SUPREME COURT OF NOVA SCOTIA

Citation: *Duncan v. Trisura Guarantee Insurance Company of Canada* , 2018 NSSC 92

Date: 2018-04-13
Docket: Tru. No. 450644
Registry: Truro

Between:

Gregory Duncan and James White

Applicants

and

Trisura Guarantee Insurance Company of Canada

Respondent

DECISION

Judge: The Honourable Justice Jeffrey R. Hunt

Heard: July 24, 25 & 26, 2017, in Truro, Nova Scotia

Final Submissions: August 31 & September 15, 2017
Written Decision: April 13, 2018

Counsel: Ronald Chisholm, Solicitor for the Applicants
Gus Richardson Q.C., Solicitor for the Respondent

By the Court:

[1] The ramifications of John Allen's destructive actions continue to reverberate through the lives of his former clients, co-workers and in the Courts.

[2] The Applicants in this matter are Gregory Duncan ("Duncan") and James White ("White") who were Financial Advisors registered as mutual fund dealers and employed, together with John Allen ("Allen"), at Keybase Financial Group ("Keybase").

[3] In September 2007 Allen was fired from Keybase when it was discovered he was operating his client's accounts in a grossly inappropriate manner. He was eventually charged and sentenced criminally on various fraud related charges arising out of his actions.

[4] In the immediate aftermath of Allen's firing there was, of course, a high degree of turmoil and upset for his former clients as they came to grips with the situation. Broadly stated, they were heavily leveraged with their accounts in exposed positions. The markets soon began to move against them.

[5] Various of Allen's former clients made different decisions. The group of former clients with which this matter is concerned opted to remain as clients of

Keybase and were assigned new agents. Many felt unable to leave Keybase given the state of their accounts and share purchase loans used to buy leveraged stock.

[6] These nine sets of clients were distributed between Duncan and White. Duncan took on the relationship with six clients and White assumed the client management for three.

[7] These clients subsequently sued Keybase and John Allen (the "2009 Action"). Duncan and White testified at the trial on behalf of Keybase but were not named as parties in that litigation.

[8] The hearing proceeded before The Honourable Justice Robert Wright in 2013. Justice Wright's judgment in this matter was given in the reported decision ***Andrews v. Keybase Financial Group Inc.,*** 2014 NSSC 31.

[9] The Court rejected Keybase's defence of failure to mitigate and its claim of contributory negligence against the Plaintiffs. The Court found that certain advice provided by Duncan and White to former clients of John Allen was deficient. Damages were eventually quantified in a subsequent decision by Justice Wright reported at 2014 NSSC 287.

[10] In or about June 2015 Keybase settled with the Plaintiffs in the 2009 Action and made a payment to be divided among the Plaintiffs in exchange for a full and

final release of the company. Keybase financial advisors were not included within the terms of the release.

[11] On June 10, 2015, the nine sets of Plaintiffs filed suit against Duncan and White (the "2015 Action") citing their alleged actions, non-actions, advice and failure to advise.

[12] In this proceeding, Duncan and White seek a declaration that the Respondent, Trisura Guarantee Insurance Company ("Trisura"), is obliged to offer them a defence and indemnity to the claims now being advanced against them in the 2015 Action.

[13] In the period July 1, 2008 to July 1, 2012 Duncan and White were "Named Insureds" under four consecutive policies of Professional Liability Insurance issued by the Respondent. Trisura is a speciality insurance company that offers, among other types of coverage, insurance for professional liability for financial advisors.

[14] The central issue in dispute is whether Duncan and White gave notice of the potential claims in accordance with the terms of the policies.

[15] This decision will review the policies themselves, the pleadings in the 2015 Action and the evidence being advanced by both sides. The Court will review the applicable principles of interpretation and the relevant authorities.

Position of the Applicants

[16] The Applicants say they took reasonable steps to put their insurer, Trisura, on notice of the potential claims which eventually did materialize.

[17] They argue that Trisura is a sophisticated insurer which had senior executives responsible for this file. They also retained outside expertise including Luc Bertrand. These individuals understood the potential exposure and this exposure was identified and understood during the period of the coverage. The fact that the actual lawsuit was commenced after the policy period is of no consequence given the wording of the advance notice provision in Clause VI(B) of the policy.

[18] It is the position of Duncan and White that if there were any technical faults with their notice to Trisura the insurer had a duty in good faith to seek clarification or further details. This was not sought. In any event, Trisura had actual knowledge of the facts and circumstances underpinning the potential claims.

Position of the Respondent

[19] Trisura argues that the Applicant's request for an order that Trisura defend them in the 2015 Action must fail because it was commenced after the last Trisura policy ended on July 1, 2012. The information they received from or on behalf of Duncan and White did not meet the standard required in the policy. Policy terms were not complied with. They also raise an issue of whether the facts and circumstances were or ought to have been known to the insureds when they first applied for coverage.

[20] They further argue the Applicant's request for an order that Trisura indemnify them with respect to any liability must fail because the 2015 Action was commenced after the last Trisura coverage period ended on July 1, 2012, or alternatively, if any duty to defend does exist, an order for indemnification is premature as the Trisura policy bars action until an insured's liability under the Action has been determined. Liability under the policy depends on the facts and findings to be determined only when the 2015 Action comes to trial.

[21] It was acknowledged by the Respondent there could be different coverage outcomes as between the nine sets of claimants. Some of the nine claimants could fall within the scope of coverage while others may not.

The Pleading

[22] An examination of the duty to defend must be rooted in the wording of the policy and the allegations in the pleadings.

[23] The relevant pleading at issue in this matter was filed June 10, 2015 and amended October 8, 2015. It sets out details of the nine sets of plaintiffs and asserts that each of the plaintiffs had a contractual and fiduciary relationship with Duncan or White as their professional financial advisor.

[24] The history of misfeasance by Allen is detailed in the Statement of Claim, as are the particulars of the discovery of Allen's actions and his firing by Keybase. It goes on to outline the assumption of client responsibility by Duncan and White. There is separate reference to Duncan's alleged additional failings in his role as Branch Manager. These is no coverage for any of Duncan's alleged actions or non-actions as Branch Manager.

[25] The allegations against Duncan and White are framed such that they could extend throughout the relationship. The pleading makes a claim against each of Duncan and White for negligence, breach of contract and breach of fiduciary duty for failure to recommend that each plaintiff client divest themselves of their

portfolio. They assert this would have taken the form of collapsing their investments and paying off the leverage loans.

[26] In making this assertion they cite a finding of Wright, J. from the decision in ***Andrews et al. v. Keybase et al., 2014 NSSC 287***:

> [159] Instead, Messrs. Duncan and White were largely left to their own devices. What is clear from the evidence is that although it is likely that they verbally identified liquidation of the investment program as a possible option, neither of them recommended that course of action to any of the plaintiffs. Nor was any financial assistance ever offered to that end. Rather, the plaintiffs were all enticed to stay with the program, albeit with the implementation of certain recommended adjustments to the individual investments and/or the loans.

[27] The Statement of Claim pleads and relies upon the factual findings of Wright, J. in ***Andrews v. Keybase***, supra, as matters of "res judicata". I take this reference to be a plea encompassing not only res judicata but more generally an assertion of issue estoppel as it pertains to findings on the actions of Duncan and White as determined by the court in.

[28] Throughout this decision it will be necessary to refer to various plaintiffs individually as each situation has its own factual nuances. For clarity the plaintiffs will be identified as follows:

- Martin Andrews and the Est. of Sheila Andrews ("**Andrews**");
- David Bateman and Charleen Bateman ("**Bateman**");

- Est. of John Cameron and Est. of Linda Cameron ("**Cameron**")
- Charles Crowell and Darlene Crowell ("**Crowell**");
- Jared Phillips and Becky Waterfield ("**Phillips-Waterfield**");
- Jeffrey Phillips and Denise Kowalski -Phillips ("**Kowalski-Phillips**");
- James Ramsay and Lisa Matheson ("**Ramsay-Matheson**");
- Est. of Ruth Shane and Wilma Shane ("**Shane**");
- Janice Verney and Est. of Robert Verney ("**Verney**").

The Policies

[29] Keybase was the sponsoring entity which applied for a master policy of insurance with Trisura. This policy covered their financial advisors. Advisors who were covered under this policy became "Named Insureds" as defined by the master policy. A Certificate of Insurance would be issued in the name of each advisor individually.

[30] Keybase itself did not hold entity insurance with Trisura. They had only vicarious liability coverage through an individual agent's certificate of insurance.

[31] The particular policies of insurance and coverage periods were as follows:

- TPL1000542 - July 1, 2008 to July 1, 2009.
- TPL10000994 - July 1, 2009 to July 1, 2010.

- TPL1001624 - July 1, 2010 to July 1, 2011.
- TPL1002259 - July 1, 2011 to July 2, 2012.

[32] These have been referred to as claims made policies. The contract does however include an important clause which allows for notice of a possible future claim. The ramifications of this clause are considered in greater detail below.

Policy Wording

[33] Coverage decisions will always be grounded in the wording of the relevant policy. By necessity the relevant provisions are reproduced here for reference:

> Trisura agrees to pay on behalf of the insured those amounts, in excess of the deductible, the insured is legally obligated to pay as damages resulting from a claim first made against the insured during the policy period or discovery period, if exercised, and reported to the insurer pursuant to the terms of this policy for a named insured's wrongful act in rendering, or failing to render, professional services for others, but only if such wrongful act first occurs on or after the retroactive date and prior to the expiration of the policy period.
>
> **Claims**
>
> Claims means:
>
> i) Any demand for monetary damages or non-monetary relief;
>
> ii) A civil proceeding commenced by the issuance of a Notice of Action, Statement of Claim, Writ of Summons, complaint or similar pleading or;
>
> iii) An arbitration proceeding.
>
> Against any insured for a wrongful act, including any appeal therefrom. A claim shall be deemed to have been first made at the earliest date upon which written notice thereof, or a copy of the claim was personally received by any insured person or received by the named insured by any means including personal delivery, facsimile transmission or e-mail.

[34] Wrongful act was defined to mean as follows:

> Any actual or alleged negligent act, error or omission, misstatement or misleading statement committed by the named insured in the performance of personal services for others.

[35] Personal Services was defined to mean:

> Those services coming with the scope of the named insured's professional capacity specified in Item 7 of the Declaration and encompassing the performance of services customary to the professional capacity so defined.

[36] Duncan and White were both identified in item 7 of the Declaration as "life and accident and sickness agent/mutual fund agent".

[37] On the issue of coverage, the policy provided that the insurer had:

> The right and the duty to defend, including the right to select legal counsel, any claim made against the insured alleging a wrongful act even if such claim is groundless, false or fraudulent, and shall pay any claim expenses for such claim.

[38] Certain claims were excluded. Included in the description of excluded claims is the following:

> [Any claim] based upon, arising out of, or attributable to any wrongful act committed prior to the first inception date if, as of the first inception date, the insured knew or ought reasonably to have foreseen that such wrongful act did or could result in a claim.

[39] It is acknowledged in these proceedings that the "first inception date" was July 1, 2008.

[40] The obligation of the insurer was conditional on the insured's duty to give notice of claims or of facts or circumstances that could reasonably be expected to give rise to a claim against the named insured. The relevant sections are as follows:

> **VI Notice of Claim**
>
> (A) The **Insureds** shall, as a condition precedent to their rights under this Policy, given written notice to the **Insurer** as soon as practicable of any **Claim** first made against any **Insured**, but in no event later than 30 days after the expiration of the **Policy Period** or **Discovery Period**, if exercised, in which the **Claim** was first made.
>
> (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 **Insured**s 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 .

[41] One of the yearly renewal policies included a section titled "Vicarious Liability Extension". It provided as follows:

> In consideration of the premium charged, it is hereby understood and agreed that the insurer shall pay, on behalf of the sponsoring entity, those amounts which the sponsoring entity is legally obligated to pay as damages, because of its vicarious liability, for the acts of a named insured for a covered claim, provided a claim in any such action instituted in respect of the claim is brought against the sponsoring entity and the named insured.

[42] Found within the general conditions is the following provision:

> **VII General Conditions**
>
> **…**
>
> **(h)** Action against Insurer: No action shall be taken against the insurer unless, as a condition precedent thereto, there shall have been full compliance with all the terms and conditions of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined:
>
> **(a)** by judgment against the insured;
>
> **(b)** after a decision has been rendered by any administrative tribunal, board or other adjudicator; or
>
> **(c)** agreement of the insured's, the claimant and the insurer.

Significance of Policy Section VI (B)

[43] This section, quoted above, has far reaching ramifications. It permits an insured to give notice of circumstances which "may reasonably be expected to give rise to a claim". The insured must give notice during the policy period.

[44] In such a case, if the claim is subsequently brought, it will be treated as if it were a claim made during the policy period.

[45] As can easily be appreciated, this is a powerful deeming provision. The relevance and operation of this provision is of major significance to this proceeding. This clause has a reach to it that distinguishes it from a number of the policy terms referred to in other case law.

Principles of Law

[46] I intend to provide an overview of the applicable law. I do so at this point in the decision as a means of ensuring these principles remain the focus of the weighing process as the evidence is considered.

[47] The law is clear that any duty to defend must be grounded in an interpretation of the pleadings and policy wording. The Respondent will have a duty to defend the Applicants only if the statement of claim seeks relief that could potentially fall within coverage: ***Non-Marine Underwriters, Lloyd's of London v. Scalera***, 2000 SCC 24 (S.C.C.) at para. 90, ***Nichols v. American Home Assurance Co.***, [1990] 1 S.C.R. 801 (S.C.C.) at para. 16.

[48] The general rule regarding the scope of the pleadings was stated in ***Bacon v. McBride*** (1984), 51 B.C.L.R. 228 (B.C. S.C.) at para. 10:

> The pleadings govern the duty to defend — not the insurer's view of the validity or the nature of the claim or the possible outcome of the litigation. If the claim alleges a state of facts which, if proven, would fall within the coverage of the policy, the insurer is obliged to defend the suit regardless of the truth or falsity of such allegations. If the allegations do not come within the policy coverage, the insurer has no such obligation.

[49] The pleadings must be assessed to ascertain the substance and true nature of the claims, and the factual allegations must be considered in their entirety to determine whether they could possibly support the plaintiff's claims: ***Monenco Ltd. v. Commonwealth Insurance Co***., 2001 SCC 49 (S.C.C.) at para. 35. In **Scalera**, Iacobucci J. developed a three-step process (at paras. 50-52):

> First, a court should determine which of the plaintiff's legal allegations are properly pleaded. In doing so, courts are not bound by the legal labels chosen by the plaintiff. A plaintiff cannot change an intentional tort into a negligent one simply by choice of words, or vice versa. Therefore, when ascertaining the scope of the duty to defend, a court must look beyond the choice of labels, and examine the substance of the allegations contained in the pleadings. This does not involve deciding whether the claims have any merit; all a court must do is decide, based on the pleadings, the true nature of the claims.
>
> At the second stage, having determined what claims are properly pleaded, the court should determine if any claims are entirely derivative in nature. The duty to defend will not be triggered simply because a claim can be cast in terms of both negligence and intentional tort. If the alleged negligence is based on the same harm as the intentional tort, it will not allow the insured to avoid the exclusion clause for intentionally caused injuries.
>
> Finally, at the third stage the court must decide whether any of the properly pleaded, non-derivative claims could potentially trigger the insurer's duty to defend.
>
> Extrinsic evidence that is explicitly referred to in the pleadings may be considered to determine the substance and true nature of the allegations: ***Monenco*** at para. 36.

[50] Where a statement of claim alleges several causes of action or theories of recovery against an insured, one of which is within the coverage of the policy and another which is not, the insurer is bound to defend the insured regarding the cause of action which, if proved, would be within coverage: ***Bacon v.***

McBride at para. 12, ***Hartup v. BCAA Insurance Corp***., 2002 BCSC 972 (B.C. S.C.) at para. 21.

[51] These principles will be considered along with the general principles of insurance contract interpretation.

[52] Second, since insurance policies are essentially contracts of adhesion, ambiguities are construed against the insurer; coverage provisions should be construed broadly and exclusion clauses narrowly: ***Scalera*** at para. 70.

[53] Justice McLaughlin (as she then was) writing for the Court in ***Reid Crowther and Partners Ltd. v. Simcoe and Erie General Insurance Company***, [1993] 1 SCR 253 discussed the general principles of interpretation as follows:

> 33 … in each case the courts must interpret the provisions of the policy at issue in light of general principles of interpretation of insurance policies, including but not limited to:
>
> (1) The *contra proferentum* rule;
>
> (2) The principle that coverage provisions should be construed broadly and exclusion clauses narrowly; and
>
> (3) The desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.

[54] The decision goes on to consider extensive case law on the question of what constitutes notice of a claim. The Court commented as follows:

> 48 … under a policy such as this one in this appeal, which contains no express requirement of a formal demand or indeed any demand at all, what constitutes a claim "made" is a question to be resolved on the facts of the case. There is no magic formula.

[55] Interestingly the Court in paragraph 52 took a practical and non-technical approach to what constituted notice of a claim. They went so far as to say that although no formal demand had been advanced by the potential claimant:

> Everyone knew what had happened at the meeting at the site– an assertion of Reid Crowther's liability and a demand for compensation had in effect been made. To borrow the words of ***St. Cloud Fire and Marine Insurance v. Guardian Insurance Company of Canada,*** supra., the substance of the claim had been brought home to Reid Crowther before the policy expired.

[56] Where the contract is unambiguous, a court should give effect to the clear language, reading the contract as a whole; where there is ambiguity, the court should give effect to the reasonable expectations of the parties:

> [L]iteral meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result ... Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract: See ***Scalera*** at para. 71, citing ***Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.***, [1980] 1 S.C.R. 888 at 901-2.

[57] The Supreme Court in ***Reid Crowther and Partners Ltd. v. Simcoe and Erie General Insurance Company, supra***, also made very instructive comments about the danger of pigeon holing an insurance policy as strictly “claims made” or strictly “occurrence based” without appreciating the role and growth of hybrid policies that have adopted elements of both claims made and occurrence based coverage.

[58] McLaughlin, J. commented as follows:

> 18 These disagreements can perhaps be resolved by recognizing that there may be different types of "claims-made" and "occurrence" policies, as well as hybrid policies that have some features of "claims-made" policies and some features of "occurrence" policies. The essential is not the label one places on the policy, but what the policy says. The courts must in each case look to the particular wording of the particular policy, rather than simply attempt to pigeonhole the policy at issue into one category or the other. Construction of policies at issue in these kinds of cases depends much more on the specific wording of the policy at issue than on a general categorizing of the policy.

[59] That said, it is important to understand what the parties are seeking to accomplish by adopting a "claims-made" or hybrid policy, as this may aid in interpreting the provisions of such a policy. An examination of the historical development of the widespread use of "claims-made" and hybrid policies is an appropriate starting point to this area of discussion.

[60] The Supreme Court has addressed notice provisions in insurance policies on a number of occasions. In ***Jesuit Fathers of Upper Canada v. Guardian Insurance Company of Canada,*** [2006] 1 S.C.R. 744, the outcome turned on whether the potential claimants had actually advanced a claim during the term of the relevant policy. A review of the policy wording appears to highlight distinguishing elements between the policy wordings at issue in that case and the present case. The wording in ***Jesuit Fathers*** was as follows:

> **F1 Notice of Accident or Occurrence**
>
> Where an accident or occurrence takes place or upon the insured becoming aware of any alleged injury to which this insurance applies, written notice of such accident, occurrence or injury shall be given by or on behalf of the insured to the insurer or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and reasonably obtainable information respecting the time, place and circumstances of the accident, occurrence or injury, the names and addresses of the insured and of available witnesses and particulars of the damaged property.
>
> **F2 Notice of Claim or Suit**
>
> If claim is made or suit is brought against the insured, the insured shall immediately forward to the insurer every demand, notice, summons or other process received by him or his representative.

[61] This language can be compared with the wording of the operative clause in the present case, which I reproduce again in part:

> VI (B) If, during the **Policy Period…** 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…** 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 **Insured**s 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 .

[62] The scope of the deeming provision in this case is broad. There is no time limit on when the "subsequently made" claim may be brought other than what might be provided by the Statute of Limitations in the normal course.

[63] The wording in VI(B) calls for the insured to give notice where they become aware of facts or circumstances that in the future may crystallize into a claim. If they do so and the claim does come to be made, even after the expiry of the policy, the deeming provision applies. There is no requirement that the insured already have been presented with a claim or have received a demand for payment or expression of responsibility. They must be aware of the facts and circumstances which may result in a claim being advanced in future.

[64] In addition to the cases directly cited in these reasons the Court has reviewed each case presented by either side, together with other authorities. These would include:

> ***Trisura Guarantee Insurance Co. v. Belmont Financial Group Inc.***, 2008 NSCA 87.
>
> ***Hants Realty Ltd. v. Travelers Guarantee Co. of Canada***, 2014 NSCA 69.
>
> ***Stuart v. Hutchins***, [1998] O.J. No. 3672 (Ont. C.A.)
>
> ***Qualiglass Holdings Inc. v. Zurich Insurance Company***, [2004] Carswell Alta. 1013 (Q.B.).

[65] In the case of ***Trisura Guarantee v. Belmont Financial***, supra the Court of Appeal deals with questions of notice in a different factual context. The questions posed in that case did not case did not require the Court of Appeal to directly address the operation of policy wording such as Clause VI(B). Ultimately each situation turns on its own particular wording and facts.

EVIDENCE AND FINDINGS

[66] I do intend to undertake a brief overview of the evidence. It is not my intention to re-state or summarize every single item of evidence or submission. I will summarize central elements and core items of relevance.

[67] I have however, reviewed, weighed, and considered all of the evidence in coming to my conclusions – even if I do not refer to every individual item here.

[68] The hearing proceeded on affidavit evidence with cross examination. It would take an enormous amount of space to repeat all the material covered in the various affidavits and attachments. I do not intend to do that here. By necessity I will only summarize various elements of the evidence which are covered in more detail in the filings.

Greg Duncan and Jim White

[69] Both Applicants produced detailed affidavits and were cross examined. Their evidence covered similar territory. They each described their background with the company, their understanding of the issues with John Allen and the process of assuming the accounts of the nine plaintiffs.

[70] Initially they did not see themselves as potential targets for allegations of negligent action and inaction. They were plainly aware of the issues with the client accounts and the fact those clients were taking steps toward action against Allen and Keybase.

[71] They say that initially when Notices of Action were being launched against Allan and Keybase they were not aware of all the implications of the litigation. The realization of their possible exposure only developed over time. The

realization had not crystallized when they made the first two yearly coverage applications and disclosures to Trisura (June 2008/June 2009).

[72] Duncan and White relied upon their employer and lawyers for advice and direction and to a large extent relied upon Keybase and Aon to be the point of contact on insurance issues.

[73] Duncan and White each addressed issues of their expectations of coverage. Their position is that while they did rely on Keybase and Aon as their point of contact with Trisura they understood this was done on their behalf. They had an expectation that Trisura would cover them if future claims materialized where notice was provided in accordance with Clause VI(B). They believe that such notice was given and accepted as such. Their position is that they rely on this in good faith.

Daniela Colalillo

[74] Daniela Colalillo ("Colalillo") is a senior claims consultant with Aon Reed Stenhouse ("Aon"). She has current responsibility for Keybase related matters.

[75] Aon was involved in this matter as an insurance brokerage and risk management services firm. They acted with respect to the placement of coverage

by Keybase and were involved in the communication between Keybase and Trisura once the John Allen debacle began to unfold. They had extensive contact with the outside adjuster, Luc Bertrand, who acted on behalf of Trisura.

[76] The Colalillo Affidavit attached many relevant documents which shed light on the nature and degree of information being shared between Keybase and Trisura. The Colalillo Affidavit takes the position that Aon, acting as agent for the insureds, provided notice to Trisura of all nine potential claims and received acknowledgement of same.

[77] These notices were given in three groupings. These were as follows:

June 23, 2010

Bateman
Phillips-Waterfield
Verney

June 25, 2010

Cameron
Kowalski-Phillips
Shane

May 16, 2011

Andrews
Ramsay-Matheson
Crowell

[78] The materials relied upon by Aon and the responses on behalf of Trisura were in evidence and received extensive attention in the hearing.

[79] I intend to turn to a consideration of these materials forwarded from Aon to Trisura or Bertrand during the term of the insurance coverage.

June 23, 2010 – Notices

[80] On June 23, 2010 Adelaide Marquardt ("Marquardt") of Aon e-mailed to Trisura a package of material pertaining to seven clients. This included three of the Plaintiffs relevant to this matter. The e-mail addressed not only the claims against Allen but directly touched on the exposure of the replacement advisors, Duncan and White . It stated as follows:

> "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 added)"

[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.

[83] Let me address the letter from the lawyer for Stacey Doncaster. For ease of reference I will refer to this as the "Doncaster Letter". The Respondent takes the position that the Doncaster Letter has little real relevance to the matter now before the Court. The actual client named in that letter is not one of the nine involved in the present proceeding.

[84] The Applicant argues it does have relevance as it removes any doubt that at least after the time of this letter, Trisura had notice that Duncan and White, as replacement advisors, were being exposed to claims. The letter sets out in unmistakeable terms the legal pathway to exposure. This is never questioned in the materials reviewed by the Court.

[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 unpinning 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 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.
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.

[86] It is in light of these comments that we must assess the material forwarded by Aon to Trisura on June 23, 2010. I will do these grouped by the relevant clients.

Bateman

[87] On June 18, 2010, an errors and omissions form was filed with Trisura in the name of Jim White. The form identified White as the person alleged to have committed a possible error for purposes of reporting.

[88] The client had written an e-mail that targeted Allen as the main culprit but contained the implication that White had failed as well. A reasonable person reviewing this complaint letter with a view to assessing whether White might eventually find himself on the firing line would conclude that could reasonably be the case.

[89] Presumably it was this exact reasoning that lead to the E&O form being filed with Trisura in the name of Jim White. The evidence is that Trisura understood the potential exposure and determined to monitor the situation.

Waterfield-Phillips

[90] The June 23, 2010 package contains a further error and omissions form for the Waterfield-Phillips clients. The form identifies John Allen and Greg Duncan as persons alleged to have committed an error.

[91] It attaches a Supreme Court Notice of Action with the Waterfield-Phillips as Plaintiffs and naming Keybase and Allen as Defendants.

[92] Duncan is not named in the Notice of Action. The Respondent argues this ends the inquiry.

[93] The position of the Applicants is that it does not. Clause VI (B) of the policy clearly calls for notice to be provided where there is knowledge of possible exposure that could result in a future claim. While the parties involved still may have been hoping that Duncan would not be targeted in future, the filing of this E&O form reveals a recognition that the risk existed.

[94] Once again the Applicant argue that this is exactly the sort of action called for by Clause VI (B). Trisura acknowledged the notice and determined to monitor the developing situation.

Verney

[95] The March 23, 2010 package included an errors and omissions form identifying Greg Duncan as a person alleged to have committed a potential error with respect to the Verney clients. In this case the form does identify a claimant lawyer and attaches a lawyers letter.

[96] The attached correspondence is addressed to Greg Duncan. It targets John Allen and Keybase most directly. The Respondent argues the letter does not claim against Duncan explicitly. The question raised by the letter, however, is whether a reasonable party in the position of the insured would be prompted to provide notice. We know in this case that it did lead to the forwarding of the E&O form which is in evidence. The facts and circumstances as they were unfolding were pointing at exactly the sorts of conclusions eventually reached by Justice Wright. It is evident that the insureds at this stage could see the unfolding disaster – even if one could call it a slow motion disaster.

[97] Additionally, when Trisura adjuster Luc Bertrand later wrote an internal report dated August 27, 2010 he included the Verney claim in the list of what he refers to as the "Duncan claims". He does this despite noting that Duncan was not

formally named in the claim letter. He was not misled or confused about what was unfolding. This report was forwarded to senior personnel at Trisura.

[98] We will return shortly to additional consideration of the letters and reports produced by Luc Bertrand in the course of his work on the matter.

June 25, 2010 - Notices

[99] The Colalillo Affidavit next goes on to attach the June 25, 2010 grouping of notices forwarded to Trisura. Like the first grouping this one includes a mix of claimants, three of whom are within the Plaintiff group relevant to this proceeding. These included the following:

Cameron

[100] The E&O form in this instance contains only the name John Allen as the person alleged to have committed the error. The attached lawsuit only names Keybase and Allen. Duncan was the subsequent advisor but was not named.

[101] The Applicants argue that the fact Duncan was not directly named at this stage is not determinative. His exposure was well known and well identified. Luc Bertrand includes the Verney claimant on his July 2, 2010 spreadsheet of claims. He stated as follows:

> … 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 Keybases 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 Duncan or White. (emphasis added)

[102] The Respondent argues that the fact Luc Bertrand, acting for Trisura, recognised the potential liability of Duncan and White in instances such as this is of no relevance. They say that under the terms of the policy this notice must come from Duncan and White.

[103] The Applicants say they did give notice and this notice was acknowledged.

[104] This has relevance for another reason. The fact that Bertrand and Trisura had actual knowledge of the "…exposure for the alleged failure by the subsequent Keybase Advisors….to rectify the situation or to have caused an aggravation of the situation…" undoubtedly played a role in their not seeking further or clarifying information from the insureds on these potential claims.

[105] Because they were well aware of the exposure they did not pose questions they might otherwise have raised in the normal course. There was no confusion and accordingly no inquiry seeking further clarification or detail.

[106] This issue was explored in the hearing. Trisura's own statement as to how it responds to notices of claims or potential claims was introduced as an exhibit. That document indicated that, where necessary, Trisura will seek further information and conduct further inquiry where additional information might be required following a report from an insured. Because Trisura had an actual understanding of the mechanism of potential exposure, the questions which otherwise might have been asked were not required.

Kowalski-Phillips

[107] The situation with the Kowalski-Phillips account is essentially similar to Cameron. The E&O form was filled out in the same basic way. The attachment appears very similar as well. The lawsuit once again only named Keybase and John Allen and did not name the subsequent advisor.

[108] The Kowalski-Phillips claim was referred to in the same e-mail by Luc Bertrand and included in the same spreadsheet of claims as discussed above.

[109] The Respondent points out that the lawsuits do not name Duncan and no law suit naming Duncan was filed until after the expiry of the last policy. Similar to the other matters, the Applicant argues that clause VI (B) called on them to provide notice of future potential exposure - not simply Notices of Action.

Shane

[110] The situation with the Shane claimants is essentially the same as with Cameron and Kowalski-Phillips. The contents of the e-mail and the attached Notices of Action are virtually the same. It is treated the same way as Cameron and Kowalski-Phillips in the Bertrand e-mail and spreadsheet of July 2, 2010.

May 16, 2010 - Notices

[111] On May 16, 2010 Aon forwarded to Trisura a third grouping of claim forms and attached lawsuits. It appears to include lawsuits that had materialized since the reporting in mid 2010. As all are very similar in nature. I will summarize these as a group. These were as follows:

1. Ramsay-Matheson
2. Crowell
3. Andrews
4. Bateman (additional material on matter previously addressed on June 23, 2010)

[112] This set of error and omission forms are again very brief and contain scant information. They describe the nature of the error in this case as "suitability of leveraging".

[113] The name of the person alleged to have committed the error is left blank. Each form directs the reader to an attached Notice of Claim which in each case is a lawsuit against Keybase and John Allen.

[114] In each case the representative of Trisura replies to Aon saying that as the lawsuit is not against a named insured (Duncan or White), there was no coverage and no vicarious liability coverage for Keybase.

[115] The Bateman Statement of Claim was included in this package but was noted to relate to a complaint "reported during the last policy term".

[116] Luc Bertrand on behalf of Trisura replied to the Bateman notice as well. He noted that as Duncan or White were not named in the lawsuit there was "no named insured involved in the claim". Accordingly, there was no vicarious liability coverage for Keybase and no coverage for Duncan and White.

[117] The treatment of the Bateman claim is instructive. Bateman had earlier been the subject of an acknowledged "notice of potential claim" that could materialize in the future. This acknowledgment was contained in a letter from Bertrand that will be addressed below. Once the initial Bateman lawsuit was filed, and it did not name the subsequent advisor, it was treated as a matter which required no further action.

[118] While it may be true the situation required no further action in the form of immediate appointment of counsel or filing of a Defence, the question remains, as it does with other claims, whether the information provided was effective under section VI (B) as notice of a potential claim which could materialize in future. This would be the case even where Allen and Keybase were sued first but the potential exposure to Duncan and White remained.

Letters Exchanged Between Aon and Trisura

[119] Luc Bertrand was a specialized adjuster with BBGC Claim Services Limited acting on behalf of Trisura. He acted on behalf of Trisura in evaluating claims and providing advice directly to Bob Taylor, a senior executive of Trisura with responsibility in these issues.

[120] His letters to Trisura and as well as to Aon and Keybase are extremely important in understanding how events unfolded. The pattern seen in the letters is that when complaints were received Bertrand would acknowledge these on behalf of Trisura. If a subsequent Notice of Action was filed which related to that client, and the suit did not claim against either Duncan or White, then coverage would be denied and no further action taken.

[121] On July 2, 2010, he 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.

The email goes on to note that six of the matters had proceeded to litigation and the "subsequent advisors" had not been named. Bertrand seemed to view this as eliminating Trisura's possible exposure on those matters. He does not address the possibility of those claimants subsequently launching action against Duncan or White. As we now know, this eventuality did materialize.

[122] He addresses the remaining matters as follows:

> In regards to the remaining 7 "complaint only" matters, the complaint letters do mention the advisor subsequent to Allen as a person partly responsible for the alleged losses.

Bertrand goes on to note that further investigation is required especially on the issues of possible late reporting of claims and questions of disclosure at the point in time where Trisura came on risk. Bertrand advised that any further investigation be conducted under a non-waiver agreement.

[123] Of the eleven claimants referenced in this email, six are claims relevant to this proceeding as they became litigants in the 2015 Action. For clarity these were as follows:

Shane

Cameron

Kowalski- Phillips

Phillips- Waterfield

Verney

Bateman

The first five listed above were Duncan clients, with the final client, Bateman, having been assigned to White.

[124] Bertrand wrote a series of letters which contained a listing of the active matters. He would move matters from the list of pending matters being followed, to the list of non-coverage matters where the filed lawsuit did not name Duncan or White.

Bertrand Letter of December 9, 2010

[125] An example of this is in the March 9, 2010 letter. An examination of that letter reveals two lists. The letter includes the following:

The present letter will deal with the following thirteen notices of claim you have sent to Trisura Guarantee Insurance Company:

Six legal actions:

R. and W. Shane,

J. Chernin, P. Chernin,

J. and L. Cameron,

Kowalski-Phillips

and J. R. Phillips and B. L. Waterfield.

Seven Notices without lawsuits:

A. Osborne,

W. Nicholson,

S. Hilchey,

A. & J. Verney,

D. Bateman,

G. Weatherbie

and S. Doncaster.

With regard to the six legal actions we note that none of the agents covered under the Trisura Policy are named as Defendants and, as such, there would be no coverage for your company under the Trisura policy since coverage is limited to Keybase as the sponsoring entity to "its vicarious liability for claims arising out of a wrongful act… only to the extent that coverage is provided by this policy to the involved named insured". In other words, if there is no named insured or covered agents involved the claim there is no coverage for Keybase as sponsoring entity.

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 reserve 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.

[126] The language of the letter appears quite clear on the issue of notice of complaints. Mr. Bertrand wrote:

> "…Trisura acknowledges notice of the complaints made against the agents White and Duncan…"

[127] Trisura argues in this hearing that this acknowledgment only pertains to Verney and Bateman as they are the included in the second list and are included in the nine plaintiffs in the 2015 Action.

[128] However, five other clients who eventually join the 2015 Action (Shane, Cameron, Kowalski-Phillips, and Phillips-Waterfield) are also referenced in that letter. They are included in the list of clients who have already opted to file a law suit that had not named Duncan or White.

[129] This fact certainly meant that no immediate action (such as the appointment of counsel or the filing of a Defence) was called for. What is does not mean is that any "notice of potential claim" under Clause VI(B) is erased or no longer operative.

[130] The point of including the notices without lawsuits in the letter was that those were going to be continued to be watched to see if they turned into law suits. The presumption made by Trisura appears to be there was no risk that the clients

who had already filed lawsuits (Shane, Cameron, Kowalski-Phillips, Phillips-Waterfield) would go on to sue Duncan and White. In fact, we know this contingent risk did crystalize.

[131] The Applicant argues that a review of the December 9, 2010 letter clearly indicates there is acknowledgment of six complaints all made within the policy period.

[132] This point can be made again when one looks at Luc Bertrand's letter of May 17, 2010. This letter follows the same pattern. It refers to matters for which "notice" had been previously acknowledged (for example in the Bateman matter) and notes that the subsequent legal actions did not in fact target the named insureds. The letter goes on to state:

> There is no vicarious liability for Trisura and as no named insured was sued in the Notice of Action there was no requirement for Trisura to respond.

[133] The question remains - Is the previously acknowledged "notice" vitiated as it pertains to any future claim against Duncan or White that may be filed. This would appear to be inconsistent with the operation of Clause VI (B).

December 29, 2010 Letter from Aon to Bertrand

[134] On December 29, 2010 Adelaide Marquette of Aon wrote to Luc Bertrand referring to a series of matters including two relevant to this proceeding and seeking to confirm that Trisura was acknowledging receipt of notice pursuant to clause VI(B). She wrote in part as follows:

> "It is our understanding that with respect to the seven provided notices, where no legal actions have been commenced…that Trisura Guarantee Insurance Company has accepted the complaints against Agents White and Duncan as notices of facts and circumstances that may reasonably be expected to give rise to claims. This is pursuant to Section VI(B)….In regard to the notices of the facts and circumstances re these complaints, we confirm that any subsequent claims will be treated by Trisura as having arisen in the period in which these circumstances were reported…".

[135] This was not questioned or objected to by Trisura. However later in 2011 when the Batemans filed suit, and that suit did not name Duncan or White, Bertrand moved the Batemans from the list of matters on which a watch was being maintained to the list of matters where they advised the insureds there was no coverage applicable.

[136] This is highly important as it is an example of an instance where the question of "notice" could not credibly be contested; yet the file was moved to the non-coverage category because the filed suit did not name Duncan or White. The issue of the still existing future contingent risk was left unaddressed.

January 4, 2012 Letter

[137] The letter of January 4, 2012 is notable. The letter follows the familiar format previously used by Bertrand when communicating to Aon. Within the letter all nine of the clients/claimants relevant to the 2015 Action are named. Coverage for each is denied on the basis Duncan and White were not named in the then existing lawsuits. Nothing is said as to how a future law suit against Duncan or White might be treated.

[138] Between the December 9, 2010 letter and the January 4, 2012 letter there were many developments. Various matters that had been referenced in the December 9th letter as "acknowledged notices of the complaints" were moved from Bertrand's list of matters being watched to the list of those for which there is no coverage. The reason being that the lawsuits as filed did not name at that point either Duncan or White.

[139] To be clear – these include clients who had been the subject of Bertrand's prior acknowledgement of notice. While the fact that the subsequent lawsuit did not name Duncan or White may well have changed how the risk was viewed, it did not eliminate the fact that effective notice was given under Clause VI (B) with respect to contingent future liability.

Rebekah Alberga

[140] Rebekah Alberga filed an affidavit on behalf of the Respondent, Trisura. She is Vice President of Claims and General Counsel to the company. Her position is one of substantial responsibility and seniority in the organization.

[141] In her affidavit Ms. Alberga describes the purpose and operation of clause VI(B). She refers to this as a "Notice of Claim" provision and in paragraph 18 testifies as follows:

> 18 The notice of claim provisions are contained in claims made policies in order to provide extra protection for insureds, in the event that they are aware of a situation or occurrence that has occurred during the policy period but, for example, an actual clear demand for monetary damages has not yet been made during that policy period. Or, for example, if a wrongful act occurs just before a policy expires, and a claim has not yet been commenced, to give an insured the ability to report something that has occurred that he or she reasonably believes could give rise to a claim before the policy expires, in the event that a renewal policy is not being sought, or a change of carriers is being made.

[142] I have reviewed all the materials presented and addressed by her on behalf of the Respondent. She clearly outlined Trisura's position that the notices were not compliant under the policy. When these were presented in 2010 – 2011 they directed Trisura to Supreme Court law suits against John Allen and Keybase, neither of which were ensured entities with Trisura. Trisura issued denials of

coverage at the time as they received each law suit which named only Allen or Keybase.

[143] Ms. Alberga filed responding affidavits in this matter. I have reviewed the points made there. I have reviewed the attached documents including Duncan's application for insurance with a different insurer dated June 24, 2014. This application includes statements in Part 2 that are arguably misleading. While this case is not about other insurance policies I have reviewed these carefully. I have read his statements about prior notice of possible negligence in conjunction with other information in the document including Duncan acknowledging his having admitted to certain violations of Nova Scotia Securities Commission standards with respect to John Allen.

[144] Additionally, in Part 3 of this Application Duncan provides further detail on his management of former Allen clients and notes that other information has been disclosed to Advocis by Keybase. What this other information may be is not detailed.

[145] In general, these materials do raise a note of caution for the court. However, to a large degree, conclusions the Court will reach on the coverage issue in the present matter are grounded in the materials exchanged between Aon on

behalf of the insureds and Trisura or their representatives as opposed to the Court relying on the direct recollection or memory of the insureds. In many instances their recall is poor for details, dates and even sequencing of events. Along with other witnesses they required recourse to the documents to recall dates and details.

[146] Alberga was directed to and addressed many of the documents referred to above including the communications of Luc Bertrand. Alberga maintained that effective notice had not been served under Clause VI(B).

Issue – Who may give Notice?

[147] The Respondent has raised the issue of whether the purported notices advanced in this case are valid because parties other than Duncan and White largely filed in the forms, had the discussions and in general were the parties in the middle. I did not get the sense that this was being advanced vigorously as it was raised I will address it.

[148] The issue of who may give notice is addressed in Insurance Law in Canada (Carswell) at Vol. 1, para 9.4(b) as follows:

> **Who May Provide Notice or Proof**
>
> The general rule is that the customer is under an obligation to do certain things upon the occurrence of a loss. If s/he does those things through the medium of an agent, the obligation is no less fulfilled. Most provision regarding who may give notice or proof are "entitling" sections in that they simply allow certain persons to

> undertake certain functions. Even though the provision may refer only to the customer, this does not preclude an agent from filing the notice on the customers behalf."

[149] I conclude that in the circumstances of this case this rationale is applicable. The parties here were acting through agents and adjusters. The question is not by who or how information was delivered but rather what and when it was provided and its legal effect.

Relief Against Forfeiture

[150] The ***Nova Scotia Insurance Act***, RSNS 1989, c.231, as amended, contains the following provision respecting compliance with statutory conditions:

> 33 Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss, and a consequent forfeiture or avoidance of the insurance in whole or in part, and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just.

[151] I have concluded that recourse to this section is not required in the circumstances. However, in the alternative I am incorrect with respect that the steps taken by the insureds constituted effective notice or issues of who provided notice on their behalf, I will consider the operation of the section. I find that as a claims made policy with hybrid elements, as discussed by Justice McLaughlin in

Reid Crowther and Partners Ltd., supra., this policy is one to which the section could be applied on issues of notice.

[152] My review will take two parts:

(1) Why was there imperfect compliance?

(2) What if any prejudice may have resulted?

[153] The parties doing the bulk of the relevant communication in this matter were Aon on behalf of the insureds and Bertrand for Trisura. If there was imperfect compliance in this matter it arose at least partly because the communicating parties seemed to have settled into a pattern of treating files in groups or batches as opposed to single "one-off" matters.

[154] It is easy to see why this occurred. There were many files and multiple clients and a myriad of potential claims. This was insurance triage. In addition to the nine claimants we are dealing with here there were many others.

[155] The parties adapted to handle not only the number of potential claimants but also the fact that many had certain similarities, although without doubt each had unique features.

[156] While these factors do not relieve against the obligation to comply with the policy, they do explain, at least in part why events unfolded as they did.

[157] Additionally, Trisura and Bertrand did not seek further information or clarification. Instead the notices were acknowledged and then when the law suits as filed did not name Duncan or White the matter was treated as closed. I find that the operation of Clause VI(B) called for more. If greater information was required there was an obligation in good faith to request it. It was not.

[158] With respect to the issue of possible prejudice it seems obvious that substantial claims will I be advanced here. However, I note that at the time the complaints against Duncan and White were first being recognized in the 2010 range Trisura did indicate that it was investigating and "following" the matters.

[159] Trisura was not in the dark. It is not immediately evident what additional investigation they may have wanted to undertake at that time in any event. There is no evidence that they would have chosen to seek to participate in the trial of the 2009 Action. It seems more likely events would have unfolded as they did. With the parties continuing to hope that the fact Duncan and White were not named in the suits at that time was an indication they would remain out of the firing line.

[160] If required I would have invoked the provisions of section 33 to relieve against any technical failures to fill in the E&O forms more completely where the actual facts and circumstances would reasonably have been known to Bertrand/Trisura. This would pertain as well to cover any situation where an incorrect certificate number was applied and the proper certificate number would have been for the adjacent certificate period for which coverage was in place.

Failure to Disclose

[161] The Respondent submits there was a failure on the part of Duncan and White to disclose the existence of these potential claims in their initial application to Trisura in June 2008. They also note that with respect to claim such as the Cameron claim it was filed with the Supreme Court and served in August, 2008. It was not reported to Trisura until June 24, 2010. The Respondent says that if it had been reported in August 2008 and Luc Bertrand took the same view of it as he did in his email of July 2, 2010 then the Cameron claim would have been considered to have been made under the first policy term (TPL1000542) and not under the second or third renewal terms. Other claims would have been excluded by Exclusion IV(1) respecting wrongful acts prior to the inception date of the policy.

[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.

[163] For the same reasons, I have concluded that the exclusion referred to in paragraph 38 of these reasons does not operate to exclude coverage in these circumstances.

[164] Given these findings I conclude there was no failure to disclose at the time of the inception of the coverage.

Summary

- Duncan and White purchased an E&O policy that offered them coverage for matters where they could give notice to the insurer during the policy term of claims that could be presented in future and even after the policy had expired. This was found in Clause VI(B).
- Beginning in about mid-2009 the insureds and their employer began to appreciate they were exposed to potential liability based in the steps they took and didn't take after assuming responsibility for former clients of John Allen.

- Beginning in 2010, Aon, acting on behalf of the Keybase and the insureds purported to give notice under Clause VI(B). The forms never contained a great deal of information and the matter was complicated by the fact John Allen and Keybase were the only parties sued, not Duncan or White.

- A review of the file materials reveals that Trisura had actual awareness that these situations could expose Duncan and White to legal liability. Initially the filed law suits did not name Duncan and White and this allowed hope to grow that they might avoid being named in the suits.

- Trisura wrote denial letters to Duncan and White advising there was no coverage as they were not being sued - thus there was no coverage for them and no vicarious coverage for Keybase.

- However, notice was received and the mere fact Duncan and White were only sued later does not erase the fact that Clause VI (B) was complied with and triggered.

- When the claims materialized, the operation of Clause VI(B) deemed them to be claims made within the policy term.

Conclusion

[165] It is the finding of the Court that the Applicants have carried their burden of demonstrating they are owed a defence in this matter given that notice of these possible claims were made under Clause VI(B) and it is possible they may fall within the scope of future indemnity obligation. This is the case with respect to all nine claimants

[166] I agree with the Respondent that at this stage this is as far as the Court is required to go with respect to a determination of the indemnity obligation. The claims as plead may reasonably be seen as falling within coverage. This is the standard required to invoke the defence obligation. As the indemnity obligation may invoke a different analysis under the provisions of the policy this decision is limited to a declaration respecting the obligation to offer a defence.

Costs

[167] In the event the parties are unable to come to an agreement with respect to costs the Court will accept written submissions on any unresolved issues within 30 days.

J.