

Take care – but how much?

11 June 2022

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In the recent case of [Certain Underwriters at Lloyd's of London v Dhillon Scaffolding Pty Ltd \[2022\] VSCA 92](#), the Victorian Court of Appeal in Australia gave useful guidance on what “reasonable precautions” are.

Background

An apprentice plumber carrying a piece of guttering on a scaffold hit overhead powerlines and suffered injuries as a result. The apprentice brought a claim for damages for personal injury against the employer, Dhillon Scaffolding (Dhillon).

The area of the scaffolding the apprentice had been walking along had been labelled a “No Go Zone”. Dhillon was prosecuted by WorkSafe and convicted for failing to obtain a permit and to ensure that any scaffolding works in the “No Go Zone” were in accordance with the permit.

Dhillon sought an indemnity under its public liability insurance policy in the respect of the claim by the employee, but cover was repudiated. In repudiating liability, insurers argued that Dhillon failed to comply with reasonable precautions conditions precedent by failing to:

- comply with the Australian Guidelines that identify proximity to power lines as a potential hazard for workers erecting or working from a scaffold; and
- take all reasonable precautions to prevent personal injury and property damage.

First instance decision

The judge found in favour of Dhillon. The issues considered in reaching this decision were:

- did the general condition requiring compliance with the Australia Guidelines require strict compliance or was the insured only required to take “reasonable precautions” to comply;
- if the general condition did require the insured to take only reasonable precautions, was Dhillon in breach of this condition; and
- was the claim denied because of Dhillon’s deliberate, conscious or intentional disregard by Dhillon’s management of the requirement to take all reasonable steps to prevent property damage or personal injury?

In finding in favour of Dhillon, the judge commented that she was not satisfied,

“that the insured's actions or inactions were a course of action deliberately adopted by him subjectively realising the danger it posed”.

Appeal

Insurers appealed the decision, and in doing so raised the following questions:

- was the judge wrong in her finding that the “reasonable precautions” condition could only be breached if Dhillon’s conduct was reckless; and
- was the judge wrong in her finding that Dhillon had taken reasonable precautions to prevent injury?

On the first ground, the court agreed with the trial judge and determined that the commercial purpose of the policy would be hindered if it required absolute compliance with regulations and that the obligation on Dhillon was to take reasonable precautions.

On the second ground, the court agreed with the insurer that Dhillon had failed to take reasonable precautions to prevent personal injury and property damage. It was determined that Dhillon knew of the proximity to power lines and recognised the danger but was indifferent as to whether any action was taken in preventing risk. Accordingly, insurers were entitled to repudiate liability.

Key considerations in English law

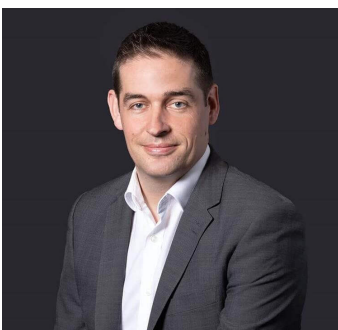
This decision was made under laws in Victoria. Under English law, it is worth remembering that case law states that in order to rely on a breach of reasonable precautions condition, insurers must essentially find the policyholder to have acted recklessly.

Although recklessness is a high bar for insurers to establish, anything otherwise could significantly undermine the purpose of the policy in the first place.

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