Allianz Australia Insurance Limited v Delor Vue Apartments CTS 39788 [2022] HCA 38 and its potential implications for insurance claims in New Zealand

Dr Robin Bowley

University of Technology Sydney

robin.bowley@uts.edu.au

Overview

- A brief overview of the *Insurance Contracts Act* 1984 (Cth)
- Factual background
- The progression of the dispute
- Reasoning by the three courts
  - Election
  - Waiver
  - Estoppel
  - Utmost Good Faith
- Potential implications for insurance disputes in New Zealand

Insurance Contracts Act 1984 (Cth)

- Application of the ICA – s 8
- s 12 – Part II not to be read down
  - But unfair contract terms provisions of *ASIC Act* 2001 apply
- s 13: Implied duty of utmost good faith in all insurance contracts subject to the ICA
  - Penalties for non-compliance by insurers
- s 14 – Parties not to rely on provisions of insurance contracts except in the utmost good faith
- s 14A – Powers of ASIC - insurer's failure to comply with the duty of the utmost good faith in relation to handling or settlement of claims
- s 15 – Certain other laws not to apply
  - Exceptions unfair contract terms provisions of *ASIC Act* 2001

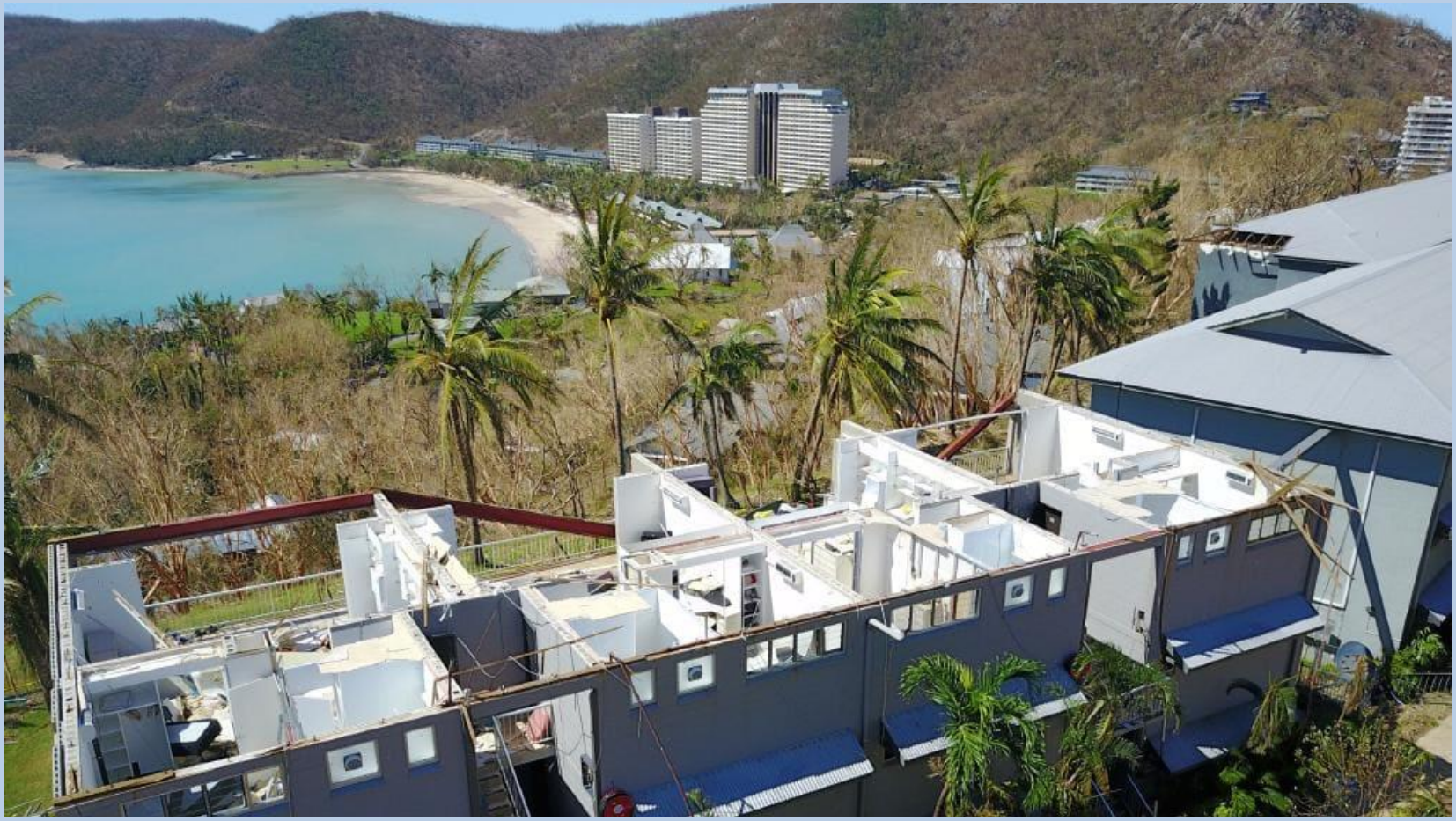
The Four Quadrants of Utmost Good Faith in Australia

(1) Pre-contractual obligations: The insured • Disclosure obligations: s 21, 20B, 26 • Insurer's remedies: ss 28 and 29	(2) Pre-contractual obligations: The insurer • Clearly inform insured of duty of disclosure: s 22
(3) Contractual obligations: The insured • Comply with policy conditions and requirements • Insurer's remedies: s 54	(4) Contractual obligations: The insurer • Claims handling

Factual background

- March 2017 - Delor Vue's entry into the policy with Allianz through its underwriting agency Strata Community Insurance (SCI)
- Failure to disclose structural defects
- 28 March 2017 - Cyclone Debbie and the claim
- 9 May 2017 - "Despite the non disclosure issue which is present, [SCI] is pleased to confirm that we will honour the claim and provide indemnity to [Delor Vue], in line with all other relevant policy terms, conditions and exclusions"
- Email also identified two categories of damage:
  - "1. Defective materials and construction of the roof, including but not limited to tie downs, rafters and timbers and soffits"
  - "2. Resultant damage including but not limited to internal water damage, fascia, guttering and roof sheeting (for those buildings which lost roof sheeting only)"
  - Repair costs for second category to be covered; First category excluded

Factual background



Factual background

- SCI's need to for further investigations
- Potential recovery options from original builder and developer – need for engineering reports
- Awaiting a scope of works for the roof repairs
  - Defective repairs to be paid for by Delor Vue
  - Resultant damage repairs to be paid for by SCI
- SCI – maintained that that roof repairs would need to be carried out before internal repairs for those buildings with roof damage or with water entering through the roof
- Both parties - retained engineers and builders to advise on the nature and cost of the repairs
- Allianz - discovered additional defects with roof trusses and their attachment to the buildings

Factual background

- Dispute between Delor Vue and Allianz – Costs, responsibility and sequencing of repairs
- January 2018 - Delor Vue enters into $750K loan to finance repairs
- March 2018 – Delor Vue renewed policy - 50% premium increase
- 3 May 2018 – Delor Vue's letter to Allianz
  - Failure to state position on indemnity "with any clarity" - had caused delays in the progression of the claim and repairs; breach of duty of utmost good faith
- 28 May 2018 – Allianz's offer of settlement:
  - Reiterated Delor Vue's non-disclosure
  - Pursuant to exclusion for prior defects - Allianz not liable for loss or damage caused by non-rectification of defects Delor Vue was "aware of, or should reasonably have been aware of"
  - Would pay costs of repairing internal and resultant damage not caused by pre-existing defects

Factual background

- 28 May 2018 – Allianz's offer of settlement:
  - Delor Vue to be responsible for arranging and paying for the repair of pre-existing defects;
  - Allianz would only work with Delor Vue to repair the damage covered by the policy if Delor Vue repaired the pre-existing defects by 23 September 2018 - under a building contract approved by Allianz
  - Allianz's loss adjusters had quantified
    - Allianz's costs of repair or replacement arising from cyclone damage at $918,709.90 and
    - Delor Vue's costs of repair or replacement of pre-existing defects at $3,579,432.72
  - If Delor Vue did not accept these terms within 21 days - Allianz's offer in relation to indemnity would lapse - and be reduced to nil pursuant to s 28 of the *Insurance Contracts Act* 1984 (Cth)

The elements of equitable estoppel

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."

Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387 at 428; [1988] HCA 7 at [34] per Brennan J. Cited in *Wilson Parking New Zealand v Fanshawe 136 Ltd* [2014] NZCA 407

The elements of the doctrine of election

'Generally, for a party to be held to an "election" on an application of the doctrine of election at common law:

(a) there must be evidence of conduct by that party (assessed on an objective standard) manifesting a choice, by it, between inconsistent (alternative) rights or remedies;

(b) there must be evidence of an express or implied communication of that choice to a party against whom the rights or remedies lie; and

(c) the interests of justice must require that the choice, once made, be held to have been irrevocable.'

Owners-Strata Plan 62658 v Mestrez Pty Limited & Ors [2012] NSWSC 1259 at [150]

[2020] FCA 588: For Delor Vue

- Delor Vue - Maintained that Allianz was not entitled to reduce its liability to nil under s 28 by reason of the principles of election, waiver and estoppel
- Allsopp CJ - Held that whilst Allianz was entitled to reduce its liability to nil pursuant to s 28(3) – *however*:
- By reason of its stated position in its email on 9 May 2017 – Allianz was unable to rely upon s 28(3) for reasons of waiver, estoppel, and the duty of utmost good faith.
- Rejected Delor Vue's submission that Allianz was bound by an election not to rely upon s 28(3)

[2021] FCAFC 121 – 2:1 for Delor Vue

- **McKerracher and Colvin JJ:**
- Upheld Allsopp CJ's reasoning on waiver, estoppel and utmost good faith
- Accepted Delor Vue's submissions that Allianz was bound by an election not to rely upon s 28(3)
- **Derrington J (in dissent):**
- Allianz was not precluded from revoking its promise by reason of election, waiver, or estoppel
- Allianz had not failed to act with utmost good faith by revoking the waiver of its right to rely upon s 28(3)
- Allianz appeal to the High Court of Australia

The High Court decision

- Allianz finally successful on appeal to HCA:
- Kiefel CJ, Edelman, Steward and Gleeson JJ in the majority
- Gageler J dissenting
- [1] Consideration of Allianz's waiver of its rights to rely upon s 28(3)
- [2] Consideration of the application of doctrine of election by affirmation
- [3] Consideration of whether there had been an irrevocable waiver by estoppel
- [4] Consideration of the Duty of Utmost Good Faith

The High Court majority

- **[1] Consideration of Allianz's waiver of the s 28(3) defence**
- Reasoned that in the law of contract 'there are limited circumstances in which a gratuitous waiver of rights becomes irrevocable' – at [4]; [29]
- At [31] - 'Outside the context of litigation, and in the law of contract, the circumstances in which a waiver cannot be revoked have always been exceptional. If such circumstances were not both exceptional and justified 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'
- At [37] - 'It is not entirely accurate to describe the waiver by Allianz as having been revoked by Allianz's letter to Delor Vue's solicitors on 28 May 2018. In that letter, Allianz undertook to grant indemnity, subject to conditions, for estimated costs of $918,709.90. The only sense in which Allianz could be said to have "revoked" its waiver on 28 May 2018 was that the continued operation of the waiver was made conditional upon acceptance of terms, in order to resolve the dispute between the parties, within a reasonable time (21 days, later extended to more than three months). It is only in that sense that the waiver can be described as having been revoked.'

The High Court majority

- **[2] Consideration of the application of doctrine of election by affirmation**
- Cautioned against expanding the operation of this doctrine
- At [66] – 'Delor Vue relied upon the following actions of Allianz, taken after Allianz's waiver of the s 28(3) defence in the 9 May 2017 email:
- (i) asserting contractual rights to take subrogated action against the builder;
- (ii) asserting contractual rights to access the property; and
- (iii) asserting contractual rights to control repair work.
- But without the waiver in Allianz's email on 9 May 2017, none of those actions was necessarily inconsistent with Allianz maintaining a defence under s 28(3). Those actions could have been consistent with Allianz maintaining a defence under s 28(3) that extended only to a partial reduction of its liability to grant an indemnity. Indeed, as the majority of the Full Court recognised, at the time of taking those actions Allianz could not have been certain of the extent of its entitlement to reduce its liability under s 28(3)**.** The actions upon which Delor Vue relied are no more than actions consistent with, but not necessarily conclusive of, Allianz maintaining a continued intention to waive the defence under s 28(3)'

The High Court majority

- **[3] Irrevocable waiver by estoppel** - Dismissed Delor Vue's claims of detriment
- [a] Loss of opportunity to challenge Allianz for indemnity in May 2017 and thereby potentially resolve the conflict
- At [84] - 'There is also no basis to infer that there was any real or substantial prospect of Delor Vue obtaining, in a mediation, a more favourable settlement than that offered by Allianz in May 2018. Since no such case was ever run at trial, no evidence was called by Delor Vue as to whether it might have commenced litigation between May 2017 and May 2018. Delor Vue did not call any evidence concerning the relationship between the parties during that year that might have shown that there was a prospect of a more favourable settlement in a mediation if litigation had been commenced. Nor was there evidence before the Court concerning any informal offers to resolve the dispute made by either party during that period, or the attitude of either party to such offers. And, in the absence of any case concerning the loss of a prospect of a more favourable outcome by a mediation, Allianz did not waive privilege or seek to tender any legal correspondence in relation to offers to resolve the dispute between May 2017 and May 2018.'

The High Court majority

- **[3] Irrevocable waiver by estoppel** - Dismissed Delor Vue's claims of detriment
- [a] Loss of opportunity to challenge Allianz for indemnity in May 2017 and thereby potentially resolve the conflict
- At [85] – 'In this Court, Delor Vue submitted that there was a "souring" of the relationship between the parties after 12 months. It can be accepted that relations had indeed soured by the time of the correspondence on 3 May 2018. But it is too late for Delor Vue to construct a case for the first time, in this Court, that a souring of relations at an unspecified time between May 2017 and May 2018 deprived it of the prospect of a more favourable outcome, by a mediation, than that offered by Allianz in May 2018. An example of one of the many issues that might have been explored had such a case been run at trial is whether, even without litigation or mediation, Allianz had made informal offers to Delor Vue to resolve the dispute which were at the limits of what it was ever prepared to offer'

The High Court majority

- **[3] Irrevocable waiver by estoppel**
- [b] Loss of opportunity to take steps to carry out repair works itself
- At [88] - 'Although Delor Vue did take some action between May 2017 and May 2018, including commissioning engineering and building reports, it is not sufficient proof of detriment for Delor Vue to assert that, as a consequence of the 9 May 2017 email, it refrained from taking unspecified additional action that it would otherwise have taken. The nature of any action that Delor Vue might have taken is important given that: (i) Delor Vue's available funds, including the proposed loan, fell vastly short of the cost of repairs; and (ii) Delor Vue never specified any of the work that it could have undertaken'.
- At [89] - 'Further, even if it is assumed that Delor Vue had refrained from taking some additional action, refraining from that action might not necessarily have been detrimental. If the cost of taking the additional action fell, then, all other things being equal, the decision to refrain would have been beneficial. Or, if the cost remained the same, the decision to refrain might still have been beneficial if the effect was to allow all repair works to be done concurrently, after the additional defects in the roof trusses had been discovered.'

The High Court majority

- **[3] Irrevocable waiver by estoppel**
- At [90] – 'In summary, Delor Vue did not prove any "acts, facts or circumstances" from which any detriment could be inferred due to the loss of an opportunity to engage in repair works itself between May 2017 and May 2018. Indeed, the facts established only a clear benefit to Delor Vue during this period from the money spent by Allianz, including on repairs.'
- At [91] -' Perhaps in order to address this obstacle, Delor Vue submitted in this Court that, "subject to the question of financial limitations", Delor Vue could have attended to "simpler and cheaper defects rectification works" in tandem with cyclone damage repairs. But, as explained above, the majority of the Full Court correctly concluded that Delor Vue had not run a case at trial that it could have undertaken works more cheaply itself between May 2017 and May 2018. In any event, such a submission is not supported by the evidence. The reference to "simpler and cheaper defects rectification works" appears to be to the uncosted option of fitting new trusses alongside the existing trusses, as suggested by Delor Vue's body corporate manager. That option was considered by Allianz's loss adjusters who concluded that it was not cost effective.'

The High Court majority

- **[4] Utmost Good Faith**
- At [99] – '… An insurer and an insured do not owe a duty never to depart from representations made to each other. For instance, even if a representation is made unequivocally, it might be reasonable to depart from that representation if it was insignificant, or if circumstances change and departure would occasion no prejudice to the other party. If such a novel duty were to be recognised, and if it were to add anything to the doctrine of estoppel, it could only be a duty not to depart, without a reasonable basis, from significant representations concerning a claim'
- At [107] - 'When the representation in the 9 May 2017 email is read in its full context, it is clear that Allianz was not accepting liability for the whole of Delor Vue's claim. Allianz's representation that it would not rely on s 28(3) was inseparable from Allianz's limited offer of indemnity that excluded "[d]efective materials and construction of the roof, including but not limited to tie downs, rafters and timbers and soffit" and required Delor Vue to pay for roof repairs of a scope yet to be defined, but to be undertaken prior to internal repairs.'

Gageler J (dissenting)

- **[1] On Waiver**
- At [159] – 'With knowledge of the facts giving rise to its statutory right to reduce its liability by reason of Delor Vue's failure to comply with its pre-contractual duty of disclosure, SCI on behalf of Allianz made and, by its email of 9 May 2017, unequivocally communicated to Delor Vue a choice not to rely on that statutory right in answer to the claim which Delor Vue had by then made for property damage arising from Tropical Cyclone Debbie. Allianz thereby and thereupon waived that right, in consequence of which Allianz was thereafter precluded from attempting to reassert it'
- **[2] On Estoppel**
- At [168] – 'For an entire year, during which time the damage to the apartment complex from Tropical Cyclone Debbie remained substantially unrepaired, Delor Vue refrained from pursuing opportunities for self-help which were obviously available to it. Delor Vue refrained from pursuing opportunities during that year-long period on the faith of Allianz's representation. Delor Vue did not need to prove that it would in fact have been better off if it had pursued one or other of those opportunities during that period in order to justify the conclusion that Allianz's subsequent departure from the position represented was unjust.'

Gageler J (dissenting)

- **[3] – On Utmost Good Faith**
- At [176] - ‘The notions of fairness and reasonableness which inform the assessment of the reasonableness or unreasonableness of an insurer’s assertion of a contractual or statutory right inherently encompass considerations of the kind traditionally understood to underpin the general “preclusionary” doctrines of waiver and estoppel. That must be so whether or not waiver is to continue to be recognised as a distinct doctrine in Australia. The considerations accordingly include: that an insured is in principle entitled to know where the insured stands in respect of a claim made under the insurance contract; that an insurer, having made and unequivocally communicated a fully informed choice not to assert a right in answer to a claim should in principle be held to that choice; and that an insured having relied to its detriment on a communicated choice of an insured not to assert a right should not in principle be subjected to prejudice by the insurer changing its position.’

Gageler J (dissenting)

- **[3] – On Utmost Good Faith**
- At [178] – 'Allianz accepted in argument on the appeal that the requirement that it act towards Delor Vue with the utmost good faith necessitated that it make and communicate to Delor Vue in a timely manner a decision as to whether or not it would accept or reject Delor Vue's claim so as to accept or reject responsibility to adjust the claim under the contract of insurance. That is what SCI as agent for Allianz did by the email of 9 May 2017. With full knowledge of the facts giving rise to Allianz's statutory right to reduce its liability in respect of the claim, SCI as agent for Allianz unequivocally announced in that email that it would not be relying on that right. Whether or not that fully informed and unequivocally communicated choice constituted a legally operative waiver, in my opinion, the statutorily implied contractual requirement that Allianz act towards Delor Vue with the utmost good faith entailed that Allianz was from then on bound to adhere to the position it had announced. **Allianz was not entitled to go back on its word. It was not entitled to blow hot and cold**.'
- Parallels to the dissenting opinion of Kirby J in *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* [2007] HCA 36

Potential implications for insurance disputes in New Zealand

- **Some recent case examples:**
- Election - *Domenico Trustee Ltd v Tower Insurance Ltd* [2015] NZHC 981
- Estoppel - *Doig v Tower Insurance Ltd* [2017] NZHC 2997
- Utmost Good Faith - *Young v Tower Insurance Ltd* [2016] NZHC 2956
- Common themes of these decisions and distinctions to Australian cases
- Future considerations for disputes on claims resulting from cyclone and other extreme weather events
- ASIC's monitoring of insurer's claims handling practices

Domenico Trustee Ltd v Tower Insurance Ltd [2015] NZHC 981

- Earthquake-damaged property insured for full replacement value
- Dispute on amount payable under policy
- Held - there was no unequivocal election made by Tower regarding the mode of settlement of the claim
- After reviewing the authorities and commentaries at [37] - [70], set out eight general principles on the application of election in relation to the handling of insurance claims at [71] (see overleaf)
- Seven of the eight principles approved on appeal: *Tower Insurance Ltd v Domenico Trustee Ltd* [2015] NZCA 372
- NZCA - Reversed Gendall J's finding of election through delay - as this was not open on the pleadings and was not raised in argument

Domenico Trustee Ltd v Tower Insurance Ltd [2015] NZHC 981

(a) election is an irrevocable act between two or more inconsistent rights that must be unequivocal, unqualified and communicated to the other party;

(b) the assessment as to whether there has been an election is evaluative in nature, drawing upon the entire factual matrix of the particular case;

(c) an election can be made either by words or conduct. The test is whether the reasonable bystander would consider the totality of the actions of the party entitled to elect meet the threshold of election;

(d) the electing party must be apprised of all relevant facts and information such that it is in a position to make an informed election;

(e) a mere offer to settle a claim without more will not ordinarily amount to an election;

(f) the making of inquiries by the insurer, even where it creates expectations upon the insured, will not ordinarily amount to an election; and

(g) the party entitled to elect has only a reasonable time in which to make their election before the law will make it for that party. - at [71]

Doig v Tower Insurance Ltd [2017] NZHC 2997

- Policy which provided for full replacement cover of an earthquake-damaged property assigned to purchasers
- Representation by claims handler to purchasers:
- "I cannot agree to the claims being transferred to your client until we receive a deed of assignment. However, supposing we do receive the deed of assignment, all settlement is based on the previous owners policy details as this is the policy which was in place at the time of the earthquakes"
- Mander J – Held that Tower was not estopped from denying full replacement cover to purchasers by virtue of claims handler's representations – No detriment established
- Upheld on appeal: *Doig v Tower Insurance Ltd* [2017] NZCA 107

Young v Tower Insurance [2016] NZHC 2956

- Dispute over repairs to earthquake-damaged property
- Complaints included delays, and withholding a recommendation from a construction firm to re-build
- At [163] - '… A duty of good faith on the part of the insurer is implied in every insurance contract. While the full scope and limits of the duty can be left for another day, I find, as a bare minimum, that the duty requires the insurer to:

- disclose all material information that the insurer knows or ought to have known, including, but not limited to, the initial formation of the contract and during and after the lodgement of a claim;
- act reasonably, fairly and transparently, including but not limited to the initial formation of the contract and during and after the lodgement of a claim; and
- process the claim in a reasonable time.'

Young v Tower Insurance Ltd [2016] NZHC 2956

- At [164] - 'As to the requirement that the insurer process a claim within a "reasonable time", this, however, must take into account the time required to properly investigate and assess all aspects of the claim. What is "reasonable" will depend on all the relevant circumstances. Factors that may need to be taken into account include the type of insurance, the size and complexity of the claim, compliance with any relevant statutory or regulatory rules or guidance, and factors outside an insurer's control. Further, if the insurer shows that reasonable grounds exist for disputing the claim (whether as to the amount of any sum payable or as to whether anything at all is payable), the insurer does not breach the implied term merely by failing to pay the claim (or the affected part of it) while the dispute is continuing. But the conduct of the insurer in handling a claim may be a relevant factor in deciding whether that good faith duty was breached and, if so, when.'
- Parallels to recent Australian cases - *ASIC v Youi Pty Ltd* [2020] FCA 1701; *ASIC v TAL Life Limited (No 2)* [2021] FCA 193