Federal Court of Australia

 Markel Syndicate Management Limited v Taylor as Liquidator of Heading Contractors Pty Ltd (In Liquidation) [2021] FCAFC 198

|  |  |
| --- | --- |
| Appeal from: | *Taylor (liquidator), in the matter of Heading Contractors Pty Ltd (in liq) v Heading* [2021] FCA 770 |
|  |  |
| File number(s): |  |
|  |  |
| Judgment of: | **ALLSOP CJ, LEE AND ANASTASSIOU JJ** |
|  |  |
| Date of judgment: | 15 November 2021 |
|  |  |
| Catchwords: | **INSURANCE** – director of a company insured under director’s liability policy – director became bankrupt and subsequently discharged from bankruptcy – insurance policy extended cover which would have been received by the director to, *inter alia*, his estate in the event of bankruptcy – whether the extension operated to indemnify the trustee in bankruptcy with respect to liability for insolvent trading  |
|  |  |
| Legislation: | *Bankruptcy Act 1966* (Cth) s 588G, s 588M*Corporations Act 2001* (Cth) ss 58, 82, 117, 149, 149A, 153*Survival of Causes of Action Act 1940* (SA) |
|  |  |
| Cases cited: | *Clyne v Deputy Commissioner of Taxation* [1984] HCA 44; 154 CLR 589*Distillers Co Biochemicals (Aust) Pty Ltd v Ajax Insurance Co Ltd* [1974] HCA 3; 130 CLR 1*Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363; 1 All ER 577*Tarea Management (North Shore) Pty Ltd (In Liquidation) v Glass* [1991] FCA 73; 28 FCR 93*Taylor (Liquidator) v Duncan, Trustee of the Property of Heading* [2020] FCA 1450*Taylor (liquidator), in the matter of Heading Contractors Pty Ltd (in liq) v Heading* [2021] FCA 770 |
|  |  |
| Division: |  |
|  |  |
| Registry: |  |
|  |  |
| National Practice Area: |  |
|  |  |
| Sub-area: |  |
|  |  |
| Number of paragraphs: | 38 |
|  |  |
| Date of hearing: | 1 November 2021 |
|  |  |
| Counsel for the Appellant: | Mr DJ Blight QC with Mr SA Evans |
|  |  |
| Solicitor for the Appellant: | Moray & Agnew Lawyers |
|  |  |
| Counsel for the First Respondent: | Mr DL Cook SC with Mr AK Baillie |
|  |  |
| Solicitor for the First Respondent: | Mansueto Legal |

ORDERS

|  |  |
| --- | --- |
|  | SAD 151 of 2021 |
|   |
| BETWEEN: | MARKEL SYNDICATE MANAGEMENT LIMITEDAppellant |
| AND: | AUSTIN ROBERT MEERTEN TAYLOR AS LIQUIDATOR OF HEADING CONTRACTORS PTY LTD (IN LIQUIDATION) ACN 067 151 688First RespondentHEADING CONTRACTORS PTY LTD (IN LIQUIDATION) ACN 067 151 688Second RespondentSTEPHEN JAMES DUNCAN, THE TRUSTEE OF THE PROPERTY OF PETER JOHN HEADING, A BANKRUPT (and another named in the Schedule)Third Respondent |

|  |  |
| --- | --- |
| order made by: | ALLSOP CJ, LEE AND ANASTASSIOU JJ |
| DATE OF ORDER: | 15 November 2021 |

THE COURT ORDERS THAT:

1. Subject to any additional orders consequent upon Order 2 below, the appeal be dismissed with costs.
2. Within 14 days the parties file submissions of no more than two (2) pages as to any further orders that they say should be made.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

## Introduction and preliminary observations

1. This appeal, brought pursuant to leave granted by the primary judge, is from orders made answering a separate question. It raises a narrow issue of construction of a Directors’ and Officers’ Liability and Reimbursement insurance policy (**Policy**).
2. Shorn of complications, the separate question was, in effect, whether the Policy issued by the appellant (**Insurer**) in favour of the second respondent, Heading Contractors Pty Ltd (**Company**) and its directors and officers could respond to extend indemnity for relief sought in the proceeding below in favour of the first respondent (**Liquidator**) of the Company against either or both the third respondent (the trustee in bankruptcy of the fourth respondent) and the fourth respondent, Mr Peter Heading, the former bankrupt. The primary judge determined that the Policy could so respond if the claim asserted were made out.
3. The dispute as to the proper construction of the Policy arises against the background that the Liquidator and the Company allege that in 2014, Mr Heading (who at all times was the sole director of the Company) failed to prevent insolvent trading. The Company and the Liquidator allege that some of the Company’s creditors have incurred losses exceeding $4 million as a consequence of the failure to prevent insolvent trading. The current version of the originating application seeks a declaration that Mr Heading incurred a liability pursuant to s 588M(2) of the ***Corporations Act*** *2001* (Cth) “prior to the date of his discharge” of bankruptcy, and a declaration that the Policy responds to that liability. Relief is also sought to recover an amount equal to the loss alleged to have been occasioned by the insolvent trading together with interest.
4. It was common ground that the Company was wound up in 2014, and Mr Heading became bankrupt on his own petition in 2015. He was discharged from bankruptcy in 2018, and this discharge occurred before the commencement of the insolvent trading claim. Prior to his being made bankrupt and prior to his discharge, no liability of Mr Heading to the Liquidator or the Company under s 588M of the Corporations Act had been established by court order, an arbitral award or a settlement.
5. Despite the very detailed and complex submissions made by the parties, the primary and determinative issue raised in the appeal is the confined question of whether Extension 2(g) of the Policy extended indemnity to the bankrupt estate of Mr Heading when Mr Heading, the former bankrupt, cannot now be made subject to an award of damages for the debt (Ground of Appeal 1.1). If it did not, then the primary judge should not have answered the separate question the way her Honour did.
6. The relevant principles governing the construction of commercial contracts were not in dispute and do not require excursus. It suffices to note that the process of construing insurance contracts is governed by ordinary principles of contractual interpretation and a clause in an insurance policy must be considered in the context of the policy as a whole, set in its surrounding circumstances. Meaning is determined objectively, by reference to text, context and purpose and, unless a contrary intention is indicated, the contract (and a provision within it) will be interpreted on the assumption that the parties intended to produce a commercial result.
7. Before coming to the terms of the Policy, as a matter of context, it is worth commencing by having regard to some fundamental and uncontroversial aspects of the operation of the law of bankruptcy, which are of cardinal importance in understanding how Extension 2(g) is to be construed. These can be summarised as follows:
8. Upon the making of a sequestration order, a bankrupt is relieved of any obligation to pay provable debts; the creditors cannot enforce remedies against him or her nor, except with leave of the court, can they commence any legal proceeding in respect of a provable debt, or take any fresh step in such a proceeding against the bankrupt’s property, whether or not such property was divisible among his creditors: s 58(3) of the ***Bankruptcy Act*** *1966* (Cth);
9. The general rule of *pari passu* distribution in bankruptcy has an exception that is relevant in this appeal, being s 117 of the Bankruptcy Act, which provides that where the bankrupt is, or was, insured against liability to third parties, and incurs such a liability (whether before or after bankruptcy), the right to recover the insurance vests in the trustee and any amount received by the trustee from the insurer is not to be distributed to the general body of creditors, but rather the trustee is to pay the proceeds to the creditor whose claim against the bankrupt was insured.
10. If a policy of this type exists, the creditor could make application for leave to commence or proceed against the bankrupt to obtain a judgment to which the policy would respond: s 58(3)(b) of the Bankruptcy Act.
11. If leave were granted to proceed under s 58(3)(b) (and there is no reason why it would not be if s 117 of the Bankruptcy Act applied, given the insurance proceeds would not be property divisible *pari passu* and a creditor having access to those proceeds would reduce the demands on the bankrupt estate) the creditor could obtain a judgment against the bankrupt, although, of course, the judgment could not be *enforced* against the bankrupt: s 58(3)(a) of the Bankruptcy Act.
12. In the case of a debtor’s petitions (as was the case here), automatic discharge will occur three years and one day after the date the petition was accepted (that is, the date of bankruptcy), as a petition cannot be accepted by the Official Receiver unless it is accompanied by a statement of affairs. However, this is subject to the filing of an objection to discharge based on grounds in s 149A of the Bankruptcy Act (which did not occur in the present case).
13. With some exceptions irrelevant for present purposes, upon discharge of bankruptcy, the effect of s 153 of the Bankruptcy Act is to release the former bankrupt from all provable debts. Hence, by reason of Mr Heading’s discharge, he was released from personal liability for the claim for insolvent trading (which was a provable debt) such that he could no longer be found liable by a Court and made subject to a judgment founded on a liability to which the Policy responded.

## The Policy

1. As noted above, the Policy provides Directors’ and Officers’ Liability and Reimbursement insurance. The insuring clause (cl 1) is in the following terms:

Underwriters agree, subject to the terms, conditions, limitations and exclusions of this Policy, to:

(a) Pay on behalf of any **Director** or **Officer** **Loss** arising from any **Claim** first made against them during the **Period of Insurance**; or

(b) Pay on behalf of the **Company Loss** arising from any **Claim** first made against any **Director** or **Officer** during the **Period of Insurance** when and to the extent that the **Company** has indemnified such **Director** or **Officer**.

(c) Pay on behalf of any **Outside Entity Director** or **Officer Loss** arising from any **Claim** first made against them during the **Period of Insurance**.

1. Clause 2 provided for “Extensions” including Extension 2 (g), which is in the following terms:

*Spousal/Legal Representative Cover*

This Policy shall apply in the event the lawful spouse of any **Director** or **Officer** is the subject of enforcement proceedings in respect of a judgment against such **Director** or **Officer** for a **Wrongful Act** of that **Director** or **Officer** for which he would have received cover under this Policy and at his request.

This policy shall apply in the event of the death or incompetency or bankruptcy of a **Director** or **Officer** to their estate, heirs, legal representatives or assigns, for **Loss** incurred due to any **Wrongful Act** of such **Director** or **Officer** for which he would have received cover under this Policy.

1. Clause 3 provides for definitions, including the following:

‘**Insured(s)**’ shall mean all or any of the **Directors** and **Officers**, **Outside Entity Directors** and **Officers**, and for the purposes of Insurance Clause 1(b) only, the **Company**.

‘**Loss**’ shall mean loss by reason of the legal liability of the **Insureds** to pay:

(i) damages or costs awarded against the **Insureds**, including punitive or exemplary damages where insurance against liability to pay such punitive or exemplary damages is lawful under the laws of the territory in which the **Claim** is made;

(ii) settlements entered into by the **Insureds** with Underwriters’ prior written consent (such consent not to be unreasonably withheld or delayed); and

(iii) **Costs** and **Expenses**.

‘**Loss**’ shall not include any obligation to repay any monies wrongfully received by the **Insureds** or any civil, regulatory or criminal fines or penalties.

## Consideration

1. As we have said, the basal question for determination in the appeal is the response of the Policy to the claim by the Liquidator that Mr Heading became liable to the company under ss 588G and 588M of the Corporations Act for insolvent trading prior to the liquidation of the company.
2. The proceeding against Mr Heading was commenced by the Liquidator five days before the expiry of the limitation period. Leave to commence and continue the proceeding was sought *nunc pro tunc*. That leave was required by reason of s 58(3)(b) of the Bankruptcy Act. The proceeding was “in respect of a provable debt” for the purposes of ss 58(3)(b) and 82.
3. The proceeding in respect of which leave to commence and continue was sought (and granted) was not only against Mr Heading, but also against Mr Duncan, who was and is the trustee of Mr Heading’s bankrupt estate.
4. Two immediate difficulties for the Liquidator were present as at the time of the commencement of the proceeding: First, Mr Heading had been discharged from his bankruptcy in 2018 under s 149 of the Bankruptcy Act. As a consequence, he was released from all debts provable in bankruptcy: s 153(1) of the Bankruptcy Act. There has never been any suggestion that the debt (the asserted liability under s 588M of the Corporations Act) was incurred by means of fraud or fraudulent breach of trust for the purposes of the exception from release in s 153(2)(b), or indeed the possible relevant operation of any other exception in s 153(2) of the Bankruptcy Act. Indeed such contention was expressly disavowed by senior counsel for the Liquidator on the appeal.
5. Secondly, the trustee cannot be liable for the debt for which Mr Heading may have made himself liable under ss 588G and 588M of the Corporations Act. A claim against the trustee personally is misconceived. The debt asserted to be owed as a result of the alleged contravention by Mr Heading was a provable debt under s 82 of the Bankruptcy Act against the estate of Mr Heading. The claim against the trustee could only be one for a declaration that the estate of Mr Heading was liable in debt by reason of the conduct of Mr Heading prior to liquidation of the Company and prior to his bankruptcy in contravention of s 588G of the Corporations Act with the consequence provided for in s 588M.
6. Nevertheless, leave was granted (against both Mr Heading and Mr Duncan): *Taylor (Liquidator) v Duncan, Trustee of the Property of Heading* [2020] FCA 1450. This is not an appeal against that grant of leave. The reason for leave was the prospect of recovery under the Policy if it were declared that Mr Heading had contravened s 588G and would have been liable under s 588M had he been sued. The utility of a judgment of the Court in such a proceeding as to a matter that could have been dealt by the trustee accepting the proof of debt is related to the possible response of the Policy and the operation of s 117 of the Bankruptcy Act.
7. The liability of the Insurer under clause 1(a) did not arise until legal liability of the Director (here Mr Heading) for “damages” had been established by a proceeding (curial or arbitral) or by settlement: *Distillers Co Biochemicals (Aust) Pty Ltd v Ajax Insurance Co Ltd* [1974] HCA 3; 130 CLR 1 at 25–26. As explained by Stephen J in *Distillers* 130 CLR at 25–26, the contractual liability to indemnify (including for defence costs) under such a policy wording as present here does not arise until liability is determined (by judgment, arbitral award or settlement agreement). Under such wording, the insurer’s liability is engaged only “upon the liability of the insured to the injured person being established”: *Distillers* at 26. Justice Stephen in *Distillers* quoted Salmon LJ in *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363; 1 All ER 577, the latter saying, amongst other things, at 377:

It is quite unheard of in practice for any assured to sue his insurers in a money claim when the actual loss against which he wishes to be indemnified has not been ascertained.

1. Thus, the liability did not arise until the *ascertainment* of the liability.
2. The appellant Insurer submitted that liability under Extension 2(g) cannot arise here because there can be no “Loss incurred” for the purposes of Extension 2(g) because Mr Heading has been released from the debt by reason of s 153(1) of the Bankruptcy Act. The Insurer submitted that Extension 2(g) says “*Loss incurred* … for which he would have received cover”; that it does not say “Loss which he would have incurred … for which he would have received cover”. Indeed, the Insurer went so far as to submit that Extension 2(g) only applied prior to the Director being made bankrupt, that is, it only applied if the Director were the subject of a judgment or award or settlement prior to being made bankrupt, because it was only then that the Director personally could be subject to a liability to pay in the sense described in the definition of Loss.
3. The Liquidator submitted that the necessary effect of Extension 2(g) is to affect the defined meaning of either or both the words “Insured(s)” and/or “Loss”. If the Policy is to be extended “to apply to the estate, heirs, legal representatives or assigns” of the Director or Officer in the event of his or her death, incompetency or bankruptcy, the content and operation of the words “Insured(s) and/or “Loss” in at least the Extension must be modified. Take the death of the Director. In any suit involving the Director as a defendant, upon death he or she would be substituted by a legal personal representative, who would be the proper defendant in the action. Under common form legislation for the survival of causes of action of a deceased tortfeasor (see for example *Survival of Causes of Action Act 1940* (SA)) the cause of action against the deceased Director would survive his or her death as against his or her estate. In such circumstances, it would never be possible for the Director to be personally liable if judgment or award or settlement had not taken place before the death of the Director. The legal personal representative would be the proper party to the suit; the liability would be of the estate reflective of the cause of action surviving against the estate. If judgment or award (or settlement) occurred against (or with) the legal personal representative, there would then be the ascertainment of the liability of the legal personal representative and the estate contemplated in *Distillers* and *Norwich Union*. The Liquidator submitted that that would fall within the apparent commercial purpose of the extension of cover in Extension 2(g). The Liquidator submitted that the same would obtain if the Director became incompetent and was represented in any proceeding by a guardian *ad litem* or tutor.
4. To interpolate at this point: Upon bankruptcy, the claim or debt is, at least provisionally, merged in an equitable execution: *Clyne v Deputy Commissioner of Taxation* [1984] HCA 44; 154 CLR 589 at 594. As we have said, it is not competent for a creditor to enforce a remedy against the person or property of the bankrupt in respect of a provable debt*:* Bankruptcy Act s 58(3)(a). The creditor can, however, with the leave of the Court, commence or continue proceedings in respect of a provable debt: s 58(3)(b); in the circumstances of s 117 of the Bankruptcy Act, there would be every reason for such leave to be granted up to, but no further than, the entry of judgment against the bankrupt. If proceedings for which leave were given were successfully completed within the three year period prior to discharge (after which the bankrupt, subject to s 149A of the Bankruptcy Act would be entitled to a discharge) the order might be a judgment against the bankrupt (without any prospect of enforcement because of s 58(3)(a)) or a declaration as to the bankrupt having incurred a debt in a given sum by reason of the operation of ss 588G and 588M of the Corporations Act. Either of such orders against the bankrupt would have *ascertained* his or her legal liability under those sections, albeit without any right to a remedy, beyond the ordinary operation of the Bankruptcy Act, given that the liability was a provable debt.
5. The Insurer contested the proposition that the Policy would respond in such circumstances.
6. The present circumstances expose the particular difficulty in construing the Policy in the context of bankruptcy. The proceeding against Mr Heading and Mr Duncan, the trustee, was filed after Mr Heading’s discharge by s 149 from bankruptcy and release from the debt by s 153(1). No basis existed to object to his discharge: cf s 149A of the Bankruptcy Act*.* He is released. His release does not, however, affect the responsibility of his estate for the debt if the proof of debt be accepted or if the claim is otherwise determined to be valid: *Tarea Management (North Shore) Pty Ltd (In Liquidation) v Glass* [1991] FCA 73; 28 FCR 93 at 99.
7. The different positions of the parties reflect a difference in asserted commercial purpose of Extension 2(g) drawn from the words of the provision. The Insurer submitted that the definition of Loss is central and determinative in that there must be a legal liability of the Insured (Mr Heading) to pay damages (accepted here to be any debt under s 588M of the Corporations Act) awarded (here by a court) against the Insured (Mr Heading). The Insurer’s position is that the liability to pay must be awarded against Mr Heading before he was made bankrupt, because after that point an order by a court to him to pay cannot be made (relying implicitly on s 58(3)(a) of the Bankruptcy Act). The Insurer submitted that the purpose of Extension 2(g) is to make clear that if there has been a Loss incurred by the Director, that is, a legal liability of the Director to pay damages awarded against the Director prior to bankruptcy, cover extends to the estate, heirs, legal representatives or assigns of the Director to claim under the Policy.
8. The Liquidator submitted that the commercial purpose of the Policy, as reflected in the wording of Extension 2(g) is wider than that. The Insurer’s contention, it was submitted by the Liquidator, would give the Extension no work to do by way of true extension of legal cover since upon judgment against the Director before his or her death, incompetency or bankruptcy, there would be cover under the Policy for the Director, who would then have a right of indemnity which would be enforceable against the Insurer at the suit of the person vested with control of the affairs and property of the Director after his or her death, incompetency or bankruptcy. The words “for which he would have received cover under this Policy” direct the Extension to giving the estate, heirs, legal personal representatives and assigns cover when the Director would otherwise have had that cover. Its purpose therefore requires the adjustment of meaning of the “Insured(s)” to accommodate the purpose.
9. We accept the thrust of the Liquidator’s submissions. The Liquidator emphasised the closing words of the second paragraph of Extension 2(g): “for which he would have received cover under this Policy”. The Insurer on the other hand emphasised the definition of “Loss” as directed to legal liability of the Insured to pay damages awarded against the Insured (that is, liability of the Insured (Director) to pay the damages awarded against the Insured (Director)). The flaw in the Insurer’s argument has two features. First, it over-emphasises a definition, when the focus should be upon the reach of the coverage clause (Extension 2(g)) drawn from its language and context. Secondly, it gives inadequate attention to the phrase “for which he would have received cover under this Policy”. The notion of “receiving cover” is not a reference to the fact of being paid by the Insurer after it had considered the claim; rather, it is a reference to cover being engaged or crystallised in the sense discussed in *Distillers* and *Norwich Union*, that is at the time of ascertainment of liability by judgment, award or settlement. The commercial purpose of Extension 2(g) is reflected in the recognition that at the time of death, incompetency or bankruptcy, the Director has not “received cover” and that the Extension was to apply and so the Policy was to “apply” (and give “cover”) for Loss, due to a wrongful act of the Director for which he or she *would have received cover*, implicitly, *if he or she had not died, become incompetent or bankrupt*. Thus, it is necessary to understand Extension 2(g) and the definitions and language adopted and used in it (in particular the word “Loss”) as conformable with the clear contractual purpose of Extension 2(g) to be taken from the closing words of the second paragraph: to give cover to the estate, heirs, legal representatives and assigns in circumstances where there has *not* yet been a judgment or award or settlement against or involving the Insured (Director) before death, incompetency or bankruptcy. If there had been such a judgment, award or settlement before death, incompetency or bankruptcy, the words “for which he would have received cover” would not be apt. The Director in those circumstances has already received cover. The cover he or she would have received is conditioned upon a suppressed premise: if he or she had not died, become incompetent or bankrupt. The cover is to be extended to the estate, heirs legal representatives or assigns in circumstances where the Director had not yet “received cover”. Thus the Extension must operate and be engaged in respect of judgments, awards or settlements *after* *(not before)* death, incompetency or bankruptcy.
10. Once one appreciates the essential point that “cover is received” in a policy worded such as this when the insurer’s obligation to indemnify is engaged or crystallised: that is, when the insured becomes subject to a relevant legal liability being established by a judgment, arbitral award or settlement; and once one appreciates that the final part of the second paragraph of Extension 2(g) tells one that at the time of death, incompetency or bankruptcy there had been no engagement or crystallisation of liability to indemnify by judgment, award or settlement agreement, and so the Director had not yet “received cover”, one must recognise that Extension 2(g) is directed to the circumstances after death, incompetency or bankruptcy in some relevant sense against the Insured by reference to the parties and concepts expressed: “estate, heirs, legal representatives or assigns”.
11. The suppressed or implicit premise involved was recognised by the plaintiff below, and respondent to the appeal (the Liquidator) in his submissions, extracted by the primary judge: *Taylor (liquidator), in the matter of Heading Contractors Pty Ltd (in liq) v Heading* [2021] FCA 770 at [57]:

[Extension 2(g), properly construed, operates so as to]… confer a right of indemnity on the estate, heirs, legal representatives or assigns, of a director or officer, where the death, incompetency, or bankruptcy of the director or officer precludes the operation of insurance clause 1(a), and operates in respect of any damages or costs for which the director or officer would have received cover under the Policy but for his or her death, incompetency or bankruptcy.

1. These submissions, and the reasons of the primary judge (at J[79]–[81]), correctly direct attention to the implicit premise in the phrase “would have received cover”, *were it not for the death, incompetency or bankruptcy*.

[79] The Policy applies to the estate “for Loss incurred due to any wrongful act” of Mr Heading “for which he would have received cover”. The words “would have received” must be read in their context and given meaningful work to do. In their ordinary meaning, they direct attention to the coverage that Mr Heading would have received had the relevant event that has triggered the operation of the clause not occurred. The phrase does not point to Mr Heading’s personal and present entitlements to be indemnified against “Loss” under the Policy in his capacity either as a bankrupt or as a discharged bankrupt. If that had been the intention, the phrase for which he “is entitled to receive cover” or something similar would have been employed. Indeed, it is difficult to conceive of any commercial utility in Extension 2(g) if its operation is to provide for the circumstance of the Trustee standing in the shoes of Mr Heading as the Insured under the Policy in a representative capacity affording him no greater claim for coverage than Mr Heading himself. There is no need for a contractual clause to achieve that result. It is the result that flows from the vesting of the bankrupt’s property (including the bankrupt’s chose in action under cl 1(a) of the Policy) in the Trustee, or (in the case of death) the deceased’s chose in action under that clause vesting in (say) an executor of his or her deceased estate.

[80] To determine what coverage Mr Heading “would have” received were it not for his bankruptcy, one must of course turn to insuring cl 1(a). But that is not to be done for the purpose of asking what entitlement to indemnity Mr Heading presently has under the Policy as a discharged bankrupt in response to the plaintiffs’ claim. Rather, cl 1(a) must be considered for the purpose of ascertaining what coverage Mr Heading would have received had the event of bankruptcy (with all of it legal consequences) not occurred.

[81] As explained above, were it not for Mr Heading’s bankruptcy, neither s 58 nor s 153 of the Bankruptcy Act would apply. Accordingly, Mr Heading would not be discharged from liability to pay damages for any contravention of s 588G of the Corporations Act under s 153 of the Bankruptcy Act. Proceedings would be brought against Mr Heading in his own name and right, and (if a contravention was proven) an award of damages would be directed to him personally. The Insurer would be liable to pay that award on his behalf. For the purposes of the closing words of Extension 2(g), that is the cover Mr Heading “would have received” under the Policy.

1. However, the submissions, and therefore the judgment below, drive at, but do not quite reach, the essential point: that “received cover” means engagement or crystallisation of the cover by judgment or award or agreement, such that, if cover has not yet been received (which is the circumstance contemplated by the Extension) then there has not yet been a judgment, award or agreement. The submissions of the parties, both below and on the appeal, and the reasons of the primary judge approached, but did not arrive at, the conclusion that, in the light of the meaning and operation of the Extension, “Loss incurred” refers to loss sustained by the Insured Director, not personally, but as legally manifested by his or her estate, heirs, legal representative or assigns. In fairness to senior counsel who argued the matter for the plaintiff Liquidator below and to the learned primary judge it may be better to express the matter by saying the point we make was implicit in the submissions by counsel and the conclusions reached by the primary judge.
2. As adverted to above, in these circumstances, the phrase “Loss incurred” must, to make sense and to give the provision *any* work to do, be referable to the Insured, that is the Director, as he or she exists *legally*, upon death, incompetency or bankruptcy: that is, as an estate, with heirs, with a legal representative or assigns. Here, there was bankruptcy and so a trustee in bankruptcy. The use of the word “Loss” in Extension 2(g) thus must accommodate, by reason of the words used and contractual context, not by implication, the legal liability of the Director manifested in the bankrupt estate represented by the trustee, or the deceased estate represented by the legal personal representative, and likewise under laws governing incompetency.
3. The clause finds its place in the law of bankruptcy. That law provides for the discharge of the bankrupt Director, but also for the liability of the estate for the debt in respect of which the bankrupt Director obtains a personal release. In such circumstances, where Extension 2(g) concerns circumstances where there has been no judgment against the Director personally prior to death, incompetency or bankruptcy, liability of the Insured to pay and the award of damages against the Insured in the definition read into Extension 2(g) must, to avoid absurdity and complete inutility, be directed to a judgment against the legal manifestation of the Director in the context of death, incompetency or bankruptcy that is expressed by the clause: the estate, heirs, legal representatives or assigns.
4. Here, such a judgment or award for the purposes of the definition of “Loss” could only be, in the context of the discharge of Mr Heading, the *ascertainment* by judgment of the liability of the estate of the bankrupt for the debt under s 588M of the Corporations Ac*t* due to the earlier contravention of s 588G by Mr Heading.
5. By this construction there is no violence done to the words of the Policy, nor artificial insertion of words into the Policy. It is recognising that when placed into the context of the operation of Extension 2(g) the definition of the word “Loss” and the definition of “Insured(s)” must accommodate the circumstance that the Director at the time of his or her death, incompetency or bankruptcy does not have a judgment or award against him or her, nor has settled a claim, since at that time, he or she has not “received cover”. The purpose of Extension 2(g) is to provide that cover by applying the Policy in such circumstances to the persons and body of assets which represent or manifest the Insured after death, incompetency or bankruptcy.
6. In these circumstances, the fundamental approach of the primary judge was correct and the Liquidator must succeed on the appeal and the appeal be dismissed.
7. We have, however, reservations about the terms of the separate question and the notion of a counterfactual as discussed in submissions and in the judgment below. The proceeding seeks a declaration that the estate of Mr Heading is responsible for a debt under s 588M of the Corporations Act by reason of Mr Heading’s actions prior to the liquidation of the Company and prior to his bankruptcy. A question built on the basis of a demurrer procedure can be understood. But there is nothing “counterfactual” about the task involved. At the hearing there must be proof of a case that Mr Heading engaged in insolvent trading in contravention of s 588G and that his bankrupt estate is burdened in the sum proven as a debt under s 588M. That matter would be proved in the usual way. It is not a counterfactual on any hypothesis; it is proving a contravention of one provision of the Corporations Act and a debt owing under another*.* Such a declaration and such findings amount to the ascertainment of the liability of the Insured in his manifestation contemplated by Extension 2(g): his bankrupt estate and trustee. A separate question directed to the legal possibility of the Insurer being liable may be posited on the assumption of the veracity of the pleaded facts.
8. It is very difficult to understand why Mr Heading should be burdened with the proceeding below when he has a statutory release. However, no appeal was brought against the orders granting leave to commence and continue the proceeding against him personally. There is no basis to sue Mr Heading personally and such inability cannot affect the right of the Liquidator to establish against Mr Heading’s estate and the Insurer its ascertained right to claim against the estate and the Insurer. The resolution of this and any other procedural issue that might arise from the form of the pleading and declaration should, however, be left to the primary judge upon remittal.
9. We would dismiss the appeal with costs, but will provide the parties with an opportunity to consider these reasons and the form of any additional orders that they consider should be made.

|  |
| --- |
| I certify that the preceding thirty-eight (38) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Chief Justice Allsop, and Justices Lee and Anastassiou. |

Associate:

Dated: 15 November 2021

**SCHEDULE OF PARTIES**

|  |  |
| --- | --- |
|  | SAD 151 of 2021 |
| Respondents |  |
| Fourth Respondent: | PETER JOHN HEADING |