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Insurance Insights

All in the mind of the Insured - subjective test confirmed for breach of condition to take reasonable precautions

QBE Insurance (Australia) Limited v BB [2022] WASCA 61

Key takeaways

- **An insured will not be in breach of a reasonable precautions condition if they show they did not recognise that a danger existed or that, recognising the existence of a danger, they took action they considered to be adequate to avoid it and were not indifferent as to whether the danger was averted. The applicable test is therefore subjective not objective. It was not a question of what a reasonable person in the insured's position would have thought or done in the circumstances.**
- **Confirmation that an appellate court will not generally be prepared to interfere with the findings of a primary judge about an insured's state of mind.**

Background

This action was an appeal from a decision of the District Court[1] finding QBE liable to indemnify Helena College Council (**Council**) for its liability to a former student, BB, for psychiatric injury suffered following sexual assault at the hands of a former teacher.

BB's claim against the Council was settled by agreement and a trial of the action in the District Court proceeded between the Council and three insurers, including QBE, who disputed that its policy responded to the Council's claim for indemnity on two grounds. First, QBE contended at trial that BB's psychiatric conditions had not been "the result of an accident" and so the claim did not fall within the insuring clause of its policy. This argument was not pursued on appeal.

Second, as was pursued on appeal, QBE contended the Council had failed to comply with the reasonable precautions condition in its policy (**Condition 5**), with the result that QBE was not liable to indemnify the Council.

Condition 5 relevantly provided that the Council, as the Insured, shall "*take all reasonable precautions to prevent bodily injury*" to students.

[1] *BB v Helena College Council Inc t/a Helena College* [2021] WADC 42

A central issue at trial and on appeal was whether the Council had taken reasonable precautions to prevent bodily injury to students arising from sexual assaults by its former teacher.

The primary judge found that the steps taken by the Council at the relevant time (1987) were sufficient to satisfy Condition 5[2].

QBE appealed the decision.

Decision

QBE's appeal was dismissed.

The relevant test to be applied was that the obligation to take reasonable precautions requires the person on whom the obligation is imposed to take such precautions as *that person* considers reasonable, having regard to the risks which *that person* recognises.

Accordingly, an Insured will not be in breach of a reasonable precautions condition if they show they did not recognise a danger existed or that, perceiving the existence of a danger, they took action *they considered to be adequate to avoid it* and were not indifferent to whether the danger was averted.[3] The applicable test is therefore subjective in nature and not objective. It was not a question of what a reasonable person in the Council's position would have thought or done.

The Court of Appeal undertook an analysis of the evidence that was put before the primary judge and the inferences to be drawn from that evidence as to the Council's thoughts and beliefs in 1987.

Ultimately, the inference to be drawn, based upon the whole of the evidence, was that the Council took what *it considered* to be appropriate steps in 1987, in light of what it knew or believed as to the teacher's past and future conduct.

It was not for the Court of Appeal to interfere with the findings of the primary judge as to (i) what the Council did or did not know and (ii) the state of mind with which the Council acted, unless that finding was demonstrated to be wrong:

- by reference to incontrovertible facts or uncontested testimony
- because the finding is glaringly improbable or contrary to compelling inferences, or
- because the trial judge failed to use, or has palpably misused his or her advantage as trial judge[4].

QBE had failed to show that the findings of the primary judge were wrong with reference to this framework.

Implications

While this case does not break new ground it reaffirms that the correct test as to whether an insured took reasonable precautions, to satisfy a condition in a policy, is based not on what a reasonable person would think (objective), but what an insured actually thought.

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[2] The findings of the District Court are summarised in *QBE Insurance (Australia) Limited v BB* [2022] WASCA 61 at [73] – [76], [78] – [82] and [84] – [85].
[3] At [110] – [111].
[4] At[157].

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The Court of Appeal's decision also confirms that an appellate Court is not inclined to interfere with the decision of a primary judge on the evidence about state of mind save in exceptional circumstances. An appellant will need to overcome significant hurdles in a case of this type before the primary decision is found to be wrong.

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