

BACKGROUND FACTS

[5] Puri PC is an accounting firm and Amit Puri (“Mr. Puri”) is its principal.

[6] Mr. Puri provided tax services and tax advice (the “Advice”) to Shahyad Farzaneh Ghoschaninejad (the “Client”). The Advice concerned the Client’s tax free savings account (“TFSA”).

[7] The uncontested timeline is as follows:

1. Mr. Puri and the Client discussed his TFSA, investments and other matters in 2014-2015.
2. The Client over-contributed to his TFSAs in the 2015 and 2016 tax years.
3. The Client received a Notice of Assessment dated January 17, 2018 from the Canada Revenue Agency (“CRA”), citing an over-contribution to his TFSA in the 2015 year
4. The Client received a Notice of Reassessment on December 18, 2018, from the CRA for the 2016 tax year, again for excess TFSA contributions.
5. Puri PC assisted the Client with a Notice of Objection on or around March 14, 2019, which was submitted with a cover letter of March 22, 2019, explaining the Client’s over-contributions were an error.
6. Subsequently, the Client was assisted by another accounting firm and the Client and the CRA eventually consented to a judgment dated September 27, 2022.

[8] On May 28, 2020 the Client sent a demand letter giving Puri PC notice of a potential claim (“the Demand Letter”). The Demand Letter alleges that Puri PC gave poor tax advice and service to the Client from 2014 to 2019 resulting in the client having to pay an advantage tax due to over contributions to the Client’s TFSA.

[9] On September 15, 2020 the Client commenced an action against Puri PC alleging that it had failed to advise of potential tax consequences related to the TSFA contributions in the 2016 taxation year, which resulted in the Client being audited by the CRA (the “Client’s Negligence Claim”).

[10] Puri PC had an insurance policy for errors and omissions coverage for accountants with policy number AT00556-0 (the “Policy”) from the Insurers with a policy period from April 9, 2020 to April 9, 2021.

[11] The policy includes coverage subject to any exclusions. One of the exclusions is entitled Retroactive Date and it excludes any actual or alleged wrongful act by the Insured (the Plaintiff)

committed or alleged to have been committed prior to the retroactive date stated on the declaration page of the Policy.

[12] Puri PC submitted a claim for coverage to the Insurers for defence and indemnity relating to the Client's Negligence Claim.

[13] The Insurers denied coverage based on the Retroactive Date exclusion.

POSITIONS OF THE PARTIES

[14] The Insurers say that there is no coverage because the wrongful acts alleged in the Client's Negligence Action occurred before the Retroactive Date.

[15] Puri PC says the Policy was valid when Mr. Puri made the claim and there are no applicable exclusions.

[16] The Insurers argue, in the alternative, that even if the Retroactive Date exclusion does not apply, Puri PC is not entitled to coverage because a trial is needed to determine if another exclusion applies. This other exclusion is based on Puri PC's knowledge of a potential claim at the time it applied for coverage. Puri PC argues that there is sufficient evidence for the court to grant summary judgment.

THE ISSUES

[17] There are two issues as follows:

1. Is this an appropriate case for summary judgment?
2. If so, is Puri PC entitled to coverage under the Policy?

ANALYSIS

Issue 1. Summary Judgment

[18] Rule 20.04(2)(a) provides: "The court shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence".

[19] Rule 20.04(2.1) sets out the court's powers on a motion for summary judgment as follows:

[20] In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

[21] In *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 66, the Supreme Court of Canada established a road map outlining how a motions judge should approach a motion for summary judgment:

[22] [T]he judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable, and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability, and proportionality in light of the litigation as a whole.

[23] There is no genuine issue requiring a trial when the court is able to reach a fair and just determination on the merits of the motion. This will be the case where the process (1) allows the court to make necessary findings of fact, (2) allows the court to apply the law to the facts, and (3) is a proportionate, more expeditious, and less expensive means to achieve a just result: *Hryniak*, at para. 49; *Moffitt v. TD Canada Trust*, 2023 ONCA 349, 483 D.L.R. (4th) 432, at para. 39.

[24] The court is entitled to assume that it has all the evidence that would be available at trial related to the matters at issue: *Portuguese Canadian Credit Union v. Pires*, 2011 ONSC 7448, at para. 11, aff'd 2012 ONCA 335.

[25] The parties agree that this is an appropriate case for summary judgment on the issue of the Retroactive Date Exclusion. The facts are largely undisputed. I am satisfied that I can come to a fair and just result. The determination of this issue is appropriate for summary judgment.

Issue 2: Coverage Under the Policy

[26] A “duty to defend” policy is one in which the insurer is required to provide a defence for the insured in the insured litigation if there is a “possibility” that the insurance policy will have to respond to the substantive claims against the insured in that litigation. If a claim falls within the terms of coverage and is not clearly and unambiguously excluded, then, by definition, there must be a “possibility of coverage”: *Progressive Homes Ltd. v. Lombard General Insurance Co.*, 2010 SCC 33, at para. 51.

[27] The Policy is a “claims made” policy meaning it provides coverage for claims made within the policy period. The policy period is April 9, 2020 to April 9, 2021. On June 5, 2020 Puri PC notified the Insurers of a potential claim. As set out above the Client’s Negligence Claim was

issued on September 15, 2020. The parties agree that the claim was made within the term of the policy.

[28] The analysis is as follows:

1. When was the claim made?
2. Did the insured have insurance on that day (is it within the policy period)?
3. If so, is there an exclusion that applies?

[29] There is no issue that the Policy was in effect in June 2020 when the Demand Letter was reported to the Insurers and the claim was made. The issue is whether an exclusion applies.

[30] Under the heading “EXCLUSIONS”, the Policy states:

3. EXCLUSIONS

UNDERWRITERS shall not be liable to pay any DEFENCE COSTS or CLAIM or make supplementary payments to the INSURED against any CLAIM or CLAIMS arising directly or indirectly out of or in respect of:

3.6 Retroactive Date

Any actual or alleged a WRONGFUL ACT by the INSURED or any negligent act, negligent error or negligent omission committed or alleged to have been committed before the RETROACTIVE DATE stated on the DECLARATION PAGE (the “Retroactive Date Exclusion”).

3.7 Circumstances Known at Inception

Any circumstance which Any circumstances which could give rise to a CLAIM under this POLICY of which the INSUREDS were aware or ought reasonably to have been aware at or prior to the inception date of this POLICY stated on the DECLARATION PAGE, whether notified under any other insurance or not.

[31] The Policy’s declarations page states that the retroactive date is April 9, 2020.

[32] Generally, coverage provisions are interpreted broadly and exclusions are interpreted narrowly. The insurer must prove that the loss is excluded. *Contra proferentem* is applied to remove a doubt, not to create a doubt or magnify ambiguity: *Kelly Panteluk Construction Ltd. v Lloyd’s Underwriters*, 2022 SKKB 227 at paras 14 and 17; *MDS Inc. v Factory Mutual Insurance Co.*, 2021 ONCA 594 at para 45.

[33] I find that the Policy covers errors and omissions which occurred during the term of the policy. The Retroactive Date Exclusion clearly and unambiguously states that the Policy does not cover wrongful acts, negligent acts, negligent errors or negligent omissions committed or alleged to have been committed before the retroactive date in the Policy.

[34] The Policy's declarations page is also clear and unambiguous; it states that the retroactive date is April 9, 2020.

[35] Mr. Puri concedes that the Client's allegations in the Negligence Action are that Puri PC and Mr. Puri were negligent before April, 2020.

[36] In his oral argument counsel for Puri PC relied on *Backyard Media Inc. v. HDI Global Specialty SE*, 2021 ONSC 2341. In *Backyard*, the definition of "retroactive date" was "not written in grammatically scannable English" and the exclusion for claims of which the insured was aware as of the inception of the policy was "hopelessly ambiguous"; *Backyard* at paras. 43 and 64. *Backyard* is distinguishable because in present case the retroactive date is not ambiguous; rather, it is a clear and specific date: April 9, 2020.

[37] Puri PC has made an argument that there was a clerical error or "typo" which was a mistake that I should rectify. Some background about the application process is necessary.

[38] Puri PC's insurance broker Multirisk Insurance Broker (the "Broker") who is not a party to this action arranged for the Policy through Premier Canada Assurance Managers Ltd. ("Premier") who is the managing general agent with delegated authority to bind the Insurers.

[39] On February 25, 2020 Mr. Puri completed an application with Multirisk for errors and omissions insurance for Puri PC (the "Application"). The retroactive date on the Application is April 9, 2020.

[40] On April 8, 2020 Multirisk emailed an underwriter to bind the policy effective April 9, 2020 with the same retroactive date.

[41] In the Application there is a question about prior insurance coverage.

[42] From 2019-2020, Puri PC was insured with ENCON Group Inc. ("ENCON") with an errors and omissions policy from April 6, 2019 to April 6, 2020.

[43] In the Application on the third page the answer to question 21 about prior coverage states that the "retroactive date" for the ENCON Policy is "April 9, 2020", when in fact it was April 6, 2020. Puri PC says that the "April 9, 2020" date is a clerical error, a "typo", and the answer ought to have been "April 6, 2020". Puri PC says it did not know that this error was made.

[44] On June 5, 2020, after Puri PC received the Demand Letter, Multirisk wrote to Premier advising that Puri PC had been able to locate its prior insurance policy and asked the retroactive date of the Policy be changed. Premier advised that they could not offer retroactive coverage due

to the three day gap in coverage between April 6, 2020 (the end of the ENCON policy) and April 9, 2020 (the start of the policy).

[45] Multirisk told Premier that the gap was due to confusion about the date of the expiry of the ENCON policy and asked them to provide coverage. Premier said they could not backdate coverage. After Multirisk asked Premier again to provide retroactive coverage, Premier said that to obtain retroactive coverage there should be no gap in coverage and “[as] such, as we are not able to backdate cover, retroactive cover would not be available too”.

[46] Puri PC submits that the three day gap in coverage triggers the Retroactive Exclusion and is the cause of the Insurers’ denial of coverage for the Client’s claim. I do not agree. I do not read the denial letter this way. The denial letter says that coverage is denied because of the Retroactive Date Exclusion set out above and because Puri PC was aware of circumstance that could give rise to a claim and the policy does not provided coverage for circumstances known at inception.

[47] Prior to issuing the Policy Premier said:

If client had E&O coverage with another carrier, Premier may offer retroactive coverage to the inception date of the previous policy (with no gap in coverage) at no additional cost. We must receive a copy of the previous policy(ies) confirming the retroactive date. Otherwise, prior acts are excluded in accordance with policy form.

[48] In its factum Puri PC says:

75. It is worth noting that there is no evidence before the Court that the Insurer’s would not have insured Puri PC had the original application form stated “April 6, 2020” as the end date of the ENCON Policy, not “April 9, 2020” as it erroneously did.

76. Puri PC submits therefore that it needs the Court’s equitable intervention to allow for rectification of the E&O Policy to commence on April 6, 2020, and run to April 6, 2021, which would allow for coverage of Puri PC in the Negligence Action.

[49] Puri PC submits that by asking about what insurance coverage Puri PC had in the past, the Application suggested that the Insurers might have agreed to provide coverage going back for five years.

[50] I do not need to decide whether the Insurers **might** have agreed to provide retroactive coverage had there been no gap in coverage. The point is that they did not do so. Rectification will not assist Puri PC.

[51] It was not the responsibility of the Insurers to ensure there was proper coverage for Puri PC. The Insurers owed no duty to Puri PC because an experienced broker Multirisk was acting on

behalf of Puri PC. The Insurers' only obligation was to issue a policy in accordance with the Application submitted: *Drader v Sebastian*, 2009 SKCA 44, para 47; *Broudreau v Ontario Soccer Assn.*, 2012 ONSC 4461, para 25.; *Ostenda et al. v Bahena Miranda et al.*, 2012 ONSC 7346, para 47.

[52] In this case the Application provided for a retroactive date of April 9, 2020. The Insurers met their obligation to provide insurance coverage in accordance with the Application. Even if the "typo" was corrected, the retroactive date would be April 6, 2020. This correction would not assist the Plaintiff because the alleged acts did not occur during the three day gap, they occurred well before April, 2020.

[53] Given my decision that there is no coverage for Puri PC with respect to the Client's Negligence Claim because the Retroactive Date Exclusion applies, I do not need to decide the issue of whether another exclusion relating to the circumstances known by Puri PC at the time it applied for the Policy applies.

[54] The Insurers' motion for summary judgment is granted. Puri PC's cross motion for summary judgment is dismissed.

COSTS

[55] The parties have agreed that if the Insurers are successful, they are entitled to costs in the amount of \$35,000 inclusive of HST and disbursements.

Merritt J.

Released: December 16, 2024

CITATION: Puri Professional Corporation v. Lloyd's Underwriters, 2024 ONSC 6997
COURT FILE NO.: CV-21-00662939-0000
DATE: 20241216

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Puri Professional Corporation

Plaintiff

– and –

Lloyd's Underwriters and The Sovereign General
Insurance Company

Defendants

REASONS FOR JUDGMENT

Merritt, J.

Released: December 16, 2024