NOVA SCOTIA COURT OF APPEAL

Citation: *Trisura Guarantee Insurance Company of Canada v. Duncan*, 2019 NSCA 54

Date: 20190618
Docket: CA 477662
Registry: Halifax

Between:

Trisura Guarantee Insurance Company of Canada

Appellant

v.

Gregory Duncan and James White

Respondents

Judge:	The Honourable Justice Peter M. S. Bryson
Appeal Heard:	March 19, 2019, in Halifax, Nova Scotia
Subject:	Insurance. Duty to Defend. Notice.
Summary:	Trisura specialized in errors and omissions coverage for investment advisors. Duncan and White assumed management of the clients of accounts of John Allen who was dismissed by his employer for negligent and fraudulent conduct. Clients ultimately sued Duncan and White for failing to properly manage their accounts after Allen left. Duncan and White sought a defence from Trisura. Trisura refused to defend on the basis that it had not been properly notified of claims or potential claims during the policy period. They added that notification of one potential claim could not apply to other potential claims. Alternatively, they alleged that Duncan and White were aware of the potential claims at the time coverage was placed. Trial judge ordered that Trisura provide a defence, finding that in the circumstances, Trisura had notice of all potential claims.

Issues:

(1) Was Trisura properly notified of potential claims during the policy period?

(2) Should respondents have disclosed potential claims prior to obtaining coverage?

Result:

Appeal dismissed. Judge did not err in interpreting the policy coverage by finding that Trisura had been properly notified. All potential claims were identified within the policy period. In the special circumstances of this case, where the claimants were all known to Trisura during the policy period and ultimately made virtually identical claims against the respondents, Trisura had notice. The judge did not err in finding that the respondents were not aware of the potential claims against them at the time of coverage placement.

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Respondents

Judges:	Beveridge, Bryson and Derrick, JJ.A.
Appeal Heard:	March 19, 2019, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Bryson, J.A.; Beveridge and Derrick, JJ.A. concurring
Counsel:	Augustus Richardson, Q.C., for the appellant Peter Rogers, Q.C. and Sunil Sharma, for the respondents

Reasons for judgment:

Introduction

[1] Trisura is an insurer specializing in the provision of professional liability coverage to investment industry advisors. Trisura provided errors and omissions coverage to investment advisors working for Keybase National Financial Services Inc. during the period July 2008 to July 2012 under four annually renewable policies.

[2] Gregory Duncan and James White were Keybase advisors who assumed responsibility for clients of John Allen, another Keybase advisor who had been dismissed in September 2007 for negligent and fraudulent handling of client accounts.

[3] Allen had encouraged his clients to borrow to finance the purchase of securities which were then pledged as collateral for the loan. Investment income could be used to service the debt. Sometimes borrowing might be secured by a home equity loan. Without other resources, investors using this strategy would be vulnerable to market corrections which triggered capital or income losses. Allen's clients generally lacked the resources to sustain such losses—let alone the existential risk of the 2008 financial crisis which shortly followed Allen's dismissal.

[4] Beginning in 2009, various Allen clients sued Allen, Keybase and a previous Allen employer. Allen was subsequently convicted for criminal offences related to his activities and the actions were discontinued against him. Allen had no insurance coverage, and Keybase defended itself in these client actions. The Allen clients were ultimately successful (2014 NSSC 31).

[5] Damages were assessed (2014 NSSC 287). Keybase then settled with the Allen clients, but expressly agreed that its advisors would not be released by the settlement. Thereafter, in 2015 the clients sued Duncan and White alleging negligence, breach of contract and breach of fiduciary duty. They pleaded the findings in 2014 NSSC 31. Essentially they complained of improper advice concerning mitigation of their losses caused by the Allen strategy.

[6] Duncan and White sought a defence and indemnification from Trisura. Trisura queried their compliance with the notice requirements of their policies and argued that the claims now advanced against Duncan and White fell outside the

Trisura policy periods. Duncan and White applied for an order compelling Trisura to defend the 2015 client action against them. The Honourable Justice Jeffrey R. Hunt so found (2018 NSSC 92). Alternatively, Justice Hunt found that if the policies had been forfeit owing to policy breaches by Duncan and White, he would have relieved them from forfeiture.

[7] Trisura now appeals, asserting that Justice Hunt erred in his interpretation of the notice obligations under the policies, erred in finding that Duncan and White had complied with those notice obligations and erred in finding that relief from forfeiture was available to them in the circumstances.

[8] For reasons that follow I would dismiss the appeal. Justice Hunt did not misconstrue the policy language, and he made no legal or clear and material factual error in finding that there was compliance with the notice obligations under the policies. It is therefore unnecessary to decide whether the judge was correct in finding that relief from forfeiture was available to Messrs. Duncan and White in this case.

Did Trisura receive notice in accordance with its policies of insurance?

[9] A correctness standard applies to interpretation of notice provisions in a policy of insurance: *Trisura Guarantee Insurance Company v. Belmont Financial Group Inc.*, 2008 NSCA 87, ¶23; *Travelers Guarantee Company v. Hants Realty Ltd.*, 2014 NSCA 69 at ¶22. Factual questions such as what a party knew and when are subject to a standard of clear and material error (sometimes infelicitously described as "palpable and overriding"): *ING Insurance Company v. SREIT (Park West Centre Ltd.)*, 2009 NSCA 38, ¶20-21.

[10] The interpretative principles applicable to insurance coverage in these circumstances were canvassed by the trial judge and are not disputed. In summary they are:

- The duty to defend is informed by the pleadings and the policy language: *Non-Marine Underwriters, Lloyd's of London v Scalera*, 2000 SCC 24, ¶90; *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801, ¶16.
- If allegations state facts which if proven fall within policy coverage, the insurer is obliged to defend regardless of the truth of the allegations: *Bacon v. McBride*, 51 BCLR 228, ¶10.

- Ambiguities in policy language are construed against the insurer; coverage should be construed broadly and exclusion clauses narrowly: *Scalera*, ¶70.
- Where policy language is ambiguous, the court should give effect to the reasonable expectations of the parties: *Reid Crowther and Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252, ¶33.

[11] Trisura advances two arguments with respect to breach of the notification provisions of its policies. First, it says that it was not notified of any claims or potential claims during the policy periods. Second, it argues that Keybase knew or should have foreseen that the conduct of Duncan and White could have resulted in a claim when Keybase first applied for insurance in 2008 and thus such claims would have been excluded from coverage. These arguments will be addressed in the order in which Trisura makes them.

Notification during the policy period:

[12] As sponsoring entity, Keybase arranged insurance coverage for its investment advisors directly with Trisura. Coverage did not extend to Keybase itself, except for any vicarious liability arising from services provided by Keybase's investment advisors. The advisors were "named insureds" under the Trisura policy. Duncan and White had no direct dealings with Trisura.

[13] The Trisura policies are generally known as "claims made" policies. This means that indemnity coverage is available for current claims made against an insured during the policy period. In this case, the lawsuit against Duncan and White was started in 2015, three years after expiry of the last Trisura policy. Therefore, on a "claims made" basis, the 2015 actions were not covered. However, like many claims made policies, the Trisura policy afforded coverage for claims made after expiry of the policy if Trisura had been notified of a potential claim during the policy period, even if no actual claim was made until later:

> VI(B) If, during the **Policy Period** or **Discovery Period**, if exercised the **Insureds** became aware of any facts or circumstances which may reasonably be expected to give rise to a **Claim** against the **Insured** and give written **notice** to the **Insurer**, as soon as practicable and prior to the date of termination of the **Policy Period** or **Discovery Period**, if exercised, of the facts or circumstances and the reasons for anticipating such a **Claim**, with full particulars as to dates, events, persons and entities involved, then any **Claim** which is subsequently made against the **Insureds** and reported to the **Insurer**, alleging, based upon, arising

> out of, or attributable to such facts or circumstances, or alleging any **Interrelated Wrongful Acts**, shall, for the purpose of this Policy, be treated as a **Claim** made during the **Policy Period** in which such notice was given.
>
> [Original emphasis]

[14] Beginning in 2010, Keybase's insurance consultant, Aon Reed Stenhouse, began to report potential claims to Trisura from former Allen clients, nine of whom eventually sued Duncan and White in the 2015 action. Justice Hunt found that these reports, taken collectively, complied with the notice requirements of s. VI(B). Trisura strenuously challenges the judge's findings because:

(a) the reported claims related to negligence and misconduct alleged of Allen and Keybase—not Duncan and White;

(b) the judge's collective treatment of notice was wrong because notice respecting one client of Duncan or White could not be notice respecting others, owing to the different circumstances of each client.

[15] Trisura's submissions require a more detailed consideration of the evidence on which the judge relied to find that notice had been given. But first it is useful to recall the purposes served by giving notice.

[16] In *Marcoux v. Halifax Fire Ins. Co.*, [1948] D.L.R. 143 (SCC), pp. 146-147, the Supreme Court explained the purpose of notice:

> The policy of insurance is a contract between the parties. The respondent undertook to indemnify the appellant; but on a condition, that is, that it be given prompt notice of the accident. One readily understands the reason justifying this clause of the contract. ***It is for the purpose of permitting the insurance company to make an investigation immediately, to check the facts, to seek the names of witnesses who later on may not be discoverable, and thus not to be at the mercy of the claimant.*** This is a protection justly claimed in the contract, and of which the insured cannot deprive his insurer with impunity.
>
> [Emphasis added]

[17] More recently in *Moore v. Canadian Lawyers Insurance Assn* (1992), 95 D.L.R. (4th) 365 (NSSC TD), rev'd on other grounds (1993), 105 D.L.R. (4th) 258 (NSSC AD) at pp. 370-371, the Nova Scotia Supreme Court commented:

> The rationale for the notice requirement is to permit the insurance company which has contracted to indemnify the Insured to investigate the loss, and possibly eliminate or reduce its financial exposure. The investigation in a timely fashion may permit a determination of no liability, partial liability or full liability and

> flowing from such early determination, the insurance company may then consider a number of strategies, including repair and/or settlement. …

[18] The purpose of notification to the insurer is clear: it is to allow the insurer to assess liability and mitigate any potential loss by legal or practical means.

[19] Keeping in mind the purpose of notification, the trial judge made no error in focusing on what Trisura knew and when it knew it.

[20] Justice Hunt found that there was compliance with the notice requirements of s. VI(B):

> [85] I have reached some conclusions as to the relevance of items such as the Doncaster Letter and the complaint letter written by Grace Weatherbie. These conclusions are touched on elsewhere in the analysis but in summary:
>
> 1. Items like the Doncaster Letter and the Weatherbie complaint obviously provided context for other complaints as they came in. Things like the Doncaster Letter and the Weatherbie complaint created an underlying knowledge base underpinning the understanding of how Duncan and White, as subsequent advisors, had been exposed to claims of liability.
> 2. There is no question that certain of the other complaints and reports forwarded by Aon on behalf of Keybase and the subsequent advisors contained scant details or lacked a re-statement of the underlying rationale for potential liability.
> 3. I accept that had any of these later complaints arrived at Trisura <u>without the context of the prior knowledge</u>, Trisura might well have sought more explanation or requested greater detail or explanation of the rationale or circumstances.
> 4. It was the case however that Trisura, as a sophisticated party in this field, represented by experienced professionals, was not confused or mislead. Because of the context and history, it knew what was being suggested (possible legal liability of the subsequent advisors) and the mechanism of exposure.
> 5. As well, the approach of Trisura was impacted by the fact that the possible exposure of Duncan and White did not result in their being sued immediately. This allowed the hope to exist that this would remain the case. Duncan and White fell victim to this hope as well.
> 6. Clause VI (B) called for the insureds to share reasonable expectation of possible future claims. This is what they did.
>
> [Original emphasis]

[21] Trisura protests that with one or possibly two exceptions, none of the communications it received complied with s. VI(B) of its policy. Trisura says that the claims reported to it related to alleged negligence of Allen and Keybase—not Duncan or White. Essentially all Aon did was forward statements of claim against Keybase and Allen—Duncan and White were not named. Trisura adds that Duncan and White both testified at the Allen client trial against Keybase that they had no concern about any potential liability for the services they provided to Allen clients. Trisura points out that the reporting done by Keybase or its insurance broker, Aon, on behalf of Duncan and White was unsupported by direct testimony from either. All that was available to the judge were inferences to be drawn from the Aon notice forms. Trisura notes that Keybase's defence to the Allen client claims was that Duncan and White did not err in their provision of professional services.

[22] Trisura makes the initially attractive argument that notification with respect to potential liability regarding one client, cannot be notification with respect to others because the facts and circumstances of each is different. Trisura complains that the judge's decision confuses the claims and argues that even if Trisura had knowledge of a potential claim with respect to one client, it cannot be assumed that this satisfied the notification requirements with respect to others. Trisura concedes that it may have been properly notified of one of the nine claims because explicit complaint was made about White's advice to the client.

[23] Trisura's argument is sound in principle, but cannot prevail if there is no material difference between the former Allen clients with respect to the claims made against Duncan and White and the losses sought. As the judge found, Trisura's outside adjuster, Luc Bertrand, appreciated the risk of liability to Duncan and White even though they were not the named defendants in the client actions. He advised Trisura accordingly. Ultimately, the 2015 action on behalf of nine Allen clients for which defence coverage is claimed in this case, makes virtually identical allegations against Duncan and White. The allegations all relate to the leveraged strategy recommended by Allen and continued by Duncan and White which was unsuitable for unsophisticated, highly vulnerable clients, apparently unable to sustain the risks of any adverse market conditions to which the strategy exposed them.

[24] Owing to the context and history of this particular case, the judge was satisfied that the notice requirements of the policy had been met; to repeat:

> I accept that had any of these later complaints arrived at Trisura without the context of the prior knowledge, Trisura might well have sought more explanation or requested greater detail or explanation of the rationale or circumstances.
>
> [Original emphasis]

[25] In June of 2010, Aon sent an email to Trisura relating to seven clients, three of whom are plaintiffs in the 2015 action against Duncan and White. The judge found that this notice was not confined to the liability of Allen. He quoted from Aon's email:

> "We have received notice of seven client complaints from Don Cook at Keybase. These all arise out of the activities of a former agent, John Allen, in Nova Scotia, and now two current agents.
>
> Mr. Cook had advised Luc Bertrand of these, as well as a further number of complaints which we will be shortly reporting to you as well.
>
> We hereby provide notice on behalf of the insured of these seven matters and would ask that you review these and advise us at your earliest convenience your position on coverage under the above-noted policy."
>
> [Emphasis of Hunt J.]

[26] The judge summarized:

> [81] The full package of material forwarded on June 23, 2010 included direct allegations against Greg Duncan ***and a detailed lawyer's letter (pertaining to a different client, Stacey Doncaster) laying out in detail the legal analysis and factual arguments underpinning liability exposure not only on behalf of Allen but also for replacement financial advisors in the position of Duncan and White.***
>
> [82] Also in the package was a complaint letter from a client, Grace Weatherbie. It laid out in lay person's language an outline of the potential liability exposure of subsequent advisors such as Duncan and White.
>
> [Emphasis added]

[27] The judge concluded that Mr. Bertrand identified the potential claims against Duncan and White. He quoted from a report by Bertrand to Trisura in July 2010:

> [121] On July 2, 2010, he [Bertrand] wrote to Taylor saying:
>
> > Bob, you will find attached a list of the 11 John Allen matters reported by the insured. They were reported in two groups, 6 at first and then 7 on June 23, 2010. Since Trisura did not issue a certificate for John Allen, there is no exposure in regards to Allen's own liability towards the various

> plaintiffs or claimants and no coverage for Keybase's vicarious liability for Allen's actions.
>
> ***However, there could be an exposure for the alleged failure by the subsequent Keybase advisors (Jim White and Greg Duncan) to rectify the situation or to have caused an aggravation of the situation***. Keybase has reported most of these matters under the name of White or Duncan.
>
> [Emphasis added]

[28] Bertrand went on to note:

> ***In regards to the remaining "complaint only" matters, the complainant letters do mention the advisor subsequent to Allen as a person partly responsible for the alleged losses***…
>
> [Emphasis added]

[29] Six of the claimants described in Bertrand's letter are plaintiffs in the 2015 action against Duncan and White.

[30] Trisura objects that the July 2, 2010 Bertrand letter was misconstrued by the judge—that Mr. Bertrand was really focusing on whether potential claims against Duncan and White should have been disclosed prior to placement of coverage with Trisura. Certainly that was one of Bertrand's concerns. But the other was the risk of liability arising from the conduct of Duncan and White. In other words, Trisura was then notified of the risk.

[31] As the judge found, Mr. Bertrand was a sophisticated adjuster, well familiar with the risks associated with the type of coverage Trisura extended to its clients. This is obvious from his reporting letters to Trisura.

[32] On December 29, 2010, Aon wrote to Bertrand confirming notification to Trisura within s. VI(B) of the current policy:

> …it is our understanding that with respect to the seven provided notices, where no legal actions have been commenced (A. Osborne, W. Nicholson, S. Hilchie, A.J. Verney, D. Bateman, G. Weatherbie, S. Doncaster) that Trisura Guarantee Insurance Company has accepted the complaints against Agents White and Duncan as notices of facts and circumstances which may reasonably be expected to give rise to claims. This is pursuant to Section VI(B) of the Keybase Master Professional Liability Policy TPL 100094.
>
> In regards to the notices…we confirm that any subsequent claims will be treated by Trisura as having arisen in the period in which these circumstances were reported…July 1, 2009 to July 1, 2010.

[33] Trisura did not respond.

[34] The judge was satisfied that Trisura acknowledged receipt of complaints against Duncan and White from at least seven clients who sued in 2015, quoting from Mr. Bertrand in December of 2010:

> With regard to the seven other claims where no legal actions have been started Trisura acknowledges notice of the complaints made against the Agents, White and Duncan, and reserves all of its rights under the said policy. We will continue monitoring each of these complaints with you and we will deal with each of them separately.

[35] The judge remarked that Mr. Bertrand appeared to take comfort from the failure to name Duncan and White in any suit during the currency of the policies—only Allen and Keybase were named defendants. But that would not preclude Duncan and White from being sued later. Nor did it vitiate any notice already given.

[36] Trisura adds that no claims against Duncan and White were made out during the policy periods because Duncan and White themselves did not think they had any exposure to the Allen clients until they testified at the Allen clients' trial in 2013, so they couldn't give notice of a risk of which they were unaware.

[37] This argument has no merit for three reasons. First, it is not legally necessary that the insured personally provide notice. Second, as the judge found, Aon was reporting to Trisura on behalf of Duncan and White as well as Keybase. Third, the purpose of notice was satisfied in light of adjuster Bertrand's assessment of the potential exposure to Trisura from the conduct of Duncan and White.

[38] Finally, Trisura's concern of "long tail" or indeterminate risk from the judge's analysis is unfounded. In each case the potential claimant is named and all notices fall within the policy periods. Indeed, in his July 2, 2010 report to Trisura when he identifies the potential exposure of Duncan and White, Mr. Bertrand appends a chart identifying each claimant, the nature of the claim against Keybase and Allen (in most cases quantifying the claimed loss) and adding comments with respect to each.

[39] The evidence shows, and the judge found, that the potential risk of claims against Duncan and White arising from their assumption of Allen client accounts was reported to Trisura during the currency of its coverage. That Duncan and White were not initially named in any suit by investors who had sued Keybase and

Allen may have been occasion for hope, but not celebration. Trisura was still bound by the notice that the judge found it had been given.

Did Duncan and White fail to notify Trisura of potential claims when applying for coverage?

[40] Section IV(1) of the Trisura policy excludes liability for, among other things, negligence of the insured if he knew or could reasonably have foreseen a claim arising from that negligence. Trisura now argues that this exemption clause was breached because no report of potential claims against Duncan or White was made to Trisura when application for coverage was first made.

[41] This submission reverses Trisura's earlier argument that it was not notified of potential claims against Duncan and White during the policy period because Duncan and White were unaware of such potential claims. Duncan and White can hardly be faulted for failing to notify of potential claims in 2008 if they didn't know of them until the Keybase trial in 2013. Trisura makes this modest submission in its factum:

> … Duncan, at least, knew that Mr. Allen had conducted himself in a grossly negligent, if not fraudulent, way. Indeed, [when] Mr. Duncan took over the Shane's portfolio in October 2007 they already had legal counsel.

[42] Trisura does not explain how Allen's bad behaviour triggered potential liability for Duncan. Nor is the significance of counsel's retention explained.

[43] Trisura can argue that the obligation of an applicant to notify of potential claims is not simply subjective because an insured's reporting obligation included conduct he "… knew or ought reasonably to have foreseen … did or could result in a claim".

[44] But this argument would require a favourable finding of fact or mixed fact and law by the judge.

[45] The judge readily dispensed with this exclusion argument when he found:

> [162] As the Court has noted elsewhere however, the process under which the potential exposure of Duncan and White was realized here was an organic one. I conclude that it was appreciated no earlier than the July 1, 2009 renewal of the policy. The true appreciation of the potential exposure began to be realized in mid-2009. By mid-2010 the problems were becoming manifest.

[46] The judge's finding is well-supported in the evidence and justifies no appellate intervention.

Conclusion

[47] The judge did not err in law or make a clear and material error of fact in allowing Duncan and White's claim to have Trisura defend the 2015 action. Indemnity is another matter for another day. I would dismiss the appeal, with costs of $9,000.00, inclusive of disbursements, representing approximately 40 percent of trial costs, the amount suggested by counsel.

Bryson, J.A.

Concurred in:

Beveridge, J.A.

Derrick, J.A.