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

Not Restricted

S CI 2012 01172

ISMAIL BARODAWALA — Plaintiff

v

SUJEETHA PERINPARAJAH — Defendant

JUDGE:	GARDE J
WHERE HELD:	Melbourne
DATE OF HEARING:	28 March 2022
DATE OF JUDGMENT:	23 May 2022
CASE MAY BE CITED AS:	Barodawala v Perinparajah (No 2)
MEDIUM NEUTRAL CITATION:	[2022] VSC 247

BANKRUPTCY AND INSOLVENCY – Whether debt incurred by means of fraud – Whether judgment debt survived discharge from bankruptcy – Res judicata – Merger by judgment – Whether decision of single judge in another State concerning a provision in a federal statute should be followed unless plainly wrong – Construction of s 153(2)(b) of the *Bankruptcy Act 1966* (Cth) – Whether fraud alleged in primary proceeding – Necessity of specifically pleading fraud – *Power v Kenny* [1977] WAR 87, applied – *Bankruptcy Act 1966* (Cth) ss 82(1), 153(2)(b).

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

HIS HONOUR:

Introduction

1 This is an appeal by the plaintiff from the decision of Irving JR (as he then was) on the defendant's summons setting aside a warrant of seizure and sale dated 7 July 2020 ('warrant') in the amount of $335,928.14 relating to the property of the defendant. The warrant was issued pursuant to the grant of leave by this Court to enforce a judgment of the Supreme Court of New South Wales against the defendant obtained on 16 December 2011.[1]

2 This appeal is brought under r 84.05(3) of the *Supreme Court (General Civil Procedure) Rules 2015* ('Rules') and is an appeal conducted by way of a hearing *de novo*.[2] By a second summons filed 14 May 2021, the plaintiff seeks to reduce the amount of the warrant to $127,591.90 and interest accrued from 18 May 2015 to the date of payment, and to extend the period of validity of the warrant. That summons was dismissed by Irving JR on 27 July 2021.

3 The key issue for decision is whether the defendant was released from the NSW judgment on her discharge from bankruptcy in 2015. For the warrant to be valid, it is necessary for the plaintiff to demonstrate that the NSW judgment is a 'debt incurred by means of fraud' within the meaning of s 153(2)(b) of the *Bankruptcy Act 1966* ('Act').

Background facts

4 Both parties relied on affidavits filed in the proceeding. The parties agreed that there was no benefit in deciding objections which had been made to certain paragraphs of the affidavits. The background facts are not in dispute and were conveniently summarised by Irving JR in his reasons for decision.[3] I will adopt a similar summary.

5 In about June 2008, the plaintiff initiated a proceeding against Sterco International Pty Ltd (ACN 118 837 924) ('Sterco') in the County Court of Victoria alleging that Sterco had engaged in misleading and deceptive conduct and seeking damages under the

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1 *Re Sterco International Pty Ltd (in liq)* [2011] NSWSC 1560 (Ball J) ('NSW judgment').
2 Rules r 84.05(4).
3 *Barodawala v Perinparajah* (2021) 359 FLR 96, 98–9.

Trade Practices Act 1974 (Cth) ('TPA'). On 30 December 2008, the plaintiff obtained a judgment for damages against Sterco. Sterco was wound up in February 2009 and deregistered on 5 December 2010.

6 On 1 March 2010, the plaintiff issued a proceeding in the Supreme Court of New South Wales seeking damages from the defendant on the basis that she was a person involved in Sterco's misleading and deceptive conduct. The plaintiff succeeded and the defendant was ordered to pay the plaintiff damages in the sum of $127,581.90 and the costs of the proceeding. The NSW judgment was registered in the Supreme Court of Victoria on 2 March 2012.

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

8 On 17 May 2012, the defendant lodged a debtor's petition and appointed Nicholas Giasoumi as trustee over her bankrupt estate.

9 On 23 May 2012, the plaintiff's creditor's petition was dismissed, with the defendant ordered to pay the plaintiff's costs as a priority in the defendant's bankruptcy.

10 On 7 November 2012, at a meeting of creditors, the plaintiff sought to prove for the amount of $256,021.14. Mr Giasoumi admitted the plaintiff to vote in the amount of $253,791.

11 On 18 May 2015, the defendant was discharged from bankruptcy by law.

12 On 23 July 2019, the defendant and her husband as joint proprietors purchased a properly at 15 Sunfield Drive, Wollert. The property is the subject of the plaintiff's warrant of seizure and sale.

13 By a notice filed in this Court on 19 March 2020, the plaintiff sought leave to enforce the NSW judgment.

14 On 24 April 2020, a Judicial Registrar of this Court granted the plaintiff leave to enforce the NSW judgment by issuing the warrant pursuant to r 68.02(1)(a) of the Rules.

15 On 7 July 2020, the warrant was issued. It consists of the following categories of debt:

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

(b) the costs order ($121,149.24);

(c) interest accruing on the NSW judgment before the defendant's bankruptcy ($5,532.33);

(d) interest accruing on the NSW judgment on or after the defendant's bankruptcy (i.e. from 17 May 2012) ($87,187.00); and

(e) the costs of enforcement ($237.10).

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

(a) it was 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.

17 On 14 May 2021, the plaintiff filed a summons relevantly seeking that:

(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 validity of the warrant for execution issued on 7 July 2020 be extended to 17 May 2022.

18 The plaintiff proposes to amend the sums in the warrant to exclude the costs order, pre-bankruptcy interest and some of the post-bankruptcy interest.

19 On 7 July 2021, Nichols J ordered in substance that the period of validity of the warrant be extended to the date of determination of the appeal from the decision of Irving JR.

Relevant provisions

20 The key issue turns on the construction of ss 82(1) and 153(2)(b) of the Act.

21 Section 82(1) of the Act provides:

> 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.

22 Section 153 of the Act provides:

> (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.
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> …
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> (2) The discharge of a bankrupt from a bankruptcy does not:
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> …
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> (b) release the bankrupt from a debt incurred by means of fraud or a fraudulent breach of trust to which he or she was a party or a debt of which he or she has obtained forbearance by fraud;

The reasons for decision

Leading authority

23 Irving JR observed that the leading authority governing the construction of s 153(2)(b) of the Act is *Power v Kenny*.[4] In that decision, Wallace J of the Supreme Court of Western Australia held that a judgment obtained in an action for fraudulent misrepresentation brought against the vendor of a business was not a debt incurred by means of fraud because the cause of action had merged into the judgment and had become *res judicata.* The result was to extinguish the cause of action in the judgment which had been pronounced.[5] As a result, Wallace J held that the fraud exception

4 [1977] WAR 87 ('*Power*').
5 Ibid 88.

contained in s 153(2)(b) did not apply, as it did not include a debt where the cause of action had merged in a judgment. *Power* has been cited on other issues in later cases.[6]

Analysis

24 Irving JR considered and distinguished two cases relied on by the plaintiff. In *SJD Marketing Pty Ltd v Venn,* Judge Cosgrave of the County Court held that judgment was not automatically entered upon a defendant's failure to comply with a condition of a self-executing order, but rather on the entering of judgment pursuant to the rules of the Court. At the time the defendant became a bankrupt, the defendant owed the plaintiff a debt, which had not merged in the later judgment.[7]

25 In *Chittick v Maxwell,* the defendant was released from the liability to pay equitable compensation for breach of fiduciary duty by entering into a composition under Pt X of the Act. Young J held that the defendant's liability to the plaintiff was a debt incurred by fraud within the meaning of s 153(2)(b). No judgment had been entered against the defendant at the time he became a bankrupt or when he entered the Pt X composition.[8]

26 Irving JR held that at the time the defendant became bankrupt, the plaintiff had obtained judgment against her. Applying the decision in *Power*, upon 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.

Plaintiff's submissions

27 The plaintiff contended that the NSW judgment debt survived the defendant's discharge from bankruptcy. He submitted that *Power* was wrongly decided and should not be followed. *Power* did not sufficiently explain why the doctrine of merger applied to exclude judgment debts from the operation of s 153(2)(b). He said that the circumstances of the present case were far removed from those envisaged by the doctrine of merger. He accepted that when the Supreme Court of New South Wales

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6 *Keast v Kavanagh* [2013] ACTMC 11, [22]; *Cameron v Murdoch* [2003] WASC 264 (S), [26], [32]; *Brott v Grey* (2000) 181 ALR 617, 631.

7 [2018] VCC 2129, [48]–[49].

8 (1993) 118 ALR 728.

gave judgment against the defendant, the plaintiff's cause of action merged into the judgment and ceased to have a separate existence. He was not seeking to reagitate any issue determined by the NSW judgment or asking the Court to make any finding of fact or to decide any question of law which had already been made or decided.

28 The plaintiff contended that the judgment debt was 'a debt incurred by means of fraud' within the meaning of s 153(2)(b), and that such an interpretation was more consistent with the purpose and policy of s 153(2)(b) and the mischief which it sought to remedy. He relied on *Hughes v Munro* for the proposition that the phrase 'by means of' should be construed to mean 'by the instrumentality of' or 'through the intervention of',[9] and contended that the facts as found by Ball J in the NSW judgment constituted actual fraud by the defendant.[10] He submitted that it did not matter that fraud had not been alleged, and that dishonest debtors should not escape their obligations. Section 153(2)(b) should not be construed to permit the fraudulent debtor to escape from liability. The plaintiff relied on overseas authority, citing the English decision of *Jones & Pyle Developments Limited v Rymell*,[11] and the three Canadian decisions of *Turner v Midland Doherty Ltd*,[12] *Re Ropchan*,[13] and *Re Hottman*.[14]

Defendant's submissions

29 The defendant submitted that the NSW judgment debt was a provable debt under s 82(1) of the Act. The NSW judgment involved a finding that the defendant was liable to pay damages for involvement in misleading and deceptive conduct. The judgment debt was not a debt incurred by means of fraud for the purposes of s 153(2)(b) of the Act.

30 During the bankruptcy, the plaintiff actively participated in meetings of creditors, and was involved in the affairs of the bankruptcy. Section 153 provides for the release of debts provable in the bankruptcy, with only a narrow range of exceptions.

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9 (1909) 9 CLR 289, 295 (Griffith CJ).
10 See NSW judgment (n 1), [31].
11 [2021] EWHC 385 (Ch).
12 (1992) 13 CBR (3d) 16.
13 (1996) 40 CBR (3d) 297.
14 (2003) 40 CBR (4th) 84.

31 The defendant noted that the Act had been amended many times, with no less than seven amendments to s 153 since *Power* was decided. The legislation is clear and precise, and the ordinary English meaning of s 153(2)(b) should be applied.

32 The defendant also said that *Power* was a case where the cause of action was fraudulent misrepresentation. It has subsequently been cited without criticism in leading insolvency texts.

The decision in *Power*

33 *Power* involved a claim for fraudulent misrepresentation which resulted in a judgment debt. After an extended period of bankruptcy, the defendant was discharged. Wallace J held that the debt incurred by means of fraud had merged into the judgment, thus becoming *res judicata* and extinguishing the cause of action in fraud. After release from bankruptcy, there was no existing debt incurred by means of fraud within the meaning of s 153(2)(b) of the Act.

34 In construing s 153(2)(b), Wallace J relied on the decision in *Blair v Curran*, where Dixon J said of *res judicata* that:

> the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence.[15]

35 The principles relating to *res judicata* and its effect on the rights and obligations in controversy between the parties to litigation and their privies are well settled by decisions of the High Court and other authorities.

36 In *Tomlinson v Ramsey Food Processing Pty Ltd*, four members of the High Court said:

> An exercise of judicial power … involves "as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons". The rendering of a final judgment in that way "quells" the controversy between those persons. *The rights and obligations in controversy, as between those persons, cease to have an independent existence: they "merge" in that final judgment*. That merger has long

15 (1939) 62 CLR 464, 532.

been treated in Australia as equating to "res judicata" in the strict sense.[16]

37 In *Clayton v Bant*, Edelman J explained the concept of merger by judgment in this way:

> [W]here a cause of action, or "the very right … claimed", has previously been established by a local court then at common law the "merger of the right or obligation in the judgment" can be relied upon to preclude re-assertion of the extinguished right. The doctrine of merger is not merely based upon principles of finality. *It exists because when a court order "replicates" the prior right, with added consequences such as enforcement mechanisms, the prior right "has no longer an independent existence". No action can be brought upon that extinguished right. The successful plaintiff's only right is a right on the local judgment, which is "of a higher nature"* …[17]

38 In *Port of Melbourne Authority v Anshun Pty Ltd*, Brennan J said as to *res judicata* that:

> Both public policy and the interests of the litigants require that there should be an end to litigation as to a particular subject matter once a judgment determining the rights and liabilities of the parties as to that matter has been recovered.[18]

39 In *Burness v Hill,* the Court of Appeal observed:

> Like the trial judge, we emphasise the words 'cease to have *an independent existence*'. That does not mean that pre-existing rights are treated as void from the beginning, or as never having existed. Merger means merger, not retrospective extinguishment, as if the pre-existing rights never existed.[19]

40 *Spencer Bower and Handley: Res Judicata* describes merger in judgment by adopting a passage from the judgment of Diplock LJ in *Thoday v Thoday:*

> … cause of action estoppel … prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist i.e. judgment was given upon it, it is … merged in the judgment … If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped *per rem judicatam*.[20]

41 In explaining the purposes of *res judicata* and related doctrines, the learned authors discuss the general interest of the community in the termination of disputes between

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16 (2015) 256 CLR 507, 516 (French CJ, Bell, Gageler and Keane JJ) (citations omitted) (emphasis added).
17 (2020) 95 ALJR 34, 49 (citations omitted) (emphasis added).
18 (1981) 147 CLR 589, 609 (citation omitted).
19 [2019] VSCA 94, [38] (Kaye, McLeish and Hargrave JJA) (footnote omitted) (emphasis in original).
20 K R Handley, *Spencer Bower and Handley: Res Judicata* (LexisNexis Butterworths, 5th ed, 2019) 279, quoting *Thoday v Thoday* [1964] 1 All ER 341, 342.

litigants and the interest of the individual litigant in the termination of disputes. They note that after judgment is given, the cause of action ceases to exist and cannot support a second action.[21]

42 In *Keay's Insolvency: Personal and Corporate Law and Practice,* the authors note:

> If a debt incurred by fraud is then the subject of a civil judgment obtained by the creditor, the fraud merges into the judgment and fraudulent nature of the debt is thereby ended: *Power v Kenny* [1977] WAR 87. Such a debt would then be discharged by bankruptcy.[22]

43 A similar passage appears in the textbook *Australian Insolvency Law*.[23]

44 The underlying logic of *Power* is that the cause of action for a debt or liability ceased to exist when the judgment was entered by reason of the doctrine of merger. The merger predated the defendant's entry into bankruptcy. It followed that when the defendant was discharged from bankruptcy, there was no debt or liability incurred by means of fraud because the cause of action for a debt incurred by means of fraud had ceased to exist, and could not be revived.

The authority of *Power*

45 *Power* is a decision of a single judge of the Supreme Court of Western Australia as to the interpretation of a federal statute. It has stood as the law in Australia for over forty years. It has not been challenged or called into question by courts or textbook authors. Its effect has not been altered by legislation.

46 As a long standing persuasive decision of a single judge involving the interpretation of federal legislation, I am, and should be, reluctant to depart from the decision. In *Hamilton Island Enterprises Pty Ltd v Commissioner of Taxation,* Rogers J stated that:

> it is of cardinal importance in the proper administration of justice that single judges of State Supreme Courts exercising federal jurisdiction should strive for uniformity in the interpretation of Commonwealth legislation. Unless I were of the view that the decision of another judge of co-ordinate authority was

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21 K R Handley, *Spencer Bower and Handley: Res Judicata* (LexisNexis Butterworths, 5th ed, 2019) 280.

22 Michael Murray and Jason Harris, *Keay's Insolvency: Personal and Corporate Law and Practice* (Thompson Reuters, 10th ed, 2018) [7.160] n 38.

23 Christopher Symes, David Brown and Sulette Lombard, *Australian Insolvency Law* (LexisNexis Butterworths, 4th ed, 2019) [2.71] n 380.

clearly wrong I would follow his decision.[24]

47 This decision was followed by Robson J in *Re Amerind Pty Ltd (in liq)*,[25] where his Honour also referred to additional decisions regarding the need for judicial comity in the interpretation of federal legislation.[26] In *Re PanBio Pty Ltd,*[27] Byrne J quoted Hayne J in *Re Brashs Pty Ltd* to the effect that, if sitting alone, 'I should be very slow indeed to depart from the decision of a single judge in relation to the Corporations Law'.[28]

48 I accept the guidance given in these authorities. It is important to maintain a consistent interpretation across Australia of a provision in a federal statute, particularly where the prevailing interpretation has been extant for over forty years and where Parliament has in the meantime not seen fit to amend the relevant exception. It is in the interests of comity between courts of different states and territories for a judge sitting alone to uphold a construction which has been given to the provision unless satisfied that it is clearly wrong.

49 In the event, I am not satisfied that the prevailing interpretation of s 153(2)(b) is clearly wrong. To the contrary, I am satisfied that it is the better construction.

Construction of s 153(2)(b)

Principles of statutory construction

50 The principles of statutory construction are well established. In *Project Blue Sky Inc v Australian Broadcasting Authority*, McHugh, Gummow, Kirby and Hayne JJ said:

> [T]he duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a

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24 [1982] 1 NSWLR 113, 119.
25 (2017) 320 FLR 118, 176–7.
26 Citing *R v Wescombe* [1987] VR 1012, 1021 (Nicholson J) and *Mustac v Medical Board of Western Australia* [2007] WASCA 128, [38] (Martin CJ, Wheeler and Buss JJA agreeing).
27 (2000) 35 ACSR 458, 461 (Byrne J).
28 (1994) 15 ACSR 477, 483 (Hayne J).

way that does not correspond with the literal or grammatical meaning.[29]

51 The plurality of the High Court emphasised the importance of text, context and purpose in *SZTAL v Minister for Immigration and Border Protection*:

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.[30]

52 In *CIC Insurance Ltd v Bankstown Football Club Ltd*, the majority of the High Court said:

> [T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous.[31]

Text

53 I will primarily consider the text of the provision itself and its purpose. The other exceptions to s 153(2) are narrow and disparate in character. There is not a lot of assistance to be obtained from the surrounding statutory context.

54 Section 153(2)(b) of the Act speaks of the 'release' of the bankrupt from 'a debt incurred by means of fraud'. For the provision to take effect, there must be in existence a debt incurred by means of fraud at the time of the discharge of the bankrupt from bankruptcy. The immediate difficulty for the plaintiff is that there was not, at the time of discharge from bankruptcy, a debt incurred by means of fraud, as the debt and the associated cause of action had ceased to exist years earlier when they were merged by judgment into a judgment debt. As was said in *Tomlinson v Ramsey Food Processing Pty*

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29 (1998) 194 CLR 355, 384 (citations omitted).
30 (2017) 262 CLR 362, 368 (Kiefel CJ, Nettle and Gordon JJ) (citations omitted).
31 (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) (citations omitted).

Ltd, the rights and obligations in controversy between the plaintiff and the defendant had ceased to have an independent existence and had merged in the final judgment.[32]

55 In *Clayton v Bant,* Edelman J said that a court order replicates the prior right with added consequences such as enforcement mechanisms, and the prior right has no longer an independent existence. Here, the plaintiff's prior right transmuted to a right to enforce the NSW judgment, a right of a higher nature.[33]

56 The consideration of the statutory text inevitably leads to the conclusion that the decision in *Power* is correct, because any debt incurred by means of fraud ceased to have an independent existence at the time of the judgment, long before the discharge from bankruptcy.

Purpose

57 There are several relevant purposes. The Act sits in the context of the common law doctrine of merger by judgment, the purposes of which include furthering the general community interest in the termination of disputes, and the interests of individual litigants in the termination of their particular disputes. Another purpose of the doctrine of merger by judgment is the extinction of the relevant cause of action, which can no longer be relied upon or disputed by the parties.

58 A related purpose is evinced by the various Rules of Court, with which the Act coexists. They provide limits on the enforcement of judgments, emphasising the importance of finally concluding disputes and related enforcement. For example, under the Victorian Rules, warrants of execution are subject to significant restrictions as to their duration. A warrant of execution is valid for the purpose of execution for only one year after the day it is issued, but its validity may be extended by an order of the Court for not more than one year at any one time from the day on which it would otherwise expire.[34] Such an order cannot be made after the date of expiry of

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32 (2015) 256 CLR 507, 516.
33 (2020) 95 ALJR 34, 49.
34 Rules rr 68.05(1)–(2).

the warrant.[35] A warrant of execution to enforce a judgment cannot be issued without leave of the Court where six years have elapsed since the judgment took effect, or where any change has taken place, whether by assignment or death or otherwise, in the identity of the persons entitled or liable to execution under the judgment.[36]

59 The purpose of s 153(2)(b) of the Act is to except debts incurred by means of fraud from the ordinary effect of discharge from bankruptcy. However, that purpose is qualified by the fact that the Act evinces no intention to override the high importance that both the common law and the various Rules of Court place on the finality given by a judgment. Ongoing attempts to enforce judgments over a decade later must be subject to some limits. The alternative is to permit enforcement to extend over the lifetime of the debtor and beyond, into the administration of the debtor's deceased estate regardless of the debtor's discharge from one or more bankruptcies. The construction adopted in *Power* is a reasonable compromise between the need for finality and the concept of merger by judgment, and the desire to allow victims of fraud a greater opportunity than other types of litigants to pursue and recover loss.

60 Civil litigation and enforcement must end somewhere. Section 153(2)(b) should be construed so as to coexist with, and not displace, the doctrine of *res judicata*. In the present case, the representations in question were made in February 2008, the NSW judgment was entered in December 2011, and the discharge from bankruptcy occurred in May 2015. Seven years have subsequently passed. Over fourteen years have elapsed since the representations were made.

61 The construction of s 153(2)(b) adopted in *Power* does not leave the provision without work to do. It continues to apply in relation to debts incurred by reason of fraud where there were no proceedings prior to the bankruptcy or where they were not completed. A fraud may be undiscovered, or a victim may not have the opportunity, means or ability to take proceedings against a perpetrator prior to the perpetrator's bankruptcy. *Power* strikes a reasonable balance having regard to the need for finality and the

35 Ibid r 68.05(3).
36 Ibid rr 68.02(1)(a)–(b).

purpose of s 153(2)(b). These considerations as to purpose confirm that the reasoning in *Power* is correct.

Overseas cases

62 The plaintiff relied on decisions in England and Canada, and submitted that the reasoning in those cases suggested that *Power* was wrongly decided. While the decisions are informative, they are decided in their own context and in the context of the statutory provisions operative in those jurisdictions. They do not persuade me that *Power* was wrongly decided.

63 In *Jones & Pyle Developments Ltd v Rymell*,[37] Paul Matthews J considered a case where damages had been awarded for fraudulent misrepresentation in connection with the sale of land. In holding that the discharge of the vendor's bankruptcy did not preclude the purchaser from seeking enforcement of the judgment debt, Paul Matthews J was not asked to consider the doctrine of merger which was not raised. The decision does not offer any insight as to the application of the doctrine of merger by judgment on the operation of the English equivalent of s 153(2)(b).[38]

64 In *Turner v Midland Doherty Ltd*,[39] Hardinge J of the British Columbia Supreme Court held that the defendant was guilty of defalcation while acting in a fiduciary capacity. Under the operative Canadian bankruptcy provisions, she was not released from the debt by the discharge of her bankruptcy.[40] The issue of merger by judgment was not raised.

65 In *Re Ropchan*,[41] a creditor obtained judgment in relation to a dispute concerning the purchase of a boat. The Court held in its reasons that the bankrupt had acted

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37 [2021] EWHC 385 (Ch).

38 *Insolvency Act 1986* (UK) s 281(3), which provides:

> 'Discharge does not release the bankrupt from any bankruptcy debt which he incurred in respect of, or forbearance in respect of which was secured by means of, any fraud or fraudulent breach of trust to which he was a party.'

39 (1992) 13 CBR (3d) 16.

40 *Bankruptcy Act*, RSC 1985, c B-3, s 178(1)(d) provided that '[a]n order of discharge does not release the bankrupt from … any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity'.

41 (1996) 40 CBR (3d) 297.

'fraudulently' in obtaining the vessel licence and bill of sale, had made 'semi-fraudulent' non-disclosure of a chattel mortgage on the vessel, and had acted with *mala fides*. Deputy Registrar Stevens held that this was sufficient to attract the operation of s 178(1)(e) of the relevant statute which dealt with obtaining property by false pretences or fraud. There was no reference to merger by judgment.

66 In *Re Hottman*,[42] a judgment creditor was awarded damages for breach of contract and for emotional distress. Master Bishop, sitting in British Columbia, held that the judgment debt amounted to a debt arising out of misappropriation or defalcation while acting in a fiduciary capacity within the meaning of s 178(1)(d) of the Canadian bankruptcy statute. While mention is made of the fact that a later court should not permit the parties to reargue the basis on which a judgment was rendered, there is no analysis of the effect of the doctrine of merger by judgment to be found in the decision.

The NSW judgment is not a judgment for a debt incurred by means of fraud

67 The plaintiff's submissions face a second major difficulty – the NSW judgment is not based on a claim of fraud. The claim made by the plaintiff in the NSW proceeding was for insolvent trading under s 588M of the *Corporations Act 2001* (Cth) in respect of a debt incurred by Sterco. On the basis that the plaintiff had been induced to enter into the relevant contract by misleading and deceptive conduct on the part of Sterco, the plaintiff claimed that the defendant, who was a person involved in a contravention within the meaning of s 75B of the TPA, was liable to pay damages under s 82 of the TPA or alternatively under s 42 of the *Fair Trading Act 1987* (NSW).

68 The findings of Ball J concern the claim for involvement in misleading and deceptive conduct. Ball J did not make findings about fraud, whether at common law or in equity. The words 'fraud' and 'fraudulent' do not appear in the NSW judgment.

69 In *Forrest v ASIC,* the plurality of the High Court articulated in the strongest terms the need to clearly plead fraud if it is to be alleged:

> This is no pleader's quibble. It is a point that reflects fundamental requirements for the fair trial of allegations of contravention of law. It is for the party making

42 (2003) 40 CBR (4th) 84.

> those allegations (in this case ASIC) to identify the case which it seeks to make and to do that clearly and distinctly. The statement of claim in these matters did not do that.
>
> Contrary to ASIC's submissions in this Court, a case of fraud cannot properly be seen as a "fallback" claim to be made against the possibility that the party accused of engaging in misleading or deceptive conduct by publishing notices in relation to a financial product may seek to characterise them as statements of opinion, not fact. *It is fundamental, and long established, that if a case of fraud is to be mounted, it should be pleaded specifically and with particularity*. A pleading of fraud will necessarily focus attention upon what it was that the person making the statement intended to convey by its making. And the pleading must make plain that it is alleged that the person who made the statement knew it to be false or was careless as to its truth or falsity. If an alternative case of misleading or deceptive conduct is to be advanced, it is necessary to identify that claim as separate from the allegation of fraud. And for the purposes of the misleading or deceptive claim the pleader must identify what it is alleged that the impugned statements conveyed to their intended audience. Of course there may be circumstances in which it is appropriate to plead alternative cases of misleading or deceptive conduct or alternative cases of fraud and misleading or deceptive conduct. But it is greatly to be doubted that it will ever be appropriate to pile, one on top of the other, as many alternative allegations as were made in this case. Doing so risks contravention of what, in *Gould v Mount Oxide Mines Ltd (In liq)*, Isaacs and Rich JJ said was "the fundamental principle that no man ought to be put to loss without having a proper opportunity of meeting the case against him" which requires that "pleadings should state with sufficient clearness the case of the party whose averments they are".[43]

70 In *Berry v CCL Secure Pty Ltd*, two members of the High Court observed that the pleadings ordinarily bind the parties as to the scope of the proceeding:

> "The function of pleadings is to state with sufficient clarity the case that must be met" and thereby to "ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and ... to define the issues for decision". A plaintiff should be expected to plead all material facts on which the plaintiff relies to constitute the statutory cause of action, including any counterfactual on which that plaintiff relies to establish the requisite causal link between identified loss or damage and identified misleading or deceptive conduct. In the same way, a defendant resisting the statutory action should be expected to plead any different counterfactual on which that party might rely to deny the causal link. Unless and to the extent that the parties choose to depart from the pleadings in the way they go on to conduct the trial, choice between the competing pleaded counterfactuals on the balance of probabilities should then exhaust the fact-finding that is required to be undertaken by the court on the issue of causation.[44]

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43 (2012) 247 CLR 486, 502–3 (French CJ, Gummow, Hayne and Kiefel JJ) (emphasis added) (citations omitted).

44 (2020) 381 ALR 427, 455 (Gageler and Edelman JJ) (citations omitted).

71 It is accepted that the word 'fraud' in s 153(2)(b) has been given a broad interpretation, and on the balance of authority includes breaches of fiduciary duty and fraud in equity in all of its forms.[45]

72 In *Play Australia Pty Ltd v Papadimitriou*, Daly AsJ referred to misleading and deceptive conduct as 'essentially a species of equitable fraud'.[46] Her Honour made the comparison for the purpose of highlighting the need for caution by the Court in finding that a party made a representation not by way of express word, but where the representation pleaded was a conclusion which might be drawn by reason of other words and conduct. Daly AsJ is not to be taken as suggesting that the statutory cause of action for misleading and deceptive conduct is a cause of action that falls within the principles of *Nocton v Lord Ashburton,*[47] or any known or accepted categories of breach of fiduciary duty or fraud in equity.[48]

73 The decision of the High Court in *Talacko v Talacko* does not assist the plaintiff. While the claim in that case was for equitable fraud, the findings amounted to findings of actual deceit. Where a claim for equitable fraud was made but actual deceit was established, the same principles applied in law and equity.[49] *Talacko* was not a case where fraud was not alleged.

74 If fraud is to be alleged, it must be clearly pleaded and properly particularised. A pleading (or points of claim) must allege the acts involved and that they were done in a manner that involves fraud.[50] This did not occur in the present case, where no allegations of fraud of any type were made in the principal proceeding.

75 In *Nadinic v Drinkwater,* the NSW Court of Appeal held:

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45 *Maxwell v Chittick* [1994] NSWCA 196, 13; *Re Bosun Pty Ltd (in liq); Makris v Sheahan* (2000) 34 ACSR 597, 602; *Skalkos v Smiles* (2006) 4 ABC(NS) 349; *Re Galtari Pty Ltd (in liq)* [2018] NSWSC 917, [83]–[84]; *Re Earth Civil Australia Pty Ltd* [2021] NSWSC 966, [2491].

46 [2014] VSC 608, [292].

47 [1914] AC 932.

48 J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2014) pt 4 ch 1.

49 (2021) 389 ALR 178, 184–5 ('*Talacko*').

50 *Sgro v Australian Associated Motor Insurers Ltd* (2015) 91 NSWLR 325, 337 (Beazley P), 338 (Meagher JA), 340 (McDougall J); *Uniform Civil Procedure Rules 2005* (NSW) r 14.14; Rules r 13.10(3)(a); *Nadinic v Drinkwater* (2017) 94 NSWLR 518, 520 (Beazley P), 529–30 (Leeming JA), 552–3 (Sackville AJA).

(a) an allegation of fraud, in the strong sense of deliberate falsehood or reckless indifference to the truth, is required to be pleaded specifically and particularised;

(b) the seriousness of a finding of fraud does not permit of other than a specific finding that the fraud has in fact occurred; and

(c) absent an adequately pleaded allegation of fraud, a judge cannot make findings of fraud consistent with, but going beyond, a pleaded case of misleading and deceptive conduct or innocent or negligent misrepresentation and which have not been put to the relevant party.[51]

76 In *Lois Nominees Pty Ltd v Hill (No 2)*, Beech J said:

> Fraud is a very serious allegation. The nature and seriousness of an allegation are relevant to whether it is found to have been proved. Fraud must be clearly proved. The court must feel an actual persuasion of the occurrence or existence of the relevant facts before being satisfied that the allegation has been made out. [52]

77 In *Bucketts Road Business Services Pty Ltd v Phalona Pty Ltd*, Sackville J said of a case involving s 153(2)(b):

> A second contention rests on the proposition that the applicants' claim for declaratory relief would not be released upon the second respondent's eventual discharge from bankruptcy. This contention, in turn, depends upon the language of s 153(2)(b) of the *Bankruptcy Act*, which provides:
>
> > *'The discharge of a bankrupt from a bankruptcy does not … release the bankrupt from a debt incurred by means of fraud or a fraudulent breach of trust to which he or she was a party'.*
>
> As I discussed … in argument, I have considerable doubts as to whether this provision can apply to a claim based on misleading or deceptive conduct or, indeed, any other conduct, that is not specifically pleaded to be fraudulent notwithstanding that a finding consistent with fraud might ultimately be made. It may be that, since the Courts have given a broad construction of the concept of fraud in s 153(2)(b) of the *Bankruptcy Act* (a point discussed in *Skalkos v Smiles* [2006] NSWSC 192), no specific pleading of fraud is required. However, I would not wish to base a grant of leave upon this particular contention. [53]

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51 (2017) 94 NSWLR 518, 520, 529–30, 543–5, 552–3.

52 [2016] WASC 104, [27], citing *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361–63.

53 [2007] FCA 1444, [15]–[16].

78 I agree with Sackville J's concern. In my view, it is not open to treat a judgment not based on fraud of any kind as akin to, or being in substance, a judgment for fraud. In the present case, fraud was not alleged or defended before the trial judge, and was not adjudicated or found at common law or in equity. The defendant had no notice of a claim of fraud of any kind, and no opportunity to defend herself from such a claim. She has subsequently deposed that she ran out of money and that her legal representatives had to withdraw from the NSW trial. She did not attend that trial. As a matter of procedural fairness, it would be surprising if over a decade later the judgment could be treated as if it were a judgment in fraud against her.

79 I find that the plaintiff's claim to rely on s 153(2)(b) of the Act must fail for this reason also.

80 It is unnecessary to consider the other arguments that were advanced by the parties.

Conclusion

81 The warrant must be set aside as:

(a) there was no debt incurred by means of fraud owed by the defendant to the plaintiff on the defendant's discharge from bankruptcy on 18 May 2015 because the plaintiff's claim and cause of action had merged in the NSW judgment; and

(b) there was no debt incurred by means of fraud because no finding of fraud at common law or in equity was considered or made in the NSW proceeding.

82 The appeal must be dismissed and the decision of Irving JR upheld.