



HIGH COURT OF AUSTRALIA

14 December 2022

ALLIANZ AUSTRALIA INSURANCE LTD v DELOR VUE APARTMENTS CTS 39788
[2022] HCA 38

Today, the High Court allowed an appeal from a decision of the Full Court of the Federal Court of Australia. The appeal concerned the ability of an insurer to rely on a statutory defence to a claim for indemnity despite a representation by the insurer that it would grant indemnity, but the extent of which indemnity was ambiguous.

The respondent, Delor Vue Apartments CTS 39788, was the body corporate for a complex of apartment buildings. It held a policy of insurance for public liability and property damage with the appellant, Allianz Australia Insurance Ltd. Delor Vue knew that the apartment buildings had serious non-structural defects. It did not disclose this to Allianz. On 28 March 2017, Tropical Cyclone Debbie struck north Queensland, causing substantial damage to the apartment buildings and exposing the defects. Delor Vue notified a claim under the policy of insurance. On 9 May 2017, Allianz emailed to advise Delor Vue that, despite the non-disclosure, it would honour the claim and provide indemnity. The extent of the promised indemnity was ambiguous. A dispute arose as to the sequence of repair work and the distribution of costs. On 28 May 2018, Allianz proposed a "settlement" to resolve the dispute about the extent of indemnity and advised that if Delor Vue did not accept, Allianz would rely on its power pursuant to s 28(3) of the *Insurance Contracts Act 1984* (Cth) to reduce its liability on the basis of Delor Vue's non-disclosure. Delor Vue did not accept and Allianz denied indemnity.

Delor Vue commenced proceedings in the Federal Court of Australia, arguing that Allianz was bound by the representation that it would grant indemnity because it: (i) had irrevocably elected not to rely on the s 28(3) defence; (ii) had waived its right to rely on the s 28(3) defence; (iii) was estopped from resiling from the representation; and (iv) had breached its duty of utmost good faith. The primary judge upheld claims (ii), (iii), and (iv). A majority of the Full Court dismissed an appeal from the primary decision, finding that all four claims were established.

The High Court, by majority, allowed the appeal, concluding that the 9 May 2017 email contained a waiver of the s 28(3) defence which was "revoked" on 28 May 2018, in the sense that it was made conditional upon the acceptance of terms resolving ambiguity as to the extent of the indemnity. In the law of contract there are limited circumstances in which a gratuitous waiver of rights is irrevocable, none of which was present. Unless such circumstances are exceptional they would undermine other contractual rules, including those generally requiring that variation of a contract be in the form of a deed or supported by consideration. Further, the waiver of the s 28(3) defence did not involve an election between alternative and inconsistent sets of rights, such as to give rise to an irrevocable "election by affirmation". Nor did Delor Vue establish that it had suffered any detriment in reliance on Allianz's representation such that Allianz was estopped from revoking its waiver. There being no free-standing obligation upon an insurer, independent of its contractual obligations, to act in a manner which is decent and fair, there was no basis to find that Allianz breached its duty of utmost good faith.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*