Neutral Citation No. [2014] NICA 50 | *Ref:* **GIR9338**

Judgment: approved by the Court for handing down | *Delivered:* **30/06/2014**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN

MARY DEVINE

Plaintiff/Respondent

AND

DANIEL McATEER

Defendant/Appellant

Before: HIGGINS LJ, GIRVAN LJ and COGHLIN LJ

GIRVAN LJ (delivering the judgment of the court)

[1] This an appeal brought by Daniel McAteer ("the appellant") from the judgment of Deeny J given on 18 December 2008 who awarded damages amounting to £6,421 to the plaintiff respondent ("Mrs Devine") together with costs. This sum represented the amount of money which the judge concluded she could have saved if the sum of £100000 had been invested in EIS qualifying shares in which Mrs Devine was led to believe she would be investing on foot of advice allegedly given to her by the appellant.

[2] According to her pleaded case Mrs Devine alleged that on or about 20 February 2000 she invested the sum of £100,000 in shares in Roe Developments Ltd ("RDL") purchased from the existing shareholders in the company. She alleged that the appellant advised her that she was entitled to claim 20% income tax relief whereas in fact the shares which she bought did not qualify for EIS relief as they were not newly issued shares. The particulars of negligence which were also expressed to be the particulars of breach of contract included allegations that the appellant caused Mrs Devine to pay a greater amount of income tax than she should have paid and the appellant failed to exercise reasonable care in and about the taking of instructions.

[3] The judge refused the plaintiff leave to amend the statement of claim to allege that the appellant should have advised Mrs Devine to defer investment until the following year to maximise tax relief. He also refused her leave to argue that she was entitled to claim for loss of use of the £100,000 from investment in RDL until it was repaid her when she encashed the shares for £100,000 in November 2004. It is clear that the plaintiff lost no capital as a result of her investment. While it might have been argued that her loss flowing from the allegedly negligent advice given by the appellant was the loss she suffered from investing in shares that produced no income and no capital growth and that if she had not received the allegedly incorrect advice she could have invested in investments producing income or capital growth that was not the pleaded case and the judge did not allow an amendment to make such a case. No appeal has been brought against the judge's refusal to allow the amendment. The case fell to be decided on the pleaded case. It is a clear principle that a plaintiff must prove her case *secundum allegatum et probatum*, that is to say according to what is alleged and proved.

[4] In paragraph [5] of his judgment the trial judge stated that he found as a fact that there was no firm agreement that the plaintiff would receive £20,000 tax relief and he did not consider that that case had been made out by the plaintiff. The judge thus excluded any finding that the appellant was warranting that tax relief of a specified amount would be obtained by the plaintiff. No such case was in any event pleaded.

[5] The judge concluded that

(a) Mrs Devine was a client of the appellant;
(b) she acted on advice given by the appellant to her husband;
(c) she invested £100000 because she had been advised albeit indirectly that she would receive significant tax relief as a result whereas she received none because the shares allocated were existing shares in the company; and
(d) the appellant who was her tax adviser and also a director in the company did not take reasonable care to ensure that she enjoyed tax relief on her investment in the way she had been led to expect.

[6] The pleaded case made by Mrs Devine was one of tortious and contractual negligence on the part of the appellant in advising the plaintiff to purchase the shares on the basis that they would attract EIS relief whereas they were not EIS

qualifying shares. The case was not pleaded on the ground that the appellant negligently and in breach of contract structured the plaintiff's purchase of shares in an inappropriate way and that the appellant should have taken steps to ensure that fresh EIS qualifying shares were issued in RDL for subscription by Mrs Devine. In paragraph [21] the trial judge comes close to finding that the appellant deliberately arranged for the shares to be purchased in a way which was designed for his financial benefit and that of his relatives. Such a finding, if the judge was making it, was not one open to the court on the pleaded case. Such a case would have required to be clearly pleaded with specific pleaded particulars.

[7] In the course of the appeal we called for a transcript of the evidence of Mrs Devine and the appellant to consider the evidential basis on which the trial judge founded his conclusions. The court was concerned to ascertain what the evidence was in relation to the nature of the appellant's advice to the plaintiff; how it was imparted to the plaintiff and what obligations the appellant was taking on in advising the plaintiff in relation to the acquisition of shares in RDL. What emerges from the evidence of Mrs Devine is that:

(a) She did not have or rely on any direct advice given to her by the appellant. It was her case that her husband mentioned to her that she should pay some money into EIS investments.

(b) She did not know anything about EIS schemes. She relied on her husband who said that EIS was a good scheme.

(c) She only met the appellant about once a year.

(d) She never saw any EIS booklet. She accepted that the appellant did not tell her anything about the EIS scheme. Her husband thought it was a good scheme and would get relief on it.

(e) In answer to questions from the appellant she accepted that he had not discussed EIS with her and she did not know anything about it. She did not take a big part in the business. It was her husband who worked with Mr McAteer.

(f) She could not remember Mr McAteer advising her to invest in RDL and her husband looked after everything.

The transcript further records that the trial judge stated that he understood the point that the plaintiff was accepting that the appellant never said anything to her directly about the matter.

[8] An analysis of Mrs Devine's evidence shows that there was no direct advice from the appellant about the tax advantages of Mrs Devine investing in RDL or on how a purchase of shares should be structured. Advice given by the appellant to Mr Devine did not, of itself, represent advice given to Mrs Devine. If liability against the

appellant was to be established for negligent advice given to Mrs Devine through the agency of Mr Devine the plaintiff had to establish that the appellant gave advice to Mr Devine relating to Mrs Devine's financial affairs, that the appellant knew or believed that that advice was going to be passed on to Mrs Devine and that it was foreseeable that she would act on that advice. In the context of this case the plaintiff needed to establish that Mr McAteer advised the plaintiff through the agency of Mr Devine that she would be entitled to EIS relief if she acquired shares in RDL. The evidence falls short of establishing these matters. The plaintiff's evidence was vague and imprecise. She was clearly relying on the advice of her husband. The possibilities of confusion and misunderstanding by Mr and Mrs Devine of the financial situation are obvious and it is clear that the plaintiff had a very unclear understanding of what was involved in EIS schemes. There was no evidence that the appellant gave advice to Mr Devine that Mrs Devine would herself obtain EIS relief on whatever shares she might purchase in RDL. In fact, the appellant did arrange for her to obtain EIS shares in other companies leading to substantial tax savings. The evidence does not provide a sound basis on which to conclude that the appellant provided negligent and improper advice to the plaintiff or that he was assuming responsibility for whatever advice Mr Devine might have given or purported to pass on to Mrs Devine.

[9] There is another reason why the appeal must be allowed. The proper measure of damages for negligent or fraudulent misstatement is to put the plaintiff back in the position she would have been in if she had not been induced to enter into the transaction that the misstatement induced. As has been noted the plaintiff recouped her entire investment. There is no pleaded claim for loss of interest or income from that capital. Mr Humphreys argued that the representation that the plaintiff would receive tax relief was incorporated into the contract as a contractual warranty as to the outcome of the transaction. No such warranty is pleaded and the particulars of breach of contract are the particulars of negligence and as stated above in para [5] of the judgment the judge rejected any firm agreement to achieve a specific tax relief.

[10] In the result we allow the appeal and will hear the parties on the issue of costs.