

# FEDERAL COURT OF AUSTRALIA

## Australian Securities and Investments Commission v Youi Pty Ltd [2020]

### FCA 1701

File number: QUD 108 of 2020

Judgment of: **ALLSOP CJ**

Date of judgment: 26 November 2020

Catchwords: **INSURANCE** – where plaintiff alleges that the defendant insurer failed to handle claim made under a home building and contents insurance policy with full and frank disclosure, fairness, and in a timely manner – where plaintiff seeks declaratory relief in respect of alleged breaches by the insurer of the duty of utmost good faith in contravention of s 13 of the *Insurance Contracts Act 1984* (Cth) – where insurer has admitted several breaches of the duty of utmost good faith – whether insurer’s conduct should sound in the making of one or multiple declarations

Legislation: *Federal Court of Australia Act 1976* (Cth) s 21  
*Insurance Contracts Act 1984* (Cth) s 13

Cases cited: *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* [2007] HCA 36; 235 CLR 1  
*Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd (No 2)* [2020] FCA 588; 379 ALR 117  
*Rural Press Ltd v Australian Competition & Consumer Commission* [2003] HCA 75; 216 CLR 53

Division: General Division

Registry: New South Wales

National Practice Area: Commercial and Corporations

Sub-area: Commercial Contracts, Banking, Finance and Insurance – Insurance List

Number of paragraphs: 71

Date of last submissions: 28 August 2020

Date of hearing: Determined on the papers

Counsel for the Plaintiff: Mr S Donaldson SC with Mr D Luxton and Mr A Ounapuu  
Solicitor for the Plaintiff: Johnson Winter & Slattery  
Counsel for the Defendant: Mr J McKenna QC with Ms N Pearce  
Solicitor for the Defendant: King & Wood Mallesons

# ORDERS

QUD 108 of 2020

**BETWEEN:**                    **AUSTRALIAN SECURITIES AND INVESTMENTS  
COMMISSION**  
Plaintiff

**AND:**                         **YOUI PTY LTD ACN 123 074 733**  
Defendant

**ORDER MADE BY:**   **ALLSOP CJ**

**DATE OF ORDER:**   **26 NOVEMBER 2020**

## **THE COURT DECLARES THAT:**

1.     The Defendant (**Youi**) breached the requirements of s 13 of the *Insurance Contracts Act 1984* (Cth), on five (5) occasions, in that it failed to act towards the insured party (**Insured**), in respect of each matter arising under or in relation to the contract of insurance (**Policy**), with the utmost good faith, by reason of each of the following:
  - (a)     from 19 May 2017 to in or about late December 2017 or January 2018, Youi failed to take reasonable steps to:
    - (i)     inform the Insured that the contractor it proposed to carry out repairs to the Insured's property (**Property**), ProBuild Australia Pty Ltd (ABN 91 114 158 744) (**PA**), had been the subject of numerous complaints to Youi in respect of delays and the quality of its work;
    - (ii)    inform the Insured that PA was not a repairer acceptable to Youi and/or a repairer from Youi's network of recommended repairers, for the purposes of, and, as required by, the Policy;
    - (iii)   afford the Insured an opportunity to request the appointment of a repairer (other than PA) from Youi's network of recommended repairers, as required by the Policy; and
    - (iv)    seek to terminate the engagement of PA, notwithstanding the matters in sub-paragraphs (i) to (iii) above,

- (b) from 24 May 2017 to on or about 29 September 2017, Youi failed to take reasonable steps to ensure that any builder commenced the repairs to the Property;
- (c) from on or about 4 October 2017 to at least 15 November 2017, Youi failed to take reasonable steps to effect make safe works to the Property;
- (d) from 2 November 2017 to at least 18 May 2018, Youi failed to take reasonable steps to consider and respond to the formal complaint made by the Insured on 2 November 2017; and
- (e) from 20 February 2018 to 5 April 2018, Youi failed to take reasonable steps to respond to the email the Insured sent to Youi on 20 February 2018 thereby further delaying the completion of the repairs.

**THE COURT ORDERS THAT:**

- 2. Each party file and serve within 14 days written submissions on costs of no more than 3 pages in length.

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

## REASONS FOR JUDGMENT

### ALLSOP CJ:

- 1 This is an application by the plaintiff, the Australian Securities and Investments Commission (**ASIC**), for declaratory relief in respect of alleged breaches by the defendant insurer, Youi Pty Ltd (**Youi**), of the duty of utmost good faith, in contravention of s 13 of the *Insurance Contracts Act 1984* (Cth) (**ICA**). Those allegations relate to Youi's handling of a particular claim made in January 2017 under a home building and contents insurance policy after a severe hail storm in November 2016 damaged the insured's Broken Hill property. In particular, ASIC alleges that Youi failed to handle the insured's claim with full and frank disclosure, fairness, and in a timely matter.
- 2 These allegations are contained in the originating process and concise statement that were filed by ASIC in April 2020. In June 2020, the parties filed a Statement of Agreed Facts and Admissions, which was subsequently amended on two occasions in July 2020 (Amended Statement of Agreed Facts and Admissions) and August 2020 (Further Amended Statement of Agreed Facts and Admissions). For the balance of these reasons, I will refer to the Further Amended Statement of Agreed Facts and Admissions as the **SAFA**.
- 3 In the SAFA, Youi makes several admissions for the purposes of this proceeding. In summary, it was admitted that the ICA applied to the insured's policy, that a breach of the implied term of utmost good faith constituted a breach of the ICA and that, through various failings which will be set out in due course, Youi had failed to act consistently with commercial standards of decency and fairness with due regard to the interests of the insured, thereby breaching the implied term of utmost good faith in contravention of s 13 of the ICA. As a result, the scope of the dispute between the parties lies within a narrow compass, and concerns the number, and precise terms, of the declarations to be made by the Court in the light of Youi's admissions in the SAFA.
- 4 This matter was provisionally set down for oral hearing in September 2020, subject to the Court informing the parties beforehand that it would be dealt with solely on the papers. By the end of August 2020, the Court had received ASIC's submissions, Youi's submissions, and ASIC's reply submissions. Upon reviewing these helpful submissions, I asked my chambers to inform the parties that I was minded to determine the matter on the papers unless Senior Counsel would like an oral hearing. Both parties informed my chambers that they were content for the matter

to be heard on the papers, although I note that Youi requested the opportunity to make short written submissions on costs after the substantive decision had been made.

5 My reasons below are structured as follows: first, I make some preliminary remarks on the implied duty of utmost good faith; secondly, I extract the exact form of the declaratory relief proposed by each party; thirdly, I set out the agreed facts relevant to the declarations sought; and finally, I consider Youi's conduct as a whole in that context to determine the declaratory relief that is appropriate in all the circumstances of this case.

### **The implied duty of utmost good faith**

6 Section 13 of the ICA is relevantly in the following terms:

#### **13 The duty of the utmost good faith**

- (1) A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.
- (2) A failure by a party to a contract of insurance to comply with the provision implied in the contract by subsection (1) is a breach of the requirements of this Act.

7 I had occasion to consider the application of s 13 in *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd (No 2)* [2020] FCA 588; 379 ALR 117. At [342]–[345] of those reasons, I set out the various expressions of the content of the obligation to act with utmost good faith in *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* [2007] HCA 36; 235 CLR 1, as follows:

342 ... 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.**

...

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.)

8 At [347], I noted that the standard contained within s 13 was better illustrated through description of elements and circumstances as opposed to particularised definition:

... 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 ...

9 The expression “commercial standard of decency and fairness” is apt also for the current circumstances. Decency and fairness were not exhibited by Youi in its handling of the insured’s claim without full and frank disclosure, clarity, candour, and timeliness such that the necessary repairs and make-safe works in response to a claim made in January 2017 were not completed until some 22 months later in November 2018. That much has been acknowledged



by Youi through its admissions. This then raises the question of the appropriate form of the declaration or declarations to be made by the Court in response to Youi's conduct falling short of that standard.

### **The parties' proposed declaratory relief**

10 In its originating application filed on 16 April 2020, ASIC claimed the following relief against Youi.

1. A declaration under s 21 of the FCA Act, s 1101B(1)(a)(i) of the Corporations Act, and the inherent or implied jurisdiction of the Court that from 19 May 2017, 1 June 2017 or 29 September 2017 to in or about late December 2017 or January 2018, Youi failed to take reasonable steps to:
  - (a) inform the Insured of the PA Issues;
  - (b) inform the Insured that PA was not a repairer acceptable to Youi and/or a repairer from Youi's network of recommended repairers, for the purposes of, and, as required by, the Recommended Repairer Term of the Policy;
  - (c) afford the Insured an opportunity to request the appointment of a repairer (other than PA) from Youi's network of recommended repairers, as required by the Recommended Repairer Term of the Policy; and or
  - (d) seek to terminate the PA Engagement, notwithstanding PA Issues and or Youi's obligations pursuant to the Policy,

and thereby breached the requirements of the ICA pursuant to s 13(2) of the ICA, in that it failed to comply with the provision requiring each party to the contract of insurance to act towards the other party, in respect of each matter arising under or in relation to the contract of insurance, with the utmost good faith.

2. A declaration under s 21 of the FCA Act, s 1101B(1)(a)(i) of the Corporations Act, and the inherent or implied jurisdiction of the Court that from 5 May 2017 to on or about 4 October 2017, Youi failed to take reasonable steps to ensure that any builder commenced the repairs to the Property, and thereby breached the requirements of the ICA pursuant to s 13(2) of the ICA, in that it failed to comply with the provision requiring each party to the contract of insurance to act towards the other party, in respect of each matter arising under or in relation to the contract of insurance, with the utmost good faith.
3. A declaration under s 21 of the FCA Act, s 1101B(1)(a)(i) of the Corporations Act, and the inherent or implied jurisdiction of the Court that from on or about 4 October 2017 to at least 17 November 2017, Youi failed to take reasonable steps to effect make safe works to the Property, and thereby breached the requirements of the ICA pursuant to s 13(2) of the ICA, in that it failed to comply with the provision requiring each party to the contract of insurance to act towards the other party, in respect of each matter arising under or in relation to the contract of insurance, with the utmost good faith.
4. A declaration under s 21 of the FCA Act, s 1101B(1)(a)(i) of the Corporations

Act, and the inherent or implied jurisdiction of the Court that from 2 November 2017 to at least 18 May 2018, Youi failed to take reasonable steps to consider and respond to the formal complaint made by the Insured on 2 November 2017, and thereby breached the requirements of the ICA pursuant to s 13(2) of the ICA, in that it failed to comply with the provision requiring each party to the contract of insurance to act towards the other party, in respect of each matter arising under or in relation to the contract of insurance, with the utmost good faith.

5. A declaration under s 21 of the FCA Act, s 1101B(1)(a)(i) of the Corporations Act, and the inherent or implied jurisdiction of the Court that from 20 February 2018 to 5 April 2018, Youi failed to take reasonable steps to respond to the email the Insured sent to Youi on 20 February 2018 thereby further delaying the completion of the repairs, and thereby breached the requirements of the ICA pursuant to s 13(2) of the ICA, in that it failed to comply with the provision requiring each party to the contract of insurance to act towards the other party, in respect of each matter arising under or in relation to the contract of insurance, with the utmost good faith.
6. Alternatively, a declaration under s 21 of the FCA Act, s 1101B(1)(a)(i) of the Corporations Act, and the inherent or implied jurisdiction of the Court that from 5 May 2017 to 18 May 2018, by the failures referred to in paragraphs 1 to 5 above, Youi breached the requirements of the ICA pursuant to s 13(2) of the ICA, in that it failed to comply with the provision requiring each party to the contract of insurance to act towards the other party, in respect of each matter arising under or in relation to the contract of insurance, with the utmost good faith.

11 The term “PA Issues” in the relief claimed is defined as the facts and matters in paras 9, 10 and 12 of the concise statement filed on 16 April 2020, which are in the following terms:

- 9 On or around 5 May 2017, having received a series of complaints made by other insureds regarding repairs carried out by PA in the Broken Hill area, Youi commenced an audit of PA’s allocated repairs in the Broken Hill area. Further to the audit, on or around 19 May 2017 Youi determined to suspend PA in the Broken Hill area as PA was not meeting the requirements of, or Youi’s expectations as to, the PA Service Agreement. The effect of this was that no new work was to be allocated to PA and existing work, where PA had not yet commenced repairs, was being re-allocated to The Roof Company Pty Ltd (ACN 126 346 236) (**RC**).
- 10 On 1 June 2017, Youi resolved internally to cancel the PA Engagement if PA had neither ordered the required materials nor commenced the works.
- ...
- 12 As at 29 September 2017, PA had not commenced repairs to the Property. On that day, Youi notified PA that Youi would no longer engage PA for works in any region beyond the term of the PA Service Agreement, which ended on 5 October 2017.

12 The primary relief sought by ASIC in this case is five separate declarations that Youi breached s 13(2) of the ICA by reason of its conduct in handling the insured’s claim. Annexed to ASIC’s

written submissions filed on 31 July 2020 is a set of proposed orders, which closely reflects the first five paragraphs of the relief claimed in the originating application, as follows:

1. That from 19 May 2017 to in or about late December 2017 or January 2018, Youi failed to take reasonable steps to:
  - (a) inform the Insured that the contractor it proposed to carry out repairs to the Insured's property, ProBuild Australia Pty Ltd (ABN 91 114 158 744) (**PA**), had been the subject of numerous complaints to Youi in respect of delays and the quality of its work;
  - (b) inform the Insured that PA was not a repairer acceptable to Youi and/or a repairer from Youi's network of recommended repairers, for the purposes of, and, as required by, the Recommended Repairer Term of the Policy;
  - (c) afford the Insured an opportunity to request the appointment of a repairer (other than PA) from Youi's network of recommended repairers, as required by the Recommended Repairer Term of the Policy; and
  - (d) seek to terminate the engagement of PA, notwithstanding the matters in sub-paragraphs (a) to (c) above,

and thereby breached the requirements of the *Insurance Contracts Act 1984* (Cth) (**ICA**) pursuant to s 13(2) of the ICA, in that it failed to comply with the provision requiring each party to the contract of insurance to act towards the other party, in respect of each matter arising under or in relation to the contract of insurance, with the utmost good faith.

2. That from 24 May 2017 to on or about 29 September 2017, Youi failed to take reasonable steps to ensure that any builder commenced the repairs to the Property, and thereby breached the requirements of the ICA pursuant to s 13(2) of the ICA, in that it failed to comply with the provision requiring each party to the contract of insurance to act towards the other party, in respect of each matter arising under or in relation to the contract of insurance, with the utmost good faith.
3. That from on or about 4 October 2017 to at least 15 November 2017, Youi failed to take reasonable steps to effect make safe works to the Property, and thereby breached the requirements of the ICA pursuant to s 13(2) of the ICA, in that it failed to comply with the provision requiring each party to the contract of insurance to act towards the other party, in respect of each matter arising under or in relation to the contract of insurance, with the utmost good faith.
4. That from 2 November 2017 to at least 18 May 2018, Youi failed to take reasonable steps to consider and respond to the formal complaint made by the Insured on 2 November 2017, and thereby breached the requirements of the ICA pursuant to s 13(2) of the ICA, in that it failed to comply with the provision requiring each party to the contract of insurance to act towards the other party, in respect of each matter arising under or in relation to the contract of insurance, with the utmost good faith.
5. That from 20 February 2018 to 5 April 2018, Youi failed to take reasonable steps to respond to the email the Insured sent to Youi on 20 February 2018

thereby further delaying the completion of the repairs, and thereby breached the requirements of the ICA pursuant to s 13(2) of the ICA, in that it failed to comply with the provision requiring each party to the contract of insurance to act towards the other party, in respect of each matter arising under or in relation to the contract of insurance, with the utmost good faith.

13 For its part, Youi contends that its conduct should instead sound in the making of a single declaration. The proposed declaration, annexed to Youi's submissions filed on 17 August 2020, is in the following terms:

1. The Defendant breached the requirement of the *Insurance Contracts Acts* [sic] 1984 (ICA) as contemplated by section 13(2) of the ICA in that it failed to comply with the provision implied into the contract of insurance by section 13(1) ICA which required it to act towards the Insured, in respect of each matter arising under or in relation to the contract of insurance, with utmost good faith, by reason of the following conduct:
  - a. From 21 July 2017 to in or about late December 2017 or January 2018, where the Defendant had received multiple complaints about PA which it had proposed to carry out repairs to the Insured's property and, following internal investigation had suspended PA from new work in the region, and was aware that PA had (without explanation) failed to commence the repairs in accordance with its own proposed timeline, the Defendant failed to take reasonable steps to:
    - i. enquire with PA as to the status of those repairs;
    - ii. convey to the Insured such material information about PA's suitability to undertake the repair work as the Defendant lawfully was able to disclose, such as to allow the Insured to express a preference as to how to address the situation, which may have included whether or not the Defendant should seek to obtain a mutually agreeable termination of the engagement with PA in respect of the Property; and
    - iii. seek to give effect to any preference indicated by the Insured,
  - b. From 21 July 2017 to on or about 29 September 2017, the Defendant failed to take reasonable steps to more closely monitor, supervise and manage PA to ensure the timely commencement of repairs to the Property either by PA or by another service provider;
  - c. From on or about 6 October 2017 to at least 15 November 2017, where the Defendant was aware of the matters the subject of (a) and (b) above, the Defendant failed to take reasonable steps to effect make safe works to the Property;
  - d. Where the Defendant was aware of the matters the subject of (a) to (c) above, the Defendant failed to respond in a meaningful way to the written complaint it received from the Insured on 2 November 2017;
  - e. From 20 February 2018 to 5 April 2018, where the Defendant was aware of the matters at (a) to (d) above, the Defendant failed to take reasonable steps to respond to the email it received from the Insured on 20 February 2018, and in so doing further delayed the completion of the repairs.

14 In its reply submissions filed on 28 August 2020, ASIC reiterated that it sought the five separate declarations set out above at [11] as its primary form of relief. In addition, ASIC annexed a competing proposed order in the event that the Court was minded to make a single declaration, which reads as follows:

1. The Defendant (**Youi**) breached the requirements of s 13 of the *Insurance Contracts Act 1984* (Cth), on five (5) occasions, in that it failed to act towards the insured party (**Insured**), in respect of each matter arising under or in relation to the contract of insurance (**Policy**), with the utmost good faith, by reason of each of the following:
  - (a) from 19 May 2017 to in or about late December 2017 or January 2018, Youi failed to take reasonable steps to:
    - (i) inform the Insured that the contractor it proposed to carry out repairs to the Insured's property (**Property**), ProBuild Australia Pty Ltd (ABN 91 114 158 744) (**PA**), had been the subject of numerous complaints to Youi in respect of delays and the quality of its work;
    - (ii) inform the Insured that PA was not a repairer acceptable to Youi and/or a repairer from Youi's network of recommended repairers, for the purposes of, and, as required by, the Policy;
    - (iii) afford the Insured an opportunity to request the appointment of a repairer (other than PA) from Youi's network of recommended repairers, as required by the Policy; and
    - (iv) seek to terminate the engagement of PA, notwithstanding the matters in sub-paragraphs (i) to (iii) above,
  - (b) from 24 May 2017 to on or about 29 September 2017, Youi failed to take reasonable steps to ensure that any builder commenced the repairs to the Property;
  - (c) from on or about 4 October 2017 to at least 15 November 2017, Youi failed to take reasonable steps to effect make safe works to the Property;
  - (d) from 2 November 2017 to at least 18 May 2018, Youi failed to take reasonable steps to consider and respond to the formal complaint made by the Insured on 2 November 2017; and
  - (e) from 20 February 2018 to 5 April 2018, Youi failed to take reasonable steps to respond to the email the Insured sent to Youi on 20 February 2018 thereby further delaying the completion of the repairs.

### **The background facts**

15 The agreed facts and admissions set out in the SAFA, the parties' submissions and the relief sought are pellucidly structured around five so-called 'failings' in Youi's handling of the insured's claim, being the PA Issue Failings, the Commencement Delay Failings, the Make-Safe Failings, the Complaint Failings, and the Completion Delay Failing. With respect to the

fourth of these categories, I note that the parties were unable to agree a formulation of the alleged failing or failings: ASIC's submissions use "Complaint Failings" whereas Youi's submissions employ the phrase "the failure to respond to the 2 November 2017 Complaint with clarity and candour". Where I use the expression "Complaint Failings" in the balance of these reasons, I do so for convenience and I should not be taken by that choice alone to prefer one characterisation of the relevant conduct over the other.

- 16 In setting out below the background facts by reference to the SAFA, I have adopted the same structure as that followed by the parties. It is convenient to commence with a consideration of the insured and the policy before turning to the events and conduct relevant to each failing or set of failings.

### *The Insured and the Policy*

- 17 In or about November 2012, Ms Sacha Murphy took out a policy for home building and contents insurance with Youi in respect of her home in Broken Hill (**Property**), under which Mr Darren Orr was an Authorised Person (for present purposes, Ms Murphy and Mr Orr are hereafter together and individually referred to as **the Insured**). The policy was renewed annually thereafter.
- 18 On 14 October 2015, Youi sent the Insured a letter confirming that the policy would be renewed with an effective renewal date of 16 November 2015 and an expiry date of 15 November 2016 (**Policy**). A policy schedule and product disclosure statement dated 1 July 2015 was enclosed with the letter. The following text was contained in the product disclosure statement under the heading "Choice of repairer" (CB, 261):

If your claim is accepted and your item can be repaired, at our option, we will arrange repairs with a repairer who is acceptable to us.

Wherever possible, we will offer you a choice of repairer from our network of recommended repairers.

You may choose another repairer, however we may not authorise repairs. If we do not authorise repairs we will pay you the fair and reasonable cost of repairs as determined by us, considering a number of factors, including comparison quotes from an alternate repairer we choose and our Quality Guarantee will not apply.

You must choose a repairer that is appropriately licensed and authorised by law to conduct the required repairs.

The offer of a choice of repairer from Youi's network of recommended repairers wherever possible is hereafter referred to as the **Recommended Repairer Term**.

19 There was also a term implied into the Policy, pursuant to s 13(1) of the ICA, that Youi was required to act toward the Insured, in respect of any matter arising under or in relation to the Policy, with the utmost good faith. That term is hereafter referred to as the **Implied Term of Utmost Good Faith**.

*The PA Issue Failings*

20 On 11 October 2016, Youi entered into a service agreement with ProBuild Australia Pty Ltd (PA), pursuant to which PA agreed to provide, as a member of Youi’s network of recommended repairers, services including home building repairs, home building replacement, assessments, inspections, re-inspections, re-assessments, rectifications and catastrophic damage repairs in accordance with the terms and conditions of that service agreement. The PA service agreement was for a term of twelve months commencing on 5 October 2016.

21 A month later, on 11 November 2016, the Broken Hill area was hit by a severe hail storm that damaged the Property and, in particular, the roof of the Property, the air conditioning unit, the veranda and some contents items. An estimated 52,387 claims made across parts of NSW, Victoria and South Australia, with an approximate loss value of \$597 million, were associated with the hail storm, which was subsequently characterised by the Insurance Council of Australia as a catastrophe. As at 11 November 2016, Youi had two active builder service providers in the Broken Hill area and PA was added to Youi’s list as a third builder service provider in the area.

22 On 25 January 2017, the Insured made a claim under the Policy (**Claim**), in response to which Youi formally requested on 27 January 2017 that PA assess the damage to the Property and provide a quotation to rectify the damage. The Building Assessment Request made to PA contained the following incident description and additional instructions (CB, 269–270):

Incident description

THERE IS HAIL DAMAGE OVER THE WHOLE ROOF, THERE ARE HOLES IN THE ROOF. THE SHED IS FULL OF HAIL DENTS AND THERE ARE HOLES IN THE SHED WHERE IT HAS GONE THROUGH THE ALSONITE. THE VERANDAH HAS HOLES IN THE ALSONITE. IT HAS SMASHED THE REVERSE CYCLE AIR CONDITIONER. THE ROOF IS A TINROOF. THE TRAMPOLINE GOT SMASHED AND WE REPLACED IT, THE HAIL WENTTHROUGH THE ROOF AND HIT THE SURFACE MAC AIR. I HAVE RECEIPTS FOR THE REPAIR OF THE MAC AIR. THE HAIL HAS BROKEN THROUGH AND LEAKED THROUGH THE CEILING AND ON THE HALLWAY CEILING.

...

Additional instructions

Please attend and confirm if damage is consistent with incident description.

Please provide detailed report on causation of resultant damage together with photographs.

Please report on any maintenance/defect issues which may have contributed to the loss.

Please provide a detailed scope of works detailing all resultant damage works required to return property to a pre loss condition.

\*\*\*Please complete applicable Checklist and return with report/quote.\*\*\*

Please book assessment appointment for as soon as possible.

Quote + report to be returned within 3 days or sooner. If this cannot be met please advise us.

- 23 On 2 February 2017, PA inspected the property and emailed its property inspection report to Youi on 10 February 2017 (**PA Inspection Report**). The PA Inspection Report relevantly included the following comments (CB, 304):

While onsite I observed that hail has caused damage to the following items

- Damage to the Main roof
- Damage to the Front veranda
- Damage to the Rear garage
- Damage to the cubby-house roof
- Damage to the Internal hall ceiling
- Damage to a Pvc pipe on the outdoor spa

Water ingress from the area around the evaporative cooler on the roof has caused damaged [sic] the hall ceiling.

Wind has damaged the soffit sheets under the front veranda but can be repaired without replacement

I believe that the damage seen onsite is consistent with hail We believe that the damages claimed should be covered under the insureds policy.

Under those comments was a scope of work providing for repairs to the main roof, rear roof, garage roof, cubby house, spa bath, hallway and front veranda (**Scope of Works**). The quoted amount to complete those works was \$25,778.28.

- 24 On 15 February 2017, Youi accepted the Claim and prepared a home assessment report, which contained the following recommendation (CB, 321):

Due to excessive dents and scratches from the hail storm the integrity of the roofing sheets have been compromised. In order to return the roof to a structurally sound state I would recommend the roofing is replaced.



25 Youi then sent to PA on 26 February 2017 a client repair authority with respect to the Property, which contained the following note (CB, 324):

Please Accept This Authority To Proceed With Repairs. Please Ensure The Customer Is Contacted With [sic] 4 Hours And Advised Of Next Steps To Commence Works Asap.

The client repair authority recorded the total authorised repair costs as \$25,778.28, being inclusive of a \$775 excess.

26 PA emailed the Insured on 3 March 2017. That email relevantly attached a Scope of Works and included the following request (CB, 326):

Please sign and return your Scope Of Works and pay your Excess at your earliest convenience. Once we have received these we will be able to commence repairs.

By 5 May 2017, the Insured had returned a signed copy of the Scope of Works, and remitted the excess under the Policy, to PA.

27 Around that time, Youi commenced an investigation into the authorised claims allocated to PA in the Broken Hill area (**PA Investigation**). That investigation was initiated following Youi's receipt between 6 February 2017 and 3 May 2017 of three complaints from two other insureds regarding the quality of workmanship of, and delays in, repairs being carried out by PA in the Broken Hill area. The following was communicated to PA in an email sent by Youi on 5 May 2017 (CB, 345):

...YOUI has a number of concerns in relation to repairs being carried out in Broken Hill by Pro Build. Feedback being received is of poor communication and delays in repairs...

Please find attached a questionnaire including a list of authorised claims in the region. Please complete the questionnaire providing detailed feedback.

PA completed and returned the questionnaire for the list of authorised claims in the region to Youi later that day.

28 Around a fortnight later, Youi decided to suspend PA as a service provider to Youi in the Broken Hill area. That decision was communicated in an internal Youi email sent on 19 May 2017, which relevantly read as follows (CB, 348):

In relation to claims in Broken Hill either be current or new claims can we please not allocate ... Progroup building until further notice.

Progroup building have been placed on suspend [sic] in the region given we have had a number of complaints regarding works authorised which includes delays in repairs, contractors not being paid or just no plaining [sic] on where the job is at. Procurement

are managing the issues with Progroup directly as result of not meeting our expectations as per our SLA. As such many of the claims authorised where they have not started repair are being re-allocated to the Roof company to complete, regardless if it includes other internal repairs as they hold a builder licence.

A consequence of this decision was that PA was also suspended, for the purposes of the Recommended Repairer Term, from Youi's network of recommended repairers for the Broken Hill area. Following the suspension, on 23 May 2017, Youi received a further letter of complaint from another insured in Broken Hill regarding PA's poor communication, lack of professionalism, inadequate supervision, and sub-standard workmanship.

29 As stated in the 19 May 2017 email, extracted above at [28], as a result of the suspension no new work was to be allocated to PA, and any existing work where repairs had not been commenced by PA would be reallocated as much as possible to a separate contractor, The Roof Company Pty Ltd (RC).

30 On 1 June 2017, an internal message was sent from Mr Rui De Sa to Mr Brett Roberts, both employees of Youi, in which Mr De Sa requested that Mr Roberts confirm PA's progress to determine if the work should instead be reallocated to RC, relevantly as follows (CB, 34):

HI BRETT, BROKEN HILL PROGROUPE CLAIM AUTH. PLEASE CAN YOU CONFIRM IF PROGROUPE HAVE ORDERED ANY MATERIALS OR STARTED WORKS, IF NOT CANCEL AUTH AND ALLOCATE ROOF CO.

Mr Roberts telephoned a representative of PA on 6 June 2017 to make these inquiries. He was advised that PA's site manager had attended the Property on 2 June 2017 to undertake a check measure, but no confirmation as to whether any materials had been ordered was forthcoming. In the same conversation, Mr Roberts asked PA to refrain from ordering any materials.

31 The next day, Mr Roberts received an email from the same PA representative, who advised that materials had been ordered, but not yet delivered, as follows (CB, 358):

Hi Brett,

As per our conversation yesterday on the phone I have contacted our supervisor Matt who attended insured property on Friday 2/6 for a progress inspection. I can confirm he has placed an order for materials and is now waiting the delivery to commence repairs.

32 On 28 June 2017, Youi received from PA a spreadsheet containing details of PA's outstanding work for Youi in the Broken Hill area. In relation to the yet-to-be-commenced work at the Property, the spreadsheet indicated an estimated work start date of 21 July 2017 with the

accompanying comment “Roofing materials ordered, start date to be advised shortly” (CB, 362).

33 PA continued to send Youi weekly updates with the spreadsheet containing the latest information relating to each uncompleted Broken Hill job. The spreadsheet received on 10 July 2020 contained the same estimated start date and comment as that received on 28 June 2017 (CB, 364). In the spreadsheet received on 14 July 2020, the estimated start date remained the same and the comment had been updated to indicate that the Insured had been contacted (CB, 366). However, the spreadsheet received on 21 July 2020 contained no estimated start date for work on the Property (CB, 368).

34 In response to the Insured contacting Youi on 10 August 2017 to report that no works had started, Youi telephoned PA for an update later that day. A representative of PA indicated that she had last spoke with the Insured on 14 July 2017 when she confirmed that repairs would start in mid-September and that the Insured was “ok with this” (CB, 36). Youi next followed up on 5 September 2017, when a start date of 25 September 2017 was confirmed with PA and communicated to the Insured. This was reflected in the Broken Hill jobs update spreadsheet received by Youi from PA on 15 September 2017, with the comment corresponding to the Property reading as follows (CB, 371): “Estimated start date 25/9/17. Insured has been contacted about these dates.” However, the spreadsheet received a week later on 22 September 2017 contained a new comment with a revised estimated start date of 3 October 2017 (CB, 373).

35 The Insured contacted Youi again on 29 September 2017 to advise that PA had not commenced works and that they were not happy with the continued delays. On this occasion, a representative of PA advised that the repairs to the Property would be “definitely starting” on 3 October 2017 (CB, 36). That same day, Youi advised PA that it would not be extending or renewing PA as a member Service Provider beyond the current contract period of the PA service agreement.

### ***The Commencement Delay Failings***

36 The facts set out above at [30]–[35] in relation to the PA Issue Failings are also relevant to the Commencement Delay Failings. The following additional facts provide further context to the consideration of the Commencement Delay Failings.

37 After Youi had confirmed with the Insured on 24 May 2017 that the excess had been paid to PA and that the scope of works had been signed, the Insured emailed Youi on 26 May 2017 with the following initial query as to the estimated date for repairs to commence (CB, 355):

Can we PLEASE get an estimate date on the repairs to the roof as we are just getting excuses from the Builder, it seems we have now gone backwards in the que [sic] of where we were up to.

38 PA commenced repair works to the Property on or about 4 October 2017.

### *The Make-Safe Failings*

39 On or about 4 October 2017, representatives of PA attended the Property and commenced removing the roof, which included removing the solar panels, air conditioning, corrugated iron and capping. Around that time, PA came to the view that further structural works were required for the Property to comply with the most recent building codes, laws and regulations once the work was completed. PA left the Property without effecting make-safe works, either by reattaching the roof sheets that it had removed or by attaching a temporary roof cover.

40 Later on 4 October 2017, PA sent an email to the Insured, attaching an additional scope of works that related to further works to the rear skillion roof and the rear veranda (**Additional Scope of Works**) and an invoice in the amount of \$3675.00 for what was referred to by PA as “private works”. The Additional Scope of Works relevantly stated the following (CB, 376):

Following our visit to yourproperty [sic], please find attached our scope of work with regard to proposed work to your property.

ProBuild Australia requires the following items to be actioned prior to starting repairs...

- **We wish to advise that if you wish to proceed with the proposed works, a payment of 50% of the quoted amount is required prior to works commencing.**

**Attached is a tax invoice for part payment.**

- **After we recieve [sic] the Authority letter and your starting payment, we will contact you to organise a time to commence works.**

The Insured forwarded PA’s 4 October 2017 email to Mr Roberts that day.

41 The Insured sent a further email to Mr Roberts on 4 October 2017, which relevantly read as follows (CB, 380):

Hi Brett,

I have attached the scope of works provided by ProBuild.

I have also attached quote and letter as provided by prebuild in an earlier email.

When yourself i believe come and visted [sic] our house, some months ago, you were very persistent on making sure that the rear area of the roof would have to be brought up to code and that this would happen at the expense of the insurance company and dealt with by the builder. You explained this several times during the visit. It was reiterated that this would most definitely be part of the repair process as they would not be able to proceed without it being brought up to code. I specifically asked regarding to this cost being on ourselves and once again was told that this was 'part of the process of repair' and covered by the insurance claim.

we have been waiting almost 12 months for these works to begin, i understand that there are many houses to be done and have been patient with the continual lies that i have had to deal with from Probuild.

I was told i needed to pay the \$775 so that the works could start within 4 week [sic] ... that was 7 months ago.

Now we are in the predicament that our roof is 1/2 way removed , and there is no way to screw down the old roofing as it has been falling apart as they removed the roof. We are now being barged into a corner and told we need to pay \$1800 or they wont [sic] be back in the morning...

This extra costing needs to be sorted out asap and should be covered by the insurance company. Surely there is a clause to make adjustments to the original quotes...

Please call me ... i need this sorted out asap.

- 42 The next morning, on 5 October 2017, Youi contacted PA for an urgent update on the repair works at the Property. That afternoon, PA provided Youi with an itemised breakdown of the costs of its “private works” quote, which were directed to the batten components of the roof of the Property. Youi contacted PA the following day to advise that the costs breakdown provided was unclear and requested that PA resend a breakdown that clearly itemised the structural works and batten replacement.
- 43 On the evening of 5 October 2017, the Insured advised Youi by phone that “part of the room [sic] is open and it’s about to rain” (CB, 38). Youi then contacted PA and asked them to send someone to the Property to undertake make-safe works by covering the roof with a tarpaulin to prevent further damage. PA did not in fact undertake the make-safe works and did not inform Youi that it had not covered the roof; for its part, Youi made no inquiries as to whether the make-safe works had been performed by PA.
- 44 Via a telephone call on 6 October 2017, Youi was informed of a health risk to the Insured arising from lead contamination at the Property. At all material times, lead dust could and can be found in open water areas, and mixed in with dust, soil, and dirt in locations throughout Broken Hill. During the telephone call on 6 October 2017, Ms Murphy advised Youi that she

was pregnant and was being exposed to high levels of lead while PA had “packed up and left” (CB, 38).

45 On 19 October 2017, Youi emailed to PA a client repair authority which authorised a variation to the original Scope of Works and requested that the repair works proceed as soon as possible with the inclusion of the required additional structural works. The next day, having revisited the Property, PA emailed Youi about further issues with the pre-existing roofing conditions. That email relevantly read as follows (CB, 416):

As repairs at [the Property] have progressed, we have now come across further difficulties with pre-existing roofing conditions.

Please see attached photos of the rear skillion purlins and beams.

[Further details were then provided.]

Due to this unconventional building situation and remedial work, it is likely that the repair costs is going to be significant.

The whole rear skillion is now exposed with all existing battening that were holding down the roof sheeting removed. To now weather proof this roof while negotiations proceed, a makesafe situation will be required. This will need to happen today and charges will apply.

This will allow you time to decide your actions in relation to this roof and framing.

46 Ms Murphy called Youi again on 20 October 2017 to express her concern about the involvement of the Environment Protection Authority (**EPA**) and the health risk to her and her family due to their exposure to lead. In response, Youi authorised the provision of temporary accommodation for the Insured and their family for four days until the “EPA and roof issue” was sorted (CB, 40). Having found their own temporary accommodation for that period, the Insured were reimbursed for the sum incurred in acquiring that temporary accommodation.

47 After sending the email extracted at [45] on 20 October 2017, PA sent a further email to Youi later that day with a costs breakdown for the make-safe works to enclose the roof of the Property temporarily. On 23 October 2017, Youi issued a client repair authority to PA with the comment “Make Safe As Dicussed [sic] 20/10/2014” to authorise this work on the roof (CB, 437). The make-safe works to the roof were inadequately conducted by PA on or around 23 or 24 October 2017, before the Insured and their family returned to the Property on 25 October 2017.

48 On 24 October 2017, the Insured emailed Youi with the results of testing that had been carried out at the Property by the EPA in February and March 2017. That testing, which was unrelated

to the Claim, recommended the replacement of hard mulch, gravel, wood chips, loam, cracker dust, straw and grass around the Property to remove the lead contaminants found onsite.

49 PA emailed Youi on 30 October 2017 with a further variation to the scope of work and noted that further repairs to the Property were on hold as they awaited Youi's further instructions. PA's quote for the additional proposed structural work to the rear skillion roof and rear veranda was \$13,695.00. As at 30 October 2017, PA had ceased work at the Property and did not subsequently return to the Property. By this time, PA had removed the roof of the Property and attached a temporary, but inadequate, roof cover; no other repair works to the Property had been effected by PA and PA did not reattach the roof sheets that it had removed. After receiving another email from PA attaching the \$13,695.00 invoice on 6 November 2017, Youi contacted RC on 7 November 2017 for a second opinion quotation in respect of repairs to the Property.

50 Broken Hill experienced significant rainfall on 15 November 2017, during which event water ingress occurred at the Property notwithstanding the make-safe works recently completed by PA. The water ingress caused internal damage to the Property, including the bathroom, which required repairs. Youi attempted but failed to contact RC later that day, following which Youi requested that another contractor Jacobson Constructions Pty Ltd (**Jacobson**) conduct further make-safe works to the roof of the Property. Jacobson carried out the make-safe works on or around 17 November 2017.

### *The Complaint Failings*

51 The Insured emailed Youi a formal letter of complaint on 2 November 2017 (**2 November 2017 Complaint**). The 2 November 2017 Complaint detailed over six pages various grievances with Youi's handling of the Claim. One particular matter raised was that the delays in the completion of the repairs to the roof meant that the remediation works at the Property recommended by the EPA to remove the lead contamination were consequently delayed.

52 As part of its response to the 2 November 2017 Complaint, Youi had telephone conversations with the Insured on two occasions. The first conversation took place on 7 November 2017, and Youi explained to the Insured that it needed to source a second opinion on the work to be done on the roof. The second conversation occurred on 22 November 2017 between Mr De Sa and the Insured. Mr De Sa informed the Insured of the difficulties that had arisen but that Youi agreed to accept repairs to bring the roof up to code. As part of its internal notes of this conversation, Youi noted the following comment (CB, 557): "Insured happy. Insured concerns dealt with."

53 After the second telephone conversation, Youi sent a letter to the Insured on 22 November 2017 about the 2 November 2017 Complaint. That letter relevantly read as follows (CB, 562):

We refer to our recent contact about the complaint that was lodged.

We're focussed on resolving the complaint and confirm the following:

- An update has been provided

The reason/s for this decision include:

- An explanation was provided to you over the phone

We trust this resolves the matter...

### *The Completion Delay Failing*

54 By way of a client repair authority emailed on 15 February 2018, Youi appointed and authorised RC to proceed with the repair works to the Property. Following this appointment, RC sent to the Insured on 20 February 2018 a scope of works for the repairs to the roof (**RC Scope of Works**) (CB, 583). In response, the Insured emailed both Youi and RC later that day in identical terms (**20 February 2018 Email**) and noted that they were "still in different ballparks in regards to the damage now relevant from both the initial incident and further incompetencies" (CB, 584). The 20 February 2018 Email set out the Insured's concerns as to various deficiencies in the RC Scope of Works such that it was in their view insufficient to rectify all of the damage that the Property had sustained and which needed to be repaired in fulfilment of the Claim.

55 The Insured had three telephone calls with Youi on 15 March 2018, 22 March 2018 and 5 April 2018. On 15 March 2018, Youi's internal records record that the claims assessor handling the Claim was in contact with the Insured "regarding ongoing issues with claim and repairs" (CB, 49). There was no specific reference to the 20 February 2018 Email. On the next two occasions, the Insured was unable to contact the responsible claims assessor. Youi's internal notes for the 22 March 2018 and 5 April 2018 calls are relevantly as follows (CB, 49):

22/03/2018

... Client has called wanted [sic] an update on claim, have advised we are awaiting revised scope of works from [Service Provider], client would like a call to discuss further progress on the claim.

05/04/2018

... Client called and is going to escalate due to delays, I have spoken to ... The Roof Company who isn't sure what variations are required as thought [Scope of Works] that was sent in February was the final [Scope of Works], Could you please contact client and [Service Provider] to discuss...



56 On 5 April 2018, Youi provided its first response in writing to the Insured's 20 February 2018 email, and the concerns on the RC Scope of Work raised therein, by way of an email requesting that the Insured provide an email to Youi "documenting the areas of concern" around the RC Scope of Works (CB, 589). The Insured replied later that day, as follows (CB, 589):

Unsure as to what you are talking about??

I have already returned my concerns months ago. This has been discussed at length with both Brett and the Roofing company.

Both have confirmed that they have read my concerns. Roofing company has already been around to my house to reassess around 5 weeks ago.

Why are we moving backwards?? This is a complete joke and I am completely over it!!

I will be seeking advice from Fair Trading if this can not be resolved suitably within the next 24 hours!!

57 Youi responded to the Insured's email on 11 April 2018, apologising for the delay in providing a "firm response" to the 20 February 2018 Email and including responses to the Insured's concerns in that email. Youi's 11 April 2018 email also contained the following comment with respect to the damage to the Property's bathroom sustained during the rainfall event on 15 November 2017 (see [50]) (CB, 590):

In regards to the Bathroom issues you have raised, we will be happy to have a suitably qualified trade attend and review the issues and concerns you have raised in this area. Should issues be identified that related to the event of subsequent events following then a suitable scope can be written for the identified repairs.

58 RC issued a revised and updated scope of works to the Insured on 13 April 2018. The revised scope of works was signed by the Insured and returned to RC that day. RC commenced the repairs to the roof of the Property in or around early May 2018 and the works were completed on or around 18 May 2018. The repairs to the bathroom damaged by water ingress as a result of PA's inadequate make-safe works were not completed until around 8 November 2018.

### **The agreed failings**

59 It was within the factual context described above that the parties set out Youi's five failings in the SAFA. Having now set out the background narrative, it is useful to reproduce here the exact way in which the parties agreed to express each of these failings.

60 The PA Issue Failings were expressed as follows at para 51 of the SAFA:

In the circumstances at paragraphs 33 to 50 above or paragraphs 42 to 50 above, Youi failed from 19 May 2017 or alternatively, 21 July 2017, to take reasonable steps to:

- (a) inform the Insured that complaints had been received from other Youi insureds in respect of delays by PA and the quality of its work;
- (b) inform the Insured that PA was no longer a repairer who was “recommended” by Youi within the meaning of the Recommended Repairer Term;
- (c) seek from the Insured their views as to whether they wished Youi to proceed with the PA Engagement, or alternatively seek to negotiate with PA a termination of the PA Engagement and the engagement of a new repairer.

61 The Commencement Delay Failings were expressed as follows at para 54 of the SAFA:

In the circumstances at 37 to 48 above or alternatively 42 to 48 above, Youi – over the period 24 May 2017 to 29 September 2017 or alternatively, 21 July 2017 to 29 September 2017 – failed to take reasonable steps to ensure that PA or any other builder commenced the repairs to the Property.

62 The Make-Safe Failings were expressed as follows at para 86 of the SAFA:

In the circumstances at paragraphs 70 to 84 or paragraphs 72 to 84 above, Youi, over the period from on or about 4 October 2017 or alternatively, 6 October 2017 until on or about 15 November 2017 – failed to take reasonable steps to ensure that PA or any other builder effected make safe works to the Property.

63 As mentioned above at [15], the parties did not agree in the SAFA on a formulation of what has been referred to as the Complaint Failings.

64 The Completion Delay Failing was expressed as follows at para 103 of the SAFA:

In the whole of the circumstances at paragraph 93 to 97 above, from 20 February 2018 to 5 April 2018 Youi failed to take reasonable steps to respond to the 20 February 2018 Email thereby delaying the completion of the repairs.

### **Youi’s admissions**

65 Further to the agreed failings, Youi makes several admissions for the purposes of this proceeding at paras 104–110 of the SAFA.

66 At paras 104–105, Youi admits that the Policy was a contract of insurance to which the ICA applied, and that, pursuant to s 13(2) of the ICA, a breach of the Implied Term of Utmost Good Faith was a breach of the ICA.

67 Paragraphs 106–110 of the SAFA then set out the breaches of the duty of utmost good faith that have been admitted by Youi, as follows:

106 By the PA Issue Failings, as outlined in Section B3 above [SAFA paras 29A–51], Youi failed to handle the Claim with full and frank disclosure and with fairness.

- 107 By the Commencement Delay Failings, as outlined in Section B4 above [SAFA paras 52–67], Youi failed to handle the Claim in a timely manner.
- 108 By the Make-Safe Failings, as outlined in Section B5 above [SAFA paras 68–86], Youi failed to handle the Claim in a timely manner.
- 109 As outlined in Section B6 above [SAFA paras 87–90], Youi failed to respond to the 2 November 2017 Complaint with clarity and candour, and in a timely manner. By the Completion Delay Failing as outlined in Section B7 above [SAFA paras 91–103], Youi failed to handle the Claim in a timely manner.
- 110 By each of the matters referred to in paragraphs 106 to 109 above, Youi failed to act consistently with commercial standards of decency and fairness with due regard to the interests of the Insured, and in each case Youi thereby breached the Implied Term of Utmost Good Faith in contravention of s 13 of the ICA.

### Consideration

68 Declaratory relief is appropriate. It is unnecessary to decide whether power exists under s 1101B of the *Corporations Act 2001* (Cth). Ample power exists from s 21 of the *Federal Court of Australia Act 1976* (Cth). There is a real and not a hypothetical dispute, albeit now resolved. ASIC is the appropriate party to seek declarations as the statutory regulator. The form of declaratory relief should identify, for the purposes of both the defendant and others in the industry, that conduct of this character is a breach of the important duty of good faith and will be exposed to the community as such. In that way declarations assist to clarify the law’s application, warn others of the dangers of contravening conduct and alert other insureds to their rights.

69 The dispute over one or multiple declarations I consider to be a matter of style rather than substance. The repetitious formality in the multiple declarations first suggested by ASIC blinds rather than illuminates others in understanding what happened. The single declaration is sufficient to express the different occasions and different conduct that amounted to the contravening conduct. The terms of declarations of right whether in private or public law can be seen to define or shape the features or content of the right or duty at issue. The terms of the declaration as to contravention in a regulatory context do not have that defining character. Rather, they assist in clarifying the nature of the contravention as a foundation for other relief such as penalties or as describing the nature of the contravention for the public purposes referred to in [68] above. The form of the declaration should specifically and succinctly identify the gist of the relevant conduct and its relationship to contravention: *Rural Press Ltd v Australian Competition & Consumer Commission* [2003] HCA 75; 216 CLR 53 at 91 [89]–[90].

70 The only difference of substance between the parties as to the gist of the conduct to be the subject of the declaration is the date of commencement of the contravention. Youi places it from 21 July 2017; ASIC from 19 May 2017. Looking at all the facts, I consider the contravention commenced at the earlier date.

71 In these circumstances, I consider the appropriate declaratory relief pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) to be as propounded by ASIC in reply. I will hear the parties on costs.

I certify that the preceding seventy-one (71) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Chief Justice Allsop.



Associate:

Dated: 26 November 2020