

update

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Friday Facts: Did you know there are exceptions to bankruptcy?

Quite often clients are unaware that there are certain debts which will survive bankruptcy. That is, a bankrupt will not automatically be released from all of their debts just because they have become bankrupt.

The general proposition that bankruptcy results in the bankrupt being released from all their debts is subject to a number of qualifications which are well established in bankruptcy law.

Perhaps the most pertinent of these exceptions relates to fraud. Section 153(2)(b) of the *Bankruptcy Act* (1966) (the "Act") provides that a debt which is incurred by "a 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" survives the bankruptcy.

Over the years the definition of fraud has been given a wide interpretation by the courts.

Importantly, a creditor who has a debt which is the result of fraud, has a right to pursue the debt against the former bankrupt or their property from the moment the bankrupt is discharged from their liabilities (Ex p Hemmingway; Re Chatterton (1879) 13 Ch D 163).

While this may present as an attractive option for creditors looking to recover from a fraudulent bankrupt, it is still subject to statutory time limitations. Time begins at the

time the fraud is discovered and is not suspended by the period of bankruptcy.

As the debt can only be realised after the bankrupt has been discharged, the possibility of being statute barred to pursue recovery of the debt needs to be considered and appropriate leave ought to be sought beforehand to ensure proceedings are not brought out of time to obtain a judgment in relation to the amount of the fraud.

Other debts which survive the discharge of bankruptcy include:

- Child maintenance agreements and maintenance orders: Section 153 (2)(c). The Courts have justified the survival of these debts because they arise not out of contract but rather through the interests of society (*Davis v Davis* (1919) 26 CLR 348)
- A debt that is chargeable at the suit of a Sheriff or public officer on a bail bond entered into for the appearance of a person prosecuted for an offence against the law of the Commonwealth or a State [s. 153(2)(a)]
- A debt incurred through operation of the Higher Education Funding Act (1998) being Higher Education Fees (HECS)

- A contract by an undischarged bankrupt in consideration of a small loan to pay in full a provable debt of a large amount is not void as being contrary to public policy or the policy of the Act

Therefore creditors need to be mindful that in some cases they will be able to pursue their debts after the debtor is discharged from bankruptcy if their debt falls within one of the exceptions.

For more information

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