W+K CASE ALERT

High Court decision offers insurers utmost good faith relief

Allianz Australia Insurance Limited v Delor Vue Apartments CTS 39788

DEC22

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At a glance

- A recent decision by the High Court provides clarity regarding the scope of an insurer's duty of utmost good faith.
- In the *Delor Vue* judgment, the Court found Allianz had the right to reduce its liability under the insurance contract and that its earlier waiver was revocable.
- The decision also clarifies that an insured seeking to establish that an insurer cannot resile from a gratuitous waiver needs to show prejudice.
- The decision provides clarity around the circumstances in which insurers can change their approach and depart from representations made regarding the availability of cover.

Background

Delor Vue Apartments CTS 39788 (Delor Vue) was the owner of the common property in a complex of apartment buildings in far north Queensland (the Apartments). The Apartments had been constructed in 2008 and 2009.

In 2014, issues were identified with the soffit sheeting on the eaves of the building. The sheeting was falling away from the frame and there was a risk of further sheets dislodging during periods of high winds. Delor Vue received a consultant engineer's report in 2016, which concluded that the construction of the roof framing along the eaves did not meet Australian Standards.

In March 2017, Delor Vue took out a policy of insurance for public liability and property with Allianz Australian Insurance Limited (the Policy) through underwriting agency Strata Community Insurance (SCI). The following week (and before commencement of any rectification works to the soffits), Tropical Cyclone Debbie caused significant damage to the roof of the Apartments and to several individual units.

Immediately following Cyclone Debbie, Delor Vue notified a claim under the policy and conducted an investigation into the defective soffits and eaves in response to initial requests from SCI. SCI stated in an email to Delor Vue that it was not advised of any defects to the property despite the defects being clearly known to Delor Vue (the non-disclosure), but "despite the non-disclosure … SCI is pleased to confirm we will honour the claim and provide indemnity".

Over the next 12 months, SCI took steps to hold third parties responsible for defective building work and undertook assessments of the damage according to the policy, which required unencumbered access to the property. In May 2018, however, SCI sought to resile from the previous statement by presenting Delor Vue with an offer of settlement on a "take-it-or-leave-it" basis, stating that it was entitled to rely on s 28(3) of the *Insurance Contracts Act 1984* (Cth) (ICA) regarding Delor Vue's misrepresentation.

Section 28(3) of the ICA provides as follows:

> "*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.*"

Proceedings

Delor Vue commenced proceedings against Allianz in the Federal Court seeking relief under s 28 of the ICA. The trial judge found:

- that Delor Vue had breached its duty of disclosure required by s 21(1)(b) of the ICA by way of the non-disclosure
- that Allianz had the right under s 28(3) of the ICA to reduce its liability under the claim to nil, however Allianz lost that right when it confirmed that the claim would be honoured notwithstanding the non-disclosure
- that Allianz is estopped from resiling from its indemnity position on the basis of the misrepresentation
- that Allianz waived its entitlement to reduce Delor Vue's claim under s 28(3) of the ICA, and
- that Allianz failed to act towards Delor Vue with the utmost good faith by resiling from its representation (which was in effect a promise), in breach of s 13 of the ICA.

Allianz appealed unsuccessfully to the Full Court of the Federal Court.

Allianz obtained Special Leave to appeal to the High Court on 17 March 2022. On 14 December 2022, the High Court allowed Allianz's appeal, finding that:

- Delor Vue did not establish that Allianz was precluded from revoking its waiver by reason of election, waiver, estoppel, or the duty of utmost good faith
- Allianz's "waiver" of its right under s 28(3) of the ICA to reduce its liability under the insurance contract was revocable and was subsequently revoked
- Delor Vue did not prove any "acts, facts or circumstances" proving it had suffered detriment, and therefore did not prove that Allianz was estopped from revoking its waiver
- there was "no basis to find that Allianz breached its duty of utmost good faith by imposing conditions on its representation that it would not rely on s 28(3) of the ICA"[1], and had such a duty existed, Allianz would not have breached it, and
- neither an insurer nor its insured owe a novel duty "never to depart from representations made to each other".[2]

[1] At [105]
[2] At [99]

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The significance of this decision for insurers

The judgment provides clarity regarding the scope of an insurer's duty of utmost good faith. The Court found there was no novel duty on Allianz not to resile, without a reasonable basis, from any significant representation to an insured concerning a claim made by that insured.

It also clarifies that an insured seeking to establish that an insurer cannot resile from a gratuitous waiver needs to show prejudice.

The decision provides clarity around the circumstances in which insurers can change their approach and depart from representations made regarding the availability of cover.

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