

Neutral Citation No: [2021] NICA 30 <i>Judgment: approved by the Court for handing down (subject to editorial corrections)*</i>	<i>Ref:</i>	McB11494
	<i>ICOS No:</i>	2003/24851 2013/98980
	<i>Delivered:</i>	07/05/2021

IN HER MAJESTY’S COURT OF APPEAL IN NORTHERN IRELAND

Between:

DANIEL McATEER and AINE McATEER

Plaintiffs/Appellants

and

SANJEEV GURAM and ANOOP GURAM

Defendants/Respondents

The first named appellant acted as a litigant in person
Downey Property solicitors acted for the second named appellant
The first named respondent acted as a litigant in person
John Maxwell of counsel (instructed by Mills Selig, Solicitors) acted for the second named respondent

Before: McBride J and Sir John Gillen

McBRIDE J (giving the judgment of the court)

Introduction

[1] On 30 April 2021 the court ruled that the second named defendant Mr Anoop Guram had *locus standi* to defend the 2013 tort action but did not have *locus standi* to defend the Roebuck appeal proceedings. The court now sets out the reasons for its decision.

[2] On 14 October 2011 both respondents were the subject of an order of sequestration in Scotland pursuant to the Bankruptcy (Scotland) Act 1985. Anoop Guram was discharged from bankruptcy on 19 March 2018. Sequestration is the Scottish

equivalent of bankruptcy. The consequence of the sequestration is that Anoop Guram is a bankrupt.

[3] Before hearing the substantive dispute Mr McAteer requested that the court determine as a preliminary issue whether the second named defendant, Anoop Guram, had *locus standi* to participate in the proceedings, given that he is now a bankrupt.

[4] On 19 January 2012 the court ordered that the Trustee in Bankruptcy be notified of the proceedings. Subsequently, the court sent a letter to the Trustee in Bankruptcy and Accountant in Bankruptcy inviting them to make written or oral submissions to the court on the question of standing and further advised that the case would proceed to hearing on 30 April 2021. The letter was sent by recorded delivery on 22 April 2021. No response was made by either the Trustee in Bankruptcy or the Accountant in Bankruptcy.

[5] Mr McAteer appeared as a litigant in person. Mrs McAteer's solicitors wrote to the court indicating that she supported her husband's arguments. The second named defendant, Anoop Guram, was represented by Mr Maxwell of counsel. The first named defendant, Sanjeev Guram, appeared as a litigant in person and stated that he agreed with the submissions of Mr Maxwell. The court is very grateful to the parties for their very helpful written submissions which proved to be of much assistance to the court.

Background to the Proceedings

[6] The preliminary issue for the court emerges from a lengthy series of interconnected litigation which commenced in 2003. At this juncture it may be useful to outline the background and history of proceedings.

[7] By Proceedings No. 2003/24851, Sanjeev Guram and Anoop Guram brought High Court proceedings against Mr and Mrs McAteer in relation to a sale and lease back of Roebuck Inn ("Roebuck Inn Proceedings"). The Gurams agreed to sell licenced premises known as the Roebuck Inn to Mr and Mrs McAteer for £500,000. The McAteers agreed to lease back the premises to the Gurams for a term of 5 years at an annual rent of £50,000 per annum with the Gurams having an option to repurchase the premises for £500,000 and giving two months' notice in writing of their intention to do so or at the latest within 5 years from the date of completion. The conveyance and lease back was executed on 16 November 2001 and the purchase price was duly paid by the McAteers. By Writ issued on 26 February 2003 the Gurams sought rescission of the transaction on the basis that they were induced to enter into the agreement by reason of the undue influence of Mr McAteer. Negligence and breach of fiduciary duty was also alleged against Mr McAteer.

[8] After a lengthy hearing, Smith J, gave judgment on 27 March 2008 and held that the sale and lease back had been procured by the undue influence of Mr McAteer. He concluded that there was a relationship of dependency between the Gurams and Mr McAteer and that he had induced them to enter into the agreement as a result of false representation. In the course of the judgment Smith J made a number of adverse findings in respect of Mr McAteer which now form the subject matter of the disciplinary action by his professional body.

[9] The judgment of Smith J gave rise to an accounts and enquiries exercise which was ultimately heard by Master Redpath on 7 January 2013. He held that the McAteers owed a balance of £56,789.20 plus interest to the Gurams. Mr McAteer has appealed these findings and these form the subject of separate proceedings.

[10] Mr and Mrs McAteer appealed Smith J's decision by Appeal Notice dated 11 July 2008. On 27 April 2010 the Court of Appeal made an order for Security for Costs. Mr McAteer was unable to comply with this order and accordingly his appeal was struck out by Higgins LJ on 28 May 2010.

[11] During the course of the Roebuck Inn proceedings Mr McAteer avers that he was denied legal representation both in the court below and the Court of Appeal because legal aid was wrongfully revoked. He asserts that the Legal Services Commission was misled by a number of individuals including solicitors acting on behalf of the Gurams at the time and as a consequence legal aid was revoked and he was left without legal representation. These allegations have formed the subject of several separate legal proceedings. Some of these have resolved and some are still extant.

[12] On 29 February 2012 Mr McAteer issued a Notice of Motion seeking, inter alia, to set aside the order striking out his appeal in the Roebuck Inn case and an order setting aside the order for Security for Costs and/or an extension of time to comply with the Security for Costs order. By order dated 23 March 2012 Girvan LJ dismissed this Notice of Motion.

[13] On 30 September 2013 Mr and Mrs McAteer issued a new tort action against the Gurams ("the 2013 tort action") whereby they claim damages, inter alia, for losses arising from the Gurams' action in fraudulently procuring a judgment against them in the Roebuck Inn proceedings.

[14] On 28 February 2014 the second defendant, Anoop Guram, applied to strike out the 2013 tort action on the ground that the pleadings disclosed no reasonable cause of action.

[15] On 5 January 2017 O'Hara J struck out the 2013 tort action and gave judgment on 13 February 2017.

[16] On 6 March 2017 Mr and Mrs McAteer issued a Notice of Appeal. On 22 June 2017 the Court of Appeal refused leave to appeal and dismissed the appeal.

[17] On 19 September 2017 Mr and Mrs McAteer applied for leave to appeal decision of O'Hara J and an extension of time to appeal.

[18] On 11 October 2017 O'Hara J refused leave to appeal and refused to grant an extension of time to appeal.

Proceedings before this Court of Appeal

[19] There are three summonses, all issued by Mr and Mrs McAteer before this court, namely:

- (i) Summons dated 19 September 2017 and summons dated 2 September 2019. These are drafted in identical terms. By these summonses the McAteers seek the following relief:
 - (a) Leave to appeal the decision of O'Hara J dated 13 February 2017 when he struck out the 2013 tort action; and
 - (b) An extension of time to lodge appeal. ["the 2013 tort action"]
- (ii) By summons dated 15 January 2018 the McAteers seek to reopen the appeal in the Roebuck Inn proceedings and/or seek an extension of time to comply with the original Security for Costs order ("Roebuck Inn appeal proceedings").

Submissions of the McAteers

[20] Mr McAteer, whose submissions are supported by Mrs McAteer, submits that the second named defendant has no *locus standi* in either set of proceedings as he is a bankrupt. As a consequence of bankruptcy, he submits that all his assets, including the proprietary interests under the Roebuck Inn judgment vest in his Trustee in Bankruptcy.

Submissions of the second named Defendant

[21] Mr Maxwell on behalf of Anoop Guram submitted that he retained standing notwithstanding the bankruptcy. He accepted the general rule was that all of a bankrupt's assets vest in the Trustee in Bankruptcy but submitted that the present causes of action did not so vest because fraud was alleged by the McAteers against his client. Allegations of fraud affected the mind character and reputation of Anoop

Guram and as such he had a right to defend the proceedings. Further, in the event the 2008 Judgment was set aside or the appeal reopened Anoop Guram would be exposed to liabilities for which his bankruptcy would be no defence as his discharge from bankruptcy did not exempt him for liabilities incurred by reason of fraud.

Preliminary Issue

[22] The preliminary issue to be determined is whether the second defendant, who is a bankrupt, has *locus standi* to defend the 2013 tort claim and or the Roebuck Inn appeal proceedings. To answer this question it is necessary to consider the effect of bankruptcy upon legal proceedings to which a bankrupt is a party.

Relevant legislation and legal principles

[23] By Article 279 of the Insolvency (Northern Ireland) 1989 the bankrupt's estate vests in his Trustee when appointed. The bankrupt's estate is defined in Article 11(1)(a) as comprising "all property belonging to or vested in the bankrupt at the commencement of the bankruptcy." In Article 2, property is defined as including "things in action." This is more commonly referred to by lawyers as "choses in action." This is a recognised legal expression used to describe personal rights of property which can only be claimed or enforced by action and not by taking physical possession - as per Channel J in *Torkington v Magee* [1902] 2 KB 427.

[24] In *Beckham v Drake* [1849] 2 HL Cas 579 9 ER 1213 the House of Lords recognised that not all rights of action form part of the bankrupt's estate. Erle J advised the House as follows at page 1222:-

"The general principle is, that all rights of the bankrupt which can be exercised beneficially for the creditors do so pass, and the right to recover damages may pass though they are unliquidated;...This principle is subject to exception. The right of action does not pass where the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind or character, and without immediate reference to his rights of property."

[25] A distinction thus falls to be drawn between those causes of action which relate to a bankrupt's person and reputation and those which relate to his property.

[26] In *Heath v Tang* [1993] 1 WLR 142, Hoffmann LJ considered the effect that bankruptcy has upon legal proceedings to which a bankrupt is a party. He considered the position both when the bankrupt is plaintiff and when the bankrupt is a defendant. At page 1423 he observed:

“The bankrupt as plaintiff:

The property which vests in the trustee includes “things in action.” Despite the breadth of this definition there are certain causes of action personal to the bankrupt which do not vest in his Trustee. These includes cases in which “the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind or character, and without immediate reference to his rights or property.” See *Beckham v Dale* [1849] 2 HL Cas 579, 604 per Erle J and *Wilson v United Counties Bank Limited* [1920] AC 102. Actions for defamation and assault are obvious examples. The bankruptcy does not affect his liability to litigate such claims. All other causes of action which were vested in the bankrupt at the commencement of the bankruptcy, whether for liquidated sums or unliquidated sums or damages, vest in his Trustee. The bankrupt cannot commence any proceedings based upon such a cause of action and if the proceedings have already been commenced, he ceases to have sufficient interest to continue them ... an illustration of the incapacity of the bankrupt to bring proceedings is *Boaler v Power* [1910] 2 KB 229 in which an action brought by the bankrupt had been dismissed with costs. The bankrupt then commenced another action to have the judgment set aside on the ground of fraud. The successful party presented a bankruptcy petition based on the unsatisfied order for costs and the bankrupt was adjudicated on the petition. The Trustee declined to proceed with the second action. The petitioner then applied to have it dismissed and the judge’s order of dismissal was affirmed by the Court of Appeal. Farwell LJ said at page 232; “The right to continue [the action] is a chose in action vested in the Trustee, and the bankrupt has no locus standi ...”

Further, when dealing with the bankruptcy of a defendant Hoffman LJ stated at page 1424 as follows:

“In cases in which the bankrupt is a defendant, there is of course usually no question of the cause of action having vested in the Trustee. Unless the defence is set-off (a situation to which we shall return later) the bankrupt will not be asserting by way of defence any cause of action of its

own...In cases in which the plaintiff is claiming an interest in some property of the bankrupt that property will have vested in the Trustee. And in claims for debt or damages the only assets out of which the claim can be satisfied will have likewise vested. It will therefore be equally true to say that the bankrupt has no interest in the proceedings.”

[27] Halsbury’s Laws of England (4th Ed Vol 3(2), 2002 reissue) at paragraph 435 sets out a list of examples of causes of action which pass to the Trustee. These include breach of contract to deliver goods, actions for trespass or negligence causing damage to bankrupt’s property and actions for fraud. In *Motion v Moojen* [1872] LR 14 Eq 202 the court held that a bankrupt could not maintain an action alleging fraud and such an action vested in his trustee.

[28] Where there are two separate and distinct causes of action arising from the same transaction, resulting both in damage to bankrupt’s property and in injury to the bankrupt personally the trustee is entitled to the right of action for damage to the property but the bankrupt retains his right to sue for personal injury – See *Boddington v Castelli* [1853] 1 E &B 879. Where there is one cause of action which results in direct loss to the property, to which the bankrupt’s personal injury is only incidental, the right of action may not be split but will pass to the Trustee – *Orde v Upton* [2000] Ch 35.

[29] Section 55 (1) of the Bankruptcy (Scotland) Act 1985 deals with the effect of discharge from sequestration. It provides,

“(1) The debtor shall be discharged within the United Kingdom of all debts and obligations contracted by him or for which he was liable at the date of the sequestration...

(2) The debtor shall not be discharged by virtue of subsection 1 above from:

(3) any liability incurred by reason of fraud or breach of trust.”

Consideration

(A) Roebuck Inn Appeal Proceedings

[30] By summons dated 15 January 2018 (the Roebuck Inn appeal proceedings) the McAteers seek relief under the inherent jurisdiction of the court to reopen the appeal against the 2008 judgment of Smith J in the Roebuck Inn proceedings and seek an extension of time to comply with the security for costs order.

[31] The Roebuck Inn proceedings were issued by the Gurams against the McAteers. In these proceedings the Gurams sought to have the agreement regarding the sale and leaseback of the Roebuck Inn set aside on the ground of undue influence. The Gurams were successful at first instance and the court gave judgment in their favour and made an order setting aside the agreement and ordered an accounts and enquiries hearing. This hearing took place before Master Redpath who ordered that the McAteers owed a balance of £56,789.10 plus interest to the Gurams. The Roebuck Inn proceedings were ongoing at the time of Anoop Guram's bankruptcy.

[32] The Roebuck Inn appeal proceedings are grounded on the affidavit of Mr McAteer sworn on 12 January 2018. In his affidavit Mr McAteer sets out reasons why the court should reopen the appeal in the Roebuck Inn proceedings and refers to issues regarding his lack of legal aid to prosecute the case and appeal; ill health; misrepresentations by Guram's legal advisors; and misrepresentations by Gurams regarding their ability to purchase the Roebuck Inn in the event the sale and leaseback was set aside. None of the pleadings in the Roebuck Inn appeal proceedings set out any allegations of fraud against the Gurams although the skeleton arguments filed by Mr McAteer make a number of allegations of fraud against the Gurams.

[33] Mr Maxwell accepts that the consequence of the bankruptcy of Anoop Guram is that all his assets including the proprietary rights under the Roebuck Inn judgment form part of his estate and therefore vested in the Trustee in Bankruptcy upon his appointment. The court considers that this is a proper concession given that the Roebuck Inn proceedings related to the bankrupt's property namely the Roebuck Inn and is therefore something in which the Trustee and the bankrupt's creditors have an interest.

[34] Mr Maxwell however submits that the Roebuck Inn appeal proceedings allege fraud against his client and he referred to various allegations of fraud set out in the skeleton arguments filed by Mr McAteer. He submits that this has two consequences in respect of *locus standi*. The first consequence is that where fraud is alleged against a person he had a right to be heard in answer – See *Vogon International Ltd v The Serious Fraud Office* [2004] EWCA Civ 104. Although that case did not involve a bankrupt Mr Maxwell submitted that actions alleging fraud come within the exception to the rule that generally causes of action vest in the trustee. This is because an action alleging fraud involves reputational rights. In support of this proposition he relied on the dicta of Hoffman LJ in *Heath v Tang* at page 1424. He further submitted that more generally the defence of an action did not vest in the trustee and again relied on Hoffman's dicta in *Heath* when he stated, "in cases in which the bankrupt is a defendant, there is of course usually no question of the cause of action having vested in the trustee...". Mr Maxwell further contends that the second consequence of alleging fraud in the Roebuck Inn appeal proceedings is that Anoop Guram would potentially be exposed to

liabilities which would not be extinguished by his discharge from bankruptcy. This is because Article 55 of the Bankruptcy (Scotland) Act 1985 discharged Anoop Guram within the United Kingdom of all debts contracted by him or for which he was liable at the date of sequestration except for any liability incurred by reason of fraud. He therefore contends that insofar as fraud is a live issue in the Roebuck Inn appeal proceedings Anoop Guram has a potential financial personal liability and therefore has standing to defend the proceedings.

[35] Fraud is not alleged in the affidavit grounding the application to reopen the appeal and when pressed by the court Mr Maxwell accepted that there were no allegations of fraud contained within the pleadings in the Roebuck Inn appeal proceedings and that the only allegations of fraud were contained in Mr McAteer's skeleton arguments. The court finds that fraud forms part of the Roebuck Inn appeal proceedings and any reference to fraud in the skeleton arguments is immaterial. Skeleton arguments do not form part of the pleadings. When fraud is alleged the rules of Court set out strict requirements as to how it should be pleaded and the court is very careful to ensure that allegations of fraud are not admitted in evidence unless they are properly pleaded and the defendant is put on notice and given an opportunity to defend such serious allegations. Fraud is also not alleged in the original Roebuck Inn proceedings and there is no counterclaim by the McAteers alleging fraud against the Gurams. We are therefore satisfied that fraud does not form any part of the Roebuck Inn appeal proceedings. In the event the appeal of the Roebuck Inn proceedings is reopened that appeal will not involve allegations of fraud as fraud formed no part of the Roebuck Inn proceedings. Consequently, Anoop Guram has no personal financial interest or reputational interest in the Roebuck Inn appeal proceedings.

[36] Accordingly, this court finds that the Roebuck appeal proceedings relate only to the bankrupt's property and accordingly the second named defendant lacks *locus standi* to defend the appeal proceedings. Under Schedule 3 Part I paragraph 2 of the Insolvency (Northern Ireland) Order 1989 the Trustee has power to defend these proceedings as they relate to property comprised in the bankrupt's estate.

The 2013 Tort Action

[37] The 2013 tort action is a new action which was issued after the date of the bankruptcy. The pleadings seek to have the 2008 judgment set aside and claim damages for loss and damage arising from the fraud of the Gurams in procuring the 2008 judgment.

[38] We are satisfied that Anoop Guram has *locus standi* to defend the 2013 tort action on the following grounds. Firstly, he is a party to a tort action which claims damages for losses arising from fraudulently procuring judgment against the McAteers. In the event the judgment is set aside on the grounds of fraud Anoop Guram will be jointly

and severally liable for any liability which flows from that as the discharge from bankruptcy is no protection from liabilities incurred by reason of fraud. Secondly, Anoop Guram's financial and reputational interests are in play in the proceedings and therefore this cause of action comes within one of the exceptions set out by Hoffmann LJ in *Tang v Heath*, to the general rule that choses in action vest in the trustee. Thirdly, the 2013 tort action issued after the date of the bankruptcy; and fourthly Anoop Guram is a defendant to a tort action and he fulfils the requirements for *locus standing* set out by Hoffman LJ *Heath*, namely he is not asserting any cause of action of his own and the plaintiff's claim is not in respect of property vested in the trustee but rather is a claim for damages based on fraud for which Anoop Guram is potentially personally liable. Accordingly the bankrupt has an interest in the proceedings and therefore has standing.

[39] Given that the 2013 tort action also relates to the property of the bankrupt's estate the Trustee has power to defend this action under Schedule 3 of the 1989 Order, if he so wishes.

Conclusion

[40] The court's judgment is that the second named defendant does not have *locus standi* in respect of the appeal proceedings but has standing in respect of the 2013 tort action.