FEDERAL COURT OF AUSTRALIA

Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd (No 2)

[2020] FCA 588

File number:	NSD 2094 of 2018
Judge:	**ALLSOP CJ**
Date of judgment:	6 May 2020
Catchwords:	**INSURANCE** – where claim made under Residential Strata Insurance Policy following tropical cyclone – whether insured made innocent non-disclosure – whether insured made misrepresentation – whether insurer entitled to reduce its liability to nil where insured failed to comply with duty of disclosure – whether insurer would have issued policy if non-disclosure had not occurred – confirmation of cover by insurer despite non-disclosure – subsequent denial of liability by insurer – whether election, waiver or breach of the duty of the utmost good faith – whether insurer estopped from relying on s 28(3) – *Insurance Contracts Act 1984* (Cth) ss 13, 21, 28
Legislation:	*Insurance Contracts Act 1984* (Cth) ss 13, 21, 28 *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 112 *Body Corporate and Community Management Act 1997* (Qld) s 15
Cases cited:	*Agricultural and Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; 238 CLR 570 *Amalgamated Investment and Property Co Ltd (In Liq) v Texas Commerce International Bank Ltd* [1982] 1 QB 84 *AMP Financial Planning Pty Ltd v CGU Insurance Ltd* [2005] FCAFC 185; 146 FCR 447 *Barclay Holdings (Australia) Pty Ltd v British National Insurance Co Ltd* (1987) 8 NSWLR 514 *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* [2007] HCA 36; 235 CLR 1 *CGU Insurance Ltd v Porthouse* [2008] HCA 30; 235 CLR 103 *Commonwealth v Verwayen* [1990] HCA 39; 170 CLR 394

Craine v Colonial Mutual Fire Insurance Co Limited [1920] HCA 64; 28 CLR 605

De Bussche v Alt (1878) 8 Ch D 286

Delaforce v Simpson-Cook [2010] NSWCA 84; 78 NSWLR 483

Freshmark Ltd v Mercantile Mutual Insurance (Australia) Ltd [1994] Qd R 390

GIO General Ltd v Wallace [2001] NSWCA 299; 11 ANZ Insurance Cases 61-506

Giumelli v Giumelli [1999] HCA 10; 196 CLR 101

Grundt v Great Boulder Proprietary Gold Mines Limited [1937] HCA 58; 59 CLR 641

Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW) [1993] HCA 27; 182 CLR 26

Johnson v Gore Wood & Co [2002] 2 AC 1

Kammins Ballroom Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850

Khoury v Government Insurance Office (NSW) [1984] HCA 55; 165 CLR 622

Legione v Hateley [1983] HCA 11; (1983) 152 CLR 406

Marketform Managing Agency Ltd v Amashaw Pty Ltd [2018] NSWCA 70; 97 NSWLR 306

Nigel Watts Fashion Agencies Pty Ltd v GIO General Ltd [1994] NSWCA 365; 8 ANZ Insurance Cases 61-235

Permanent Trustee Australia Ltd v FAI General Insurance Co Ltd (In Liq) [2003] HCA 25; 214 CLR 514

Powell & Thomas v Evan Jones & Co [1905] 1 KB 11

Prepaid Services Pty Ltd v Atradius Credit Insurance NV [2014] NSWCA 440; (2015) 18 ANZ Insurance Cases 62-047

Purkess v Crittenden [1965] HCA 34; 114 CLR 164 at 168,

Sargent v ASL Developments Ltd [1974] HCA 40; 131 CLR 634

Schaffer v Royal & Sun Alliance Life Assurance Australia Ltd [2003] QCA 182; 12 ANZ Insurance Cases 90-116

Stealth Enterprises Pty Ltd (t/a The Gentlemen's Club) v Calliden Insurance Ltd [2017] NSWCA 71; 19 ANZ Insurance Cases 62-131

Strong v Woolworths Ltd [2012] HCA 5; 246 CLR 182

Thompson v Palmer [1933] HCA 61; 49 CLR 507

Watts v Rake [1960] HCA 58; 108 CLR 158

Yorkshire Insurance Co v Craine [1922] 2 AC 541

Date of hearing:	16–18 October 2019
Registry:	New South Wales
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Commercial Contracts, Banking, Finance and Insurance: Insurance List
Category:	Catchwords
Number of paragraphs:	353
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Solicitor for the Respondent:	Holman Webb Lawyers

ORDERS

NSD 2094 of 2018

BETWEEN:	**DELOR VUE APARTMENTS CTS 39788** Applicant
AND:	**ALLIANZ AUSTRALIA INSURANCE LTD ABN 12 000 122 850** Respondent

JUDGE:	**ALLSOP CJ**
DATE OF ORDER:	**6 MAY 2020**

THE COURT ORDERS THAT:

1. The matter be stood over to a date to be fixed for the making of orders and for case management to settle orders for the reference referred to in proposed Order 2(a) in [352] of the reasons herein.
2. Within 14 days the parties file orders that are agreed to reflect the reasons herein, or if there be no agreement each party file and serve draft orders and submissions of no more than three pages as to the orders to be made directed, in particular, as to why the proposed orders in [352] should or should not be varied. Subject to any application of the parties, the making of orders and the resolution of any differences in the submissions of the parties (other than any differences as to orders for the said reference) is to be dealt with on the papers.

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

REASONS FOR JUDGMENT

ALLSOP CJ:

Introduction

1 On 10 May 2019, in an interlocutory judgment *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd* [2019] FCA 639, I made orders for the hearing of the first stage of the proceeding to deal with two issues in respect of the claim by the applicant (**Delor Vue**) for indemnity against its property insurer, the respondent (**Allianz**). For the reasons that follow it is appropriate to vary these orders as to relief in order to deal with the substance of the issues litigated.

2 The applicant is a body corporate of apartments in Cannonvale, some 500km north of Yeppoon in Queensland, north of the 23rd parallel. The apartments were built in 2008 and 2009 by a developer, **Delorain** Pty Ltd and a builder, **Beachside** Constructions (National) Pty Ltd.

3 The claim of the insured is for property damage caused to the insured property by Tropical Cyclone Debbie on 28 March 2017. The insurance had only just been put in place. There were defects in the eaves, soffits and roof trusses of the buildings on the property. Delor Vue knew about the former (the eaves and soffits), but not the latter (the roof trusses). A question of non-disclosure arose as soon as the loss began to be adjusted. After the insurer had had an opportunity to ascertain the history of the defects, in addition to examining the damaged property, it communicated a decision to the insured on 9 May 2017 that it confirmed cover and would pay the claim subject to the terms of the policy. A year later, after further adjustment of the claim, commencing or threatening to commence subrogated proceedings against the builder, and renewing the policy for a premium of $62,281, Allianz wrote to Delor Vue with an offer to resolve the claim. The offer stated that it was in accordance with the terms of the communication 12 months before. The offer stated that it was open only for 21 days, after which time Allianz would deny monetary responsibility for the claim based on the non-disclosure and misrepresentation in connection with the taking out of the policy, claiming a legal entitlement to reduce its liability to nil under s 28(3) of the *Insurance Contracts Act 1984* (Cth) (**the Act**).

4 The two issues the subject of the orders of 10 May 2019 were as follows:

> (a) the rights, if any, of the respondent to reduce its liability to nil under s 28 of the *Insurance Contracts Act 1984* (Cth); and

(b) whether by some operative rule or principle the respondent is now unable to rely upon s 28.

5 When the matter was called on for hearing on 16 October 2019, the parties handed up elaborations of the two primary issues by reference to more specific issues, differently expressed by reference to the respective positions of the parties. Those issues have been helpful in formulating these reasons.

The structure of the case

6 The proceedings were documented by an amended originating application, an amended concise statement, a concise statement in reply by the respondent, and a concise statement in reply by the applicant.

7 The essence of the case made by the applicant was the holding of Allianz to the email of 9 May 2017. In the amended concise statement it was asserted that various policy exclusions had also been waived. This second aspect of the case was never pressed.

8 The applicant relied on election, waiver, estoppel and the duty of the utmost good faith to hold Allianz to cover under the policy terms. Allianz asserted that it was entitled to reduce its liability to nil under the policy, relying on an asserted breach of the duty of disclosure in s 21 of the Act, an asserted misrepresentation and remedial rights under s 28(3) of the Act.

9 As part of its case on election, waiver, estoppel and a lack of good faith, the applicant pointed to a number of steps taken by Allianz consistent with the email as set out in [11] of the amended concise statement:

> Allianz has taken a number of steps consistent with the Waiver 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 a potential recovery against the original Developer and Building 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 deferral of deregistration.

10 The applicant also pointed to steps that it took consistent with and in reliance upon the email and the representation in it, as set out in [12] of the amended concise statement:

> 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.

11 The applicant also identified further matters to found an estoppel, as set out in [20] of the amended concise statement as follows:

> 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.

12 There was a dispute at the hearing as to the extent to which the applicant had properly pleaded or identified the detriment from reliance on the email. I will deal with that in due course.

13 The non-disclosure alleged by Allianz was expressed in the concise statement in reply to be based on knowledge of the damage to the complex in March 2010 caused by a previous cyclone, the 2014 direction by the Queensland Building and Construction Commission to the builder to rectify defects in the complex, Mr Ingledew's report of 2015, the Goddard Report of December 2016 and the McNeill Report of March 2017.

14 At the hearing, and in particular based on the underwriting evidence, the matters relevant to the assertion of non-disclosure were the contents of the Goddard Report and the McNeill Report in late 2016 and early 2017.

15 The misrepresentation case was first adverted to in May 2018. It rested on a document provided by a broker to Allianz in February 2017 to the effect that the building had no defects.

16 The amended originating application, amended concise statement and the applicant's concise statement in reply asserted a waiver of some of the policy exclusions (exclusions 1(c)(i) and 1(d)). The separate questions posed and all submissions in the case were limited to the inability of Allianz to rely upon the asserted non-disclosure and misrepresentation. The case as presented was an effective abandonment of the case that the applicant had an entitlement to be paid under the policy by varied terms without reliance on the above exclusions. The recognition of this position will be included in the orders that I make.

Disposition of the first stage of the proceeding and a summary of the facts and reasoning

17 The resolution of the issues in the first stage of the proceeding requires a close examination of the facts as they occurred over a number of years. To that end, I have approached the factual analysis by beginning with a narrative of the background facts that led up to the critical points in the insurance relationship between Delor Vue and Allianz: the taking out of the insurance; the considered position taken by Allianz on 9 May 2017 that it confirmed cover under the policy notwithstanding what it referred to as "non-disclosure issues", which position was taken after the insured buildings and their cyclone damage had been examined by the loss adjuster, and with full knowledge of all information and documentation provided by Delor Vue; the year-long adjusting of the claim; and the resiling from late May 2018 from the position taken as to coverage under the policy by the replacement of the confirmation of cover made in May 2017 with a choice given to Delor Vue between acceptance of an offer of settlement or receiving nothing under the policy by the claimed operation of the remedies under the Act for non-disclosure and misrepresentation.

18 I have not found the resolution of the issues under the Act to be easy. Delor Vue had, for some years, recognised the defective construction of parts of the buildings, in particular, relevantly, the roofs. Reports had been obtained on the subject since 2014. The previous body corporate agent had been less than satisfactory in its efforts to remedy the problems and was replaced, in 2016, about nine months before the Allianz policy was taken out and Tropical Cyclone Debbie wreaked her havoc, by Mr Key's company. Mr Key was an efficient, precise, business-like and

honest person, who, by March 2017, was attending with care and efficiency to the assessment and repair of the apparently important problem of the defectively affixed and constructed soffits and eaves. Importantly, none of these problems had been identified as structural in the sense of relating structurally to the trusses or tie-downs of the steel roof structure of the buildings. (This problem was revealed upon examination of the damaged buildings, some with roofs blown off.) Especially with hindsight, it could perhaps be thought that if the soffits and eaves were inadequately constructed and affixed in a number of places, there could be, as-yet-unseen, structural deficiencies in the roof structures. But this was not appreciated by Mr Key or the body corporate.

19 Mr Key and the body corporate did, however, appreciate that there was a clear danger to persons or property of soffits falling to the ground. Whilst perhaps not probable or whilst unlikely, the risk, if it did materialise, could see catastrophic personal injury to, or death of, someone, or some damage to property, such as to a motor vehicle.

20 I am clear in my view that Messrs Key and Nobilia (the chair of the body corporate committee), who both gave evidence, did not "know" the matters required for s 21(1)(a) of the Act. There was an assertion of fraudulent non-disclosure which was never pressed. There was no behaviour either by Mr Key or Mr Nobilia or the body corporate which could found any question about his or their honesty.

21 I have come to the view that a reasonable person in the circumstances could be expected to know that the defective soffits and eaves, reflected in the two most recent reports obtained by Delor Vue (of an engineer, Mr Goddard, and of a builder, Mr McNeill), were matters relevant to the decision of the insurer whether to accept the risk, and most particularly on what terms, in connection with writing the public liability risk, insofar as the reasonable person would know that the cover included public liability cover and did not include any exclusion or exemption for personal injury or property damage caused by existing building defects, which did present a real danger to persons and property of others. I do not consider that a reasonable person, knowing what Mr Key and the body corporate *knew*, could be expected to know that the defective soffits and eaves reflected in the two most recent reports were matters relevant to the decision of the underwriter whether to accept the risk and on what terms in connection with property damage risk covered by the policy.

22 Finding innocent non-disclosure under s 21 of the Act, it is necessary, in order to assess whether Allianz lost any rights under the Act by the operation of the principles of election, waiver,

estoppel or by the asserted breach of the duty of the utmost good faith in s 13 of the Act, to consider whether it would have been entitled to reduce its liability to nil under s 28(3) of the Act, the question being whether it would have accepted the risk if it had known of the soffits and eaves problem.

23 I have come to the view that Allianz would have been so entitled. One of the senior underwriters of the underwriting agency for Allianz (Strata Community Insurance, to which I will refer as **SCI**), its Queensland State Manager, Mr Iconomidis, gave evidence. (SCI was at all times a specialist strata insurer owned and controlled by Allianz. A reference to SCI is a reference to Allianz.) He did not participate in the immediate decision contemporaneously to grant cover to Delor Vue. I consider, however, he would have been involved in that decision if there had been the disclosure of the soffits and eaves problem. His evidence was uncompromising that he would not have accepted the risk – not because of its relationship with public liability risk, but because of a concern with property risk. There were some problems, logically, with some aspects of his evidence. Certainly, I would accept that a prudent underwriter could have reasonably written the risk, especially in the light of the existing exclusions for existing defects. I am, however, of the view that Mr Iconomidis' view was reasonably open to an underwriter in his position and so to him (if that be a relevant consideration) and that he would not have accepted the risk. Important to this conclusion is the contemporaneous view he had in May 2017 when consideration was being given to the "non-disclosure issue". He was of the view, at that time, that the claim should be rejected for non-disclosure. A contrary decision was taken by Allianz, which decision was never explained.

24 Notwithstanding these conclusions, Allianz is bound to deal with the claim by reference to the terms of the policy, and not by reference to s 28(3) of the Act. It must do this because that is what it clearly told Delor Vue that it would do: it represented, in effect promised, as much. The email of 9 May 2017 was relevantly clear in this respect, reflecting a decision taken with full knowledge of all the facts known to the insured as passed on to the insurer and of all facts known to the insurer in the underwriting process leading up to the underwriting decision.

25 The operative principles of election, waiver and estoppel have some degree of taxonomical confusion and overlap. This is partly linguistic. I have concluded that Allianz did not elect between inconsistent and mutually exclusive *rights*. It did, however, choose between inconsistent *positions* with full knowledge of all the facts, a course of action which provided it with an advantage, being the entitlements of an insurer to full access to the insured property

and to the co-operation of its insured, which it received. That choice and that action invoked the doctrine of waiver as illuminated by *Craine v Colonial Mutual Fire Insurance Co Limited* [1920] HCA 64; 28 CLR 605. I also consider Allianz to be estopped from resiling from the choice that it made as communicated by the 9 May 2017 email taking into account and considering the detriment to Delor Vue such resiling would produce, non-specific though that detriment was.

26 Finally, I have also found that Allianz acted towards Delor Vue in 2018 exhibiting less than the utmost good faith. I appreciate the importance of such a finding to an insurer, especially since Act No. 17 of 2019 incorporated penal consequences to a breach of s 13 of the Act. These events relevantly took place prior to that change in the law. The position taken in May 2017 by SCI on behalf of Allianz was carefully considered (involving lawyers), quite likely perceived to be in Allianz's interests, and also honourable. Ordinary people had suffered a serious loss to their properties. There was obviously an "issue" about what the insured had known and what it had disclosed up to the point of the insurance incepting. The insured had co-operated fully in giving all of its reports and knowledge of the problem to the adjuster and the claims handler from the first request after the loss. A representation was made that cover was confirmed on policy terms. This was a representation, in effect a promise, to adjust the claim on policy terms. This was resiled from a little over a year later on a take-it-or-leave-it offer basis. That approach did Allianz no credit. It put the insured in a critical position: take the offer or take nothing. That is not how an insurer should behave in these circumstances. If there was a difference of view about the claim or if a position was being taken under the policy and it was not agreed, some dispute resolution means of resolving the issue conformable with the matter being resolved pursuant to policy terms should have been taken. Here, having represented, in effect promised, to pay the claim on policy terms, Allianz gave an offer on a take-it-or-leave-it basis and in the alternative denied policy terms and invoked s 28(3) of the Act, a course which it had represented, in effect promised, it would not do. This was conduct that was not commercially decent and fair.

27 It is now necessary, at this point, to become immersed in the facts of the buildings' defects as to the roofs.

A narrative of the background facts

28 This narrative of the background facts is taken principally, but not solely, from the documents. References in the form of 1/100 are to the volume of the court book and page number. This

narrative is supplemented with a discussion of the evidence of the witnesses, and later with more precisely focused findings in resolving the issues in dispute between the parties.

29 The evidence from which the facts are taken was: an agreed statement of facts and accompanying court book of four volumes; an affidavit of Mr Stewart Key, the body corporate manager of Delor Vue; an affidavit of Mr Anthony Nobilia, a member of the body corporate committee; a statement of Mr Constantinos Iconomidis, an underwriter from Allianz; and the oral evidence of Messrs Key, Nobilia and Iconomidis. There was also a small number of documentary exhibits outside the court book. There was agreement between the parties as to the status of the contents of the court book, which was reduced to writing as Exhibit A1. It was in the following terms:

> The court book contains a substantial number of reports prepared by building inspectors, engineers and other professionals. Each report is identified in the index to the court book, with each being defined by the use of a bold name which appears in brackets. None of the authors of these reports have been engaged as an independent expert witness to prepare an expert report for use in these proceedings, and none are being called as witnesses.
>
> These reports are admissible as evidence of the fact such a report was created and issued. It is also accepted that where a report describes how an object or part of the building actually appeared to the author, it is admissible to prove the fact of how that object or part appeared at the time of the author's inspection.
>
> The opinions expressed in those reports are not admissible to prove that the position was as opined by the author. Such opinions include the description of items as being defective or non-compliant, their characterisation as "major" defects or otherwise, and opinions about the degree of risk of there being other damage not reported in the report.

30 The factual survey that is required is determined by the two fundamental issues: (a) the asserted non-disclosure and misrepresentation in the taking out of the insurance and (b) the behaviour of the parties after Allianz said that it would confirm cover on policy terms and would not rely upon non-disclosure.

31 Originally, Allianz's concise statement in reply relied upon the non-disclosure of matters from an earlier cyclone in 2010. At the hearing the focus of the evidence was from, at the earliest, late 2014. The evidence of Mr Iconomidis only relied on reports in late 2016 and early 2017. I take the case to be so confined.

32 The insured property comprises 11 multistorey buildings used for residential dwellings. The buildings, identified as A to K, have lower level carparks and two or three storeys of apartments. There are some 62 lots, being the apartments, as well as common property.

33 The community titles scheme, of which Delor Vue is the body corporate, was created pursuant to the *Body Corporate and Community Management Act 1997* (Qld) (**BCCM Act**). Delor Vue had a committee under the BCCM Act. Delor Vue, as body corporate, employed a body corporate manager. From 25 May 2015 to 31 May 2016, the manager was Archers BCM (Whitsundays) Pty Ltd (**Archers**) under an administration agreement. Archers had related companies attending to various duties. It is unnecessary to identify them separately. It was replaced on 30 May 2016 when the committee appointed Aspire Body Corporate Management (**Aspire**) as manager. Mr Key was a director of Aspire and it is convenient to refer to him as the body corporate manager.

34 From at least late 2014 a number of reports concerned with building issues had been prepared and provided to various parties. Some, at least, of the reports concerned dissatisfaction with the building work and the attempts to hold the builder to account.

35 In November 2014 Mr Loft of Archers prepared a Workplace Health and Safety Inspection Report (**Loft Report 1**). The objective of the report was stated to assist the body corporate in meeting its statutory obligations as to safety and to maintain the property in a safe condition. The report was some 35 pages in length and dealt with 11 categories: housekeeping and common areas; electrical; plant and equipment; lighting; contractor control; fire control; hazardous material control; the pool area; general building structure; asbestos; and other issues. Relevant for these proceedings were some of the comments dealing with general building structure. The report identified "sections of eaves lining 'missing' on two blocks". The recommendation made to the body corporate was as follows (1/192):

> It is recommended that the body corporate engage a contractor to repair the 'missing' section of eaves lining and secure the adjoining sheets
>
> It is also recommended that an inspection of the eaves is undertaken to ensure that other areas are secure and not likely to become a 'falling' hazard

36 It would appear that this report was given to the building manager, Mr Paul Wellard. Mr Wellard lived at the property and was a director of the developer and the builder. An email of 20 November 2014, from him to Ms Tovey of Archers (1/216) contained quotations for repairs which included: "replace blown out eaves sheets … $2,800."

37 In April 2015, a licensed builder, Mr Paul Ingledew, prepared a report (1/219) which was commissioned by the body corporate to provide advice to Delor Vue concerning the condition of the building. The scope of the inspection was stated to be dealing only with any 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". The report identified a range of items that Mr Ingledew advised defective, including cracking to slabs, beams, piers, bars and block work, loose items, rusting, soil erosion and subsidence, as well as sagging of soffit sheeting. Care is to be taken in placing weight on the range and nature of the defects given what was ultimately the narrowness of the non-disclosure and misrepresentation case – to do with eaves, soffits and trusses. The only concerns dealt with by Mr Ingledew dealing with soffits and eaves were in item 3.3. The summary of findings included the following (1/221):

> This Summary is not the Report. The following Report MUST be read in full in conjunction with this Summary. If there is a discrepancy between the information provided in this Summary and that contained within the body of the Report, the information in the body of the Report shall override this Summary.
>
> The building was built approximately 6 years ago. The property appears to have been constructed to a reasonable standard for the period using workmanship and materials of an acceptable quality and has since been reasonably maintained.
>
> In respect of significant items:
>
> Evidence of structural damage was observed – see Item 3.1.
>
> Evidence of conditions conducive to structural damage was observed – see Item 3.2.
>
> Evidence of major defects in the non-structural elements of construction was observed – see Item 3.3.
>
> Evidence of minor defects was observed – see Item 3.4.
>
> Evidence of serious safety hazards was observed – see Item 3.5.
>
> Following the inspection of surface work in the readily accessible areas of the property, the overall condition of the building relative to the average condition of similar buildings of approximately the same age that have been reasonably well maintained was considered: Below Average Condition. See also Item 4 "Conclusion".
>
> However, due to the level of accessibility for inspection including the presence of obstructions, the overall degree of risk of undetected structural damage and conditions conducive to structural damage was considered: High. See Item 2 for details.
>
> A further inspection is strongly recommended of those areas that were not readily accessible and of inaccessible or obstructed areas once access has been provided or the obstruction removed. This will involve a separate visit to the site, permission from the owner of the property and additional cost.
>
> In respect of any defect or significant item identified in this Report, a further detailed investigation by a competent person is strongly recommended to determine the cause, method and extent of any remedial work required, and associated costs.
>
> Unless stated otherwise, any recommendation or advice given in this Report should be implemented as a matter of urgency.
>
> For further information including advice on the implementation of a preventative maintenance program see Clause A.3 "Important Note".

38 In the body of the report it was clear that roof space had not been inspected. In relation to undetected structural damage risk assessment the following appeared (1/223):

> **2.3 Undetected Structural Damage Risk Assessment** Due to the level of accessibility for inspection including the presence of obstructions, the overall degree of risk of **undetected** Structural Damage and Conditions Conducive to Structural Damage was considered:
>
> **High. See Recommendation below.**
>
> RECOMMENDATION: Where the risk is considered "Moderate" or "Moderate-High" or "High", a further inspection is strongly recommended of areas that were not readily accessible, and of inaccessible or obstructed areas once access has been provided or the obstruction removed. This may require the moving, lifting or removal of obstructions such as floor coverings, furniture, stored items foliage and insulation. In some instances, it may also require the removal of ceiling and wall linings, and the cutting of traps and access holes. For further advice consult the person who carried out this report.
>
> Additional Comments: **No**

39 Under major defects in secondary elements and finishing elements in item 3.3 the report identified sagging to soffit sheeting, as follows (1/233):

> Sagging to soffit sheeting, the frame has not been fixed out to adequately support the soffit sheeting, some sheeting fallen away from frame.

Whilst this was advice about defects concerned with the buildings' roofs, it should be noted that there was nothing concerning the roofs in the sections on "Structural Damage" or "Conditions Conducive to Structural Damage". Further in conclusion the inspector made the following remarks about the various categories of his report (1/234–235):

> **4 CONCLUSION**
>
> In the opinion of this Inspector:
>
> The incidence of Structural Damage in this property in comparison to the average condition of similar buildings of approximately the same age that have been reasonably well maintained was considered: Above Average.
>
> The incidence of Conditions Conducive to Structural Damage in this property in comparison to the average condition of similar buildings of approximately the same age that have been reasonably well maintained was considered: Above Average.
>
> The incidence of Major Defects in Secondary Elements and Finishing Elements in this property in comparison to the average condition of similar buildings of approximately the same age that have been reasonably well maintained was considered: Above Average.
>
> The incidence of Minor Defects in this property in comparison to the average condition of similar buildings of approximately the same age that have been reasonably well maintained was considered: Average.

> In conclusion, following the inspection of surface work in the readily accessible areas of the property, the overall condition of the building relative to the average condition of similar buildings of approximately the same age that have been reasonably well maintained was considered: Below Average Condition.

40 Allianz in its concise statement in reply and submissions draws from this report that it revealed "defects in the construction of the buildings' roofs". That expression of the matter should be qualified by a recognition of what Mr Ingledew actually said, to which I have referred.

41 The committee met on 25 May 2015. The report of Mr Ingledew was before the committee. In the minutes of the meeting under General Business, Archers noted that the report of Mr Ingledew had been received and could be used to submit a claim with the Queensland Building and Construction Commission (**QBCC**) prior to the expiry of the claim period after construction. It was resolved to do that. The minutes also noted under General Business that there was discussion about the eaves as follows (1/246):

> **Eaves**
>
> It was discussed by those in attendance that there are a number of boards that are missing from the building eaves and general advice obtained appears that, at the time of construction, a beam needed to be installed to allow for the sheets to be attached on a more permanent basis. It was agreed to include this issue in the upcoming QBCC claim in order to actively pursue having them repaired, however, in the meantime, any fallen debris is to be cleared by Mr John Carter as soon as possible.

42 On 25 May 2015, a body corporate management agreement was executed by Archers and Delor Vue. The authorised powers of Archers as manager included the following provisions (1/249):

> 5.1 The Body Corporate authorises the Manager to exercise the Authorised Powers.
>
> 5.2 The Manager shall only exercise the Authorised Powers to facilitate the performance of the Agreed Services or any Additional Services.
>
> …
>
> 5.6 The Body Corporate specifically authorises the Manager to:
>
> (1) obtain quotations for insurances required to be effected by the Body Corporate under the Act or the Module;
>
> (2) effect, on behalf of the Body Corporate such insurances as the Body Corporate directs the Manager to obtain;
>
> (3) pay insurance premiums from the Body Corporate's funds; and
>
> (4) submit insurance claims to the Body Corporate's insurers which the Body Corporate acknowledges forms part of the Additional Services.

43 On 16 June 2015, Archers, on behalf of Delor Vue, sent Mr Ingledew's report to the builder, Beachside, requiring a proposal for rectifying the defects. The letter included the following (1/256):

> The Committee request that you peruse the attached report and provide a viable solution to have the following summary of defects attended to in addition to any others mentioned in the report:
>
> ***Evidence of structural damage was observed – see Item 3.1.***
>
> ***Evidence of conditions conducive to structural damage was observed – see Item 3.2.***
>
> ***Evidence of major defects in the non-structural elements of construction was observed – see Item 3.3.***
>
> ***Evidence of serious safety hazards was observed – see Item 3.5.***
>
> It has been requested that you provide a viable solution with agreed timeframes to the Body Corporate Committee, for their consideration, to rectify this issue within 14 days of this letter. If we have not received a response within the 14 day time frame, the Body Corporate Committee will be forwarding the report to the Queensland Building and Construction Commission (QBCC) for further attention.

44 The issue of the eaves came up again at the body corporate committee meeting of 21 July 2015. The minutes of the meeting record the following (1/260–261):

> **Eaves**
>
> It was noted in the minutes of the previous Committee Meeting held on 25th May 2015 that there are a number of boards that are missing from the building eaves and general advice obtained appears that, at the time of construction, a beam needed to be installed to allow for the sheets to be attached on a more permanent basis. It was agreed to include this issue in the upcoming QBCC claim in order to actively pursue having them repaired, however, in the meantime, any fallen debris is to be cleared by Mr John Carter as soon as possible. It was noted by Mr Paul Wellard that the reason for the boards dislodging from the eaves is due to people opening their doors during high winds, eg cyclones, which forces pressure up into the eaves. It was noted by Mr Ron Jamieson that there are currently 4 boards missing and it was agreed by those in attendance that Mr John Carter obtain a quotation from Mr Jason Kibbis to complete these repairs for the consideration of the Committee.

45 In November 2015, Mr Loft of Archers prepared another Workplace Health and Safety Inspection Report (**Loft Report 2**). The report was in a similar form to that dated November 2014. It contained an identically worded section on the eaves.

46 On 24 November 2015, the body corporate committee met again. The minutes record that there had been an onsite meeting prior to 21 July 2015 with Mr Wellard to discuss Mr Ingledew's April report, which resulted in various "action items". As to the eaves, the following was recorded in the minutes (1/301):

> **Eaves**

> It was noted in the minutes of the previous Committee Meeting held on 21st July 2015 that there are a number of boards that are missing from the building eaves. Mr Paul Wellard advised that the reason for the boards dislodging from the eaves is due to people opening their doors during high winds, eg cyclones, which forces pressure up into the eaves. It was noted by Mr Ron Jamieson that there are currently 4 boards missing and it was agreed by those in attendance that Mr John Carter obtain a quotation from Mr Jason Kibbis to complete these repairs for the consideration of the Committee. It was noted by Mr Carter that Mr Kibbis has declined to quote on the repairs along with a number of other contractors that have attended site. It was agreed by those in attendance that although it is aesthetically displeasing to have these boards missing, there is no urgency to have them replaced, especially due to the upcoming cyclone season. It was further agreed that the missing boards can be replaced at the same time as painting the external surfaces of the building as access to the eaves will be easier. It was suggested by Mr Paul Wellard that the Committee consider cutting grills into the eaves at the same time, as this will provide more airflow through the roof cavity and hopefully reduce the likelihood of the boards being dislodged in the future.

47 In January 2016, Archers purported to appoint **Marsh** Advantage Insurance Pty Ltd as insurance broker for the body corporate. It is an issue in the proceedings whether the appointment (as binding Delor Vue) was valid. The relevance of the issue is that about a year later, after Archers had had its retainer as body corporate manager terminated, and shortly prior to the issue of the Allianz policy, Marsh as (the soon to be replaced) holding broker sought an insurance quotation from Allianz which contained a communication upon which Allianz now relies as a relevant misrepresentation. If Marsh was not properly appointed, this may make the misrepresentation (if it be such) one that was made without Delor Vue's authority. Archers' letter of 27 January 2016 signed by Mr Staehr, a director of Archers, stated as follows (1/305):

> **Letter of Appointment**
>
> This letter serves to confirm that with effect from 27 January 2016 we have appointed Marsh Advantage Insurance Pty Ltd as the exclusive Insurance Broker and Risk Adviser on behalf of Delor Vue Apartments CTS 39788.
>
> This letter rescinds all previous appointments and the authority herein shall remain in force until cancelled in writing.
>
> Marsh Advantage Insurance Pty Ltd are authorised to negotiate directly with all Insurance Companies on behalf of Delor Vue Apartments CTS 39788.
>
> This letter also constitutes authority for insurers to furnish Marsh's representatives with all information they may request as it relates to on behalf Delor Vue Apartments CTS 39788.

48 The emails from Ms House of Marsh and relevant documentation (including the letter of appointment from Archers) refer to Marsh. There is also reference in some of the emails to **MAI** Strata Pty Ltd as an authorised representative of Marsh.

49 Mr Key in his affidavit said that Delor Vue itself did not request, or resolve, to appoint Marsh (or MAI) as its insurance broker. No record produced contradicted this statement.

50 On 18 March 2016, Ms House of Marsh sent an email to committee members containing a letter from Marsh to the body corporate committee together with an insurance renewal offer from two insurers, one of which was AIG. The letter had a notice as to the duty of disclosure in standard and unremarkable terms, as follows (1/311):

> **Your Duty of Disclosure – contracts of general insurance subject to the Insurance Contracts Act**
>
> Before you enter into an insurance contract, you have a duty to tell the insurer anything you know, or could reasonably be expected to know, may affect the insurer's decision to insure you and on what terms.
>
> You have this duty until the insurer agrees to insure you.
>
> You have the same duty before you renew, extend, vary or reinstate an insurance contract.
>
> You do not need to tell the insurer anything that:
>
> – reduces the risk they insure you for; or
>
> – is common knowledge; or
>
> – they know or should know as an insurer; or
>
> – they waive your duty to tell them about.
>
> **If you do not tell the insurer something**
>
> If you do not tell the insurer anything you are required to, they may cancel your contract or reduce the amount they pay you if you make a claim, or both.
>
> If your failure to tell the insurer is fraudulent, they may refuse to pay a claim and treat the contract as if it never existed.

51 At this time, no one on the committee or at Marsh or at Archers appeared to feel any need to disclose anything about the condition of the building, or the eaves or soffits.

52 Shortly prior to 23 March 2016, the body corporate entered into a contract of insurance with AIG for the period 23 March 2016 to 23 March 2017.

53 On 1 June 2016, Aspire and Delor Vue executed an Administration Agreement appointing the former as body corporate manager. This change of management was brought about for a reason. Mr Nobilia recalled that the committee was dissatisfied with Archers' performance in connexion with what he originally called (Tp 131 l 37) the "aesthetics of the building". He said: "we were paying a maintenance manager this money and nothing was ever being looked after" (Tp 131 ll 40–41). Later, (Tp 136 ll 1–5) he said that the dissatisfaction (I infer in committee members) concerned the attendance by Archers to the question of soffits and eaves as reflected in the May, July and November 2015 minutes.

54 Thus, an early point of focus for Mr Key (whose first committee meeting as body corporate manger was that of 20 June 2016) and for Mr Nobilia (who became chairman of the body corporate committee in May 2016) was attending to the problem of the soffits and eaves.

55 On 20 June 2016, the committee of the body corporate met. Once again the eaves were the subject of discussion. The minutes record the following (1/337):

> **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.

56 This last resolution led to the retention by Aspire of Mr Ross McNeill, a builder, to advise as to "maintenance works" at the buildings. In late July 2016, McNeill Building inspected the property at the request of Aspire and provided a report on defective soffits, in the following form (1/339):

> Thank you for asking us to look at Delor Vue Apartment maintenance works.
>
> Following our inspection yesterday please find my notes below.
>
> Soffit sheeting dislodging:
>
> - Please find attached Eaves & Soffits Technical Specifications from James Hardie.
> - Without closer inspection, (due to the heights) at first glance it appears the installation of the soffit sheeting may not been installed as per manufacturers recommendations in regards to support and fixing spacing's and this is why in my opinion the sheeting is dislodging from the soffits, In viewing the missing soffit sheets from the ground the timber fixing purlins appear to be spaced around 800mm to 900mm. I would require the use of a knuckle boom or scaffold to measure and inspect at the soffit height to verify along with which material was used to verify.
> - I noticed there are multiple areas of soffit which are hanging out of the barge boards along with soffit sheeting bowing and possibly ready to dislodge as well.
> - The cost of rectification could vary depending on the current installation method and what is required to make good (if not installed correctly). It [would] also depend on how far or how much you would like done. Eg: if found to be inadequately installed it may be typical throughout.

57 Within days of receipt of this report, on 29 July 2016, the committee met and resolved to have Aspire engage a structural engineer to prepare a report and to obtain quotes to fix the problem. The minutes of the meeting record the following (1/342):

> **Eaves Cladding:** The soffits on the eaves are falling off the building in several places. This was commented on by the building inspector in his report on 1 April 2015 who stated – the frame has not been fixed out to adequately support the Soffit sheeting. This inspection report was provided to McNeills who attended site on Thursday 28 July. They provided a copy of the technical specifications for soffits and indicated in their opinion the soffits were not installed to specification.
>
> The committee resolved to have Aspire engage a structural engineer to prepare a report on the fitment of the soffit sheeting and to obtain quotes to fix the problem.

58 Also, Mr McNeill was asked to supply a quote to supply and fix the soffit sheeting. By letter of 30 August 2016, Mr McNeill provided a quotation, and in it he stated (1/349):

> Please find our price to undertake the works for the above project as listed in our Tender by Trades document and Prices Estimate documents.
>
> Our price covers the following:
>
> 1. Supply and fixing of Hardiflex soffit sheeting.
> 2. Supply and painting to the affected areas
> 3. Supply hire of scaffolding
>
> Scope of works:
>
> To remove soffit sheeting, install battens and fix new sheeting, refasten barge flashings where required along with painting.
>
> Due to the nature of the works and the access difficulties I have listed our rates where we would charge for the works undertaken.
>
> We identified at least 8 barge soffits either dislodged or ready to dislodge, I would assume all soffit sheeting was installed the same way so there may be more affected area's with a closer inspection (due to the height it is difficult to tell until we gain access)

The quotation identified a range of expense from $50,000 to $70,000 with an estimate of duration of four to six weeks. Mr McNeill supplied a "mud-map" of the site identifying the eight locations where soffit panels were missing or bowed. The eight locations were spread across the site and not limited to one building.

59 Mr Key had also asked another builder, Mr Scott Pawsey, to provide a quotation. Mr Pawsey responded by email on 9 September 2016. He did not provide a detailed quotation for the reasons set out in the email which was in the following terms (1/353.11):

> Regarding the Soffit sheeting to the units, looking from the ground up there is no where near enough battens to fix the sheets to, especially being in a cyclone region, so we would need to firstly install the required battens where needed then re-sheet and then paint,
>
> Again with this job it is the unknown and therefore not able to put a fixed price on the job, (unless it was way over the top to allow for the unknown).

> The repairs would need to be done on an hourly rate of $80/hr plus gst for tradesman and $45/hr plus gst for labor plus materials and hire equipment at cost. I would envisage no longer than 2 weeks work to replace the plans marked sheeting and to refix barge flashings.
>
> I would also suggest to put extra fixings in the other soffits (not included in the 2 weeks) while the hire equipment is on site as its just a matter of time before they start to come down as well.

Handwritten annotations to the email (which I infer to be of Mr Key), priced his quotation at $42,000 for a four week job.

60 Meanwhile, the day before on 8 September 2016, Mr Key emailed the members of the committee about Mr Wellard. It included the following (1/353.10):

> Because of the magnitude of the problem I have sourced two providers to quote on the replacement of the soffits and put the time into that matter myself as suggested by the committee.

61 The eaves repair quotes were placed on the agenda for the next meeting of the committee on 12 October 2016. The quotation of Mr McNeill and the email of Mr Pawsey of 9 September 2016 were placed with the papers for the meeting. In late September 2016, Mr Key sought a fee proposal from a firm of engineers, GW **Goddard** & Associates, in relation to a review of soffit installation.

62 The committee met again on 12 October 2016. The notes of the meeting record the following discussion and resolutions (1/355):

> **Eaves Cladding Structural Engineer:** Aspire has obtained a quote as instructed in the last committee minutes for a structural engineer to prepare a report as to the standard of fixing of the Soffits. Paul Wellard questioned the minutes and indicated there was no such motion to engage an engineer – this was to obtain quotes from builders. On [sic] member of the committee read the relevant section of the minutes to the committee. The quote from GW Goddard & Associates for $880 incl GST was tabled.
>
> Discussion then focused on the quotes to repair the soffits.
>
> Aspire has secured two providers who have provided prices to repair the soffits. McNeills Building have provided a price that is ranged from $50,000 to $70,000 utilising two trades people full time and a supervisor part time. This price includes equipment hire, removal of rubbish from site, painting and fixing to 8 identified areas of the buildings where soffits have fallen or are seen from the ground to be dislodged. They can not provide a fixed price until they can inspect the work up close.
>
> Pawsey Building and Maintenance has also provided an estimate for the work. This is also not a fixed price but indicates two trades people over 2-4 weeks work and excluded equipment hire. This price is also of the order of $40,000 once calculated.
>
> The committee then resolved that with an engineering report the two builders could then provide a more defined quote. The committee then resolved to accept G W

> Goddards quote for the engineering report of the method of fixing of the soffits to a value of $880.00 incl GST.
>
> **CARRIED For 4 Against 0 Abstain 0**
>
> The committee then resolved that Aspire should use the engineers report to enable both builders to provide a fixed quote to repair the soffits.
>
> **CARRIED For 4 Against 0 Abstain 0**
>
> Paul Wellard to obtain a fixed price quote from At Home Improvements

63 The minutes of the meeting of 12 October 2016 also reveal that certain correspondence was discussed including (as well as the quotes on soffits from McNeill, Pawsey and GW Goddard) "Insurance issues (Legal Defence)". There was also adjacent to this note of correspondence the following concerning insurance (1/357):

> **Insurance Claim**: Past insurance claims for the roof repair were discussed. The insurance claims history was not received from Archers. The current broker has not been able to trace a claim. It was indicated that a claim was made in 2010. Aspire will again approach the insurers at that time to determine the details of the claim. Paul Wellard was not sure if this was an insurance claim event.

64 In August 2016, Mr Key requested Ms House of Marsh to obtain "some additional information on a claim that was submitted in 2010 for claim # CL5488". (The terms of this request as here quoted were contained in Ms House's email to a Ms Ainslie of Zurich. It turned out that Zurich had no records.) This request shows, at least, that Mr Key (and so Delor Vue) was treating Marsh as the current broker.

65 On 21 October 2016, Mr Key informed Goddard & Associates of the acceptance of their proposal.

66 On 31 October 2016, Aspire asked McNeill Building to provide a fixed price quote for the job.

67 Before Mr Goddard produced his report he carried out a site inspection with a representative of McNeill Building using an elevated work platform. Mr Key gave evidence (Tp 206 ll 13–28) that he spoke with Mr Goddard after the inspection who told him that he had "observed a lack of fixings, a lack of screwing and … problems to the eaves, framing, and problems to the soffit attachment".

68 On 1 December 2016, Goddard prepared a report. It was reviewed by Mr Key on 7 December. Given its importance in the proceeding, as one of the two reports about which Mr Iconomidis said that had he read them he would not have agreed to the writing of the policy, I set out the text in full (1/364–365):

INTRODUCTION

G W Goddard & Associates Consulting Engineers were engaged by Aspire Body Corporate to carry out a site inspection, view available documentation and make comment on the apartments, with regards to the framing and fixing of the soffit sheeting on the eaves of the apartments of which areas of concern has been raised.

The investigation was carried out on 1 December 2016 by Gary Goddard from this office. No Architectural or Structural Documentation was available to be viewed by this office.

OBSERVATIONS

Delor Vue Apartments consists of multiple blocks of four (4) storey buildings constructed up the side of a hill in Cannonvale.

The buildings are slab on ground for car parking and three (3) levels of units using reinforced block work and suspended concrete floors. The roof is a skillion roof sloping down to the rear of each unit block and has approximately 750mm eaves on each side of each of the buildings.

Areas to the soffit sheeting had fallen to the ground exposing the framing. A cherry picker was used to access the exposed soffit area on one of the apartment blocks, refer photos Appendix 'A'.

The framing on the eave consisted of roughly measured a 50mm top hat section at approximately 900cts cantilevering 750mm supporting the roof sheeting. Some screw fixings from the sheeting to the top hat missed for the entire length of the eave or did not extend to the outside edge of the eave.

Pine noggins (120 x 35) at approximately 900cts had been nailed to blocking along the external wall frame and extended out to the outside edge of the eave. Some of the noggins had brackets fixed to the ends to support the outside metal fascia. The soffit sheeting was pushed into the rebate of the fascia with one nail fixing the soffit to the noggin back towards the external wall line.

The one nail fixing only occur on every noggin. Flashing over the fascia and the roof sheeting along the eave was seen to be screw fixed to the roof sheeting and not into the top hat. The top hat did not extend all the way to the fascia, refer photos.

CONCLUSIONS

The roof framing along the eave is not constructed in accordance to Section 7.2.24 Eaves Construction of AS 1684.3, Residential Timber-Framed Construction Australian Standard, where outriggers should be used extending back twice the cantilever fixing to the main roof framing. The 35 x 120 MGP pine noggin provides insufficient strength and support to the eaves and are not positioned to support the tophat roof battens which are not designed to cantilever.

The soffit lining appears to be a Hardieflex or similar product. The spacing of supports and sheeting fixing of the soffit inspected does not comply with the recommended support and sheeting fixings specified by James Hardie for the sheeting nominated above.

The support of the metal fascia is insufficient for cyclonic regions and the fixing of the flashing appears only to be fixed to the roof sheeting and not to the roof battens. The screw fixing location for the flashing appears to indicate that the flashing does not overlap the roof sheeting by the recommended amount.

> This report has been based on a visual inspection of the building where access was able to be gained on the day of the inspection. No drawings or specifications were available at the time of the inspection.
>
> Areas which were concealed at the time of this inspection could not be inspected. There appears other issue onsite [sic] which we were not engaged to inspect and report on, but would need attending too.

69 Mr Key in his affidavit said that he understood Mr Goddard's reference in the last paragraph quoted above to "other issues onsite" to concern an (otherwise unrelated) issue with the driveway. He was not challenged about this. In the crucial email of 9 May 2017, Ms Lander of SCI inferentially sought to say that these "other issues" may have related to the trusses. That was not the case.

70 Six photographs were attached to the Goddard Report. The captions for the six photographs were (1/367–369):

> Screw fixing of flashing to sheeting, overlap of flashing appears insufficient if fixing at edge of flashing
>
> …
>
> Shows no roof sheeting screws into roof batten
>
> …
>
> Shows noggins instead of outriggers used to frame eave
>
> …
>
> Shows unsupported roof batten and roof sheeting fixing insufficient at eave
>
> …..
>
> Typical soffit framing and fascia cleat fixing
>
> ….
>
> Typically one nail fixing of soffit sheeting to noggin at wall line

71 On 12 January 2017, Mr Key provided the Goddard report to Mr McNeill under an email entitled: "Report form [sic] Goddards – for your eyes only". The email sought a quote for repair work for one building as follows (1/374):

> Please find the report from Gary Goddard attached
>
> We welcome the quote you can provide to undertake a replacement exercise of one building and in particular the two ends left and right of one six unit block
>
> As you will see this will require reframing the eaves and recladding, we would like an all in price please. I believe we all talked about this being a maximum price with a lower fee applying if there is less to do

72 On 16 January 2017, Mr Key provided a colleague of Mr McNeill with a typical roof plan of a 3 Unit Block.

73 Shortly thereafter, Mr McNeill provided a quote for building A of $9,330.

74 On 27 January 2017, a minute was circulated among the committee to accept the quote from McNeill Building to remove soffit panels and repair the eaves framing and then reinstate soffit panels. Importantly, the work was only for building A. An explanatory note in the minute contained the following (1/380):

> McNeill's builders have inspected the site, and provided a fixed price quote to undertake the work on the two ends of Building A, where several soffit panels have dislodged and fallen down. That is the right and left ends when facing the building from Deloraine Close. The work can commence immediately the approval is provide [sic] and a worksite plan will be provided to Neil on site to help coordinate logistics for Building A and the site. McNeill's will confer with G W Goddards & Associates to ensure the repairs are completed to the standard required by our engineers. McNeills have also given an undertaking that if the work is completed for a lesser consumption of labour and resources, this saving will be passed back to the Body Corporate.
>
> The working will not only repair Building A, it will permit the committee to understand more about the scope of works required to undertake the complete repair of all buildings and also more about the status of the soffits and eaves framing on the long front and rear sides of each building.

75 On 25 January 2017, the committee sent to all occupiers of apartments a notice which gave the following information and warning:

> As some residents will have noticed, the panels under the eaves at Delor Vue appear to be defective and requiring repair.
>
> This situation has been reviewed and examined by the committee of the Body Corporate and action is underway to repair the building and replace the eaves panels.
>
> This repair programme will take some time and will not be conducted before the storm season commences in Airlie Beach. The committee wishes to remind all residents to be mindful of the current situation with the eaves panels. Storm winds are likely to cause damage to the eaves panels which may dislodge such panels. Lot owners ought to avoid walking or parking in the vicinity of the areas of the defective eaves.

The notice then identified, in relation to each of the eight affected buildings, the area of dislodgment by reference to which end or ends of the building was or were affected. Warning advice was given in relation to "action required in time of winds" referable to each building. Examples of the advice were, in relation to building A (1/379):

> Do not walk under these ends of the building and remove cars parked on the right end of the building in the visitors' bay.

in relation to building C:

> Do not walk near the left end of the building including the walkway to the pool.

and in relation to buildings F, G, H and K:

> Do not walk near the left end of the building.
>
> Do not walk near the right end of the building.
>
> Do not walk near the right rear end of the building.

76 On 30 January 2017, Aspire wrote to Mr Wellard and Beachside about the defects to the building. The letter was not limited to the soffits. The letter invited Beachside "as the original builder of the defective works" to "inspect the site, and defects, and propose a satisfactory repair". The letter included the following (1/382):

> We note that Beachside Constructions (National) Pty Ltd are aware of the shedding of soffit panels at the site and we attach to this letter a report from G W Goddard and Associates referring to the defective eaves framing and soffit fitment.
>
> The Body Corporate requests Beachside Constructions (National) Pty Ltd inspect the site and propose a repair plan that is acceptable to the Body Corporate. We expect that this repair plan will be undertaken and completed at no cost to the Body Corporate and will be certified by our engineers G W Goddard and Associates. We wish this plan to be prepared for discussion at the forthcoming Body Corporate Committee meeting
>
> …
>
> The Body Corporate has reserved all rights in regard to undertaking works to repair the building and in parallel to this request to Beachside Construction (National) Pty Ltd may commence prudent repair works.

77 On 3 February 2017, Ms House sent an email to SCI seeking a quotation for insurance. The email was sent by MAI as Marsh's "authorised representative". Mr Key said, and the documents support the conclusion, that no instructions were given or sought for this step (though Marsh's appointment had not yet been terminated and, as has been referred to, Mr Key had been in contact with Ms House in August 2016 about the earlier claim in 2010). The email contained an "Occupiers Statement" concerning fire safety installations, AIG's claim history sheet for the three policy years from March 2014, showing no claims, and a 7 page report from Archers dated 22 February 2011 entitled "Estimate of Replacement Cost For Insurance", which identified a replacement cost of $26,790,500. The email also attached a quotation slip which was in the form of printed questions to which answers were given. It was filled out by MAI (or Marsh) without instructions from, or the knowledge of, Aspire or the body corporate. The quotation slip had 14 questions under a heading "Duty of Disclosure Details". One question and its answer by MAI was as follows (1/396):

> Are there any hazards/defects associated with the property? No

78 Mr Key said in his affidavit that if he had been asked whether the premises contained "hazards/defects" he would have referred the question to the broker for assistance. He said he was uncertain as to what it meant. I accept that evidence.

79 Five days later, a quotation was sent by Mr Mark McGuire of SCI to Ms House. It was addressed to Delor Vue "c/- MAI Strata Pty Ltd". The covering email was to Ms House by name, which means, I infer from other emails sent by her, that it was sent to an email address at Marsh. I will refer to this as the **Marsh/SCI quote**. The quotation request had been referred to Mr Iconomidis. The quoted premium was $82,244.09. The quotation request had been considered by Mr McGuire. I will deal with this quotation in more detail when I deal with the non-disclosure and misrepresentation case of Allianz, in due course.

80 Meanwhile, two days before SCI sent its quote, Mr Key sent an email to Ms House asking once again about the 2010 claim. The email was in the following terms (1/399):

> Apologies for revisiting this issue, but my committee at Delor Vue are somewhat insistent
>
> They are still requesting details of a claim made back in 2010 and 2011 on the roof of the building
>
> There is a record of a claim paid on 25/08/2011 on a CGU Policy 06S0478258 (NSW Branch) for $225,048.42 which is the same amount as shown on the Zurich record for 21/03/2010 under a Zurich Policy 43 2003183 GST

81 At this time, Mr Key was discussing the arrangement of insurance with another broker, Ms McGorlick of BCB Strata Insurance Brokers (**BCB**). In his affidavit Mr Key said that he spoke with Ms McGorlick on 10 February. Ms McGorlick agreed to arrange insurance. In the conversation Ms McGorlick asked: "Can you tell me what the condition of the property is like?" Mr Key responded:

> It's reasonably good. The Body Corporate has had some problems with soffits falling out of the eaves which is a maintenance issue and the Committee is working through a maintenance program to get them fixed. There is also an issue with the driveway which the Body Corporate are having fixed.

Mr Key gave substantially the same account of the conversation in cross-examination. Ms McGorlick also asked for an up to date certificate from AIG and a claims history for the body corporate.

82 On 10 February 2017, Ms McGorlick sent Mr Key a draft letter of appointment for all relevant insurance policies. Each letter stated (1/412):

> This letter is to confirm that with immediate effect The Body Corporate hereby appoint

> Body Corporate Brokers to act as their Registered General Insurance Broker in all matters pertaining to their insurance program and this letter rescinds all previous appointments.
>
> Body Corporate Brokers is hereby authorised to negotiate with insurers and any other interested companies in respect to changes to our existing insurance policies. This includes the authority to negotiate prompt settlement of any outstanding insurance claims, negotiate renewal terms, obtain claims information, underwriting information and property surveys in relation to the insurance program, and also discuss general insurance matters relative to the Body Corporate.

83 On 13 February 2017, the committee agreed by minute to appoint BCB as brokers for renewal.

84 On 14 February 2017, Mr Key signed the letters of appointment in the form that had been provided in draft by BCB, adjacent to the corporate seal, sending them to Ms McGorlick on that date under an email that asked her to arrange cover.

85 The Marsh/SCI quote was not communicated to Aspire or the body corporate in the light of the appointment of BCB and Marsh's loss of the position as broker.

86 Meanwhile, on 10 February Mr Key sent Ms McGorlick details of earlier claims of Delor Vue in 2010, 2011 and 2012 that could previously not be found.

87 On 27 February 2017, Ms McGorlick sent an email to SCI seeking a quotation. The email made clear to SCI that BCB had been appointed as brokers for the insurance program. The cover sought was similar but not identical to that sought by Ms House of Marsh. The quotation slip supplied by BCB, unlike that supplied by Marsh, did not have questions and answers under a heading of a duty of disclosure.

88 The following day, Ms Tak of SCI provided a quotation, without reference to Mr Iconomidis. I will refer to this as the **BCB/SCI quotation**. I will deal with the underwriting and decision-making process in relation to the BCB/SCI quotation when I deal with Allianz's non-disclosure and misrepresentation case.

89 On Sunday 5 March 2017, Ms McGorlick sent an email to Mr Key enclosing quotations from CGU and SCI. CGU's premium was $105,444.75, SCI's was $84,600.81. Ms McGorlick recommended SCI.

90 The BCB quotation which included the comparative Allianz (via SCI) and CGU (via "Strata Unit Underwriters") premiums had on its first page adjacent to the summary of the recommended premium a statement of "Your Duty of Disclosure" in unremarkable terms, as follows (1/484):

YOUR DUTY OF DISCLOSURE

Before you enter into a Contract of general insurance with an Insurer, you have a duty under the Insurance Contracts Act 1984 to disclose to the Insurer every matter that you know, or could reasonably expect to know, is relevant to the Insurer's decision whether to accept the risk of Insurance and if so, on what terms. You have the same duty to disclose those matters to the Insurer before you renew, extend, vary or reinstate a Contract of general insurance. Your duty however does not require disclosure of matter.

- that diminishes the risk to be undertaken by the Insurer
- that is common knowledge
- that your Insurer knows or, in the ordinary course of business, ought to know
- as to which the compliance with your duty is waived by the Insurer.

NON-DISCLOSURE

If you fail to comply with your duty of disclosure, the Insurer may be entitled to reduce the liability under the Contract in respect of a claim or may cancel the Contract. If your non-disclosure is fraudulent, the Insurer may also have the option of avoiding the Contract from its beginning.

91 On the following day, 6 March 2017, Mr Key sent the BCB recommendation and quotation to the committee members. The decision to accept this quotation was made at the committee meeting on 13 March 2017.

92 Meanwhile, McNeill Building had been undertaking work on the eaves and soffits. On 1 March 2017, Mr Gartrell of McNeill Building sent Mr Key an email concerning the works and enclosing a tax invoice for $9,330. He explained that additional work was required in the following terms (1/439):

> Per our discussions, during the works we encountered various extras/variations that weren't in the scope of works at the time of quoting in particular but not limited to rafters that appeared not to be fixed to anything and the framing that was present was in need of more attention than what could have been assessed while sheeting was on (even partially). However, as an act of good will towards you and your client we will absorb those costs in this instance.
>
> Please find attached the claim for the works in line with the works order number. Per discussion I will put together a report of works undertaken, what rectification was required and the recommendations to remedy the other defects observed onsite.

93 Mr Gartrell sent a report dated 3 March 2017 **(the McNeill Report**) under cover of email of that date to Mr Key. The evidence is not clear whether the report was sent to Mr Key on 1 or 3 March. The precise date does not matter. Certainly he had it by 3 March; and on or about that date had a meeting with Mr Gartrell and discussed it. The report stated the following (1/442–443):

Scope of works completed:

- Removed damaged and incorrectly fixed sheets
- Frame out the soffits in accordance with BCA and manufactures requirements to fix soffit sheets.
- Some of the rafters already present in the structure were not fixed to anything, or only partially fixed. They were not suitable to fix soffit sheets to. We fixed these off from within the ceilings space of the top floor units and continued framing per the above.
- Fixed the fascia (it was only partially screwed off)
- Replaced Soffit sheets and fixed off in accordance with BCA and manufactures requirements
- Painted Soffit Sheets

Additional information

- While it is was difficult to inspect the other locations (front and rear of the building and adjoining buildings) it is our assessment from the inspections that we could make that the above scope of works will be required for at least the front and back of the subject building but likely the other buildings as well.
- We also note that some of the roof sheets were not screwed down at all while others were screwed down incorrectly.
- There is damage on the roof that appears to have been caused during construction (likely trades walking on the roof below the top floor units.)
- While we were working we noticed significant water leakage in the middle of the building on the lower level

Recommendation:

- The majority of the cost involved in this rectification process was the transporting of the machine large enough to cope with the hard to reach location of the soffits. The machine was transported from Rockhampton.
- A smaller machine (located in the Whitsundays) could be used to reach some of the easier to reach locations.
- It is our recommendation that rather than fix one building at a time the decision be made to hire a machine and complete all the rectification over a few weeks. This will reduce the machine hire (float) component and allow for some economies of scale in relation to materials and labour.
- 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)

94 The report was provided to Mr Key in word version on 8 March 2017. He asked for it in word version so that he could send relevant extracts (being the scope of works) to Delor Vue's lawyers.

95 The committee met on 13 March 2017. The minutes recorded that the Goddard report had been circulated and that the eaves repair had been completed on building A. The minutes do not record the tabling of the McNeill Report. The committee resolved to approve the sending of a letter of demand drafted by the body corporate's solicitors to the builder, Beachside, and the developer, Delorain, in relation to the repair of the eaves and soffits.

96 The meeting of 13 March 2017 is important. There was considerable attention to it in cross-examination of Mr Key and Mr Nobilia. As this narrative of the facts makes clear, a number of issues were coming together at about the same time and their relationship to each other will be important to consider. Mr Key and the committee were attending in a methodical way to the examination of the repair of the soffit problem. In the course of that they were ascertaining, in particular through McNeill Building, the extent of the problem. They had taken steps to warn residents of precautions to take against falling soffits. The damage in the soffits falling was, perhaps, self-evident, but was emphasised by Mr Gartrell's remarks in the McNeill Report in the fourth dot point under "Recommendation". Mr Key was seeking to have the builder pay for the defective construction. And the insurance renewal was in full swing, the insurance covering property damage and public liability, that is, in this latter respect, including personal injury.

97 The correspondence tabled at the meeting on 13 March 2017 noted in the minutes included: the insurance renewal from BCB Brokers, the letter to Beachside dated 30 January 2017 (see [76] above), a briefing note to OMB Solicitors, a fee proposal and costs agreement for OMB Solicitors and the Goddard Report. As earlier noted, the McNeill Report was not separately listed as being tabled. It would appear, however, that it was before the committee. One of the documents listed under "correspondence" was "Briefing Note to OMB Solicitors". A notice to produce during the hearing calling for that document saw the production of an email from Mr Key to Mr Robinson of OMB Solicitors dated 8 March 2017. The email attached the McNeill Report (though it had an error as to the date) together with a site layout.

98 The meeting resolved to approve the sending of a letter of demand to be drafted by OMB Solicitors to the builder, Beachside, and the developer, Delorain "in relation to the repair of the Eaves and Soffits".

99 Mr Key said that Mr Gartrell (who had prepared the McNeill Report) and he sat down in March and discussed the job. The discussion was described by Mr Key in the transcript (Tpp 214-217). I will refer to it in some more detail when I deal with the evidence of Mr Key. It suffices to say at this point that Mr Key said that he did not read parts of the McNeill Report until 20 March 2017. He said his focus was on the necessary scope of works and to pass on what was necessary for a solicitor's letter of demand. This focus was about obtaining a sensible and measured maintenance program by using the scope of works that had been undertaken in relation to building A for work on the other buildings across the site. The conversation between Mr Gartrell and Mr Key and Mr Key's approach did not exhibit alarm, urgency or tension as to the soffit issue or its remediation. I accept Mr Key as an intelligent, careful and honest witness and I accept that he had this focus and lack of concern.

100 In March 2017, Delor Vue's solicitors prepared letters to the developer and the builder. The drafts were dated 12 and 15 March 2017. I infer that they were sent soon after 15 March 2017. The letters summarised the nature of the complaints of the body corporate as to the construction of the property. The letters were directed to the known problem of the defective eaves and soffits. I find that they reflected Mr Key's concerns. The letters were in slightly different form but each contained the following (1/505):

> The Body Corporate consists of 11 buildings identified as block A to Block K (consisting of 62 lots).
>
> The Body Corporate's buildings are affected by residential building defects specifically, defective soffits.
>
> The Body Corporate has obtained a report from G.W. Goddard & Associates (Consulting Engineers) regarding the building defects. Please find **attached** a copy of such report.
>
> The report confirms that the soffits were not constructed appropriately and therefore, defective upon construction.
>
> The Body Corporate has organised the repair of part of a defective soffits [sic] on one (1) of the buildings to obtain a (general) scope of works and cost of repair. Please see **attached** a copy of such scope of works.
>
> Based on this assessment by McNeil Building [sic], the total estimate of costs of repair is over $230,000.00 for the defects affecting all 11 buildings.

The letters called upon Delorain and Beachside to carry out all necessary repairs, failing which the body corporate would carry out the work and recover the cost from them.

101 On 20 March 2017, Mr Key informed Ms McGorlick that the committee had agreed on 13 March to accept the SCI quote.

102 BCB issued a closing advice dated 20 March 2017, and on 22 March 2017 (after payment of the premium) a certificate of currency was issued stating the period of insurance to be from 23 March 2017 to 23 March 2018.

103 On 28 March 2017 Cyclone Debbie crossed the coast and damaged the apartments. Notification of loss ("roof damage from cyclone") was made on 30 March 2017.

104 SCI quickly retained a loss adjuster, Mr Patterson of **Exigo**. He undertook a site inspection on 4 April 2017, and on the following day sent an email to SCI reporting on his observations. The email was copied to Ms Macaulay of BCB. The email raised concerns about the adequacy of the construction of the roof structure. The email included the following on this subject (2/510):

> There is structural damage to various buildings, mainly to soffits, gutters, flashings, etc.
>
> A section of roof above Unit 36 (Site Manager's Unit) has been torn off. On inspection we had concerns regarding the construction of the roof structure. In our opinion it is not adequately tied down and for a building approximately 9 years old it does not appear to comply with the relevant building codes of the time.
>
> …
>
> In view of our concerns regarding the roof structure/s we arranged for an engineer from Morse Building Consultancy to attend, inspect and provide a report on the buildings in relation to the construction. That inspection may take place as soon as tomorrow.

105 The concerns of Mr Patterson were elaborated upon to Ms Macaulay of BCB by email on the following day, 6 April 2017, with copies to SCI. He sought information as follows (2/512):

> As mentioned in our recent site inspection advice we have concerns regarding the roof structure and we are awaiting an engineer's inspection and report.
>
> To assist with our enquiries it would be appreciated if you could advise regarding the following matters.
>
> - Has there previously been issues with the roof structure of any of the buildings?
> - If there have been issues were they raised with the original Developer/Builder?
> - What were the nature of the issues?
> - If raised with the original Developer/Builder, what action did they take?
> - Was the QBCC (Qld Building & Construction Commission) involved?
> - Have there been any issues with or damage to the roof giving rise to a claim?
> - What were the nature of the issues/claim and what was the outcome?
>
> If there have been any issues would you please provide copies of all documents relating to those issues, including but not limited to Minutes, Correspondence, Quotes,

Invoices, etc

106 On 8 April, Exigo informed BCB of approval of certain urgent work for unit 36 that had lost its roof.

107 On 10 April, Ms Macaulay passed on both the 5 and 6 April emails from Exigo to Mr Key. Mr Key immediately set about preparing a response to the seven questions in Mr Patterson's email of 6 April.

108 Also on 10 April, Ms Lander from SCI sent an email to Ms Macaulay (copied to Exigo) which summarised the position as follows (2/520):

> This afternoon, I have been in contact with Keith Patterson of Exigo (Assessor) to seek an update on where we are at with the make safe repairs and the engineers report on the roof.
>
> In summary:
>
> - Engineers Report – we believe the engineer attended the property either Thursday or Friday of last week. Keith, the assessor, is going to follow-up with the engineer and is hoping to have his report by the end of this week, work load permitting.
> - Make safe repairs – Advanced Buildings have been instructed to undertake the make safe works. As you are aware, access to the property is difficult and to date, the builder has not been able to access the property with their equipment. Keith is going to follow-up with Advanced Buildings to find out where this is at and how we can move forward with the required repairs.
>
> Keith is going to update me later this week in which time, I will ensure you are up to date on the position of the claim / repairs etc.
>
> In the meantime, if you could please work towards having a response from the Body Corporate in respect to the email below. Ideally, if we can obtain this information by the end of the week, this will give us an opportunity to review and ask any further questions, if need be.

109 On the morning of 20 April 2017, Mr Key provided answers to the seven questions. I set out Mr Key's email in full because it reveals the openness with which Mr Key approached the adjuster's and insurer's enquiries and it assists with the narrative that I have outlined (2/524–525):

> Apologies for the delay in responding – we needed to do some digging
>
> In answering these questions I will provide the supporting documents, as they are rather large we will attach these to follow up emails as well
>
> The answers below have been considered by the committee
>
> **Q1: Has there previously been issues with the roof structures of any of the buildings:**

Since 2011 soffit panels have been dislodged from the building. This lead [sic] to an inspection in December 2016 indicating the need to repair the roof eaves. The attachment and framing of the soft [sic] panels on all buildings has been the subject of consideration by the Body Corporate Committee since June 2016. Repairs were undertaken of one building in January/February 2017.

Q2: If there have been any issues were they raised with the original Developer/Builder:

The situation of the soffit issue has been raised with the builder developer since June 2015 from a building inspection report in April 2015. It has been raised again in January 2017 in relation to an engineering report of December 2016 and again by the Body Corporate Solicitors in March 2017.

Q3: What were the nature of the issues:

The soffit panels do not appear to be attached to standard and the framing of the eaves is also not to standard as outlined in the engineering report of December 2016. Since some repairs have been undertaken the scope of work has increased as per a letter from the repairing builder dated 3 March 2017. No issues have been raised specifically with the roofs.

Q4: If raised with the original Developer/Builder, what action did they take:

Despite several attempts to have any action taken – none has been forthcoming. We noted correspondence in November 2014 whereby the builder quoted for repair of blown out eaves for $2,800.00 but we are unaware if the repair was undertaken

Q5: Was the QBCC involved:

We will provide letters from the QBCC in regard to other building defects (copping tiles in the pool). However they were not involved in any defects concerning the roof or soffits as they were determined "out of time".

Q6: Has there been any issues with or damage to the roof giving rise to a claim:

No the only claim we are aware of was to shutters during a previous cyclone (details below)

BNE: Cyclone Damaged Shutters – GCU Policy 06S Resi Strata PP 25/08/2011 $225.048.42

0478258 (NSW Branch)

Q7: What were the nature of the issues/claim and what was the outcome:

As far as we can determine there was not a claim for roofing.

Please let me know if you need further information concerning the Body Corporates Records on this matter.

The email attached the Ingledew report of April 2015.

110 On the same day, 20 April 2017, Mr Key sent an email to Ms Macaulay attaching a large number of documents for provision to the loss adjuster and insurer, including: committee minutes of 25 May, 21 July and 24 November 2015; 20 June, 29 July and 12 October 2016; 13 March 2017; a flying minute of 27 January 2017; the Goddard Report and the McNeill Report;

extracts from Loft Report 1; the solicitor's letter to the developer and builder; and other documents and communications. All these documents were sent by BCB to Exigo.

111 Meanwhile, SCI had sought engineering advice from Mr Johnstone of **Morse** Building Consultancy. On 21 April 2017, Mr Johnstone provided a detailed 20 page advice. The report revealed some truss failures which may have been due to inadequate design or inadequate tie down of the gable end of the truss. He also stated that the failure of the soffits appeared to be a function of supporting battens being spaced too far apart. It is important that the report identified inadequacy in the roof trusses or ties – a defect hitherto not revealed to anyone. This report was not given to Mr Key or Delor Vue until later in the year, in September.

112 On 24 April Ms Lander of SCI spoke with Mr Key. The matters discussed between them were recorded in an email from Ms Lander to Ms Macaulay and Mr Key of that day (2/572):

> Following my conversation with Stewart this afternoon, he has informed me of the following, which I am sure will mostly be covered in his email:
>
> - The Body Corporate commissioned a Building Defects Report 2 years ago – no defects were reported in respect to the roof
> - On the 27th of January 2017, the Body Corporate became aware of issues with the soffits (engineers report)
> - No issues / defects were raised by the engineer or were known by the Body Corporate, in respect to the roof ties
> - All 11 buildings were believed to have these issues with the soffit and the Body Corporate were addressing the issue one building at a time. 1 out of 11 buildings had rectified the defect.
> - The claim which occurred back in 2010, related to damage to louvres, nothing to do with the roof
> - Original Developer – Delorain Pty Ltd, ACN: 125 370 461, still in operation
> - Original Builder – Beachside Constructions (National) Pty Ltd, ABN: 112 688 007, still in operation
> - The original developer and builder, share the same directors
> - The Body Corporate have engaged OMB Solicitors, to assist with the handling of a potential recovery against the original builder / director, for the issues known with the roof – 2 Letters of Demand have been issued by the Body Corporate to both parties, with no response

113 Though there was reference in this description to "roof ties", I find that Ms Lander did not discuss with Mr Key any inadequacies of trusses found in the Morse Report. Mr Key gave evidence (see below) that it was not until September when he saw this, and a later report of Morse, that he became aware of problems with roof trusses.

114 Mr Key gave evidence of this conversation with Ms Lander in his affidavit. He did not dispute any aspect of it recorded in the email, but gave his own version. The terms of the conversation given by him make it plain that the discussion contained no reference to trusses and he described the existing problem as one to do with the soffits, as follows:

> Well, there was a maintenance issue with soffits falling out of eaves and the Body Corporate were undertaking a program to fix the soffits when the Cyclone hit.

115 He discussed the extent of the issues as affecting all 11 buildings. He also referred to the earlier report of April 2015 (the Ingledew Report) as follows:

> The Body Corporate commissioned another report about two years ago as the Body Corporate was having a number of maintenance issues around the property, including soffits falling from the eaves. But there are no other reports specific to the roofs. The Body Corporate were going to use the report in a potential recovery action against the original builder and developer.

116 On the same day, Ms Lander sent another email to Mr Key in the following terms (2/573):

> Thank you for taking the time this afternoon to discuss the cyclone claim for Delor Vue.
>
> I understand that you have responded to Kim with the answers to the questions we raised earlier this month in respect to known issues and previous claims with the roof. I have left a message for Kim this afternoon and will follow this up with her, to make sure the information is provided to our office.
>
> In the meantime, could you please email me with the following:
>
> - Original design specification for the roof
> - Original drawings for the roof
>
> We are requesting this information in order to understand who is responsible for the defects with the roof ties and soffits.

117 On 27 April 2017, Ms Lander sent an email to Ms Macaulay raising the issue of a possible issue of non-disclosure (2/577–578):

> As you are aware, the policy was first bound with Strata Community Insurance on the 23rd of March 2017. The event took, place on the 29th of March 2017.
>
> We were not advised of any known defects with the property.
>
> Following the documentation that you provided to our office on Monday, it has become clear that the Body Corporate was aware of defects in relation to the roof, specifically the soffit panels.
>
> This was first raised in the Building Inspection Report from Paul Ingledew dated the 1st of April 2015, with a more precise synopsis of the issue being covered in the Engineer Inspection Report from G.W. Goddard & Associates dated the 1st of December 2016.

> The report carried out in December 2016, also concluded that "There appears other issue onsite which we were not engaged to inspect and report on, but would need attending too." We need to understand what the Body Corporate did with this professional advice.
>
> Based on the above, there appears to be a "non-disclosure" issue here and we need to investigate further, before making a determination. This will involve the engagement of a Search Agent, to search the Body Corporate's books and records, and any other professional advice / services required by our office.
>
> [The duty of disclosure was then set out.]
>
> We will continue with our investigations and advise you, once we are in a position to comment on coverage.
>
> Until such time, we would suggest that the Body Corporate continues to act uninsured and takes all precautionary measures to protect and maintain their property.

118 It is to be noted that there was no reference to any misrepresentation arising from the email and enclosures of Ms House of Marsh sent to SCI on 3 February 2017.

119 On 28 April 2017, Ms Lander asked Mr Key for the two letters of demand to Delorain and Beachside. Mr Key responded by email that day, saying that he had already sent them in the body of documents sent on 20 April; but, in any event, he sent them again attached to the email.

120 On 2 May 2017, Mr Patterson of Exigo sent an email to Ms Macaulay of BCB confirming the consideration of non-disclosure (2/593):

> Further to the email from Heather Lander dated 27 April 2017 we confirm investigations in relation to the circumstances surrounding non-disclosure are ongoing.
>
> The original drawings provided were last week passed to the appointed engineer for review and report/comment. The review has been conducted and the report is presently being prepared, we hope to have it by the end of this week.

121 Again, no mention was made of any misrepresentation.

122 By 9 May 2017, SCI had requested and been supplied with all relevant documents from Delor Vue and Mr Key. The provision of that information had been open, prompt and thorough. There is no suggestion from the evidence or in any submission put to the Court that by 9 May 2017, there was any factual information relevant to the decision under consideration as to whether to rely upon non-disclosure (or indeed misrepresentation) that was unavailable or not supplied to SCI. And, as I have noted, there was no contemporaneous assertion by SCI that it had suffered a misrepresentation by the quotation request submitted by Ms House of Marsh on 3 February 2017.

123 It was in this light that Ms Lander sent the 9 May 2017 email to Ms Macaulay that was copied to Mr Key, Exigo and Mr Iconomidis. The email (2/596–599) included the following brief recitation of events:

> As you are aware, the policy was first bound with Strata Community Insurance on the 23rd of March 2017. The loss occurred on the 29th of March 2017.
>
> Prior to the policy being effected, we were not advised of any defects with the property, despite these clearly being known to the Body Corporate.
>
> In the Building Inspection Report from Paul Ingledew dated the 1st of April 2015, the Body Corporate first became aware of the defects in relation to the roof, specifically the soffit panels. A more precise synopsis of the issue being covered in the Engineer Inspection Report from G.W. Goddard & Associates dated the 1st of December 2016.
>
> The report carried out in December 2016, also concluded that **"There appears other issue onsite which we were not engaged to inspect and report on, but would need attending too."** It appears that the Body Corporate did not investigate the engineers closing statement and that it is reasonable to believe that the Body Corporate <u>should have been aware</u> of all defects associated with the roof.
>
> (Original emphasis).

124 As can be seen by the last paragraph, the question of the defective roof trusses or tie downs was sought to be addressed by a form of constructive notice. (It is to be recalled in this context (see [69] above) that Mr Key's unchallenged understanding was that the "other issue [sic: issues] onsite" related to a driveway and were unrelated to the roofs.) The email then went on, nevertheless, to confirm cover (2/597):

> Despite the non-disclosure issue which is present, Strata Community Insurance (SCI) 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.

125 The email then went on to state SCI's position by reference to the damage and the policy:

> <u>Summary of Damages</u>
>
> The damages known to our office at present, are broken down into two categories:
>
> 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)
>
> <u>Relevant Policy Exclusions</u>
>
> SCI will cover the 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.
>
> 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 moths, termites or other insects, vermin, mice, rats, rust or oxidisation, mildew, mould, contamination or pollution, wet or dry rot, corrosion, gradual corrosion or deterioration, change in colour, dampness of atmosphere or other variations in temperature, evaporation, disease,* ***inherent vice or latent defect****, loss of weight, change in texture or finish or pecking, biting, chewing or scratching by birds or animals; …*
>
> **(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;…"*

The Body Corporate will be responsible for the costs associated with this portion of the claim.

(Original emphasis.)

126 The email then addressed recovery issues, co-operation, and the current position of the claim:

> Recovery
>
> SCI have engaged Holman Webb Lawyers, to assist our office with a potential recovery against the original Builder and Developer of the property.
>
> We are currently awaiting our Engineers report, which will assist SCI in outlining the deficiencies with the roof and who is responsible for the shortcomings in the construction.
>
> To assist with our prospects of a successful recovery, additional information and specialist reports will most likely need to be obtained.
>
> We ask that the Body Corporate cooperates with our office as and when required, to ensure we have the best chance possible of a successful recovery from the responsible party/ies.
>
> Current Position of claim
>
> SCI is currently awaiting the following:
>
> - Quotation, including Scope of Works from Ambrose Buildings, for the internal resultant water damage repairs – we are expecting to receive the builders this week
> - Engineers report, outlining the deficiencies with the roof – we are expecting to receive the Engineers report this week
> - Scope of Works from the Engineer, for the repairs to the roof. This will be broken down into 2 parts:

- 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)

Due to the complexity and nature of the defects with the roof, this will take approx. 2 weeks, in which time the Scope with then be put to two builders, for quoting purposes.

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 entering the building through the roof, the roof repairs will need to be carried out first, before the internal resultant damage repairs can proceed.

We will continue to work closely with the assessor, Body Corporate and your office, to ensure the claim progresses as quickly as possible and all parties are kept up to date with the status of the claim.

I trust the Body Corporate will be happy with our decision to grant indemnity and welcome your call, should you wish to discuss any aspect of the above, further.

127 The email was the expression of a measured, informed and apparently final position. It was one that on its face was intended to be acted on by Delor Vue as a statement of the continuing relationship of insurer and insured. Any recovery actions were to be run by SCI with Delor Vue's co-operation, the claims would be attended to with the division of responsibility according to the policy and repair work would proceed. The factual and legal state of affairs between insurer and insured would proceed on the basis of the policy without any reliance by SCI on any rights it may have had arising from non-disclosure.

128 Allianz did not seek to explain the decision-making process that led to this decision in its evidence in chief. Mr Iconomidis, however, was asked about it in his oral evidence. The cross examiner cut off (legitimately) a non-responsive answer of Mr Iconomidis (at Tp 73 l 5): "My – my view was ---". The subject was broached again in re-examination. He said that he did not approve the sending of the email. After some parrying about the form of questions in re-examination, Mr Iconomidis was asked and answered as follows in re-examination:

All Right. Now, I just want to ask you what, if anything did you say on that topic?---My view was to decline the claim on non-disclosure.

Why?---Because – because of the Goddard and McNeill reports that we had to hand at the time.

Did you approve this email of 9 May 2017 being sent?---No.

129 I will return in due course to the significance of this evidence. It suffices at this point to say that the decision to confirm cover was a considered one, taken with the involvement of lawyers and against the view of the underwriter who was Queensland State Manager.

130 Mr Key said in his affidavit that he understood the following from the email:

> (a) SCI would honour the claim and indemnify the Applicant despite any possible lack of disclosure in relation to building defects;
>
> (b) SCI would cover the costs associated with resultant damage including, but not limited to, internal water damage, fascia, guttering and roof sheeting (for those buildings which lost roof sheeting), despite policy exclusions 1(c)(i) and 1(d) of the Policy;
>
> (c) SCI had taken steps to commence repairs to the property and to commence a recovery action against responsible parties;
>
> (d) SCI and Allianz had instructed lawyers to pursue the recovery action on behalf of the Applicant which meant that the Applicant didn't have to do that; and
>
> (e) SCI had satisfied itself in relation to the matters that it had obtained information on concerning building defects.

131 I will return to this in due course. This understanding was in identical terms to the equivalent paragraph in Mr Nobilia's affidavit.

132 It will be necessary in due course to discuss the terms of the policy, not least for assessing what a reasonable insured in Delor Vue's position would have considered relevant for disclosure. It is sufficient to appreciate at this point that the policy contained defect exclusions.

133 After 9 May 2017, SCI proceeded to adjust the claim. This involved taking steps, through its lawyers, to hold the builder and developer responsible for the defective building work, and also the assessment of the damage, including the division of financial and contractual responsibility for damage and defects, according to the terms of the policy. The following narrative outlines these matters. All the steps identified should be understood to reflect 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. It should also be recognised that at no time in 2017 or 2018 did Allianz or SCI complain about any aspect of the co-operation or conduct of Delor Vue (other than the claim of non-disclosure and misrepresentation in and after May 2018).

134 On 10 May 2017, Ambrose Building Pty Ltd provided the loss adjustor with a quotation for repair work of $553,207.

135 On 12 May 2017, Ms Richardson of SCI sent an email to Ms McGorlick of BCB pointing out exclusion 1(d) in the policy and stating that a consequence of that was as follows (2/629.1):

> What this means is, until such time as the defects to the Roof and eaves as denoted under the engineering report by Morse Consulting are rectified then no further damage claim that relates to the property damage as a result of or contributed to by these defects will be accepted.

136 On 17 May 2017, Ms Lander of SCI sent an email to Ms Macaulay of BCB (cc'd to Mr Key, Exigo, and Mr Iconomidis) which clarified the state of adjustment of the claim and which sought to clarify the division of responsibility between SCI and Delor Vue under the terms of the policy, as follows (2/630):

> A summary of the claim status, is as follows:
>
> - Quotation, including Scope of Works from Ambrose Buildings, for the internal resultant water damage repairs – this has been received and is being reviewed by Keith, before reporting back to our office on the costs and scope. As you can appreciate, there are many units involved and scope is quite lengthy, so this may take a few days.
> - Engineers report, outlining the deficiencies with the roof – Keith has been in contact with Morse Building Consultancy on a number of occasions, chasing their report. The engineer has verbally advised that the construction and deficiencies differ from building to building. As such, this is proving to be a much greater task and has delayed the finalisation of their report. At this stage, we anticipate receiving the report by mid-late next week.
> - Scope of Works (SOW) from the Engineer, for the repairs to the roof. This will be broken down into 2 parts:
>   - 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)
>
> The SOW cannot be prepared until the engineer has finalised the report on the roof. The engineers report forms the foundation in which the Building Consultant can then prepare the SOW.
>
> As outlined in my previous email, once the SOW has been prepared, this will then be put to two builders for a quote.

137 The report from Morse referred to by Ms Lander in this last email became available to SCI the following week. In the report, dated 23 May 2017, Mr Johnstone described the building characteristics as follows (2/632):

> Construction consists of sheet metal, corrugated roofing supported on steel top hat roof battens. Battens were fixed to pre-fabricated gang-nailed softwood trusses. Trusses were mono-type geometry (half truss) and fixed to tops of masonry walls via cast in cleat plates with M16 bolts through plates and trusses. Strap bracing was observed.

The floors were of reinforced concrete construction.

138 After discussing his observations, Mr Johnstone then set out conclusions that included the following (2/651):

> 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.
>
> The inspection of a sample of the roof framing to 7 of top floor units indicated systematic and consistent irregularities between the nominated design and in-situ construction. These irregularities have manifested themselves via truss failure through a number of mechanisms and secondary wall failure in one observed instance.
>
> These problems are as below:
>
> - *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*
>
> Based on my experience, the information provided on the design documentation and nominated by the designer to the truss manufacturer is consistent with industry practice and represents the application of sound and practical design principles.
>
> Given the observed scope of the problem and the inherent difficulties in strengthening in-situ trusses and in-situ truss tie downs into masonry; the truss system and tie down as a whole is structurally inadequate and cannot be salvaged.
>
> This inadequacy extends to the connection to the top course fixing to the reinforced masonry wall which would need to be addressed prior to any rectification works being performed.
>
> Replacement trusses will require redesign and consideration of strengthening of connection to top of masonry wall.
>
> Soffits and gable end cladding will require redesign.

139 This report of Morse also contained a scope of works. This scope of works was given to Ambrose Building, which prepared a revised scope of works by 26 May.

140 Meanwhile, on 9 May 2017, Holman Webb, on behalf of SCI, wrote to ASIC requesting the deferral of deregistration of Beachside and informed ASIC of the claim against it by Delor Vue, to be pressed by SCI. ASIC immediately responded, granting a 90 day deferral. Mr Wellard, on behalf of Beachside, responded to this on 7 June 2017 with a notice of objection

asserting an entitlement to deregister Beachside. During June 2017, Ms Lander kept Ms Macaulay informed of these attempts to keep alive the subrogated rights against Beachside.

141 During June 2017, Mr Johnstone and staff of Morse inspected the buildings in furtherance of the development of a detailed scope of works to divide responsibility for the damage. On 19 June 2017, Mr Patterson of Exigo advised Ms Macaulay of BCB of further defects discovered that would not be covered by the policy.

142 On 22 June 2017, Ms Lander sent two emails to Ms Webb of BCB (cc'd to Exigo). The first email described the increasing complexity and cost of the claim and stressed the need for co-operation, as follows (2/687–688):

> Further to Keith's email below and as discussed, the complexity and nature of the damage to the roofs has extended and the scope of works is continuing to broadened [sic], since our previous correspondence.
>
> As you are aware More [sic] Building Consultancy are currently preparing the Scope of Works for the roofs, and are breaking the repairs down into the following categories:
>
> - 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)
>
> Morse have advised that following their further inspections of the roofs (11 buildings in total, each containing different issues), further failures and defects have been identified, 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
>
> 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.
>
> Both the defective related repairs and insurable related repairs will need to be carried out hand in hand, in order for the buildings to be returned to their pre-loss condition.
>
> We anticipate the Scope of Works will be ready for realise [sic] in 2 weeks, in which

> time the Scope will be provided to 3 contractors to quote on the repairs. It will be at this stage, that we will be able to accurately quantify the costs which the Body Corporate will need to cover and the costs Strata Community Insurance will pay for.
>
> Given the size and complexity of the claim, we would welcome the opportunity to meet with all parties involved, including the Committee, Owners and Tenants, to discuss how the repairs are going to be carried out (staged project), what is covered under the strata policy v what is not etc. This would give everyone the opportunity to attend a meeting in which all of the questions can be answered. More importantly, allowing all parties to be clear on how the work is going to be carried out. At this meeting, we would encourage the appointed builder to also be in attendance, to provide further particulars specific to the works program.
>
> We will ensure to keep you abreast of further developments and trust the above additional information, will assist the Body Corporate in understanding where the claim is at and more importantly, the extend [sic] of the defects which have been advised to date.
>
> (Original emphasis.)

143 The second email recorded that each of Delor Vue and SCI had retained lawyers: OMB (for Delor Vue) and Holman Webb (for SCI). The email dealt with the insured and uninsured components of the one recovery action. It included the following statement (2/689):

> Whilst the Body Corporate and Strata Community Insurance each have different legal counsel, there will only be 1 court proceeding in which both uninsured losses (Body Corporate's claim) and insured losses (Strata Community Insurance's claim) will be heard.
>
> Should the Body Corporate wish to incorporate the uninsured losses in the action taken by Holman Webb, this can be arranged and would be subject to a clear agreement outlining the manner in which costs will be split (in line with Section 67 of the Insurance Contracts Act 1984).

144 On 22 June 2017, Holman Webb sent a letter to Beachside and Mr Wellard dealing with deregistration stating that it would allow Beachside to become deregistered upon conditions of the provision of a relevant insurance policy and a statement of indemnity from the insurer and its willingness to be a defendant. This proposal was later rejected.

145 Morse produced to Exigo sets of scope of works dated 22 June 2017 for each building; one titled "Pre-Existing Related Issues" and the other titled "Cyclone-Related Issues".

146 On 11 July 2017, Mr Key and the committee members were provided with the Morse scope of works, but only on certain conditions of confidentiality. Mr Key and the committee members were not provided with the Morse Reports dated 21 April 2017 and 23 May 2017.

147 On 18 July 2017, the body corporate committee met. Mr Robinson of OMB Solicitors was in attendance by telephone. The minutes record the following discussion involving Mr Robinson (2/715):

He outlined the following information.

- That the insurer has undertaken a detailed engineering review of the buildings and the damage from Cyclone Debbie
- That the insurer has now informed the body corporate that significant defects exist with the buildings and as a consequence the insurer will not extend their indemnity to all the damage.
- The insurer has provided reports to the voting members of the committee only under legal privilege outlining the scope of works that the insurer will undertake and the scope of works that must be undertaken and paid for by the Body Corporate.

He outlined the following plan of attack for the Body Corporate and therefore the Committee to follow which included:

- Appoint an independent engineer to review the defects and determine the casual nature of the defects
- Work with the insurer to repair the building
- Undertake actions to minimise the cost to the Body Corporate (these plans are subject to legal privilege)
- Once the cost the body corporate will need to pay has been determined, raise these funds either by a special levy or a strata loan
- Prepare a communication to owners regarding their obligations in regard to disclosure of this information.

148 Some emphasis was given by Allianz to the phrase "plan of attack" in this note, in a submission to undermine the notion of co-operation between insurer and insured as part of Delor Vue's estoppel case. I would place no weight on the phrase in this way. I would treat it as a turn of phrase reflecting a lawyer's recognition (perfectly correctly) of the need for Delor Vue to be astute to recognise and pursue its own interests.

149 By the time of this meeting of the body corporate committee, Mr Key had been provided with detailed reports and documentation from Morse that contained the scope of works for the individual units. This was the product of detailed inspections of individual units requiring substantial access (by the insurer through its agents) to the buildings and the units.

150 Following the meeting, on 19 July 2017, Mr Key contacted Ms Webb of BCB informing her of the committee's decision to retain an engineering consultant, and requesting that she seek the insurer's permission for the Morse scope of works to be disclosed to such consultant. Mr Key also raised an important question (2/719):

> In the reports provided we can not find any explanation as to the engineering reasons for the replacement of the roof trusses in total and the subsequent works i.e. electrical cabling, roof plumbing etc that this causes. This is extensive and expensive work.

> Do you have a report from the engineers indicating why in the main the complete replacement of the roof trusses is required and why this damage has been caused by a defect. This seems to be a central issue and one that is confounding the Body Corporate. The installation of the trusses was controlled by the builder and the certifier. They would have been previously certified by the truss manufacturer. So we would appreciate if you have a report that details how the damage has been caused by a defect or defects and what the defect or defects may be. This will greatly assist.

151 After Mr Key's enquiry of 19 July, Ms Webb of BCB sent an email, on 20 July 2017, to Ms Lander of SCI that reflected some of the conceptual difficulties in the division of financial responsibility for the loss, and that also reflected the confusion and potential for disputation over those issues (which disputation subsequently came about) (2/728):

> I have received the email below from the Strata Manager and think it might be best if you provide the response or have Morse provide a simple explanation. From the email below I do not believe they understand that the original construction of the building is defective as they state:
>
> *"Do you have a report from the engineers indicating why in the main the complete replacement of the roof trusses is required and why this damage has been caused by a defect".*
>
> This seems to indicate that their understanding is that the replacement of the roof has been caused by a defect, not (as I understand it) that the roof itself is the defect.
>
> The works required are extensive because of the type of roof requiring the removal and replacement of the ceilings, electricals etc immediately below the roof and I think this is the part they do not understand.
>
> If the engineer could provide a simple explanation that I could provide back to the Insured it would be appreciated.

152 Permission to disclose the Morse scope of works was refused by SCI on 21 July 2017.

153 Correspondence continued in July 2017 as to the division of responsibility between insurer and broker, and broker and insured (Mr Key for Delor Vue). The email of Ms Webb of BCB to Mr Key of 25 July 2017 illustrates the discussion (2/731–732):

> The Insurer has provided the following statement by way of simple explanation:
>
> *"As an interim measure, the best way to explain this to the Committee is that the Cyclone caused damage to certain aspects of the building. Upon investigation of the roof, it became evident that short cuts where [sic] taken when the building was constructed. Whilst certain elements of the roof may not be physically damaged, now that these defects have come to light, the shortcomings must be rectified, prior to the resultant damage being attended to."*
>
> The comments made in my email were as a result of a discussion with the loss adjuster and not taken directly from the Morse Report. I attempted to identify in simple terms the type of defects as there seems to be some confusion as to what a defect is and what is cyclone damage and how they relate. As per the statement above from the Insurer there is physical cyclone damage and there are building defects. The physical cyclone damage cannot be repaired without the building defects being attended to at the same

time because a Building Certifier would not be able to sign off on the final repairs.

The very shortened description provided in my statement can be scattered throughout the reports and also from the photos and their descriptions. The Property Description at the start the report [sic] for Units 51–56 states that the *"Buildings have pine softwood half trusses…*", and under Site Inspection (Roof Elevation A): "*Some roof battens that are visible due to missing soffit sheets are unsupported as they have finished short of outrigger frame leaving last roof sheet unsecured to main structure in some sections. Roof fasteners have missed roof batten along barge line at top section of roof".*

Under the same report (Roof Elevation C) they state: *"Roof fasteners have not been installed during construction to apron flashing along entire width of elevation this would have accentuated uplift to tops of roof sheets being unsecured. Last 3 roof sheets at northern end of roof have only been fastened on sheet laps and far northern roof sheet is totally unsecured. (See photos:- 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36)."*

Under the Eastern External Elevation they state: *"Top section of stairwell cladding was not installed during construction leaving open void between soffit sheet and top of main roof below and allowing rain to enter into ceiling area over stairs and is not resultant of recent event. (See photos:- 43, 44, 45, 46 and 47)."*

The following appears on page 4 of the report entitled Report & Scope of Work – Cyclone Related Damages; Building G:

"There is strong evidence of non-complaint work in relation to the fixing of the roof battens. The inspection of the roof battens to evaluate uplift damage, which was not evident, led to discovering that the roof battens were not fixed to the gable truss to the end of the structure that is still intact.

As indicated in the engineers reports the trusses, tie-downs and roof and soffit framing work to this structure are also non-complaint."

The defects in each report for each building do differ in some areas, however, some of the defects appear to be consistent throughout so each report needs to be read to determine the defects affecting that particular building.

The Insurer has advised they will provide more information in due course regarding the rectification and rebuilding works required.

154 On 21 August 2017, Mr Whitehead of the consulting engineers **GHD** Pty Ltd provided to Delor Vue an initial (though detailed) report. He had been provided with the Goddard Report and a set of structural drawings, but not with the Morse Reports. He carried out a site inspection. The purpose of the report was stated as follows (2/741–742):

1.2 Purpose of Report

The purpose of this report is to:

- Record the observations and outcomes of the structural inspection of the roof spaces;
- Comment on the damage that has been caused to the roof;
- Comment on the likely cause of this damage;
- Comment on the relationship between previously identified defects and the

damage;

- Recommend a way forward in general terms; and
- Comment on how the Body Corporate could have known if the trusses were defective.

155 Mr Whitehead made some detailed observations and commented on the defects, including the trusses and eaves. It is unnecessary to set out these matters in detail. It is sufficient to say that the report was not as critical of the trusses as were the Morse Reports.

156 On 29 August 2017, Mr Key provided the GHD Report to Mr Tsoukatos of SCI (cc'd to Exigo and BCB) and stated the position that the Morse Reports were wrong (2/760–761):

> The report submitted by GHD Ltd structural engineers is attached.
>
> This report clearly indicates that the roof trusses are undamaged (save for one local failure) and certified for the purpose. GHD's opinion is that the roof trusses do not need replacement. Interpretation of the report also determines that differences exist between the "as designed" and "as built" details of the attachment of the trusses. Yet the trusses were certified for this installation and are undamaged.
>
> The Body Corporate is of the view, based on its independent engineering advice obtained from GHD, that the truss replacement as suggested by the Morse reports is unsubstantiated.
>
> 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 applicable to any other aspect of this claim.
>
> Considering the above, the Body Corporate requests a meeting be convened to settle this claim and permit the works to commence to repair the damage to the building under the policy.
>
> We await your response to set up a meeting in the short term to resolve this claim.

157 In late August 2017, BCB and Mr Key expressed some dissatisfaction with the progress of the claim. These matters were the subject of a response by Mr Patterson (of Exigo) on 30 August. This email included a recognition that the apparent engineering disagreement had to be resolved (2/765):

> Stewart has requested a meeting of all relevant/interested parties, that was always on the agenda, but in our opinion until the engineering/defect situation (differing opinion) is resolved any meeting is unlikely to achieve much. **Your thoughts would be appreciated.**
>
> (Original emphasis.)

158 Meanwhile, however, matters not thought to be affected by the defect issue were being attended to, and where necessary, paid for under the policy.

159 In early September 2017, SCI agreed that the two Morse Reports dated 21 April 2017 and 23 May 2017 and the Ambrose Building quote could be released to Delor Vue. In his affidavit, Mr Key said that it was not until this time when he read the Morse Reports that SCI had now made available that he became aware of any issues with the trusses. I accept that evidence.

160 Meanwhile, Holman Webb was dealing with Beachside and Mr Wellard. In September 2017 ASIC informed Holman Webb that Beachside had been deregistered. Later, on 18 October 2017, Holman Webb wrote a detailed letter to ASIC setting out the history of the matter and Delor Vue's claim against Beachside and requesting reinstatement of Beachside. Notice was given to Beachside. On 2 November 2017, Holman Webb wrote to an engineer (Dr Bruce Harper) to retain him, on behalf of the body corporate, in relation to an anticipated (subrogated) recovery action against Beachside, and possibly others.

161 On 17 October 2017, the body corporate committee resolved by minute to appoint GHD to provide a second report. The explanatory note to the minute stated the following (2/784):

> In accordance with advice from OMB Solicitors and our insurers representative we have received a proposal to engage GHD Pty Ltd to determine a solution pathway so we can then certify the trusses in the roofs at Delor Vue Apartments. Once these trusses are certified, then the insurance claim can proceed.

162 On 19 October 2017, Ms Webb of BCB informed Mr Key that he had the insurer's permission to give the Morse Reports to GHD.

163 On 3 November 2017, Exigo advised SCI of a reserve of $3 million.

164 On 12 December 2017, the body corporate committee met. The minutes record a proposal to borrow $750,000 for work in relation to the damage. The note concluded in this respect (2/857):

> In the meantime Aspire are to work with the insurers to establish as quickly as possible a budget price for the defects repairs. This will include the roof repairs and the repairs to the soffits and soffit framing.

165 In December 2017, GHD produced a second report. The purpose of the report was stated to be as follows (2/863):

- Assess the current state of the roof trusses;
- Review the truss manufacturer results;
- Provide certification or recommendations to strengthen the existing trusses to gain

certification.

- Assess the tie down capacity vs loads specific to the truss design;
- Advise the suitability and/or modifications required to the tie downs;
- Assess the lateral cross bracing capacity vs loads specific to the truss design;
- Advice [sic] the suitability and/or modifications required for the lateral cross bracing.

The soffits and batten framing of the roof are not required to be certified for this scope of works and hence have been excluded.

The report included a design review of the trusses by another firm, Pryda. The recommendations and conclusions on the trusses were as follows (2/873–874):

> **5.1 Roof Trusses**
>
> As can be seen from the Pryda analysis as well as the independent GHD analysis, the roof trusses would require extensive strengthening repairs to allow for certification to be provided. Given that the current roof trusses do not have certification and the level of strengthening required, GHD recommend that the roof trusses be redesigned and replaced.
>
> **5.2 Hold Downs**
>
> The tie-down capacity in the current state is not sufficient to withstand the winds loads for this region. Extensive alterations would need to be made to strengthen these connections. In line with the above advice, GHD recommend that the design of the tie-down connections should form part of the roof truss redesign.
>
> **5.3 Cross Bracing**
>
> The cross bracing that is currently installed requires minor alterations to ensure full capacity is reached. This would be through ensuring the bracing is fixed to the roof trusses and tightened to ensure full capacity is developed. Given that the roof trusses need to be redesigned and replaced, the cross bracing would need to be reinstalled with the new roof structure. This would also form part of the roof truss redesign.
>
> **6. Conclusion**
>
> …
>
> 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.

166 On 12 January 2018, Mr Key sent the second GHD report to BCB to be passed on to the adjuster and SCI. The email also requested an urgent meeting with the assessors. Mr Key made the following suggestions (2/905):

> In the Body Corporates view the best way forward is to have two building companies

> quote for all works, and appoint only one for all works partitioned into two contracts divided by funding source with different superintendents. The work to be funded by the Body Corporate is now determined by the GHD report and we need a meeting to determine how the work is to be finally scoped in detail, quote, awarded and then costs apportioned. There may very well also be a need for some minor engineering work on the stairwell roofs and some of the soffit framing.

167 On 18 January 2018, there was an extraordinary general meeting of the body corporate which approved the adoption of a strata loan of $750,000 for 12 years, with the first two years being interest only.

168 In January and February 2018, there were emails sent by Mr Key to Ms Webb of BCB regarding disagreement with the extent of the repair work. Mr Key sent an email to Ms Webb on 19 February 2018. He considered that the repairs suggested by GHD were not being attended to. Mr Key also provided a Revised Scope of Works that drew on the GHD work. In the email, he said (2/920):

> We have been asked by the committee to send this report to you.
>
> It outlines the method of repair for the defect works as determined by our engineers in discussion with the Body Corporate and is far simpler, faster and therefore lower cost to the Morse engineering scope of works provided by the insurer to the committee
>
> Can you please pass this information on to the insurer and request that they ask quoting builders to amend their quotes in line with the revised scope of work method proposed.
>
> The committee is increasingly frustrated by the lack of progress on this claim, and so has been proactive in preparing this report. They consider an urgent meeting is required to set timetables at the very least, as despite promises of two weeks for quotations there has been little if any response from the insurer for the last seven months

169 In his affidavit, Mr Key said that on 27 February 2018, he had a telephone conversation with Mr Patterson of Exigo. They discussed the quotes of the builders that Exigo had received which, according to Mr Patterson "split up the costs to the costs being covered by SCI and those which are for the Body Corporate". Mr Key said in his affidavit that Mr Patterson said that SCI costs were $3 million and "defects work" was quoted by one builder at $3.2 million and by another at $2.14 million. Mr Key asked him about his "cost saving method for the defect work", which I take to be the Revised Scope of Works that had drawn on the GHD work. Mr Patterson said that the builders did not think it would save much. Mr Key and Mr Patterson also spoke about collaboration in the recovery action.

170 By February 2018 the policy was coming up for renewal. As the month of February progressed, with no renewal papers from SCI, tension and concern began to rise. Finally, on 7 March 2018

an invitation for renewal was sent for 12 months for a premium of $128,830.05 (an increase of over $40,000 – about 50%), but the renewal was stated to be (2/954):

> conditional upon works relating to the roof defects being completed within 6 months of renewal date.

171 These terms created some frustration in Mr Key and BCB. This frustration, in particular as to the handling of matters, was reflected in Mr Key's email to Mr Tsoukatos of SCI of 13 March 2018 about the claim handling (2/966):

> As the renewal date for the insurance on this Body Corporate is 23 March 2018, we were expecting a communication concerning the claim progression before that date. This was as communicated to us on the 27 February. This would be a reasonable expectation. We now understand from Keith Patterson at Exigo that this will not happen.
>
> We request that SCI reconsiders the timing of the provision of information concerning the progression of this claim so that the Body Corporate can be informed as to it's decision making. A delay of a further two weeks, from today which is 18 days since notification of the intention to provide this information, given the copious delays introduced by the Eixgo [sic] processes to date is unreasonable and further adds to the unconscionable conduct of this claim.
>
> Currently we do not have visibility of the tender process, the tender responses, the methods of repair, access to electronic files of the SOW's, a full SOW nor due consideration of alternative repair methods, nor a date for a meeting which was first requested in August 2017. We are in receipt of a reimbursement for an expenditure that was presented in July 2017 and was finalised two days ago.

172 On 21 March 2018, Mr Driscoll of SCI sent an email to Ms Webb and Mr Key, amongst others, which responded to various questions. The email reflected a somewhat terse expression of SCI's position. It included the following (2/971–972):

> 1. Why has SCI removed cover for Section 6 and Section 9 of their policy?
>
> 2. Why has SCI applied such a high excess on Section 1 of the policy?
>
> - SCI reviews all information as it is disclosed or found, in relation to risks that it covers.
>
> When information comes to hand that indicates that the risk is adversely affected then these considerations will increase premium, excesses or both.
>
> When information comes to hand that indicates the insured through its own actions or inaction has or is adversely affecting the risk then we look to return that risk to the insured until the issue is managed.
>
> - In the case of Delor Vue the unrepaired building poses significant physical risk to us the insurer, and the remaining building is at a significantly higher risk of damage by any future event.
>
> - Additionally, information which is now to hand indicates that the Body Corporate is, and has been (even prior to the cyclone loss) internally conflicted and unwilling

> to act on the instruction / advice of SCI and its representatives. This increases the risk of actions which will result in claims within Section 6 and / or Section 9.
>
> …
>
> 5. Time elapsed and way forward
>
> • In relation to the current claim status, in light of some new information, we are currently awaiting legal advice which it is [sic] expected later next week. This legal advice may affect our position on policy response and impact the claim and the terms offered going forward from 23rd March, 2018.
>
> We will be in contact with you once the advice has been received.
>
> 6. We note your email received this afternoon and your client's request for SCI to consider a 6 month term
>
> • SCI can consider a 6 month policy term. We await your instruction on this matter.

173 By this time, one can certainly see in the correspondence a certain fraying of the relationship arising from the slowness and complexity of the claim adjustment, the pressure of renewal and the growing likely size of the loss (to both the insurer and the body corporate).

174 At a body corporate committee meeting on 21 March 2018, it was resolved to retain what was said to be a specialist claims processor (LMI Group) to act on behalf of the body corporate. Later, LMI Legal was retained. The minutes of the meeting reveal the position that Delor Vue found itself in (2/978–979):

> Aspire reported to the committee that currently the insurer SCI remains unresponsive, delays are being experienced in getting information from the loss assessor Exigo or the insurer SCI, information is being withheld including tender documents and responses for repairs and costs, reimbursement payments are taking up to 8 months to action. The Committee requested a meeting with the insurer in August 2017 and is still waiting for this to be organised.
>
> The insurance renewal is due on the 23 March 2018 and the renewal notice was issued 14 days prior to that date to our brokers by SCI. Renewal terms included an increase in the premium from $81,403.40 to $128,830.05. The excesses payable by the Body Corporate were reset so that the general excess on all claims increased from $1,000.00 to $100,000.00 and the named cyclone excess increased from $41,350.00 to $2,000,000.00. In addition Office Bearers' Liability, Government Audit Costs, Appeal Expenses and Legal Defence Expenses cover was removed from the policy. The renewal was also conditional on completion of the defect repairs in six months.
>
> The Body Corporate were not provided with any alternative covers to consider from our brokers.
>
> Further correspondence promised from SCI in relation to the claim, has been delayed until after the policy renewal.
>
> Verbal advice only from Keith Patterson at Exigo has been received that the costs have now been reviewed from two building companies for works to be undertaken to repair the buildings. Exigo indicated that the insurer has accepted liability for repairs totalling approximately $3.00 million. Exigo also indicated that prices for the component of the

repairs the insurer wishes the Body Corporate to pay for totals $2.145 million. The Body Corporate through Aspire have requested for the copies of these tender documents and they are not forthcoming.

After discussion, Aspire were requested to initiate four actions in regard to the renewal of insurances.

- Obtain a six month offer for renewal so that the policy can be reviewed towards the end of this period, once the repairs have been more closely defined.
- Obtain a 60 day to pay condition on the policy renewal
- Obtain a price for insurance excess buy back to permit the insurance excess to reduced [sic].
- Commence applications for Office Bearers insurance with Corpsure Insurance Broking to ensure the committee has continuity of cover and can continue to make decisions after 23 March 2018.

As the insurance will terminate at 4:00pm on Friday 23 March 2018 it was resolved for the committee to reconvene this committee meeting on Friday 23 March 2018, at a time to be set by Aspire, to specifically resolve the insurance renewal and permit time for Aspire to undertake the actions above.

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In addition Aspire will obtain from OMB Solicitors an understanding of the risks and action that the committee could take if there is a time gap between the termination of Office Bearers cover on 23 March at 4:00pm and the commencement of any other cover that could commence.

175 Thereafter, Delor Vue then sought, and on 23 March 2018 was granted, a six month renewal for a premium of $62,281.

176 On 28 March 2018, Mr Johnstone of Morse Building produced a third report. He had the benefit of the two GHD reports. The report concluded as follows (3/1017):

From my previous 2 reports and desktop review of supplied data from Holman Webb lawyers I reiterate the following:

Tropical Cyclone Debbie of March 28, 2017 generated wind speeds lower then [sic] what the unit complex should have been designed to withstand.

The design documentation available and reviewed does not indicate any inadequacies in the engineering design of the structure (excluding trusses).

Roof trusses were designed, documented and constructed by a specialist truss manufacturer, the GHD report has identified failings within these elements.

The unit complex experienced significant structural damage to the roof framing due to:

- The tie down of the trusses to the masonry walls not being consistent with the designers instructions
- The failure of the truss members at connection points to the wall

- The failure of truss members subjected to wind uplift loading
- The design of the trusses has been highlighted as being inadequate
- The absence of cast in truss plates highlighted in my 2nd report

Roof sheeting and Soffit damage was a direct consequence of the failure of the trusses and truss tie downs.

Inspections of the building prior to occupancy and during construction would have clearly shown significant differences between the designers documentation and the actual construction of critical building elements.

177 On 4 April, Mr Key wrote directly to Mr Driscoll of SCI in terms which made it clear that Delor Vue would be taking charge for itself of the claims processing through the LMI Group. The tone of the email was polite, but firm.

178 In his affidavit, Mr Key said that he had a conversation with Mr Tsoukatos of SCI to the following effect:

Me:	Can you please provide an update of the situation regarding the provision of the tender documents and our request to provide information to LMI Group?
Arthur:	Con Iconomidis is currently meeting with our legal advisors, and I expect that we will be able to provide you with an update in the next email.

179 Mr Iconomidis was senior to Mr Tsoukatos. That Mr Iconomidis was now consulting with lawyers is not without its importance. As will be seen shortly, on 28 May 2018, when SCI sent the letter which has given rise to this case, it included in its claims, for the first time, reference to the alleged misrepresentation by Marsh in early February 2017 in seeking the quotation. Mr Key was not cross-examined on the conversation. I accept his evidence. I will return to the significance of this. Mr Iconomidis said in cross-examination that Mr Tsoukatos was involved in (indeed the relevant person responsible for) the decision in May 2018.

180 Mr Iconomidis now became involved. (Hitherto, he had been copied into many of the emails during the adjusting process.) He spoke with Mr Key. In an email of 10 April to Mr Key, Mr Iconomidis referred to the process of "finalising settlement details" of the claim. Mr Key gave evidence of this conversation in his affidavit. He said that he asked Mr Iconomidis for the builders' reports that he had discussed with Mr Patterson. Mr Iconomidis refused, saying "[w]e will not release the documents until we are ready". Mr Key was not cross-examined on this conversation. I accept his evidence. Clearly SCI was assessing its legal position.

181 On 19 April 2018, Exigo requested Morse Building to prepare a report, in the following terms (3/1034):

> 1.1 We request a report from Morse that sets out those items of work as contained in the Cyclone Related Damage Scope of Works for each building that represent 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.

182 On 3 May 2018 LMI Legal (the applicant's now solicitors on the record in these proceedings) wrote to Ms Lander. The letter had a direct, and to a degree, combative (though not rude) tone. It set out a number of complaints: the failure to provide documents; a lack of "transparency" in the adjustment process; and delay. Under the heading "Allianz's and SCI's obligations" the following was stated (3/1039–1040):

> 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.

183 SCI responded by letter dated 28 May 2018. The letter enclosed Ms Lander's email of 9 May 2017, as well as a number of other documents. The letter set out SCI's position in some detail, over nearly four pages, identifying aspects of the loss and damage covered, and not covered. The letter quantified what SCI would pay for ($918,709.90) and what it would not pay for as "Pre-existing defects / faulty workmanship and materials" ($3,579,432.72). The letter appears to have been carefully settled. I infer that it was settled after consultation with Holman Webb. Mr Iconomidis' evidence (upon which he was not challenged) was that the National Claims Manager, Mr Tsoukatos, was responsible for the decision in the letter. Mr Tsoukatos' conversation with Mr Key (see [178]–[180] above) indicates an involvement of Mr Iconomidis. I would infer that both Mr Iconomidis and Mr Tsoukatos were involved in the preparation of the 28 May 2018 letter. The letter then set out a proposed "settlement" approach, as follows (3/1053–1054):

2. 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 [sic], 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.

184 Importantly, however, that offer was followed by a time limit and the assertion of continued rights arising from asserted non-disclosure prior to March 2017. The letter stated (3/1054):

> **4. RESERVATION OF RIGHTS**
>
> 4.1 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.

185 The letter then went on to assert a misrepresentation by Marsh before BCB was engaged (3/1054–1055):

> **Misrepresentation**
>
> 4.2 Before engaging BCB to negotiate the terms of the policy, the Body Corporate was previously represented by insurance brokers, Marsh Advantage (**Marsh**). When negotiating the policy Marsh provided a quotation slip to SCI dated 3 February 2017 (**enclosed**) in which it was stated under the heading *"Duty of Disclosure Details"*: "*Are there any hazards/defects associated with the property?".* Marsh's response to that question on behalf of the Body Corporate was *"No."* As such, the Body Corporate misrepresented the true state of affairs, which was that there were significant defects to the soffit panels of the buildings at the Premises, which the Body Corporate was aware of since 2015. The Body Corporate was very familiar with the issues regarding the soffit panels as is clear from the minutes of the meetings of the Committee of the Body Corporate that have been provided to us.
>
> 4.3 Had SCI known of those defects with the soffit panels, it would not have entered into the policy of insurance with the Body Corporate. The Body Corporate misrepresented the situation in respect of the defective soffit panels, which were significant, and this influenced SCI's decision to enter the policy.
>
> 4.4 On that basis, SCI reserves its rights to reduce payment of the claim to $nil in respect of any of the damage sustained to the Premises during the cyclone on 28 March 2017 pursuant to section 28 of the *Insurance Contracts Act 1984* (Cth) if the above offer in respect of indemnity is not accepted.

186 This was the first time that misrepresentation had been mentioned. The inference is available, which I draw, that it arose at this time because of the review of the policy by lawyers, Holman Webb, with Mr Tsoukatos and Mr Iconomidis, as SCI finalised its legal position in the increasingly tense relationship. Finally, after discussing the exclusion clauses and other terms, the letter concluded (3/1057):

> **7. 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.

187 The "attached information" dealing with complaints handling and dispute resolution procedures referred to in the concluding paragraph was not in evidence. Notwithstanding the apparent reasonableness of the last paragraph, the letter was clear. After careful examination of the buildings and properties (enabled through the full access for over a year, as insurer) an offer was made (cl 2.10 of the letter). If not accepted within 21 days the offer was that the insured would receive nothing. Though hedged about with qualification, its essence was: $918,709.90 within 21 days or nothing based on the now-asserted position of non-disclosure and misrepresentation.

188 LMI Legal responded to this letter on 12 June 2018. It asked for an extension of time for any acceptance of the offer. This extension was granted by SCI by letter of 14 June to 31 August 2018. The same letter confirmed its position in relation to the soffits, as follows (3/1058.6):

> 3. SCI confirms its position that if the defects in the soffit panels, which the Body Corporate was aware of since 2015, had been disclosed to it, it would not have extended cover to the Body Corporate. SCI will if required provide the required evidence in relation to this issue should this matter be litigated.

189 By late July 2018, LMI Legal was in a position to respond to SCI's letter of 28 May 2018. LMI Legal sent two letters to SCI: the first was dated 27 July 2018, the second 30 July 2018.

190 The letter of 27 July was in response to SCI's threat to invoke s 28 of the Act. The letter denied this entitlement first because of election or waiver arising from Ms Lander's email of 9 May. It was also said to be a breach of s 13 of the Act. The letter also contested SCI's entitlement, on the merits, to invoke s 28.

191 The letter of 30 July dealt with what was said to be Ms Lander's waiver of certain exclusion clauses, being exclusions 1(c)(i), 1(d) and 2(b). This claim of waiver or election is no longer made by the applicant. The letter also dealt with the application of the policy otherwise on its face.

192 On 22 August 2018, Holman Webb responded by informing LMI Legal that Allianz had reduced its liability to nil. The basis of that course was non-disclosure of not only the problems with eaves and soffits, but also the trusses, and the asserted misrepresentation by Marsh.

193 The proceedings were begun in the Insurance List in November 2018.

The evidence of the witnesses

Mr Key

194 My Key was a qualified mechanical engineer and certified management consultant, having qualified with a first class honours Bachelor of Engineering, and a Master of Business Administration. He was a principal for 26 years in a management consulting practice and a technical engineering practice. His evidence, reflecting (if I may say) this background and training, was clear, precise and to the point. These features were reflected also in the day to day conduct of his role as body corporate manager. He gave his evidence without evasion or equivocation. I accept him as an honest witness, seeking at all times to provide the unvarnished truth. I accept his evidence unless expressly qualified.

195 Mr Key had no specialist knowledge or expertise in insurance or insurance related matters. Nevertheless, as an intelligent and honest person familiar with practical business life, his views in relation to the proper, reasonable and honest conduct of affairs (considerations relevant to behaviour contemplated by the Act) are not without relevance.

196 I have already referred to parts of Mr Key's affidavit in setting out the factual narrative.

197 There are a number of places in the cross-examination where a reading of the transcript may give a reader the impression that Mr Key was being difficult or stubborn or unhelpfully pedantic. That would be a misreading of the transcript and a misunderstanding of the exchanges. Mr Key was a precise and careful witness. If I may say, without the slightest intended disrespect, the cross-examiner from time to time overlooked this in his pursuit of what he saw as a concession to which he was entitled upon his framing of the question. At no time was Mr Key in any way untruthful or unhelpful or evasive. The transcript must also be read with the recognition that Mr Key was slightly deaf.

198 The cross-examination began by a body of questions seeking to reveal that he must have understood the nature of the duty of disclosure. There were some fruitless exchanges on the topic. Mr Key was used to addressing questions from brokers. But he accepted that he understood that a duty of disclosure existed. (See Tp 189 ll 34–39; Tp 190 ll 21–22.) Generally, however, he felt that the duty was discharged by answering the questions an insurer asked of one. He said: "[I]n all my experience in taking out insurance I was provided with something to complete or a broker undertook that process for me." He accepted that the state of a building was a matter of relevance for an insurer of the building.

199 Mr Key was first taken to the minutes of the meeting of 20 June 2016 (see [55] above). This was Mr Key's first meeting as the body corporate manager of Delor Vue. He prepared the minutes. He was cross-examined about the references to "serious defect" and "serious Work Place Health and Safety issue" and accepted that someone could be injured by a falling soffit, but said he did not appreciate that someone could be killed. I do not think that the debate about injury or death in the transcript (Tpp 195–196) reflected badly on Mr Key. He was dealing with questions that mixed his recollection of what he thought, with questions of objective likelihood.

200 He was asked about Mr Ingledew's report (see [37]–[40] above). He read this in July 2016. He read the report completely. He accepted that he read the matters set out in the extract at [37] above. But he also said that the matters in section 3.1 (structural damage that did not include the eaves and soffits) were subsequently examined by a structural engineer, a Mr Thompson, and found not to be structural damage. (See Tp 197 ll 3–5). He read this subsequent report of a Mr Thompson in 2016. He was also asked about the section of the Ingledew Report set out at [39] above. He read this. He said that Mr Thompson did not look at the roof because the roof issues were not structural and Mr Thompson had only been retained to report on structural issues. He was also asked about the conclusions of Mr Ingledew set out under the heading "Conclusion" at [39] above. He accepted that he was aware that soffit sheets were detaching and wanted to understand why.

201 He was then taken to the retention of Mr McNeill and the preparation of the McNeill Report referred to and set out at [56] above. Mr Key read the report when it was available. Mr Key said the report did not surprise him and it did not lead him to think that the problem with the soffit panels was any worse or different to that which he had understood previously. He had inspected the property with Mr McNeill. He said that during the inspection he observed six sheets missing (out of 526 sheets on 11 buildings) and two other areas where one or two sheets were bowed. (See Tpp 199–200.) Mr Key also said that he thought the risk of injury to persons or property was minor. The areas of the apparent problem were where people and equipment would not be expected. (See Tpp 201–202.) This was also Mr Nobilia's view (Tp 161). Where anything had fallen closer to human activity, precautions had been taken to ensure people did not walk or park in that location (Tp 161), and to have bollards in place. (See Tp 176.)

202 I accept Mr Key's evidence. The problem of the eaves and soffits had not been described by Mr Ingledew as structural. There was dislodgment that posed some risk, and there was an explanation for the dislodgment.

203 Mr Key was then taken to the minutes of the meeting of 29 July 2016 and the relevant part set out at [57] above. When asked about this (at Tp 199) Mr Key emphasised that the reference was to six soffits. He had accompanied Mr McNeill on his inspection and had viewed the building from the ground using binoculars. Thus the McNeill Report concerned six missing sheets out of 256 on 11 buildings. In addition, there were two other areas of the buildings where, from the ground, it appeared that the soffit sheets were bowed. He accepted that the balance of the soffits needed further inspection and that the installation may not have been as per manufacturer's recommendation. I do not consider that Mr Key was seeking to downplay the significance of the problem. His evidence, which I accept, was of a careful analysis of a problem of a non-structural kind which he was addressing methodically with the assistance of professionals.

204 Mr Key was then taken to his email to the body corporate committee dated 8 September 2016 (see [60] above) and his reference to the "magnitude of the problem". He said that it reflected his view that it was "something to be attended to immediately", because the McNeill Report "indicated that they had been potentially installed incorrectly" and that it was "urgent". He thought it was urgent because he did not want them falling off, potentially causing injury and potentially damage to other property. There then ensued a debate between Mr Key and the cross-examiner about whether it was "an unacceptable risk to leave [the soffits] in that condition". He thought it was a "relatively minor" risk. He said in explanation that the two bulging soffits were in areas where people or equipment would not be present. There was an answer in this exchange (at Tp 202 ll 8–14) which was said to be knowingly false. I reject that criticism. Mr Key said that he was referring to the two bowed soffits when he used the expression "magnitude of the problem". I accept that that was a part of his concern, but I find that his reference was also informed by Mr McNeill's qualification that there may be more affected areas on closer inspection, a possibility implicit within Mr Pawsey's unwillingness to give a fixed quote (see [59] above). This is made clear in his answer immediately after the cross-examiner accused him of giving false evidence, when he said (at Tp 202 ll 23–25): " the magnitude of the problem here is simply that if it did exist throughout the entire site, it would be a large job to undertake the inspections and the repairs." The exchange may also have been affected by Mr Key's deafness.

205 Mr Key was then taken to Mr Pawsey's email. (See [59] above.) He accepted that Mr Pawsey said there were not enough battens. This was an answer in a body of exchanges about the proposition that the building had not been "properly constructed": Tp 202 l 36 – Tp 203 l 37.

Mr Key, perfectly legitimately, was attempting to be precise in what he accepted. A certain broadness in generalisation was being sought from him which he was not prepared to accept. He is not to be criticised for that.

206 The cross-examination then moved to the body corporate committee meeting of 12 October 2016 and the minutes thereof (see [61]–[63]). The cross-examination involved a discussion of the "mud map" (see [58] above) with an attempt to demonstrate that the problem was now perceived as wider than appreciated in July 2016. Mr Key rejected this. He was being precise, and he was correct. The exchanges over Tpp 204–205 were not helpful. It was clear that by October 2016 there were repairs needed to eaves and soffits, as well as some fascias and barges. The extent of the problem was not known. It had not been described as structural. There was a risk of falling soffits (six had come off and at least two had bowed). The problem required immediate attention, which it was getting by the employment of engineers and builders. All of these matters were explicit and implicit in Mr Key's evidence.

207 Mr Key was then cross-examined about the Goddard Report (see [67]–[70]). Once again there was a clash between cross-examiner and witness about whether the report of Mr Goddard should have revealed to Mr Key that the problem revealed was "worse" than previously understood. Mr Key, in my view perfectly reasonably, found this simplistic. It was "different" he said, but not (with one exception) "worse". He accepted that he had understood the report's contents. It elaborated on the known problems. He did accept that the "framing issues with the soffits" were worse than he had previously thought.

208 Mr Key was asked why in his email to Mr McNeill of 12 January 2017 (see [71] above) he had used the expression "for your eyes only". He said that he did not have permission from the committee to circulate the report. He was challenged on this by reference to the authority said to be implicit in the minutes of 12 October 2016. I accept Mr Key's evidence. Of course he had authority to give the Goddard Report to Mr McNeill as the cross-examiner suggested. That was implicit in the 12 October minutes. But there was no authority for *wider* distribution. The implication (without express clarity) that Mr Key was not being truthful is rejected.

209 Mr Key was asked about the "Notice to Occupiers" (see [75] above). Mr Key accepted that it was a precaution against a recognised risk. He shared that view: "my view was that someone could be injured." (See Tp 210 l 9).

210 Mr Key was asked about the McNeill Report of March 2017. Again there was a debate about whether the report or parts of it showed the position to be "worse" or "different". This was directed in particular to the part of the report that said some roof sheets were not screwed down. Mr Key accepted that Mr Wellard in constructing the eaves had done a "poor job" because he had constructed them "not up to code". Mr Key said that after receiving the report he was initially interested in the scope of works in the McNeill Report. He read the substance of it later in March after the 13 March committee meeting, possibly before the insurance incepted. Mr Key explained the apparent oddity in this delayed reading of the substance of the McNeill Report. He said, and I accept, that in early March and leading up to the 13 March committee meeting, he was focused on putting in place the claim against Mr Wellard and Beachside. This explanation was most clearly given at Tp 216. Mr Key said there were two "parallel streams" of activity. One was "to see what could be done for Beachside to assist in the repair of the … buildings". And the other was "to obtain quotes to repair the buildings … [a]nd the only way we could get competent quotes was to get information about what was required to be done". Mr Key had a long discussion with Mr Gartrell (of McNeill) after the report on building A and Mr Gartrell indicated a method of repair that avoided a piecemeal approach. Mr Key said that the conversation with Mr Gartrell was as follows (see Tp 217):

> He told me that he conducted the works, as we had discussed on site. He then indicated to me that he felt it would be best to undertake the work by having an elevated work platform on site continually during the entire works, because that would save resources, and then to bring scaffolding in later, to reach the rear of the buildings, which needed to be worked on. He indicated that, given what they had learnt from building A, that the progress to do the buildings – the remaining 10 buildings plus the front and back of building A, would be somewhat slower than they had thought from the ground inspections that had been done previously. And we talked about the types of trades and trade supervision that would be required on site. And then we talked about an estimate of those amounts of works. And then he was to go away and provide a quotation. Unfortunately, that was the day before he went away for a week's leave or – or several days leave. And he didn't return until the 7th.

211 During the conversation or afterwards (but before the committee meeting on 13 March), Mr Key and Mr Gartrell discussed an overall figure for the job being done at one time. Mr Key said (at Tp 218):

> I worked with Mr Gartrell to come up with a number, a figure, as to what the cost would be, because we wanted to have something to give to the committee for them – bearing in mind this was a group of volunteers who were trying to make decisions about the future of their building. So trying to give them something to say this is the order of magnitude or very close to what it would cost to do the repair. And we came up with a figure close to 240,000.

212 I accept Mr Key's evidence about the McNeill Report. I reject the cross-examiner's implication that his approach was less than competent. It was not: it was rational, prudent, coherent and comprehensive.

213 Mr Key's cross-examination concluded with a somewhat different exchange about disclosure (see Tpp 227–228). Mr Key accepted (at Tp 229) that the state of the premises that were being insured was a relevant consideration for any insurer of the property. Notwithstanding this agreement, the cross-examination ended as follows:

> MR McLURE: Now, on 10 February 2017, you had a conversation with Kerry McGorlick of BCB. Do you remember that?---Yes.
>
> And in that conversation, she asked you about the condition of the applicant's property?---She said, "What is the property like?" Something like that, yes.
>
> And in response to that question, you told her that the body corporate had some problems with the soffits falling out of the eaves?---Yes.
>
> And the reason why you told her that is you thought that was a relevant answer to her question?---Absolutely. It was what I knew at the time.
>
> And the reason why you told her that is you thought that the problem with the soffits in the eaves would be relevant to whether or not to this insurer or any insurer would give the applicant the insurance it wanted?---You're asking the – me the same question again. My answer is, as I said to the Honour, that I was asked the question from the broker and the broker asked that question for a reason and I answered it. I'm not a broker. I don't know what they do with that information. I'm sorry.
>
> I'm asking you to accept that the reason why you gave that information to the broker is you thought that was relevant to the insurer's decision whether to issue a policy to the applicant.

214 I rejected the last question. The approach of Mr Key in his last answer was legitimate. I will deal further with his evidence (and Mr Nobilia's) when making specific findings for the non-disclosure case. But, it should be noted at this point that nowhere in Mr Key's cross-examination was he asked why he did not think then, or why he does not think now, that disclosure of specified matters should have occurred. He then could have been challenged and tested on that matter with a degree of focus and precision.

Mr Nobilia

215 Mr Nobilia was the chairman of the body corporate committee from May 2016. As such he was the main point of contact with Mr Key. He gave his evidence in chief by affidavit. He was called for cross-examination before Mr Key.

216 Mr Nobilia's background was varied, he attended university studying dance and drama, after which he undertook various occupations including waiting and bar work as well as working on

the communications team for the interior design of the A380 aircraft. He then worked in television: researching, reporting and producing television shows at Fox Sports. In 2010 he went to Airlie Beach working as a photographer in the tourist industry. After a time he bought a company which operated the photography business. For a time it had three photo shops on three islands employing up to nine people. Cyclone Debbie and the resultant widespread damage affected the business. He now works for himself.

217 From this background, Mr Nobilia had some familiarity with insurance and with taking out insurance, though perhaps little more than any member of the public who had arranged car, home and life insurance. The evidence about this was less than satisfactory, in the sense that it was somewhat confused and muddled. He was less than clear about understanding anything about any duty to disclose matters to an insurer, though on at least one occasion (Tp 129 ll 24–26) he said that he did understand the duty. It is not necessary to deal with this evidence given the objective character of the standard in s 21(1)(b) of the Act.

218 Mr Nobilia's knowledge of the premises was derived from his general familiarity with the premises, what he was told by Mr Key and others and from the committee papers. His affidavit, like that of Mr Key, comprised largely a chronology of documentation received, sent and read.

219 Mr Nobilia indicated early in his oral evidence that his memory was not particularly good. His evidence rather reflected that. Mr Nobilia was not as precise or clear as Mr Key in his evidence. He could often not remember documents and events which were important to the case. He accepted on a number of occasions that if he were understanding his duties as a body corporate committee treasurer (which he was prior to May 2016) or chairman (which he was from May 2016) competently, he would have read a document. These questions and answers and the degree of lack of precise memory revealed, I infer, that he relied significantly on the views and competence of Mr Key in the management of the affairs of the body corporate, no doubt for the reasons that I have identified: Mr Key's intelligence and practical competence.

220 I have no doubt that the balance of the committee would have had the same confidence in Mr Key. The committee was comprised of various people who were described briefly by Mr Key and Mr Nobilia. Some (Mrs Blomme) were retired, one (Mr Foster) was a secretary, another (Mr Carter) the on-site caretaker, others (Mr and Mrs Campbell) worked in the area, another (Ms Grant) worked with indigenous persons, one (Ms Samuel) was a council employee, one (Mr Jameson) was a truck driver and owned a service station. They were a mix of ordinary people, some working, some retired.

221 As to the documents, and information in them, I infer that Mr Nobilia relied on Mr Key to inform the committee of anything of importance; that the minutes of meetings reflected what he and the committee members were told; and that Mr Nobilia may not have studied the detail of documents and reports particularly carefully.

222 I consider that Mr Nobilia gave his evidence honestly and was not deliberately evasive, though he was sometimes vague. Some attacks were made upon his truthfulness during cross-examination. I reject them. Considering the above, I do not consider it useful to traverse his cross-examination in the same detail as I did that of Mr Key.

223 That is not to say that there were not some important recollections of Mr Nobilia. His recollection as to why the body corporate management was damaged gave a context to Mr Key's competent focus in solving the problem of soffits and eaves. Also, Mr Nobilia expressed somewhat more concern about the risks of the falling soffits than did Mr Key. That is not a criticism of Mr Key, but reflective of the fact that this kind of assessment might strike different people differently.

224 As to the issue of the McNeill Report of March 2016 and when it was received by the committee, in his affidavit Mr Nobilia said that he did not recall being presented with it until about 2018.

225 As to the disclosure of the eaves and soffits issue, he said the following at paras 62–64 of his affidavit:

> I was not aware that the eaves and soffit issue was a matter that needed to be disclosed prior to entering into the Policy. It was part of the Applicant's maintenance program, as were other matters such as the sinking driveway. The eaves and soffits were being repaired and would have been repaired were it not for the cyclone damage. Other repairs to maintain the Premises were taking place on an ongoing basis.
>
> I was therefore not aware that the eaves and soffit issue may be relevant to the Respondent's decision to insure the Premises and on what terms.
>
> As I was not aware that there were any issues with the trusses and truss tie downs, they are not matters which I could have disclosed. In any case, I was not aware that it may be necessary to disclose issues with trusses, and that such issues may be relevant to the Respondent's decision to insure the Premises, and on what terms.

226 Mr Nobilia accepted on a number of occasions that the problem with the eaves and soffits was serious. He cavilled at referring to it as a "serious building defect" (Tp 132 l 26). Yet that is how the minutes of 20 June described it (see [55] above). I think this terminological debate was unhelpful and distracting. Mr Key and the committee (Mr Nobilia, as chair, signed the minutes

of the 20 June 2016 committee meeting) viewed the eaves and soffits issue as a form of defect. It had not been said to be structural in character by Mr Ingledew in April 2015. Mr Nobilia adequately and fairly summed it up in one answer: "It was a serious issue because the eaves could fall and hurt people" (Tp 132 ll 38–39) "or damage property" (Tp 133 l 40).

227 Mr Nobilia accepted that someone might be killed or catastrophically injured if hit by an eave sheet (Tp 133 ll 43–45) or property could be damaged (Tp 134 ll 1–2). See also, for example, Tp 142 ll 43–44. Whilst expressing these views, he adhered to the view that it was a maintenance issue, though he accepted that it was out of the ordinary, and not "routine".

228 He accepted that everyone was concerned.

229 Mr Nobilia was cross-examined about the Ingledew report. Whilst it should be recalled that most of the issues referred to in the report were irrelevant to the non-disclosure case, Mr Nobilia accepted that it was "fairly grim" (Tp 137 l 23). He made the point, however, that all buildings have defects (Tp 138 l 22).

230 Mr Nobilia was cross-examined about the Goddard Report and the McNeill Report. Little beyond his acceptance of the text of these reports need be noted. The cross-examination sought to obtain concessions as to the characterisation of the problem. At times the engagement and exchange was useful. The exchanges at Tpp 160–162 were illustrative. Mr Nobilia accepted that there were serious issues (a serious building defect) for repair, not "ongoing maintenance" but were external (and implicitly not structural) and in that sense "cosmetic".

231 Mr Nobilia was asked about the notice to occupiers in the context of the duty of disclosure. He thought that any risk had been ameliorated by the placement of bollards and the warnings. He said: "I thought we did enough to mitigate the problem" (Tp 177 ll 6–7 in context of Tpp 175–177).

Mr Iconomidis

232 Mr Iconomidis was the State Manager for Queensland of SCI and had been since he commenced with SCI in August 2014. He gave evidence by a statement that he adopted; he gave short oral evidence; and he was cross-examined.

233 Mr Iconomidis was experienced in insurance. He began with FAI in 1983 progressing to be a senior claims manager by 1989, and Compliance Manager and Assistant Claims Manager from 1993 to 1999 (with FAI). From 2000 to October 2007 he was Business Development Manager

at **CHU** Underwriting Agencies Pty Ltd. From November 2007 to October 2012 he was a manager at BCB. In October 2012 he returned to CHU where he was State Manager. CHU is an insurance intermediary that issues and advises on general insurance products, including writing strata title risks as agent for insurers.

234 As State Manager for SCI, Mr Iconomidis' role included underwriting approvals and managing the other underwriters in the Brisbane office.

235 Mr Iconomidis first gave evidence about underwriting the policy. He commenced with the receipt of Ms House's email. This, he said, would be entered into a document management system.

236 In his statement, Mr Iconomidis referred to the records in the document management system. Commencing with Ms House's email, this was annotated by a data entry officer who recorded against a question in the data base ("any known defects") the word "No". The page of the system was annotated by Mr McGuire, a Brisbane underwriter; this was a message to Mr Iconomidis recommending provision of a quote. He referred this to Mr Iconomidis because of what Mr Iconomidis said was a "standing practice in the Brisbane office that no quotes are offered for risks in Northern Queensland without my approval". Mr Iconomidis approved the issue of the Marsh/SCI quote on 7 February. Mr Iconomidis said that it was his practice to review the documents in the document management system before issuing a quote and that he believed he followed this practice.

237 This quote, of course, was not taken up. Rather, on 27 February a second quotation request came in: this one from BCB. The underwriter who approved this was Ms Tak. She did not refer the request to Mr Iconomidis. Ms Tak did not give evidence. There was no explanation in the evidence for her absence.

238 Mr Iconomidis' statement from paras 9–19 dealt with the underwriting on the premise of the continuation of the relevant influence of the information in the House email and attachments. In para 19 he said:

> On 28 February 2017 Ms Tak sent an email followed by a letter to BCB, offering terms for the Delor Vue policy (Cl1 page 186). Because the BCB quote request did not indicate any change to the circumstances contained in the Marsh quote, Ms Tak was entitled to issue terms to BCB based on my earlier approval.

239 Mr Iconomidis then in paras 21–28 commented upon the underwriting practices of SCI in February and March 2017.

240 I will comment further on Mr Iconomidis' evidence in dealing with s 28(3) of the Act.

The question of non-disclosure and s 21 of the Act

241 It is convenient at this point to draw together the evidence on the question of whether Delor Vue failed to fulfil its duty to disclose matters to SCI required by s 21 of the Act.

242 The respondent raised fraudulent non-disclosure in its concise statement in reply; no case, however, was made of fraudulent non-disclosure at the hearing. I take it to have been abandoned. The cross-examination sought concessions from Mr Key and Mr Nobilia that they knew or must have known that the problems with the eaves and soffits as revealed by the Goddard Report and the McNeill Report and their knowledge of the problem by March 2017 were matters relevant to the decision of SCI whether to take the risk and if so on what terms.

243 Each denied that he knew the matters were relevant to the decision of the insurer. I accept their evidence as truthful.

244 The question is whether s 21(1)(b) applies.

245 The applicant accepted that the knowledge of Delor Vue of matters extended to include the knowledge of Mr Key. There was initially some debate about this given the difference in view in *Permanent Trustee Australia Ltd v FAI General Insurance Co Ltd (In Liq)* [2003] HCA 25; 214 CLR 514 between McHugh, Kirby and Callinan JJ at 531 [30], and Gummow and Hayne JJ at 548 [86]–[87] on this issue. Both expressions of view were obiter. Given the concession, there is strictly no need to comment on this difference of view. Nevertheless, it is appropriate for me to say that I consider the concession was made entirely appropriately, since I find the views of Gummow and Hayne JJ at 214 CLR 548 [86]–[87] persuasive.

246 The application of s 21(1)(b) is substantially factual, being a process of characterisation of the found facts to the standard set by the words of the provision. The correct factual analysis or characterisation depends, however, on applying the correct meaning of the words of the provision. The reasonable person must "know" certain things; it is not "suspect" or "believe". In *Permanent Trustee* 214 CLR at 531 [30], McHugh, Kirby and Callinan JJ said, albeit about "knows" in para (a):

> The word "knows" is a strong word. It means considerably more than "believes" or "suspects" or even "strongly suspects". And the matter, to answer the description that par (a) of the sub-section states, must be a matter that is not only "relevant to the decision of the insurer whether to accept the risk, and if so, on what terms", but also one that the insured knows to be such a matter.

247 This passage was applied in *Marketform Managing Agency Ltd v Amashaw Pty Ltd* [2018] NSWCA 70; 97 NSWLR 306 at 314 [28] by Meagher JA (with whom Leeming JA agreed at 325 [72]). The content and operation of s 21(1)(b) (and s 28) was carefully and fully discussed by Meagher JA (with whom Ward JA, specifically, and Sackville AJA, implicitly, agreed) in *Stealth Enterprises Pty Ltd (t/a The Gentlemen's Club) v Calliden Insurance Ltd* [2017] NSWCA 71; 19 ANZ Insurance Cases 62-131, especially at [31] and following.

248 The relevant enquiry is whether a reasonable person could be expected to *know* that the state of the property was such as to be relevant to SCI's decision to accept the risk. I would approach the matter on the basis that that relevance is more than the insurer being interested to know something to be taken into account, though ultimately not affecting the decision: see the remarks of Kirby P in *Barclay Holdings (Australia) Pty Ltd v British National Insurance Co Ltd* (1987) 8 NSWLR 514 at 517–519; Enright W and Merkin R, *Sutton on Insurance Law* (4th ed, Thomson Reuters, 2015) at [7.50] and [7.220]; and McPherson JA in *Schaffer v Royal & Sun Alliance Life Assurance Australia Ltd* [2003] QCA 182; 12 ANZ Insurance Cases 90-116 at 86,308 [72]. The knowledge is as to relevance in the sense that it would influence in the decision posited by para (b): "so relevant", being "whether to accept the risk and, if so, on what terms" from para (a).

249 The reasonable person would understand the terms of the policy. In this respect, as the SCI email of 9 May 2017 pointed out, the relevant policy wording had exclusions for inherent vice, latent defect, and rectification of faulty material or workmanship: see in particular Exclusions 1(c), 1(d) and 2.

250 The reasonable person could also be expected to know that the risk of serious injury to, or death of, a person caused by the state of the property would be a matter that was relevant to the public liability risk that was covered by the policy. The policy concerned public liability involving personal injury as well as property damage.

251 The appropriate approach to the property risk for a reasonable person was the understanding that this was a recently constructed (in 2008 and 2009) apartment complex. There had been problems with the quality of the builder's work. Relevantly, it was not known (or even believed or suspected) that there were structural weaknesses in the tying down of the roof, by the trusses. The problem of the soffits and eaves was real and fully known. They presented a physical danger to people or property if they dislodged. Warnings had been given to apartment occupiers to ameliorate this risk. The body corporate (at least since mid-2016, with the change of body

corporate manager) was concerned about this matter, but was dealing with the problem in an organised, intelligent and deliberate way. The body corporate did not know that there was a structural issue concerned with the roof construction.

252 In the light of all my findings about how the body corporate had approached the matter I do not consider that it knew of matters that a reasonable person could be expected to know were relevant to the underwriters in relation to the property damage risk being undertaken by Allianz.

253 This is reinforced by the lack of questioning about the property in any proposal.

254 It is easy to dwell upon the Goddard Report and McNeill Report line by line. But the reality was that there was no basis to believe that these were structural problems and such defects as there were would not be covered by the policy's exclusions.

255 A reasonable person in the position of the body corporate would have expected that an experienced underwriter such as Allianz would appreciate that all buildings had some defects and that non-structural problems, even if serious at one level, that were in-hand in terms of rectification were not matters about which an experienced underwriter would need to be told to assess the risk, at least insofar as the policy concerned property risk.

256 I am reinforced in this view by the terms of the email of 9 May 2017 from Ms Lander. There was no explanation in evidence as to why Allianz took the views it did in this email. One view, open on the face of the email, was that they knew that the highest they could put the truss issue was by reference to constructive notice: see the last paragraph quoted at [123] above.

257 It is to be noted that the 9 May 2017 email did not deal with any disclosure that should have been made insofar as it may have concerned personal injury or property damage related to public liability risk. That, perhaps, is to be expected given the focus on the damage caused by the cyclone.

258 Notwithstanding this, the heightened risk of possible serious injury to people or property, but especially people, by soffits falling was a serious matter. It concerned both Mr Nobilia and Mr Key. Mr Nobilia adequately encapsulated the matter (as I set out at [226] above): "It was a serious issue because the eaves [and soffits] could fall and hurt people … or damage property." This included the possibility of killing or catastrophically injuring someone.

259 There was no relevant policy exclusion available to be relied upon to remove cover for public liability of this kind caused by pre-existing defects in the property.

260 When Mr Key was asked about the condition of the property by Ms McGorlick he referred to falling soffits: see [81] above. The broker did not follow this up.

261 Though not at the centre of the policy being taken out, the public liability coverage was important. This building, to the knowledge of the body corporate, had serious non-structural defects of badly affixed and constructed soffits and eaves. They were a danger to persons and property if they dislodged, as a number had done. Steps were in hand to repair the problem; and steps had been taken to ameliorate the danger. It was submitted by the applicant that a reasonable person would consider the practical realities of the risk to injury – there had been no such incident across the passage of years. The soffits that were of concern were in areas almost exclusively not where people were expected to be. And some of them were already fixed and there was a program to be implemented for the remainder. In the real world, a reasonable person in the insured's position would be entitled to regard itself as in control of the low risk associated with the soffit panels. Further, the reasonableness of this position was said by the applicant to be reinforced by the fact that, upon accepting the claim, SCI was in no hurry at all to get any or all of the soffit repair works undertaken. Notwithstanding these arguments, which have some force, 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.

262 In coming to this conclusion, I am not being critical of, or disbelieving, the evidence of Mr Key. He, as the contemporaneous actor here, did not turn his mind to these matters. He was a careful, prudent and honest man. If one were to anthropomorphise the reasonable person in s 21(1)(b) he might be considered to be such a person. Given his qualities it is unnecessary to address the question of "intrinsic" as distinct from "extrinsic" circumstances: cf *CGU Insurance Ltd v Porthouse* [2008] HCA 30; 235 CLR 103 at 118 [52]–[53]. The task is, as follows: "[T]he ultimate question [under s 21(1)(b)] turns on what could be expected of a reasonable person's state of mind, not on the insured's state of mind.": Heydon JA in *GIO General Ltd v Wallace* [2001] NSWCA 299; 11 ANZ Insurance Cases 61-506 at 75,866 [23] cited with approval in *CGU Insurance Ltd v Porthouse* 235 CLR at 118 [52, ftnt 37]; and by Meagher JA in *Stealth* 19 ANZ Insurance Cases 62-131 at [39]. I also recognise that he said to his broker that soffits had fallen.

263 There is necessarily a degree of an imputed standard of behaviour which the court (reflecting the demand of the statute) requires. All the circumstances must be considered. These include that no proposal questions were directed to the state of the property and the risks to the public, and that a broker and an underwriter experienced in this field were involved. But it is important not to abstract overly this question. It is intended to be a standard of imputed reasonableness in setting the proper balance of knowledge between insured and insurer in accepting or not an insurance risk and on what terms. 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. Perhaps Ms McGorlick failed to enquire about the falling soffits, but she was not apprised of the potential danger.

264 There was a failure by the body corporate to comply with the duty in s 21(1)(b) in respect of the public liability risk contained in the policy.

The question of s 28 and remedies for non-disclosure

265 It will be necessary in due course to deal with the misrepresentation case alleged by Allianz arising from the communication of Marsh of 3 February 2017. First, however, it is necessary to consider the operation of s 28 based on the breach of s 21(1)(b) that I have found.

266 The breach of the duty that I have found was not the focus of the evidence. Allianz's main case was that there had been a non-disclosure in respect of the physical and material defects of the property in respect of the roofs as illuminated in the Goddard Report (in December 2016) and McNeill Report (in March 2017) and by reference to the physical damage to property caused by the cyclone. For the reasons that I have given, I do not consider that there was any breach of s 21(1)(b) in connection with the property risk covered by the policy. Nevertheless, if there had been disclosure of the soffits and eaves problem in relation to the public liability risk, SCI would have had the problems disclosed to it. The insurer would then have been in a position of being free to decide for itself as to the whole of the insurance.

267 This raises the question of the scope of the operation of s 28(3):

> 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 failure had not occurred

268 Though I have analysed the matter by reference to the type of risks covered by the policy: property and public liability, and although there were separate parts of the policy dealing with these different risks, which might have enabled a choice by the insured (or insurer) whether to take (or to grant) cover by reference to some, but not all, risks in different parts of the policy, there is no warrant in the terms of the statutory provision to analyse the insurer's position differentially by reference to the type of risk that informs the consideration of s 21(1). Conformable with the weight of the authorities concerning s 28(3): see generally the cases referred to in *Mann's Annotated Insurance Contracts Act* (7th ed, Thompson Reuters, 2016) at 256–259 [28.30.1], if the insurer can persuade the court that had the matter that should have been disclosed, been disclosed, it would not have issued the policy, it can reduce its liability to nil. Here, the insured innocently failed to comply with its duty of disclosure because a reasonable person in its position could be expected to know that the defective eaves and soffits were a real danger to persons and that matter would be relevant to the decision of the insurer whether to accept the public liability risk, and, if so, on what terms. It is then open to the insurer to prove that had the defective eaves and soffits been disclosed it would not have granted cover, for whatever (legitimate) reason. The words of s 28(3) do not require an entire or a precise conformance between the reason why the reasonable person could be expected to know of the matter's relevance and the reasons that might move a particular insurer to a particular view about whether to grant cover, had disclosure been made.

269 Thus, one must turn to the case of Allianz to assess what it would have done had it learned of the matter of the defective soffits and eaves. Allianz's case was based on the evidence of Mr Iconomidis and documents. Ms Tak, the underwriter who made the decision to provide the relevant quotation to BCB did not give evidence. She did not refer the matter to Mr Iconomidis. No evidence was led as to why Ms Tak was not called. I am, however, prepared to infer that it was likely that Mr Iconomidis would have become involved in the decision had the Goddard and McNeill Reports been provided. If the soffit and eave problem had been disclosed, I infer that it would have been explained by Mr Key by reference to these reports. He was at all times honest and open with the insurer. I have no doubt he would have been honest and open if asked for an explanation of any soffit and eave problem. These two reports were the most focused and up to date examinations of the problem.

270 The evidence as to the underwriting of the risk and the case sought to be made by Allianz that it would not have granted cover is related to the misrepresentation case to which I will come. Ms House, of Marsh, had included a quotation slip with questions and answers (perhaps taken,

although the evidence is not clear, from the website kept by SCI or Allianz) that answered "no" to a posited question as to whether there were "hazards/defects associated with the property". This was information provided by a broker purporting to act for a prospective insured. Mr Iconomidis, interpreting the business records of SCI, said that this information was put into the electronic records of SCI. Inferentially, once this was done, it was said to have been used by Ms Tak in her decision when dealing with the BCB quotation request later. It is reasonable to consider that she looked at SCI's records that concerned the property.

271 A Mr McGuire referred the Marsh quotation request to Mr Iconomidis, because Mr Iconomidis said that Mr McGuire's authority did not extend to northern Queensland without referring the matter to him. Mr Iconomidis approved it and the Marsh/SCI quotation was sent on 8 February 2017. No response was ever made to it.

272 When SCI received BCB's request for quotation on 27 February (in somewhat different terms), SCI became aware that BCB, not Marsh, was the broker appointed on behalf of the putative insured. Ms Tak gave a quotation without reference to Mr Iconomidis, though she reported to him. In his statement Mr Iconomidis said:

> Because the BCB quote request did not indicate any change in the circumstances contained in the Marsh quote, Ms Tak was entitled to issue terms to BCB based on my earlier approval.

273 Thus, Mr Iconomidis assumed that Ms Tak took into account the "no" answer to the defects question in the Marsh quotation request. Mr Iconomidis also gave evidence as to the underwriting practice of SCI and of what he would have done had disclosure been made of the Goddard and McNeill Reports of December 2016 and March 2017, respectively.

274 The SCI underwriting guidelines had particular requirements for property north of the 23rd parallel, by reasons of cyclone activity. Property built prior to 1995 which had certain construction was excluded. The guidelines stated (1/103):

> ***(7) Property North of the 23rd Parallel***
>
> The higher exposure resulting from cyclone activity above this latitude requires us to take measures that restrict our acceptance of risks based on their construction.
>
> We do not want to write risks where they have been constructed prior to 1995 and where construction of the walls is **Mixed** or **Inferior** (Iron / Steel, Asbestos Sheeting) and / or Roof comprises **Tiles (Concrete / Clay**) and/or **Inferior** walls, roof and floors, to ensure we can deliver on our long term objectives.
>
> Alternatively, we are looking to write risks where they have been constructed after 1995 and construction comprises **Massive** Walls (Brick/Masonry, Concrete –

> Reinforced), **Massive** Floors (Concrete – Reinforced) and Roof being **Iron / Steel** only.

275 The respondent submitted that the reports would have revealed "inferior" roofs for the purpose of the second paragraph. That is doubtful. The reference to "inferior" there is to "Iron / Steel, Asbestos Sheeting" roofs in pre-1995 construction. That was not this building. Other parts of the guidelines, however, also to do with properties north of the 23rd parallel give some support to the respondent's position; although the guidelines as a whole were far from clear, indeed arguably self-contradictory. Also, as the Morse Report dated 23 May 2017 revealed (see [137] above) the construction of the buildings conformed with the third paragraph above: buildings in respect of which Allianz was (at least generally) "looking to write risks".

276 Reliance was placed on the bald and unequivocal statement in paras 30 and 31 of Mr Iconomidis' statement. There he said:

> I have read the following documents:
>
> (a) report of GW Goddard & Associates of 1 December 2016;
>
> (b) report of McNeill Building of 3 March 2017.
>
> On my reading of those reports there were extensive defects in the roofs in all the buildings in the Delor Vue complex. It would have been obvious to me that those defects would substantially increase the risk of a claim in the event of a storm or cyclone. If the information contained in the reports had been disclosed to SCI, I would not have approved the quote to Marsh or BCB under any circumstances.

277 I am prepared to accept that if some disclosure had been made of soffits and eaves defects then the insurer would have asked for details, and these two documents would likely have been provided. I am therefore prepared to infer that in these circumstances Mr Iconomidis would have become involved in the underwriting decision.

278 Whilst I do not consider that the honesty of Mr Iconomidis should be doubted, there are objective considerations that lead one to doubt that SCI would not have provided cover, or at least objective considerations that would have made a decision to grant cover reasonable. First Ms Tak was not called. The thought process of the underwriting officer who made the decision is still unknown. That is not critical perhaps given my view as to Mr Iconomidis' likely involvement if the Goddard and McNeill Reports had been made available. It is not clear with precision what steps Ms Tak would have taken by way of clarification from the body corporate, if some problem in general terms had been revealed. If some explanation had been sought, I have no doubt that Mr Key would have proffered the two reports.

279 The evidence in paras 30 and 31 with its brevity and uncompromising character, in hindsight, has some objective difficulties. Neither of the two reports establishes that there were defects in all the buildings (though the McNeill Report said that it was possible that the defects were in all buildings); neither establishes that there were any structural defects. Paragraph 31 proceeds on an unstated and, to a degree, incorrect assumption to make the assertion that there was an increased risk of a claim. The paragraph pays no attention to the exclusions for defects in the policy. It does not engage with the fact that the known defects were not structural. Nor does the evidence grapple properly with the underwriting guidelines and their ambiguity.

280 The underwriting guidelines dealt with "defects" generally as follows (1/92):

> **g) <u>Defects</u>**
>
> In our "Quote Request" form on our website we ask the question: "Are there any known hazards or defects on site or to the Building?"
>
> Given the development of defects as a growing issue for the Strata sector it is important we treat the question of defects in the same way as we do advices regarding claims, that is, as mandatory minimum information.
>
> As such we must revert to the intermediary/direct client and request an answer to the above question, in all instances where information has not been provided. This applies whether the SCI "Quote Request" form is used, or intermediary uses their own template quote request form, or otherwise.
>
> Defects impact on the quality of the risk and therefore require careful assessment to arrive at a decision as to whether to insure the risk and if so at what terms / conditions.

281 None of the guidelines demonstrated with any clarity that this risk fell outside what was acceptable as a matter of written policy.

282 There was no analysis of the type of defect that would be determinative. I do not accept (as Mr Iconomidis' evidence tended to assert) that any defect would suffice to reject cover for buildings constructed within 8-9 years. If it is to be accepted (as the evidence demonstrates) that the defects were not structural, were excluded by the policy in any event and were being efficiently and conscientiously attended to, by way of repair, objectively there would seem to be a reasonable basis to write the risk. No case was made that the premium would have been higher.

283 Other considerations also tell in favour of the objective availability of acceptance of the risk. The property fell within the description, otherwise, of properties in respect of which SCI was "looking to write risks" in this area: constructed after 1995, with massive walls, massive floors and an iron/steel roof, as set out in the Morse Report dated 23 May 2017 (see [137] above).

SCI was a specialist underwriter in the strata market. Mr Iconomidis accepted that strata property was notorious for having defects, that one could not possibly expect any apartment block to be free of defaults and that any difference between defects and maintenance was open to interpretation (Tpp 54–55). It was not part of SCI's guidelines to obtain survey reports.

284 There was an attempt by Mr Iconomidis to draw on other examples of underwriting decisions to support what he said he would have done. The examples were not helpful. They either related to pre-1995 buildings or were structurally dependent on another property – quite different to the circumstances here.

285 There was no evidence led of an equivalent rejection of a post-1995 property, containing the three construction elements referred to above, because of non-structural defects.

286 There was, however, the oral evidence of Mr Iconomidis that in May 2017 (at the time of consideration of the decision that came to be communicated in the 9 May 2017 email) he was of the view that the claim should be denied on the basis of the matters that were revealed in the Goddard and McNeill Reports. This was a contemporaneous view as to what he thought. I accept it as an honest recollection. I find it curious that this matter was not addressed in his evidence in chief, but the evidence was given and I accept it. It was, however, even in May 2017, naturally coloured by the serious damage that had occurred.

287 An individual underwriter's decision in the counterfactual posited by s 28(3) on the hypothesis of innocent non-disclosure does not have to be entirely logical; nor must it accord with the court's view of what is more reasonable, nor must it accord with the views of others as to whether there were grounds for making another, and different, decision. Underwriting decisions can be made on a wide variety of considerations: some logical, some affected by the state of the market, some affected by the state of the business written by the insurer, and some based on experience, feel and intuition.

288 There were objective factors, including the (ambiguous) underwriting guidelines to make a decision to accept this risk in March 2017, knowing of the history of the soffits and eaves problem and of the contents of the Goddard and McNeill Reports, reasonable. That said, a decision by an underwriter such as Mr Iconomidis, responsible for the underwriting performance of his employer, who saw the Goddard and McNeill Reports, could reasonably be one to refuse the risk outright. There is no reason why an underwriter could not reasonably have said to himself or herself: "If that is the extent of non-structural defects in so many of

these buildings, what else might there be? I will not put this on the books – they can stay with their existing underwriter." On balance, and accepting Mr Iconomidis 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.

289 The insurer bears the onus of proof under s 28(3). There was a debate about who bears the evidential burden of descending into the detail of the counterfactual: the insurer, or the cross-examiner. This is not a debate to be settled as a matter of rule. It depends on the flow and quality of evidence and who has the particular knowledge to bring forward, or about which to ask. Discussion of the evidentiary burden in *Watts v Rake* [1960] HCA 58; 108 CLR 158, *Purkess v Crittenden* [1965] HCA 34; 114 CLR 164 at 168, *Strong v Woolworths Ltd* [2012] HCA 5; 246 CLR 182 at 201–202 [53] and *Prepaid Services Pty Ltd v Atradius Credit Insurance NV* [2014] NSWCA 440; (2015) 18 ANZ Insurance Cases 62-047 at 76,122 [53]–[55] demonstrates that the quality of the evidence led by the insurer must be assessed for its persuasiveness. The insured is not disentitled from pointing out the inherent and objective weaknesses of the rolled up assertion by the underwriter. The trial is adversarial; but it is not a game. Mr Iconomidis gave brief and uncompromising evidence. In fact, it reflected his contemporaneous view in May 2017. His evidence as to his contemporaneous view in May 2017, together with the reasonableness of viewing the Goddard and McNeill Reports as potentially indicative of deeper problems, result in the conclusion that SCI could reasonably have taken the view that this risk should not be accepted, even if another underwriter might reasonably have accepted the risk. The evidence rested where the choice of counsel caused it to lie. On the basis of the evidence I accept that SCI would not have accepted the risk had it known of the soffits and eaves defects.

290 The fact that renewal was granted for six months does not undermine this conclusion. The problems of the buildings were known and the subject of a claim being adjusted under the previous year's policy. I do not see that the willingness to renew undermines a conclusion that Mr Iconomidis would not have accepted the risk in March 2017.

The misrepresentation case

291 Marsh had been appointed by the previous body corporate manager (Archers). Marsh, relevantly, was a "service contractor" for a community titles scheme for the purpose of s 15 of the BCCM Act.

292 Archers had been appointed in May 2015 with specific authority to "obtain quotations for insurances required to be effected": see [42] above.

293 In January 2016, Archers purported to appoint Marsh: see [47] above.

294 The body corporate, other than through the body corporate management agreement (see [42] above), did not authorise Marsh's appointment: see [49] above.

295 By the *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) (**the Regulations**) s 112 a body corporate may engage a body corporate manager or service contractor, but only if the body corporate passes an ordinary resolution approving the engagement.

296 Archers' appointment was so approved. Marsh's appointment was not so approved. Marsh can only be viewed as having been acting on behalf of Delor Vue if the appointment of Archers and the grant to it of authority to obtain insurance quotations can be construed as authority to appoint, on Delor Vue's behalf as its agent, an insurance broker of its (Archers') choice.

297 As a general rule, an agent is not authorised to delegate its authority to establish a relationship of principal and agent between principal and third party: *delegatus non potest delegari* (see Dal Pont G, *Law of Agency* (3rd ed, LexisNexis, 2014) ch 9). The question is one of construction of the authority of the appointed agent. The authority may be express or implied.

298 There was no express authority here. There will be such implied authority when the conduct of the parties, the usages of the trade or the nature of the business make it reasonably presumed that the parties to the agency agreement (Delor Vue and Archers) intended that Archers would have authority to create, through the appointment of an insurance broker, a relationship of principal and agent between Delor Vue and the broker: see generally Dal Pont op cit at 190–192; and *De Bussche v Alt* (1878) 8 Ch D 286 and *Powell & Thomas v Evan Jones & Co* [1905] 1 KB 11.

299 The use of insurance brokers for the obtaining of insurance quotations can be accepted to be a common occurrence. Certainly Archers could not be criticised for engaging Marsh, at least as

its agent, for fulfilling its responsibilities as body corporate manager. The question is whether Marsh was Delor Vue's agent in February 2017, notwithstanding that Archers had ceased to be the manager.

300 Mr Key knew of Marsh's position as broker in and before February 2017: see [50], [64] and [80] above. Plainly, however, he did not consider Marsh to be the broker to arrange the coming year's insurance since he was at this time appointing BCB: see [82] above. The committee had dealt directly with Marsh in March 2016 in the arranging of the previous year's insurance. The letter with quotations and advice came from Ms House and Marsh directly to the committee members: see [50] above. Mr Key also dealt with Marsh to obtain information. Mr Key knew that Marsh was fulfilling the position of a broker for Delor Vue. Nevertheless, he had not authorised them to negotiate renewal in 2017 nor had he authorised them to make representations to insurers about the property without instructions.

301 In the context of s 112 of the Regulations and the limited words in Archers' retainer, I would not imply into the retainer an authority to appoint a sub-agent as Delor Vue's agent, irrespective of Archers' position.

302 Further, Archers' letter of appointment was to "Marsh Advantage Insurance Pty Ltd". The representation was made by MAI Strata Pty Ltd "as authorised representative of Marsh Advantage Insurance Pty Ltd": see the email of Ms House of 3 February 2017.

303 Thus, the question is whether the retainer of Archers authorised it to engage a sub-agent, to engage a further sub-agent to act as the agent of Delor Vue. I do not so read the engagement of Archers.

304 In any event, I do not consider that any actual or implied authority of any broker extended to providing information to the insurer about the risk without even purporting to obtain instructions. For all these reasons I do not consider that Ms House or Marsh had actual authority of Delor Vue to make the representation.

305 Nor was there ostensible authority. It may be that in appropriate circumstances a principal would be bound by the ostensible authority of its broker. But here, there was no holding out of Marsh by Delor Vue. The insurer was put on notice shortly after the representation was made that Marsh was not the putative insured's broker. The evidence revealed that on 6 February 2017 Mr Iconomidis instructed his subordinate underwriter Mr McGuire to find out whether Marsh was the "attacking or holding" broker. SCI's records show that on 7 February 2017, Mr

McGuire confirmed that Marsh was the holding broker. I would infer that Mr McGuire contacted Ms House to confirm that she was the existing broker for the applicant. There was no evidence that Mr McGuire spoke to Mr Key about this. When the BCB request came in shortly afterwards (without any response to the Marsh/SCI quote), SCI knew that Marsh had lost the account. If it relied on the representation of Ms House it did so assuming that the representation was made with authority. Delor Vue had not held out Marsh to have authority to represent the condition of the property. It had no such authority. The representation had been made by a party that SCI could not assume was acting as the putative insured's broker or with its authority. All it knew was that it was the holding broker seeking to retain the account. To the extent that SCI thought (as it did) that Marsh had been the "holding" broker and that now it appeared that BCB had the account, SCI would have appreciated that Marsh may well have been (as they were) acting on their own account in order to compete for and retain the account. In any event, by the time it came to decide upon BCB's request, there was no basis for SCI to conclude that Delor Vue was holding out Marsh as its broker to make the representation in the light of the appointment of BCB.

306 Further, given the entirely separate requests by two brokers, for different quote requests, in circumstances where by the time of the second request SCI knew that the first request had not been acted on and the proponent of the first quotation request was not the appointed broker, it is difficult to see how the misrepresentation was made in relation to the transaction that led to the insurance contract.

307 That SCI may have incorporated the "no defects" statement from the Marsh quotation request into its information system, being information provided by a broker purporting to act on behalf of a putative insured, may explain why SCI made no enquiries of the broker they (shortly afterwards) knew to be acting on behalf of the putative insured; but it does not create a foundation for the authority (actual, implied or ostensible) necessary to sheet home responsibility for the accuracy of the statement or representation to the putative insured.

The effect of the conduct from 9 May 2017

Election, waiver, estoppel and good faith

308 Delor Vue puts its case on several legal bases to hold Allianz to its stated position communicated on 9 May 2017: election, waiver, estoppel and a breach of the duty of the utmost good faith.

309 The context in which the enquiry is thrown up by the controversy is not breach of contract. Contract is the field in which the interplay of, or differences between, the legal principles or categories of reference of election, waiver and estoppel often play out. Here, the hypothesis is that an innocent breach of the duty of disclosure has provided the insurer with an entitlement to avail itself of a state of affairs provided for by s 28(3) of the Act: "the liability … is reduced to the amount" referable to the hypothesis for which the subsection provides or that there are sufficient facts available to make an assertion of such relief under s 28(3) credible. Section 28(3) does not in terms create a right to be exercised or activated in some way. This distinguishes it conceptually from circumstances such as the operation of the law of contract which would give the promisee of a fundamental condition of a contract which has been breached or the innocent counterparty to a repudiatory breach of contract a right upon becoming aware of the breach or repudiation to accept the breach or repudiation as from that point and thereby terminate the contractual relationship and claim damages flowing from the loss of bargain. That right carries within it, immanently, a choice: to exercise the right of termination or to affirm the contract, sometimes, it is said (reflecting the interchangeability of language used in the field) thereby waiving the breach by electing to affirm the contract. These circumstances reflect alternative rights inconsistent with each other where the law will, if there is knowledge of facts that give rise to the choice, hold the party to its choice: *Kammins Ballroom Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at 882H-883D. This is election: *Sargent v ASL Developments Ltd* [1974] HCA 40; 131 CLR 634 at 641 (Stephen J). The rights must be alternative, mutually exclusive and inconsistent: one cannot say that the contract exists and does not exist at the same time. See also *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* [1993] HCA 27; 182 CLR 26 at 41 and *Agricultural and Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; 238 CLR 570 at 588–589 [56]–[58].

310 Election is, however, sometimes discussed as a cognate concept with waiver and estoppel: eg Brennan J in *Commonwealth v Verwayen* [1990] HCA 39; 170 CLR 394 at 421. The expression "waiver" is sometimes used synonymously with election or estoppel: see the discussion in *Agricultural and Rural Finance* 238 CLR at 587 [51]. The three concepts can be seen to have different informing legal purposes or considerations: election removes inconsistency of contractual or remedial behaviour; estoppel prevents injustice from reliance on a stated position; and waiver recognises unilateral abandonment of rights: *Verwayen* 170 CLR at 423 (Brennan J). That said, the relationship between the doctrines can be said to be "beset with

difficulties": *Sargent* 131 CLR at 655 (Mason J); and see generally the discussion in *Agricultural and Rural Finance* 238 CLR at 583–600 [40]–[93].

311 Here, the statute provides for a state of affairs: being that "the liability of the insured is reduced to the amount" referable to the hypothesis for which the subsection provides. It was submitted by the respondent that this meant there could be no election, waiver or estoppel. That is too sweeping a proposition. Though framed as it is in terms of a state of affairs or a legal conclusion, the plain intention of s 28(3) is to place the insurer in a position different from a duty to comply, in an unqualified way, with the terms of the policy. It enables the insurer to approach the claim for an indemnity not by reference to the terms of the policy, but by reference to an hypothesis. 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. 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. The position here was one of an arguable (but not demonstrably clear) invocation of rights arising from ss 21 and 28. The insurer is not to be seen as giving up a right, but as to be 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.

312 There is no public policy within Pt IV or any other Part of the Act which would prevent an insurer taking the view in its own interests and by its own judgment that it will not insist on taking the benefit of rights afforded to it by s 28(3).

313 The parties spent some time debating the relevance and application of the judgment of Handley JA in *Nigel Watts Fashion Agencies Pty Ltd v GIO General Ltd* [1994] NSWCA 365; 8 ANZ Insurance Cases 61-235 and the majority and minority judgments in *Freshmark Ltd v Mercantile Mutual Insurance (Australia) Ltd* [1994] Qd R 390.

314 *Freshmark* concerned a claim under a policy for damage to a trailer. The circumstances of the loss were not covered by the policy. After the claim was made the insurer authorised some repairs, but later denied liability. The trial judge found no detriment sufficient to ground an estoppel but found that there had been a waiver of its rights to rely on the relevant endorsement that took the claim outside the policy terms. The Court of Appeal by majority (McPherson JA and Dowsett J) allowed the appeal, saying that there was no need for choice (election) between inconsistent rights. That conclusion is readily understandable and, with respect, correct.

315 In *Nigel Watts*, Handley JA dealt with the principle of election (Kirby P and Mahoney JA considering it not necessary to do so). Handley JA did not find the doctrine engaged, nevertheless his Honour at 8 ANZ Insurance Cases 75,649–75,650 helpfully and succinctly expressed the principle as follows:

> 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.

316 There may be seen to be a difference between "inconsistent rights" (cf *Khoury v Government Insurance Office (NSW)* [1984] HCA 55; 165 CLR 622 at 633 (per Mason, Brennan, Deane and Dawson JJ) and "inconsistent positions" or "inconsistent courses of action" (cf *Nigel Watts*; and *Immer* 182 CLR at 41 per Deane, Toohey, Gaudron and McHugh JJ, citing Spencer Bower and Turner, *The Law Relating to Estoppel by Representation*). The latter can be seen as wider, and less crisp, than the former. In *Immer* 182 CLR at 41, Deane, Toohey, Gaudron and McHugh JJ said:

> The true nature of election is brought out in this sentence from the seminal work of 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."
>
> (Footnotes omitted.)

317 Nevertheless, Handley JA posited the clear position of competing, inconsistent and mutually exclusive *rights* – 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. That simple choice of inconsistent rights is not present here.

318 That leaves estoppel; and it also leaves a conception of waiver which is not simply based on the unequivocal choice between two inconsistent and mutually exclusive *rights* but upon an intentional choice made with full knowledge between *inconsistent positions* and the choice being one that gives an advantage to the party making the choice which would otherwise not be available. This conception of waiver looks not to the detriment of the representee, but to the position of the party making the choice and taking an advantage, so as not to be permitted to approbate and reprobate.

319 I will first deal with estoppel.

Estoppel

320 It is necessary to recognise that the various doctrines and remedies in the field of estoppel may not yet be capable of expression as a "single overarching doctrine" or as a "general doctrine of estoppel by conduct", to use the words of Mason CJ and Deane J, respectively, in *Verwayen* 170 CLR at 411 and 440, as referred to in *Giumelli v Giumelli* [1999] HCA 10; 196 CLR 101 at 112–113 [7] by Gleeson CJ, McHugh, Gummow and Callinan JJ.

321 Nevertheless, the categories of estoppel and their origins both at common law and in equity should not be seen as taxonomically strictly divided with self-contained separate rules. Here, the insurer made a clear representation or body of representations in the email of 9 May 2017. It raised "the non-disclosure issue which is present". This was not a clear assertion of an entitlement to assert the issue of non-disclosure. The reliance on constructive notice in the previous paragraph would have been enough to throw some doubt on the clarity of the issue. That said, it was clear that the insurer was stating that it would not raise the issue: "Despite the non-disclosure issue which is present, … SCI is pleased to confirm that we will honour the claim and provide indemnity … in line with all other relevant policy terms, conditions and exclusions."

322 Contrary to the submissions of the respondent, this was a clear representation that the claim would be honoured and indemnity would be provided, in accordance with the policy terms and conditions. There is some ambiguity about the operation of the exclusion clauses. Until the hearing and submissions, the applicant asserted that part of the letter as a further waiver. That assertion was abandoned by the time of the hearing, and correctly so. 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.

323 This was not merely a representation by one contracting party to another. This was a statement of the basis of a relationship between insurer and insured as to the resolution of the claim, a relationship founded upon the utmost good faith, being a relationship in which the adjustment of the claim henceforth would involve co-operation, trust and openness. To express the matter thus can be seen to invoke threads of considerations of promissory or equitable estoppel as well as conventional estoppel. This, perhaps, reflects the difference of approach of Robert Goff J and the Court of Appeal in the *Texas Bank* case (*Amalgamated Investment and Property Co Ltd (In Liq) v Texas Commerce International Bank Ltd* [1982] 1 QB 84). Robert Goff J (as he explained 20 years later in his speech in *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 40) hesitated to use estoppel by convention and relied upon equitable estoppel: [1982] 1 QB at 106–108. The members of the Court of Appeal, on the other hand, expressed themselves by reference to notions underlying estoppel by convention: [1982] 1 QB at 121–122 (Lord Denning MR), at 126 (Eveleigh LJ) and at 131 (Brandon LJ).

324 The overlap and intertwining of the applications of those two doctrines, having their sources in equity and the common law, is not to be seen as a product of some inappropriate fusion or mixing of distinct principles. One can analyse the matter by reference to equitable principles and take account of the considerations that reinforce the underlying equities that would otherwise be important for the common law sourced doctrine of estoppel by convention.

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. The relationship and mutual affairs were ones which involved mutual utmost good faith, and which provided the insurer with 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.

327 This relationship, so conventionally based in accordance with the solemn and considered statement of the insurer in May 2017, lasted for over a year until the insurer resiled from this position by its letter of 28 May 2018.

328 It was submitted that the 28 May 2018 letter was in accordance with the 9 May 2017 email. I reject that. The 9 May 2017 email said the claim would be paid according to the policy: not that it would be paid by an offer that the insurer said was in accordance with the policy, and if such offer were not acceptable to the insured, the insurer would pay nothing by reverting to rights of relief for breach of the duty of disclosure by reliance on s 28(3), which it had said it would not do. The insurer was plainly changing its position and resiling from what it had stated a year before.

329 It was submitted that the combative attitude of LMI Legal in the period leading up to the May 2018 letter and the reliance by Delor Vue on its own claims manager undermined any notion of trust and confidence, and so undermined any estoppel. I reject that submission. The estoppel was not founded on Delor Vue trusting SCI and Allianz to act in its (Delor Vue's) interests. It was based on reliance upon a statement, a state of affairs, and an underlying relationship existing, that the insurer was liable under the terms of the policy to pay that which it was contractually obliged to pay. This did not mean that Delor Vue should not look to its own interests. It did not disentitle or discountenance a clear and, perhaps, a forceful statement of the position of those interests. Nothing done by Delor Vue or its advisors made it any more just or reasonable for SCI and Allianz to resile from its stated position of a year earlier. If there was a disagreement as to how the policy applied to the claim that could be resolved in an appropriate forum of dispute resolution.

330 Within the exchange there was an assertion by the applicant of an entitlement to be free of some of the exclusions. I have found that the 9 May 2017 email was not a clear statement to that effect. That case has been abandoned. That position of asserted right did not entitle the insurer to resile from the fundamental clarity of the position it had taken: cover was granted according to the terms of the policy.

331 The clearest representation of intention of the grant of cover and of future conduct was made in May 2017. It was relied upon by the parties for a year as the basis of a relationship involving good faith and co-operation. It founded, for instance, the entitlement of the insurer to adjust the claim, to enter the property whenever it needed to, and to propose to sue a third party in furtherance of its subrogated rights. It meant that the insured 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).

332 A matter of relevance is the extent to which one can point to some detriment or harm that can be seen to flow from the change of position as a source of prejudice: *Grundt v Great Boulder Proprietary Gold Mines Limited* [1937] HCA 58; 59 CLR 641 at 674–675 (Dixon J). This applies to promissory estoppel: *Legione v Hateley* [1983] HCA 11; (1983) 152 CLR 406 at 437; *Delaforce v Simpson-Cook* [2010] NSWCA 84; 78 NSWLR 483 at 491 [43].

333 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.

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.

335 The equitable estoppel and relief arising from equitable principles are not limited to removing or reversing, by the minimum equity necessary, the precisely-weighted prejudice or detriment suffered: *Giumelli* 196 CLR at 120–125; *Delaforce* 78 NSWLR at 485–486 and 493–494. The correct way to approach the matter does not involve measuring out equitable relief by the

teaspoonful to reach some asserted equality with the measured detriment: *Giumelli* 196 CLR at 123–125 [40]–[48]. 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: see the citations in *Delaforce* 78 NSWLR at 485 [3] referred to below. I would approach the matter as I expressed the question in *Delaforce* 78 NSWLR at 485–486 [3]–[5] (with the express agreement of Giles JA at 486 [6]):

> I agree in particular with Handley AJA that the reasons of Gleeson CJ, McHugh J, Gummow J and Callinan J in *Giumelli v Giumelli* (1999) 196 CLR 101 appear to remove as a governing principle in the relief to be granted in equitable or proprietary estoppel cases the notion of enforcement or vindication only of the "minimum equity": see *Giumelli* (at [40]-[48]). That, of course, does not make irrelevant matters that can assuage the detriment brought about by the resiling from the representation or encouragement by the party concerned. It does mean, however, that relief in such cases is not to be measured by weighing detriment too minutely in order that it be converted into some equivalent of cash or kind, as if one were measuring the consideration for a commercial bargain. Equity will look at all the relevant circumstances that touch upon the conscionability (or not) of resiling from the encouragement or representation previously made, including the nature and character of the detriment, how it can be cured, its proportionality to the terms and character of the encouragement or representation and the conformity with good conscience of keeping a party to any relevant representation or promise made, even if not contractual in character. Equity has also had a place in keeping parties to representations or promises: see for example, *Burrowes v Lock* (1805) 10 Ves Jr 470; 32 ER 927; *Horn v Cole* 51 NH 287; 12 Am Rep 111 (1868); S W Symons (ed), J N Pomeroy, *A Treatise on Equity Jurisprudence* 5th ed, Vol 3 (1941) San Francisco, Bancrof-Whitney at 179-188 [802]-[803]; R Meagher, J Heydon and M Leeming, *Meagher, Gummow and Lehane's Equity: Doctrine and Remedies* 4th ed (2002) Sydney Butterworth LexisNexis at 556-560 [17-065]-[17-070] and 567-568 [17-110].
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> Proportionality of the claimed interest or remedy to the prejudice or detriment is undeniably a relevant consideration, and sometimes of considerable importance. It should not, however, be transformed into a necessary constitutive element of a cause of action to be pleaded or proved by the party seeking relief. To do so would elevate one consideration above others, and in particular above the importance of making good an expectation by encouragement or representation: *Plimmer v The Mayor, Councillors and Citizens of the City of Wellington* (1884) LR 9 App Cas 699 at 713-714; *Riches v Hogben* [1985] 2 Qd R 292; *Giumelli* (at [10] and [35]). It would tend to equate the analysis to one requiring that the party encouraged receive no more than it can prove that it suffered in detriment. This would see the equity become one of compensation for proved equivalent detriment. The equity is a broader one based on the just and conscionable satisfaction in appropriate fashion of the equity arising from the expectation created in another by encouragement or representation. As Handley AJA says, the role of proportionality is better understood, in a doctrine dealing with the legitimacy or otherwise of resiling from an encouragement or representation that has created an expectation, as assisting in an assessment whether what is claimed or contemplated to be granted is disproportionate or unjust in all the circumstances.

> 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) 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.

336 This approach accords with the approach of the majority judgments in *Verwayen,* cited, discussed and implicitly approved in *Giumelli* 196 CLR at 123 [42], 124 [43] and [44] by Gleeson CJ, McHugh, Gummow and Callinan JJ, and in particular with the expression of the matter by Deane J in *Verwayen* 170 CLR at 443 and 445, cited in *Giumelli* 196 CLR at 123 [42]:

> Prima facie, the operation of an estoppel by conduct is to preclude departure from the assumed state of affairs. It is only where relief framed on the basis of that assumed state of affairs would be inequitably harsh, that some lesser form of relief should be awarded.
>
> …
>
> [T]he question whether departure from the assumption would be unconscionable must be resolved not by reference to some preconceived formula framed to serve as a universal yardstick but by reference to all the circumstances of the case, including the reasonableness of the conduct of the other party in acting upon the assumption and the nature and extent of detriment which he would sustain by acting upon the assumption if departure from the assumed state of affairs was permitted.

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.

338 The letter of 9 May 2017 did not refer to misrepresentation, only non-disclosure. The absence of any such reference is a testament to the absence of any realisation of any misrepresentation. The records of SCI of the events of February 2017 were known to those parties on 9 May 2017. The senior underwriter (Mr Iconomidis) was a recipient of the 9 May 2017 email. By 9 May 2017, Delor Vue had supplied the adjuster and so SCI with all information that was relevant. There could be no doubt that SCI and so Allianz was fully cognisant of all relevant facts as at May 2017 about the underwriting of this risk. It is to be inferred that it was only during the trawling through of records by Holman Webb and Mr Tsoukatos or Mr Iconomidis in 2018 that the misrepresentation point was thought up. In my view, no distinction should be made between the non-disclosure and misrepresentation cases at least for the estoppel case. The insurer had all the knowledge about the underwriting, the claim and the history of the soffits and eaves, and it represented, in effect promised, that cover was confirmed, and that it would adjust the claim in accordance with the policy terms. It should be held to that representation or promise.

Waiver

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.

340 Thus, notwithstanding the circumstances of the applicability of the doctrine of estoppel, and bearing in mind the caution to be observed in any assertion of taxonomical clarity in this field, to be derived from consideration of *Agricultural and Rural Finance* 238 CLR at 583–601 [40]–[93], I would also conclude that by May 2018 Allianz had waived any entitlement to assert a position inconsistent with that taken by it in the email of 9 May 2017.

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. Apparently no one had lighted upon the misrepresentation argument or any apparent merit in it. I have concluded that the insurer is estopped from resiling from the clear position that the claim would be honoured and indemnity provided subject to the terms of the policy. That conclusion is premised on the injustice of resiling from that position in all the circumstances, including the relevant detriment. 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. Does it extend to prevent the misrepresentation case? In my view, yes. The choice was made. Fairness (see *Immer* 182 CLR at 41) requires that the insurer be held to the choice. The insurer knew of the circumstances of the underwriting. It focused only on the cognate issue of non-disclosure which, in effect, was the other side of the coin of the asserted misrepresentation. Thus, I would hold the insurer to the choice it made to confirm cover in accordance with the terms of the policy by the principle of waiver, whereby the insurer is taken to have waived any right to assert relief from the operation of s 28(3) of the Act.

Good faith

342 The above conclusion is reinforced by the separate consideration of the conduct of Allianz in 2018 in resiling from its earlier stated position, as a breach of the obligation of good faith as

contained in s 13 of the Act. The obligation of good faith is as the statute says the "utmost good faith". A lack of honesty is not a prerequisite. In *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* [2007] HCA 36; 235 CLR 1 three judgments of the Court dealt with the matter. Chief Justice Gleeson and Crennan J said the following at 235 CLR 12 [15]:

> **We accept the wider view of the requirement of utmost good faith adopted by the majority in the Full Court, in preference to the view that absence of good faith is limited to dishonesty.** In particular, we accept that utmost good faith may require an insurer to act with due regard to the legitimate interests of an insured, as well as to its own interests. The classic example of an insured's obligation of utmost good faith is a requirement of full disclosure to an insurer, that is to say, a requirement to pay regard to the legitimate interests of the insurer. Conversely, an insurer's statutory obligation to act with utmost good faith may require an insurer to act, **consistently with commercial standards of decency and fairness,** with due regard to the interests of the insured. Such an obligation may well affect the conduct of an insurer in making a timely response to a claim for indemnity.
>
> (Emphasis added and footnotes omitted.)

343 Justices Callinan and Heydon said at 235 CLR 77–78 [257]:

> At the outset we should say that we agree with the Chief Justice and Crennan J that a lack of utmost good faith is not to be equated with dishonesty only. The analogy may not be taken too far, but the sort of conduct that might constitute an absence of utmost good faith may have elements in common with an absence of clean hands according to equitable doctrine which requires that a plaintiff seeking relief not himself be guilty of tainted relevant conduct. We have referred to the doctrine of clean hands because, as with another equitable doctrine, that he who seeks equity must do equity, it invokes notions of reciprocity which are of relevance here. **That is not to say that conduct falling short of actual impropriety might not constitute an absence of utmost good faith of the kind which the Insurance Act demands. Something less than that might well do so.** Utmost good faith will usually require something more than passivity: it will usually require affirmative or positive action on the part of a person owing a duty of it. It is not necessary, however for the purposes of this case, to attempt any comprehensive definition of the duty, or to canvass the ranges of conduct which might fall within, or outside s 13 of the Insurance Act.
>
> (Emphasis added.)

344 Justice Kirby (in dissent) said the following about good faith at 235 CLR 42 [130], 43 [131] and 45 [139]:

> No one doubts that the absence of honesty on the part of an insurer (or insured) will, if proved, attract the provisions of s 13 of the Act. However, this does not mean that a want of honesty is a universal feature of a want of the utmost good faith in this context.
>
> …
>
> In my view, the **criteria of dishonesty, caprice and unreasonableness more accurately express the ambit of what constitutes a breach of s 13 of the Act.**
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> …

> In particular, the broad view which the Full Court majority took concerning the operation of s 13 of the Act is one that this Court should endorse. It sets the correct, desirable and lawful standard for the efficient, reasonably prompt, candid and business-like processing of claims for insurance indemnity in this country.
>
> (Emphasis added and footnotes omitted.)

345 The views of the Full Court as to the breadth of the obligation, with which Gleeson CJ and Crennan J, and Kirby J agreed, were set out by Emmett J (with whose reasons Moore J agreed) in *AMP Financial Planning Pty Ltd v CGU Insurance Ltd* [2005] FCAFC 185; 146 FCR 447 at 475–476 [87] and [89]–[91]:

> 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.**
>
> **…**
>
> 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, for example, *Kelly v New Zealand Insurance Ltd* (1996) 130 FLR 97 at 111-112).
>
> A failure to make a prompt admission of liability to meet a sound claim for indemnity and to make payment promptly may be a failure to act with the utmost good faith on the part of an insurer. Of course, where the insurer is awaiting details that are necessary for the making of a decision whether to accept liability to indemnify or to determine the quantum of its liability, the position would be different (see *Moss v Sun Alliance Australia Ltd* (1990) 55 SASR 145 at 154). A failure by an insurer to make and communicate within a reasonable time a decision of acceptance or rejection of a claim for indemnity, by reason of negligence or unjustified and unwarrantable suspicion as to the bona fides of the claim by the insured, may constitute a failure on the part of the insurer to act towards the insured with the utmost good faith in dealing with the claim.
>
> Putting it another way, acting with *utmost* good faith involves more than merely acting honestly: Otherwise, the word utmost would have no effect. Failure to make a timely decision to accept or reject a claim by an insured for indemnity under a policy can amount to a failure to act towards the insured with the utmost good faith, even if the failure results not from an attempt to achieve an ulterior purpose but results merely from a failure to proceed reasonably promptly when all relevant material is at hand, sufficient to enable a decision on the claim to be made and communicated to the insured (see, eg, *Gutteridge v Commonwealth*, unreported, Supreme Court of Queensland, Ambrose J, 25 June 1993).
>
> (Emphasis added.)

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. 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.

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.

348 The insurer sought to say that the applicant had also shown a lack of good faith by its reliance on the argument that the exclusions had been waived. That this was a mistaken or ambitious claim can be accepted. It was in no way dishonest; nor was it lacking in commercial decency or fairness. It certainly did not entitle the insurer to resile from its representation, in effect a promise, of May 2017.

349 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.

350 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.

Relief

351 The questions in the orders of 10 May 2019, set out at [4] above, strictly lead to the answers:

(a) the respondent had prior to 9 May 2017 a right to reduce its liability for the claim to nil under s 28(3) of the Act; and

(b) yes, by reason of estoppel, waiver and if necessary, an injunction to restrain conduct to put into effect a breach of the duty of the utmost good faith in s 13 of the Act, the respondent is now unable to rely upon s 28(3) of the Act.

352 The appropriate substantive relief may be by way of declaratory relief. Subject to the parties being given an opportunity to address the terms of the orders, the orders that I would propose making would be as follows:

1. In the circumstances that have happened the Court declares that:

(a) In failing before the entry into the contract of insurance with the respondent to disclose to SCI or the respondent the known defects concerning soffits and

eaves, the applicant breached its duty of disclosure under s 21(1)(b) of the *Insurance Contracts Act 1984* (Cth) (**the Act**).

(b) Subject to the declarations in 1(c), 1(d) and 1(e) below, as at 8 May 2017, the respondent was entitled to a remedy under s 28(3) of the Act, in particular the remedy of reducing its liability to nil for the claim made consequent on damage caused to the applicant's property by Tropical Cyclone Debbie in March 2017.

(c) The respondent is estopped from resiling from the representation made by email on 9 May 2017 that the claim would be honoured and indemnity provided, such that the mutual rights of the parties and the claim made by the applicant referred to in declaration (1)(b) were to be assessed and resolved 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.

(d) By 28 May 2018, the respondent 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 the respondent that the claim would be honoured and indemnity provided in accordance with the terms of the policy.

(e) In seeking to resile from the representation made by email on 9 May 2017 and in seeking to rely upon the non-disclosure of the applicant, the respondent, contrary to s 13 of the Act, failed to act towards Delor Vue in relation to the resolution of the claim with the utmost good faith.

(f) The mutual rights and obligations of the applicant and respondent in connection with the claim under the policy made by the applicant concerning the damage to the applicant's property caused by Cyclone Debbie in March 2017 fall to be adjusted and determined by reference to the terms of the said policy, and not by reference to any asserted non-disclosure or misrepresentation.

2. The Court orders that:

(a) The matters the subject of declaration 1(f) be referred to a referee for delivery of a report by 31 December 2020, subject to further directions by the Court.

(b) The respondent pay the costs of the applicant.

353 Given the way the case was run by the applicant, it is to be taken to have abandoned any case as to waiver or estoppel concerning reliance on policy exclusions. The declarations set out above should be understood to incorporate that abandonment.

I certify that the preceding three hundred and fifty-three (353) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop.

Associate:

Dated: 6 May 2020