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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **18/12/08**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

ACTION 2003 No 2793

MARY DEVINE

Plaintiff;

-v-

DANIEL McATEER

Defendant.

DEENY J

[1] The plaintiff brings these proceedings on foot of a writ of summons of 15 May 2003 and a statement of claim of 30 March 2004. She issued a notice of discontinuance against Noel Duddy on 9 November 2007. She is the wife of Sean Devine and her action was heard in the same term as his action with regard to Enterprise Investment Scheme Tax Relief. She says that on advice she received, not directly from Daniel McAteer but through her husband, she invested £100,000 in an Enterprise Investment Scheme on the understanding and the basis that she would receive tax relief on such an investment. The particular pleading at paragraph 6 of her statement of claim is for "loss of the sum of £20,000 which the plaintiff was unable to claim for tax relief, together with interest at 8% from 31 January 2001 until judgment or sooner payment." It is agreed that the sum of £20,000 would have been properly deductible from her tax liability for the year ending 5 April 2000, if her £100,000 had been invested in new ordinary shares in a company qualifying under the Enterprise Investment Scheme. It was common case that the monies had not been so invested but had been invested in shares owned by existing shareholders in Roe Developments Limited. For these purposes only it was

accepted that that company would otherwise have qualified. However it is a requirement of Section 289 of the Income and Corporation Taxes 1988 Act as then amended, that the investment is in eligible shares which are new ordinary shares in the company. Mr Coyle appeared for the Plaintiff and Mr McAteer on his own behalf. The court had the benefit of very good trial bundles prepared by Miss Brinton of Messrs Cleaver, Fulton and Rankin.

[2] It was further helpfully agreed, after the issue was raised by Mr McAteer with the encouragement of the court at a review hearing, that in fact the plaintiff did not have £20,000 of tax liability to benefit from this investment. Partly because of the limited amount of tax she was liable to pay in the particular tax year and partly because she had another EIS investment in a company called Mysbid Limited, also through the defendant, she had only £6,241 available to benefit from tax relief if the EIS shares had been invested in new shares in Roe Developments Limited.

[3] The plaintiff sought to expand on that situation in three different ways. Firstly on 10 April 2008 she brought an application before the court to amend the statement of claim. The amendments were largely concerned with alleging that Mr McAteer, in anticipation of her income being inadequate to benefit from such a large investment in EIS should have encouraged her to defer the investment until the following year when she had a larger income. I refused leave for this amendment partly because it was clearly made in response to Mr McAteer's attempt to narrow the issues in the case and partly because I thought it unfair to him to ask him to justify a new aspect of his professional conduct as an accountant some 8 years after the events in question and barely a fortnight before the hearing of the action.

[4] Mr Coyle of counsel in opening the action sought to argue that the statement of claim did allow him to claim on behalf of the plaintiff her loss of use of the sum of £100,000 from the date of investment in RDL until it was repaid to her following the settlement of proceedings in the High Court on 11 November 2004. Mr McAteer strenuously objected to this and in my view rightly. It was outwith the simply stated statement of claim. Furthermore it had never been envisaged even in Mary Devine's witness statement which was dated as recently as 21 April 2008, one week before the opening of the action. I considered that allowing such a claim would be to take the defendant unfairly by surprise. I might add that such a claim would be difficult to establish. Her claim is for loss of EIS relief and must therefore carry the implication that at least part of her investment would have gone into another EIS company for new ordinary shares. However such an investment might have been lost completely whereas she recovered her principal in this case. The court would have to speculate on where the money would have gone if she had not used it. Absolutely no particulars had been given of this alleged loss of opportunity.

[5] Mr Kevin Bell, a specialist tax partner with KPMG, Belfast, in his supplementary report (after Mr McAteer's contribution at the review hearing) did make the point, which I think was within the pleadings, that if she had agreed with Mr McAteer that she would get £20,000 relief on her investment and she did not get it that was the measure of her loss. I consider that was a valid argument but I can deal with it quite shortly. It was not borne out in her evidence, whether written or oral, or in any other evidence on her behalf that Daniel McAteer had promised her tax relief in the sum of £20,000 if she made this investment. Indeed the only figure she mentioned, as her husband had done, was one of 40% tax relief. As was agreed between the parties this was a reference to capital gains tax deferral which was available under this scheme. I find as a fact that there was no firm agreement that she would receive £20,000 tax relief and I do not consider that case therefore to have been made out by the plaintiff.

[6] The plaintiff did satisfy me, however, that not only was she a client of the Defendant's but also she had acted on the advice given by Mr McAteer to her husband, who had described that advice in the earlier proceedings. No technical issue of hearsay was taken and I consider I can properly give weight to what she quoted her husband as saying, partly because of her own demeanour and partly because of certain documents to which I will refer shortly.

[7] Mr McAteer's contention was that she along with her husband was anxious to invest in RDL and that the EIS tax relief was not the only or even a significant motivating force in that investment. He knew that the purchase of second hand shares would not achieve EIS relief. He did not claim it for her in her tax return, which she signed for the relevant year. He was not therefore guilty of either negligence or breach of statutory duty as alleged or at all.

[8] However I find as a fact that the plaintiff did invest this large sum of money because she had been advised, albeit indirectly, that she would receive significant tax relief as a result, whereas in fact she received none because she was allocated existing shares. I pause at this point to say that in law the fact that she formed this view through the medium of her husband and that she and Mr McAteer never discussed EIS is not a bar to her succeeding. Mr McAteer is sued as a certified accountant who was acting as her tax adviser at all material times. This is not disputed and nor is it disputed that he was at the same time a director of RDL, one of only two directors. Nor is it disputed that some of the shares that were sold to the plaintiff belonged to relatives of Mr McAteer who had invested in the company over the years since 1995. It is helpful to refer to the judgment of Lord Steyn in <u>Williams v. Natural Life Health Foods Limited and Mistlin</u> [1998] 1 WLR 830 at 835 F-H –

> "The touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff. Obviously, the impact of what a defendant says or does must be judged in the light of the relevant contextual scene. Subject to this qualification the primary focus must be on exchanges (in which term I include statements and conduct) which cross the line between the defendant and the plaintiff. Sometimes such an issue arises in a simple bilateral relationship. In the present case a triangular position is under consideration: the prospective franchisees, the franchisor company, and the director. In such a case where the personal liability of the director is in question the internal arrangements between a director and his company cannot be the foundation of a director's personal liability in tort. The enquiry must be whether the director, or anybody on his behalf, conveyed directly or indirectly to the prospective franchisees that the director assumed personal responsibility towards the prospective franchisees."

[9] I set out some of the grounds on which the plaintiff has made out her case that the investment was on the assurance that tax relief would be forthcoming. For completeness I should mention that Mr Bell expressed the opinion that the shares would not qualify for capital gains tax deferral purposes any more than for income tax purposes because they were not new shares. Nor did the lady in fact receive any income tax relief or capital gains tax deferral. In cross examination the Defendant disputed Mr Bell's opinion regarding CGT deferral for some time but ultimately accepted it, rightly I believe in the light of Section 289 of the ICTA. Mr McAteer raised the issue of possible inheritance tax relief from investing in a company of this sort even with second hand shares but I am satisfied that this lady who was under the age of 40 at the time of these matters had, as she said, no thought of inheritance tax in her mind at this stage, despite discussion of making Wills. There is no reference to inheritance tax relief for her in any correspondence.

[10] I set out some of the grounds relied on by the plaintiff. Firstly her counsel points out that consistent with her evidence the share transfer forms are not signed by her. On the contrary they are largely in the writing of Mr McAteer. Secondly the Defendant admits that a number of the vendors of the shares were his close relatives. He had been the promoter of the company in question and it may well have been advantageous to him to be able to find a

buyer for his relatives who had invited in the company. They may well have already obtained their tax relief by that stage. Thirdly at plaintiff's bundle 2, page 197, there is a letter from Joseph McElhinney, solicitor, to the defendant himself of 2 November 2000 setting out the assets of Mr & Mrs Devine in preparation for drafting of Wills. This followed a meeting between the Devines and their solicitor and accountant. The list of assets for Mary Devine (as for Sean) recites, at para 3:

> "EIS Shares - £100,000 share capital in Roe Developments Limited".

Mr McElhinney can only have got that from Mr McAteer or the Devines. Clearly it was thought that her investment was an EIS compliant investment. Fourthly this is reinforced by the fact that Mr McAteer put to the plaintiff's witness that he had corrected Mr McElhinney's letter in a couple of respects. Mr McElhinney then wrote further on 14 November 2000 but, significantly he repeated the sentence quoted above i.e. Mr McAteer did not correct him and say that Mrs Devine's shares were not EIS shares. This was despite the fact that Mr McAteer had sent in her tax return not claiming relief for these shares i.e. on 10 May 2000 he knew she was not entitled to relief but he did not draw this to the attention of her solicitor either at the meeting with the Devines or in the subsequent correspondence.

[11] In the same volume at pages 202-203 there is a letter from a Mr Clive Russell, whom Mr McAteer was consulting on tax matters. Again Mr Coyle draws attention to Mr Russell's advice, which related to Mrs Devine as well as Mr Devine that in the event of the sale:

> "EIS relief previously granted will be liable to be repaid to the revenue irrespective of the dividend/capital treatment".

The court was asked to infer, and does infer from that that Mr Russell was not informed when being instructed prior to this letter of 13 June 2002 that in fact Mrs Devine had been allocated shares which were not EIS complaint. I have taken into account Mr McAteer's evidence on this point, and others.

[12] On 16 May 2002 Mr McAteer writes to Mr Devine following the rupture between them which led to the appointment of Messrs Moore Stephens as the accountants to the architects. Mr McAteer expressly says at paragraph 4 under the heading EIS Investments:

> "We can confirm that both yourself and Mary have investments that qualified under the Enterprise Investment Scheme."

The author of the letter goes on to note that one of the objectives for the investment was:

> "(b) Creating an investment vehicle that would yield substantial tax advantages."

The immediate next paragraph says:

> "Based on this investments were made as follows:
>
> (a) Roe Developments Limited £200,000.
> (b) Mysbid Limited £100,000."

The inevitable implications here is that he was saying that Mary Devine's £100,000 (and that of Sean) was an investment qualifying under the EIS and made with that objective in mind of yielding substantial tax advantages.

[13] At plaintiff's bundle 8, page 72 at paragraph 4.3, Mr McAteer claimed in an earlier affidavit that the Devines were aware that Mary's shares were second hand "and they signed the stamped transfer forms". In fact Mr McAteer acknowledged in the course of his cross examination of one of the witnesses that he was in error in saying that and he accepted that they had not signed the forms. I conclude that he was also in error in averring on the earlier occasion that she was aware that she was getting second hand shares.

[14] Mr McAteer was at pains on occasions to make the point that 40% capital gains tax deferral could be achieved for 12 months before the investment and 36 months after it. Mr Bell agreed that one could defer the gain within those parameters but of course that was not open to the plaintiff here because Mr McAteer had bought second hand shares on her behalf.

[15] In cross examination he sought to argue that clearly he would have known that second hand shares did not qualify at this time. Mr Bell said that he could not assess his state of mind at that time but certainly that it was a very obvious point. I am not certain that Mr McAteer did not overlook the point. He put to Mr Bell that the plaintiff had sold two houses before the end of the tax year in question and that this affected her income in a way that he could not have anticipated at the time of the purchase of the shares in RDL. But Mr Bell pointed out that because she had sold two houses and because land development profits are treated as income her income actually increased for the tax year in question and therefore there was more income to achieve more relief, rather than the reverse. While it may be this was negligence in the sense of inadvertent error by Mr McAteer in failing to allocate new shares to the plaintiff I find on the balance of probabilities that it suited him to allow some existing shareholders, including his uncles, to realise their holdings by selling to her. I am satisfied that as her tax adviser, who was also in fact a director of

the company, he did not take reasonable care to ensure that she enjoyed tax relief on her investment in the way that she had been led to expect.

[16] It is interesting to note that at a meeting of 21 February 2003 between the defendant, his fellow director and former assistant, Gavin Magill, the plaintiff's new accountant John Love and Mr Sean Devine, Mr Love had to ask three times "why Mary had not received a fresh issue of shares at the same time as Sean." Mr McAteer's then reply that this would have broken the 30% rule was not stood over by him. It seems clearly wrong on the evidence and expert testimony. As a penultimate point I preferred the evidence of Mrs Devine to that of Mr McAteer on this topic, although it must be acknowledged that her memory of what passed in 2000 was not extensive. The trial of her action had been delayed by her husband's later action on the same topic. Finally, it is inherently unlikely that the plaintiff would have invested £100,000 in a small private company, which owned or operated one or two "local pubs" in Mr McAteer's phrase in the city but not in the city centre, a company of which her husband was not a director, without believing that substantial tax benefits were to be achieved.

[17] I have taken into account in arriving at my decision the points made in cross examination by Daniel McAteer, who represented himself in his customary confident and articulate fashion. I also take into account his sworn evidence and his written closing argument. One point touched on at paragraph 6 of that argument requires to be addressed by the court. The defendant set out at paragraph 6 not only the maximum loss which he said the plaintiff might claim, with which the court agrees but also a series of sums, some much larger, which he said should be "offset" against her alleged loss. He relied on <u>Bartlett v. Barclays Bank Trust Company Limited</u> (No 1) to which he had seen reference in a textbook. That decision of Brightman J, as he then was, is reported at [1980] 1 All ER 139. The defendant, a professional corporate trustee, was found liable for loss caused to a trust by neglect to exercise the special care and skill which it professed to have. However in assessing damages Brightman J took into account the following matters, at page 155 e-f –

> "The general rule as stated in all the textbooks, with some reservations, is that where a trustee is liable in respect of distinct breaches of trust, one of which has resulted in a loss and the other in a gain, he is not entitled to set off the gain against the loss, unless they arise in the same transaction: see Halsbury's Laws of England, Snell's Equity, Lewin on Trust, Underhill's Law of Trust and Trustees. The relevant cases are, however, not altogether easy to reconcile. All are centenarians and none is quite like the present. The Gilford Developments stemmed from the exactly the same

> policy and (to a lesser degree because proceeded less far) exemplified the same folly as the Old Bailey project. Part of the profit was in fact used to finance the Old Bailey disaster. By sheer luck the gamble paid off handsomely, on capital account. I think it would be unjust to deprive the bank of this element of salvage in the course of assessing the cost of the shipwreck. My order will therefore reflect the bank's right to an appropriate set off."

[18] This decision was considered by the Court of Appeal in England in Brown v. KMR Services Limited [1995] 4 All ER 598. In that case the plaintiff was a successful businessman who began underwriting as a Lloyds name in 1977. While initially his policy was a conservative one, in the 1980s he began to write a larger premium income limit and by 1989 he was on 35 syndicates, of which 15 were high risk excess of loss syndicates amounting to 49% of his premium income limit. When these investments in the years 1987 to 1990 led to very large losses he sued his member's agent at Lloyds. He succeeded at first instance but a number of matters were brought before the Court of Appeal on appeal and cross appeal. For these purposes the relevant issue which the majority found, reversing the trial judge, was that the plaintiff had an independent and separate cause of action in respect of the three loss making years and that each cause of action gave rise to a right in law, which arose under contract and was not dependent on any equitable or restitutionary principle, to recover the damages which the plaintiff had suffered by reason of their breach which constituted that cause of action, namely the failure of the member's agent to advise its client on his allocations for the following year. There was certainly an element of repetition in the breaches by the member's agent, but that repetition did not constitute a continuing breach since each breach was complete when the plaintiff had been committed to that year's allocation. Accordingly the sole function of the court was to find and award to the plaintiff the damages which he had proved that he had suffered as a result of the three distinct breaches of contract and which he succeeded i.e. in 1997 for the year 1998, in 1988 for the year 1989 and in 1989 for the year 1990. The judge was not therefore entitled to set off underwriting profits for 1986 and 1987 against those losses incurred in the years in question, with the result that the cross appeal in that ground would be allowed.

[19] I pause there to observe that despite occasional references to the contrary Mr McAteer is not being sued here in a fiduciary capacity but as a tax adviser who was also a director of the company. The plaintiff is not seeking equitable relief. Hobhouse LJ, with whom Peter Gibson LJ agreed, considered that the principle applied by Brightman J in Bartlett arose "from the context of that particular case. It cannot, in my judgment, properly be applied to the legal remedies being enforced in the present case." Stuart-Smith LJ dissented,

dealing with the matter at pages 621-622. He agreed with the trial judge that discounting the years 1986 and 1987 when these high risk syndicates had in fact delivered profits led to an unjust result. He pointed out that the advice about the plaintiffs over-commitment to high risk syndicates ought to have been given for the 1986 allocations and need not necessarily have been repeated each year. He felt the plaintiff was having it both ways in enjoying the profits of the first two successful years with the excess of loss syndicates but requiring the agent to pay the losses in the later years.

[20] Decisions of the Court of Appeal in England are strongly persuasive authority in this court. Indeed as recently as Beaufort Developments Ltd v. Gilbert –Ash (N.I.) Ltd [1997] NI 142, the Court of Appeal in Northern Ireland followed the practice set out in the judgment of Holmes LJ in the Irish Court of Appeal in McCartan v. Belfast Harbour Commissioners [1910] 2 IR 470 at 494-495 of following decisions of the coordinate English Court of Appeal and leaving error "if there be error, to be corrected by the tribunal whose judgment is final on both sides of the Channel." I also observe that clearly the facts of Bartlett and Brown and this action are all different and the former decision was at first instance.

[21] I am not persuaded that Mr McAteer is entitled to a set off in this action. I have already mentioned that he is not a trustee as the defendant was in Bartlett. He charged fees for the advice he was giving. Indeed in the actions of Duddy and McAteer and Co v. N R Devine Limited and Others [2007] NI QB 89 counsel for the Devine interests had at one stage sought to argue that Mr McAteer should be denied fees for accountancy work he had done because of other breaches of his duty of which he was guilty including this action before the court. It would be inconsistent and unfair, having given judgment for Mr McAteer on those fees, to allow him to rely on set offs from other transactions which he carried out with more success for the plaintiff. His strongest point might be that he had obtained EIS income tax relief for the plaintiff from her investment in Mysbid Limited. First of all I am inclined to think that that was not the same transaction but I acknowledge that so far as the plaintiff's evidence was concerned she was handing over money via her husband for Mr McAteer to invest in EIS funds and so it is at least arguable that from her point of view the EIS investments were a single transaction. However even if that were the case I would not allow a set off of the relief she obtained against the loss, albeit modest, that she sustained. I say that partly because of the finding which I have already made that it is more probable that the reason she was sold second hand shares rather than being allocated new shares was to suit the defendant and his relatives rather than an inadvertent and negligent mistake on the part of Mr McAteer. In any event her loss and her claim are reduced by the efficacy of the EIS investment in Mysbid Limited. Furthermore I think the position of Mr McAteer as an accountant here is more analogous with a solicitor than with the trustee that Bingham J was dealing with in Bartlett. A solicitor may act for the developer of an estate in several scores of conveyances

of the houses on that estate to the purchasers. It seems to me he or she would be unlikely to succeed, in the event of it being proved that the solicitor had been negligent in the conduct of one of the conveyances, in a claim for set off of the loss suffered by the developer by saying that the solicitor had successfully conveyed the other houses. It is possible that in such a situation the client might not pursue the matter, as may well happen in such a case or in analogous cases but that is a different matter from the client having no legal right to pursue the matter because other work had been done properly by the professional adviser.

[22] For all these reasons I find that the plaintiff has proved that she suffered a loss here in the sum of £6,421. Following my decision in McAteer v. N R Devine Limited and Others [2007] NIQB 89 I award interest at 6% from the date of the writ of 15 May 2003 until the 18th December 2008 which appears to be a sum of £4,623.12 leading to a total award of £11,044.12.