Neutral Citation No.: [2008] NICh 19 | *Ref:* **DEE7354**

Judgment: approved by the Court for handing down | *Delivered:* **18/12/08**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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N & R DEVINE LIMITED

-v-

DANIEL McATEER TRADING AS DUDDY McATEER AND COMPANY
(2004 No. 2440)

-and-

DANIEL McATEER

-v-

SEAN DEVINE TRADING AS SEAN DEVINE CONSTRUCTION
AND
N AND R DEVINE LIMITED

(2003 No. 40750)

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DEENY J

[1] The plaintiff in the first entitled action above is a limited company which in the period of 2001 and 2002 was engaged in property development in the north west of the province. The defendant practised as an accountant and entered into an arrangement with Mr Sean Devine, the principal shareholder and director of the plaintiff company with regard to the transaction the subject of these proceedings. That involved the plaintiff company acquiring development lands belonging to a Mr Billy Henderson or companies under his control. The format of this purchase was to be through the purchase of shares in a company called Hertford Properties Limited (which would acquire the lands in WDH Construction Ltd). The plaintiff company alleges that it suffered loss and damage by reason of the plaintiff's negligence, breach of contract and breach of duty in respect of that proposed purchase of lands at Eglinton, County Londonderry. The statement of claim

enlarged on that to some degree by claiming £1,000,000 for the loss of the purchase of the Eglinton lands and a further £25,000 in a way I will describe in due course.

[2] In the second named action Mr McAteer claims, inter alia, his fees for working on this transaction which the parties have customarily referred to as the Billy Henderson deal. The precise terms of the agreement between Mr Devine and Mr McAteer I will turn to in due course but Mr McAteer's sues on his invoice of 14 May 2002 in the sum of £9,585 plus VAT. This is stated to be :"fee agreed £10,000, discount allowed £415". I heard other aspects of this action in the autumn of 2007 but accepted the application of Mr Coyle, counsel for Mr Devine, that the issue of this fee should be decided when I had heard the full facts of the Billy Henderson deal in the first named action above. See Duddy and McAteer v N R Devine Limited and Others [2007] NIQB 89 at para. 21. Mr McAteer appeared for himself.

[3] Mr Sean Devine, of the plaintiff company N & R Devine Limited, was a builder and developer who was keenly interested in acquiring a number of development sites which Mr Billy Henderson had assembled through his corporate interests. At that stage Mr Devine was only emerging from a modest way of business and he was glad to have the advice and assistance of Mr McAteer. As I have said in a number of other judgments Mr McAteer was a self-confidence and articulate person and I accept that at this time, in 2001 and early 2002, Mr Devine placed considerable confidence in him. They had a discussion as to how Mr Devine might go about acquiring these lands, to the availability of which he had been alerted. They agreed a fee of £10,000 for Mr McAteer to act in this matter. That was to be paid if the deal was completed, said Mr Devine; if he, Mr McAteer was to finish the deal and get it "over the bar". The court had the somewhat unusual situation of the other party to this conversation himself cross-examining the witness. In fact that made it absolutely clear who was telling the truth in this regard. Mr Devine was completely convincing whereas Mr McAteer seemed to me embarrassed and hesitant in his contradiction of Mr Devine on this point. He put to him that the fee was not a case of "no foal, no fee" but I accept Mr Devine's denial of that and evidence that the fee was to be payable only if Mr McAteer successfully completed the deal. This is of relevance later.

[4] In the spring and summer of 2001 Mr Devine was keen to move on with this transaction, which involved a number of different sites, as was Mr Henderson. Mr McAteer, however, warned that purchasing the shares in Mr Henderson's company would create a "tax trap" for the plaintiff company. Mr Devine complained that he never crystallised what that alleged tax trap was. Mr Henderson was annoyed with Mr McAteer for, he felt, interfering with the proposed transaction. I heard evidence about this matter from Mr Devine, Mr Nigel Thompson, an accountant retained by Mr Henderson and Mr Stephen McCarron, an estate agent acting for Mr Henderson as well as

from Mr McAteer. I did not hear from Mr Henderson himself. One might have thought he could have cleared this matter up. He would have known why he did what he did. What he did was to withdraw a large site at Eglinton, County Londonderry, from the transaction. Mr Thompson thought he did that in August 2001 but it was certainly done by September 2001.

[5] The plaintiff company claims that it lost £1,000,000 loss of profit by the removal of this site from the transaction. It is to be noted, of course, that the transaction changed significantly with a reduction in price when these lands were removed. That is, when Mr Henderson reduced the amount of land for sale he also reduced the price. The plaintiff's contention is that the removal of those lands was due to the fault of Mr McAteer. Firstly, I accept the evidence of Mr McAteer that the deal was not a fixed one throughout. The lands at Bready did come in and out of the transaction. Secondly, I accept in its entirety the evidence of Mr Nigel Thompson who was a careful and wholly reliable witness. But he did not give evidence that the reason why Mr Henderson removed Eglinton from the transaction was because of the delay on the part of Mr McAteer. This assertion came from the evidence of Mr McCarron the agent but I have to say he was a less satisfactory witness. He had got the dates wrong in a way which instilled concern on the part of the court.

[6] The statement of claim, based apparently on his instructions, alleged that WDH Construction sold the lands at Eglinton for some £1.6m to a third party between 2002 and March 2003. However a company linked with Mr Henderson was still applying for planning permission with regard to these lands in 2003 and the purchaser, Mr Brian McCracken is only registered as owner in late 2004. In his affidavit 1 April 2008 Mr McCarron had said the sale figure was £1.6m but he corrected that to £1.5m and acknowledged that the dates were not correct. While in the affidavit he seemed to give sole blame to the withdrawal of the Eglinton lands to Mr McAteer, in his evidence he acknowledged that his client Mr Henderson felt that land values were increasing in the Eglinton area and that he could achieve more for the land in due course. Mr McCarron had not appeared when initially scheduled to give evidence and the court was told on that occasion by counsel on instructions that he was "violently ill" on that day, Friday 2 May. When it was put to Mr McCarron he denied that he had said that he was violently ill but that he was sick and he did not get to work. I must reject that evidence. On the day in question Mr McAteer caused a member of his staff, Miss Ashling Grieve, to telephone Mr McCarron at his office and then to go to the office of Mr McCarron and ascertain that Mr McCarron was in fact at work. While I do not fully accept every iota of her evidence I entirely believe her in that regard. The plaintiff's case therefore as to the cause of the removal of the lands is at best a hearsay case and a weak hearsay case.

[7] For completeness, having said that I am not satisfied that Mr McAteer's conduct caused and in particular was not the effective or dominant cause of the removal of the Eglinton lands I should say a word more. Mr Nigel Thompson quite legitimately expressed considerable surprise that at one point in the Spring of 2001 Mr McAteer chose to reply to a letter from Mr Thompson by writing to Mr Thompson's client, a most unusual step by any professional person. Mr McAteer certainly did not expedite the matter over this period of time and he was not achieving what his client wanted but it seems to me that his actions or omissions on that period did not amount to negligence and, given that there was a certain amount of complexity here and that no time limit had been agreed between him and Mr Devine for the completion of the contract that it did not amount to a breach of contract either on his part at that time. I note the submissions made by him and Mr Coyle in their thorough written closing submissions and I take those points into account including the fact that the heads of agreement do not seem to have been sent to the plaintiff's solicitors until the Autumn of 2001. I therefore find for the defendant on this first issue.

[8] The matter then continued with regard to the rest of the lands over the autumn, winter and spring of 2001/ 2002. I accept Mr Devine's evidence that he did ask Mr McAteer on occasions to clarify the tax issue and this did not happen. While one was left with some suspicion that Mr McAteer did not want this deal to come to fruition, I have concluded that it is only a suspicion and that I cannot be satisfied on the balance of probabilities that the various delays were deliberate on his part. Indeed I think it, on balance, more likely that he had difficulty in operating outside his own sphere of expertise, which did not extend to the taxation of companies. It is clear from the correspondence from Mr Nigel Thompson and from Messrs Tughans, for Henderson, that they were pressing for a resolution of the transaction. Mr Devine, on Mr McAteer's advice apparently had originally instructed a firm of solicitors in Derry to act on the matter. However they later decided they were not suitable, and having obtained a quotation from the plaintiff's present solicitors, which was not accepted, Mr Devine instructed Arthur Cox and Company. Their concerns, of course, were chiefly as regards the contractual agreements and any related matters rather than specifically with taxation. I am satisfied that Mr Thompson was always ready to co-operate with Mr McAteer in this regard. I am satisfied that he would have provided any necessary information well before 11 January 2002 when he did so in response to a request. I am satisfied that that fax gave Mr McAteer the necessary information to calculate the tax liability of N & R Devine Limited with reasonable accuracy following the transaction proposed by Mr Henderson and his advisors. But he did not carry out that calculation or did not convey to Mr Devine until a letter of 19 March 2002. Even then the information is, one has to say, buried in a rather long and wordy letter. Furthermore it is followed by a page of discouragement to Mr Devine in going through with the transaction. Indeed its presence in that letter, appears

to have been overlooked by the principal parties until the actual hearing of the action.

[9] Furthermore in the period preceding that we find Mr McAteer taking the advice of a Mr Clive Russell, a tax consultant. Mr Russell never sent an invoice to Mr Devine. I find that consulting him was Mr McAteer's idea. I draw the inference that Mr McAteer did not fully understand the tax implications of the transfer deal which was being put forward by Mr Thompson of Moore Stephens, although the latter said there was nothing particularly unusual about it. I note the further letters of Mr McAteer as late as May of 2002 were still warning against the deal but without ever coming to grips with what was a fairly simple equation. I accept the evidence of Mr John Love and Mr Sean Devine that the matter was resolved to Mr Devine's satisfaction at one short meeting between them and a second meeting of perhaps two hours. Within about two weeks of being instructed in the matter Mr Love had calculated what the liability of Mr Devine and his company was. Like Mr Thompson he rejected the allegation that there was a "tax trap". It was simply a potential liability which the company Mr Devine's company was buying would be under if and when they disposed of the assets held in Hartford. Mr Devine did his calculations when properly advised by Mr Love and decided that the deal was still a profitable one, even with a tax liability approaching half a million pounds. This was the structure which was advantageous to Mr Henderson and which throughout he was insisting on. I can see no good reason why that should not have been done at a much earlier stage by Mr McAteer. Either he did not in fact grasp these matters and was operating outside his scale of competence or he had some ulterior motive for trying to dissuade Mr Devine from completing the transaction. In any event he did not perform the task agreed with Mr Devine of bringing this deal "over the bar" or to completion. Given the delay which had occurred it was reasonable for Mr Devine to employ Mr Love who did bring the matter to completion. I therefore find that Mr McAteer did not perform his contractual obligation to Mr Devine as previously agreed. Therefore he is not entitled to the fee of £10,000 plus VAT (with or without a discount). I accept the submission of Mr Coyle that a quantum meruit is not appropriate in the circumstances.

[10] The plaintiff company goes further. Mr Devine, in his witness statement and in his oral evidence said that Mr Henderson was annoyed about this delay and threatened to withdraw from the transaction completely in the Spring of 2002. To assuage his anger Mr Devine agreed to pay him an additional amount of £25,000 which seems to have been a form of interest on the purchase price which had not altered from September 2001. Mr Devine's advisors then claim that amount as a loss caused by the breach of contract and negligence of the defendant, Mr McAteer. Having considered the evidence and the submissions of the parties I am not satisfied that Mr McAteer was guilty of negligence in this regard. He was guilty of wasting his energies in

some unnecessary directions and in delay in providing advice which he had promised to provide but it does not seem to me that a case of negligence against him has been made out. Mr Coyle accepted that his case was based on omissions rather than negligent acts and I do not find that the former on these facts amount to negligence.

[11] I have, however, found that he was in breach of his contract with Mr Devine who, for those purposes, was acting for the plaintiff company. To recover damages for a breach of contract the plaintiff must show that the breach was the "effective" or "dominant" cause of that loss. Chitty on Contracts 26-029; Galoo v Bright Grahame Murray [1994] 1 WLR 1360, at 1374-1375. I find, on the probabilities, that Mr McAteer's delays of some nine months in providing the advice did contribute to this need to pacify Mr Henderson. But was it the effective or dominant cause of that loss? At that point I feel the plaintiff faces a number of difficulties. First of all it is clear that there are a considerable number of other matters being debated at that time. See the letter from Arthur Cox and Company of 19 April 2002 to John McKee and Sons who were acting for the other side. That letter reveals that as late as then Mr Creed of Arthur Cox was taking an opinion by telephone from Senior Counsel in London with regard to some aspects of the transaction. Furthermore as late as 22 May 2002 Messrs Moore Stephens were reviewing draft documentation from Arthur Cox relating to the proposed agreements including possible VAT liability. This would point to this being an elaborate and very substantial transaction which still had a considerable number of loose ends before Mr Devine and Mr McAteer fell out at the beginning of May 2002.

[12] There are some further matters which weaken the plaintiff's case. Even on his own evidence Mr Devine does not appear to have complained to Mr McAteer that he was about to agree or had agreed to pay Mr Henderson an additional £25,000 because of Mr McAteer's prevarication. Mr Devine is a very substantial businessman and while I accept he was strongly under the influence of Mr McAteer in 2001 I do find it surprising that if he believed he was paying or agreeing to pay this sum of money because of Mr McAteer that he would say nothing to him. Mr McCarron in his affidavit does not blame this payment on the defendant but on delay generally. Furthermore I note that the writ of summons in this Act was not issued until 29 June 2004 more than two years later. It therefore bears the marks more of a sweeping up exercise by Mr Devine's solicitors rather than a sense of burning indignation on his part at the time. It was also right to say that Mr McAteer drew attention to the cheque itself which is not paid by N & R Devine Limited but paid by Sean Devine Limited. Furthermore it is paid to Mr Henderson on 21 January 2003 some eight months or more after it was agreed. The precise date of the agreement indeed was not before the court and does not seem to have been expressly noted at the time.

[13] For all these reasons it seems to me that the plaintiff has not proved its case against Mr McAteer in this regard. It has not satisfied me on the balance of probabilities that his omissions were the effective or dominant cause of Mr Henderson's demand for £25,000. I therefore find for Mr McAteer on the action brought by N & R Devine Limited against him.