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## The importance of a policy's construction as a whole - *Malamit Pty Ltd v WFI Insurance Ltd [2017] NSWCA* 162

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### Introduction

A recent New South Wales Court of Appeal decision provides a useful illustration of how courts will have regard to an insurance policy's overall construction in interpreting the meaning of key phrases and clauses.

In *Malamit Pty Ltd v WFI Insurance Ltd*<sup>1</sup> the court found that a claim made against the insured by a company wholly owned by the insured's sole director was still a claim made by a 'third party' as required by the policy's insuring clause. Ultimately the claim was excluded under a different clause however the case nonetheless serves as a reminder for insurers to be mindful of the importance of the overall construction of their policies to avoid inadvertently providing cover for unintended risks.

### Background

Malamit and Blue Dolphin Racing Pty Ltd as trustee for MA and LA Mitchell Investment Trust (**Blue Dolphin**), were issued a professional indemnity insurance policy by WFI Insurance Ltd.

Malamit contracted with Treetops Lismore Pty Ltd (**Treetops**), being a trustee for the Lismore Business Park Unit Trust (**Trust**), to provide project management services in relation to the Lismore Business Park Development.

At all material times Mark Mitchell was a director of Treetops and its sole shareholder. He was also the sole director of Malamit. Mr Mitchell and his wife held the two shares in the other insured, Blue Dolphin, which wholly owned Malamit.

In July 2010 there was a landslip at the Lismore Business Park Development. In 2014, Treetops brought a claim for damages in the Supreme Court of New South Wales against the consulting engineers retained to carry out engineering work on the development. By an Amended Summons filed on 21 January 2015, Treetops joined Malamit as a defendant to the proceeding.

Malamit sought cover under the policy however WFI denied liability because Treetops was not a '*third party*' as defined within the policy's definition of '*claim*' and therefore the insuring clause did not respond. WFI further denied indemnity on the grounds it was excluded pursuant to various policy exclusions because it was *brought*:

1. '*by*' Treetops, a '*subsidiary*' of an insured, Mr Mitchell, who was the sole director of Malamit and owned all of the issued voting shares in Treetops;
2. '*on behalf of*' or '*for the benefit of*' an insured, Mr Mitchell; and
3. '*for the benefit of*' '*family members*' of an insured, Mr Mitchell, namely his spouse and children who were shareholders in companies which in turn were unit holders in the Trust.

## Supreme Court Decision

At first instance,<sup>2</sup> Sackar J found that the claim by Treetops was one brought by a subsidiary as defined in the policy (and thus excluded under the policy). His Honour held as a matter of construction, it followed that Treetops could not be regarded as a third party for the purposes of the policy, and therefore no '*claim*' had been made as defined by the policy.<sup>3</sup>

Sackar J also found that there was insufficient evidence to make a finding that Treetops' claim was brought '*on behalf of*' or '*for the benefit of*' an insured or '*for the benefit of*' the nominated members of Mr Mitchell's family.



## Issues

The matter was appealed. The issues the New South Wales Court of Appeal was tasked to decide were:

1. whether the proceeding against Malamit was brought by a '*third party*';
2. whether the claim was brought '*by*' a '*subsidiary*'; and
3. whether the claim against Malamit was '*on behalf of*' or '*for the benefit of*' an '*insured*' or '*family member*'.

## Decision

### Was the proceeding against Malamit brought by a '*third party*'?

The court noted that on its face, the reference to a '*third party*' could be a reference to someone who is not a party to the contract, to someone who is not an insured under the contract or to anyone other than the particular insured against whom the proceeding is brought.

In order to consider the scope of cover, the court had regard to the exclusions of the policy to construe the contract in the way that best gives effect to all of its terms.<sup>4</sup>

In performing that exercise, the court noted that the policy excluded claims '*by, on behalf of, or for the benefit of any insured*'. The existence of that clause meant that a proceeding brought by one insured against another (whether that insured is a party to the contract or not) is a '*claim*' that would otherwise be within cover if not for the exclusion. The court accordingly held that the expression '*third party*' should be construed in accordance with that premise, which is only achieved if it is described as any person other than the insured against whom the proceeding has been brought.

Ultimately, the Court of Appeal found the primary judge's conclusion that a '*third party*' is a person '*who is not a party to the contract, not an insured as defined and not an associate [pursuant to the policy]*',<sup>5</sup> did not give effect to established principles of policy construction. The Court of Appeal upheld Malamit's appeal in this regard.

### Was the claim brought by a subsidiary?

The policy excluded any claim by, on behalf of or for the benefit of any '*subsidiary*'.



'Subsidiary' was defined in the policy to include 'any corporate entity in which the insured owns or controls 50% of the issued voting shares'. At first instance, the court found the claim was brought by Treetops, as trustee of the Trust, against Malamit. Treetops was held to constitute a 'subsidiary' as Mr Mitchell owned all of the shares in Treetops and was the sole director of Malamit. It followed that the claim was excluded because it was brought by a subsidiary of the insured.

On appeal Malamit made two arguments in this regard:

1. The claim was brought by the Trust (not Treetops) and Mr Mitchell held no voting entitlements in the Trust therefore the claim was not brought by a subsidiary; and
2. Even accepting that by virtue of his directorship, Mr Mitchell was an insured pursuant to the terms of the policy, the use of the definite article '*insured*' in the definition of subsidiary means that only those listed on the policy schedule were the relevant insureds. Mr Mitchell was not listed on the policy and therefore Treetops was not a subsidiary of an insured.

In relation to the first argument, the court upheld the primary judge's decision. The court held that the insuring clause envisages a third-party claimant who brings proceedings to enforce a civil liability of the relevant insured to that claimant. Treetops was the entity that brought the proceeding and was the party to which Malamit would be liable (not the Trust). Further, the reference to an '*entity*' in the definition of subsidiary was a reference to a company or other entity with a legal personality (and therefore could not refer to the Trust which is not a separate legal entity).

In relation to Malamit's second argument, the court had further regard to the construction of the policy as a whole and the likely purpose of the relevant exclusion, which was presumably to avoid the risk of collusion or assistance between insureds by excluding them from cover.<sup>6</sup> Accordingly, the expression '*any insured*' in the context of a claim made against one insured must mean any other insured and encompass persons answering that description pursuant to the policy (and not limited to those specified in the policy schedule).

Likewise, the expression '*any subsidiary*' describes any company or other legal body constituting a '*subsidiary*' pursuant to the policy in relation to any insured. The court found that construction gave effect to the evident intent of the exclusion in relation to claims for compensation against one insured in which another insured, or any subsidiary or family member of an insured, has a financial interest.<sup>7</sup>

The Court of Appeal ultimately rejected Malamit's grounds of appeal relevant to this issue and dismissed the appeal.

### Was the claim against Malamit '*on behalf of*' or '*for the benefit of*' an '*insured*' or '*family member*'?

Although not strictly necessary, the Court of Appeal considered WFI's argument that this exclusion was triggered because an indirect beneficial interest in the claim or its potential proceeds, even without proof of monetary benefit, should suffice to characterise a claim as '*for the benefit of*' Mr Mitchell or of members of his family.

The Court of Appeal rejected this ground of appeal in circumstances where neither Mr Mitchell nor members of his family enjoyed a beneficial interest (either directly or indirectly) in the claim against Malamit or in its potential proceeds.

At the time Treetops joined Malamit to its proceeding against the engineers, Mr Mitchell no longer held any units in the Trust directly. Instead, he and his family members held shares in companies which directly or indirectly held units in the Trust. The court distinguished share ownership with ownership of units in the Trust and found that the former will only entitle the holder to the benefit of company assets upon a distribution and accordingly, it could not be said that the claim against Malamit was brought for the benefit of Mr Mitchell or his family members.



The court finally considered what scenario would satisfy this exclusion, concluding that a claim will be brought for a person's benefit if the proceeds were to be paid to or at the direction of that insured or family member. The court confirmed that a claim brought by the trustee of a unit trust does not answer that description considered from the perspective of a shareholder of a corporate unitholder in the trust.

## Comment

Malamit was ultimately unsuccessful in this appeal because the claim against it was made by Treetops, a subsidiary (pursuant to the policy) of an insured (Mr Mitchell), and therefore excluded under the policy.

This case provides a useful example of how the courts will consider insurance policies in their entirety to interpret individual clauses. In this case, a 'third party' was considered to be anyone other than the insured involved in the proceeding, and therefore if not for the exclusion for claims made by subsidiaries, Malamit would have been entitled to be indemnified for the claim made against it by an entity wholly owned by one of its directors.

Insurers should be mindful that the clauses of their policies may not be read in isolation, and that care should be taken to draft policies in a manner where their construction as a whole reflects the policy as intended.



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<sup>1</sup> [2017] NSWCA 162.

<sup>2</sup> *Malamit Pty Ltd v WFI Insurance Ltd & Ors* [2016] NSWSC 1306.

<sup>3</sup> Claim was defined as 'any civil proceeding brought by a third party against the insured for compensation'.

<sup>4</sup> At [20] to [22].

<sup>5</sup> *Malamit Pty Ltd v WFI Insurance Ltd & Ors* [2016] NSWSC 1306 at [46].

<sup>6</sup> At [32].

<sup>7</sup> Ibid.

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