

SUPREME COURT OF QUEENSLAND

CITATION: *Liberty International Underwriters v The Salisbury Group Pty Ltd (in liq) & Ors* [2014] QSC 240

PARTIES: **LIBERTY MUTUAL INSURANCE COMPANY t/as
LIBERTY INTERNATIONAL UNDERWRITERS
ABN 61 086 083 605**
(applicant)
v
**THE SALISBURY GROUP PTY LTD (IN
LIQUIDATION)
ACN 089 332 918**
(first respondent)
IAN WEAVER
(second respondent)
**TREADSTONE DEVELOPMENTS PTY LTD
ACN 069 137 177**
(third respondent)

FILE NO: SC No 7919 of 2014

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 2 October 2014

DELIVERED AT: Brisbane

HEARING DATE: 17 September 2014

JUDGE: Flanagan J

ORDER: **1. Applicant granted leave *nunc pro tunc* to proceed against the first respondent pursuant to s 500(2) of the *Corporations Act 2001*.**
2. The application is otherwise dismissed.

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – DISCRETIONARY TRUSTS – CREATION AND EFFECT GENERALLY – where the first respondent held a professional indemnity insurance policy (“**the policy**”) with the applicant – where the second respondent was an authorised representative of the first respondent and was also “an insured” under the policy – where the first respondent, by the second respondent as its authorised representative, gave financial advice to the third respondent as trustee for the “Weaver Family Trust” – where the second respondent and his spouse and children constituted discretionary beneficiaries under the “Weaver Family Trust” – where the third respondent’s directors and shareholders constituted the second respondent’s spouse and children – where the third

respondent, as trustee, commenced proceedings against the first and second respondent for negligent financial advice and/or misleading and deceptive conduct – where the first and second respondents sought indemnity under the policy in respect of the third respondent’s claim – where the policy excluded cover for a claim made on behalf of one insured against another insured or one insured’s spouse or child against another insured – where the policy excluded cover for a claim made by, or on behalf of, any entity an insured has a financial interest in – whether the claim made by the third respondent as trustee is a claim made “on behalf of” the second respondent or his spouse or children in their capacity as discretionary beneficiaries – whether the second respondent, as a discretionary beneficiary, has a “financial interest” in the “Weaver Family Trust”

INSURANCE – PROFESSIONAL INDEMNITY INSURANCE – EXCLUSIONS – where the first respondent held a professional indemnity insurance policy (“**the policy**”) with the applicant – where the second respondent was an authorised representative of the first respondent and was also “an insured” under the policy – where the first respondent, by the second respondent as its authorised representative, gave financial advice to the third respondent as trustee for the “Weaver Family Trust” – where the second respondent and his spouse and children constituted discretionary beneficiaries under the “Weaver Family Trust” – where the third respondent’s directors and shareholders constituted the second respondent’s spouse and children – where the third respondent, as trustee, commenced proceedings against the first and second respondent for negligent financial advice and/or misleading and deceptive conduct – where the first and second respondents sought indemnity under the policy in respect of the third respondent’s claim – where the policy excluded cover for a claim made on behalf of one insured against another insured or one insured’s spouse or child against another insured – where the policy excluded cover for a claim made by, or on behalf of, any entity an insured has a financial interest in – where the second respondent removed himself as a beneficiary of the discretionary trust two days prior to the hearing – whether the claim made by the third respondent as trustee is a claim made “on behalf of” the second respondent or his spouse or children in their capacity as discretionary beneficiaries – whether the second respondent, as a discretionary beneficiary, has a “financial interest” in the “Weaver Family Trust” – whether the second respondent’s removal of himself as a discretionary beneficiary defeats the interest, if any, he holds in the Weaver Family Trust or whether the interest, if any, is determined at the time the claim is made

INSURANCE – THE POLICY – CONDITIONS,

WARRANTIES AND EXCEPTIONS – EXCLUSION CLAUSES – where the first respondent held a professional indemnity insurance policy (“**the policy**”) with the applicant – where the second respondent was an authorised representative of the first respondent and was also “an insured” under the policy – where the first respondent, by the second respondent as its authorised representative, gave financial advice to the third respondent as trustee for the “Weaver Family Trust” – where the second respondent and his spouse and children constituted discretionary beneficiaries under the “Weaver Family Trust” – where the third respondent’s directors and shareholders constituted the second respondent’s spouse and children – where the third respondent, as trustee, commenced proceedings against the first and second respondent for negligent financial advice and/or misleading and deceptive conduct – where the first and second respondents sought indemnity under the policy in respect of the third respondent’s claim – where the policy excluded cover for a claim made on behalf of one insured against another insured or one insured’s spouse or child against another insured – where the policy excluded cover for a claim made by, or on behalf of, any entity an insured has a financial interest in – where the second respondent removed himself as a beneficiary of the discretionary trust two days prior to the hearing – whether the claim made by the third respondent as trustee is a claim made “on behalf of” the second respondent or his spouse or children in their capacity as discretionary beneficiaries – whether the second respondent, as a discretionary beneficiary, has a “financial interest” in the “Weaver Family Trust” – whether the second respondent’s removal of himself as a discretionary beneficiary defeats the interest, if any, he holds in the Weaver Family Trust or whether the interest, if any, is determined at the time the claim is made

Ashmere Cove Pty Ltd v Beekink [2009] FCA 564, considered
Chief Commissioner of Stamp Duties (NSW) v Buckle (1998) 192 CLR 226, cited

CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic) (2005) 224 CLR 98, considered

Darlington Futures Ltd v Delco Australia Pty Ltd (1986) 161 CLR 500, cited

Kennon v Spry (2008) 238 CLR 366, considered

Leedale v Lewis [1982] 3 All ER 808, considered

McCann v Switzerland Insurance Australia Ltd (2000) 203 CLR 579, cited

R v Toohey; Ex parte Attorney-General (NT) (1980) 145 CLR 374, considered

Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Elliott (2009) 174 FCR 387, considered

COUNSEL: S Donaldson SC, with J Baartz, for the applicant
 No appearance for the first respondent
 The second respondent appeared on his own behalf
 D de Jersey for the third respondent

SOLICITORS: Wotton + Kearney for the applicant
 No appearance for the first respondent
 The second respondent appeared on his own behalf
 Tucker & Cowen for the third respondent

- [1] By amended originating application filed by leave on 17 September 2014 the applicant, Liberty Mutual Insurance Company trading as Liberty International Underwriters (“**Liberty**”), sought the following declarations:

- “1. A declaration that, by reason of the operation of exclusions 4.14(a) and 4.14(c) of the Applicant’s Financial Institutions Professional Indemnity Policy number FI-SY-SPC-07-501585 for the period 30 June 2007 to 31 March 2008 (the ‘Policy’) the claims made against the First Respondent in Supreme Court of Queensland proceedings number BS 6878/13 (the ‘First Respondent Claims’) are not the subject of indemnity under the Policy.
2. Alternatively, a declaration that, by reason of the operation of exclusion 4.14(d) of the Policy, the First Respondent Claims are not the subject of indemnity under the Policy.
3. A declaration that, by reason of the operation of exclusions 4.14(a) and 4.14(c) of the Policy, the claims made against the Second Respondent in Supreme Court of Queensland proceedings number BS 6878/13 (‘the Second Respondent Claims’) are not the subject of indemnity under the Policy.
4. Alternatively, a declaration that, by reason of the operation of exclusion 4.14(d) of the Policy, the Second Respondent Claims are not the subject of Indemnity under the Policy.”

Background

- [2] The first respondent, The Salisbury Group Pty Ltd (in liquidation) (“**TSG**”), was an Australian Financial Services licence holder carrying on an investment advice business until it was placed into liquidation on 7 May 2013.¹
- [3] The liquidators of TSG did not appear in response to the amended originating application but advised by letter dated 16 September 2014 that they neither opposed

¹ Affidavit of Jennifer Lucy Jones sworn 20 August 2014, [4].

nor consented to Liberty's application for leave *nunc pro tunc* to proceed against TSG pursuant to s 500(2) of the *Corporations Act 2001* (Cth).²

- [4] The second respondent, Ian Weaver (“**Mr Weaver**”), was an authorised representative of TSG between 21 December 2004 and June 2010.³ Liberty issued a Financial Institutions Professional Indemnity Policy for the period 30 June 2007 to 31 March 2008 (“**the Policy**”) in respect of TSG. The Policy contains certain exclusions.
- [5] In his capacity as an authorised representative of TSG, Mr Weaver provided certain financial advice to Treadstone Developments Pty Ltd (“**Treadstone**”).
- [6] Treadstone was incorporated on 21 April 1995 and it has two directors, Jillian Weaver and her son Scott Weaver. Its shareholders are Scott Weaver and his brothers Jonathon Weaver and Justin Weaver. Mr Weaver is the husband of Jillian Weaver and the father of Scott, Jonathon and Justin Weaver.⁴
- [7] On 28 April 1995 the Weaver Family Trust was created by deed. The parties to the Deed of Settlement are John Stewart as settlor and Treadstone as trustee.⁵
- [8] By application filed 16 September 2014 Treadstone, as trustee for the Weaver Family Trust, sought to be joined as a respondent to the originating application. This joinder was sought pursuant to rules 69(b)(i) and (ii) of the *Uniform Civil Procedure Rules 1999* (Qld). Liberty did not oppose leave being granted and accordingly Treadstone was made the third respondent to the amended originating application.

Proceeding Number 6879 of 2013

- [9] Treadstone commenced proceeding 6878 of 2013 in the Supreme Court of Queensland as trustee of the Weaver Family Trust on 26 July 2013. Treadstone has sued TSG, Mr Weaver, Avanteos Investments Limited and the Commonwealth Bank of Australia.

² Exhibit 1.

³ Affidavit of Jennifer Lucy Jones sworn 20 August 2014, [5], [21].

⁴ Affidavit of Scott Weaver sworn 15 September 2014, [4]-[7].

- [10] Relevantly as against TSG and Mr Weaver, Treadstone alleges:⁶
- (a) that in or about 2005, it engaged TSG to provide financial advice and financial services;
 - (b) that in reliance upon negligent or misleading and deceptive advice (and representations) from TSG, by its authorised representative, Mr Weaver, it made investments in capital investment funds and obtained margin loans [from the Commonwealth Bank] resulting in substantial losses;
 - (c) that the provision of the advice by TSG, through its authorised representative, Mr Weaver, constituted a breach of contract, negligence or misleading and deceptive conduct in contravention of the *Corporations Act 2001* (Cth), the *Australian Securities & Investments Commission Act 2001* (Cth) or the *Trade Practices Act 1974* (Cth);
 - (d) that it is entitled to damages for breach of contract, damages for negligence, damages for misleading or deceptive conduct pursuant to s 1041I of the *Corporations Act 2001* (Cth), s 12GF of the *Australian Securities & Investments Commission Act 2001* (Cth) and s 82 of the *Trade Practices Act 2001* (Cth), damages for breach of s 945A or s 945B of the *Corporations Act 2001* (Cth) pursuant to s 953B of that Act, and damages pursuant to s 1022B of the *Corporations Act 2001*(Cth) for breach of s 1012A of that Act.

Notification under the Policy and denial of indemnity

- [11] By letter dated 27 November 2007 TSG and Mr Weaver notified Liberty of potential claims against them.⁷ Further notification was given to Liberty on 19 February 2008 and 12 March 2008.⁸ By letter dated 31 July 2014 Liberty wrote to TSG and Mr Weaver declining indemnity.⁹ The primary basis identified by Liberty for declining indemnity under the Policy was by reference to the “Related Entities” exclusions in clause 4.14 of the Policy.

The Policy

- [12] The Policy insured TSG and others, including Mr Weaver, for legal liability in respect of claims first made and notified during the period of insurance arising from acts, errors or omissions in the provision of financial planning and other services.¹⁰
- [13] The Policy provides at clause 2.1:¹¹

⁵ Affidavit of Jennifer Lucy Jones sworn 20 August 2014, [17].

⁶ Applicant’s outline of argument dated 17 September 2014, [9].

⁷ Affidavit of Jennifer Lucy Jones sworn 20 August 2014, [29], exhibit JLJ-1, 118-119.

⁸ Affidavit of Jennifer Lucy Jones sworn 20 August 2014, [30]-[31], exhibit JLJ-1, 120-132.

⁹ Affidavit of Jennifer Lucy Jones sworn 20 August 2014, [46], exhibit JLJ-1, 248-292.

¹⁰ Affidavit of Jennifer Lucy Jones sworn 20 August 2014 exhibit JLJ-1, 19-36.

¹¹ Affidavit of Jennifer Lucy Jones sworn 20 August 2014 exhibit JLJ-1, 20.

“Liberty will pay on behalf of the Insured any Loss which the Insured becomes legally liable to pay in respect of a Claim made against the Insured arising from an act, error or omission of the Insured from the provision of Professional Services. The Claim must have been first made against the Insured, and must be notified in writing to Liberty, during the Period of Insurance.”

[14] “Professional Services” is defined in the Policy Schedule as “Financial Planning, Life Insurance Broking, Mortgage Broking”.¹²

[15] “Insured” is defined as:¹³

- “(a) the Named Insured;
- (b) a director of the Named Insured;
- (c) if the Named Insured is a partnership, each partner;
- (d) any past, present or future employee, authorised representative, partner or director of the Named Insured while acting in that capacity that occurred prior to their last day of employment or authorisation with the Named Insured during the Period of Insurance; or
- (e) in the event of the death or incapacity of any employee, partner or director of the Named Insured, the estate, heirs, legal representatives or assigns of any employee, partner or director of the Named Insured.”

The Policy schedule identified TSG as the “Named Insured”.¹⁴

[16] “Claim and/or Claims” is defined relevantly to mean “any writ, initiating legal proceedings, or other written demand for compensation against the Insured which may result in a Loss”.¹⁵

[17] Part 4 of the Policy contains a number of exclusions including clause 4.14 which is headed “Related entities” and excludes cover for:¹⁶

- “a Claim made by or on behalf of:
- (a) one Insured against another Insured;
 - (b) a Subsidiary of the Named Insured against another Insured;
 - (c) any current or former spouse or partner, parent, child or sibling of any Insured against another Insured; or
 - (d) any entity the Insured has a financial interest in.

¹² Affidavit of Jennifer Lucy Jones sworn 20 August 2014 exhibit JJJ-1, 19.

¹³ Affidavit of Jennifer Lucy Jones sworn 20 August 2014 exhibit JJJ-1, 33.

¹⁴ Affidavit of Jennifer Lucy Jones sworn 20 August 2014 exhibit JJJ-1, 19, 28.

¹⁵ Affidavit of Jennifer Lucy Jones sworn 20 August 2014 exhibit JJJ-1, 27.

¹⁶ Affidavit of Jennifer Lucy Jones sworn 20 August 2014 exhibit JJJ-1, 23.

- (e) any legal entity who has control directly or indirectly of more than 50% of the Named Insured's equity or control of the board"

[18] "Subsidiary" is a defined term in the Policy and means:¹⁷

"a company in which the Named Insured:

- (a) controls the composition of the board of directors;
- (b) controls the majority of voting rights; or
- (c) owns either directly or indirectly through one or more of its subsidiaries more than 50% of the issued and outstanding voting shares."

[19] The Policy does not contain definitions of the terms "related entity", "on behalf of", "financial interest" or the word "entity". Clause 4.14 does however appear to draw a distinction in 4.14(d) and 4.14(e) between an "entity" and a "legal entity".

The Deed of Settlement

[20] The Deed of Settlement is dated 28 April 1995.¹⁸

[21] Clause 2(a) deals with the "Vesting Day".¹⁹

"For the purposes of this Deed the 'Vesting Day' means the day upon which shall expire the period of seventy-five (75) years after the date of this Deed or the day upon which shall expire the period of twenty-one (21) years after the death of the last survivor of the descendants now living of His Late Majesty King George VI whichever day shall first occur, or such earlier date as the Trustee may at any time in writing or by oral declaration subsequently recorded in writing or in the case of a corporation by oral resolution of its Boards of Directors passed in the manner for the time being provided in its Articles of Association, appoint to be the Vesting Day."

[22] Clause 4 provides:²⁰

"The expression 'the Father' wherever used in this Deed shall mean Ian John Weaver of 6 Aquamarine Close, Caves Beach, New South Wales."

[23] The expression "the beneficiaries" is defined in clause 5 as follows:²¹

¹⁷ Affidavit of Jennifer Lucy Jones sworn 20 August 2014 exhibit JJJ-1, 29.

¹⁸ Affidavit of Jennifer Lucy Jones sworn 20 August 2014 exhibit JJJ-1, 3.

¹⁹ Affidavit of Jennifer Lucy Jones sworn 20 August 2014 exhibit JJJ-1, 4.

²⁰ Affidavit of Jennifer Lucy Jones sworn 20 August 2014 exhibit JJJ-1, 4.

²¹ Affidavit of Jennifer Lucy Jones sworn 20 August 2014 exhibit JJJ-1, 4-5.

“The expression ‘the beneficiaries’ wherever used in this Deed shall mean and include the following:-

- (a) The Father.
- (b) The lawful wife or widow from time to time of the Father born before the Vesting Day.
- (c) Any former wife of the Father born before the Vesting Day.
- (d) Any child of the Father born before the Vesting Day.
- (e) Any grandchild of the Father born before the Vesting Day.
- (f) Any great grandchild of the Father born before the Vesting Day.
- (g) The lawful husband, widower, wife or widow from time to time of any child, grandchild or great grandchild of the Father PROVIDED THAT such husband, widower, wife or widow was born before the Vesting Day,
- (h) The mother of the Father.
- (i) The father of the Father.
- (j) The mother-in-law from time to time of the Father born before the Vesting Day.
- (k) The father-in-law from time to time of the Father born before the Vesting Day.
- (l) Any brother or sister of the Father born before the Vesting Day.
- (m) Any nephew or niece of the Father born before the Vesting Day.
- (n) Any company in which any of the beneficiaries referred to in this clause 5 has a beneficial interest in any voting shares or stock whether in the beneficiary’s own capacity or in a capacity as trustee of any trust or settlement.
- (o) Any subsidiary of any company referred to in the previous paragraph.
- (p) The trustee or trustees of any unit trust in their, his or its capacity as such trustee or trustees in which any of the beneficiaries referred to in this clause 5 has for the time being a beneficial interest in any of the issued units whether in the beneficiary’s own capacity or in a capacity as trustee of any trust or settlement.
- (q) The trustee or trustees of any Qualifying Settlement in their, his or its capacity as such trustee or trustees.”

[24] Clause 6 provides:²²

- “(a) Until the Vesting Day the Trustee shall stand possessed of the income of the Trust Fund derived by it in any financial year ending on the 30th day June or such portion of such income as the Trustee may in its absolute discretion determine upon trust absolutely for the beneficiaries or any one or more of them (exclusive of the other or others of them) and in such shares and proportions (whether varying or uniform) as the Trustee shall in its absolute discretion determine prior to midnight on the 29th day of June in such year.
- (b) Where the income of the Trust Fund is derived from more than one of the following classes of income, that is to say:

²²

Affidavit of Jennifer Lucy Jones sworn 20 August 2014 exhibit JLJ-1, 6-7.

- (i) income from property other than dividends or capital gains;
- (ii) income from dividends;
- (iii) income being capital gains;
- (iv) interest income;
- (v) other income

The Trustee may in its absolute discretion make a separate determination pursuant to paragraph (a) of this clause 6 in respect of each such class of income.

- (c) Where the income of the Trust Fund includes dividends from more than one company or source the Trustee may in its absolute discretion make a separate determination pursuant to paragraph (a) of this clause 6 in respect of dividends received from each company or source.
- (d) In determining the income of the Trust Fund from any class of income the Trustee may allocate each of the expenses of the Trust Fund to such classes of income or to such income as is determined to be the entitlement of each beneficiary pursuant to paragraph (a) of this clause 6 and in such proportions as the Trustee may in its absolute discretion determine.
- (e) In the event of the Trustee failing to make a determination pursuant to paragraph (a) of this clause 6 with respect to the income of the Trust Fund or any portion thereof then such income or such portion (as the case may be) shall be held upon trust absolutely for any lawful wife or widow of the Father as shall be living on the 30th day of June in such year provided however that should there be no wife or widow of the Father then living as aforesaid then for any child or children of the Father as shall be living on the 30th day of June in such year and if more than one in equal shares as tenants in common provided further that should there be no child or children of the Father then living as aforesaid then for any grandchild or grandchildren of the Father as shall be living on the 30th day of June in such year and if more than one in equal shares as tenants in common provided further that should there be no grandchild or grandchildren living as aforesaid then for such other of the beneficiaries (excluding such beneficiaries as may be trustees, corporations or institutions) as shall be living on the 30th day of June in such year and if more than one in equal shares as tenants in common.”

[25] Clause 9 provides:²³

“Without limiting or restricting any express trust hereinbefore declared the Trustee shall have power in its absolute discretion and from time to time to pay or apply the whole or any part of the income

²³ Affidavit of Jennifer Lucy Jones sworn 20 August 2014 exhibit JLJ-1, 7.

of the Trust Fund towards the maintenance, advancement, education (by travel or otherwise) or benefit in any way whatsoever of any one or more of the beneficiaries (to the exclusion of the other or others) and where such beneficiary is an infant in that case to pay the same or any part thereof to the parent or guardian of such infant or to the person with whom such infant may for the time being be residing without being responsible to see to the application thereof and this power shall extend so as to authorise the Trustee to make reimbursement of any amounts paid for the maintenance advancement education or benefit of any infant beneficiary.”

[26] Clause 10 provides:

“Upon the Vesting Day the Trustee shall stand possessed of the capital of the Trust Fund subject to any prior application thereof pursuant to Clause 12 upon trust to distribute the same as follows:-

- (a) To the beneficiaries or any one or more of them (exclusive of the other or others of them) and in such shares and proportions (whether varying or uniform) as the Trustee shall in its absolute discretion determine on or prior to the Vesting Day.
- (b) In default of determination under sub-clause (a) of this clause then the capital of the Trust Fund shall be distributed to such of the children of the Father as shall be living on the Vesting Day and if more than one in equal shares as tenants in common provided however that should there be no child or children of the Father then living as aforesaid then to any grandchild or grandchildren of the Father as shall be living on the Vesting Day and if more than one in equal shares as tenants in common.
- (c) In default of determination under sub-clause (a) of this clause and in the event that none of the beneficiaries referred to in sub-clause (b) of this clause shall be living on the Vesting Day then the capital of the Trust Fund shall be distributed between those persons or bodies who would if the Father had died on the Vesting Day have been entitled to his residuary estate (and if such entitlement would have been governed by any power of appointment, as if such power of appointment had not been and would not be exercised) in the proportions in which they would have been so entitled.”

[27] By clause 14, Treadstone, as trustee, has an express number of “absolute powers and discretions”, including in sub-clause 14(s), the power and discretion to “institute and defend legal proceedings of any kind in any Court or tribunal and to proceed to the final end and determination thereof or compromise the same as the Trustee shall consider advisable”.²⁴

²⁴

Affidavit of Jennifer Lucy Jones sworn 20 August 2014 exhibit JLJ-1, 11.

- [28] The Weaver Family Trust may therefore be described as a discretionary trust with an open class of beneficiaries. The discretion of Treadstone to distribute to any one or more of the beneficiaries is absolute.

The principles of construction relevant to the Policy

- [29] In *McCann v Switzerland Insurance Australia Ltd*, Gleeson CJ identified the principles which guide the interpretation of insurance contracts:²⁵

“A policy of insurance, even one required by statute, is a commercial contract and should be given a businesslike interpretation. Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure.” (*footnotes omitted*)

- [30] Clause 4.14 is an exclusion clause. In *Darlington Futures Ltd v Delco Australia Pty Ltd*, Mason, Wilson, Brennan, Deane and Dawson JJ stated:²⁶

“...interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause *contra proferentem* in case of ambiguity.”

- [31] In *Ashmere Cove Pty Ltd v Beekink*, Barker J identified the following principles of constructions in respect of exclusion clauses:²⁷

“In construing a policy of insurance, it is understood that, as in the case of any commercial contract, the policy should be given a businesslike interpretation, requiring attention to the language used by parties, the commercial circumstances which the document addresses and the objects which it is intended to secure: *McCann* 203 CLR 579 at para 22; *Wilkie v Gordian Runoff Limited* (2005) 221 CLR 522 at para 15.

It is also understood and accepted that the construction of the written contract involves the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were, at the time of the contract; that knowledge may include matters of law: *International Air Transport Aviation v Ansett Australia Holdings Limited* (2008) 234 CLR 151 at para 53; *Magbury Pty Limited v Hafele Australia Pty Limited* (2001) 210 CLR 181 at para 11.

²⁵ (2000) 203 CLR 579, [22].

²⁶ (1986) 161 CLR 500, 510.

²⁷ [2009] FCA 564, [100]-[104].

It is also accepted that generally a so called ‘liberal approach’ will be adopted in the construction of insurance contracts in favour of an insured, and that in the case of ambiguity the *contra proferentem* rule is applied against the insurer: *Maye v The Colonial Mutual Life Assurance Society Ltd* (1924) 35 CLR 14 at 22; *Halford v Price* (1960) 105 CLR 23 at 30, 34; *McCann* 203 CLR 579 at para 74(4).

It is also understood and accepted that an exclusion is to be construed in the context of the policy as a whole including the relevant insuring clause: *FAI General Insurance Co Ltd v Maracorp Financial Services Ltd* [1994] 1 VR 455 at 470, 478; *Wilkie* 221 CLR 522 at para 16.

Further, it is understood and accepted that a court will endeavour in construing an exclusion to construe it in a manner consistent with the commercial purpose of the contract of insurance and where possible to avoid the exclusion operating so as to substantially defeat the indemnity granted by the policy and render the policy ‘practically illusory’: *Alex Kay Pty Ltd v General Motors Acceptance Corporation* [1963] VR 458 at 462 – 463; *Fraser v BN Furman (Productions) Limited* [1967] 1 WLR 898 at 905 – 906.”

Exclusions 4.14(a) and 4.14(c)

- [32] The first and third declarations sought are in respect of claims made by Treadstone against TSG and Mr Weaver. To fall within the exclusion in clause 4.14(a) of the Policy, Liberty must establish that the claim is made by or on behalf of an Insured against another Insured, that is that Treadstone’s claims are made “on behalf of” Mr Weaver against TSG.
- [33] To fall within the exclusion in clause 4.14(c) of the Policy, Liberty must establish that Treadstone makes the claims against TSG on behalf of the wife or any of the sons of Mr Weaver.
- [34] Mr Donaldson SC who appeared with Mr Baartz of Counsel for Liberty submitted that Treadstone would be said to make its claims in the Supreme Court proceedings against TSG on behalf of Mr Weaver, his wife and his sons because they are beneficiaries of the Weaver Family Trust:²⁸

“The question that arises in connection with the operation of exclusions 4.14(a) and (c) in the present case is whether the action by Treadstone against TSG and Mr Weaver, which is expressly brought

²⁸ Applicant’s outline of argument dated 17 September 2014, [20].

as trustee for the Weaver Family Trust for the recovery of losses sustained by the trust, is a claim made ‘*on behalf of*’ the beneficiaries within the meaning of the exclusion. If so, then the claim;

- (a) subject to the impact of the deeds which are said to have been executed on 15 September, 2013 (which issue is dealt with below) is a claim made on behalf of Mr Weaver against another insured, and is excluded by exclusion 4.14(a); and
- (b) is a claim made on behalf of the current or former spouse and children of Mr Weaver against another insured and is excluded by exclusion 4.14(c).” (*footnotes omitted*)

[35] As I have already noted the term “on behalf of” is not a defined term in the Policy. Mr Donaldson referred to the following passage from *R v Toohey; Ex parte Attorney-General (NT)*:²⁹

“The phrase ‘on behalf of’ is, as Latham C.J. observed in *R. v. Portus; Ex parte Federated Clerks Union of Australia*, ‘not an expression which has a strict legal meaning’, it bears no single and constant significance. Instead it may be used in conjunction with a wide range of relationships, all however in some way concerned with the standing of one person as auxiliary to or representative of another person or thing.

In what is perhaps its least specific use, ‘on behalf of’ may be applied to someone who does no more than express support for persons or for a cause, as with one who speaks on behalf of the poor or on behalf of tolerance. It may be used when speaking of an agency relationship, but also of some quite ephemeral relationships, such as that which exists between a party to litigation and the witness he calls, a witness ‘on behalf of’ the defence. Again, it may, as the Northern Territory here contends, be used where the relationship is that of trustee and cestui que trust. It was of such a use that Lord Cairns L.C. spoke when he said, in *Gillespie v. City of Glasgow Bank*, that the phrase could describe a relationship of trustee and cestui que trust ‘if the circumstances of the case are consistent with that interpretation’. Context will always determine to which of the many possible relationships the phrase ‘on behalf of’ is in a particular case being applied; ‘the context and subject matter’ (per Dixon J in the *Federated Clerks’ Case*) will be determinative.” (*footnotes omitted*)

[36] In reliance on the above passage Mr Donaldson submitted as follows:³⁰

“Having regard to the context in which the expression appears in the Policy and its subject matter, it is appropriate to adopt an interpretation consistent with that favoured by the High Court in

²⁹ (1980) 145 CLR 374, 386 (Stephen, Mason, Murphy and Aicken JJ).

³⁰ Applicant’s outline of argument dated 17 September 2014, [22]-[25].

Ross [R v Toohey] and to treat the claim brought by Treadstone in its capacity as trustee as a claim *on behalf of* the beneficiaries.

The scope and purpose of the exclusions, insofar as they operate to exclude claims by an insured against another insured, or by a member of the insured's family against an insured, is unambiguous. It was not intended to provide indemnity to an insured in respect of its own losses, or losses arising out of disputes or purported disputes between the various parties comprising the insured under the Policy and their family members. That purpose was no doubt associated with the fact that claims from which an insured or members of the family of an insured stand to benefit pose a significantly enhanced risk, the burden of which was not intended to be imposed on the insurer.

The extension of the scope of the exclusion to include claims brought '*on behalf of*' persons of that description is also clear. That is, it was intended that the exclusion operate notwithstanding that the insured or insured's family member who is to benefit from the claim is not making the claim directly, but through the interposition of some other person or entity.

Viewed from the perspective of the parties' evident intent, it makes no sense to treat the exclusion as effective to place claims arising from the loss of an insured's investments made in its own name as beyond the scope of cover, but not those made by a trustee for the benefit of the insured. It should not be concluded that the parties intended that the availability of cover depend upon the manner in which the insured has structured its business affairs. Indeed, it should be concluded that the words '*on behalf of*' were included in the exclusions for the very purpose of avoiding that result."

[37] These submissions do not, in my view, flow from a proper analysis of the decision of the High Court in *R v Toohey*. The case turned upon the construction of the term "on behalf of" which appeared in s 50(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Section 50(1) relevantly provided:

"The functions of the Commissioner are:

- (a) on an application being made to the Commissioner by or on behalf of Aboriginals claiming to have a traditional land claim to an area of land, being unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals-" (*my emphasis*)

[38] Section 50(1) used the term "on behalf of" in two contexts. First, in the context of an application being made to the Commissioner on behalf of Aboriginals and second, in the context of estates and interests held on behalf of Aboriginals.

[39] As was noted by their Honours in *R v Toohey*, context will always determine to which of the many possible relationships the phrase “on behalf of” is, in a particular case, being applied. In considering the different context in which the term “on behalf of” occurred in s 50(1) their Honours stated:³¹

““On behalf of” occurs twice within the space of a few lines in s. 50(1)(a). Where first occurring it refers to the act of making application; application may be made either personally by Aboriginals or by another on behalf of Aboriginals. In that context the use of the phrase contemplates some representative capacity or agency relationship. Where secondly occurring no act is referred to but rather a static situation, in which estates or interests in alienated Crown land are held either personally by Aboriginals or by another ‘on behalf of’ Aboriginals. It would clearly enough include the case of a trustee holding an estate or interest in land in trust for Aboriginals; the question is whether it does not also extend to the case of estates or interests in land held by a statutory corporation which, while not a trustee for Aboriginals, is nevertheless under a statutory duty to make the land available exclusively for occupation by them.”

[40] Where the term is used in the context of making an application on behalf of another person their Honours identified that “on behalf of” contemplates some representative capacity or agency. This is because the term is used in relation to the doing of an act, namely the act of making an application. “On behalf of” arises in the same context in clauses 14.4(a) and (c). These clauses deal with the act of making a claim on behalf of identified persons, namely Mr Weaver (as an insured) in clause 14.4(a) and the wife and sons of Mr Weaver in clause 14.4(c).

[41] On an ordinary and natural reading of the words of these exclusions in the context of making a claim, it cannot be said that Treadstone, as trustee of the Weaver Family Trust, made the claims in the Supreme Court proceedings on behalf of Mr Weaver, his wife and his sons as beneficiaries of the trust.

[42] The claim is not made by the trustee in any representative capacity or as an agent. Clause 14(s) of the Deed of Settlement makes it clear that the power and discretion to institute legal proceedings is solely that of Treadstone. Whilst one may generally view a trustee as bringing court proceedings on behalf of the trust, the trustee does not do so as either the representative or agent of the beneficiaries. Mr de Jersey of Counsel, who appeared for Treadstone, submitted that the contention that

³¹ *R v Toohey; Ex parte Attorney-General (NT)* (1980) 145 CLR 374, 386-387.

Treadstone as trustee made the claim on behalf of the beneficiaries blurs the distinction between a trust relationship and an agency relationship, particularly in circumstances where this is a discretionary trust and Mr Weaver, his wife and sons are members of a much broader class of beneficiaries. Mr de Jersey relied on the following passage from *Jacobs' Law of Trusts in Australia*:³²

“However, a trustee is often found to be also an agent, and conversely an agent can often be a trustee of property or money entrusted to the agent by the principal. Where the actual title to property (other than money) is vested by a principal in the agent, the agent will be a trustee of the property. In such cases, agents may not only bind themselves at law in their dealings with that property, but they may also within the scope of their authority bind their principals. Although the trust property is vested in them, they are agents in so far as they are bound to follow their principals' directions in regard to that property. They have not the usual powers and discretions of trustees.”

- [43] Mr de Jersey further submitted, by reference to clauses 22 and 23 of the Deed of Settlement, that unlike an agent, the trustee is personally liable to third parties for all activities relating to the trust assets (but with a right of indemnity from trust assets). The claim is therefore not made by Treadstone “on behalf of” the beneficiaries but rather by the trustee with “unfettered discretionary power regarding the objects of the trust.”³³
- [44] These submissions must be accepted. It is necessary to construe clause 14.4 in the context of the Policy as a whole. The Policy by clause 2.1 covers Mr Weaver and TSG for any loss which they become liable to pay in respect of a claim made against them arising from their acts, errors or omissions in the provision of their professional services. The general cover would therefore include all claims, whether they be made by independent third parties or related parties to whom the financial service advice has been provided.
- [45] Clause 4.14 however seeks to exclude certain claims. The claims that are excluded are those made by one Insured against another, a claim made by a subsidiary of the Named Insured against that Named Insured, a claim made by family members of an Insured against another Insured and a claim by an entity in which the Insured has a financial

³² J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [210].

³³ Outline of submissions on behalf of Treadstone Developments Pty Ltd dated 17 September 2014, [41](e), (f).

interest. The claims sought to be excluded are broadened by including claims brought “on behalf of” those persons or entities.

[46] The purpose of clause 14.4, which may be gleaned from its heading and the ordinary and natural meaning of its words, is to exclude claims made by or on behalf of related entities or a family member of an Insured against another Insured. The exclusion may only apply however, where the claim is made by or on behalf of the relevant entity or family member. The inquiry must be in the context of the making of a claim, that is, the doing of an act. Giving clause 14.4, in the context of the Policy as a whole, a business like interpretation, I do not accept that Treadstone, as trustee of the Weaver Family Trust, made the claims on behalf of the beneficiaries identified in the broad class of beneficiaries in clause 5 of the Deed of Settlement. This is because Treadstone brings the proceedings in its own right as trustee of the Weaver Family Trust. It does not do so, as a matter of fact or law, in any representative capacity or as the agent on behalf of the beneficiaries of the trust.

[47] I therefore decline to make the declarations sought in paragraphs 1 and 3 of the amended originating application.

Clause 4.14(d)

[48] On Liberty’s case this exclusion is said to apply because Mr Weaver, as a beneficiary, has a financial interest in an entity, namely, the Weaver Family Trust. The Supreme Court proceedings are, of course, brought by Treadstone. There was uncontested evidence before me that Mr Weaver has no financial interest in Treadstone. He has never been a director or shareholder of Treadstone nor is he a creditor of Treadstone.³⁴ One may readily understand therefore why Liberty sought to apply the exclusion in clause 4.14(d) by asserting that Treadstone made the claim “on behalf of” the Weaver Family Trust in which (Liberty further asserts) Mr Weaver has a financial interest..

[49] Before I deal with the submission as to whether this exclusion applies, it is necessary to deal with two matters raised by Treadstone.

³⁴ Affidavit of Scott Andrew Weaver sworn 15 September 2014, [8]-[11].

- [50] First, by a Deed of Variation of Trust, Mr Weaver was removed as a beneficiary of the Weaver Family Trust.³⁵ This Deed of Variation was undated but was sworn to have been executed on 15 September 2014.³⁶ Mr de Jersey submitted that in the event I accepted Liberty’s submission that Mr Weaver has a financial interest in the Weaver Family Trust, that his financial interest ceased on 15 September 2014 when he was removed as a beneficiary.
- [51] This submission should be rejected. It does not accord with the ordinary and natural reading of the exclusion clause. Clause 14.4(d) excludes a claim made by or on behalf of any entity in which the Insured has a financial interest. The inquiry as to whether such a financial interest is held must be at the time of the making of the claim. The wording of the exclusion specifically directs one’s attention to when a claim is made. It would be an absurd result if an insured could denounce their financial interest in an entity after a claim has been made so as to avoid the operation of the exclusion clause. Accordingly, such a claim is to be excluded if it is made by an entity in which the Insured has a financial interest at the time the claim is made.
- [52] The second matter concerns whether the word “entity” would include a trust such as the Weaver Family Trust. A trust is not a legal entity but as I have already observed clause 4.14(d) and (e) appears to distinguish between an “entity” and a “legal entity”. Mr Donaldson submitted that the expression “entity” is frequently employed to describe a trust and is perfectly capable of being so interpreted in a commercial agreement.³⁷ I am content to proceed on the basis that the Weaver Family Trust is an “entity” for the purposes of clause 4.14(d).
- [53] The issue is whether Mr Weaver, as a beneficiary of a discretionary trust, can be said to have a financial interest in the trust. Mr Donaldson submitted that decisions concerning the application of revenue laws establish that a beneficiary of a discretionary trust can be regarded as having an “interest” in the assets of the trust. In this respect he referred to the decision of the Full Court of the Federal Court in *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Elliott*. The Full Court at [21] stated:³⁸

³⁵ Affidavit of Scott Andrew Weaver sworn 15 September 2014, [14](b), exhibit SAW-2.

³⁶ Affidavit of Scott Andrew Weaver sworn 15 September 2014, [13].

³⁷ Applicants’ outline of argument dated 17 September 2014, [34].

³⁸ (2009) 174 FCR 387, 393-394 [21].

“Analysis

The issue of whether a person who is a beneficiary or object, whether as to income or capital or both under a discretionary trust, has an ‘interest’ in that trust or the income thereof, invariably described as a ‘beneficial interest’, has been addressed in a number of cases over the last 120 years in different statutory contexts. In every case, the answer or conclusion arrived at has depended on two matters:

1. The nature of the discretionary trust in relation to the beneficiary or object; whether the trust is exhaustive with respect to the class of which the beneficiary or object is a member in the sense that the trustee is bound to distribute to one or more of the class or whether the trust is non-exhaustive by reason that the trustee has, in the case of income, a power to accumulate, or, in the case of corpus, there is a gift over in default of exercise of the discretion; and whether the relevant class is, at the relevant time, still open or closed; and ,
2. the statutory context in which the issue arises; in particular whether the mechanism of the statute cannot operate unless the precise extent of the interests can be identified.”

[54] Mr Donaldson also referred to the judgment of Lord Wilberforce in *Leedale v Lewis* where his Lordship stated:³⁹

“The key question is as to the meaning of the word ‘interests’ in s 42(2) of the Finance Act 1965, the alternatives being whether this word refers only to such interests as can be assigned a value or whether it is a word of more general significance capable of covering any interest, quantifiable or non-quantifiable, of a beneficiary under a trust. That either of these is a possible meaning in fiscal legislation is made clear (a) by the general observations of Lord Reid in *Gartside v IRC* [1968] 1 All ER 121 at 126, [1968] AC 553 at 603 (see also those of Stephen and Wills JJ in *A-G v Heywood* (1887) 19 QBD 326) and (b) by a comparison of the cases just cited. In *Heywood*, which arose under s 38 of the Customs and Inland Revenue Act 1881, and where the question was whether the settlor had reserved ‘an interest’ by including himself among a discretionary class of beneficiaries, the word ‘interest’ was given the more general meaning. To require that it meant something to which an ascertainable value could be assigned would, it was held, be contrary to the scheme of the statute. In *Gartside*, on the other hand, which arose under s 43 of the Finance Act 1940, and where the question was whether estate duty could be charged in respect of the determination of a discretionary interest, this House held that the word must bear the narrower meaning because the statute necessarily required ascertainment of the quantum of the interest. In *Gartside* I expressed the opinion, from which the other members of the House did not dissent, that these two cases could stand together. The word ‘interest’ is one of uncertain meaning and it remains to be decided on

³⁹ *Leedale v Lewis* [1982] 3 All ER 808, 815-816.

the terms of the applicable statute which, or possibly what other, meaning the word may bear.”

[55] The term “financial interest” in the present case does not arise in any statutory context. The Policy does not define “financial interest”. “Financial” is defined in the Macquarie Dictionary as “pertaining to monetary receipts and expenditure” and “interest” is “a share in the ownership property, in a commercial or financial undertaking” or “any right of ownership in property, commercial undertakings.”

[56] It is necessary to identify the nature of the “interest” of Mr Weaver in respect of the Weaver Family Trust and whether such an “interest” may be described as “financial”. This inquiry is undertaken by reference to the terms of the Deed of Settlement. I have already set out the relevant terms of the Deed of Settlement. Further reference should be made however to decisions that seek to identify a beneficiary’s “interest” under a trust.

[57] In *Chief Commissioner of Stamp Duties (NSW) v Buckle*,⁴⁰ the High Court considered the term “discretionary trust” noting that it had no fixed meaning and is used to describe the particular features of certain express trust:

“The meaning of this term is disclosed by a consideration of usage rather than doctrine, and the usage is descriptive rather than normative.”

[58] The Court continued:⁴¹

“In the case of the Deed of Settlement, the identity of those who might receive income or capital, the amounts they might receive, the period or duration of the trusts, the content from time to time of the fund impressed with those trusts, and the very terms of the trusts themselves all depended wholly or significantly upon the exercise of, or the failure to exercise, powers bestowed by the Deed of Settlement upon the trustee. In such a case, the term “discretionary trust” serves a useful purpose in emphasising the strong position occupied by the trustee and the instability of the interests and prospective interests of those taking under the Deed of Settlement.”

[59] In *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)*⁴² the High Court had occasion to consider the nature of the interest held by a unit holder under a unit trust in the context of the *Land Act 1958 (Vic)*. Gleeson CJ, McHugh, Gummow,

⁴⁰ (1998) 192 CLR 226, 234 [8] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

⁴¹ (1998) 192 CLR 226, 234 [9] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

⁴² (2005) 224 CLR 98.

Callinan and Heydon JJ referred to the observation of Griffith CJ in *Glenn v Federal Commissioner of Land Tax*:⁴³

“based on the assumption that whenever the legal estate in land is vested in a trustee there must be some person other than the trustee entitled to it in equity for an estate of freehold in possession, so that the only question to be answered is who is the owner of that equitable estate. In my opinion, there is a prior inquiry, namely, whether there is any such person. If there is not, the trustee is entitled to the whole estate in possession, both legal and equitable’.

That statement was a prescient rejection of a ‘dogma’ that, where ownership is vested in a trustee, equitable ownership must necessarily be vested in someone else because it is an essential attribute of a trust that it confers upon individuals a complex of beneficial legal relations which may be called ownership.” (*footnote omitted*)

[60] In *CPT Custodian* the submission of the Commissioner was that the entitlements of the unit holders under the unit trust made each unit holder an “owner” in the relevant sense.⁴⁴ In rejecting this submission the plurality accepted the correctness of the decision of Nettle J (as his Honour then was) at first instance:⁴⁵

“On this issue, remarks by Nettle J are in point and conclusive. His Honour said:

‘It may well be that the income of the fund as finally constituted and distributed will include all of the rents and profits generated by a particular parcel of land within the fund. But it is distinctly possible that it will not. Each of the deeds gives power to the trustee to provide out of receipts for future and contingent liabilities; to apply receipts in the purchase of any property or business; to invest receipts in authorised investments and to deal with and transpose such investments; and the only right of the unit holder is to a proportionate share of the income of the fund for the year.

The Commissioner contends that the trustees’ powers of disposition and transposition make no difference. He submits that insofar as receipts from particular properties may be applied in making payments other than to a unit holder, they must be seen as made on behalf of the unit holder and in that sense as received by the unit holder. He says that it is in principle no different to the case of a simple trust of land with only one beneficiary, under the terms of which the trustee is entitled to apply receipts in the payment of obligations and in the making of provisions in connection

⁴³ *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98, 112 [25].

⁴⁴ *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98, 113 [28].

⁴⁵

with the management of the land. The Commissioner contends that in such a case there can be no doubt that the beneficiary would be liable to tax as 'owner'.

But I think there is a difference. In the case of a simple trust of the kind instanced by the Commissioner the entitlement of the trustee to apply part of the receipts in defined ways determines the amount of the income which the beneficiary has a right to receive. Contrastingly, in a case of a complex unit trust of the kind with which I am concerned, the entitlement of the trustee to apply receipts in defined ways informs the nature of the income that the unit holders have a right to receive: not a total of all of the receipts derived from each asset the subject of the fund but rather such if any income as may be derived from the product of the application of gross receipts in various ways'." (*footnote omitted*)

- [61] In *Kennon v Spry* French CJ identified the "interest" of the beneficiaries under the terms of the relevant Deed of Settlement:⁴⁶

"The Trust fell within the genus of 'discretionary trust', a term which has 'no fixed meaning and is used to describe particular features of certain express trusts'. Absent an obligation on the part of the trustee to apply any of the income or capital of the Trust to any of the beneficiaries at any time it answered the description 'purely discretionary' or 'non-exhaustive'. The class of beneficiaries was 'open'. It extended to the spouses from time to time of the issue of Charles Chambers Fowell Spry and further issue of that issue, including persons unborn when the Trust was created, and their spouses from time to time.

As sole trustee of the Trust Dr Spry had the legal title. He was the only person entitled in possession to the assets. His power as trustee to apply the income or capital under the terms of the Trust was not a species of property according to the general law but his legal title was.

Absent a specific application of Trust capital or income to one of the objects of the Trust, there was no equitable interest in its assets held by anyone. There did not need to be." (*footnotes omitted*)

- [62] *Jacobs Law of Trusts*, referred to by Mr de Jersey, identifies the interest of beneficiaries under a discretionary trust as follows:⁴⁷

The chief jurisprudential interest of discretionary trusts is that a member of the class of possible objects of appointment has no proprietary interest in the trust assets (unless there is no other

⁴⁶ (2008) 238 CLR 366, 386 [47]-[49].

⁴⁷ J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [314], [2315].

discretionary object), although the member does have standing to compel the proper administration of the trust

There, in the place of ‘beneficiaries’ in the traditional sense who between them aggregate beneficial ownership of the trust property, there is a class of persons described in wide terms. This class is, in essence, the object of a trust power in the trustee to appoint either or both income or corpus and to do so periodically between members selected from the designated class on each such occasion, but reserving in the trustee a discretion as to the quantum of income or corpus appointed to any particular individual and a discretion to declare the exercise of the power on any occasion. In such cases, it is difficult to maintain that any particular object of the power has an interest in the trust fund and, indeed, the widespread use of discretionary trusts as a means of avoiding death duties assumed that there would be no such interest for the purposes of revenue legislation. Further, to say as between all of them the objects enjoy beneficial ownership and therefore may, if all *sui juris*, invoke the rule in *Saunders v Vautier*, is to envisage a group interest greater than the aggregate of individual interests by attribution to the whole of a character not possessed in any degree by any of its parts.

- [63] Mr de Jersey accordingly submitted that as the Weaver Family Trust is a discretionary trust, the beneficiaries, including Mr Weaver, have no financial interest in it.⁴⁸

As a beneficiary of the discretionary Weaver family trust, Ian Weaver certainly had no ‘share in the ownership of property, in a commercial or financial undertaking’ or ‘any right of ownership in property, commercial undertakings’. All he had was standing to compel proper administration of the trust. That is not a ‘financial interest’ in the trust.

- [64] Mr Donaldson submitted, by reference to clauses 6(a), 6(e) and clause 10 of the Deed of Settlement, that Mr Weaver, for the purposes of clause 4.14(d) of the Policy has a financial interest in the Weaver Family Trust.⁴⁹

“But, insofar as the principles [of *Leedale v Lewis*] are relevant to the task of construing the Policy, they favour the conclusion that Mr Weaver has a financial interest in the Weaver Family Trust, as:

- (a) the trustee is to determine the distribution of the income of the Trust on the 29th of June each year and, in default of such determination, the income is distributed to identified classes of beneficiaries; and
- (b) upon the ‘*Vesting Day*’ the corpus is to be distributed between the beneficiaries in such shares and proportions as

⁴⁸ Outline of submissions on behalf of Treadstone Developments Pty Ltd dated 17 September 2014, [42](f).

⁴⁹ Applicant’s outline of argument dated 17 September 2014, [29].

the trustee determines and, in default of such a determination, it is distributed to identified classes of beneficiaries.”

- [65] This submission should be rejected.
- [66] By clause 6(a) the trustee holds the income or such portion of the income for each financial year upon trust absolutely. The trustee, in its absolute discretion, determines the size of the portion of the income which is held on trust. The trustee also has an absolute discretion to determine prior to 29 June in each relevant year the beneficiaries for whom the income is held on trust absolutely and the share or proportion of each beneficiary in that respect. The trustee is not however bound to distribute any of the income in each year.
- [67] Clause 6(e) is the default provision. If the trustee has not determined which beneficiaries and in what share the income or portion of such income is held on trust absolutely, then it shall be held for any lawful wife or widow of Mr Weaver or if there is no wife or widow of Mr Weaver then it is held for his children and if no surviving children then for his grandchildren.
- [68] Whether the trustee holds any share of the income on trust absolutely for Mr Weaver under clause 6(a) depends entirely on a favourable exercise of discretion by the trustee prior to 29 June in each relevant year. The trustee’s discretion is absolute and may be exercised in respect of any one or a number of beneficiaries falling within the class identified in clause 5. This includes beneficiaries who are not yet born but may be born before the vesting day.
- [69] The default position under clause 6(e) is that the income of any financial year or such portion of such income is never held on trust absolutely for Mr Weaver. This is because absent a determination pursuant to clause 6(a), the income is held on trust absolutely for either his wife, widow, children or grandchildren.
- [70] In respect to clause 10 the trustee stands possessed of the capital of the trust fund upon the vesting day. The distribution of the trust capital contemplated by clause 10 is one that is to take place on the vesting day. This could be as far into the future as 2070. In those circumstances Mr Weaver cannot be considered a contemplated

object of such distribution. Even if he was a living beneficiary as at the vesting day, the existence of any interest would again require a favourable exercise of the trustee's absolute discretion in respect of an open class of beneficiaries. Further, the default situation under clause 10(b) does not contemplate Mr Weaver participating in any distribution of capital. The terms of clauses 6(a), 6(e) and 10 do not therefore establish that Mr Weaver has a "financial interest".

[71] To use the language of French CJ in *Kennon v Spry*, "[a]bsent a specific application of Trust capital or income to one of the objects of the Trust, there was no equitable interest in its assets held by anyone."⁵⁰ Whilst Mr Weaver had standing to compel the proper administration of the trust this does not constitute a "financial interest" in the trust because such a right does not equate to any right of Mr Weaver to either share in the ownership of trust property or participate in any distribution of trust capital or income.

[72] Mr Donaldson submitted that in light of its commercial and textual context it should be concluded that the purpose which the parties intended to achieve through exclusion 4.14(d) was to place outside the scope of cover claims from which an insured would benefit through its interest in the claimant entity. Whilst the correctness of this submission may be accepted it cannot be said upon a proper analysis of the Deed of Settlement that Mr Weaver has a "financial interest" in the Weaver Family Trust. He clearly does not have a financial interest in Treadstone as the claimant entity.

[73] Whilst it may be accepted that Liberty intended to exclude claims from which Mr Weaver may benefit directly or indirectly, the plain and natural meaning of the words agreed to by the applicant must apply. Liberty could have defined specific words or terms so as to expressly exclude a claim made by a trustee of a trust of which an Insured or member of an Insured's family were beneficiaries. Liberty did not do so.

[74] I therefore decline to make the declarations sought in paragraphs 2 and 4 of the amended originating application.

⁵⁰ (2008) 238 CLR 366, 386 [49].

Conclusion

1. I grant leave *nunc pro tunc* to Liberty to proceed against TSG pursuant to s 500(2) of the *Corporations Act 2001*.
2. The application is otherwise dismissed.

[75] I will hear the parties as to costs.