Does A Judgment Debt for
Moneys Obtained by Fraud Survive Bankruptcy?

The Facts in Brief

March 2013	The plaintiff, Mr. K, was introduced to RS Pty Ltd by Mr. W, a consultant to RS.
15 March 2013	The plaintiff received a copy of RS's fund raising pack by email from 'W'.
On or about 5 April 2013	The plaintiff met Mr. C, the first defendant (director and guarantor of RS) and requested details of both RS's financial position and Mr. C's financial position,
On or about 5 April 2013	The plaintiff received a draft convertible note deed from Mr. W by email.
On or about 6 April 2013	The plaintiff received a set of financial statements from Mr. C which included a balance sheet setting out Mr. C's financial position. The statement as to the assets of Mr. C were alleged by the plaintiff to be fraudulent.
On or about 8 April 2013	The plaintiff conducted an ASIC and PPSR search of RS.
10 April 2013	The plaintiff received an email from Mr. W to which was attached a convertible note deed (*the convertible note deed*) and guarantees signed by the first and second defendants.
10 April 2013	In reliance on the capacity of the Defendants to guarantee the debt the plaintiff printed and signed and posted the convertible note deed received by email from Mr. W to RS.
10 April 2013	The plaintiff transferred $250,000.00 to RS's bank account.
4 May 2013	Pursuant to the terms of the convertible note deed the first monthly interest payment was due to the plaintiff.
On or about 10 May 2013	RS paid $2,708.00 into the plaintiff's Commonwealth Bank Account, being interest due for the period 10 April 2013 to 4 May 2013.
4 June 2013	Pursuant to the terms of the convertible note deed the second interest payment was

	due to the plaintiff no payment was received nor any monthly interest payment thereafter.
1 April 2014	Statement of claim filed in the District Court of NSW
4 April 2014	Pursuant to the terms of the convertible note deed the final interest payment was due to the plaintiff.
On or about 6 June 2014	The plaintiff filed a notice of motion for default judgment against the first defendant was filed at the District Court of NSW.
30 June 2014	The second defendant filed a defence at the District Court of NSW.
On 20 August 2014	The First Defendant, Brett John Mr. C, was, by way of his own debtor's petition, declared bankrupt.
26 September 2014	The District Court of NSW ordered judgment in favour of the plaintiff, against the first defendant in the amount of $322,500.00.
18 November 2014	The plaintiff by way of his solicitor lodges a proof of debt in the amount of the judgment.
9 February 2015	The plaintiff filed a notice of motion for default judgment against the second defendant.
19 March 2015	The plaintiff's solicitors receive a notice of change of solicitor and the affidavit of the second defendant affirmed in Hong Kong on 17 March 2015 alleging his signature was forged on the guarantee accompanying the deed.
5 August 2015	The District Court of NSW ordered judgment in favour of the plaintiff, against the second defendant in the amount. Thereafter the second defendant cannot be found.[1]
To date	No distribution was made by the Trustee nor is it likely that any distribution from the estate as it then was will ever be forthcoming.

[1] See *Karliner v McCallum* [2015] NSWDC 191 (5 August 2015)

By what means can the Judgment Debt or its' equivalent be recovered?

I have been asked to provide an opinion as to whether the damages payable of $322,500 ordered in the judgment entered in favour of Mr. K against the First Defendant, Mr. C, on 29 September 2014 might be recovered by way of an application for compensation by either the police or by an application from Mr. K himself under the *Victims' Rights and Support Act* 2013.

The Relevant Law

Section 81 of the *Bankruptcy Act* 1966 provides:

> *"(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**."*

It is clear, that the judgment of 26 September 2014 is a future debt which the First Defendant became subject to before his discharge by reason of the obligation incurred under the personal guarantee executed in favour of Mr. K on 10 April 2013 forming part of the Convertible Note also executed on 10 April 2013 and is a provable debt for the purposes of the *Bankruptcy Act* 1966.

Section 149(4) of the *Bankruptcy Act* 1966 provides:

> *"…the bankrupt is discharged at the end of the period of 3 years from the date on which the bankrupt filed his or her statement of affairs."*

Section 153(1) of the *Bankruptcy Act* 1966 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."*

On or about 20 August 2017 Mr. C was discharged from bankruptcy and that discharge operated to release him from the judgment debt entered against him on 26 September 2014.

Relevantly where a creditor attempts to take action to enforce a provable debt during the term of the bankruptcy Section 60(1) of the *Bankruptcy Act* 1966 provides:

> *"The Court may, at any time after the presentation of a petition, upon such terms and conditions as it thinks fit: "**stay any legal process**, whether civil or criminal …against the person or property of the debtor: (i) in respect of the non‑payment of a provable debt or of a pecuniary penalty payable in consequence of the non‑payment of a provable debt; or (ii) in consequence of his or her refusal or failure to comply with an order of a court, whether made in civil or criminal proceedings, for the payment of a provable debt"*

It is to be observed that where creditors have attempted to bring proceedings to recover a debt which is provable in bankruptcy Courts have not been reluctant to exercise the discretion provided for under Section 60(1) and stay such an attempt permanently.

What, if any, avenues remain available?

However, and most importantly for the purposes of this matter Section 82 (3) of the *Bankruptcy Act* 1966 provides:

> *"Penalties or fines imposed by a court **in respect of an offence against a law**, whether a law of the Commonwealth or not, are not provable in bankruptcy."*

Relevantly, Section 97 of the *Victims Rights and Support Act* 2013 (hereinafter "the VRS Act") provides:

> *(1) A court that convicts a person of an offence **may** (on the conviction **or at any time afterwards**), by notice given to the offender, direct that a specified sum be paid out of the property of the offender to any:*
>
> *(a) aggrieved person, or*
>
> *(b) aggrieved persons in such proportions as may be specified in the direction,*
>
> ***by way of compensation for any loss sustained through, or by reason of, the offence** or, if applicable, any further offence that the court has taken into account under Division 3 of Part 3 of the Crimes (Sentencing Procedure) Act 1999 in imposing a penalty for an offence **for which the offender has been convicted**.*
>
> *(2) A direction for **compensation may be given** by a court on its own initiative or on an **application made to it by or on behalf of the aggrieved person.***

Section 99 of the VRS Act then sets out the factors to be taken into consideration in making a Section 97 direction as including:

> *"(a) any behaviour (including past criminal activity), condition, attitude or disposition of the aggrieved person which directly or indirectly contributed to the injury or loss sustained by the aggrieved person,*
>
> *(b)* ***any amount*** *which has been paid to the aggrieved person or* ***which the aggrieved person is entitled to be paid by way of damages awarded in civil proceedings in respect of substantially the same facts as those on which the offender was convicted****,*
>
> *(c) such other matters as it considers relevant."*

Section 99 (a) above was of no relevance in this matter but clearly Section 99 (b) was of great relevance in the matter.

It could be argued that even though the judgment debt is a provable debt for the purposes of s.81(1) of the *Bankruptcy Act* 1966 from which Mr. C would be released under s. 153(1)[2] Mr. K would still be entitled to a direction for compensation under s. 97 of the VRS Act.

Section 100 of the VRS Act describes provides:

> *Subject to section 9 of the Criminal Appeal Act 1912 and to the provisions of the Criminal Procedure Act 1986, any sum directed to be paid by an offender to an aggrieved person, under a direction for compensation****, must be paid immediately****, or within such period (if any) as is specified in the direction, to the registrar of the court for payment to the aggrieved person.*

Section 101 of the VRS Act dealing with the enforcement of directions for compensation provides:

> *(1) If a court gives a direction for compensation and the whole or any part of the amount specified in the direction is not paid in accordance with the direction, the registrar of the court must, on the application of the aggrieved person, issue to the aggrieved person a certificate that:*
>
> *(a) identifies the direction, and*
>
> *(b) specifies the offender, and*

[2] But see the effect of s. 153(2) of the Bankruptcy Act 1966 as set out herein below.

(c) specifies the amount required by the direction to be paid which has not, as at the date of the certificate, been paid to the registrar.

(2) The registrar must not subsequently accept any payment from the offender in respect of the direction for compensation identified in a certificate issued under this section.

(3) An aggrieved person may file such a certificate in the registry of a court having jurisdiction to order payment of the amount specified in the certificate, and the registrar of that court must ***immediately enter judgment*** *in favour of the aggrieved person against the offender specified in the certificate for:*

(a) the amount specified in the certificate as having not been paid, and

(b) any fees payable to the registrar in respect of the filing of the certificate.

(4) A direction for compensation may only be enforced in accordance with this section and any amount not paid is not payable from the Fund or any other public money.

Thus, it is to be noted that ultimately where the offender does not pay a direction for compensation the judgment is entered and would require enforcement in the same manner as any other judgment.

What is the effect of Section 82(3) of the *Bankruptcy Act?*

Whilst it is true to say that discharge from bankruptcy releases the debtor from all provable debts, including secured debts, the debtor still remains liable to meet, in full, excepted debts and liabilities and non-provable debts and liabilities. Provided the debts are not provable debts, the creditors of excepted and non-provable debts and liabilities can resume their full legal remedies against the debtor even after discharge.

As the cases I have summarised below demonstrate a penalty imposed by the Court in respect of an offence against the law is not for the purposes of the *Bankruptcy Act* 1966 a provable debt and therefore remains recoverable from the property of the bankrupt.

In this regard in *R v Rumpf* [1988] VR 466 the Full Court of the Supreme Court of Victoria held*;*

"It is formally conceded that it is not open to the respondent to contend that he lacks means and ability to pay the fine of $35,000. A fine is not discharged by bankruptcy (s82 (3) and s153 (1))."

Then at first instance in the *State of Victoria v Mansfield* [2003] FCAFC 154 the Federal Court held;

> *"The Bankruptcy Act 1924 (Cth) ("the 1924 Act") (which was repealed and replaced by the current Bankruptcy Act) made provision for provable debts in s81. Neither s81 nor any other provision of the 1924 Act contained any provision equivalent to s82 (3) of the current Act…In Re Bradbury; ex parte The King; The Official Receiver (1931) 3 ABC 204 ("Re Bradbury"), Lukin J held that a fine imposed by the Court of Petty Sessions at Swan Hill, in Victoria, upon the bankrupt's conviction for offences under the Game Act 1928 (Vic) was not a provable debt within the meaning of s81 of the 1924 Act. At the heart of his Honour's reasoning was the concern that: [I]f this fine be a debt provable in bankruptcy, this Court is enabled to free the bankrupt, by making an order of discharge, from a pecuniary penalty imposed by the Federal or State Courts for a criminal offence."*
>
> *S82(3) is framed on the premise, first, that a penalty or fine in respect of an offence is imposed by a court to meet the public interest in punishing the offender for his or her offence; and, secondly**, that the interests of ordinary creditors should not be adversely affected by the criminal or quasi-criminal conduct of the bankrupt.** (If fines or penalties were to be treated as provable debts, then the funds available to ordinary creditors would be diminished…The policy of the Bankruptcy Act points, in this respect, against any unduly narrow construction of s82 (3) where, in reality, a penalty or fine has been imposed for a breach of the law. Furthermore, this policy embraces a penalty or fine imposed by a court for an offence irrespective of what the seriousness of the particular offence might be thought to be.*
>
> *CAN S60 HAVE ANY APPLICATION?*
>
> *Since the penalties imposed on the respondent were not provable debts within s82 (1) of the Bankruptcy Act, s60 (1)(b) can have no application. An enforcement order…is not an order within s60 (1)(b)(ii), because it is not an order "for the payment of a provable debt". Further, s60 (1)(b)(i) cannot apply because there is no provable debt for the purposes of any part of that paragraph."*

Further, on appeal in *State of Victoria v Mansfield* [2003] FCAFC 154 the Full Federal Court held;

> *"The relevant issues on the appeal are to be defined by reference to s82 (1), s82 (3) and s60 (1)(b) of the Bankruptcy Act. If the liabilities arising under the State's legislation in respect of the respondent's*

> ***parking infringements*** *are properly characterised as "penalties or fines imposed by a court in respect of an offence against a law", then* ***they cannot give rise to debts that are provable in the respondent's bankruptcy; and the Court cannot make an order under s60 (1)(b).****"*

And more recently in *Environment Protection Authority v Ableway Waste Management Pty Ltd* [2005] NSWLEC 469, Lloyd J, applying the decision in Mansfield, regarding the effect of the bankruptcy on any fine held;

> *"Mr Tsaur became a bankrupt on 15 June 2005 when his debtor's petition was accepted by the Official Receiver. This raises a question as to whether a fine or monetary penalty impose by the Court, if any, becomes a provable debt in the bankruptcy. If so, then the burden of the fine would be borne not by Mr Tsaur but by his creditors, whose dividend would be thereby diminished. If it is not a provable debt in the bankruptcy then Mr Tsaur would continue to be personally liable for any such fine.*
>
> *Section 82 of the Bankruptcy Act 1966 (Cth) relevantly states: (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. (3) Penalties or fines imposed by a court in respect of an offence against a law, whether a law of the Commonwealth or not, are not provable in bankruptcy.*
>
> *In State of Victoria v Mansfield (2003) 130 FCR 376; (2003) 199 ALR 395, a Full Bench of the Federal Court considered whether* ***parking infringement*** *penalties were provable debts within the meaning of s 82(1) of the Bankruptcy Act. Specifically, the Full Court considered the critical question: "Are relevant liabilities properly characterised as penalties or fines imposed by a court in respect of an offence against a law of the State?" (at 399[16]). The Full Court then considered the policy behind s 82(3) of the Bankruptcy Act and said (at [33]):*
>
> *Section 82(3) is framed on the premise, first, that a penalty or fine in respect of an offence is imposed by a court to meet the public interest in punishing the offender for his or her offence; and, secondly, that the interests of ordinary creditors should not be adversely affected by the criminal or quasi-criminal conduct of the bankrupt…*
>
> *The decision in Mansfield was followed and applied by Palmer J in Australian Winch and Haulage Co Pty Ltd v State Debt Recovery Office [2005] NSWSC 423. The question was whether a* ***fine*** *imposed by the*

Industrial Relations Commission of New South Wales on a company for a breach of the Occupational Health and Safety Act 1983 (NSW) was a provable debt against an insolvent company by virtue of the operation of s 553B (1) of the Corporations Act 2001 (Cth). Palmer J found that the fine was not a provable debt and in following Mansfield said (at [10]):

It will be seen at once that, if the argument of the Plaintiff in the present case is correct, the rationale behind s 553B (1) would be defeated utterly. The burden of the fine imposed by the Industrial Relations Commission on the Plaintiff will be borne, not by the Plaintiff and its shareholders, but by the Plaintiff's creditors, whose dividend from the Deed Fund will be diminished substantially. Further, if the Plaintiff's argument is correct, the deterrent effect of a fine or penalty imposed upon a company by a court may be very easily negated by the simple expedient of entering into a Deed of Company Arrangement ….

Having regard to these considerations I conclude that a fine imposed by the Court for an offence of contempt of court is a fine for "an offence against a law" within the meaning of s 82(3) of the Bankruptcy Act. It would follow that any fine imposed by the Court would not be provable in the bankruptcy. Neither would the Federal Court be empowered to make orders under s 60 of the Bankruptcy Act or to place any limit on the Court to punish the contemnor for his contempt."

As the above cases make clear a penalty imposed by a court in respect of an offence does not constitute a provable debt for the purposes of the *Bankruptcy Act* 1996 and does not shield Mr. C from an action to enforce a penalty or fine imposed on him by a Court.

Does a direction for compensation constitute a penalty or fine for the purposes of Section 82 (3) of the *Bankruptcy Act?*

Given, that a penalty imposed by a court in respect of an offence does not constitute a provable debt for the purposes of the *Bankruptcy Act* 1996 and will not shield Mr. C from an action to enforce that penalty or fine the relevant question becomes does a direction for compensation under Section 97 of the VRS Act 2013 qualify as a penalty or fine for the purposes of Section 82 (3) of the Bankruptcy Act?

In the matter of *Moore-McQuillan v Scott and Others* [2006] FCA 63 Mansfield J held:

"Under the earlier legislation, Re Bradbury; Ex parte The King; Official Receiver (Respondent) (1931) 3 ABC 204 had held that a penalty for a

*criminal offence was not a provable debt. In that case the relevant liability comprised a fine imposed for certain offences under the Game Act 1928 (Vic) and the costs ordered to be paid...**In essence, the liability was found not to be a provable debt because it was in the nature of a punishment**. The question was, however, addressed in a somewhat different context in Re Caddies; Ex parte Stapleton [1963] QWN 5. The bankrupt, before his bankruptcy, had been convicted of false pretences, **fined, and ordered to make restitution** within three months, with a term of imprisonment in default of payment. Before the three month period had expired, he became bankrupt. He was, however, then arrested for non-payment of the fine and restitution, although the bankrupt by then had made some part payment which well exceeded the amount of the fine itself. Gibbs J at 158 held that the order of the police Court was of **a punitive character, in particular as the magistrate had a discretion whether to make a restitution order, and whether to order a term of imprisonment in default of compliance with it. Once the characterisation of the order as being "something in the nature of punishment" was made, it was not an order in the nature of legal process to procure payment. The Court concluded that there was no power under the Bankruptcy Act 1924-1960 (Cth) to discharge the order upon which the bankrupt had been imprisoned.** See also Commissioner for Motor Transport v Train (1972) 127 CLR 396; Re Hollis (1968) 15 FLR 386.*

In this matter, the Court is asked to determine whether, under s 60(1)(b), any process undertaken under the Sentencing Act should be stayed because it is "in respect of the non-payment of a provable debt", or because it is in consequence of the applicant's "failure to comply with [the order] for the payment of a provable debt". Unlike the restitution cases referred to above, the costs order made under s 120(3)(b) of the Compensation Act was in respect of the costs of WorkCover and not to compensate it for its loss resulting from the commission of the offences under s 120(3)(a). It remains to be seen whether that factual difference is significant…

In this matter, s 120(3) of the Compensation Act is clearly a compensatory provision. It is intended to provide a direct means of compensation following a conviction for an offence against s 120(1), for both loss sustained by the commission of the offence and for its costs.** The costs provided for extend to the investigation of the offence. The Court has no discretion to exercise under s 120(3). It obliges the Court to make the order sought on the application of WorkCover. It applies equally to "self-insurers", that is, exempt employers. **Clearly its focus is not punitive but compensatory. For those reasons, I characterise the order made under s 120(3) that the applicant pay to WorkCover $115,000 for costs incurred in the

> ***investigation and prosecution of the offences as one in respect of which s 60(1) of the Act is available to stay any legal process for its recovery under the Sentencing Act. The underlying liability, namely the costs of WorkCover in investigating and prosecuting the offences, is one which WorkCover could prove in the bankruptcy of the applicant."***

Also in *Re: The Bankrupt Estate of Allan Andrew Keogh Ex Parte: Allan Andrew Keogh V. Director of Public Prosecutions for The State of New South Wales*[3] concerned a matter where the applicant had been found guilty in 1982 upon two counts of obtaining money by false pretences. Sentence was deferred upon Mr. Keogh entering into two bonds, each of three years, conditional upon his paying **compensation** in a total amount of $13,644.10.

Although the proceedings concerned an application under s60(1) of the *Bankruptcy Act* 1966 or the exercise of the discretion by the Court to prevent the imposition of a custodial sentence for the failure of the bankrupt to make the compensation payments there was no dispute between the parties and it was accepted by the Court that, to the extent that the compensation had not been paid, it represented the sum of provable debts.

Further in *Re: The Bankrupt Estate of Allan Andrew Keogh Ex Parte: Allan Andrew Keogh V. Director of Public Prosecutions for The State of New South Wales*, Burchett J placed emphasis upon the findings of Pincus J in *Re Lenske; Ex parte Lenske* (1986) 9 FCR 532 a matter that involved an order for **restitution** in respect of stealing offences.

Therein Pincus J at 535 said:

> *"The central point to be considered, in my view, is that the offences in question, although no doubt serious enough, were not inherently of great heinousness; the sentencing court did not believe that a custodial sentence was warranted.* ***While different considerations may apply where the compensation or restitution is ordered by reason of some truly vicious crime, it seems to me that, in an ordinary case such as this, prima facie the discretion should be exercised in favour of the applicant****. I can see that it is a difficulty that ... the sentencing court may well have imposed a heavier sentence if no order for restitution, with its accompanying penalty in default, had been imposed. However, that will very often be so in cases of this sort and cannot, I think, justify the dismissal of the application."*

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[3] [1995] FCA 1721 (5 December 1995)

It is probably unlikely that where the NSW Police prosecute and obtain a conviction against Mr. C under s.192E (1) of the *Crimes Act NSW* 1900 which provides*:*

"A person who, by any deception, dishonestly: (a) obtains property belonging to another, or (b) obtains any financial advantage or causes any financial disadvantage, is ***guilty of fraud***"

It is probably unlikely that where the NSW Police prosecute and obtain a conviction against Mr. C under s.192E (1) that, irrespective of the fact that the maximum penalty for this offence is 10 years' imprisonment, the court will impose a custodial sentence. In this respect, I am not of the opinion the Court would find Mr. C's crime was sufficiently heinous or vicious to impose a custodial sentence.

In light of the above cases, in particular, *Moore-McQuillan v Scott and Others* where Mansfield J relied on *Re- Higgins; Ex parte Higgins* (1984) for FCR 533 on the basis that "*the fine and costs imposed were in reality the punishment*" and found that an order for compensation under the *Workers Rehabilitation and Compensation Act* 1986 (SA) rather than being punitive was compensatory in nature and therefore was neither a penalty nor fine for the purposes of s.82(3) of the *Bankruptcy Act* 1966 I am not of the opinion that a Court would find that a direction for compensation under Section 97 of the VRS Act 2013 obtained whilst Mr. Callum was still in bankruptcy is a penalty or fine for the purposes of s.82(3) of the *Bankruptcy Act* 1966 and therefore exempt for the purposes of Mr. C's bankruptcy.

It should be understood the above opinion is premised on the assumption that any application made under Section 97 of the *Victims Rights and Support Act* 2013 by either the police or Mr. K had been made before Mr. C was discharged from bankruptcy on 20 August 2017.

Importantly, where the application is made under Section 97 of the VRS Act and a direction for compensation issued after Mr. C is discharged from bankruptcy then this would not, in my opinion, for the purposes of s.81(1) of the *Bankruptcy Act* 1966 be a debt "*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"* and could therefore be recovered.

Is it necessary to obtain a s.97 VRS Act direction to recover against Mr. C?

Section 153(2) of the *Bankruptcy Act* 1966 provides:

> *"The discharge of a bankrupt from a bankruptcy does not: ...*
> *(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".

In *Skalkos v Smiles and Ors* [2006] NSWSC 192 (27 March 2006) that concerned the Plaintiff advancing some $370,000 to the associated entities of the First Defendant that was never repaid on the basis of misrepresentations made by the First Defendant Johnson J at 62 to 65 held:

"The term "fraud" in s.153(2)(b) of the Act has been given a broad meaning. In Chittick v Maxwell, Young J (as his Honour then was) held that s.153(2)(b) of the Act was applicable in circumstances where equitable fraud had been established. On appeal, Mahoney JA (Priestley and Powell JJA agreeing) upheld this finding: Maxwell v Chittick. Mahoney JA said at 13:

"It was submitted for Mr Maxwell that the result of the composition with creditors which was effected in 1991 was that he was released from the claims made by the plaintiffs. Section 153(2)(b) of the Bankruptcy Act 1966 provided that no discharge should be effected so as to 'release the bankrupt from a debt incurred by means of fraud or a fraudulent breach of trust to which he was a party or a debt of which he has obtained forbearance by fraud'. The learned judge concluded, and I agree, that the 'debt' owed to the plaintiffs was incurred by means of fraud or a fraudulent breach of trust. ***As the learned judge has pointed out, the term 'fraud' in the bankruptcy provisions in this regard has been given a broad interpretation…there was deceit in the nature of fraud at that time. That deceit was repeated at the time the deed was executed…****In my opinion, on each of the relevant occasions, there was fraud within the meaning of the statute. I agree with the judge's conclusions in this regard."*

The decision of the Court of Appeal in Maxwell v Chittick was followed by Debelle J in Re Bosun, where His Honour said at paragraph 18: …As was observed by Mahoney JA in Maxwell v Chittick (unreported, NSW Court of Appeal, 23 August 1994):

'The term 'fraud' in the bankruptcy provisions in this regard has been given a broad interpretation'."

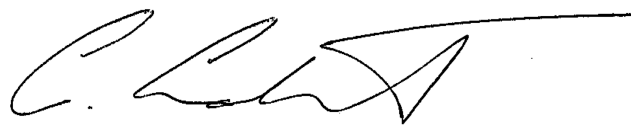
The Further Amended Statement of Claim contains express allegations that the seven sets of representations allegedly made by the First Defendant were false or were made with reckless indifference as to their truth.

In SGB v The Queen (2005) HCA 80, Gummow, Hayne and Heydon JJ said at paragraph 2:

> *"When 'reckless' is used in applying the principles of the tort of negligence, the yardstick is objective rather than subjective. On the other hand**, to sustain an action in deceit, fraud is proved when it is shown 'that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false'** [the formulation is that of Lord Herschell in Derry v Peek [1889] UKHL 1; (1889) 14 App Cas 337 at 374] at 374]. But (3) is but an instance of (2) because, as Lord Herschell put it in Derry v Peek [at 374]:*
>
> *[O]ne who makes a statement under such circumstances can have no real belief in the truth of what he states.*
>
> *This reasoning is akin to that which supports the evidentiary inference explained by Lord Esher MR as being that one who willfully shuts his eyes to what would result from further inquiry may be found to know of that result [English and Scottish Mercantile Investment Co v Brunton [1892] 2 QB 700 at 707–708]."*
>
> *Applying Maxwell v Chittick and Re Bosun, I consider that "fraud" in s.153(2)(b) of the Act extends to fraud of the type described in SGB v The Queen.*

It seems clear, on the face of the above authorities, that if the police were successful in obtaining a conviction for fraud under s192E of the *Crimes Act NSW* 1900 in circumstances where it is shown Mr. Ks' consent to enter into the Convertible Deed executed on 10 April 2013 was obtained in reliance on balance sheet found to be fraudulent and found to be provided by Mr. C on or about 9 April 2013 then the debt for which judgment was entered in the District Court on 29 September 2014 is "*a debt incurred by means of fraud*"[4] and will therefore not be extinguished by Mr. C discharge from bankruptcy.

On this basis, if and once fraud is proven against Mr. C, it is my opinion Mr. K will be able to pursue the recovery of the judgment debt entered in the District Court on 29 September 2014 per se without the need for an application under Section 97 of the *Victims Rights and Support Act* 2013.



Barrister at Law
Windeyer Chambers.

[4] See Section 153(2)(b) of the *Bankruptcy Act* 1966