

Insurance Insights

A change of heart on indemnity | a landmark High Court decision for insurers

[Allianz Australia Insurance Limited v Delor Vue Apartments CTS 39788 \[2022\] HCA 38](#)

Key takeaways

- The High Court has provided important guidance regarding the circumstances in which an insurer can depart from earlier representations made regarding the availability of cover.
- The duty of utmost good faith does not always prevent an insurer from retracting an earlier representation.
- If an insured intends to rely on estoppel, it must prove it has suffered real detriment (supported by evidence) in order to successfully argue the insurer should not be allowed to resile from an earlier representation.
- An insured's non-disclosure of materially relevant facts is a serious breach of its duty of good faith, which may permit an insurer to limit (sometimes entirely) its coverage exposure.

Background

Delor Vue Apartments (Delor Vue) is the body corporate for an apartment complex located in Far North Queensland. On 28 March 2017, Tropical Cyclone Debbie caused substantial damage to the apartment complex, prompting Delor Vue to immediately lodge a claim with Allianz (the insurer). Delor Vue had taken out the policy 5 days prior to the cyclone, which covered, among other things, property damage.

Prior to entering into the policy, Delor Vue was aware that parts of the roof of the apartment complex were badly constructed and poorly affixed. In the process of adjusting the claim, it became apparent to Allianz that the apartment complex contained significant defects which Delor Vue had failed to disclose.

Nevertheless, in May 2017, Allianz sent the following email to Delor Vue:

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

Allianz's email clarified that it would only cover resultant damage from the cyclone and not the costs of repairing the pre-existing defects in the roof.

Over the course of the following year, further defects were identified by Allianz and a dispute arose regarding the rectification works that should be covered. In May 2018, Allianz proposed a settlement where it would pay for some repairs (totalling around \$918,000), with the remaining repairs to be arranged and paid for by Delor Vue (totalling around \$3.5 million).

Allianz stated that if this ‘take it or leave it’ offer was not accepted, it would invoke its power under section 28(3) of the *Insurance Contracts Act* and refuse to contribute towards the claim on account of Delor Vue’s earlier non-disclosure. Section 28(3) provides that an insurer may reduce the amount it pays to a claim if there has been non-disclosure by an insured.

Delor Vue rejected the offer. Allianz, as threatened, responded by denying indemnity on account of the pre-contractual non-disclosure.

Earlier Court decisions

Delor Vue commenced proceedings in the Federal Court. At first instance, the primary judge found that Allianz had waived its rights to raise the non-disclosure defence and was also prevented from doing so. It was also found that Allianz failed to act with utmost good faith.

An appeal to the Full Federal Court by Allianz was dismissed by a majority.

Appeal to the High Court

Allianz appealed again, leaving the High Court with four issues to determine:

- (a) Whether Allianz had irrevocably **elected** not to exercise its power to rely on section 28(3);
- (b) Whether Allianz had **waived** its right to rely on section 28(3);
- (c) Whether Allianz was precluded (estopped) from retracting its earlier representation that it would grant indemnity; and
- (d) Whether Allianz had failed to act with the **utmost good faith**.

In a 4-1 majority, the High Court found in favour of Allianz on all issues.

Election

In short, the doctrine of election prevents an insurer from retracting a decision between two inconsistent rights that cannot exist simultaneously.

As the majority identified, the defence under section 28(3) merely permits an insurer to reduce its liability under a policy. It does not involve an election between inconsistent rights. With or without the waiver of section 28(3), the insurance contract remains in place. As a result, there was no irrevocable election made by Allianz.

Waiver

The majority noted that a waiver of a contractual right is rarely irrevocable. Allianz's contractual right in this instance was the defence of non-disclosure under section 28(3).

The majority held that a gratuitous waiver of a legal right amounts to nothing more than a 'mere naked promise', while there are only limited circumstances in which a waiver is irrevocable – none of which were present in these proceedings. An example of a limited circumstance is the waiving of legal privilege.

Estoppel

When considering estoppel, the majority focused on whether Delor Vue had suffered detriment (a key element of estoppel) by relying on Allianz's representation that it would not invoke the non-disclosure defence.

Delor Vue argued that it suffered detriment as a result of the following:

- (a) A lost opportunity to sue Allianz for indemnity in May 2017 whereby a better outcome may have been reached compared with the terms of Allianz's 2018 settlement offer, and
- (b) A lost opportunity to carry out or arrange the repairs itself in 2017 rather than being left with a damaged property for over a year.

Regarding point (a), the majority found that there was insufficient evidence to suggest that Delor Vue could have realistically obtained a better outcome than that proposed by Allianz in May 2018. On point (b), it was determined that the potential completion of the repair works in 2018 (12 months later) did not mean they would be more costly or difficult to undertake. Delor Vue had not suffered any detriment. It was also pointed out that Delor Vue did not have the \$3.5 million in capital required to repair the apartment complex at the time.

Duty of Good Faith

Importantly, the majority held that Allianz had not breached its duty to act in good faith by choosing to invoke section 28(3) to pressure the insured into the settlement. The Court emphasised that there is no duty requiring an insurer to uphold all its representations.

In arriving at this conclusion, the Court also emphasised that the duty to act in good faith is *symmetrical* in its application to the insured and insurer. In doing so, the Court reminded Delor Vue that it had initially breached this duty by failing to disclose the defects to Allianz.

It was clear to the majority that Allianz never 'reversed' its position regarding indemnity. In fact, its May 2018 correspondence clarified what specific losses it agreed to cover. At most, Allianz had 'reversed' their decision to invoke the section 28(3) defence, although this had to be understood in context and did not amount to a breach of good faith.

Implications

This landmark decision is a win for insurers and offers important lessons.

The duty of good faith will not hold the insurer to every representation that has been made. Moreover, it will not necessarily prevent an insurer from exerting pressure on the insured by threatening to invoke its lawful rights.

In saying that, insurers must continue to proceed with caution when making concessions and representations so similar disputes can be avoided.

The judgment also affirms that the doctrines of election, waiver and estoppel are key issues for insurers to keep in mind when managing claims.

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