

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
ENFORCEMENT LIST

Not Restricted

S CI 2012 01172

ISMAIL BARODAWALA

Plaintiff

v

SUJEETHA PERINPARAJAH

Defendant

JUDICIAL REGISTRAR: Irving JR
WHERE HELD: Melbourne
DATE OF HEARING: 17 May 2021
DATE OF JUDGMENT: 1 July 2021
CASE MAY BE CITED AS: Barodawala v Perinparajah[2021] VSC 387
MEDIUM NEUTRAL CITATION: [2021] VSC 387

BANKRUPTCY AND INSOLVENCY – Whether debt incurred by means of fraud – Actual fraud – *Power v Kenny* [1977] WAR 87 applied – *SJD Marketing Pty Ltd v Venn* [2018] VCC 2129 distinguished – *Chittick v Maxwell* (1993) 118 ALR 728 distinguished – (Cth) Bankruptcy Act 1966 ss 82, 83, 153.

PRACTICE AND PROCEDURE – Application to set aside warrant of execution – Amounts in the warrant were erroneous – Warrant issued irregularly – (Vic) Supreme Court (General Civil Procedure) Rules 2015 rr 68.02(1)(a), 68.02(3).

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr A Terzic	CAV Law Pty Ltd
For the Defendant	Ms A Carruthers	Hutchinson Legal

Introduction

- 1 On 1 March 2010, Ismail Barodawala (**'plaintiff'**) issued proceedings against Sujeetha Perinparajah (**'the defendant'**) in the Supreme Court of New South Wales (**'NSWSC'**).¹
- 2 At trial, the plaintiff alleged the defendant, in her capacity as sole director of Sterco International Pty Ltd (ACN 118 837 924) (**'Sterco'**), was a person involved in Sterco's misleading and deceptive conduct. The NSWSC gave judgment for the plaintiff in the sum of \$127,591.90 and ordered the defendant pay the plaintiff's costs (**'NSW judgment'**).
- 3 The NSW judgment was registered in the Supreme Court of Victoria on 2 March 2012. The defendant became a bankrupt on 17 May 2012 and was released from bankruptcy in 2015. On 24 April 2020, the plaintiff was granted leave by this Court to enforce the NSW judgment, it being more than six years old, by issuing a warrant of execution.
- 4 There are two applications before the Court. Each turn on whether the debt embodied in the NSW judgment was released upon the defendant's discharge from bankruptcy.
- 5 In seeking to have the warrant set aside, the defendant says:
 - (a) the cause of action claimed by the plaintiff in the NSW judgment had merged into the judgment and ceased to have a separate existence; and
 - (b) by operation of s 153 of the *Bankruptcy Act 1966* (Cth) (**'Bankruptcy Act'**), the debt now embodied in NSW judgment was released upon her discharge from bankruptcy.
- 6 The plaintiff says the debt embodied in the NSW judgment was obtained by fraud and therefore is expressly excluded from release by operation of s 153(2)(b) of the

¹ *Re Sterco International Pty Ltd (In Liquidation)* [2011] NSWSC 1560 [3].

Bankruptcy Act. The plaintiff seeks orders to extend the period of warrant's validity for execution and amendment to the sums claimed.

7 For the reasons set out below, I have decided that the plaintiff's warrant should be set aside. Accordingly, I have also dismissed the plaintiff's application.

Background

8 The parties were in agreement about the factual background of this proceeding.

9 On or about June 2008, the plaintiff initiated a proceeding against Sterco in the County Court of Victoria alleging Sterco had engaged in misleading and deceptive conduct and seeking damages under the *Trade Practices Act 1974* (Cth).² On 30 December 2008, the plaintiff obtained a judgment for damages against Sterco.³ Sterco was wound up in February 2009 and deregistered on 5 December 2010.⁴

10 On 1 March 2010, the plaintiff issued the NSW proceeding against the defendant seeking damages on the basis she was a person involved in Sterco's misleading and deceptive conduct.⁵ The plaintiff succeeded and on 16 December 2011, the defendant was ordered to pay the plaintiff damages in the sum of \$127,581.90 plus costs in the proceeding. The NSW judgment was registered in the Supreme Court of Victoria on 2 March 2012.⁶

11 On 2 April 2012, the plaintiff filed a creditor's petition against the defendant in the Federal Magistrates Court of Australia (**'creditor's petition'**) relying on the NSW judgment.⁷

12 On 17 May 2012, the defendant lodged a debtor's petition and appointed Nicholas Giasoumi of Dye & Co Pty Ltd (**'Trustee'**) as trustee over her bankrupt estate.⁸

² Seventh Affidavit of Ismail Barodawala, affirmed 13 May 2021 ('plaintiff's seventh affidavit') and Exhibit IB-1 at [1].

³ Ibid [8].

⁴ Affidavit of Sujeetha Devashanthi Perinparajah, affirmed 31 March 2021 ('defendant's affidavit').

⁵ Ibid [10].

⁶ Ibid [13].

⁷ Ibid [14], [31] and Exhibit SDP-1.

⁸ Ibid [17].

- 13 On 23 May 2012, the plaintiff’s creditor’s petition was dismissed with the defendant ordered to pay the plaintiff’s costs of the creditor’s petition in the sum of \$2,229.50.⁹ This was paid as a priority in the defendant’s bankruptcy.¹⁰
- 14 In relation to the cost order in the NSW proceeding, costs were determined on 20 September 2012 and 3 October 2012 in the sums of \$4,532.96 and \$116,616.28 respectively, against the defendant.¹¹
- 15 On 7 November 2012, at the meeting of creditors, the plaintiff sought to prove for \$256,021.14. The Trustee admitted him to vote for \$253,791.¹²
- 16 On 18 May 2015, the defendant was discharged from bankruptcy by law.
- 17 On 23 July 2019, the defendant purchased 15 Sunfield Drive, Wollert VIC 3750, Title Volume 11605 Folio 297 (**‘the Property’**) with her husband as joint proprietors.¹³ The Property is the subject of the plaintiff’s warrant of seizure and sale.
- 18 By Notice to Produce filed in this Court on 19 March 2020 the plaintiff sought leave to enforce the NSW judgment, being more than six years old.
- 19 On 24 April 2020, the Supreme Court of Victoria granted the plaintiff leave pursuant to r 68.02(1)(a) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) (**‘Rules’**) to enforce the NSW judgment by issuing a warrant of execution in the sum of \$127,591.90 plus interest accrued from 16 December 2011 to 24 April 2020 in the sum of \$87,187.00, plus any interest further accruing.
- 20 On 7 July 2020, the plaintiff’s warrant of seizure and sale was issued. The warrant is composed of the following categories of debt:

- (a) the judgment order (\$127,591.90);

⁹ Ibid [18].

¹⁰ Ibid [19].

¹¹ Ibid [20]–[21].

¹² Ibid [24]–[25].

¹³ Ibid [35].

- (b) the costs order (\$121,149.24);
- (c) interest accruing on the NSW judgment before the defendant's bankruptcy (\$5,532.33) ('**pre-bankruptcy interest**'); and
- (d) interest accruing on the NSW judgment on or after the defendant's bankruptcy (i.e. from 17 May 2012) (\$87,187.00) ('**post-bankruptcy interest**'); and
- (e) the costs of enforcement (\$237.10) ('**enforcement costs**').

21 On 31 March 2021, the defendant filed a summons seeking to set aside the warrant on the basis that:¹⁴

- (a) it is out of time and without notice;
- (b) the debt relied upon was a provable debt in the defendant's bankrupt estate; and
- (c) the debt was relied upon by the plaintiff as a creditor in the defendant's bankrupt estate.

22 On 14 May 2021, the plaintiff filed a summons in this proceeding relevantly seeking:

- (a) the sum in the warrant of execution filed on 7 July 2020 be amended to \$127,591.90 plus interest of \$55,378.55 accrued from 18 May 2015 to 17 May 2021 plus enforcement costs of \$237.10 plus any interest further accruing up to the date of payment; and
- (b) the period of the validity of the warrant for execution issued on 7 July 2020 be extended to 17 May 2022.

23 The plaintiff's proposed amendment of the sums in the warrant reflected the plaintiff's admission that the defendant's discharge from bankruptcy released her from the costs order, pre-bankruptcy interest and some of the post-bankruptcy interest.

¹⁴ Ibid [41].

Material filed in the application

24 The plaintiff relied on the following in support of his application and opposition to the defendant's application:

- (a) the first affidavit of Ismail Barodawala sworn 15 March 2012;
- (b) the second affidavit of Ismail Barodawala sworn 17 March 2020;
- (c) the third affidavit of Ismail Barodawala sworn or affirmed 20 April 2020;
- (d) the fourth affidavit of Ismail Barodawala sworn or affirmed 12 May 2020;
- (e) the fifth affidavit of Ismail Barodawala sworn or affirmed 25 May 2020;
- (f) the sixth affidavit of Ismail Barodawala sworn or affirmed 7 July 2020;
- (g) the seventh affidavit of Ismail Barodawala affirmed 13 May 2021;
- (h) the eighth affidavit of Ismail Barodawala affirmed 17 May 2021; and
- (i) an outline of submissions dated 14 May 2021.

25 The defendant relied on the following in support of her application and opposition of the plaintiff's application:

- (a) the affidavit of Sujeetha Devashanthi Perinparajah affirmed 31 March 2021; and
- (b) the affidavit of Mark Gerard Slater sworn 13 April 2021; and
- (c) an outline of submissions dated 19 April 2021.

Relevant principles and provisions

26 A warrant of execution to enforce a judgment shall not be issued without leave of the Court where six years have elapsed since the judgment took effect.¹⁵ An application for leave to issue a warrant may be made without notice to any person unless the Court otherwise orders.¹⁶

¹⁵ Rule 68.02(1)(a) of the *Rules*.

¹⁶ Rule 68.02(3) of the *Rules*.

27 This case raises the issue of whether the defendant was released from the NSW judgment on her discharge from bankruptcy.

28 Section 82 of the *Bankruptcy Act* sets out debts that are provable in bankruptcy:

82 Debts provable in bankruptcy

- (1) Subject to this Division, all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the date of the bankruptcy, or to which he or she may become subject before his or her discharge by reason of an obligation incurred before the date of the bankruptcy, are provable in his or her bankruptcy.¹⁷

29 It was common ground between the parties that the NSW judgment was provable in the defendant's bankruptcy.

30 Section 153 of the *Bankruptcy Act* relevantly provides:

153 Effect of discharge

- (1) Subject to this section, where a bankrupt is discharged from a bankruptcy, the discharge operates to release him or her from all debts (including secured debts) provable in the bankruptcy, whether or not, in the case of a secured debt, the secured creditor has surrendered his or her security for the benefit of creditors generally.
- (2) The discharge of a bankrupt from a bankruptcy does not:
- ...
- (b) release the bankrupt from a debt incurred by means of fraud...¹⁸

The parties submissions on *Power v Kenny* and whether the debt was obtained by fraud

31 The parties were in agreement that in order to for the warrant to be valid, it is necessary for the plaintiff to demonstrate the NSW judgment is "a debt incurred by means of fraud" within the meaning of s 153(2)(b) of the *Bankruptcy Act*.

32 The defendant, relying on *Power v Kenny*¹⁹ (*'Power'*) submitted s 153(2)(b) of the *Bankruptcy Act* does not assist the plaintiff because when a debt incurred by fraud is

¹⁷ Sections 83(1A)–(3B) of the *Bankruptcy Act* then lists categories of debts which are not provable in bankruptcy.

¹⁸ There are other exceptions under sections 153(2)(a)–(aa) and (c) of the *Bankruptcy Act* which are not relevant to this application.

¹⁹ [1977] WAR 87.

then the subject of a civil judgment obtained by the creditor, the fraud merges into the judgment and the fraudulent nature of the debt is thereby extinguished.²⁰ The debt, not now falling within the s 153(2)(b) exception, was discharged by the bankruptcy.

33 The defendant submitted if that is wrong, then the debt does not come within the s 153(2)(b) exception because fraud was not pleaded or adjudicated on in *Re Sterco International Pty Ltd (In Liq)*²¹ ('the NSW judgment') and, in any event, the defendant did not have an opportunity to respond to any allegation of fraud as she was not present or represented at the hearing.²²

34 The plaintiff agreed that if *Power* applies, the defendant's application must succeed. He submitted however, that *Power* does not apply because:

- (a) Section 153(2)(b) of the *Bankruptcy Act* must be interpreted in light of its context and purpose. A fundamental purpose of the *Bankruptcy Act* is to ensure that dishonest debtors do not escape their obligations.²³ This purpose should be upheld when interpreting s 153(2)(b) regardless of the mechanism that gives rise to the obligation to pay such a debt;
- (b) the principle in *Power* finds no expression in the statutory text and is at odds with the purpose of that provision and with one of the fundamental purposes of the *Bankruptcy Act*;
- (c) *Power* conflicts with the approach of other courts in cases dealing with s 153(2)(b);²⁴ and

²⁰ Ibid [2].

²¹ [2011] NSWSC 1560.

²² *Lois Nominees v Hill* [No 2] [2016] WASC 104, [27] and [85]; *Briginshaw v Briginshaw* (1938) 60 CLR 336 [361]–[363].

²³ *R v Davison* (1954) 90 CLR 353, 375 (Fullagar J). The other purpose described was the protection of the honest debtor.

²⁴ *SJD Marketing Pty Ltd v Venn* [2018] VCC 2129 and *Chittick v Maxwell* (1993) 118 ALR 728, [736].

(d) *Power* is a decision of a single judge sitting at first instance in the Supreme Court of Western Australia that is referred to in five cases, none of which apply the doctrine of merger.²⁵

35 The plaintiff submitted that the NSW judgment was “a debt incurred by means of fraud” for the purposes of s 153(2)(b) of the *Bankruptcy Act*. The text of s 153(2)(b) of the *Bankruptcy Act* does not require the Court to limit itself to any particular cause of action or even an allegation of fraud in the first instance. This provision requires the Court to determine whether the debt was incurred by means of fraud. This enquiry looks at the substance of the debt not its form; the key issue being whether the debtor’s conduct amounted to fraud.²⁶

36 The plaintiff further submitted that it is not necessary for the Court to decide whether ‘fraud’ for the purposes of the provision refers to actual fraud or the broader equitable fraud as, in this case, the NSW judgment was incurred by means of fraud on either view.

The authorities

37 The facts of *Power* are remarkably similar to the facts of the present case. In that case, Power issued proceedings against Kenny for fraudulent misrepresentation in the sale of a business. Power obtained judgment against Kenny in 1959 but sought to issue execution in 1976 when the judgment was statute barred.

38 Power argued that the operation of the relevant limitation period was suspended because of Kenny’s intervening bankruptcy. During the bankruptcy Power received some dividend payments from Kenny’s bankrupt estate. Power argued that because the debt had been incurred by fraud, Kenny’s discharge from bankruptcy did not free Kenny from the requirement to pay the balance of the debt to Power. Power relied on

²⁵ *Barbaro v Millington* [2010] ACTSC 118 (1 October 2010); *Brott v Grey* (2000) 181 ALR 617; *Cameron v Murdoch* [2003] WASC 264; *Panizza v Commissioner of State Taxation* (1981) 11 ATR 624; *SJD Marketing Pty Ltd v Sutherland (Trustee), in the matter of Venn (Bankrupt)* [2018] FCA 1406 (6 September 2018). *Power v Kenny* [1977] WAR 87 is also referred to in a footnote in a sixth case, but without approval of the doctrine of merger: *Keast v Kavanagh* [2013] ACTMC 11.

²⁶ See, e.g., *Talacko v Talacko* [2021] HCA 15 [27]; *SJD Marketing Pty Ltd v Venn* [2018] VCC 2129 [60]–[64].

‘a long list of authorities....but in no instance in those cases was the debt incurred by fraud the subject of a judgment of court.’

39 In opposition, Kenny argued that the judgment was not a debt incurred by fraud as the cause of action had merged into the judgment, ‘becoming *res judicata* and extinguishing the cause of action in the judgment which [was] pronounced.’

40 Wallace J accepted that the protection of bankruptcy exists for the benefit of honest debtors and that s 153(2)(b) should be construed with that in mind. However, he found that the fraud exception contained in s 153(b)(2) does not include a debt where the cause of action had merged in a judgment.

41 The plaintiff says that the principles in *Power* were not followed in the case of *SJD Marketing Pty Ltd v Venn*²⁷ (***SJD Marketing***). In *SJD Marketing*, on 29 September 2014, the County Court of Victoria had made self-executing orders requiring the defendant to pay a sum of money into court by a particular date, failing which there would be judgment for the plaintiff. The dates in the original order were amended on 24 October 2014, however, the defendant failed to pay the required sum into court by the amended date of 7 November 2014. On 19 November 2014, the plaintiff filed an affidavit requesting the court to give judgment to the plaintiff as per the earlier amended order. On 26 November 2014, the defendant filed a debtor’s petition and became bankrupt. On 27 November 2014, the court made orders entering judgment for the plaintiff.

42 In *SJD Marketing*, Judge Cosgrove set out the issues as articulated by the plaintiff and the defendant.²⁸ Both parties agreed that if the self-executing order made on 29 September 2014 was a judgment and not an order, the cause of action would merge with the judgment and there would be no debt the plaintiff could enforce against the defendant. Judge Cosgrave found that judgment is not automatically entered upon a defendant’s failure to comply with a condition of a self-executing order, but rather on

²⁷ [2018] VCC 2129.

²⁸ Ibid [28]-[31].

the entering of judgment pursuant to the rules of the Court.²⁹ His Honour accepted that the plaintiff did not obtain judgment until 27 November 2014 (after the defendant had become bankrupt) with the consequence that, at the time the defendant declared bankrupt, the defendant owed the plaintiff a debt, that debt not having merged with the later judgment.³⁰

43 As can be seen, the facts of *SJD Marketing* differ fundamentally from those in *Power* such that there is no inconsistent application of legal principle.

44 The plaintiff sought to rely on *Chittick v Maxwell*³¹ (*'Chittick'*) to demonstrate that the principle in *Power* had not been consistently followed. An issue in *Chittick* was whether the defendant was released from liability to pay equitable compensation for breach of fiduciary duty by entering into a composition under Pt X of the *Bankruptcy Act* or whether such a debt fell within the s 153(2)(b) exception. The defendant had been involved in mortgaging land and making representations to the lenders that the plaintiffs had no interest in the land when he knew the contrary to be the case. Justice Young found that the defendant's liability to the plaintiffs was a debt incurred by fraud within the meaning of s 153. Importantly, no judgment had been entered against the defendant either at the time the defendant became a bankrupt or when he entered the Pt X composition.

45 The facts of *Chittick* are fundamentally different from those in *Power* such that *Chittick* does not involve an inconsistent application of legal principle.

46 In relation to the plaintiff's submission, while *Power* has been cited in subsequent cases, none of those cases has applied the doctrine of merger, I note that these subsequent cases cited *Power* in support of the principle that payments made during

²⁹ Ibid [48].

³⁰ Ibid [49].

³¹ (1993) 118 ALR 728.

the course of a bankruptcy do not operate to revive the original debt.³² That issue was not raised in this proceeding.

Analysis

47 In this case, there is no dispute that at the time the defendant became bankrupt the plaintiff had obtained judgment against her. In accordance with the principle in *Power*, on judgment being entered, the plaintiff's cause of action merged into the judgment and ceased to have an independent existence capable of falling within the s 153(2)(b) exception.

48 I agree with Justice Wallace's comment in *Power* that:

It is true....that the protection of bankruptcy exists for the benefit of honest debtors..... I have every reason to believe that the fraud to which the subsection in question and the debt involved in this application is directed is other than that involved in a cause of action merged in a judgment.

49 It is unnecessary for me to consider the other arguments put forward by the plaintiff and the plaintiff has acknowledged that if I find against him on the *Power* point, his application must fall away.

Conclusion

50 The warrant of seizure and sale dated 7 July 2020 shall be set aside. The plaintiff's summons filed 14 May 2021 is dismissed. I will hear from the parties on the question of costs.

³² *Robert Keast v Dennis Kavanagh and IAG Australia Pty Ltd t/as NRMA Insurance Ltd* [2013] ACTMC 11,[22]; *Cameron (as Executrix of the Will of Alexander Donald Robert Gordon Cameron (Dec)) v Murdoch (as Administrator of the Estate of James Cameron (Dec))* [2003] WASC 264 [26] & [32]; *Brott v Grey* [2000] FCA 1727, [69].

CERTIFICATE

I certify that the 11 preceding pages are a true copy of the reasons for judgment of Irving JR of the Supreme Court of Victoria delivered on 1 July 2021.

DATED this first day of July 2021.


E. Lawson
Associate