) (the terms and effect of which should be taken to be known to an insurer such as Allianz), it would be permitted to approbate and reprobate: at [341]
2. Allianz now knows with certainty that it had the right conferred by s 28(3) because of the unchallenged finding of the primary judge that Allianz would not have entered into the policy had it known the facts at that time. However, in May 2017 it would have faced possible reputational issues and the risk that it would not have established the causation element of s 28(3) to the extent of full liability under the policy. There was no certainty that s 28(3) could be invoked as to the whole of the claim by Delor. Until there could be a determination of that issue, Allianz would not have been subrogated to the rights against the builder and developer or exercise other rights under the policy. Importantly, we do not know the extent to which such matters affected the decision by Allianz to send the May 2017 Email and act in the way it did in giving effect to the terms of the email for over a year because it gave no evidence to explain its decision to seek to change its position and assert that s 28(3) applied.
3. In the appeal, Allianz urged taxonomical strictness, denying the existence of a species of waiver that extended beyond the factual circumstances of *Verwayen*. It contended that there was no waiver outside election and estoppel. For reasons that have already been expressed, the foundation for that submission is not to be found in the reasoning of the High Court in this area. *Verwayen* is not authority for the proposition and the decision in *Craine* cannot simply be put to one side.
4. It was submitted that the decision in *Freshmark* was authority standing against the existence of a species of waiver that is independent of estoppel and election. The conclusion reached by Dowsett J (McPherson JA agreeing) has already been quoted. It was not to the effect contended for by Allianz. Rather, it was to the effect that a mere indication of an intention not to rely upon contractual rights will not generally constitute a waiver sufficient to bar a future action to enforce such rights. The primary judge did not reach the conclusion that there was waiver in the present case based upon a 'mere indication of an intention'.
5. For those reasons, if contrary to the views that have already been expressed, election did not apply (being the premise of the challenge by Allianz to the finding by the primary judge of waiver), then it has not been demonstrated that the primary judge was in error in concluding that there was waiver of the kind found by the High Court to exist in circumstances that could not be materially distinguished from the present case.

## Issue (8): Did the primary judge err in finding that Allianz breached its duty of utmost good faith?

1. The primary judge reasoned in the following manner as to why the conduct of Allianz in resiling from the considered position taken in the May 2017 Email was unjust, unreasonable and unfair and also below a commercial standard of decency and fairness and therefore a failure to conform to the statutory requirement that the insurer act in utmost good faith (see [347]):

The conduct of Allianz was a resiling from a considered position (taken with legal assistance and against the opinion of a senior underwriter of SCI) of a claim of significant financial dimension to an insured who had since March 2017 been open, co-operative and responsive in the provision of information. A degree of terseness had developed by May 2018 in the communications between insurer and insured. But that in no way justified Allianz going back on its representation or promise of a year earlier, a representation or promise that gave it the benefit of full possession of the site and co-operation of the insured in which to assess its own position. It is not appropriate to seek to define the standard within s 13. It is a normative standard involving the considerations referred to in *CGU v AMP* in the High Court and in the Full Court. Description of elements and circumstances better illuminate the standard involved. The expression of Gleeson CJ and Crennan J of a 'commercial standard of decency and fairness' is, for these circumstances, most apt. The persons who made and make up the interests behind Delor Vue were, as SCI and Allianz must have known, ordinary people. The damage to their properties will be (as was always evident) expensive to remedy. The policy terms will see a division of responsibility for that. The position taken in the 9 May 2017 email was clear and (if I may say) honourable and also, probably, in the perceived commercial interests of Allianz. That is probably why it was taken - for all those reasons. A year was spent adjusting the claim, taking advantage of the rights of access to the property, and obtaining the co-operation of the insured. Then, for reasons that have never been explained, a take-it-or-leave-it offer was made, resiling from the 9 May 2017 email. Even if it be that the division of financial responsibility in the 28 May 2018 letter turns out to be the correct division, there was still a lack of decency and fairness in the position that was taken. If that was Allianz's view, a view reached after all the advantages of access to the property, adjusting the claim, and expecting and being given the co-operation of the insured, decency and fairness required an offer to arbitrate or litigate the loss in some acceptable dispute resolution forum on the basis that the 9 May 2017 email represented or promised: the policy terms. Decency and fairness were not displayed by threatening an approach previously clearly disavowed which involved further significant personal strain and financial risk to these people, unless a take-it-or-leave-it offer was accepted.

1. The contention advanced by Allianz as to why there had been error in the reasoning of the primary judge as to the duty of utmost good faith rested on the footing of the determination by the Court that s 28(3) applied. It was submitted that it could not be a breach of the duty to rely upon the Court's determination under s 28 which favoured Allianz.
2. However, to reason in that manner is to evaluate the conduct of Allianz with hindsight. The conduct of Allianz is not vindicated or justified as fair and decent just because it was ultimately successful in its claim. In May 2017, as an insurer, it may be taken to be aware of its rights under s 28 of the Act and its obligations under s 13 of the Act to act towards Delor with utmost good faith. Cognisant of that position it considered what it should do and it communicated to Delor the terms of the May 2017 Email. It then acted consistently with that email for more than 12 months. When it made the decision to proceed in that way on a formal and considered basis and then to give effect to its decision it had no certainty as to what the outcome might be if it was to assert that it had no liability under the policy. The outcome to that effect depended upon the consideration of detailed evidence including the evidence of its officers as to matters that affected the decision whether to issue the policy.
3. In those circumstances, whether Allianz acted in good faith was to be evaluated according to the known circumstances that provided the context for the dispute that arose in May 2018 and the subsequent proceedings in this Court. An evaluation as to what was required to conform to the obligation to act in good faith was not be deferred until the outcome of those proceedings was known. The obligation arose and was to be applied to the conduct of Allianz well before the result was known. At least for 12 months those proceedings were not contemplated by either party because the position had been conceded by Allianz.
4. Significantly, as has been noted (and as was emphasised by the primary judge), Allianz offered no explanation for its change of position. Whether it was consistent with utmost good faith in the circumstances which pertained by May 2018 for Allianz to then rely upon s 28(3) of the Act was a very different question to whether it would have been consistent to do so from the outset rather than send the May 2017 Email. The context in which Allianz acted and resiled from its past course of conduct must be brought to account. As must the fact that no reason is given by anyone with authority to speak for Allianz.
5. The effect of an insurer proceeding for a year on the basis that liability will be accepted on a particular basis only to recant that position results, at least, in a considerable delay to the resolution of the issue. Instead of the dispute crystallising in May 2017, the parties proceeded down a particular path for over a year.
6. Whether the conduct of Allianz in all the circumstances amounted to a breach of the duty required an evaluative decision to be made by reference to all of the circumstances of the case. The primary judge examined those circumstances with considerable care making findings of all that happened in detail. The appellant did not seek to challenge those findings choosing instead to point to the conclusion that had been reached by the primary judge at the end of that process as demonstrating that Allianz could not be said to be acting without utmost good faith. For reasons that have been given, that submission proceeds on a false premise and should be rejected.
7. Allianz further submitted that s 13 of the Act imposes a contractual obligation to act consistently with commercial standards of decency and fairness. On the basis of that re‑formulation of the statutory language it was submitted that the duty in the context of the performance of the contract of insurance is substantially the same as the implied term of good faith and reasonableness in commercial contracts. The submission of Allianz to that effect should not be accepted for two reasons. First, as was noted by the primary judge, the decision of the High Court in *CGU Insurance Limited v AMP Financial Planning Pty Ltd* [2007] HCA 36; (2007) 235 CLR 1 expressed agreement with the views in *AMP Financial Planning Pty Ltd v CGU Insurance Ltd* [2005] FCAFC 185; (2005) 146 FCR 447 expressed by Emmett J at [87], [89]. Those views emphasised that the concept of utmost good faith involves something more than mere good faith and in the context of insurance 'encompasses notions of fairness, reasonableness and community standards of decency and fair dealing': at [89].
8. Second, whether there is a general duty to act in good faith in the performance of contracts that forms part of the common law of contract remains an open question: *Commonwealth Bank of Australia v Barker* [2014] HCA 32; (2014) 253 CLR 169 at [42], [107]; and *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5; (2002) 240 CLR 45 at [40], [86]‑[88], [156]. The cases apply good faith in a contractual context in particular respects and care must be taken to understand that context. Colvin J considered these matters in *Australian Competition and Consumer Commission v Geowash Pty Ltd (Subject to a Deed of Company Arrangement) (No 3)* [2019] FCA 72 at [707]ff. Section 13 of the Act applies more broadly. Its scope should not be confined by reference to the use of the same terminology in a broader contractual context.
9. For those reasons, error has not been demonstrated in the reasons of the primary judge concerning the breach by Allianz of its duty of utmost good faith.

## Issue (9): Having regard to the conclusions as to each of the other issues, was the relief granted by the primary judge proper and appropriate?

1. It follows that Allianz has not demonstrated error in the reasoning or conclusions of the primary judge and the declaratory relief granted by the primary judge to give effect to that reasoning should not be disturbed.
2. Having upheld the claim of breach of the duty of utmost good faith, the primary judge reasoned at [349]‑[350] as follows:

The conclusion of a lack of utmost good faith is not a punishment. There is no need to restrict a party to damages. An injunction would be available to hold the insurer to its stated position, if the breach of the duty is the resiling from that position. Given my views about estoppel and waiver, it is unnecessary to make an order for injunctive relief.

This view is not affected by the misrepresentation claim not being referred to in the 9 May 2017 email. That circumstance has never been put as the determining factor in the change of position. When one appreciates the facts surrounding that part of the claim, one is not surprised by that fact.

1. Allianz took issue with that approach. If the appeal had succeeded in relation to all issues other than good faith then it would have been appropriate to consider the circumstances in which an order of that kind might have been appropriate. As part of that consideration it would have been necessary to consider the contention that no such claim was made as part of the concise statement or application and the significance of that fact if it was shown to be the case.
2. However, given the conclusions that have been reached as to election, estoppel and waiver no purpose would be served by considering whether such relief would be appropriate given that other claims will require Allianz to give effect to the position as stated in the May 2017 Email.

## Conclusion and costs

1. For the reasons that have been given, the appeal should be dismissed and the matters raised by Delor by way of contention should be upheld. Delor having been entirely successful, Allianz should pay the costs of the appeal.

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| --- |
| I certify that the preceding two hundred and sixty (260) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices McKerracher and Colvin. |

Associate:

Dated: 9 July 2021

REASONS FOR JUDGMENT

DERRINGTON J:

# introduction

1. Tropical North Queensland is a place known for the not infrequent occurrence of cyclones. Its local inhabitants are acutely aware of that as, undoubtedly, are insurers who accept risks relating to property damage in that location. In that context, any insurer proposing to provide such cover in that region can expect that a prospective insured will inform it of any significant defects, of which they know, in any building intended to be the subject of cover. In this case, the body corporate responsible for the unit development known as “Delor Vue”, located at Cannonvale, near Airlie Beach in the Whitsundays area of Queensland, knew of the defective condition of the roofs of the 11 multi-story apartment buildings constituting the development. That was a matter that a reasonable person would have known was relevant to an insurer’s determination whether to provide insurance in relation to the buildings. Despite that, it did not inform Allianz Australia Insurance Ltd (through its underwriting agent, Strata Community Insurance Agencies Pty Ltd (SCI)) (referred to herein simply as “Allianz”) of that fact when negotiating for a policy of insurance which was issued on around 22 March 2017.
2. On 28 March 2017, tropical cyclone Debbie crossed the Queensland coast around Airlie Beach and caused substantial damage to the buildings in the Delor Vue complex. Allianz responded to the body corporate’s claim on the policy by engaging adjusters to assess the claim and, within a relatively short time, became aware that the body corporate may have breached its disclosure obligations under s 21 of the *Insurance Contracts Act 1984* (Cth) (the ICA) by omitting to mention defects in the roofs. It also concluded that much of the damage sustained to the buildings was consequent upon their defective construction and that any such damage was excluded from the property damage cover in the policy.
3. Nevertheless, on 9 May 2017, Allianz advised the body corporate (which hereinafter is also referred to as “Delor Vue”) that, despite the apparent non-disclosure, it intended to honour the policy according to its terms. It did, however, emphasise that it would not provide indemnity in relation to the defective construction of the buildings, and that Delor Vue would be required to meet the cost of any remediation work in that respect. For the following year, Allianz set about attempting to adjust Delor Vue’s claim. This was no simple task given the relative remoteness of the location, the difficulties of undertaking inspections, and the challenge of dissecting the damage contributed to by the structural defects in the buildings from damage caused solely by the cyclone. Allianz engaged and paid for engineers who provided reports on the damage and obtained building quotes and scopes of work for the repairs. It also made payments under the policy for loss of rent and the accommodation of persons displaced by the damage caused to their units. In total, it expended nearly $200,000 in payments under the policy and on the costs associated with preparing for the remediation of the buildings.
4. By about May 2018, it had become apparent that the total cost of effecting repairs to the buildings was substantially greater than originally appreciated. The then estimated cost was between around $4 million to $6 million and, according to Allianz’s assessment, the cost of rectifying the defective construction, which was the subject of the policy exclusion, was between $2 million to $3 million. Also at about that time, Delor Vue’s solicitors commenced accusing Allianz of, amongst other things, failing to make its position on policy coverage clear, failing to honour its obligations of utmost good faith, and failing to comply with industry codes of practice.
5. On 28 May 2018, Allianz offered to pay Delor Vue the sum of approximately $918,000 under the policy in settlement of the claim. That offer was subject to certain conditions and expressed to be open for a period of 21 days. Allianz indicated that if the offer were not accepted it would rely upon Delor Vue’s pre-contractual non-disclosure to reduce its liability under the policy to “nil” consequent upon the operation of s 28(3) of the ICA. Delor Vue rejected that offer and commenced these proceedings.
6. The learned primary judge accepted that Delor Vue had breached its disclosure obligations under s 21 of the ICA such that the amount of Allianz’s liability under the policy was nil. However, he also concluded that Allianz was now unable to rely upon Delor Vue’s non-disclosure because it was estopped from doing so, had waived its right to do so, or would be a breach of its duty of utmost good faith if it did so. His Honour rejected Delor Vue’s claim that Allianz was now unable to rely upon s 28(3) because it had made an election between that right and a mutually inconsistent right.
7. On this appeal, Allianz submitted that it was not estopped from relying upon the operation of s 28(3). It submitted that no proper case of estoppel was pleaded against it because, although reliance was alleged, there was no allegation that Delor Vue suffered detriment as that concept is properly understood. In the alternative, it submitted that, on the evidence, Delor Vue had not, in fact, suffered detriment consequent upon Allianz’s initial intimation that it would not rely upon the non-disclosure. Indeed, it submitted that the evidence actually establishes that Delor Vue obtained substantial advantages flowing from the adjustment of the claim, including the obtaining and paying for multiple engineering reports, building quotes and scopes of work. In relation to waiver, it submitted that no separate doctrine of that nature exists in Australian law in relation to the contractual rights of parties *inter se* in circumstances such as the present. As to the duty of good faith, it submitted that there was nothing in the circumstances of the case which had the consequence that commercial decency and fairness obliged it to pay a substantial claim for which it had no liability merely on the basis that, when the claim was substantially more modest, it had said that it would. It also sought to maintain the primary judge’s determination that no election between inconsistent rights occurred in the present case.
8. For the reasons which follow the appeal should be allowed. In reaching that conclusion, I acknowledge that I am in disagreement with the customarily careful and erudite reasons of the learned primary judge and that, necessarily, gives me great cause for pause and reflection. I also acknowledge that the resolution of the issues in this most difficult matter was rendered considerably less burdensome by the primary judge’s meticulous analysis of the intricate factual context in which the issues arose. Similarly, that I am unable to agree with the reasons of McKerracher and Colvin JJ, for whom I also have the greatest respect, gives me reason for additional contemplation as to the correct outcome of this matter.
9. Ultimately, however, the essentiality of reliance and detriment to the doctrine of estoppel ought not to be diminished in favour of general notions of keeping parties to unilaterally made promises. The economic norms inherent in common law and equity respect a value-based approach to the alteration of rights and, consequentially, provide security to contractual bargains. Mere promises, in the absence a *quid pro quo* or detrimental reliance, generally do not alter the rights and obligations of contractual parties *inter se*. Were it otherwise, the security of bargained for rights would be loosened considerably. Similarly, the right to make an election is dependent upon the existence of antecedent agreed rights and obligations and the operation of circumstances upon them which then accord one party the power to create new sets of rights and obligations between the parties. I agree with the observations of the learned primary judge and the extra-curial writings of the Hon. KR Handley AO QC to the effect that election does not follow upon a unilateral promise, not derivative upon the operation of contractual terms, to provide a benefit which the promisor was not otherwise obliged to give. If election is not properly confined by the principles so carefully articulated by the Hon. KR Handley AO QC, it will acquire the potential to undermine the foundations of all contractual bargains and become a ubiquitous defence to contract claims. The importance of the economic underpinnings of estoppel and election also tends to preclude the possibility of the existence of a separate doctrine of waiver in the context of the contractual performance. Further, to recognise the possibility of the loss of rights by waiver, so called, other than by the operation of the principles of estoppel and election, would necessarily undermine the utility and the existence of the latter two concepts. It must necessarily also undermine the strength and value of contractual rights. The matter of the obligation of utmost good faith in insurance stands aside from those issues. Nevertheless, adherence to that obligation in the performance of a contract of insurance could very rarely, if ever, require the unilateral sacrifice of a party’s rights for the benefit of another in the absence of some recognised benefit moving from that other party.

# The facts

1. Although the general nature of the circumstances of this matter are briefly mentioned above, in order to deal with the myriad issues raised on appeal, it is necessary to set them out in substantially greater detail. A very clear and real danger would exist in assessing the operation of the principles of estoppel, election, waiver and utmost good faith by reference to only a few of the more germane facts from the total picture in which the issues arose. Those principles must be considered in their proper context.
2. The following narration of facts is largely taken from the learned primary judge’s careful and close analysis, although it omits reference to those matters which were relevant to whether Delor Vue had breached its disclosure obligations pursuant to s 21 of the ICA, that issue not being challenged on appeal. Additionally, no reference is made to those facts which related only to the case advanced by Allianz at trial which alleged misrepresentation by Delor Vue’s agents when negotiating the policy. The primary judge rejected that claim and, again, no challenge is made to that determination on this appeal.
3. Delor Vue, more properly described as Delor Vue Apartments CTS 39788, is the body corporate of a community title scheme created under the *Body Corporate and Community Management Act 1997* (Qld) (the BCCM Act). Relevantly, from 30 May 2016, it engaged a body corporate manager, Aspire Body Corporate Management (Aspire), of which a Mr Key was director. It is convenient to refer to Mr Key, himself, as the actual body corporate manager. Prior to Aspire’s appointment, the body corporate manager was a firm called Archers BCM (Whitsundays) Pty Ltd (Archers).
4. In the day-to-day operation of the Delor Vue complex, the body corporate manager reported to the committee of the body corporate which had been established in accordance with the BCCM Act. In these reasons, it is simply referred as “the Committee”.
5. The community title scheme incorporated land on which 11 multistorey buildings had been erected for residential dwellings and, around them, there existed a substantial area of common property. The buildings contained around 62 apartments in total.
6. As mentioned, the apartment complex is located at Cannonvale, near Airlie Beach, in the Whitsundays area of Queensland.

## The pre-existing issues with the buildings at the Delor Vue complex

1. For some time from 2014, there arose not insubstantial discontent from a number of unit owners in relation to certain building issues for which they sought to hold the developer and builder of the complex accountable and, for that purpose, a number of expert reports were obtained. In November 2014, Archers produced a report to assist Delor Vue to meet its statutory obligations in relation to safety and the maintenance of the property in a safe condition. Of particular relevance in that report was the identification of “sections of eaves lining ‘missing’ on two blocks”. The “eaves lining” comprised largely aesthetic “soffit” sheeting or panels that lined the underside of the eaves. Recommendations were made for the repair of the missing sections and for a further inspection to be undertaken to ensure that other areas were secure and did not pose a “falling hazard”.
2. In April 2015, a further report was commissioned and obtained for the purpose of seeking evidence of “Structural Damage; Conditions Conducive to Structural Damage; and Major Defect in the condition of Secondary Elements and Finishing Elements; collective (but not individual) Minor Defects; and any Serious Safety Hazard” in relation to the buildings at the Delor Vue complex. The report identified a wide range of defects but, relevantly for the issues in the present case, identified evidence of sagging soffit sheeting. The report advised that this indicated a high risk of undetected structural damage and recommended that a further inspection be undertaken of areas which were not readily accessible.
3. That report was tabled at Committee meetings on 25 May and 21 July 2015 during which the issue of the defective eaves was considered, as was the observation in the report that a further beam ought to have been installed at the time of construction onto which the eaves might have been attached. A letter was then sent to the builder, Beachside Constructions (National) Pty Ltd (Beachside) in June 2015, requiring it to provide a proposal for rectification of the defects including the identified problems with the eaves. Delor Vue also resolved at the 25 May 2015 meeting to make a claim to the Queensland Building and Construction Commission in relation to the building defects.
4. Archers prepared a further report in November 2015 in relation to the several building defects and again referred to the defective eaves which had not been rectified and the matter was further considered by the Committee at its meeting on 24 November 2015.
5. On or around 23 March 2016, Delor Vue entered into a contract of insurance with AIG in respect of the complex and its buildings. The policy period of that insurance was from 23 March 2016 to 23 March 2017. There was no disclosure to AIG of the defective condition of the buildings.
6. Archers were replaced by Aspire as the body corporate manager on 1 June 2016, partly due to the Committee’s dissatisfaction with the former’s failure to progress the rectification of the several building defects, including of the eaves and soffits. In that context, the issue was again raised at a Committee meeting on 20 June 2016, the minutes of which record the following:

**Eaves Cladding:** This is a serious building defect that was requested to be repaired under the original building defects time period. It needs investigation to determine the cause and remedy. It is also a serious Work Place Health and Safety issue due to potential injury to persons if a sheet falls. The committee resolved to have the problem examined by a qualified building inspector and to obtain quotes to remedy the situation.

1. The resolution in the last sentence of that minute resulted in the engagement of a builder, Mr McNeill of McNeill Building, who prepared a report in around July 2016 (the First McNeill Report) which documented the several defects in the buildings at the complex. In relation to the eaves and soffits, Mr McNeill advised that the soffit sheeting had not been installed in accordance with the manufacturer’s recommendations in relation to support and fixing spacings, and that there were other areas where the soffit sheeting was hanging out or bowing, and possibly ready to dislodge. On receipt of that report, the Committee met and resolved to secure the services of a structural engineer to prepare a report and quote to fix the eaves. Mr McNeill was also asked to provide a quote and he did so. The figure quoted was between $50,000 and $70,000, and he identified that there were eight locations around the complex where repair work was required but noted that there may be more. On 9 September 2016, another builder, a Mr Pawsey, quoted a price of $42,000. On 12 October 2016, a fee proposal was also obtained from structural engineers, GW Goddard & Associates, for the preparation of an engineering report in relation to the method of fixing the soffits. The Committee determined to obtain that report so as to allow the builders to refine their quotes, and accepted the fee proposal on 21 October 2016.
2. At around this time, being between August and October 2016, the Committee sought to ascertain the nature of any insurance claims which had previously been made with respect to the defects relating to the roof.
3. On 1 December 2016, GW Goddard & Associates produced a report (the Goddard Report), which concluded that the roof framing along the eaves had not been constructed in accordance with the relevant Australian Standard, the present construction was insufficient to support the eaves, the pine noggins were not sufficiently spaced to support the roof battens, and the soffit linings were not installed according to the manufacturer’s recommendations. That report was provided to Mr McNeill who provided a quote of $9,330 for repairing the eaves on one building, a quote which was later accepted by the Committee.
4. On 25 January 2017, the Committee circulated a notice to the tenants and owners of the apartments advising them of the work which would be carried out. It mentioned that strong winds are likely to cause damage to the panels in the eaves which may dislodge and warned lot owners to avoid walking or parking in the vicinity of the defective eaves. The notice identified the dangerous areas in respect of each of the eight affected buildings.
5. On 30 January 2017, Aspire, on behalf of Delor Vue, wrote to Beachside and its director, Mr Wellard, inviting them to inspect the defective works and to propose a satisfactory repair.

## The obtaining of the relevant insurance cover for the 2017 / 2018 period

1. On 3 February 2017, Ms House of Marsh Advantage Insurance Pty Ltd (Marsh), who had previously placed insurance for Delor Vue, sent an email to Allianz seeking quotes for insurance cover in respect of the buildings at the complex. Allianz responded and offered cover through its underwriting agent and subsidiary, SCI. For convenience, the nomenclature of “Allianz” will also be used in these reasons to describe the insurer, notwithstanding the involvement of SCI. Before the primary judge, a question arose as to whether Ms House or Marsh had been authorised by Delor Vue to seek insurance cover on its behalf. That gave rise to an additional issue in connection with a question of whether misrepresentations were made to Allianz on behalf of Delor Vue. Neither issue remains live on this appeal.
2. The email of Ms House to Allianz contained a document entitled “Occupier’s Statement”, relating to fire safety installations, a claims history from AIG revealing the absence of any claims in the three years from March 2014, and a report from Archers showing an estimated replacement value of the buildings at a cost of $26,790,500. The email also contained a printed quotation slip that included a number of questions which had been completed by Ms House, albeit without instructions from Delor Vue. One of the questions, “Are there any hazards/defects associated with the property?”, was answered “No”.
3. On 8 February 2017, Allianz sent a quote to Ms House at Marsh offering cover for a premium of $82,244.09.
4. At around this time, Mr Key had been discussing Delor Vue’s continuous insurance needs with a Ms Gorlick of BCB Strata Insurance Brokers (BCB). In those discussions, Mr Key mentioned that there were some problems with the soffits falling out of the eaves and that this was a maintenance issue which the Committee was working to have resolved. BCB was formally appointed as the brokers for Delor Vue on 14 February 2017.
5. On 27 February 2017, Ms Gorlick sent an email to Allianz seeking a quotation in respect of the buildings at Delor Vue. This contemplated similar but not identical cover to that for which Ms House of Marsh had sought a quote. Ms Gorlick subsequently prepared a comparison of two quotations which she had received, being one from CGU with a premium of $105,444.75 and one from Allianz at $84,600.81, which she sent to Delor Vue on 5 March 2017. The comparison document also contained a statement setting out the insured’s duty of disclosure and identifying the consequences of non-disclosure.
6. On 13 March 2017, the Committee determined to accept the quotation offered by Allianz through BCB.

## Ongoing rectification works at Delor Vue

1. On 1 March 2017, McNeill Building had completed the rectification work on the first building and an invoice was emailed to Delor Vue for the work done. In the email, a Mr Gartrell of that company advised that additional work had been necessary as a result of the discovery of further defects during the course of the rectification work.
2. On or around 3 March 2017, Mr Gartrell sent a further report from McNeill Building (the Second McNeill Report) to Mr Key. The report identified that an expanded scope of works was required by reason of the discovery of the additional defects in the eaves, as well as the existence of other defects in the roof structure. It also advised that, given the equipment required to undertake the work and the likelihood that similar defects existed in other buildings, it would be appropriate to undertake all of the remaining work at once. It was further stated:
* The rectification will be required on any soffits that were installed in manner that we encountered on the subject building — it is simply a matter of time and these soffit sheets are heavy and dangerous to be falling from any height, let alone 15 odd meters. It is our understanding that most (or all) of the complex is affected.
* It would also be advised to allow in the budget and timing for rectification of damaged or incorrectly fitted roofing and roofing components (gutters /fascia/barges/capping).
1. On 13 March 2017, a Committee meeting was held where the issue of the numerous defects in the roofs was the principal topic of discussion. The Committee also considered the renewal of insurance and the letter received from BCB, a letter of demand to be sent to Beachside and the developer, Delorain Pty Ltd (Delorain), in respect of the defective building work which had been discovered, a briefing note to OMB Solicitors, and a fee proposal and costs agreement provided by that firm. It also appears that the Second McNeill Report was before the Committee, even if this was not recorded in the minutes. Those minutes do, however, record the resolution to send letters of demand to Beachside and Delorain in relation to the repair of the eaves and soffits.
2. On or shortly after 15 March 2017, OMB Solicitors sent letters of demand on behalf of Delor Vue to each of Beachside and Delorain. Those letters asserted that there were defects in the eaves and soffit sheeting, that reports had been obtained as to the scope of work required to repair the defects, and that the total estimate was over $230,000. The letters called on the developer and the builder to carry out all necessary repairs, failing which Delor Vue would undertake the work itself and recover the cost from them.

## Entry into the contract of insurance

1. On 20 March 2017, Mr Key informed Ms Gorlick of BCB that the Committee had resolved to accept the Allianz quote.
2. As a result, BCB issued a closing advice dated 20 March 2017, the premium was paid, and a certificate of currency was issued on 22 March 2017 identifying the period of insurance as being from 23 March 2017 to 23 March 2018.

## Cyclone Debbie and the causing of damage to Delor Vue

1. On 28 March 2017, tropical cyclone Debbie crossed the Queensland coast near Airlie Beach. It caused substantial damage to the buildings in the Delor Vue complex and to a number of individual apartments in the complex.
2. On 30 March 2017, a notification of loss was made to Allianz identifying roof damage from the cyclone.

## The steps taken after the making of the claim

1. Allianz promptly retained a loss adjuster, Mr Patterson of Exigo Pty Ltd (Exigo), who undertook a site inspection of the Delor Vue complex on 4 April 2017. The following day, he sent an email to Allianz reporting his preliminary observations. In it, he identified the existence of structural damage to various buildings, being mainly to soffits, gutters, eaves and flashing, and that one section of a roof had been torn off. He raised a question as to the structural integrity of the buildings and mentioned that he had engaged an engineer to report on that issue.
2. By an email of 6 April 2017, Mr Patterson sought information from BCB (and the insured) as to whether there had been any previous issues with the roof structure of the buildings.
3. By emails of 8 and 10 April 2017, Mr Patterson of Exigo and a Ms Lander of Allianz respectively advised BCB that, in the interim, the insurer had arranged for building work to be undertaken to render the buildings safe.
4. By an email of 20 April 2017, Mr Key provided a response to Mr Patterson’s enquiries in which he mentioned the issue of the soffit panels dislodging, the subsequent inspections, and the consideration by the Committee of the nature and extent of the repairs required. He outlined the nature of the defective installation of the soffit panels and the repairs which had been completed to date. He also advised that these matters had not raised any issues with the structural integrity of the roof. On that same day, he sent a further email to BCB attaching a number of documents for provision to Allianz and the loss adjuster, including the Goddard Report and the Second McNeill Report.
5. On 21 April 2017, a Mr Johnson, of Morse Building Consultancy (Morse), provided a report which had been commissioned by Allianz in relation to the structural integrity of the roofs at the Delor Vue complex (the First Morse Report). He identified a number of roof truss failures consequent upon the occurrence of the cyclone which may been due to inadequate design or tie down. As the learned primary judge observed in his reasons (at [111]), this particular defect had hitherto not been revealed. Whilst it may be true that the specificity of the defect had not been identified to that time, on 1 December 2016, the Goddard Report had identified that the “roof framing” had not been constructed in accordance with Australian Standards.
6. Subsequently, a number of discussions occurred between Mr Key and persons on behalf of Allianz, including Ms Lander, concerning the building defects of which the Committee of Delor Vue had been aware prior to the effecting of insurance with Allianz.

## Non-disclosure and Allianz’s statement of intention to indemnify notwithstanding

1. On 27 April 2017, Ms Lander of Allianz sent an email to Ms Macaulay of BCB in which she raised the issue of whether Delor Vue had failed to disclose the “defects in relation to the roof, specifically the soffit panels”, and advised that Allianz would be undertaking an investigation in relation to potential non-disclosure. That issue was the subject of not insubstantial correspondence and discussion between Allianz and those representing Delor Vue.
2. It appears that, by 9 May 2017, Allianz had been provided with substantial information relating to the knowledge of Delor Vue’s Committee concerning building defects and, in particular, the issues with the soffit panels. On that day, Ms Lander sent an email to Ms Macaulay advising that Allianz considered that Delor Vue had failed to make proper disclosure of the defects relating to the soffit panels and that it should have been aware of other defects given the concerns raised in the Goddard Report. However, the email went on to state:

Despite the non-disclosure issue which is present, Strata Community Insurance (SCI) [Allianz] is pleased to confirm that we will honour the claim and provide indemnity to the Body Corporate, in line with all other relevant policy terms, conditions and exclusions.

1. As Mr McLure SC for Allianz submitted, that statement was concerned with Allianz’s intention as to how it would deal with Delor Vue’s claim. In the context of what followed in the email, that intention was that Allianz would provide a partial indemnity under the policy. In the ordinary course, that would involve paying an amount in respect of the cost of the repairs.
2. The email went on to categorise the damage which had, “at present”, been identified:

1. Defective materials and construction of the roof, including but not limited to tie downs, rafters and timbers and soffit

2. Resultant damage including but not limited to internal water damage, fascia, guttering and roof sheeting (for those buildings which lost roof sheeting only)

1. Ms Lander’s email then elaborated upon the indemnity which Allianz intended to provide:

SCI will cover costs associated with the resultant damage (point 2. above), despite the policy exclusion outlined below.

In respect to the repairs to the defective materials and construction of the roof (point 1. above), unfortunately the policy does not provide cover for this portion of the claim.

1. As well as the non-disclosure issue raised earlier, this division of responsibility was framed by reference to the relevant policy exclusions. These were identified as follows:

We refer you to the “Exclusions” outlined on pages 28 & 29 of our Residential Strata Policy Wording, which states the following:

*“...* ***1. We will not pay for Loss or Damage:*** *...*

*(c) ...*

(i) *caused by* […] ***inherent vice or latent defect*** […]; ...

**(d) *caused by non-rectification of an Insured Property defect, error or omission that You were aware of, or should reasonably have been aware of.* ...”**

***“...******2. We will not pay for: ...***

(b) *the cost of rectifying faulty or defective materials or faulty or defective workmanship; …”*

(Original emphasis).

1. Ms Lander re-emphasised Allianz’s intended division of responsibility for the property damage, stating that Delor Vue would be responsible for “the costs associated with [the] portion of the claim” for which coverage was excluded by the above exclusions.
2. The email thereafter identified that Allianz had engaged solicitors, Holman Webb, to assist in a potential discovery action against the property’s original builder and developer, and, to that end, Allianz had commissioned an engineering report to assist in outlining the deficiencies in the roof and the responsibility for the shortcomings in its construction. Ms Lander sought the Committee’s cooperation to ensure the best possible opportunity of recovery. She also identified that Allianz was awaiting reports from Ambrose Building Pty Ltd (Ambrose Building) as to the scope of works for the remediation work which would identify the repairs which were to be paid for by Delor Vue and Allianz respectively. It was pointed out that, in relation to some of the buildings, the work rectifying the defective construction of the roofs would have to be undertaken before the work to be paid for by Allianz could be commenced.

## Events following the 9 May 2017 email

1. As the learned primary judge observed, subsequent to the 9 May 2017 email, Allianz proceeded to adjust the claim. That involved taking steps, through its lawyers, to hold Beachside and Delorain responsible for the defective building work, the assessment of the damage and defects, and the division of financial responsibility as between it and the insured. His Honour observed (at [133]) that these actions reflected Allianz’s “unqualified acceptance of its responsibilities under the policy, its unqualified right to have any relevant access to or possession of the site, its unqualified right to pursue third parties in vindication of the (subrogated) rights of Delor Vue and its unqualified right to full co-operation from Delor Vue in regard to these matters”. That said, the steps taken in pursuit of the builder and developer did not involve the commencement of proceedings during the relevant period.
2. On 10 May 2017, Ambrose Building provided the loss adjuster with a quotation of $553,207 for the “internal resultant water damage” repairs.
3. On around 23 May 2017, Allianz received a more fulsome report from Mr Johnstone of Morse (the Second Morse Report). In it, he opined:

In my professional opinion the damage to the building elements identified within this report were a function of wind loading from cyclone Debbie impacting upon inadequate construction practices engaged during the building of the units.

1. He observed that there were systemic and consistent irregularities between the nominated design and in-situ construction, and he identified the large number of them. This led him to conclude that the truss system and tie downs as a whole were structurally inadequate and could not be salvaged, with the consequence that replacement trusses would need to be redesigned and consideration given to strengthening the connection on the top of the masonry walls. The report contained a further scope of works which was provided to Ambrose Building so it could revise its quotation for the remediation work.
2. At around this time, ASIC had commenced the process of deregistering Beachside which prompted Holman Webb on behalf of Allianz to seek a deferral of that process on the basis that Delor Vue had a claim which it intended to press. Mr Wellard, the director of Beachside, objected to that deferral by letter of 7 June 2017.
3. Further investigations were undertaken in relation to the building defects at the Delor Vue complex and, on 22 June 2017, Ms Lander of Allianz sent an email to a Ms Webb of BCB advising of the increased complexity and cost of the claim, as well as the identification of certain additional defects. She advised that the cost to Delor Vue of rectifying the defects will be “in the millions” and that it would need to undertake appropriate fund raising “in order for the rectification works to proceed”. She further suggested a meeting between all interested parties to discuss how the remediation work was to be done and to identify the repairs which would be covered under the policy and those which would not.
4. In a further email from Ms Lander to Ms Webb on 22 June 2017, it was recorded that, in relation to potential action by Delor Vue against Beachside and Delorain, the body corporate had engaged OMB Lawyers to act for it and Allianz had engaged Holman Webb. It was observed that, whilst there was separate representation, there would be only one court proceeding in which both insured and uninsured losses would be sought.
5. On 18 July 2017, the Committee together with its solicitor, Mr Robinson of OMB Lawyers, considered a scope of works which had been produced by Morse on 22 June 2017. It resolved to appoint independent engineers to review the defects and determine their causes.
6. On 19 July 2017, Mr Key contacted Ms Webb of BCB and informed her of the resolution. He also sought an explanation of how it had been determined that certain damage had been caused by the defective construction and why the complete replacement of the roof trusses was required. These concerns were relayed to Allianz on 20 July 2017.
7. Thereafter, further communications passed between Delor Vue, BCB and Allianz concerning the division of responsibility for the repairs and the factors which justified the attribution of responsibility by the insurer.
8. On 21 August 2017, Mr Whitehead of GHD Pty Ltd (GHD), consulting engineers, provided a report to the Committee (the First GHD Report). He had previously carried out a site inspection and considered the Goddard Report and a set of structural drawings, but, notably, he had not been provided with either Morse Report. As compared to the latter report, Mr Whitehead expressed the view that the deficiencies in the roof trusses were not as substantial.
9. As a result, on 29 August 2017, Mr Key wrote to Allianz enclosing the First GHD Report and asserted that the Morse Reports were wrong and that Delor Vue was of the view that the roof trusses did not need replacement. He further stated:

We also understand that the loss assessors are indicating section 1 (d) of the exclusions to the policy applies to a significant amount of the alleged works required to be carried out. Our independent advice is such that only defects to the eaves were known to the Body Corporate, or could reasonably have been known. **Therefore, the Body Corporate refutes that the exclusion referred to by the loss assessors is not [sic] applicable to any other aspect of this claim.**

(Emphasis added).

1. In the context, this was an assertion that Allianz was liable for the costs of repairing the defective construction of the roof (other than the defects in the eaves). This entailed a repudiation of Allianz’s apportionment of liability in the 9 May 2017 email by which the insurer’s representative identified that it intended to partially indemnify Delor Vue for its loss, excluding the “[d]efective materials and construction of roof”. It must be recognised that there is a degree of tension between Delor Vue seeking to enforce Allianz’s statement of intention not to rely upon the insured’s non-disclosure in providing a partial indemnity, but earlier having rejected the terms on which the insurer stated such indemnity would be provided.
2. In the letter, Mr Key also indicated that Delor Vue requested a meeting be convened “to settle this claim and permit the works to commence to repair the damage to the building under the policy”. This too is somewhat at odds with Delor Vue’s assertion, which was accepted by the primary judge, that it regarded Allianz as having finally accepted the claim by the 9 May 2017 email.
3. In around late August 2017, Mr Key expressed his dissatisfaction with the progress of the claim, and this was met by the response of Mr Patterson (of Exigo) that, until the differing opinions of the engineers concerning the cause of the damage was resolved, the claim could not be advanced.
4. Nevertheless, other matters which were not thought to be affected by the defect issue, and therefore were not the subject of the above disputation, were being attended to at the Delor Vue complex and paid for by Allianz where appropriate under the policy.
5. In early September 2017, Allianz agreed to the release of all collected engineering reports to Delor Vue. Mr Key later stated that it was only upon seeing these reports, in particular the two Morse Reports, that he became aware of any issue with the trusses.
6. During September 2017, Holman Webb continued its pursuit of Beachside and Mr Wellard. The company had been deregistered by ASIC and Holman Webb sought to have it reinstated. It also engaged an engineer, on behalf of Delor Vue, in relation to an anticipated recovery action against Beachside and possibly others.
7. On 17 October 2017, Delor Vue determined to obtain a further report from GHD in an attempt to resolve the issues concerning the roof trusses at the complex so they could be certified and the insurance claim could proceed (the Second GHD Report). Unlike the First GHD Report, GHD considered the Morse Reports in preparing its further report.
8. The Second GHD Report was provided in December 2017. Unfortunately for Delor Vue, it ascertained that there were, in fact, serious deficiencies in the roof trusses. It stated that those trusses would require extensive strengthening repairs before they could be certified and, in the circumstances, they should be redesigned and replaced. It also found that the tie down capacity was insufficient and that new tie down connections should be redesigned as part of the redesign of the trusses. Similarly, the cross-bracing in the roof would also need alterations and reinstallation. In summary, the report provided:

GHD and Pryda have both concluded that the current roof trusses are not adequate to withstand the design wind loads in the region. As such, the roof trusses would require extensive repairs to strengthen the timber members as well as strengthen the tie-down capacity at the masonry wall supports to gain certification. Given the level of repairs and strengthening required, GHD recommend that the roof trusses be redesigned and replaced. The tie-down modifications should also form part of the roof truss redesign.

1. On 12 January 2018, Mr Key sent the Second GHD Report to BCB for forwarding to Exigo and Allianz, and requested an urgent meeting to consider obtaining quotations and the appointment of a builder to undertake both the insured and uninsured work pursuant to “two contracts divided by funding source with different superintendents”.
2. On 18 January 2018, there was an extraordinary general meeting of the Delor Vue body corporate at which approval was given for a strata loan of $750,000 for 12 years for the purpose of meeting the costs of carrying out the repairs.
3. In January and February 2018, emails were sent by Mr Key to Ms Webb of BCB concerning the disagreement as to the extent of the repair work. On 19 February 2018, Mr Key sent an email enclosing a new scope of works that drew upon the Second GHD Report. He claimed that this scope of works was far simpler, faster and less expensive than the scope of works prepared by Morse. He asked that Allianz request that the quoting builders amend their quotes in line with the new scope of works.
4. On 27 February 2018, Mr Key had a telephone conversation with Mr Patterson of Exigo in which they discussed the quotes Exigo had received. Mr Patterson advised that the quotes identified that the costs of repairing the resultant damage (for which Allianz had stated its intention to be responsible) were $3 million and the costs of remediating the pre-existing defects (for which Allianz had indicated Delor Vue would be responsible) was quoted at $3.2 million and $2.14 million. He also indicated that the quoting builders thought that the scope of work proposed based on the Second GHD Report would not lead to any real cost savings.

## Renewal of the Allianz insurance

1. In March 2018, the policy period under the existing Allianz cover was approaching its conclusion. On 7 March 2018, Allianz offered a new policy for 12 months for a premium approximately 50% higher than the existing policy and on different terms. The policy was subject to the condition that the work relating to the roof defects be completed within six months. The coverage was more limited. Notably, the general excess on all claims was increased from $1,000 to $100,000 and the cyclone excess was increased from $41,350 to $2 million. Unsurprisingly, this generated some consternation for Delor Vue and some terse correspondence was exchanged.
2. As it ultimately transpired, Delor Vue obtained a six month renewal for a premium of $62,281.

## Further disputes as to the responsibility for repairs

1. On 21 March 2018, the Committee engaged a specialist claims processor, LMI Group, to act on behalf of Delor Vue in the management of the claim on Allianz and, subsequently, LMI Legal was retained.
2. On 28 March 2018, Mr Johnstone of Morse produced a further report after having considered the GHD Reports (the Third Morse Report). In it, he identified the structural damage to the roof framing was caused by insufficient tie down of the trusses to the masonry walls, the failure of the truss members at connection points, the failure of the truss members due to wind uplift loading, the design of the trusses being inadequate, and issues with the truss plates. He further observed that the “[r]oof sheeting and Soffit damage was a direct consequence of the failure of the trusses and truss tie downs.”
3. On 4 April 2018, Mr Key wrote to a Mr Driscoll of Allianz and advised that Delor Vue would take charge of the claims process itself through the LMI Group. In a telephone conversation shortly thereafter with a Mr Tsoukatos of Allianz, Mr Key was told that Delor Vue would be provided with an update in relation to its claim in the near future.
4. On 19 April 2018, Exigo requested a further report from Morse setting out the scope of work for each of the buildings which identified the costs of:

(a) Rectifying faulty or defective workmanship and / or faulty or defective materials;

(b) Rectifying any damage caused during the cyclone as a consequence of faulty or defective workmanship or faulty or defective materials to the extent such costs are not already covered by (a) above;

(c) Cyclone related damage that is not covered by (a) or (b) above.

1. In around May 2018, a Mr Iconomodis of Allianz became involved in the claim. He had been aware of and copied to some of the prior correspondence, but was now directly involved.

## The dispute giving rise to the proceedings

1. On 3 May 2018, LMI Legal, on behalf of Delor Vue, wrote to Allianz in relation to the claim. The letter raised a number of complaints concerning Allianz’s conduct relating to an alleged failure to provide documents, an alleged lack of “transparency” in the adjustment process, and delay. In part, it provided:

20. The claim was submitted in late March 2017. Despite more than a year having elapsed, **SCI has not stated its position on indemnity with any clarity**.

…

22. Although SCI has been provided with comprehensive details of the damage suffered, **it has failed to make any clear decision on policy coverage and the extent of the indemnity available to the Insured**.

23. **The failure by SCI to state its position as to indemnity** has caused significant delays in the progression of the claim and repairs.

24. **Any extraordinary delay in making a decision as to indemnity** to this extent may be tantamount to a breach of contract and an entitlement to consequential damages may arise for the Insured should SCI continue in its failure to make a decision as to indemnity.

25. Further, **as SCI has been provided with all information necessary for it to make a decision as to indemnity**, interest now accrues pursuant to section 57 of the *Insurance Contracts Act 1984* (ICA).

26. As a signatory to the *General Insurance Code of Practice*, Allianz is to act in a manner which promotes better and more informed relations between itself and the Insured, and which improves consumer confidence in the general insurance industry.

27. The manner in which SCI, on behalf of Allianz, has handled the Insured’s claim is in contradiction of the *General Code of Practice*, and of the duty of good faith owed to the Insured pursuant to section 13 of the *Insurance Contracts Act 1984* (ICA).

28. **The Insured is entitled to a prompt decision on indemnity** and to disclosure of any unprivileged documents produced in relation to the claim.

29.  **SCI is called upon to articulate its position on indemnity** and to make available and approve the release of the Scope of Works prepared by Morse, any tender documentation issued to Advanced Buildings and Ambrose, and any quotations provided by Advanced Buildings and Ambrose to undertake the works.

(Emphasis added).

1. It might be observed that there is also a not insignificant degree of tension between these paragraphs of the letter and the case advanced by Delor Vue being founded upon Allianz having made a clear and unequivocal representation as to the granting of indemnity under the policy in the 9 May 2017 email. However, the assertions in the letter as to the lack of clarity are not without merit. There was indeed a lack of precision in the email as to which damage Allianz was indicating that it intended to remedy. It would seem to be fairly certain that the defective construction of the roof, being the most expensive element of the remediation work that needed to be undertaken, was not included.
2. Even if Allianz is taken as having stated its position on indemnity with certainty in the 9 May 2017 email, it is apparent from LMI Legal’s letter that Delor Vue did not consider that question to be settled. This is consistent with the statements in Mr Key’s letter of 29 August 2017 which suggested that Delor Vue did not consider Allianz as having finally stated its position on indemnity in the 9 May 2017 email or, alternatively, that it did not accept the position there stated. That correspondence might not necessarily reflect how the Committee understood the statement of intention in the email when it was received, but this merely goes to highlight the importance of and need for evidence about its understanding at that time.
3. Allianz responded by a letter of 28 May 2018 which set out its position in relation to the claim and as to what it says was covered and that which was not covered. It identified that it was prepared to pay for certain repairs at a cost of $918,709 and further identified the remediation for which it said it was not liable, being “Pre-existing defects / faulty workmanship and materials” which it valued at $3,579,432.72. It then set out the terms on which it proposed to settle Delor Vue’s claim. It offered to work with the insured to cause the remediation work to be undertaken so long as it first undertook the necessary preliminary work. The offer was subject to a time limit for acceptance of 21 days. Allianz then stated that, if the offer was not accepted within that time, it would lapse and the insurer would pay nil on the basis of the insured’s non-disclosure and alleged misrepresentations in relation the defective soffit panels when Marsh was negotiating the policy. Allianz also reserved its right to rely upon the exclusion clauses in the policy.
4. On 12 June 2018, LMI Legal requested that the time for accepting the offer be extended, and Allianz agreed and set a new date of 31 August 2018.
5. Delor Vue’s real response to Allianz’s offer of 28 May 2018 was in the form of two letters from LMI Legal in late July 2018. By a letter of 27 July 2018, LMI Legal denied Allianz’s claim to be entitled to invoke s 28(3) of the ICA based on an election or waiver arising from the 9 May 2017 email. Alternatively, the letter contested the application of that section. It further claimed that invoking s 28(3) would be in breach of Allianz’s duty of utmost good faith pursuant to s 13 of the ICA. A further letter of 30 July 2018 asserted that Allianz had also waived Exclusions 1(c)(i) and (d) and Exclusion 2 by the 9 May 2017 email.
6. These letters are instructive for the purposes of the issues raised in this matter. The 9 May 2017 email had indicated that Allianz was relying upon at least Exclusion 1(d) and Exclusion 2 which included within their scope the rectification of defects in the insured property and losses caused by the non-rectification of such defects of which the insured was aware or should have been aware. In particular, Allianz had indicated that the repair work in relation to the defective construction of the roofs would not be indemnified. Nevertheless, by the letters of LMI Legal, Delor Vue denied Allianz’s entitlement to rely upon the non-disclosure or the exclusions with the result that it would be prevented from refusing to indemnify for the repairs required to the roofs. Indeed, it was asserted that Allianz was required to pay for all of the damage sustained to the Delor Vue complex. In effect, the letters amounted to an assertion by Delor Vue that it was entitled to accept and act upon that part of Allianz’s email of 9 May 2017 which indicated that it would pay some of the claim but, simultaneously, was entitled to reject that concomitant part of the email which asserted Allianz’s entitlement to deny liability to pay the remainder.
7. On 22 August 2018, Holman Webb wrote to LMI Legal advising that Allianz had reduced its liability to nil on the basis of Delor Vue’s non-disclosure of the defects in the eaves and soffits, as well as the roof trusses, and the asserted misrepresentation by Marsh.
8. Delor Vue commenced these proceedings against Allianz in November 2018.

# The decision of the primary judge

1. The learned primary judge undertook an exhaustive and comprehensive analysis of the substantial evidence before him and, to a significant degree, the factual conclusions reached below are not challenged on appeal. To a large extent this obviates the need to consider the underlying evidence relating to those findings.

## Non-disclosure under s 21 of the ICA

1. Although Allianz pleaded a claim that Delor Vue had engaged in misrepresentation during the negotiations between Marsh and the insurer, this was not ultimately pressed. Instead, it relied only upon non-disclosure by the insured as the basis for its claimed entitlement to reduce its liability with respect to the claim to nil pursuant to s 28 of the ICA.
2. The primary judge concluded that the known circumstances relating to the eaves and soffits prior to the entry into of the policy were not material to the property damage cover being sought from Allianz: at [251] – [255]. The known facts, so it was said, did not raise any structural issues with the building and such defects as there were would be covered by the relevant exclusions. To the extent to which they amounted to defects in the buildings, they were not thought to be serious and an experienced underwriter would have expected that all buildings have some defects of a relatively minor nature. This finding is not challenged on appeal.
3. However, his Honour did conclude that the problems experienced with the eaves and soffits were material to the public liability cover which Allianz was offering under the policy, because they posed a risk of serious injury or death to persons who may come within the vicinity of the buildings: at [258] – [261]. In addition, there was not a relevant policy exclusion available in relation to such risk. His Honour said (at [261]):

… I consider that a reasonable person in the position of the body corporate could be expected to foresee and be concerned by the risk, and to know that the insurer, which may have to pay compensation for death or catastrophic injury to someone hit by a falling soffit or eave, would want to know about the state of the buildings to assess the terms of the policy. The insurer might well have reasonably wanted an increase in public liability premium or a specific bespoke exclusion related to injury caused by the existing defects.

1. Later, his Honour added (at [263]):

… Here the reasonable person knew that the policy covered public liability risk of injury to persons and their property; the reasonable person knew, as the body corporate did, that there was an existing danger in a number of the buildings from defective soffits and eaves which carried a real risk (ameliorated as it had been) of catastrophic injury to or death of someone if hit by a falling soffit. This was a risk of which the broker could not be expected to be aware unless told clearly. …

1. Accordingly, his Honour concluded that Delor Vue had failed to comply with its duty of disclosure pursuant to s 21(1)(b) of the ICA in relation to the public liability risk in the policy: at [264]. This conclusion was also not challenged on appeal.

## Reduction of liability to nil under s 28 of the ICA

1. After careful and thorough consideration of the evidence of Allianz’s practices relating to providing cover for buildings in cyclone prone areas, and of the evidence of those who made the underwriting decisions, the primary judge determined that, had the issues with the eaves and soffits been disclosed, Allianz would not have assumed the risk: at [269] – [288]. This conclusion was founded upon the finding that, had the issues been revealed, the Goddard and McNeill Reports would have been provided to Allianz and they would have revealed the likelihood of other defects in the roofs of the buildings. His Honour held (at [288]):

… On balance, and accepting Mr Iconomidis [the underwriter] as an honest man, and giving weight to his contemporaneous view in May 2017 that the claim should be denied for non-disclosure (which implicitly carried with it his view that he would not have written the risk), I am persuaded on the balance of probabilities that if disclosure of the eaves and soffits problem had been made, the Goddard and McNeill Reports would have been provided to SCI, Mr Iconomidis would have become involved, and he would not have accepted the risk on behalf of SCI and Allianz.

1. The effect of this conclusion was that Allianz was entitled to reduce its liability under the policy to nil pursuant to s 28(3) of the ICA. Importantly for one of the more significant issues which arises in this case, the process by which that conclusion was reached ought not to be ignored. Necessarily, the process of reaching that conclusion involved the primary judge considering what Allianz would have done in a counterfactual scenario in which Delor Vue had not failed to comply with its duty of disclosure pursuant to s 21 of the ICA. That counterfactual scenario was no less hypothetical than what Delor Vue would have done in a scenario in which Allianz had not made the representation in the 9 May 2017 which is the focus of these proceedings.

## Election, estoppel, waiver, and utmost good faith

1. Despite Allianz’s liability to pay the claim having been reduced to nil, Delor Vue asserted that, by reason of Allianz’s indication in its email of 9 May 2017 that it would cover the claim, it was now not entitled to deny indemnity. That assertion was underpinned by the claims based on the doctrines of election, waiver and estoppel, and the duty of the utmost good faith.
2. The primary judge observed that the present circumstances did not typify those in which notions of election, waiver and estoppel are usually invoked, being those in which there existed a breach of contract and the innocent party was required to choose between alternative, mutually exclusive and inconsistent contractual rights. He observed that the boundaries between the three related concepts were diffuse and that their operation tended to overlap. In relation to the matter before him, he observed that s 28(3) brought about a state of legal affairs in which the liability of the insurer was the reduced amount determined in accordance with that provision: at [311]. However, he rejected the submission that this had the consequence that there could be no conduct by the insurer which could engage the doctrines of election, waiver or estoppel, and thereby prevent it from relying upon its legal rights. This was because the intention of s 28(3) is to place the insurer in a position different from the duty to comply with the terms of the policy in an unqualified way and allows it to approach the question of indemnity by reference to the facts amounting to a non-disclosure and a hypothetical as to what would have occurred. His Honour held that this armed the insurer with “a body of substantive rights which it can raise in defence or answer to the contractual claim for indemnity under the policy”. In this way, an insurer’s statement that it will not take the position in relation to a claim for indemnity that it has that body of rights under s 28(3) is not an election between inconsistent rights. Rather, it raises the question of “whether the insurer can in law resile from the position it has taken and expressed unequivocally and without qualification in the conduct of the contractual and commercial relationship between it and its insured.”
3. In the circumstances, Allianz’s conduct was characterised as being a representation that it will not run an arguable defence to a claim and would deal with Delor Vue in accordance with the policy terms. His Honour then observed that the ability to resile from that position falls to be considered by reference to whether, in all the circumstances, it is just or fair that it should be permitted to adopt an entirely different position.

### Election

1. In relation to election, the learned primary judge determined that, as Allianz was not confronted with a choice between inconsistent “competing, inconsistent and mutually exclusive rights”, as opposed to inconsistent “positions”, the doctrine was not relevant: at [312] – [317].

### Estoppel

1. Turning his attention to estoppel, his Honour characterised the statement in the 9 May 2017 email, as a clear representation that Allianz would not, in dealing with the insured’s claim, raise the issue of non-disclosure: at [321]. That is, that the claim would be honoured and indemnity provided in accordance with the policy terms and conditions. He rejected Allianz’s submission that the letter from LMI Legal in May 2018, in which it asserted that the insurer had not clearly stated its position on indemnity or at all, revealed that no clear or unequivocal representation had been made. He found that the letter did not mean what it repeatedly said, but was “a product of the evident frustration to this point in obtaining the translation of the clear statement of acceptance of cover into the practical division of responsibility and what could be seen as some temporising in the correspondence by this time”: at [322]. He further found that Allianz’s representation was as to the state of its relationship with the insured in respect of a contract of utmost good faith and was in the nature of a representation which might found a promissory estoppel or an estoppel by convention. He then summarised the position as follows:

[325] Here, the representation as to the conduct and dealing between the parties henceforth was clear: to the extent we (SCI and Allianz) may have, or to the extent we have, rights to rely upon s 28 of the Act we do not propose to rely upon them, and we confirm indemnity in accordance with the terms of the policy.

[326] This representation and the acting under it was to adopt a conventional basis for the governance of a relationship between insurer and insured in the conduct of their mutual affairs in adjusting a large and difficult claim. …

1. The relationship “so conventionally based” was identified as continuing for over a year from May 2017 until the insurer sought to resile from it by its letter of 28 May 2018. It was further found that the parties relied upon the representation as to the basis of a relationship involving good faith and co-operation: at [331]. In particular, the primary judge observed that the represented relationship founded Allianz’s entitlement to adjust the claim, to enter the property when it needed to, and to propose to sue the builder and developer in furtherance of its subrogated rights. Further, Delor Vue did not “have whatever opportunity it would have had, and may have taken, to act for and by itself in that period to deal with the property damage and to contest the insurer’s assertion of rights under s 28(3).”
2. With respect to the promissory estoppel claim, his Honour held (at [333]) that the prejudice which Delor Vue would suffer as a consequence of Allianz resiling from its representation was not specific but, nevertheless, was real: at [333]. It was identified as the passage of 12 months in which Delor Vue could have taken matters into its own hands and “acted by itself in rectifying the property to the extent to which it was financially able to do so and in suing the insurer”. It was further held that how that may have played out, in the sense of a counterfactual, was impossible to tell because “the parties had conducted themselves on an entirely different basis”. The primary judge continued (at [334]):

… Guesses in self-serving evidence as to what would have been done would not be very helpful. The obvious objective facts are that Delor Vue would have had to have taken on the repair work itself, denying to the insurer any access to the premises. How that would have taken shape in terms of funding and responsibility is impossible to tell. It is impossible because the clear choice was made by the insurer to take responsibility for the adjustment of the claim, and deny the reality of that counterfactual. …

1. Although it was accepted that there was no pleaded case by Delor Vue that it lost any opportunity as a result of relying on Allianz’s representation, the primary judge held that the opening submissions and the facts themselves raised the question of Delor Vue’s loss of opportunity to conduct its affairs on the correct hypothesis: at [334].
2. He further considered the relief arising from equitable estoppel was not limited to removing or reversing, by the minimum equity necessary, the precisely-weighted prejudice or detriment suffered, and that such an approach would pay insufficient regard to the equity’s concern of keeping parties to their promises. Referring to what he had said in *Delaforce v Simpson-Cook* [2010] NSWCA 84; (2010) 78 NSWLR 483 (*Delaforce*) (at 485 – 486 [3] – [5]), the primary judge noted (at [335]) that equity will look at all the relevant circumstances that touch upon the conscionability or otherwise of resiling from the representation including the nature of the detriment suffered, how it can be cured, its proportionality to the terms and character of the representation, and the conformity with good conscience of keeping a party to their representation. (It might be observed that this latter matter appears to be the very question that the consideration of the other matters seeks to answer). He added that the importance of keeping a party to their representation or encouragement is all the more stronger in cases where the representation has been relied upon by a party to abandon a course of conduct which could possibly have led to a different outcome.
3. In the result, his Honour concluded (at [337]):

It would, in my view, be unjust, inequitable and unconscionable to permit Allianz to resile from its stated position in the email of 9 May 2017 by its stated course on 28 May 2018 and as slightly modified thereafter. It should be held to the representation or promise (for that, as between honest commercial parties, especially bound by the duty of the utmost good faith, was what it was — a form of promise) that it made. It is a circumstance and outcome that is proportionate and reasonable.

1. Before this Court, neither party sought to identify how the primary judge concluded that imposing a liability of possibly $3 million on Allianz when its actual liability was nil was reasonable and proportionate, either by reference to any detriment that Delor Vue had suffered consequent upon the 9 May 2017 email or otherwise.

### Waiver

1. The primary judge also concluded that Allianz had waived its entitlement to rely upon Delor Vue’s non-disclosure prior to entering into the policy: at [339] – [341]. He found that Allianz deliberately and knowingly took the position of confirming cover notwithstanding the possibility of the existence of a right to deny indemnity, and that it thereby obtained the consequential benefit of access to the insured property and of the insured’s full cooperation. This was likened to the position which existed in *Craine v Colonial Mutual Fire Insurance Co Ltd* [1920] HCA 64; (1920) 28 CLR 305 (*Craine v Colonial Mutual*), where the intentionality of the act done with full knowledge had the consequence of preventing the party so acting from approbating and then reprobating by taking an inconsistent position. His Honour said (at [341]):

The choice of position was expressed to be confirmation of cover notwithstanding the non-disclosure “issue”. From that clear choice and clear act a benefit was obtained. The insurer should not be permitted to reprobate after approbating. It knew of all the facts in May 2017, including all the circumstances of the underwriting of the risk. … Here the waiver brought about by taking a position inconsistent with relying on the non-disclosure issue is rooted in the act of choice of position and the advantage obtained therefrom, not detriment. …

### Duty of utmost good faith

1. His Honour then held that the foregoing conclusions were reinforced by the separate consideration of Allianz’s conduct of resiling from its earlier stated position as a breach of the obligation of good faith imposed by s 13 of the ICA: at [346] – [350]. He observed that a lack of utmost good faith was not confined to circumstances occasioning dishonesty. It may require an insurer “to act, consistently with commercial standards of decency and fairness, with due regard to the interests of the insured”: *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* [2007] HCA 36; (2007) 235 CLR 1 (*CGU v AMP*) at 12 [15] per Gleeson CJ and Crennan J. See also the observations of Callinan and Heydon JJ at 77 – 78 [257]. In the circumstances, the primary judge held (at [346]):

Here there was no dishonesty, but, in my view, the resiling from the clear representation, in effect a promise, in the 9 May 2017 email was unjust, unreasonable, unfair and did Allianz no credit as a commercial insurer by reference to expected standards of decent commercial behaviour. It was, to use the words of Gleeson CJ and Crennan J, conduct which fell below a commercial standard of decency and fairness…

1. His Honour concluded that the consequence of the breach of the duty of utmost good faith could be the issuing of an injunction to prevent the breach occurring. However, given the relief to which Delor Vue was otherwise entitled, he concluded there was no need to grant such relief.

## Orders made by the primary judge

1. His Honour disposed of the matter by making a number of declarations in relation to the issues which had been raised for determination. He declared that Delor Vue had breached its duty of disclosure under s 21(1)(b) of the ICA and that Allianz was, *prima facie*, entitled to reduce its liability to nil pursuant to s 28(3) of the ICA. However, he also declared that Allianz was estopped from relying upon that entitlement as a result of the representation made in the 9 May 2017 email, that Allianz had also waived that entitlement, and that, in seeking to resile from its representation, Allianz had breached the duty of utmost good faith owed to Delor Vue. His Honour further ordered that the rights of the parties fell to be adjusted and determined by reference to the terms of the policy and not by reference to Delor Vue’s non-disclosure.

# The grounds of appeal

1. The essence of Allianz’s appeal is that the learned primary judge erred in concluding that, as a result of its conduct, it was prevented from relying upon its entitlement to reduce its liability under the policy to nil pursuant to s 28(3) of the ICA on the basis of Delor Vue’s non‑disclosure. Specifically, Allianz submitted that his Honour erred in finding that it was estopped from doing so, had waived its entitlement to do so, or that, in attempting to do so, was in breach of its duty of utmost good faith under s 13 of the ICA.
2. By a Notice of Contention, Delor Vue asserted that the primary judge’s decision ought to be upheld on the additional basis that Allianz had elected between two alternatively, mutually exclusive, and inconsistent rights by agreeing to grant indemnity and proceeding to adjust and determine the insured’s claim by reference to the policy.

# Ground 1: estoppel

1. Ground 1, which was the main focus of the appeal, was stated in the following terms:

The primary judge erred by finding at [320] – [338] that the appellant is estopped from reducing its liability to the respondent to nil pursuant to s 28(3) of the *Insurance Contract Act 1984* (Cth) (**Act**).

## The representation

1. Allianz did not cavil with the primary judge’s conclusion (at [321] – [322]) that, by its email of 9 May 2017, it represented that it would not assert an entitlement to rely upon Delor Vue’s non-disclosure and would, to some extent, indemnify the insured under the policy, and that the claim would be honoured and indemnity provided in accordance with the policy terms.
2. The learned primary judge’s description of Allianz’s representation shows that it was promissory in nature, being to the effect that the insurer would not deny its liability to indemnify Delor Vue with respect to property damage when resolving the claim (at least not on the basis of the non-disclosure). The *in futuro* nature of the representation was necessitated by the fact that, at the time of its making, the claim had been neither adjusted nor quantified.
3. However, it is important to keep in mind that Allianz’s indication that it would partially indemnify Delor Vue was only part of the 9 May 2017 email. Although it was not expressed in the clearest of terms, it is sufficiently apparent that Allianz was not accepting liability for defective materials and construction of the roofs. Its preparedness to indemnify was limited to assuming responsibility for what it termed “resultant damage”, which generally concerned internal water damage and superficial roof items such as fascia, guttering, and sheeting. To the extent to which it erred on the side of generosity by not relying on Exclusions 1 and 2, that was only in respect of that resultant damage which, it is assumed, Allianz considered was wholly or largely a consequence of defects of which Delor Vue knew or ought to have known.
4. The context of the whole of the email in which the representation was made is also important. In it, Allianz sought to apportion responsibility for the damage sustained by identifying that for which it would pay, and that for which the insured was responsible. As discussed later, although the email does not expressly state that Allianz’s acceptance of some liability was conditioned upon Delor Vue accepting that it was responsible for the remainder, that is implicit. This is important where the essence of Delor Vue’s claim was that Allianz must be held unconditionally to its acceptance of liability and, indeed, must accept a greater amount of responsibility for the cost of remediation than it had indicated in its email, whilst Delor Vue, itself, was not bound to Allianz’s apportionment. So much is made clear by the letters from Delor Vue’s solicitors, LMI Legal, to Allianz of 3 May 2018 and 27 July 2018, as well as the relief sought (although not ultimately pressed) in these proceedings to the effect that Allianz was also not entitled to rely upon the policy exclusions in any way. The absence of any correspondence from Delor Vue after 9 May 2017 accepting Allianz’s apportionment of responsibility for the cost of repairs is significant in this context. In fact, Mr Key’s correspondence of 29 August 2017 was to the contrary and rejected that apportionment.
5. The 9 May 2017 email does not suggest that Allianz was asserting its final position in relation to indemnity. The letter was written on the basis of the “damages known to our office *at present*” and that Delor Vue’s claim would progress as quickly as possible, with the indication being that the statement of position was somewhat qualified. The context of the email was Allianz making a gratuitous offer to partially indemnify Delor Vue with respect to a claim which it might have refused in its entirety consequent upon the insured’s non-disclosure. Those circumstances suggest a reasonable implication that the offer might be withdrawn or might be limited to the then anticipated costs of rectification. After all, the indication to provide some cover was made at a time when those costs were relatively modest. There was no express statement that Allianz would meet those costs regardless of how much that might involve. As with the construction of all documents, they must be interpreted in their context. When a serious commercial document prepared by experts should still be construed in its circumstantial context, I have difficulty in accepting that a proper and even somewhat generous concession given in modest haste and pressure should not be given the same relaxation from a strictly literal meaning by way of mitigating implied conditions of a reasonable and intelligent order. This conclusion as to the lack of finality is supported by Mr Key’s letter of 29 August 2017, as well as the letters from LMI Legal to Allianz in May and July 2018, in which complaints were made that the insurer’s position on indemnity and the extent of it had not been made clear.
6. For the contrary result, it is necessary that the insurer’s communication be construed as absolute, total, and unqualified, even by implication. That is, it has the insurer saying that, although it had a very strong and correct view that it could refuse to pay any indemnity at all, it would indemnify within the cover, no matter that it may amount to a sum far exceeding the amount that it contemplated on its then knowledge and understanding. That construction is not appealing and may well disregard any factor of reasonableness or the circumstantial context, matters such as the learned judge at first instance properly took into account in concluding that the communication of Delor Vue’s solicitors did not truly mean what it repeatedly said. I am not satisfied that the insurer’s communication was so clear and unequivocal, but unfortunately the point was not argued as to the full consequences of the alternative view and the learned primary judge treated its promise as being somewhat more definitive. In these circumstances, the matter must be dealt with on that basis.

## Reliance and detriment

1. The initial part of Allianz’s first ground of appeal was founded upon its submission that Delor Vue failed to plead or prove the reliance and detriment on which the primary judge’s reasons were founded.
2. His Honour’s findings in relation to reliance appear in paragraphs [331] to [334] of his reasons. He found that Allianz’s statements were “relied upon by the parties for a year as the basis of a relationship involving good faith and cooperation”, which appears to be a conclusion relevant to an estoppel by convention. He also said Allianz’s statements founded the conduct of the parties, including the insurer’s entitlement to adjust the claim, to enter into the complex, and to suggest pursuing third parties. This, his Honour found, meant that Delor Vue did not have the opportunity that it would have otherwise had to do what it wanted in relation to the property, to act as it would have, and to contest the liability of Allianz (including its assertion of rights under s 28(3) of the ICA). His Honour thereafter returned to considering the elements of estoppel and identified that, whilst the detriment suffered by Delor Vue was not specific, it was real and involved “the passage of 12 months in which Delor Vue could have taken its own fate in own hands and acted for itself in rectifying the property to the extent to which it was financially able to do so and in suing the insurer”. Reference was also made to the benefits flowing to Allianz in that period, although how the accrual of such benefits amounted to detriment to Delor Vue is not clear.
3. In relation to Allianz’s submission that Delor Vue had not pleaded any established detriment such that its claim ought to fail for that reason, the primary judge held (at [334]):

The respondent submitted that the applicant did not plead or prove any detriment as to loss of opportunity and did not lead evidence as to what it would have done. The applicant's amended concise statement, concise statement in reply and its submissions and the evidence did not go into particularity of some counterfactual. The opening submissions (and the facts themselves plainly) raised the question of loss of opportunity to conduct its affairs on the correct hypothesis. Guesses in self-serving evidence as to what would have been done would not be very helpful. The obvious objective facts are that Delor Vue would have had to have taken on the repair work itself, denying to the insurer any access to the premises. How that would have taken shape in terms of funding and responsibility is impossible to tell. It is impossible because the clear choice was made by the insurer to take responsibility for the adjustment of the claim, and deny the reality of that counterfactual. There was no surprise or unfairness in how the matter was put in submissions and in argument.

### The absence of any pleaded reliance

1. Allianz’s primary submission is that Delor Vue failed to plead any estoppel case founded upon the reliance which the primary judge held had occurred consequent upon Allianz’s representation. It submitted that the primary judge held that Delor Vue relevantly changed its position in two ways. First, by refraining from suing the insurer to challenge its reliance on s 28(3) and, second, by refraining from carrying out the repairs itself: at [331] and [333]. It further submitted that neither of these alleged acts of reliance were raised in the Delor Vue’s amended Concise Statement. That latter submission is demonstrably correct. Neither were raised by Delor Vue in any of the documents by which it articulated its case prior to trial and, indeed, prior to the end of the trial. It was not in dispute during the appeal that the acts of reliance identified above were indeed those upon which the primary judge founded his decision on estoppel.
2. It was not disputed by Delor Vue that no attempt was made by it in its original Concise Statement to articulate a claim of estoppel, although it had raised, in a fashion, a claim of waiver on the basis of the 9 May 2017 email. There it was asserted that Allianz had acted consistently with a waiver in a number of respects, including by engaging engineers and building contractors and making payments for loss of rent.
3. At a case management hearing on 11 December 2018, an issue was raised as to whether Delor Vue was, in fact, seeking to agitate any claim founded upon an estoppel. Counsel for Allianz sought directions to the effect that, if Delor Vue was seeking to rely upon any estoppel founded upon detrimental reliance, it ought to be clearly pleaded. The learned primary judge agreed and indicated to Delor Vue’s Counsel that, if it was seeking to rely upon a change of position to the effect that if Allianz had not done some particular thing then Delor Vue would have been in a better position, it should be properly articulated. Counsel for Delor Vue advised the Court that he would seek instructions in relation to that issue. Consequently, directions were made affording Delor Vue the opportunity to amend its Concise Statement as it saw fit.
4. Delor Vue availed itself of that opportunity and, on 21 December 2018, filed an amended Concise Statement. The drafter of that document addressed the issues of waiver, election and estoppel in a “rolled up” manner, and a general allegation was made that Allianz was estopped from relying upon Delor Vue’s non-disclosure. The author of the document was apparently alive to the need to plead reliance and did so by listing five asserted acts as follows:

12. The Applicant has taken steps (or otherwise abstained from taking steps) consistent with, **and in reliance on**, the Waiver Email and the election and representations made by Allianz, including:

a. Providing access to the premises, and individual lots, to enable Morse Building Consultancy to inspect the roofs in order to determine the scopes for claimable damage and rectification of defects.

b. Providing a report to Allianz outlining an alternate method of defect repair to that proposed by Morse Building Consultancy;

c. Procuring a report from GHD to establish the extent of damage to the roofs, the cause of particular damage, and the relationship between the Truss Defects and Soffit Defects and the damage;

d. Abstaining from engaging or seeking scopes of works or quotations relating to damage caused by Cyclone Debbie (including resultant damage); and

e. Cooperating with Allianz with respect to the potential recovery action against the original builder and developer and placing recovery in the hands of Allianz.

(Emphasis added).

1. The term “Waiver Email” was a reference to the 9 May 2017 email.
2. Delor Vue further raised the issue of estoppel in the following terms:

20. Further and in the alternative, the Applicant says that Allianz is estopped from acting contrary to the Waiver Email, in that:

a. The Applicant adopted the Waiver Email and the grant of indemnity;

b. Both parties, following the Waiver Email and until the Offer, conducted themselves in a manner consistent with the Waiver Email;

c. Allianz induced or acquiesced in the Applicant's adoption of the Waiver Email;

d. The Applicant acted in a manner consistent with and in reliance of the Waiver Email;

e. Allianz knew or intended that the Applicant would act or abstain from acting in reliance with the Waiver Email; and

f. The Applicant will suffer detriment if the Waiver Email is not fulfilled.

1. As was submitted by Allianz, those assertions do not raise any case that Delor Vue relied upon the representations in the 9 May 2017 email by not contesting the insurer’s entitlement to rely on s 28(3) or by not undertaking the repair of the complex itself. Allianz further submitted, as is the case, that sub-paragraph 20(f) appears to be an assertion that Delor Vue would suffer detriment by the non-fulfilment of the representation.
2. In accordance with the case management orders made in the proceeding, Delor Vue filed opening submissions shortly prior to the commencement of the trial. It submitted in paragraph 25 of those submissions that, as a result of the content of the 9 May 2017 email, it made certain decisions about renewing its policy with Allianz and allowed for the repair investigations and work to be handled largely by the insurer at its pace. In the context of the case to that point in time, the latter reference could, at best, only refer to the pleaded assertion in paragraph 12(d) of its amended Concise Statement that it had abstained from engaging or seeking scope of works or quotations in relation to the damage to the Delor Vue complex.
3. Mr McLure SC for Allianz further submitted that, at the commencement of the hearing before the learned primary judge, the parties handed to the Court a document which was entitled “List of Issues for Determination”. As to estoppel, the document identified the following issues:

9. Did the applicant rely on the representation to its detriment, by:

a) making policy renewal decisions, and by not seeking to negotiate renewed cover as if its position in relation to the claim was otherwise;

b) allowing for the repair investigations and works to be handled largely by the respondent at its pace? AS [25]

10. Would it be unconscionable for the respondent to depart from the representation in the 9 May 2017 email?

11. Alternatively, by entering into the policy in 2018 in the factual context that is found to exist, was it a term of that policy that the respondent would not exercise its rights under s 28 in respect of the claim.

1. It was not contended that this document expanded the scope of the acts of reliance on which Delor Vue sought to found its claim based on estoppel. Indeed, Counsel for Delor Vue submitted to this Court that his client did not agree to the terms of that document.
2. On the first day of trial, a question was raised as to the scope of the issues which had been raised by the parties for determination. It was put to the Court, and apparently accepted by Delor Vue, that if it intended to advance a case of estoppel based upon matters which were not then the subject of the pleading, it was necessary for amendments to be made. It is apparent that this was said specifically in relation to a late allegation that Delor Vue paying approximately $62,000 for the renewal of the policy was an act of detrimental reliance. However, as Counsel for Allianz submitted, the expression of the requirement that Delor Vue raise the grounds on which the estoppel was based ought to be regarded as a general direction. At the very least, Allianz was entitled to expect that the hearing would be determined on the issues raised and that it had not agreed to permit the matters in issue to traverse the boundaries of the pleading.
3. The trial proceeded and witnesses from both sides were called, gave evidence and were cross-examined. Before this Court, Delor Vue did not attempt to contradict the proposition that neither of its witnesses gave any evidence to the effect that, had the representations in the 9 May 2017 email not been made, it would have undertaken the repairs to the complex itself or brought proceedings against Allianz to contest its reliance on s 28(3) of the ICA. It might be thought that this precluded judgment in favour of Delor Vue based on those alleged acts of reliance.
4. On the last day of the hearing before the primary judge, the parties made oral and written submissions to the Court. Allianz submitted that this was the first occasion on which Delor Vue raised an allegation that it had suffered detriment by reason of abstaining from undertaking and paying for the repairs itself. At paragraph [124] of its written submissions, Delor Vue asserted:

As the correspondence makes plain (see the factual narrative schedule), there were extensive delays on the part of the respondent in progressing the repair works, such that the works remained largely untouched almost 12 months later. Had the position been otherwise, the applicant could have decided to undertake and pay for the repair work urgently, and to sue the respondent for indemnity or damages later. It did not do so in circumstances where these matters were in the hands of the respondent.

1. Delor Vue’s written submissions also contended that it suffered detriment because, following the expiry of the renewed policy in circumstances where the repairs had not been effected, it was unable to obtain insurance which it was statutorily obliged to hold. It submitted that, had it known that Allianz was not intending to indemnify, it would have taken steps to ensure that the work was carried out so that it could secure further insurance cover. It submitted in subsequent paragraphs that, had the representation not been made, it would have taken the opportunity to bring proceedings against Allianz 12 months sooner than it did.
2. Mr McLure SC submitted that Allianz did not have the opportunity to meet a case based upon Delor Vue’s alleged reliance in not undertaking the repair work itself or not commencing proceedings against the insurer earlier than it did.

### Delor Vue’s submission that the relevant case was raised

1. Mr Elliott SC for Delor Vue submitted that the reliance on which the primary judge founded an estoppel had been legitimately raised and was a live issue in the proceedings.
2. First, he referred to paragraph 20 of the amended Concise Statement and, in particular, to sub-paragraph (d) which asserted that Delor Vue had acted consistently with and in reliance on the 9 May 2017 email. However, that allegation does not raise the reliance on which the trial judge concluded the existence of an estoppel with any degree of particularity.
3. Second, reference was made to sub-paragraph 20(f) which alleged that Delor Vue will suffer detriment if “the Waiver Email was not fulfilled”. Whilst that might tend to approach the relevant issue, it is far from clear whether the detriment is that which flowed from non-fulfilment of the promise or by reason of some other factors. Again, it did not articulate the reliance or detriment which the trial judge found to exist.
4. Third, Mr Elliott SC submitted that a number of acts of reliance were referred to in paragraph 12 of the amended Concise Statement and, although they did not refer to Delor Vue abstaining from undertaking repairs itself, the chapeau of that paragraph used the word “including” which thereby indicated that the matters to be relied upon were not to be confined. He also submitted that the sub-paragraphs of paragraph 12 raised the issues in question and, in particular, that sub-paragraph (d) asserted that Delor Vue abstained from engaging in work. That latter submission obviously misstates the effect of the words “[a]bstaining from engaging or seeking scopes of works or quotations”, which are only concerned with obtaining scopes of works and quotations rather than undertaking works.
5. Fourth, reliance was placed on sub-paragraph 12(e) which asserted that Allianz handled the potential recovery action, although how that relates to the question of whether the matters relied upon by the primary judge as supporting the estoppel had been articulated was not clear.
6. Fifth, it was submitted that it was an “irresistible consequence” of the allegations in the amended Concise Statement that Delor Vue was advancing a case that it relied on Allianz’s representations by not undertaking the repair work itself, and that the Court should not find any merit in Allianz’s submission that the pleading was defective merely because it did not contain the assertion of reliance or that detriment was suffered by Delor Vue by not undertaking the repairs itself. That submission is as unmeritorious as it sounds.
7. Sixth, the Court was taken to Allianz’s written submissions in opening, filed some six weeks prior to the hearing, where it was stated that “[a]n issue to be explored at the hearing will be whether the applicant relied to its detriment on any representation by the respondent.” From this, it was submitted that the parties accepted that the question of detriment was “relatively open-ended”. There is also no merit to that submission. Allianz’s submission was not an invitation to hold an unfettered inquiry into whether Delor Vue had relied on any representation to its detriment. The submission merely articulated that an issue for determination was whether Delor Vue had acted in reliance as it claimed it had.
8. Seventh, the Court was taken to paragraph 25 of Delor Vue’s written submissions in opening where, so it was said, its contentions were sufficiently expressly identified. That paragraph needs be set out in full:

Even if one could assume that the respondent had not made the election it did, by its words and conduct summarised above it represented to the applicant that it accepted the claim subject to the ‘prior defects’ exclusion, and would not rely on the alleged non-disclosure. The applicant thereafter behaved on that basis. It made policy renewal decisions, and did not seek to negotiate renewed cover as if its position in relation to the claim was otherwise. It allowed for the repair investigations and works to be handled largely by the respondent at its pace. It is not now possible to confer upon the applicant the various opportunities it would have had to conduct itself differently had it not been led to believe that the respondent's position was as represented. As such, it is unconscionable for the respondent to depart from its representation, and it is estopped from doing so.

1. There is nothing in that paragraph that raises, with anything nearing appropriate particularity, the allegation that Delor Vue relied on the representation by refraining from undertaking the repairs itself or commencing proceedings against Allianz earlier than it did. Although Mr Elliott SC acknowledged that there was nothing in that paragraph which referred to Delor Vue relying on the representation when negotiating a new policy, that somewhat irrelevant acknowledgement tended only to distract from the issues on appeal given that such reliance was not found to have generated any detriment on which the primary judge based his decision.
2. Eighth, it was submitted that Delor Vue did not concede that the document entitled “List of Issues for Determination” which was handed to the Court contained the totality of issues to be determined at trial. The transcript of the third day of the hearing bears out that submission with Mr Elliott SC having been recorded as saying, “it [the List of Issues for Determination] certainly doesn’t encapsulate the extent of the issues and arguments that we will raising [sic] in relation to estoppel, for example”. Whilst it can be accepted that Delor Vue did not agree to all of the matters in the list as constituting the scope of the debate, there was nothing in his comments which identified that the case to be agitated by Delor Vue was wider than its pleading indicated. That is not insignificant given that, by that time, the hearing had reached the stage of addresses.
3. The foregoing submissions by Mr Elliott SC only serve to emphatically support the substance of Mr McLure SC’s submissions that, at no appropriate time, did Delor Vue raise as an issue in the proceedings that it had relied on the 9 May 2017 email by abstaining from conducting the repairs to the complex itself, or by not commencing proceedings against Allianz sooner. That is corroborated by the oral submission made by Delor Vue to this Court that it had been placed in a position where it had been induced to conduct a relationship with its insurers over an extended period of time and that this was a difficult position from which to establish what would have occurred in one or more counterfactual universes. Mr Elliott SC thereafter described Delor Vue’s “broad” case as being that “merely being put in a position of that kind was itself a form of detriment of the kind that equity would recognise”. He continued:

True it is we put that broad case, but equally true we did, for the purpose of seeking to make good that broad case, seek to identify a number of particular examples or illustrations of the way in which **we could have acted differently**, without seeking to prove in fact that had one or more of those various alternatives been taken, we would in fact have ended up in a different position.

(Emphasis added).

1. He also claimed that the effect of this was that Delor Vue was entitled to assert that, subsequent to 9 May 2017, it might have acted in myriad different ways and that in enumerating them, “[o]ne just needs to let one’s imagination go”, and because there might have been so many various scenarios it was “unnecessary for [Delor Vue] to try and prove to any significant extent any one particular counterfactual scenario”.
2. It is not possible to derive from the matters identified by Mr Elliott SC any articulation by Delor Vue of a case founded upon reliance consisting of, or detriment arising from, it refraining from carrying out the repairs itself or commencing its action against Allianz earlier. No matter how one might analyse its amended Concise Statement or any other document in which the issues for hearing were articulated, it is not possible to discern any allegation of the reliance on which the primary judge founded his decision on estoppel. This, of itself, is sufficient to allow the appeal in relation to the estoppel point. Nevertheless, there exists a further and more fundamental reason as to why the estoppel claim could not succeed.

### A misconception about detriment

1. Even if it were possible to re-cast Delor Vue’s articulation of its case as somehow encompassing the alleged reliance, it would nevertheless face the insurmountable difficultly that it failed to address the essential element of promissory estoppel (or an estoppel by convention), being the existence of detriment. This misappreciation was reflected in its submissions to this Court that it was not necessary for it to establish that it actually altered its position in reliance on the representation such that it would suffer detriment if Allianz were not kept to its promise. As the discussion below reveals, it is not mere reliance on a prior promise or an assumed state of affairs which justifies restraining a person from resiling from the promise or state of affairs, but the detriment which will be occasioned to the promisee who has acted in reliance on the promise consequent upon the promisor resiling from it. This appears clearly enough in the following passage from the reasons of Dixon J in *Grundt v Great Boulder Pty Gold Mines Ltd* [1937] HCA 58; (1937) 59 CLR 641 (*Grundt*), a case of estoppel by convention,at 674 – 675:

[I]t is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. **This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it.** So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain. **His complaint is that when afterwards the other party makes a different state of affairs the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment.** His action or inaction must be such that, if the assumption upon which he proceeded were shown to be wrong and an inconsistent state of affairs were accepted as the foundation of the rights and duties of himself and the opposite party, the consequence would be to make his original act or failure to act a source of prejudice.

(Emphasis added).

This was later approved of by a majority of the High Court in relation to proprietary estoppel in *Sidhu v Van Dyke* [2014] HCA 19; (2014) 251 CLR 505 (*Sidhu v Van Dyke*)at 528 – 529 [80] – [81].

1. This aspect of the nature of “detrimental reliance” is considered further in the discussion below.
2. For present purposes, it was Delor Vue’s obligation to plead and prove the real detriment or harm which would flow from its change of position if the assumption created by Allianz was abandoned. This necessitates identifying the manner in which the change of position occurred (i.e. reliance), the consequence to Delor Vue of having adopted that position if the assumption on which it relied was abandoned, and that the harm or detriment was real. To say that the insured could have taken some theoretical opportunities which may have been available to it is to say no more than it acted in reliance on the representation of Allianz by not pursuing one course or another. However, that says nothing of whether it would suffer harm or detriment if the insurer were permitted to resile from its promise.
3. It follows that, whilst Delor Vue raised, albeit in a somewhat vague and nebulous way, that it relied upon Allianz’s promise, it did not go further and plead (or establish) that it suffered any relevant detriment. In fact, Delor Vue failed to articulate any relevant act of reliance (being those upon which the primary judge acted) which might have had the consequence that it suffered real detriment.

### The effect of not raising the relevant detriment

1. It matters not how a party articulates its claim, be it by a statement of claim, points of claim or concise statement, the principles of natural justice on which this Court is founded require each party to inform the other of the case sought to be made against them. In *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* [1990] HCA 11; (1990) 169 CLR 279 (*Banque Commerciale v Akhil Holdings*), Mason CJ and Gaudron J said of the importance of pleadings (at 286 – 287):

The function of pleadings is to state with sufficient clarity the case that must be met: *Gould and Birbeck and Bacon v. Mount Oxide Mines Ltd. (In liq.)*. In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. The rule that, in general, relief is confined to that available on the pleadings secures a party’s right to this basic requirement of procedural fairness. Accordingly, the circumstances in which a case may be decided on a basis different from that disclosed by the pleadings are limited to those in which the parties have deliberately chosen some different basis for the determination of their respective rights and liabilities. See, e.g., *Browne v. Dunn*; *Mount Oxide Mines*.

(Footnotes omitted).

1. Such a view was reiterated by the Full Court in *Betfair Pty Ltd v Racing New South Wales* [2010] FCAFC 133; (2010) 189 FCR 356 (this point not being the subject of the appeal to the High Court), where it was said (at 373 – 374 [50]):

Pleadings provide a structure for a proceeding for the purpose of the attainment of justice. The pleadings identify the material facts upon which the parties rely and the issues the parties seek to have determined. Because the pleadings require the parties to identify all material facts and issues, the pleadings provide the benchmark for discovery before trial and the admissibility of evidence at trial. Parties are required to plead the material facts upon which the party relies and the issues which that party seeks to have resolved for the further purpose of giving the opposing party fair notice of the case to be met at trial thereby minimising any risk of injustice by taking the opposing party by surprise. Pleadings incidentally are the record of the proceeding for the purpose of any subsequent arguments relating to res judicata or issue estoppel or any like issue.

1. This passage has been relied upon subsequently in *Prysmian Cavi E Sistemi SRL v Australian Competition and Consumer Commission* [2018] FCAFC 30 [69] and *Zibara v Ultra Management (Sports) Pty Ltd* [2021] FCAFC 4; (2021) 387 ALR 48 [122].
2. In accordance with *Banque Commerciale v Akhil Holdings*, the relief to which Delor Vue was entitled was confined to the case agitated on the pleading. Here, no case of estoppel founded upon Delor Vue’s abstaining from undertaking the repairs itself or from commencing proceedings against Allianz earlier than it did was raised in the amended Concise Statement or in any other document which articulated the matters to be determined during the course of the hearing. The first time Delor Vue sought to raise such a case was during Mr Elliott SC’s address to the trial judge and, even if that were thought to be acceptable, there was nevertheless no assertion of any relevant detriment flowing from the alleged reliance.
3. It cannot be thought that Delor Vue’s failure to specify the reliance or detriment on which the judgment was founded was minor or trivial in the circumstances of the case. The learned primary judge concluded that it was sufficient to warrant holding Allianz to its stated intention of not relying upon Delor Vue’s breach of its disclosure obligations and to deal with the claim according to the terms of the policy. Had Delor Vue articulated the acts of reliance found to have occurred, its witnesses may well have given some evidence to the effect that it would have so acted or, in the case of the repairs, had the financial capacity to do so. Evidence might have been brought to establish even a possibility that the repair works would have proceeded faster than they had actually occurred. For the insurer’s part, it would have had the opportunity to cross-examine those witnesses as to the veracity of their evidence and adduce rebutting material. As it was, none of this took place. Further, had Delor Vue articulated the suffering of some relevant detriment, that too may have been the subject of debate.
4. Mr Elliott SC submitted that it was not necessary for Delor Vue to plead detriment as that would necessitate the agitation of a hypothetical scenario, being how it would have acted and how it would be worse off if Allianz were permitted to resile from the representation in the 9 May 2017 email. He submitted, in effect, that it cannot be known how Delor Vue would have specifically acted in the absence of that representation. That submission should be rejected. In the case of an allegation that a counterfactual scenario would have existed, a party can be expected to plead or identify the material facts on which that counterfactual is founded. That this may encompass a hypothetical situation is no impediment. Such circumstances arise regularly in civil litigation involving claims for damages which include a loss of opportunity or the sustaining of damage in cases involving misrepresentation. Indeed, in matters involving statutory causes of action based on misleading or deceptive conduct, it is often necessary to identify a counterfactual circumstance when establishing the causal link between the alleged misrepresentation and the claimed loss or damage: *Berry v CCL Secure Pty Ltd* [2020] HCA 27; (2020) 94 ALJR 715 at 738 [72]. As French J (as his Honour then was) said in *Bond Corp Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 215 at 222, it is necessary that the “facts and circumstances should be set out leading to a reasonable inference that the conduct and the damage stood to each other in the relation of cause and effect”. This statement has been applied on many occasions: see the authorities collected in *Wyzenbeek v Australasian Marine Imports Pty Ltd* [2017] FCA 1460 [84]: and, although French J’s observation concerned the pleading of loss or damage arising in misrepresentation cases, its relevance here is that pleadings of the type referred to by his Honour necessitated identifying the hypothetical, counterfactual position which the plaintiff would have been in had the misleading conduct not occurred.
5. Mr Elliott SC for Delor Vue submitted that the pleading of loss or damage involving a misrepresentation and pleading detriment for an estoppel could not be equated, although he did not identify any relevant difference in principle. In each case, the pleading party is asserting reliance upon some inducement which has caused them to act in a manner which has brought about harm. In the pleading of damages, the harm is that the plaintiff is in a different position to that which they would have been in had they not acted upon the misleading conduct with the result that they are in a diminished economic position. Similarly, for a plea of estoppel, the plaintiff must assert that, having acted in reliance on the representation, promise or assurance, they have been placed in a position which they would otherwise not be in, and that if the promisor is entitled to resile from the promise they will be in a worse position than they would have been in if the promise had not been made. There is, with respect, no difference in principle in the obligation to inform the party against whom the plea is made of the causative pathway between the representation or other inducing conduct and the resulting detrimental position.
6. Here it is apt to recognise again that an issue before the primary judge was how Allianz would have acted, for the purposes of s 28(3) of the ICA, had Delor Vue not breached its duty of disclosure. That is, whether, in that hypothetical, counterfactual scenario, Allianz would have accepted the risk by issuing the policy and on what terms. Ultimately, the primary judge accepted that it would not have. There is, perhaps, some inconsistency with that conclusion and the primary judge’s observations in the passages set out above, that it was “impossible” to tell how Delor Vue would have conducted itself if Allianz had not made the representation in the 9 May 2017 email because that would involve the consideration of a hypothetical scenario. As was mentioned above, courts regularly consider how a party would have conducted itself in a hypothetical scenario, for example, absent some particular representation. The real difficulty in doing so in this case was of an evidentiary nature: Delor Vue led no evidence as to what it would have done in the absence of the representation in the 9 May 2017 email.
7. In its written submissions, but conspicuously absent from its oral address, Delor Vue asserted that, although it did not raise in its amended Concise Statement any issue that it suffered detriment as a result of relying upon the representation by abstaining from undertaking repairs to the buildings at the complex or from commencing proceedings, it was not obliged to do so as a concise statement is not a pleading. That submission is devoid of merit. Regardless of the nature of the document articulating a party’s claim, the recipient of it is entitled to know the case which they are required to meet. That is a fundamental requirement of the Australian legal system and an irreducible element of fundamental fairness. It is, in any event, a requirement of the processes of this Court. The Commercial and Corporations Practice Note (C&C-1) makes provision for a party to rely upon a concise statement as opposed to a statement of claim, but such a document is nevertheless required to, *inter alia*, “bring to the attention of the respondent and the Court the key issues and key facts at the heart of the dispute” and is further required to summarise “the important facts giving rise to the claim”. It is also to be kept in mind that the burden of proof on the issue of the suffering of prejudice lay on Delor Vue as it was the party asserting the affirmative of it: *et qui affirmat non ei qui negat incumbit probatio*. With the greatest respect to those who might hold a different view, it would be an affront to justice to hold that a party might succeed on an estoppel claim without having alerted the opposite party to the two essential elements of one of its claims: the relevant act of reliance and the detriment which would ensue if the promisor were entitled to resile from their promise. If the Rules of Court allowing for the use of concise statements are to operate in a way which removes the basic requirement of procedural fairness referred to in *Banque Commerciale v Akhil Holdings* so as to permit and encourage trial by ambush, which is the logical conclusion of Delor Vue’s submission, they ought to specifically so provide.
8. Here, Delor Vue’s amended Concise Statement asserted steps or actions taken by it in purported reliance on the representations made. They were the matters of which Allianz was notified were to be advanced at trial in support of the estoppel, waiver and election claims, and those in respect of which Allianz might come to court prepared to contradict. Subject to its agreement, whether expressly or by its conduct, to widen the boundaries of the dispute, they were the only matters which Allianz was required to address in defending the claim against it. They were also the only matters on which judgment against Allianz might be given. Delor Vue did not advance a case that Allianz agreed to expand the issues in dispute to take into account the relevant detriment on which the primary judge relied.
9. It is, with respect, patently clear that Delor Vue led the learned trial judge into error by advancing a case in its submissions which it had neither pleaded, raised in the course of the hearing, nor established by evidence. It was not one in respect of which relief might be given. That being so, the judgment based on the alleged estoppel should be set aside.

## The nature of the estoppel which Delor Vue advanced

1. The manner in which the primary judge dealt with Delor Vue’s claims gives rise to some fundamental issues concerning the several forms of estoppel and the extent to which they are separate or distinct principles. Although his Honour correctly identified (at [321]) that there is, presently, no single overarching doctrine of estoppel or any general doctrine of estoppel by conduct, he, nevertheless, also observed (at [322]) that the categories of estoppel “should not be seen as taxonomically strictly divided with self-contained separate rules”. Whilst there is force in the latter observation, which might be taken as simply meaning that any one factual scenario may give rise to relief by the application of more than one form of estoppel, there are many authorities which seek to differentiate between the several historically recognised types: see the extra-judicial observations of Lord Neuberger in “Thoughts on the law of equitable estoppel” (2010) 84 ALJ 225 at 236 – 238. In *Zugic v Vesuvius Australia Pty Ltd* [2020] NSWSC 106, Ward CJ in Eq noted (at [269]ff) the continuing distinction between promissory and proprietary estoppel and between their constituent elements. In *Thorner v Major* [2009] 1 WLR 776, Lord Walker observed (at 795 [61]) that the former needed to be based on an existing legal relationship (usually, but not always, a contract), whilst the latter need not be, but must relate to identified property, owned or about to be owned by the defendant. See also *Moore v Aubusson* [2020] NSWSC 1466 [344]. There may be doubt as to whether, in Australia, equitable estoppel (being proprietary estoppel) needs to relate to interests in land: cf. *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2016] HCA 26; (2016) 260 CLR 1 (*Crown Melbourne*)at 45 [145] per Keane J. However, recognition of the differences between the several forms of estoppel is not to deny that some common or, at least, similar principles are applicable to each, particularly those relating to the essential elements of representation, reliance and detriment, as well as the principles surrounding the appropriate measure of relief.
2. That aside, it should presently be accepted that there is no single unified doctrine of estoppel in Australia: *Crown Melbourne* at 16 – 17 [36] – [37] per French CJ, Kiefel and Bell JJ and at 43 [139] – [141] per Keane J; *Giumelli v Giumelli* [1999] HCA 10; (1999) 196 CLR 101 (*Giumelli*) at 112 – 113 [7] per Gleeson CJ, McHugh, Gummow and Callinan JJ; *Compass Marinas Australia Pty Ltd v The State of Queensland* [2020] QSC 375 [176] per Dalton J. Recently, in *DHJPM Pty Ltd v Blackthorn Resources Ltd (formerly called AIM Resources Ltd)* [2011] NSWCA 348; (2011) 83 NSWLR 728 (*DHJPM v Blackthorn Resources*),Meagher JA (with whom Macfarlan JA agreed) observed (at 739 [43]):

The judgments in *Waltons Stores v Maher* accept that common law and equitable estoppel are separate doctrines although they have many ideas in common: at 398–399, 415–416, 458–459. See also *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 422, 454, 499–500; *Silovi v Barbaro* at 472 and *S&E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122 ALR 637 at 652–653. They also accept that the “familiar categories” of promissory and proprietary estoppel identify different characteristics of circumstances in which equitable estoppels will arise: at 399–400, 404, 420, 458–459. See also *Legione v Hateley* (1983) 152 CLR 406 at 432, 434–435 and *Giumelli v Giumelli* [1999] HCA 10; (1999) 196 CLR 101 at [6], [7]. Those different characteristics were described by Brennan J (at 420):

“In cases of promissory estoppel, the equity binds the holder of a legal right who induces another to expect that right will not be exercised against him … . In cases of proprietary estoppel, the equity binds the owner of property who induces another to expect that an interest in the property will be conferred on him”.

See also Mason CJ and Wilson J at 399, 404 and Gaudron J at 458–459.

1. No submissions were made to this Court as to the taxonomical issues concerning estoppel *in pais* (which includes estoppel by convention), promissory estoppel and proprietary estoppel, nor as to any relevant distinction would advance either party’s position.
2. The presently disorganised state of this area of the law no doubt has many causes. One may be that the academic writing, on which Courts and judges rely so heavily to clarify the existing law (see generally the observations of Kiefel CJ speaking extra-judicially in ‘The academy and the courts: what do they mean to each other today?’ (Australian Academy of Law Patron’s Address, Brisbane, 31 October 2019)), has, in this area, been concerned with idiosyncratically reframing and developing the law rather than providing a cohesive explication of it. Two recent notable exceptions are found in the works of Professor Denis Ong (Ong DSK, *Ong on Estoppel* (The Federation Press, 2020) (*Ong on Estoppel*)) and Michael Barnes QC (Barnes M, *The Law of Estoppel* (Hart, 2020) (*Barnes*)). In each, the particular nature of promissory estoppel, as a separate and distinct form of estoppel arising in equity, is discussed and the particular rules which have been established around it are identified. These discussions are important in the present case where Delor Vue’s case was identified by the primary judge as being that it acted in reliance upon Allianz’s alleged promise or statement of intention not to rely upon its non-disclosure when dealing with the claim made on the policy: at [321] – [322].
3. That being so, and while according appropriate deference to the careful and erudite reasons of the primary judge, this matter is more appropriately approached by the application of the principles of promissory estoppel, it being a case which falls within the established category of cases where a party having contractual rights and entitlements makes a promise as to the manner in which they will be applied.
4. The history of the development of promissory estoppel in both Australia and the United Kingdom is carefully chartered in the above works of Professor Ong and Mr Barnes QC respectively. For present purposes, the six elements of the principle identified by Brennan J in *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7; (1988) 164 CLR 387 (*Waltons Stores v Maher*) provide a solid basis for its presently accepted scope. There, his Honour said (at 428 – 429):

In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff’s action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.

1. There is no need in this case to consider whether the party relying on promissory estoppel is required to establish the fourth element. Arguably, once the first three are established, there appears to be no reason why the promisor should be able to avoid the estoppel (assuming elements five and six are also established) by showing that they neither intended nor knew that the plaintiff would act upon the representation: see the discussion in *Ong on Estoppel* at 183 ‑ 185. Further, as the estoppel fails on other grounds, there is no need in this case to consider whether promissory estoppel is confined to imposing restraint upon the exercise of legal rights – being used as a “shield” – or extends to enabling the creation of legal rights – being used as a “sword”. It is noted that a number of decisions emanating from the New South Wales Court of Appeal would appear to confine the principle to the more narrow, prophylactic scope: *Saleh v Romanous* [2010] NSWCA 274; (2010) 79 NSWLR 453 (*Saleh v Romanous*) at 460 [62] per Handley AJA (with whom Giles JA and Sackville AJA agreed); *DHJPM v Blackthorn Resources* at 750 [93] per Handley AJA; *Van Dyke v Sidhu* [2013] NSWCA 198; (2013) 301 ALR 769 at 777 [39] per Barrett JA (with whom Basten JA and Tobias AJA agreed). However, it is regularly recognised that there is a significant amount of *dicta* in favour of the wider view: see *Lopeman v WIN Corporation Pty Ltd* [2020] NSWSC 1305 [70] per Sakar J and the authorities there cited. See also the discussion in *Ong on Estoppel* at 192 – 195.
2. Nevertheless, this being a case founded upon promissory estoppel, it was necessary for Delor Vue to plead or identify the acts done (or not done) by it in reliance on the assumption or expectation created by Allianz which would result in its suffering relevant detriment if that assumption or expectation were not fulfilled. In the context of a claim (or defence) relying upon promissory estoppel, the identified acts and anticipated resultant detriment are critical and interrelated elements. As such, the person against whom the estoppel is alleged is entitled to be made aware of their nature before any trial commences. Here, the absence of any pleading or indication of Delor Vue’s reliance or detriment suffered, as found by the primary judge, had the consequence that Allianz was unaware of the case it had to meet.

## What was the detrimental reliance which was required to be shown and established in this case?

1. Delor Vue’s case, both before the learned primary judge and this Court, was vividly opaque. The precise manner in which any estoppel arose was vague and ill defined. On some occasions, it appeared that a promissory estoppel was being relied upon and, on others, an estoppel by convention. With respect, it is problematic to suggest that the same set of facts gives rise to both a promissory estoppel *and* an estoppel by convention. If the matter on which reliance is placed is the existence of a promise that something will occur in the future – in this case that Allianz will pay the claim when it is quantified – the state of affairs adopted can only be that the insurer has made a voluntary promise to do an act in the future, which promise was unsupported by consideration and therefore revocable but for the estoppel. It cannot create an existing state of affairs (of either fact or law or mixed law and fact) on which Delor Vue could rely for an estoppel by convention. That common law doctrine was never sufficiently wide to enforce a statement made by one party to another as to what they intended to do. Had it been otherwise, there would have been no need for the steps taken by Bowen LJ in *Birmingham and District Land Company v London and North Western Railway Company* (1888) 40 Ch D 268, by the House of Lords in *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 1 WLR 761 and, subsequently, by the Privy Council in *Ajay v RT Briscoe (Nigeria) Limited* [1964] 1 WLR 1326 at 1330 from which the principles of promissory estoppel emerged.
2. Moreover, Mr Elliott SC did not take the Court to any case which suggested that estoppel by convention had merged with promissory estoppel and, thereby, extended itself to include mutual assumptions as to what will occur in the future as opposed to existing states of affairs. There is probably good reason for that. It would appear to be now well established that estoppel by convention is a common law doctrine, being one similar to an estoppel *in pais* if it is not subsumed within that concept: *Saleh v Romanous* at 459 [53]; Handley KR, *Estoppel by Conduct and Election* (2nd ed, Sweet & Maxwell, 2006) at 116 – 118. It was not contended in this Court that *Saleh v Romanous* ought not be followed in this respect.

### Detriment required for promissory estoppel

1. In relation to the sufficiency of any detriment in this case, it is appropriate to first consider that question in relation to promissory estoppel. Here, at its best for the insured, the representation or promise by Allianz was that it would pay the claim according to the policy terms and, in doing so, would not rely upon Delor Vue’s non-disclosure as a basis for declining cover.
2. In the course of the appeal, it was suggested that the question of detrimental reliance arose at two points in the application of the principles of promissory estoppel, first, by giving rise to an enforceable estoppel and, second, in determining the nature and extent of any remedy. That approach gains some credence from the manner in which the elements of estoppel by representation are regularly expressed and from the general lack of clarity in this area of law. In essence, the issue is caused by the vagueness of what is meant by “the estoppel” which arises. Given its common law origins, the reference is generally taken as meaning that the representor is estopped from denying the truth of the representation or state of affairs which they have induced the representee to assume because the representee has suffered the relevant detriment. As a rule of evidence, that would exclude the introduction of proof of that matter and would operate absolutely in relation to that issue. However, in equity, the principle has developed so that whilst an “estoppel” might arise, it will not necessarily require the making good of the promise or representation and some lesser remedy might be available. That lesser remedy may be in the nature of an order sufficient to avoid the detriment which might otherwise be suffered by the promisee. In this way, the estoppel is said to have a *pro tanto* operation. In such cases, detriment is initially considered when determining whether an estoppel arises and, if so, it is considered again where its nature and extent is relevant to the relief granted. In proprietary estoppel, the latter question is often framed as being whether the enforcement of the promise is out of all proportion to the detriment suffered.
3. It is an understatement to observe that there is considerable uncertainty and doubt around these principles as well as a lack of any perceivable underlying rationale guiding their development. For instance, if a representee does not suffer sufficient detriment as a result of relying on a representation to justify estopping the representor from resiling from it, what is the justification for granting any relief? Similarly, what occurs in those circumstances where, through outside intervention or otherwise, the representee is prevented from further acting on the representor’s promise? If, as it appears, the principles of equitable estoppel are being driven to establish a form of equitable contract, of which *Waltons Stores v Maher* may be an example, there will be a need for its reconciliation with notions of mutuality, part-performance, breach, repudiation, damages and the like.
4. This issue of a supposed dual role for detriment may have been resolved to some extent by the majority decision in *Sidhu v Van Dyke* (at 530 [85]) where the concept of the “minimum relief necessary to ‘do justice’ between the parties” was largely jettisoned in favour of the view that “where the unconscionable conduct consists of resiling from a promise or assurance which has induced conduct to the other party’s detriment, the relief which is necessary in this sense is usually that which reflects the value of the promise.” That latter proposition tends to suggest a more absolutist approach such that, where actual detriment is suffered, the promise is enforced unless doing so require would be inequitable and out of all proportion to the promise.
5. The concept of detriment for the purposes of promissory estoppel was first fully explained in Australia in *Waltons Stores v Maher.* Mason CJ and Wilson J grounded promissory estoppel in unconscionability, being not merely the departure by a representor from their promise but the consequences of such departure for the representee. Their Honours said (at 406):

The foregoing review of the doctrine of promissory estoppel indicates that the doctrine extends to the enforcement of voluntary promises on the footing that a departure from the basic assumptions underlying the transaction between the parties must be unconscionable. As failure to fulfil a promise does not of itself amount to unconscionable conduct, mere reliance on an executory promise to do something, resulting in the promisee changing his position or suffering detriment, does not bring promissory estoppel into play. Something more would be required. *Humphreys Estate* suggests that this may be found, if at all, in the creation or encouragement by the party estopped in the other party of an assumption that a contract will come into existence or a promise will be performed and that the other party relied on that assumption to his detriment to the knowledge of the first party.

1. The articulation of the nature of promissory estoppel by Brennan J in that case has been set out above. There, his Honour identified that relevant detriment as being that which will be suffered by the representee, who has acted on the assumption or expectation, which is not fulfilled and which the defendant has failed to act to avoid, whether by fulfilling the assumption or expectation or otherwise. This articulation of relevant detriment is coherent with the notion that the relief which is available is that which is the minimum to do equity or, in other words, that which will relieve the representee of the detriment which they will suffer by having acting in reliance on the representation if the representor is allowed to resile from it. This was echoed in *Sidhu v Van Dyke* where the majority (at 522 – 523 [58]) identified that it was not the breach of promise which justifies the holding of a party to their promise but the detrimental reliance caused by the promise. Their Honours (French CJ, Kiefel, Bell and Keane JJ) assayed the evidence of detriment, identified in that case as being the plaintiff’s loss of opportunity to undertake other paths in life or other jobs, and it was in that context they considered the extent to which it was unconscionable for the representor to seek to resile from the assurances which had been made. In particular, they relied on the observations of Dixon J in *Grundt* (which are set out above) to the effect that the relevant detriment is not the reliance on the assumed state of affairs, but the harm which would flow if the assumption were deserted in circumstances where the promisee had acted in reliance on the promise. In *Ashton v Pratt* [2015] NSWCA 12; (2015) 88 NSWLR 281 (*Ashton v Pratt*), Bathurst CJ made the point in similar terms (at 307 [141]):

The relevant detriment is that which the party asserting the estoppel would suffer, as a result of her original change of position, if the assumption which induced it was repudiated by the party estopped: *Delaforce v Simpson-Cook* [2010] NSWCA 84; 78 NSWLR 483 at [42], *Grundt v The Great Boulder Proprietary Gold Mines Ltd* (1937) 59 CLR 641 at 674–675 and *Sidhu* at [81].

1. The issue was significant in that case where the plaintiff had made substantial gains as a result of acting in reliance on the representation on which she sought to found an estoppel with the consequence that no detriment was suffered. See also the discussion of Handley AJA in *Delaforce* at 491 [41] – [44].

### The nature of “sufficient” detriment

1. The foregoing raises the issue of the nature of detriment in estoppel and, in particular, that of sufficient detriment. In this context, “sufficient” refers to the quality of detriment which justifies holding the representor to their representation or to the assumed or accepted state of affairs which it has created.
2. As the reasons of the learned primary judge reveal, any consideration of nature of sufficient detriment necessarily involves a consideration of the object of estoppel generally. In *Commonwealth of Australia v Verwayen* [1990] HCA 39; (1990) 170 CLR 394 (*Verwayen*),some members of the High Court adhered to the view expressed in *Waltons Stores v Maher* that relief for estoppel was determined by ascertaining the minimum equity to do justice to the plaintiff (at 411 – 412 and 416 per Mason CJ; at 429 – 430 per Brennan J) which was coherent with estoppel’s object being to prevent a representee suffering detriment as a result of acting on a representor’s promise. At least, in terms, the recognised general aim of estoppel seems to remain undisturbed. In *Sidhu v Van Dyke*, the High Court reinforced this view by citing with approval the observations of Mason CJ in *Verwayen* (at 409) that estoppel’s fundamental purpose is to accord protection against the detriment which would flow from a representee’s change of position if the assumption or expectation generated by the representor which led to it were deserted: at 511 [1]. See also the observations of Dixon J in *Grundt* at 674; *Waltons Stores v Maher* at 419; *Giumelli* at 124 [44]; and more recently *Crown Melbourne* at 43 [139].
3. In this case, the learned primary judge adopted the approach which he had taken in *Delaforce*, in which prominence was given to keeping the representor to their representation, even if it was not contractual, on the basis that “equity has also had a place in keeping the parties to representations or promises”: at [335]. See also the reasons of Handley AJA with whom Giles JA agreed in *Delaforce* (at 494 – 495 [63] – [77]). By adopting that approach in *Delaforce*, the Court of Appeal held that there was no basis for limiting the relief which might be granted to that which was proportionate to the detriment which the representee had sustained. Effectively, the suffering of any detriment was sufficient to render the representor’s promise enforceable (*in specie* or by an appropriate substitute), save in those cases where the representor is able to establish that the relief is out of all proportion to the detriment. Handley AJA said (at 495 [77]):

… In my opinion, and with respect there is no positive requirement for a plaintiff to prove that the relief sought is proportionate. The principle, a negative one, is that enforcement of the expectation must not be disproportionate.

1. It ought to be kept steadily in mind that *Delaforce* concerned a claim of proprietary estoppel, a category of estoppel which arises where the owner of property has encouraged another to alter their position in the expectation of obtaining a proprietary interest in that land and the other has changed their position to their detriment. For that reason, the numerous cases cited and referred to in the judgements of the Court of Appeal were predominantly cases where similar estoppels were raised. Here, the estoppel relied upon is promissory estoppel, being a distinct category of estoppel and one not involving the consequences of one party performing their side of a reciprocal arrangement nor the unconscionable reliance on the *Statute of Frauds* requirements*.*
2. Although the matter is not entirely free from argument, there remains a strong line of authority that the principles of estoppel do not outflank the requirement of consideration in contract and that estoppel’s historical object, being to avoid detriment rather than to hold parties to their promises, remains intact. In *Sidhu v Van Dyke*, the majority said (at 522 – 523 [58]:

In point of principle, to speak of deploying a presumption of reliance in the context of equitable estoppel is to fail to recognise that it is the conduct of the representee induced by the representor which is the very foundation for equitable intervention. Reliance is a fact to be found; it is not to be imputed on the basis of evidence which falls short of proof of the fact. It is actual reliance by the promisee, and the state of affairs so created, which answers the concern that equitable estoppel not be allowed to outflank *Jorden v Money* by dispensing with the need for consideration if a promise is to be enforceable as a contract. It is not the breach of promise, but the promisor’s responsibility for the detrimental reliance by the promisee, which makes it unconscionable for the promisor to resile from his or her promise. In *Giumelli v Giumelli*, Gleeson CJ, McHugh, Gummow and Callinan JJ approved the statement of McPherson J in *Riches v Hogben* that:

“It is not the existence of an unperformed promise that invites the intervention of equity but the conduct of the plaintiff in acting upon the expectation to which it gives rise.”

(Footnotes omitted).

1. Subsequently, when considering the question of the appropriate measure of relief, their Honours cited (at 528 – 529 [80] – [81]) with apparent approval the observations of Dixon J in *Grundt* (speaking of estoppel *in pais* and estoppel by convention):

[I]t is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it.

1. After noting that Dixon J’s comments had been applied to cases of equitable estoppel such as *Donis v Donis* [2007] VSCA 89; (2007) 19 VR 577 (at 593 – 594 [54] per Nettle JA (with whom Maxwell ACJ and Ashley JA agreed)) and *Delaforce* (at 491 [42] per Handley AJA), their Honours referred (at 529 [82]) to the Court’s earlier adoption of the same proposition in *Giumelli* (at 112 [6]) in the following manner:

In *Giumelli v Giumelli*, Gleeson CJ, McHugh, Gummow and Callinan JJ held that, because the fundamental purpose of equitable estoppel is to protect the plaintiff from the detriment which would flow from the defendant’s change of position if the defendant were to be permitted to resile from his or her promise, the relief granted may require the taking of active steps by the defendant including the performance of the promise and the performance of the expectation generated by the promise. That holding is supported by the leading decisions to which this category of equitable estoppel is usually traced [*Dillwyn v Llewelyn* (1862) 4 De GF & J 517 [45 ER 1285]; *Ramsden v Dyson* (1866) LR 1 HL 129; *Riches v Hogben* [1985] 2 Qd R 292; *The Commonwealth v Verwayen* (1990) 170 CLR 394.]

(Footnotes omitted).

1. Despite endorsing the purpose of estoppel as being the protection of the plaintiff from the detriment which would flow from the defendant’s change of position, the majority (at 529 ‑ 530 [83] – [84]) nevertheless framed the principles around the measure of relief in terms akin to contractual specific performance. The exception was in those cases where the value of the promise was disproportionately greater than any detriment suffered and the detriment is easily quantifiable. Although their Honours left room for the application of the principle of the “minimum equity to do justice as between the parties”, they considered that justice between the parties would not be done in the case before them other than by holding the appellant to the representation. They said (at 530 [85]):

While it is true to say that “the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct”, where the unconscionable conduct consists of resiling from a promise or assurance which has induced conduct to the other party’s detriment, the relief which is necessary in this sense is usually that which reflects the value of the promise.

(Footnote omitted).

### The relationship between the nature of the promise, reliance and detriment

1. In the consideration of the sufficiency of detriment, some attention needs to be given to the context in which the issue arises, in particular, the nature of the representation made and the extent of reliance. In relation to the former, a distinction exists between a representation or promise involving a unilateral assumption of a burden or voluntary surrender of a right on the one hand (a voluntary promise) and, on the other, one which is part of a “reciprocal arrangement” (as described by Ben McFarlane and Sir Philip Sales in “Promises, Detriment and Liability: Lessons from Propriety Estoppel” (2015) 131 LQR 610). In the latter scenario, the arrangement itself tends to provide some metric by which the sufficiency of detriment might be measured. This generally occurs in relation to claims concerning proprietary estoppel arising from family arrangements where the promisee is offered an interest in land consequent upon them performing work on the property or staying with the family business for a significant period of time. Certainly, when the bargain or arrangement has been fully executed by the promisee, there is little doubt that their “expectation interest” can only be satisfied by the performance of the promise and that nothing short of that is appropriate. Where performance by the promisee is something less, questions must arise as to the extent of the relief to which the promisee should be entitled and that may only be answered, in part, by reference to the reciprocal bargain which has given rise to the representation or expectation.
2. The above considerations have no obvious application when the representation arises from the unilateral act of the promisor such as in the present case. Here, Allianz’s promise did not carry with it any stipulation by which some conduct by Delor Vue would render it irrevocable or by reference to which a metric might be discerned to determine what amount of detriment might be sufficient. In this sense, any expectation by Delor Vue is founded upon the hope that Allianz does not change its mind. See the observations of Mason CJ and Wilson in *Waltons Stores v Maher* at 403 and of Robert Goff LJ in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84 (*Amalgamated Property Co v Texas Bank*) at 107. It was not founded upon any reciprocal arrangement which carried within it the implication that Delor Vue’s performance of some obligation would secure the fulfilment of Allianz’s promise.

## The absence of actual prejudice/detriment

1. Allianz further submitted that, even had the acts of reliance which founded the estoppel identified by the primary judge been appropriately raised, Delor Vue did not establish the existence of any actual detriment. It submitted that Delor Vue failed to establish that it would suffer detriment as a result of acting in reliance on the promise if Allianz was entitled to resile from it. For the reasons which follow, that submission should be accepted. This conclusion is not surprising. Not only did Delor Vue not plead the relevant acts of reliance, it did not attempt to plead that any actual prejudice would flow from it having changed its position if Allianz were entitled to resile from its stated intention. The necessary consequence was that it did not attempt to prove any such matter.

### Omission to bring proceedings against Allianz

1. Allianz submitted that Delor Vue did not suffer detriment consequent upon its omission to commence an action to enforce its claimed rights under the policy for three reasons. First, it did not lose any entitlement to pursue Allianz. Second, contrary to the primary judge’s conclusion that it was impossible to tell what the result would have been, the circumstances reveal that it would have failed in any action as the primary judge determined that Allianz was entitled to reduce its liability to nil. Third, it was not suggested that the delay which was caused altered the outcome of the disputed rights under the policy.
2. It is not unfair to say that, on the appeal, Delor Vue made no attempt to rely upon its omission to commence proceedings against Allianz as amounting to sufficient detriment which would support an estoppel in this case. It relied only on the observations of the primary judge but did not advance any argument in support of his conclusion. That is understandable given the force of Allianz’s submissions.
3. Whilst in some circumstances refraining from commencing legal proceedings against a third party may well amount to detriment of such magnitude that it suffices to support an estoppel, the present case is not one of them. First, the cause of action was not lost. It was actually pursued, being the institution of these proceedings. In terms of any detriment, all that might be said is that Delor Vue did not commence them earlier. Second, whilst in some cases it might not be possible to tell what would have been the outcome of having commenced proceedings, here the outcome of that putative action is known. In these proceedings, the primary judge correctly determined that Delor Vue’s non-disclosure entitled Allianz to reduce its liability to nil. Undoubtedly, that would also have been the outcome had the proceeding been commenced earlier. Third, there is nothing to suggest that, had an action against Allianz been commenced in May 2017, the result would have been different or that Delor Vue is relevantly prejudiced by not having commenced this action earlier.
4. It follows that, contrary to the conclusion of the learned primary judge, the omission to commence proceedings was not detriment of a kind which would support an estoppel.

### Detriment by refraining from carrying out repairs

1. Allianz also submitted that there was insufficient evidence on which the primary judge might have concluded that Delor Vue suffered detriment as a result of it refraining from carrying out repairs to the damaged property. It supported this submission by reference to the 9 May 2017 email, which, so it said, specified that Delor Vue was obliged to undertake the repairs to the roofs before the internal damage for which Allianz had agreed to pay would be rectified and the failure of Delor Vue to undertake those repairs. It further submitted that there was no evidence to suggest that Delor Vue suffered detriment as a result of repairs not being undertaken sooner and said that, even if there were such evidence, it was not consequent upon any representation in the 9 May 2017 email.
2. Delor Vue principally submitted that the statement in the 9 May 2017 email was not to the effect that it was required to undertake the repairs to the roof prior to the commencement of the work which Allianz had agreed to indemnify. It asserted that the statement in the email was of a general nature and merely identified the sequence of repair work and that the extent to which the repair work to the roof was to be indemnified under the policy was yet to be determined. In other words, it rejects the factual foundation of Allianz’s submission that there was some imperative for the insured to undertake the initial repairs and that the absence of repairs reveals that its failure to carry out repairs was not a consequence of the representation.
3. The difficulty underlying any examination of this issue is the absence of any pleading supporting the alleged detriment. Such a pleading would have articulated the proposition that, had the representation in 9 May 2017 email not been made, Delor Vue would have taken some action relating to the repairs needed at the complex. The persons who would have made the decision to undertake the work would have been identified and the capacity of Delor Vue to undertake it would necessarily have been asserted. Any properly formulated pleading would also have identified the position in relation to repairs in May 2018 which had occurred and how those repairs were less advanced than they would have been had Delor Vue pursued that task.
4. As it was, none of these matters were pleaded and, as a necessary consequence, no evidence adduced in relation to them. The persons who may have relied on the representation were not identified and nor did they give evidence about what they would have done in the counterfactual scenario. Assuming that evidence of some decisional process to that effect had been adduced, further evidence would have been required as to how the repairs may have been effected, including the obtaining of relevant engineering and building reports as well as scope of works. These are not mere side issues in this case where, in the period between May 2017 and May 2018, Allianz undertook the urgently needed repairs and sought and obtained reports on the nature and extent of the major repair work required, as well as reports from builders concerning the necessary scope of works. Whilst it is true that some of these steps also involved the attempt to categorise the work into non-indemnified and indemnified work, the steps taken would have been objectively beneficial to Delor Vue had it been required to undertake the work. At the very least, had the issue been properly articulated, this would have been a matter of contention.
5. It is necessary to reiterate that the counterfactual scenario relevant to any inquiry for the purposes of estoppel is the position in which the promisee would be had they not relied upon the assurance or representation. It is not, necessarily, the position the promisee would be in if told of the opposite of the representation. Whilst it may regularly be that the giving of an assurance or making of a promise has occurred because the circumstances were such that the representor was required to give an indication one way or another, that is not necessarily so. Here, given the difficulties with the assessment of the damage and the insurer’s concern as to the extent to which the cyclone damage may have fallen within one of the exclusions, it may have been that, rather than signifying an intention to indemnify, Allianz may not have given any indication of its position until some substantial time later. True it is that the insurer was under an obligation to make a decision in a timely manner and within a reasonable time: s 57 of the ICA: but, in the circumstances of this case where issues of non-disclosure had been raised and substantial questions existed as to the defective condition of the roofs at the complex, it would not have been unreasonable for Allianz to defer making a final determination for some time. As this issue was not raised in the appeal, there is no need to consider it further.
6. As was submitted by Mr McLure SC for Allianz, the claim that, in reliance on the representation, Delor Vue abstained from undertaking the repair work was first raised in its written submissions handed to the Court in the course of addresses. It had not been pleaded, opened, and no evidence was called in support of it. Delor Vue did not submit that it called evidence in relation to this issue. Consistently with its submission that it was entitled to support an estoppel by the mere reference to the existence of possible opportunities which might have existed and had been forgone, it did not call evidence to establish that it would have undertaken the repairs itself or that it would suffer harm if Allianz were entitled to resile from its representation. That approach was misguided. As was clearly stated in *Sidhu v Van Dyke*, the onus is on the party propounding the estoppel to plead and prove the existence of real detrimental reliance. That did not occur here.

### The meaning and import of the 9 May 2017 email

1. The foregoing renders it unnecessary to consider the meaning of the 9 May 2017 email for the purposes of the estoppel claim. However, as the Court received substantial submissions on this topic and because it is relevant to other issues on the appeal, it is appropriate to do so.
2. At least in the appeal, Delor Vue asserted that it relied upon the content of the email as constituting a representation that Allianz would indemnify in respect of the claim and, in reliance on that, it abstained from undertaking repairs to the complex itself. Allianz submitted that there could be no such reliance as the email required Delor Vue to undertake repairs before any work for which it would indemnify the insured would be commenced. Delor Vue disputed that construction.
3. On its face, the content of the 9 May 2017 email is somewhat ambiguous, although some of that uncertainty is clarified by reference to the context in which it was written. That context includes the several reports which had been obtained and passed between the parties in the period prior to the date of the email concerning the pre-existing defective condition of the roofs at the Delor Vue complex. Nevertheless, the email provided a statement of Allianz’s intention to partially indemnify under the policy despite Delor Vue’s non-disclosure. However, by no means did it indicate that Allianz intended to indemnify in respect of all of the repairs which had to be undertaken at the complex. It clearly specified that damage in the category of “Defective materials and construction of the roof, including but not limited to tie downs, rafters and timbers and soffit” would not be covered and that Delor Vue would be responsible for repairs of that nature. In the context of the reports obtained to that date, it was patent that such work would be considerable. On the other hand, Allianz did indicate its intention to indemnify with respect to the cost of repairing that damage referred to as “Resultant damage including but not limited to internal water damage, fascia, guttering and roof sheeting (for those buildings which lost roof sheeting only)”. In the context of the communications between the parties and the background in which the issue arose, it is sufficiently clear that Allianz intended to indemnify in respect of some matters which could only be attended to once the structural or major repairs to the roofs were undertaken. It is axiomatic that fascia, guttering and roof sheeting could only be applied once the structural defects in the roof were remedied. The 9 May 2017 email then referred to the engagement of engineers to provide a scope of work for the repairs to the roof and, again, reference was made to the defective repairs which were to be paid for by Delor Vue and the resultant damage which was to be covered by Allianz. Thereafter, it was mentioned that the roof repairs would have to be undertaken before the internal repairs were started. In this respect, the letter said:

In terms of the repairs, for those buildings which have not sustained damage to the roof or water is not entering the building through the roof, once the quotation has been received and approved, the internal repairs will be able to commence.

However, for those buildings which have sustained damage to the roof or water is not [sic] entering the building through the roof, the roof repairs will need to be carried out first, before the internal resultant damage repairs can proceed.

1. A difficulty here is the uncertainty which existed at the time of the 9 May 2017 email and, particularly, as to the extent of the structural defects. By that date, it was apprehended by all that there were, or it was reasonably probable that there were, serious structural defects in the roofs of the buildings at the complex and, in particular, with the trusses and tie downs. It is also apparent that the structural repairs to the roofs would have to be effected prior to other repairs such as the replacement of gutters, fascia and roof sheeting. Although that would appear to be somewhat obvious, it is not possible to discern from the letter any statement to that effect or that this was what Allianz intended. The quoted paragraphs refer to the undertaking of all of the work on the roofs prior to the *internal* resultant damage repairs being undertaken. This is reinforced by the contrasting position stated with respect to buildings which had not sustained damage to their roofs. Nonetheless, those paragraphs do not assert that Delor Vue was required to undertake, by itself, the uninsured work prior to the commencement of the repair work for which the Allianz had accepted liability.
2. It is not possible to derive from the 9 May 2017 email the imposition of a prerequisite to Allianz indemnifying Delor Vue in respect of insured repair work that it complete the repairs to the roof structures on the buildings. However, that is not to say that the email does not provide support for the submission that it did not provide any reasonable foundation for Delor Vue’s claimed inactivity. The express indication that remediation of the structural defects in the roofs were to be paid for by Delor Vue which would have to be completed prior to Allianz undertaking repair work for internal damage must surely have indicated to the insured that it would need to be either wholly or overwhelmingly involved in the undertaking of that initial work. The letter provides a strong indication that Delor Vue would need to progress its part of the repair work in order to ensure the overall remediation could occur expeditiously.
3. In cases of this nature, it is especially important to ascertain how a written representation was understood by those who received it. Here, there was no such evidence nor any opportunity for cross-examination on the issue. That might have occurred had, at the trial, Delor Vue raised as an issue prior to its final address that its detriment flowed from abstaining from undertaking repairs earlier than it did. Then the relevant persons who allegedly so relied could have been cross-examined on their understanding of the 9 May 2017 email and, in particular, the imperative that Delor Vue undertake a substantial part of the initial repair work. At best, there was only indirect evidence before the primary judge as to such understanding, being Mr Key’s correspondence of 29 August 2017 and LMI Legal’s letter of 3 May 2017, each of which asserted that Allianz had not finally stated its position on indemnity.

### Could the alleged representation have continued?

1. Had Delor Vue properly raised the issue of detriment flowing from it abstaining from undertaking remediation work, a question would have arisen in the proceeding as to the length of time during which it might have claimed that it legitimately relied on the representation in the 9 May 2017 email as the basis for not proceeding with the work. On 22 June 2017, Ms Lander of Allianz advised Ms Webb of BCB by email that a further inspection of the roofs by Morse had identified additional defects in the buildings, including:
* Truss failure due to bottom chord splitting at HD bolt locations
* Truss failure due to top chord splitting at nail-plate
* Gable end cladding to trusses failed as a result of inadequate fixing to supporting trusses
* Soffit failure as a result of inadequate fixing to support members
* Vertical wall reinforcement protruded past the top course of masonry
* Gable end truss tie down inadequate
* No internal bracing to high end truss members
1. This must have alerted Delor Vue to the fact that substantial repairs relating to the trusses would have to be undertaken and paid for by it. If that was not apparent by the list of defects, it was by the subsequent statement in the letter that:

Whilst the Scope of Works has not been finalised as yet, given the further failures which have come to light, we believe the costs involved in rectifying the defective related items will be in the **millions**. The Body Corporate need to be aware of this, as funds will need to be raised and be available, in order for the rectification works to proceed.

(Original emphasis).

1. Whilst the letter did say that the insured and uninsured work would need to be carried out “hand in hand”, it must have been obvious that, until Delor Vue held sufficient funds to undertake the repairs for which it was responsible, the project could not proceed. There is little evidence of the funds which were available to Delor Vue, but that evidence which does exist supports the view that it was well short of “millions”. It is not immediately clear how Delor Vue could claim that it would have proceeded with the entire remediation project given that it apparently only had the financial ability to fund only part of it.
2. The understanding that the work for which Delor Vue was responsible would be substantial must have also been emphasised when, at its meeting on 18 July 2017, the Committee reviewed the scope of works which had been prepared by Morse. That was further reinforced when, in December 2017, it received the report which it had commissioned from GHD confirming that the trusses needed to be replaced (at significant expense).
3. Again, had Delor Vue raised as an issue that it had abstained from undertaking repairs itself on the faith of the statements in the 9 May 2017 email, the persons claiming such reliance would have been required to respond to the substance of these letters. They would have been required to confront the issue that Delor Vue may not have had the financial ability to undertake the work at that time or for some time thereafter. As the issue was not raised, their response is unknown.

### Was there evidence that Delor Vue abstained from undertaking repairs in reliance on the representation?

1. Allianz further submitted that, even if the issue of Delor Vue’s reliance by abstaining from undertaking repairs had been raised, the evidence before the Court did not establish that it would have acted in that manner. Necessarily, there is a difficulty in considering this topic in the absence of any pleading, evidence or submission from Delor Vue as to the manner in which it would have acted and, importantly, its financial ability to conduct itself in that manner.
2. The conclusion as to the manner in which Delor Vue would have acted is essential to any estoppel claim as it provides the foundation for assessing the detriment which it would suffer if Allianz were allowed to resile from its prior indication that it intended to provide a partial indemnity in respect of the damage. However, as there was no pleading or indication as to the facts on which Delor Vue relied to raise the inference that Allianz’s representation and any subsequent detriment stood to each other in the relation of cause and effect, no conclusion is possible. There was no evidence adduced that the relevant persons would have made the decision to undertake the repairs, how the repairs would have been effected, how they would have been financed, and the extent to which they would have been completed by May 2018. Even if the case were put as being the loss of an opportunity to undertake repairs, there was no evidence from which it was possible to conclude on the balance of probabilities that it would have been pursued, and that Delor Vue would have been better off than it was following the work which was undertaken by Allianz.

### The events which occurred between May 2017 and May 2018

1. Mr McLure SC for Allianz submitted that, given the events which did occur in the period between the email of 9 May 2017 and May 2018, it could not be concluded that Delor Vue would suffer any actual prejudice from the insurer resiling from its stated intention to partially indemnify in respect of the claim. He identified that, prior to 9 May 2017, the insurer had already engaged an engineer from Morse to attend the site, inspect and provide a report on the construction of the buildings. Although the report subsequently produced undoubtedly had relevance to the insurer’s interests, it was also of benefit to Delor Vue to understand the damage requiring remediation. It identified the nature and extent of the damage and its causal origins in the defective construction. On 10 May 2017, a scope of works and quote for undertaking the work was received by the insurer. Again, this document became available to Delor Vue and, on any view, would have assisted it in understanding the extent of the repair work and the likely cost. A further report was obtained by Allianz from Morse on 12 May 2017 detailing the findings from a subsequent inspection. The content of that report elaborated upon and extended the identification of the nature and extent of the cyclone damage and the existing defective construction. The author of the report also provided guidance as to the work required to rectify the existing deficiencies in the roof trusses and included a further scope of works. It was submitted that Delor Vue would have been required to obtain such a report in order to plan the remediation work and that its acquisition therefore to the insured’s advantage. In that latter respect, it is worth noting that part of Delor Vue’s pleaded claim is that it suffered detriment by not obtaining scopes of work for the undertaking of the repairs and, as Mr McLure SC submitted, the fact that they were obtained by Allianz must have been to Delor Vue’s advantage. Additionally, in the period after 9 May 2017, Allianz caused urgent repairs to be made to buildings which were exposed to the weather, reimbursed Delor Vue for the cost of the caretaker’s accommodation, and made payments in respect of loss of rental receipts for some unit owners. The evidence revealed that, by December 2017, it had expended around $192,000 in obtaining engineering and building reports, paying for various reports, temporary accommodation and loss of rent. The expenditure of this amount was largely to the benefit of Delor Vue. Allianz also sought and obtained two building quotations for the work identified in the scope of works produced by Morse which were provided to Delor Vue. These quotations identified the cost of undertaking the remediation work which Allianz indicated that it did not intend to cover and were for $2.1 million and $3.2 million.
2. Despite Delor Vue pleading that, in reliance on the 9 May 2017 email, it abstained from obtaining scopes of works or quotations, the evidence shows that it did retain GHD to undertake an inspection and to provide a report in relation to the roof trusses. The First GHD Report, produced on 21 August 2017, identified the several defects and the manner in which they might be addressed. It also identified that those defects had their origin in the construction of the buildings. An additional report was produced by GHD in December 2017 which further identified the damage sustained to the buildings, gave opinions as to the cause, and advised on methods of repair. Importantly, it also concluded that the current roof trusses were not adequate and advised that they required extensive repairs. In relation to funding the repairs which were to be undertaken by Delor Vue, it is apparent that a decision was made at the Committee meeting in December 2017 to apply the sinking fund of $250,000 towards the cost of repairs and to borrow a further $750,000.
3. On Delor Vue’s unpleaded case that it suffered detriment by abstaining from undertaking repairs, Allianz submitted that it was required to identify what work it abstained from undertaking, show that it would have been accomplished sooner or differently than it was, and demonstrate how it would have been in a better position than it was in May 2018 (i.e. that it had suffered harm or detriment consequent upon its reliance). It submitted that, in the light of the above matters, Delor Vue could not, on the evidence adduced in the hearing, demonstrate any real detriment. So the submission went, the damage to the buildings was problematic and extensive. Reports and building quotes were obtained and, rather than agreeing to a path by which the work could be performed, Delor Vue spent time attempting to ascertain how it might be done more cheaply. The evidence also suggests that, at best, Delor Vue would have been able to pay for only a portion of the repairs. In summary, Allianz submitted that the evidence of the work actually done tends to establish that Delor Vue would, at least, have been in no better position had Allianz not indicated its intention to pay a portion of the claim with the result that it would not suffer detriment if Allianz does not fulfil its promise.
4. These submissions should be accepted. As far as the evidence goes, it suggests that whatever work was required to be performed in relation to undertaking of the repairs was being attended to in the 12 months following the 9 May 2017 email. The nature and extent of the damage was not immediately ascertainable and nor was the extent to which it was derivative upon the defective construction of the buildings. In circumstances where Delor Vue had contemplated proceedings against the builder and developer, it is most unlikely that, had it assumed control of effecting the repairs, it would have proceeded without identifying the liability which might be attributed to those parties. The preparatory work done by the several engineers and builders was work which had to be undertaken in any event and at no time was it suggested that that which was performed was not beneficial to Delor Vue.
5. The evidence also shows that the total remediation costs were between $4.5 million and $5.6 million and the only funds to which Delor Vue had access totalled $1 million. This strongly negates any suggestion that the body corporate could have embarked upon the project by itself. Although Mr Elliott SC submitted that the repair work might have been undertaken in a staged way, there was no evidence to support that possibility or how it might occur. Again, had the issue been legitimately raised, evidence of that nature may have been forthcoming. Allianz would then have had the opportunity to challenge such evidence and adduce its own.
6. Mr Elliott SC also submitted that Delor Vue suffered detriment by allowing Allianz access to the buildings at the complex for the purposes of inspection and the procurement of engineering reports. It was said that it suffered detriment because Allianz was able to ascertain the extent to which the damage was caused by the defective nature of the construction of the buildings and more accurately assess the extent of its liability under the policy. It was further submitted that, had the representation not been made, Delor Vue would have been in a position to demand payment of more than it was entitled to, presumably because Allianz would not have been in a position to quantify its liability in the absence of access. Whether equitable estoppel can be supported on detriment of that nature need not to be decided, although it must be strongly doubted. Nevertheless, there is no causal connection between Allianz’s promise and it becoming aware of the nature and extent of the damage resulting from defects in the buildings. Had the promise not been made, Allianz may have continued to assess the claim for some time. If so, it is likely that it would have used its entitlement under the policy to enter the premises when a claim is made so as to inspect any damaged property. In that sense, the insurer’s entitlement to access or take possession of the property was not founded upon the making of the representation in the 9 May 2017 email: see at [25], [326], [333], [339]; but merely the making of the claim. Even if it is assumed that, rather than expressing the intention in the 9 May 2017 email, Allianz declined cover with the consequence that litigation commenced, it is also undoubted that the litigation processes would have enabled Allianz access to the premises for the purposes of obtaining expert reports. Again, these are matters which, had the issues been properly raised, could and would have been canvassed at the trial. In any case, it is simply not possible to conclude that Delor Vue is worse off if Allianz is entitled to resile from its representation on the basis that the insurer gained access to the insured premises for the purposes of ascertaining the extent to which the relevant policy exclusion applied.
7. The evidence before the primary judge fell well short of establishing that Delor Vue suffered any real detriment by having abstained from effecting repairs in reliance on the 9 May 2017 email. Even if it is assumed that Delor Vue would have attempted to proceed in some manner, there is nothing which evidences what it would or could have achieved in the 12 months to May 2018. Moreover, as a consequence of the work undertaken by Allianz, there is nothing from which it can be determined that Delor Vue was in a worse position because the insurer indicated its intention to indemnify and proceeded to expend substantial funds preliminary to the undertaking of the remediation work.

### Assessing the competing advantages and disadvantages.

1. In the analysis of whether a party propounding an estoppel has suffered detriment, any comparison of their actual position with their hypothetical counterfactual position must include an assessment of any benefits accruing to them as a result of the course they have adopted. That approach is coherent with the estoppel’s object to protect against the suffering of detriment consequent upon reliance on a promise. On this issue, Allianz relied upon the recent decision of the New South Wales Court of Appeal in *Q (a pseudonym) v E Co (a pseudonym)* [2020] NSWCA 220; (2020) 383 ALR 469 (*Q v E*), which was delivered subsequently to the primary judge’s judgment in this matter. In that case, the sons of Q raised a proprietary estoppel against their father when claiming an interest in the family farming businesses. They asserted their interest arose from an expectation created and encouraged by Q that they would each receive an interest in the farming properties of the businesses on his death. The sons claimed that, in reliance on that expectation they worked in the family businesses for many years, but that Q subsequently altered his will which would have the effect of denying them any interest in the properties subsequent to his death. The primary judge upheld the sons’ claim on the basis that Q had, indeed, created an expectation that if they remained in the family businesses whilst he retained ownership of the family farms they would inherit them on his death. It was held that, as the sons had made “life-changing decisions” not to pursue other career options and had joined the family business, it would now be unconscionable to allow Q to act otherwise than in accordance with the sons’ expectation, even though the relationships had irretrievably broken down. A central issue on appeal was whether the sons had suffered real or significant detriment as a result of relying upon the expectation created and, within that issue, was the extent to which the countervailing benefits which the sons obtained from participation in the family businesses were relevant. Meagher JA (with whom Leeming and Payne JJA agreed) relied (at 505 – 506 [145] – [155]) upon the observations of Dixon J in *Grundt* (at 674 – 675) in concluding that the assessment of detriment required that a comparison be made between the positions the sons currently occupy and those they would have occupied had they not changed their positions in reliance on the expectation of an inheritance. His Honour observed (at 505 [154]):

There will be an estoppel if the sons would suffer prejudice or disadvantage by reason of their changes of position if Q were to depart from that expectation. The fact that each has received and retains a quarter share in E Co [being one of the family companies] is plainly a matter to be taken into account in assessing whether they would be prejudiced or disadvantaged in that event.

1. His Honour identified that there was nothing in *Giumelli* or *Sidhu v Van Dyke* which contradicts the requirement to take into account the benefits which a party asserting an estoppel has acquired in reliance on a promise. He then observed that it was possible to conceive of cases where the party relying on an expectation will have benefited so greatly through their reliance such that they would not suffer any prejudice if the expectation were departed from. On the other hand, his Honour held (at 506 [157]) that it was impermissible to undertake a precise quantification of the advantages and disadvantages flowing from reliance on an expectation when ascertaining whether any detriment was sustained. The comparison is one which may be founded upon evaluative judgments. Meagher JA also acknowledged (at 506 [158]) that occasions will arise where the party relying on an estoppel may have foregone opportunities which cannot be readily valued, but which cannot be rejected as carrying only a fanciful or unrealistic prospect that the party discouraged would not have been better off.
2. In this context, Mr McLure SC also referred to the decision of Bathurst CJ in *Ashton v Pratt*, where the Chief Justice (at 307 [143] – [144]) undertook an evaluation of the benefits which the appellant had received by acting in reliance on the representation on which the estoppel claim was founded. Weighing those benefits, the Chief Justice concluded that no detriment was suffered by the appellant.
3. In this matter, the above recitation of the facts which occurred in the period between May 2017 and May 2018 not only contradicts the argument that Delor Vue suffered any real or significant detriment, it rather tends to suggest that Allianz’s participation in the organisation of the remediation project conferred a considerable advantages on it which would not otherwise have been obtained. It is perhaps desirable to reiterate once more that, had the detriment now relied upon been squarely pleaded, such matters would have been the subject of evidence and submission before the primary judge.

### Delor Vue’s claims of lost opportunities

1. As previously mentioned, Mr Elliott SC submitted that Delor Vue was able to establish detriment by identifying possible opportunities which might have been lost by reason of its reliance on the stated intention of Allianz to partially indemnify the claim. He submitted that a party in Delor Vue’s position was entitled to “let its imagination go” and could rely upon any hypothesised lost opportunity so long as it was not fanciful or unrealistic. In that latter respect, he relied upon the observations in *Delaforce* at 486 [5] perAllsop P.
2. However, these submissions misapply the President’s observations in that paragraph and are not consistent with the reasons of Meagher JA in *Q v E*. In that latter case, his Honour observed (at 506 [158]):

Thus, the question becomes whether this was a case in which there were opportunities forgone by B and C through reliance which cannot readily be valued but which nevertheless cannot be rejected as carrying only a fanciful or unrealistic prospect that the party encouraged would have been better off. …

1. His Honour’s statement indicates it is the prospect that the party encouraged would have been better off had the opportunity been pursued that needs to be not “fanciful” or “unrealistic”, which was the same conclusion reached by Allsop P in *Delaforce*. That stands in stark contradistinction to Delor Vue’s submissions that the mere existence of the opportunity can be relied upon if it is not fanciful or unrealistic. It was on this basis that the submission was advanced that it was unnecessary for Delor Vue “to try and prove to any significant extent any one particular counterfactual scenario”. Necessarily, Delor Vue’s submissions that it was entitled to establish detriment by merely identifying the not fanciful or not unrealistic possibility of lost opportunities was erroneous and must be rejected.
2. The error of Delor Vue’s submissions in this respect is evidenced by a consideration of the matters on which it relied to support the existence of detriment. In the course of address to this Court, Mr Elliott SC sought to rely upon a number of alleged opportunities which, it was said, Delor Vue had foregone with the consequence that it suffered detriment. He submitted that Delor Vue lost the opportunity to undertake a staged repair of the buildings, initially utilising the $1 million it had raised, that it lost the opportunity to undertake the repairs in a cheaper manner, that it forewent the opportunity to pursue the developer and builder of the complex as that was in the hands of the insurer, and that it lost the opportunity to negotiate a term of the policy renewal that enshrined Allianz’s position concerning non-disclosure in the 9 May 2017 email (although how that may have occurred is unclear and how the opportunity was lost because of the statement in the email is difficult to comprehend). It was submitted that it was sufficient for Delor Vue to merely raise these and that, as they were not fanciful, Delor Vue did not have to go further and establish that it would have taken up these opportunities or that it would have been better off had it done so.
3. Putting aside that there was no evidence to support a case that pursuing any of these opportunities would have resulted in Delor Vue being placed in a better position, there was no evidence before the Court than any of these opportunities were actually available to Delor Vue. Most of these matters were not pleaded, not included in the list of issues, not the subject of evidence, and not the subject of argument before the primary judge. Moreover, many were not referred to in Delor Vue’s written submissions and were raised for the first time on appeal during Delor Vue’s address which, coincidentally, is consistent with the manner in which it conducted its case at trial. Had those matters been raised at an appropriate stage, they may have been the subject of evidence, cross-examination and the adducing of rebutting evidence. Regardless of the fact that reliance on them will fail for the reasons referred to above, Delor Vue ought not be permitted to raise them now: *Water Board v Moustakas* [1988] HCA 12; (1988) 180 CLR 491.
4. In any event, Delor Vue’s submission is misconceived. Raising the existence of possible alternative courses of action does not establish detriment. Even though it is not necessary to establish the actual value of the opportunities foregone, it is necessary to prove to the requisite degree that they were actually available, that they were able to be pursued, and that they would have been. To merely point to them as being potentially available does not establish detriment. Delor Vue’s submissions in this respect must be rejected.

## Estoppel by Convention

1. Delor Vue submitted that it also advanced its case as one of an estoppel by convention as described by Dixon J in *Grundt*, and that this was accepted by the primary judge. In support of this, reference was made to paragraphs [323] and [326] of the primary judge’s reasons. However, those paragraphs do not suggest that an estoppel by convention was a foundation of his Honour’s decision. Rather, his Honour only appears to have drawn on the principles of estoppel by convention in the context of considering a promissory estoppel. In the absence of this issue being raised in its Notice of Contention, it is inappropriate to allow Delor Vue to now agitate a different ground for upholding the primary judge’s decision. That, however, is but one of the reasons why Delor Vue could not sustain the judgment below on this basis.
2. It is sufficiently clear that no estoppel by convention was raised in Delor Vue’s amended Concise Statement, the list of issues handed to the Court, or the pre-trial written submissions. As with the promissory estoppel raised by Delor Vue, there is a conspicuous failure to plead or identify actual detriment. Mr Elliott SC sought to respond to the submission that no estoppel by convention was raised in the amended Concise Statement by resort to what he said were “irresistible inferences” arising from that which was pleaded. He claimed that Delor Vue’s assertion in the amended Concise Statement that, in reliance on the 9 May 2017 email, it cooperated “with Allianz with respect to the potential recovery action against the original builder and developer and [placed] recovery in the hand of Allianz” contains an assertion that it would otherwise have undertaken those proceedings itself. No such inferential allegation arises. However, even if it did, it would be insufficient to raise an allegation of detriment. No adequate or appropriate pleading of detriment was raised for the purposes of estoppel by convention.
3. Mr Elliott SC further submitted that the issue was raised before the trial judge by its being mentioned in Delor Vue’s written closing submissions which were handed to the Court after Mr McLure SC had addressed the Court. That is a most inappropriate basis on which to accept that it was a live issue in the proceedings. To accept otherwise is to countenance trial by ambush and would set at nought the obligations of the parties in ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth).
4. Allianz’s submission that Delor Vue had not appropriately raised any claim based on an estoppel by convention should be accepted. It was not raised in advance of or during the hearing before the primary judge. There is no indication that, during the hearing, Allianz acted in a manner which indicated a preparedness to contest issues not raised on the pleading, and there was no submission made on this appeal that such was the case. It may be that, for this reason, the learned primary judge did not found his decision on an estoppel by convention, but only on promissory estoppel. The absence of any appropriately pleaded case of estoppel by convention provides a second insurmountable reason as to why judgment below cannot be sustained on that ground.
5. Even had Delor Vue raised, at an appropriate time, a conventional estoppel, it was not established on the evidence before the primary judge. Most relevantly, this form of estoppel also requires that the party raising it establish that it has suffered real or substantial detriment. That conclusion is supported by the decision of the New South Wales Court of Appeal in *Miller Heinman Pty Ltd v Sales Principles Pty Ltd* [2017] NSWCA 106; (2017) 94 NSWLR 500. There, the parties had entered into a services agreement pursuant to which the appellant, MH, was to pay the respondent, S, a fee for sales training services provided by S to MH’s clients. The agreement provided that MH might terminate the agreement for serious misconduct on the part of S. An incident occurred in which one of MH’s clients claimed to have been upset by a remark made by a director of S. MH did not terminate the agreement but informed S that, as a result of the incident, it would not receive any remuneration based on the revenue derived from that client. S asserted that it did not agree, although it did not seek payment of the disputed fee. Subsequently, the services agreement expired through the effluxion of time and, thereafter, S commenced proceedings for the payment of its full fees. MH argued that S was estopped from doing so on the basis that the parties had adopted a common assumption that the calculation of fees would exclude revenue derived from the client in question and, on that basis, it had not terminated the services agreement. The trial judge held that S was entitled to the payment of its full fees although did not deal with MH’s defence founded upon an estoppel. The Court of Appeal (Macfarlan JA, with whom McColl JA and Sackville AJA agreed) allowed the appeal holding MH was entitled to rely upon a conventional estoppel. Its decision primarily concerned the issue of the sufficiency of the causal connection between the assumed state of affairs and the manner in which the party raising the estoppel had acted. However, it also concluded that, as with other forms of estoppel, it was necessary in a conventional estoppel to establish the suffering of detriment. Specifically, Macfarlan JA (at 508 [37]) referred to the early statement of the principles by Dixon J in *Thompson v Palmer* [1933] HCA 61; (1933) 49 CLR 507 where it was observed (at 547) that a conventional estoppel will operate if the party raising it “placed himself in a position of material disadvantage if departure from the assumption be permitted”. His Honour also identified (at 508 [38]) that Dixon J, in his later decision in *Grundt*, further referred (at 674 – 675) to the requirement of detriment in terms that the party relying on the estoppel must establish that their action or inaction was “such that, if the assumption upon which he proceeded were shown to be wrong and an inconsistent state of affairs were accepted as the foundation of the rights and duties of himself and the opposite party, the consequence would be to make his original act or failure to act a source of prejudice”. Subsequently in his reasons, Macfarlan JA equated the requirements of reliance and detriment for estoppel by convention with those of promissory or proprietary estoppel. In the matter before the Court of Appeal, MH had adduced evidence that, had the parties not acted on the basis that S would not receive fees in relation to the client in question, it would have terminated the service agreement and, thereupon, not have become liable for the fees payable to S from the revenue derived from that client. That evidence was accepted and was found to be sufficient detriment to support the estoppel.
6. The requirement for conventional estoppel identified by Macfarlan JA, that real or significant prejudice has to be shown to establish detriment as is the requirement for other forms of estoppel, is well supported by the commentators in this area: see *Barnes* [5.77] – [5.81]; Feltham et al, *Spencer Bower: Reliance-Based Estoppel* (5th ed, Bloomsbury, 2017) [8.43]; Wilken and Ghaly, *The Law of Waiver, Variation and Estoppel* (3rd ed, Oxford University Press, 2012) [10.11] – [10.12].
7. On the evidence before the primary judge, there was nothing which might sustain a finding that Delor Vue suffered any prejudice which might sustain a conventional estoppel. It follows that, even in the absence of any finding to that effect by the primary judge or it being raised in its Notice of Contention, Delor Vue cannot succeed on this basis.

## Proportionality

1. The concept of proportionality is related to the remedy which a Court will provide where it concludes that one party is estopped from asserting or denying a right. It is closely related to the issue of whether detrimental reliance existed and the concepts sometimes overlap. Here, Allianz submitted that, if Delor Vue did suffer some detriment, holding the insurer to its representation so as to confer a benefit on Delor Vue would be disproportionate to any detriment suffered. It was submitted that the primary judge erred in making various moral judgments about Allianz’s conduct when considering the issue of proportionality and, even if that were proper, failed to take all relevant considerations into account, including the behaviour of Delor Vue.
2. Whilst there is force in Allianz’s submissions in this respect, given the numerous grounds on which the estoppel claim otherwise fails, there is no need to consider it. Nevertheless, it should be observed that Delor Vue’s failure to plead or prove detriment had the consequence that it is impossible to even commence to attribute any notional value to whatever detriment there was, so that some comparison might be made to the $2 million to $3 million impost on Allianz which will arise if it is held to its promise.

# Ground 2 – Waiver (and election)

1. The learned primary judge held that Allianz had waived any entitlement it had to rely upon s 28(3) of the ICA because it had intentionally chosen to forego its right and had obtained an advantage by doing so: at [341].
2. As articulated in the Notice of Appeal, Ground 2 asserted:

The primary judge erred by finding at [339] – [341] that the appellant waived the right to reduce its liability to the respondent to nil pursuant to s 28(3) of the Act.

1. It is convenient to deal with Delor Vue’s Notice of Contention, that the decision of the primary judge could be maintained on the basis of an election, contemporaneously with this ground.

## The appellant’s submissions

1. Allianz’s main submission is that there exists no freestanding doctrine of waiver operating in the context of contractual relations outside of election and estoppel. In support, it relied upon the decision in *Freshmark Ltd v Mercantile Mutual Insurance (Australia) Ltd* [1994] 2 Qd R 390 (*Freshmark v Mercantile Mutual*) at 404 and on the reasons for decision of Mason CJ, Brennan, Deane, Dawson and McHugh JJ in *Verwayen*. It submitted that contrary *dicta* does not displace this. It further submitted the learned primary judge erred in determining it had waived any right to rely upon Delor Vue’s non-disclosure simply because it had stated that it intended not to rely on its rights pursuant to s 28(3) of the ICA and had then obtained resultant advantages over the following 12 months.
2. Alternatively, it submitted that it gained no advantage and Delor Vue suffered no detriment as a result of the making of the alleged waiver. All that relevantly occurred between the email of 9 May 2017 and the letter of 28 May 2018 was that it sent engineers and builders to the premises for the purposes of effecting temporary repairs and planning the carrying out of major repairs, and provided some financial benefits to Delor Vue and unit owners. This, it is said, was to Delor Vue’s advantage.

## The respondent’s submissions

1. In response, Delor Vue submitted that Allianz’s conduct amounted to either waiver or election and that there was little practical difference between the two doctrines. Its primary submissions were that an independent doctrine of waiver exists and that it applied in the circumstances of this case. The principle relied upon was that where “an insurer who intentionally and with knowledge indicates that it will not take a particular position and obtains something it could not if it took up an inconsistent position, may not later take up that inconsistent position”. The detail of these submissions is considered more fully below.
2. In the alternative, Delor Vue submitted that the primary judge erred in concluding that Allianz’s conduct had not amounted to an election between inconsistent rights.

## Discussion

1. The evaluative analysis of the parties’ submissions on this issue necessitates a somewhat detailed consideration of the authorities on which they relied, not in the least because one party relies on a free-standing principle of waiver while the other denies its existence.

### The decision in Craine v Colonial Mutual

1. Delor Vue principally relied upon the decision of Isaacs J (delivering the judgment of the Court) in *Craine v Colonial Mutual* in support of the existence of a separate principle or concept of waiver. However, it is apparent that subsequent authorities have regarded Isaac J’s use of the expression “waiver” as being synonymous with “election”: see for example the comments of Brennan J in *Verwayen* at 424. The facts of *Craine v Colonial Mutual* may be briefly stated. In an action on a policy of insurance, the insurer asserted that the insured’s claim had not been made within the period stipulated by the conditions of the policy, being a particular time after the sustaining of the insurable loss. The insured claimed the insurer had waived its entitlement to rely upon the late making of the claim or was estopped from doing so because it had, after the making of the claim, acted as if the claim had been made in time and in a manner adversely to the insured. Importantly, Isaacs J observed that, at the trial of the action, the insurer had not put into question either issue of the making of the representation or the suffering of prejudice and that these must be taken against it. His Honour identified that the insurer was not entitled to deny the contract but insist upon the rights under it, stating (at 320):

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.

1. In that case, after the making of the late claim by the insured, and despite in its correspondence asserting that its continuing discussions were “without prejudice and without setting up any waiver of any of the provisions or requirements of the policy conditions”, the insurer had insisted that the insured perform the terms of the policy in respect of that claim. The Court’s reasoning appears to have been that, whilst the insurer had sought to preserve its position it had, through a series of correspondence, positively insisted on the insured acting as if the claim was within the terms of the policy. That included the insurer exercising its rights on the basis that it had agreed to indemnify in respect of the claim by identifying that it was exercising its rights to sell the insured property, taking possession from the insured of the premises where the damage had occurred, and engaging in the salvage of damaged goods. In respect of the relief to be granted, Isaacs J observed (at 324):

There being, apart from the several legal objections yet to be dealt with, evidence to support the finding, and the other elements of estoppel being uncontested, the rest is matter of pure law.

1. Thereafter, his Honour considered, *inter alia*, objections on the grounds that the matters in question could not give rise to an estoppel. Indeed, recognition was given to the fact that the terms of the policy excluded waiver by the insurer. Isaacs J identified (at 326), in *obiter*, that waiver was an intentional act, where the act constituting the waiver was distinct and done with the express or implied intention to treat a condition as if it did not exist or to proceed as though the breach of it had not occurred, and with knowledge of all the facts. It is a conclusion of law to prevent a person from approbating and reprobating. As it was, the matter was determined on the basis that the jury was entitled to uphold a case founded upon an estoppel.
2. It is not unfair to say that no subsequent authority has taken up the wide description given to waiver by Isaacs J. Indeed, the contrary is true and, in general terms, it can be said that it is confined to those circumstances where a party has been required to, and has, chosen between inconsistent rights, as in the nature of election: see *Sargent v ASL Developments Ltd* [1974] HCA 40; (1974) 131 CLR 634 (*Sargent v ASL Developments*) at 655. That view is reinforced by Isaacs J’s focus upon the treatment of contractual rights, being that a condition did not exist or a breach had not occurred.

### Verwayen

1. Reference was made also to the consideration of waiver in the individual judgments in *Verwayen*. That case is undoubtedly difficult, being one in which there was a majority against each basis for the decision ultimately reached – being waiver and estoppel – and, therefore, no majority and no *ratio* at all on either issue: *Commonwealth v Clark* [1994] 2 VR 333 at 374 ‑ 375 (perOrmiston J with whom Fullagar J agreed); *Brodie v Singleton Shire Council* [2001] HCA 29; (2001) 206 CLR 512 at 562 – 563 [112]. Nevertheless, the observations of the individual justices of the Court do provide some guidance on those issues.
2. The facts of the matter are well known and do not require detailed repetition. It suffices to say that, in the course of litigation by an injured member of the Navy, the Commonwealth indicated either an intention not to rely upon a defence under the relevant *Limitations of Actions Act*, or that it did not relevantly owe the plaintiff a duty of care. It subsequently changed its policy and determined to amend its pleading to raise both issues. The plaintiffs sought to prevent the Commonwealth from doing so relying upon estoppel, election and waiver. Mason CJ identified (at 406) that the term “waiver” is used “to describe the result of the application of various principles rather than to designate a particular legal concept or doctrine”, and that it was “an imprecise term capable of describing different legal concepts, notably election and estoppel”. His Honour seemed to accept the view that it does not exist, save when used an alternative designation for some other defences such as election, estoppel or new agreement. He further accepted that “an existing legal right is not destroyed by mere waiver in the sense of an express or implied intimation that the person in whom the right is vested does not intend to enforce it”. More is required, being something in the nature of election or estoppel. That view appears to be contrary to the wide definition of waiver identified by Isaacs J in *Craine v Colonial Mutual*. Subsequently, Mason CJ identified (at 407 – 408) waiver as being, in effect, an election, in that it occurs where a party is entitled to alternative rights which are inconsistent with one another, or an estoppel.
3. Brennan J identified the term “waiver” as a vague term with a shifting meaning and used in many senses. His Honour interpreted it as being a unilateral abandonment of a right in such a way that it cannot be asserted thereafter and, probably, because through the effluxion of time the opportunity to rely upon it ceases: at 422 – 423. The failure to take a defence such as a limitation point might be waived where a person fails to advance it before judgment is delivered. This was made clear by his Honour’s reliance on *Graham v Ingleby* (1848) 1 Ex 651; 154 ER 277 at 279 and *Wilson v McIntosh* [1894] AC 129 at 133, and his subsequent discussion of the circumstances in which the entitlement to exercise a right will be lost when a new legal relationship is established: at 427. That being so, his Honour concluded that the Commonwealth, despite its prior statement not to rely upon the limitation defence, was entitled to raise it up until the pronouncement of judgment. Again, this conclusion would appear to have some tension with that of Isaacs J in *Craine v Colonial Mutual*.
4. The topic of waiver was also considered briefly by Deane J who confined its operation to those circumstances of a unilateral waiving of a right or entitlement which was effective despite the absence of any reliance on the part of the other person affected and which his Honour regarded as cases of “true election”: at 449 – 450.
5. Dawson J also regarded the word “waiver” as being an imprecise term and as being “used to describe what is done in a variety of circumstances rather than to assert any particular legal process”: at 451. His Honour regarded it as being indistinguishable from election or estoppel and noted some of the many judicial and academic criticisms of it as an independent principle. Otherwise his Honour appeared to adopt a similar view to that of Brennan J, namely that the term might be used when a party chooses not to insist on a right or entitlement and loses the right to do so by choice or default and the passing of time: at 457 – 458.
6. In his reasons, Toohey J (at 467) equated the concept of waiver with that of election and within the statement of that principle by Mason J in *Sargent v ASL Developments* (at 655) being “the legal grounds on which a person is precluded from asserting one legal right when he is entitled to alternative rights inconsistent with each other” and “the legal grounds on which a person is precluded from raising a particular defence to a claim against him”. See also his Honour’s comments at 472. His Honour held that the renunciation of the right to plead the limitation point, once taken, was apparently irretrievable although there is no explanation as to why that may be so prior to, at least, some point in the trial.
7. Gaudron J adopted a wider view of waiver holding that it extended to occasions where parties adopted inconsistent positions rather than inconsistent rights: at 484 – 485. However, it is apparent that her Honour was considering the issue in the conduct of litigation rather than some broader context.
8. Finally, McHugh J concluded that there was no independent principle of waiver outside of election and estoppel and, although there were some anomalous cases where parties were held to be entitled to waive statutory rights, there was such no principle which applied in the case before the Court.
9. It follows that a majority (in number) of the Court eschewed the existence of an independent doctrine of waiver.

### Freshmark v Mercantile Mutual

1. Next, Allianz relied upon the Queensland Court of Appeal’s decision in *Freshmark v Mercantile Mutual* as a clear decision of an intermediate appellate court to the effect that there exists no independent doctrine of waiver which was separate or distinct from estoppel or election. In that case, the insurer of an articulated vehicle authorised the making of repairs to it after it had been damaged whilst being controlled by a driver who was under the age of 25. The policy excluded cover if the vehicle was damaged whilst under the control of such a person. On the making of a claim, the insurer, which had full knowledge of the age of the driver, authorised the making of repairs to the vehicle. A week later it notified the insured that, due to the age of the driver at the time of the accident it would not indemnify and it, thereupon, directed the repairer to cease work. Dowsett J (with whom McPherson JA agreed) considered the several judgments in *Verwayen*, particularly those of Mason CJ and McHugh J which doubted the existence of any separate doctrine of waiver. His Honour identified that Mason CJ had further held that an existing legal right was not destroyed merely by an express or implied intimation that the person in whom it vests does not intend to enforce it. He also referred to the reasons of Dawson J who favoured the view that there was no distinction between estoppel and waiver when the latter is not used to describe election. At its highest, waiver was seen as the outcome of an election or an estoppel. The case acutely raised the efficacy of a unilateral abandonment or release of a right and, in relation to this, Dowsett J said (at 403):

The better view is that a mere indication of an intention not to rely upon contractual rights will not generally constitute a waiver sufficient to bar a future action to enforce such rights. Waiver should not be seen as an alternative weapon to estoppel in the war against the doctrine of consideration. However, where a party elects between alternative rights available under a contract, such election will usually be final.

1. His Honour then identified that the mere performance of what is perceived to be one’s obligations under a contract or to insist upon rights arising thereunder does not, *per se*, constitute an election. In this context, the mere exercising of rights by the insurer to authorise repairs was the discharging of an obligation not the exercise of a right which was inconsistent with a right to decline to indemnify. His Honour concluded his analysis by eschewing the concept of a separated doctrine of waiver in the following terms (at 404):

In my view, the decision below proceeded upon the basis that there was an independent doctrine of waiver separate from estoppel or election. The better view is that there is no such doctrine. In the absence of an estoppel or election, there was no justification for depriving the appellant of the benefit of the Articulated Vehicles endorsement.

1. In the course of submissions, Mr Elliott SC submitted that the Court of Appeal in *Freshmark v Mercantile Mutual* had not been taken to the decision in *Craine v Colonial Mutual*, although reference to the report of the argument and the list of cases cited in the authorised report shows that this was not the case. It might be accepted that Dowsett J did not specifically refer to Isaacs J’s decision although it is referred to three times in the passages cited by his Honour from *Verwayen*. It is therefore not possible to conclude that it was not considered by the Court of Appeal. In any event, one might think that the weight of a strong majority (in number) in *Verwayen* could be taken as overwhelming the *obiter* in *Craine v Colonial Mutual*.
2. Delor Vue was not explicit in submitting that the decision in *Freshmark v Mercantile Mutual* was “plainly wrong” and should not be followed: *Farah Constructions Pty Ltd v Say-Dee* *Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89 at 151 – 152 [135]: although that must necessarily be the logical implication of its submissions. However, there was very little, if any, explanation as to why the decision of the Court of Appeal should be considered to be clearly in error.

### Agricultural & Rural Finance Pty Ltd v Gardiner

1. The concept of waiver was considered more recently by the High Court in *Agricultural & Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; (2008) 238 CLR 570 (*Agricultural & Rural v Gardiner*). There, borrowers, who were participants in an agricultural project, asserted that the financiers of the scheme had accepted late payments from them in relation to their respective loans. They claimed that, as a result, a related party who had agreed to indemnify them in respect of those loans, so long as they had punctually complied with their obligations under them, had thereby waived its entitlement to rely upon the lack of timeliness of those payments to refuse indemnity. The majority (Gummow, Hayne and Kiefel JJ) noted the uncertainties surrounding the concept of waiver, the criticisms of it as a separate doctrine, the use of the expression as a synonym for estoppel or election, and that it is sometimes considered as a conclusory description of the outcome of the application of different principles: at 586 – 587 [50] – [51]. However, they also noted that there were cases where the expression “waiver” was used outside of election, estoppel and variation of contract, including to describe the entire abandonment of a contract, a party not insisting on the performance of a term of a contract which was for that party’s sole benefit, and where a party entitled to claim legal professional privilege chooses not to stand on that right: at 587 [52] – [53]. Without attempting to identify any taxonomy around the circumstances in which the expression waiver had been used, it was decided that the word was used to refer to either election, forbearance, abandonment or renunciation. However, their Honours observed that the circumstances in which there is an election between inconsistent rights is vastly different from cases founded upon a waiver of rights as occurred in *Verwayen*, and they identified the waiver in that case as being limited to conduct in the course of litigation: at 590 [61] – [62]. Their Honours added there would be “evident danger in divorcing what is said in that case from that context”. It would appear that, save in respect of diverse minor categories, the majority considered waiver to have no operation in the context of the matter before the Court.
2. The result in *Agricultural & Rural v Gardiner* was that, whilst the financier may have made an election between existing rights in that it could not accept the late payments and then chose to rely upon an acceleration clause in the loan agreement, that was irrelevant to the entitlement of the indemnifier who had not been required to and did not make such an election. The majority also considered whether there existed separate doctrines of forbearance, abandonment or renunciation, however, as none were relied upon by Delor Vue in this matter, there is no need to consider that discussion.
3. It is undoubtedly the case that there still exists uncertainty as to the nature and extent of any doctrine of “waiver”. For example, in *Federal Commissioner of Taxation v Tasman Group Services Pty Ltd* [2009] FCAFC 148; (2009) 180 FCR 128, the Full Court considered (at 141 [44]) the nature of waiver, albeit that the decision in *Freshmark v Mercantile Mutual* had not been cited to it and nor was it considered. The Court observed that *Craine v Colonial Mutual* recognised that there can be an effective waiver by conduct which was distinguishable from estoppel, however it is apparent that their Honours were there equating the principle with election and holding the party in question to have “elected” between inconsistent rights.

## Conclusion as to waiver

1. There is much force in Allianz’s submissions that no separate principle of “waiver” (other than in the nature of forbearance, abandonment or renunciation) which prevents a party who has indicated an intention not to rely upon a particular contractual right from changing their mind. From one perspective, if there were such a principle in terms as wide as Delor Vue contends, there would be no need for the separate principles of election or estoppel which would necessarily be subsumed within the wider concept.
2. Very little was advanced by Delor Vue in its written submissions in defence of the primary judge’s reasons concerning waiver. Rather, it relied upon the principles of election in relation to this aspect of its case. Nevertheless, it sought to advance the principle as articulated by the primary judge (at [339]) in reliance on the decision of Isaacs J in *Craine v Colonial Mutual*. The primary judge identified that Allianz had deliberately and knowingly taken a position confirming cover notwithstanding that there was a position which it might take with respect to those rights to deny liability and thereby obtained certain benefits, being the access to the insured property and the cooperation of the insured. His Honour continued (at [339]):

All the elements of the circumstances that led to a conclusion of waiver in *Craine v Colonial Mutual* were present here: full knowledge, the deliberate act and intention to take a position inconsistent with any assertion of a right under s 28(3), that is the deliberate act to confirm cover, the intention being to treat the relationship as if there had been no non-disclosure, whereby Allianz was thereafter entitled to the advantage (that it thereafter had) of adjusting the claim and thereby assessing its own position by free and full access to the property and the co-operation of Delor Vue, an advantage which it would not have had had it asserted its entitlement under s 28(3) to act on the basis that its liability was nil because it would never have issued the policy.

1. With the greatest respect, it must be doubted that a stage will have been reached whereby contractual rights are lost merely because a party adopts inconsistent positions with respect to them in circumstances which do not amount to an election. Although the various judgments in *Verwayen* did not, in the unique circumstances of that case, give rise to any binding *ratio* in relation to the existence or otherwise of a doctrine of waiver, the carefully considered *dicta* of Mason CJ, Dawson, Deane and McHugh JJ, as well as Brennan J to a certain extent, rejected the existence of a separate principle of waiver which might operate in circumstances such as the present. Their Honours indicated that it is the doctrine of election, whereby the choice manifested by one party effects an unalterable transformation of the rights of the respective parties for the future performance of an agreement which governs the rights of the parties. It is probable that this is the underlying rationale of the subsequent authorities which have declined to accept waiver as a standalone principle in circumstances akin to the present case. So much was said expressly in *Freshmark v Mercantile Mutual* and nothing advanced by Delor Vue on this appeal suggested that decision was plainly wrong. In those circumstances, this Court is bound to apply it here and, indeed, it is consistent with the observations of a majority of the judgments in *Verwayen* and with the comments of the majority in *Agricultural & Rural v Gardiner*.
2. To the above it might be added that in the work, *The Law of Waiver, Variation and Estoppel*, the identification by the learned authors of the several varieties of waiver does not include the principle which was relied upon in this case. The closest derivative may be the concept of unilateral waiver which is suggested may only arise in very limited circumstances.
3. It follows that the learned primary judge erred in accepting Delor Vue’s submission that Allianz had, in the circumstances of this case, waived its right to rely upon Delor Vue’s non-disclosure and, to the extent to which his Honour’s decision was founded upon waiver, it ought to be set aside.
4. It should also be noted that Delor Vue avoided any precision as to the right which was allegedly waived and how that occurred. Its submissions were advanced at a high level of generality and abstraction. In relation to the first issue, the discussion in these reasons under the following heading, “Election”, identifies that there was no such right in respect of which an election or waiver might occur, but merely a purported assumption of liability. In relation to the second issue, Delor Vue omitted to identify the clearly adopted position which Allianz was said to have taken. In this respect, it seems that the position taken by Allianz in its email of 9 May 2017 was that it would pay for the repairs referred to as the resultant damage despite the non-disclosure and that Delor Vue would be responsible for paying for the “Defective materials and construction of the roof, including but not limited to tie downs, rafters and timbers and soffit”. It must be kept in mind that at no time did Delor Vue accept that it was responsible for undertaking those latter repairs. Indeed, it later explicitly denied that any of the damage is not covered by the policy. Whilst the email did not expressly state that Allianz’s intention to indemnify in respect of the “resultant damage” was conditional upon Delor Vue’s acceptance of responsibility to undertake the remaining repairs, it is necessarily implicit. That is particularly so in the context of the allegation that it had, for the purposes of the alleged principles of waiver, “taken a position” in relation to indemnity. Its position, to the extent to which it is possible to state that it took one (as opposed to stating an intention to take one), concerned, *inter alia*, an intended division of responsibility for the cost of repairs and that was something the insured both did not expressly accept and later emphatically denied.

## Election

1. By its Notice of Contention, Delor Vue challenged the primary judge’s conclusion that no election arose in the present case by reason of Allianz acting as if the policy remained on foot in relation to the claim. The primary judge’s analysis was, in substance, based upon the unique effect of the operation of s 28(3) of the ICA which, he said, gave the insurer an entitlement to avail itself of a state of affairs to reduce its liability by reason of the insured’s non-disclosure. Perhaps slightly inconsistently, his Honour then concluded that s 28(3) did not create a right to be exercised or activated in some manner. That being so, the circumstances of this case were substantially different to those which arise where a breach of contract has occurred giving rise to a right in the innocent counterparty to either accept repudiation and terminate the agreement or to affirm it. In such cases, the innocent party is faced with a choice between inconsistent rights. His Honour correctly observed that, in order for an election to arise, the “rights must be alternative, mutually exclusive and inconsistent: one cannot say that the contract exists and does not exist at the same time”: at [309].
2. It is undoubted that his Honour’s rejection of election rested upon his conclusion as to the nature of the relationship between the parties consequent upon the operation of s 28(3). His Honour seemed to accept that although the wording of the section created a state of affairs – being a reduced liability on the insurer to pay a claim – by its operation it placed the insurer in a position whereby it was entitled to approach the claim by reference, not to the terms of the policy, but by reference to an hypothesis. This, so his Honour said (at [311]):

arms the insurer with a body of substantive rights which it can raise in defence or answer to the contractual claim for indemnity under the policy. Thus understood, if the insurer says, unequivocally and without qualification, that it will not thereafter take the position in response to the claim for indemnity that it has that body of rights by way of answer or defence or that it will treat the insured as if it had not breached its duty of disclosure such that the body of rights can be taken not to have arisen, the proper characterisation of the governing legal rights is not an election between two alternative, mutually exclusive and inconsistent, *rights* but whether the insurer can in law resile from the position it has taken and expressed unequivocally and without qualification in the conduct of the contractual and commercial relationship between it and its insured.

1. Whether the insurer might subsequently assume an inconsistent position, so his Honour concluded, was not to be resolved by the application of principles of election. In this respect, his Honour referred to the following observations of Dowsett J in *Freshmark v Mercantile Mutual* (at 403):

Obviously, a contracting party always has the right to insist or not insist upon his rights and conversely, to accept or not accept alleged liability. Such a choice is not accurately described as an election in the sense intended in *Verwayen*. There, the Commonwealth chose not to rely on available defences, but that was not, relevantly, an election.

1. His Honour also relied upon the consideration of the issue of election by Handley JA in *Nigel Watts Fashion Agencies Pty Ltd v GIO General Ltd* (1994) 8 ANZ Ins Cas 61-235 (*Nigel Watts Fashion*) and Handley JA’s conclusion that what is required for an election is the existence of competing, inconsistent and mutually exclusive rights – such as a right to avoid or affirm a contract and a right to rely upon a repudiatory breach and terminate a contract or to affirm it.
2. Mr Elliott SC submitted that the primary judge accepted that the observations of Handley JA in *Nigel Watts Fashion* purported to extend the concept of election in relation to insurance contracts to those situations where the insurer made a choice between inconsistent positions, which is substantially broader than the concept of choosing between inconsistent rights. He also submitted the primary judge endorsed the view that election applied in circumstances where a party chose between inconsistent “courses of action”. With respect, those submissions cannot be accepted. It is clear that the primary judge accepted (at [317]) that the correct view was, as advanced by Handley JA, that election requires a choice between alternative, inconsistent and mutually exclusive *rights*, being a position entirely coherent with the authoritative reasons of Mason J in *Sargent v ASL Developments* at 655.
3. Alternatively, Mr Elliott SC submitted that Allianz was faced with an election between inconsistent rights. Although he accepted that the operation of s 28(3) gave rise to a statutorily imposed state of affairs, he submitted that this gave rise to an entitlement in the insurer to say to the insured that it would not pay anything under the policy, and that this was a right for the purposes of the narrower view of election. The alternative right, so the submissions went, was the right to say that the policy responds. The culmination of this submission was that there existed a choice between inconsistent rights for the purpose of the doctrine of election.
4. With respect, that is not the correct analysis. Here, the right in question, if it can be considered a right, is not one which will found an election. It is not one the acceptance of which will, of itself, determine the nature of the contract for the future between the parties. In *Sargent v ASL Developments*, Stephen J spoke (at 646) of the exercise of one of two sets of rights and each being inconsistent with the other in the sense that the exercise of one of the rights altered the legal foundation such that the other could not exist. This was described by Mason J in the same case in the following terms (at 656):

A person confronted with a choice between the exercise of alternative and inconsistent rights is not bound to elect at once. He may keep the question open, so long as he does not affirm the contract or continuance of the estate and so long as the delay does not cause prejudice to the other side. An election takes place when the conduct of the party is such that it would be justifiable only if an election had been made one way or the other (*Tropical Traders Ltd. v. Goonan*). So, words or conduct which do not constitute the exercise of a right conferred by or under a contract and merely involve a recognition of the contract may not amount to an election to affirm the contract.

(Footnote omitted).

1. The above principles were succinctly summarised by the Hon. KR Handley in *Estoppel by Conduct and Election* in the following terms (at 255):

It will be seen that the so-called right of election is not a right in the strict sense with a corresponding duty in another, but a power. An elector has the power to change the legal rights and duties of another vis-à-vis himself or a third person with a corresponding liability of the first to submit to the change. An 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.

(Footnotes omitted).

1. See also the statement of principle by Lord Goff in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyds Rep 391 at 397 – 398 and the commentary in *The Law of Waiver, Variation and Estoppel* [4.02] – [4.06].
2. The above statements of principles identify two important characteristics of the rights which might be the subject of an election. One is temporal, the other qualitative. The latter is concerned with the legal consequence of the exercise of a right; that of effecting the establishment of a new legal relationship which is legally inconsistent with the alternative right. The paradigm case is the position of an innocent party to a contract faced with a repudiatory breach by the other party. There, immediately prior to acceptance of repudiation and the contract’s termination, the parties’ rights and obligations are determined by the bargain agreed between them and the legal consequences of their conduct. If the innocent party chooses not to accept the repudiation, the contract remains on foot and the parties’ obligations are to further perform their agreed covenants together with the innocent party’s right to recover damages for breach although not their expectation losses. The non-acceptance of the repudiation confirms the continuance of the contract which is then inconsistent with the innocent party subsequently claiming to be free of any obligation in reliance on the repudiatory conduct. Alternatively, acceptance of the repudiation and the termination of the agreement has the consequence that parties are no longer legally bound to perform the contractual stipulations further (save to the extent they might survive termination). The election to terminate, *of itself*, establishes a separate set of rights between the parties for the future, being one in which the parties are not bound by their former agreement save to the extent to which residual rights – such as a claim to damages – exist. The choice as to which set of facts will control the parties’ rights and obligations *inter se* may be made expressly or by conduct consistent only with one choice or the other.
3. The rights which may give rise to an election also have a temporal characteristic in the sense that, in the fulfilment of the respective contractual obligations, a point is reached at which the further efficacious operation of the contract requires the party to determine whether a right is exercised one way or another. It may happen that, if that point is reached and the party does not elect one way or the other, they will in law be taken to have chosen to have elected not to exercise the right or to have done so.
4. In the present matter, the circumstances confronting Allianz did not require it to choose whether to terminate the contract of insurance or to excuse the breach and allow it to continue on foot so as to regulate the rights between the parties for the future. The change wrought to the rights of insurers by Part IV of the ICA, and especially s 33, had the consequence that an insured’s innocent non-disclosure prior to entering into a contract did not afford the insurer any right to avoid the policy. The erstwhile right to that effect was deliberately abolished and the statutory scheme modified the common law position by limiting the insurer’s liability to the prescribed extent. Section 28, by its terms, reduces the insurer’s liability to “the amount that would place the insurer in a position in which the insurer would have been if” the insured had not failed to comply with its duty of disclosure. Mr Elliott SC accepted, as was found by the primary judge, that the section itself creates a state of affairs, being the reduction of insurer’s liability on the policy. The resulting position in this case was that the parties remained bound to the contract of insurance, but Allianz’s liability to Delor Vue on the claim in respect of the cyclone damage was nil. All that occurred by Allianz’s statement in the 9 May 2017 email was the equivalent of the making of a voluntary offer to partially indemnify in respect of the damage which had been suffered.
5. However, for the purposes of the claimed election, Delor Vue submitted that the right in question was, “a right on the part of the insurer to rely upon the state of affairs created by s 28, the right to say the policy does not respond.” Such a right, if it be properly so called, is not one which arises by reason of the contractual terms existing between the parties. A party to any contract whose obligations are limited may voluntarily indicate an intention to confer on the other party benefits which it is not contractually bound to provide. To paraphrase the observations of the Hon. KR Handley AO QC referred to above, the power of one party to inform the other that they will confer such a benefit is not one which, of itself, changes the legal rights and duties between them with a corresponding liability on the other to submit to the change. The absence of any contractual mechanism to give such a statement immediate effect to change the set of rights governing the parties’ obligations *inter se* renders it inchoate. It will remain so unless and until given enforceability by the provision of consideration or a change of position by the other party acting in reliance on it to such an extent that they will suffer detriment if the promise is not fulfilled.
6. In this case, nothing occurred which accorded Allianz the power to make a choice which, of itself, had the effect of altering the legal rights between it and Delor Vue. The events had not put it into the position whereby it might determine the agreement and set the parties rights at naught on the one hand or, on the other, elect to continue the agreement and, thereby, create a new set of rights. All that could occur was the unilateral and voluntary indication by the insurer to pay more in relation to the claim than it was obliged to do. Necessarily, no election can arise.
7. Whilst it may be that if Allianz subsequently paid the claim under the policy once adjusted on the basis that its liability was not affected by non-disclosure, it would be bound by that act. However, that would not be due to any election but by reason of it submitting to an honest claim made by Delor Vue and the parties having agreed to compromise their rights under the agreement in that way.
8. Further, it must be kept steadily in mind that if the insurer consistently informed the insured that it would pay the claim notwithstanding it was not liable to do so, there may come a time prior to actual payment when the insurer is estopped from resiling from that indication. However, whether that is so depends upon the suffering of actual detriment which was not established in this case.

## Conclusion with respect to Ground 2

1. Allianz is also entitled to succeed with respect to the primary judge’s conclusion as to waiver. That principle, to the extent that it might exist, has no application in the present case.
2. Delor Vue’s Notice of Cross-Contention fails. The circumstances in this matter did not give rise to a situation in which Allianz was entitled or required to choose between inconsistent rights causing the creation of new sets of rights. Its voluntary act of indicating that it would deal with Delor Vue’s claim as if the non-disclosure had not occurred did not, of itself, create new rights between itself and Delor Vue. The primary judge was correct to reject the claim based on election.

# Ground 3: duty of utmost good faith

1. Ground 3 concerns the alleged breach of the duty of good faith and was articulated as follows:

The primary judge erred by finding at [342] – [350] that the appellant breached its duty of utmost good faith under s 13 of the Act and that as a consequence, the appellant was unable to reduce its liability to the respondent to nil pursuant to s 28(3) of the Act.

## The conclusions of the primary judge

1. The primary judge found that, although there was no dishonesty, the resiling from the clear representation in the 9 May 2017 email was “unjust, unreasonable, unfair and did Allianz no credit as a commercial insurer by reference to expected standards of decent commercial behaviour”, and was “conduct which fell below a commercial standard of decency and fairness”: at [346]. However, it appears that his Honour was concerned to identify that the breach of good faith was not merely resiling from the indication of an intention to honour the claim but, further, the making of the offer – or ultimatum – that Delor take an amount in settlement of it. His Honour added (at [346]):

Whatever the apparent civility of the references to internal dispute resolution (see [186]), this was a clear renunciation of a representation, in effect a promise, to confirm cover in accordance with policy terms: take the money that we say is due under the policy, or take nothing because we will assert the statutory rights that we said we would not assert.

1. Subsequently, his Honour said (at [347]) that the terseness which had crept into the correspondence from the insured’s solicitors did not justify Allianz going back on its representation or promise made a year earlier that gave it the benefit of full possession of the site and cooperation of the insured in which to assess its own position. To these issues, his Honour added that the people who stood behind Delor Vue were “ordinary people”, that the damage to their properties will be expensive to repair, that a year had been taken to adjust the claim, the promise to honour the claim was probably to the benefit of Allianz, and that, even if the amount offered in the letter of 28 May 2018 was the correct amount, there was a lack of decency and fairness in the position taken. His Honour identified the appropriate approach for Allianz in the circumstance was as follows (at [347]):

If that was Allianz’s view, a view reached after all the advantages of access to the property, adjusting the claim, and expecting and being given the co-operation of the insured, decency and fairness required an offer to arbitrate or litigate the loss in some acceptable dispute resolution forum on the basis that the 9 May 2017 email represented or promised: the policy terms. Decency and fairness were not displayed by threatening an approach previously clearly disavowed which involved further significant personal strain and financial risk to these people, unless a take-it-or-leave-it offer was accepted.

1. His Honour further stated that Delor Vue’s assertion to the insurer that it had waived its right to rely upon the defective work exclusion in the policy was incorrect but it was not dishonest and did not entitle the insurer to resile from its previous promise: at [348].
2. In the result, his Honour would have granted an injunction had the defences of estoppel and waiver not been sustained. He nevertheless made a declaration as to Allianz’s breach of the duty of good faith.

## Allianz’s submissions

1. Allianz submitted that the obligation of utmost good faith does not condition its entitlement to rely upon the operation of s 28(3) and there was nothing in its conduct indicating its intention to rely on that entitlement which contravened its duty of utmost good faith. It also submitted that a consideration of the circumstances, including the interaction between it and Delor Vue immediately prior to the letter of 28 May 2018, disclose that its actions in negotiating with Delor Vue were not unreasonable or not lacking in good faith.

## Delor Vue’s submissions

1. In the course of submissions to this Court, Delor Vue did not elaborate upon its written submissions as to the question of utmost good faith. In relation to the identification of the correct principle, it submitted that a higher standard is required of the duty of utmost good faith than of the relatively cognate principle of good faith and reasonableness in commercial contracts. It particularly referred to the observations of Kirby J in *CGU v AMP* at 42 – 43 [130], 43 [131], 45 [139], 54 [176] and 54 [178] to the effect that good faith alone is not sufficient, it must be good faith in its utmost quality. The obligations imposed are of a stringent kind in respect of the conduct of the insurer and insured with each other wherever that conduct has legal consequences. It also relied upon the views of Emmett J in the Full Court decision in that case that “the concept of utmost good faith involves something more than mere good faith” and that “the precise content of the concept of utmost good faith depends upon the legal context in which it is used. In the context of insurance, the phrase encompasses notions of fairness, reasonableness and community standards of decency and fair dealings”.
2. Delor Vue’s submissions suffer from a lack of precision as to the conduct in respect of which it is claimed that Allianz failed to perform its obligation of utmost good faith. In substance, it seemed to submit that the lack of good faith arises in Allianz’s attempt to settle the claim at its figure while threatening to pay nothing in reliance on its rights under s 28(3) when the parties had relied upon Allianz’s earlier promise that it would not rely on Delor Vue’s non-disclosure. In other words, the complaint concerned Allianz’s attempt in negotiations with Delor Vue to utilise its superior bargaining position.
3. Further, Delor Vue asserted that the mere fact that it did not capitulate in the face of Allianz’s conduct does not render the conduct lacking in good faith. It also submitted that the assertions which it made to Allianz as to the extent of insurer’s liability, which may not have been correct, were not relevant to characterising Allianz’s conduct in the circumstances.
4. Finally, it submitted that, if Allianz is successful in relation to the other grounds of appeal and that it is unsuccessful in relation to the election issue, it should succeed on this issue and an injunction ought to be granted to prevent Allianz from further breaching its duty.

## Consideration of utmost good faith

1. It is, with the greatest respect, somewhat difficult to identify the gravamen of Allianz’s conduct which was characterised as offending the duty of utmost good faith. As was submitted by Mr McLure SC, neither Delor Vue nor the primary judge expressly considered it to be the mere reliance on the operation of s 28(3) of the ICA. It seems to have encompassed the original intimation that it would not rely upon that section in dealing with the claim, the benefit which the insurer obtained from Delor Vue’s acquiescence in it investigating the damage to the buildings at the complex, the hardship which unit holders will suffer if cover is not provided, and Allianz’s alleged high-handed approach in its letter of 28 May 2018. However, as Mr McLure SC further submitted, by its letter of 28 May 2018, Allianz was offering to pay the amount which it considered that it would pay if it had adhered to its earlier intimation not to rely upon Delor Vue’s non-disclosure.

### The content of the duty of utmost good faith

1. Both parties were content to accept the general identification of the content of the duty of utmost good faith articulated by the learned primary judge (at [342] – [345]). His Honour observed that the statutory obligation of utmost good faith is not breached only where there is an evident lack of honesty: *CGU v AMP* [15]: and the obligation may require the insurer to act with due regard to the legitimate interests of the insured as well as to its own interests. This was explicitly stated by Gleeson CJ and Crennan J in *CGU v AMP* [15]*,* where their Honours held that the insurer may be required to act consistently with commercial standards of decency and fairness, with due regard to the interests of the insured. In that case, Callinan and Heydon JJ (at 77 – 78 [257]) agreed that a breach of the duty is not to be equated with dishonesty only and that conduct falling short of actual impropriety might constitute an absence of utmost good faith within the meaning of the ICA. Kirby J endorsed the proposition that dishonesty is not an essential hallmark of a lack of utmost good faith and indicated that it involved notions of capriciousness and unreasonableness.
2. The various statements in the reasons of the members of the High Court in *CGU v AMP* referenced the observations of Emmett J in *AMP Financial Planning Pty Ltd v CGU Insurance Ltd* [2005] FCAFC 185; (2005) 146 FCR 447, the decision of the Full Court from which the appeal was taken. There, his Honour (with whose reasons Moore J agreed) said (at 475 [87] and [89]):

87. While a want of honesty will constitute a failure to act with the utmost good faith, want of honesty is not necessary in order to establish a failure to act with the utmost good faith in the context of a contract of insurance. The notion of acting in good faith entails acting with honesty *and* propriety. Lack of propriety does not necessarily entail lack of honesty. Further, the concept of *utmost* good faith involves something more than *mere* good faith.

…

89. The precise content of the concept of utmost good faith depends on the legal context in which it is used. In the context of insurance, the phrase encompasses notions of fairness, reasonableness and community standards of decency and fair dealing. While dishonest conduct will constitute a breach of the duty of utmost good faith, so will capricious or unreasonable conduct. While an essential element of honesty may be at the head of the concept of utmost good faith, dishonesty is not a prerequisite for a breach of the duty (see, eg, *Kelly v New Zealand Insurance Co Ltd* (1996) 130 FLR 97 at 111-12).

(Original emphasis).

1. Allianz submitted that, in the context of post-contractual conduct, the duty of utmost good faith was substantially the same as an implied duty of good faith and reasonableness in commercial contracts, assuming that any such implication is appropriate (as to which no comment is needed here). In particular, where a power or right in a contract exists for the benefit of only one of the parties, any duty of good faith does not extend to acting with altruism or without regard to the interests of the acting party: *Australian Co-operative Foods Ltd v Norco Co-operative Ltd* [1999] NSWSC 274; (1999) 46 NSWLR 267 at 282 – 283 [62] per Bryson J. It further submitted that it cannot be thought that the party with a right to promote its legitimate interests can be restrained by the duty of good faith: *Beerens v Bluescope Distribution Pty Ltd* [2012] VSCA 209; (2012) 39 VR 1 at 13 [55]; as it is not a fiduciary duty to act in the interests of another party: *CGU Workers Compensation (NSW) Ltd v Garcia* [2007] NSWCA 193; (2007) 69 NSWLR 680 at 693 [60]; although there may be some similarities on occasion: *Maksimovic v Royal and Sun Alliance Life Assurance Australia Ltd* [2003] WASC 46; (2003) 12 ANZ Ins Cas 90-115 [18]. These latter submissions should be accepted. Neither party to an insurance contract is obliged to sacrifice their interests under a policy for the benefit of the other.
2. Nevertheless, it is apparent from the identification of the principle and the authorities that whether or not a duty is breached in a particular case requires an evaluation of all of the circumstances relevant to the conduct in question.

### The conduct said to be in breach of the duty and the circumstances in which it arose

1. The essence of the conduct which the primary judge found to be in breach of the duty of good faith must necessarily be Allianz’s statement in the letter of 28 May 2018 that its actual liability under the policy was nil and later asserting the same. In other words, its abandonment of its earlier intimation to partially honour the claim. Merely offering to pay a large gratuitous amount in respect of a liability which did not exist, even if the offer was open for a limited duration, does not amount to a breach of the duty. Whether the resiling from the earlier promise will amount to a breach of the duty will depend upon the circumstances existing between the parties at the time.

### Legal rights of the parties

1. From the above discussions of Grounds 1 and 2 and the Notice of Contention, the legal position between the parties was that Allianz’s liability under the policy in respect of Delor Vue’s claim was nil. The latter’s non-disclosure had the result that, by its promise in the 9 May 2017 email, Allianz offered to cover a risk in circumstances where it was not otherwise obliged to. Although Allianz had nevertheless said it would pay part of the claim (specifically excluding the defective construction of the roofs), the circumstances were such that its voluntary assumption of that liability, unsupported by consideration as it was, did not give rise to any estoppel, waiver or election which prevented it from withdrawing the promise.
2. Therefore, apart from any obligation of good faith, as at 28 May 2018, Allianz did not have, and did not believe it had, any obligation to provide a partial indemnity in relation to Delor Vue’s claim.
3. The legal rights of the parties in relation to the remainder of Delor Vue’s claim seem to have remained unsettled at least as far as Delor Vue was concerned. Allianz’s intention to provide an indemnity was expressly limited by reference to Exclusion 1(c)(i) and (d) and Exclusion 2 of the policy. It expressly rejected any liability relating to the defective construction of the roofs. However, as appears by the letter from its solicitors of 30 July 2018, it is apparent that Delor Vue did not accept that there were any relevant limitations on Allianz’s obligation to indemnify, that there were any relevant operative exclusions in the policy, or that Allianz might exclude liability to pay for the defective construction of the roofs. It should be noted that, in the course of this litigation, Delor Vue accepted that Allianz had not waived its entitlement to rely upon the exclusions, although it continued to assert that the exclusions are not operative in the circumstances with the result that Allianz must indemnify in respect of all of the damage.
4. The effect of this is that Delor Vue is forced to adopt the position that the duty of utmost good faith in the circumstances of this case required Allianz to accept liability for a significant claim of between $4 million and $6 million where it is not otherwise obliged to indemnify. Such cases, if they exist, must necessarily be extremely rare as they require an insurer to sacrifice its actual legal rights for the benefit of the insured. In effect, to act solely in the insured’s interests. That imposes a substantially greater obligation on an insurer than one which requires only that it act in the interests of both the insured and itself when exercising its rights under the policy as identified by Gleeson CJ and Crennan J in *CGU v AMP*.

### Delor Vue’s position in respect of the claim.

1. It is relevant in the characterisation of Allianz’s conduct towards Delor Vue to ascertain the latter’s expressed view of the relationship between them. For present purposes, that is most relevantly ascertained from the letter from Delor Vue’s solicitors of 3 May 2018 which is set out above. That unequivocally and repeatedly asserted that Allianz, amongst other things, had not stated its position on indemnity with any clarity, had failed to make clear any decision on the policy coverage and the extent to the indemnity available, and had failed to state its position as to indemnity. Indeed, it went further and asserted that the delay by Allianz in making a decision on indemnity was so great that it may well be in breach of the policy. As has been mentioned above, there is significant tension between the assertions in this letter and Delor Vue’s claim that it had relied upon some clear and unequivocal representation by Allianz in its email of 9 May 2017 that it would indemnify part of the claim. At paragraph [322] of the primary judge’s reasons, he said of Delor Vue’s solicitor’s letter, which I repeat for convenience:

The applicant’s solicitors’ position by May 2018 that Allianz was not stating its “position on indemnity” either at all or clearly (see [182] above) can be seen as a product of the evident frustration to this point in obtaining the translation of the clear statement of acceptance of cover into the practical division of responsibility and what could be seen as some temporising in the correspondence by this time.

1. With respect, it is difficult to see how the repeated assertions that Allianz had failed to make a decision on indemnity can be seen as some form of posturing. The context, known to both parties, in which Allianz’s concession was made included that the amount required to repair the damage was unknown and it would have been obvious to any reasonable person in the circumstances that Allianz’s concession would have been qualified at least to that extent. This is consistent with the content of 9 May 2017 email which was ambiguous, especially as to the extent of indemnity which might be provided. That ambiguity increased over time as the nature and extent of the structural defects in the roofs became more evident. In any event, absent some disavowing of the statements made in the letter, there is no reason why Allianz ought not to have taken Delor Vue at its word and treated it as an insured which believed that no final determination had been made as to whether its claim would be indemnified and which was demanding that a decision be made. With respect, it is difficult to see how, in the face of Delor Vue’s demand that Allianz make a decision on indemnity, it amounted to breach of the duty of good faith for Allianz to do as requested. By its letter of 3 May 2018, Delor Vue wanted to know whether it had to litigate its claim and Allianz’s response provided it with a choice to do so or to accept a sizeable sum in settlement of the claim.

### Delor Vue’s position with respect to its responsibility for repairs

1. Mr McLure SC submitted that Allianz was entitled to press Delor Vue to take a position as to its responsibility for the repairs which Allianz had maintained were not within the scope of the policy in any event. It is to be recalled that the 9 May 2017 email identified that Delor Vue was responsible for a substantial portion of the cost of repair and it was evident that Delor Vue would need to financially commit to effecting those repairs before they could be commenced. The import of that was emphasised in the email of 22 June 2017 to Delor Vue which advised that its costs would be “in the millions” and it would need to arrange sufficient funding. The material before the Court reveals that, despite the passing of approximately 11 months, Delor Vue had not taken any substantial step towards arranging that funding. Instead, it had made repeated, albeit failed, attempts to minimise the cost of the work for which it would be responsible and would not commit to any particular position. That is, perhaps, not surprising in the light of the letter of 30 July 2018 where it alleged that Allianz was responsible for the total costs of remediation. Despite that, Allianz was not required to wait for any extended period of time for Delor Vue to meaningfully engage in the remediation process.

### The benefits obtained by Delor Vue

1. In the 12 months following Allianz’s statement of intention to partially indemnify, a considerable amount of work was undertaken by it to advance the work needed to repair the damaged buildings. That has been referred to above with the conclusion reached that Delor Vue would not be in any worse position if Allianz were entitled to withdraw from its prior representation. In fact, it is likely that Delor Vue benefited from the not insignificant amount of money spent by Allianz in undertaking the necessary preparatory steps and providing direct payments to unit owners, the total cost of which was around $192,000.

### The benefits obtained by Allianz

1. As the primary judge determined, Allianz obtained the benefit of Delor Vue’s cooperation in relation to the assessment of the damage, including the conducting of inspections by engineers and experts and that put it into a position whereby it was able to obtain an accurate assessment of the damage and understanding of the cost of repairs. Whilst it is true that the same level of cooperation from the insured may not have been forthcoming had Allianz not indicated that it would partially indemnify, as has been discussed previously one way or another the insurer would have been entitled to access to the premises for the purposes of undertaking inspections.

### The position if Allianz is required to indemnify

1. In ascertaining whether Allianz breached its duty of good faith, some consideration needs to be given to the consequences of it being held to its statement that it would partially indemnify. On the assumption that Allianz was entitled to rely upon Delor Vue’s non-disclosure, its liability would be nil. On the other hand, if Allianz were held to the original intimation in the 9 May 2017 email, it would, on Delor Vue’s submission, be liable for the whole of the claim in the amount of approximately $6 million. Whilst that might not ultimately be the correct sum, much will depend on ascertaining the manner in which the several exclusion clauses operate. On the figures calculated by Allianz, its liability would be somewhere between $2 million to $3 million.
2. Given the above, Delor Vue’s case is that, in order to perform its obligation to act with utmost good faith, Allianz was required to assume a liability of between $2 million to $6 million in circumstances where it was not otherwise liable on the claim and where Delor Vue has suffered no ascertainable damage or detriment from relying on the prior representation.
3. The primary judge took into account that the persons who stand behind Delor Vue were “ordinary people” and that the damage to the apartment complex was significant. Whilst that is no doubt true, it does not affect the legitimacy of Allianz’s conduct. In the circumstances of the present matter where an insurer is called upon to pay a claim for which it has no liability, the perceived financial standing of the insured (or the insurer) can have no relevance. It is difficult to envisage a case where the duty of utmost good faith will impose upon an insurer an obligation to make a gratuitous payment depending upon the apprehended wealth of the insured. Were it so, it would necessarily follow that the insurer’s current financial position would also affect the content of the duty. It would mean that where an insurer is called upon to act in a manner which is said to be in accordance with its duty and detrimental to it, it may be entitled to rely upon its extant financial position in deciding whether it will act or not. Although it can be accepted that the financial position of the insured may be relevant where the insurer’s decision or proposed conduct affects the insured’s ability to have their claim properly adjudicated, that is not the present case.
4. Even if it be true that, as a result of Allianz resiling from its stated preparedness or intention to partially indemnify, the “ordinary persons” who stand behind Delor Vue will be required to fund the substantial remediation expenses on their own, their obligation in that respect was the consequence of Delor Vue’s non-disclosure and not the withdrawal of Allianz’s indication that it would indemnify part of the claim. In that regard, it can be mentioned that it is rather astonishing that Delor Vue, which had the professional assistance of a body corporate manager and an insurance broker, might find itself in a position where it had so blatantly breached its duty of disclosure to its insurer.

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

1. When considered in the light of the surrounding circumstances, Allianz’s conduct does not bespeak of a failure on its part to comply with its duty of good faith. One must start with its willingness to overlook the insured’s breach of duty of disclosure and to gratuitously agree to partially indemnify in respect of a claim. It would be naïve to think that Allianz’s conduct in this respect was solely altruistic. No doubt it believed that to partially honour the claim made good business sense, although that ought not to diminish the propriety of its conduct. Common sense also dictates the conclusion that, when it offered to pay a portion of the claim, it did so in the belief that the amount in question would be modest. It is not suggested that, as at 9 May 2017, either of the parties were aware of the magnitude of the remediation work which would actually be required to restore the premises. In that respect, it was not reasonable to assume that the insurer who agreed to indemnify part of a modest claim when not obliged to do so should be required to indemnify in respect of the claim when it transpires that the amount which it would be required to pay is much greater.
2. Additionally, it is not possible to conclude that, by offering to pay Delor Vue the sum of $918,709 so long as the offer was accepted within 21 days when its actual liability was nil, Allianz contravened community standards of honesty, fairness or reasonableness and thereby breached its duty of good faith. Nor did Allianz breach any duty by resiling from its previously stated intention.
3. It was in those circumstances of the crystallisation of a substantive claim that Delor Vue asserted that Allianz had not made a decision on indemnity and its delay in doing so was a breach of its duty of utmost good faith. Allianz was entitled to respond to Delor Vue’s demand that it make a decision on indemnity and, in doing so, it was also entitled to assume that Delor Vue believed that it had not previously made any final decision. Indeed, given the vagueness of the 9 May 2017 email, that may well have been the case. The correspondence shows that the position in relation to indemnity was far from settled and Delor Vue’s solicitors’ assertion in their letter of 30 July 2018 that Allianz was liable to indemnify in respect of the whole loss, and not just that part which had been accepted in the 9 May 2017 email, shows this to be so. That stance, indicated in earlier correspondence sent on behalf of Delor Vue, also revealed that insured did not accept the totality of the content of the 9 May 2017 email, which included Allianz’s apportionment of part of the responsibility for the repairs remained with the insured.
4. Even if Delor Vue’s solicitors were engaging some form of temporising in their letter of 3 May 2018, Allianz was nevertheless of the opinion that it had no liability in respect of Delor Vue’s claim and it was correct to believe that to be the case. Pursuant to s 28(3) of the ICA, its liability was nil and its statement of intention in the 9 May 2017 email that it would partially indemnify did not give rise to any liability by way of estoppel, waiver or election. That earlier intimation to provide some indemnity could only reasonably have been seen by Delor Vue as being a gratuitous or voluntary promise which, just as easily, might be withdrawn at any stage: *Waltons Stores v Maher* at 403; *Amalgamated Property Co v Texas Bank* at 107 perRobert Goff J.
5. If the duty of good faith prevents Allianz from withdrawing its earlier intimation, it follows that the insurer must assume an obligation to pay up to $6 million in respect of a claim for which it had no liability, in circumstances where the insured will not suffer harm or detriment by reason of Allianz’s change of attitude (as opposed to the operation of s 28(3)). Even if the prospective liability would be only $2 million to $3 million, that too is a significant amount when weighed against the absence of any detriment to which Delor Vue might be exposed.
6. The mere fact that the parties had worked over the previous 12 months to advance the project to remediate the damage caused by the cyclone did not have the consequence that Allianz was required to sacrifice its own interests for the benefit of Delor Vue. The contrary is true. That 12 months of work and the expenditure of nearly $200,000 by Allianz almost certainly enured for Delor Vue’s benefit.
7. It also cannot be said that the benefit to Allianz of having obtained of access to the buildings at the Delor Vue complex consequent upon its intimation that it would indemnify were such that it ought to assume a liability of up to $6 million. This has been dealt with above in the discussion on detriment. It suffices to say that, in the face of the claim for indemnity, Allianz would have been entitled to access the property for the purposes of ascertaining the scope of its alleged liability. As an advantage to Allianz arising from its intimation that it would provide a partial indemnity, it is more chimerical than real. It might also be odd, in the context of considering the mutual and reciprocal obligations of utmost good faith, for Delor Vue to assert that Allianz gained an advantage, being a more precise understanding of the actual quantum of its assumed liability. That suggests Delor Vue was entitled to prevent or hinder Allianz in ascertaining the true nature and extent of the damage, so that it might secure payment of a greater sum under the policy than it was entitled.
8. Moreover, Allianz did not immediately and without warning resile from its previously stated intention. Rather, it offered to pay the quantified sum of $918,709 towards the cost of remediation, subject to certain conditions and the acceptance of the offer within 21 days. It was only if that was not accepted that Allianz would rely upon its lack of liability which arose as a result of s 28(3). The primary judge relied on this as Allianz indicating to Delor Vue that the offer was in the nature of a “take it or leave it” offer and, in that respect, it applied undue pressure on the insured. However, at that time, Delor Vue had placed the insurance claim in the hand of professional insurance advisers and solicitors who were able to advise them and act in the protection of their rights. It is unlikely that any relevant pressure was applied to Delor Vue by the letter of 28 May 2018 and that is particularly apparent by its rejection of the offer and the commencement of proceedings. It is, with respect, one thing to identify the effective application of undue pressure which has forced a weaker party to enter an agreement, but it is difficult to identify it when the attempted exertion of pressure has had no effect at all.
9. The conditioning of the offer of payment of $918,709 on acceptance within a period of three weeks in circumstances where Allianz’s actual liability was nil (and believed to be nil), hardly appears to be conduct which lacks commercial standards of decency and fairness. In circumstances where it was not obliged to indemnify at all, the offer to pay that amount, being in addition to the approximately $192,000 already paid, was an appropriate display of commerciality rather than being parsimonious, unfair or unethical. Additionally, Allianz was prepared to extend the time in which Delor Vue might accept the offer.
10. It can be accepted that Allianz’s withdrawal of its voluntary intimation that it would partially indemnify under the policy would be disappointing for the unit owners in the Delor Vue complex and leave them in a financially unfortunate position. However, those consequences do not justify imposing upon an insurer an obligation to provide an indemnity which does not otherwise exist. Whilst Allianz’s indication that it would partially indemnify for the losses suffered may have provided some comfort for a period of time, the insurer disabusing the insured of any belief it had engendered and thereby returning the insured to the position which it would have been in had the intimation not been made will cause it no real detriment. Moreover, in making its decision to resile, Allianz is entitled to act in the protection of its interests. It did not breach its duty of utmost good faith in doing so and it is entitled to succeed on this ground as well.

## Nature of the remedy assuming a breach of the duty of good faith

1. The learned primary judge indicated that he would have granted an injunction to restrain Allianz from resiling from its indication that it would grant an indemnity in respect of a portion of the damage suffered by Delor Vue but that, in the circumstances of the case, it was unnecessary to do so.
2. Mr McLure SC submitted that the granting of an injunction would have been inappropriate in circumstances where it was not relief sought in the originating application, mentioned by Delor Vue in its submissions, or raised in the course of the hearing. Those matters taken together provide a substantial, if not insurmountable, reason for refusing the grant of an injunction in the circumstances of this case. It might also be said that the granting of a mandatory injunction to require a party to perform a positive stipulation in a contract is somewhat unusual, and relief in the nature of specific performance, if it is available, is the orthodox remedy. This may provide an additional reason for rejecting relief in the nature of an injunction as would the fact that a Court would be required to engage in continual supervision of the performance of the injunction if it were granted.
3. Although Delor Vue had claimed damages for breach of the duty of utmost good faith, there may be doubt as to whether such relief is available to an insured: but see *Lomsargis v National Mutual Life Association of Australasia Limited* [2005] QSC 199; [2005] 2 Qd R 295 at 314 [56] perMcMurdo J. Before this Court, Delor Vue submitted damages for breach of the implied obligation would, effectively, have the same result as an injunction because Allianz would be required to put it into the same position as if it did not breach the duty; namely, the position it would be in if Allianz did not resile from its earlier intimation and paid the claim according to the terms of the policy.
4. It would seem that, because the primary judge did not reach any final conclusion in relation to the question of whether an injunction should issue or whether damages was an appropriate remedy, the parties on appeal paid them little attention. In relation to the duty of utmost good faith, the only actual relief granted was the making of a declaration and, that being so, the only orders which ought to be made on this appeal is that the primary judge’s declaration be set aside.

# Orders on appeal

1. As a result of the foregoing, the orders which should be made are:
2. The appeal be allowed.
3. The declarations made by the learned primary judge on 24 July 2020 numbered 1 to 6 be set aside and in lieu thereof:
	1. it be declared that, pursuant to s 28(3) of the *Insurance Contracts Act 1984* (Cth), the respondent, Allianz Australia Insurance Ltd, is entitled to reduce its liability to nil for the claim made consequent on damage caused to the property of the applicant, Delor Vue Apartments CTS 39788, by Tropical Cyclone Debbie in March 2017; and
	2. it be ordered that:
		1. the proceedings NSD 2094 of 2018 are otherwise dismissed; and
		2. the respondent to the appeal is to pay the appellant’s costs of the proceedings before the primary judge.
4. The respondent is to pay the appellant’s costs of the appeal.

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| I certify that the preceding three hundred and forty-five (345) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Derrington. |

Associate:

Dated: 9 July 2021