Neutral Citation No.: [2008] NICh 18 **FINAL** *Ref:* **DEE7260**

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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Action 2006 No 52529

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SEAN DEVINE

Plaintiff;

-v-

DANIEL McATEER

and

GAVIN Mc GILL
(No 2)

Defendant.

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DEENY J

[1] In this action the plaintiff sued the defendants and each of them on foot of a writ of summons of 3 August 2006. The claim therein is for damages for loss and damage sustained by the plaintiff by reason of the negligence, breach of contract and breach of fiduciary duty of the defendants in and about the management of Roe Developments Limited as a company within the rules of the Enterprise Investment Scheme. The Statement of Claim of 12 February 2007, as amended, with leave, elaborated on this allegation. The plaintiff contends that he lost tax relief of £20,000 with interest thereon of £7,336.88 which he was required to repay to Her Majesty's Revenue and Customs because of a breach of the enterprise investment scheme regulations and statutory provisions in connection with his investment in Roe Developments Limited. The Statement of Claim made clear that the defendants were sued

not only as directors of the company but as tax advisers to the plaintiff and in the first defendant's case as his accountant.

[2] At the opening of the case I pointed out to Mr Coyle of counsel, who appeared for the plaintiff that the Statement of Claim was in wider terms than the writ of summons. His submissions were firstly that it was legitimate for a Statement of Claim to enlarge on the writ of summons and that no amendment was necessary, but that if the court was against him on that he would apply to amend. The defendants, who both appeared in person, opposed the application to amend and the prior submission of Mr Coyle. The court rose to consider the authorities on this point referred to in the Supreme Court Practice by Mr Coyle. I was satisfied on foot of the dicta of Romer LJ in Marshall v London Passenger Transport Board [1936] 3 All ER 83, 90 and that of Lord Greene MR in Batting v London Passenger Transport Board [1941] 1 All ER 228, 299 and that of Ormerod J in Grounsell v Cuthbert and Lundy [1952] 2 QB 673 and particularly that of Devlin J, as he then was, in Hill v Luton Corporations [1951] 2 KB 387 at 390 that a defective endorsement was curable by a properly drafted Statement of Claim, even if a limitation period had expired in the interval. It will be observed that the added material in the Statement of Claim still relates to the conduct of Roe Developments Limited but draws attention to the plaintiff's contention that the defendants were his tax advisers and that Mr McAteer was his accountant. In the circumstances I acceded to Mr Coyle's submission that an amendment was not required. For completeness I observe that the defendants had had the Statement of Claim for some months and there could be no question of them being taken by surprise and, if required, leave to amend could properly have been granted.

[3] On 22 April 2008 at the conclusion of the plaintiff's case both defendants applied to dismiss that case. On 24 April 2008 I delivered judgment on that application in Sean Devine v. Daniel McAteer and Gavin McGill [2008] NI Ch 7. I found then that the plaintiff had not adduced a case for Gavin McGill to answer and I entered judgment for him. I find that the plaintiff had adduced a case for Daniel McAteer to answer and I directed the action to proceed against him. It did proceed therefore against Mr McAteer both in his capacity as the plaintiff's accountant and in his capacity as a director or Roe Developments Limited. The nature of the legal duty arising from the latter is not without interest. I set out my views on that at paragraphs 8 to 17 of the previous judgment. I refer to that and do not propose to repeat the matter therein set out.

[4] I have delivered judgment in the closely related action of Mary Devine v Daniel McAteer. Therein I have dealt with a number of the issues raised in this action also and I do not propose to repeat myself. I consider therefore that I can deal with this action quite shortly, conscious as I am of the desirability of the parties knowing their position in regard to the same.

[5] The defendant Daniel McAteer accepts that he owed a duty of care to the plaintiff as his accountant and tax adviser. He does not, in his closing submission, at least, accept that he owes a duty of care as a director of Roe Development Limited but claims that he discharged such a duty of care, if such existed. Many of the facts of the matter are not in dispute but some are.

[6] The plaintiff gave evidence in this action. I considered him an honest witness who was trying to conscientiously remember events which had taken place some time ago. In cross-examination the defendant, who conducted that cross-examination, pointed out a number of apparent discrepancies between the plaintiff's oral evidence and previous documents issued on his behalf in this or other litigation. Insofar as there are discrepancies, having considered the same, I consider that the likely explanation is merely a difference of language between the plaintiff speaking colloquially and his legal advisers preparing a document for the court, in one case a petition for the winding up of a company. He admitted in cross-examination by the defendant that the defendant had made or saved him large sums of money in other respects. It is convenient that I deal with that issue now. For the reasons set out at paragraphs [17]-[21] of the judgment of Mary Devine v Daniel McAteer I do not consider that the defendant, whether as an accountant or director of the company is entitled to set off for money he made for the plaintiff on other occasions. As I pointed out there are good reasons for taking that approach. The facts here are not exactly the same but I consider on reflecting upon them that the same principles should apply.

[7] The plaintiff admitted that what he had lost was not the investment but the tax relief on that investment. I am satisfied that the defendant had promised him that he would get tax relief on his investment in Rowe Development Limited or indeed more generally in a company which qualified for such tax relief. The plaintiff believed it was 40% but in fact the proper measure of relief was 20% although it may well be that the plaintiff was told the former. Insofar as there is a dispute of recollection between the plaintiff and the defendant personally I prefer the evidence of the plaintiff. I accept the evidence of the plaintiff that he had been advised by his accountant before 17 November 2004 that he would loss the tax relief on this investment because it did not comply with the statutory requirements. There was no reason why he should not sell the shares with effect from 17 November 2004 as part of the settlement of other litigation. That was a significant point in the defendant's initial defence but one which I consider does not avail him for that reason.

[8] The court heard from Mr Malcolm McCausland, a senior officer with HM Revenue and Customs. Mr McGill on behalf of the company had written to the Revenue informing them that they had not complied with the rules of the investment income scheme as they were required to do. It was on foot of that admission, volunteered by Mr McGill, although not it would seem with the agreement of Mr McAteer, that relief was subsequently withdrawn. The

amount of £20,00 with interest thereon of £7,336.88 was repaid to HM Revenue and Customs.

[9] Both with this witness and in his own evidence Mr McAteer sought to raise the possibility that the Revenue might be able to revisit this decision that relief was withdrawn because of the failure of the company to employ the funds within the required time limit. Accepting for these purposes that there is such possibility I conclude that it makes no difference to the outcome of this case. The withdrawal of the relief and the repayment of the sums on foot of the relief are facts established to the court. The possibility and it seems to me only a remote and theoretical one at present, that the Revenue might one day arrive at a different decision cannot serve to set aside an established fact before the court. Mr McAteer would have needed to have had that decision reversed ahead of the hearing before the court if he had wanted to defeat the claim in that way. He has had ample time in which to do so but all he has been able to do is raise the possibility which is not enough. I note the documents produced by Mr McCausland in support of that view.

[10] The plaintiff called Mr Kevin Bell F.C.A., M.C.I. Taxation, a partner in the leading firm of KPMG for nearly 20 years, who specialises in this field. Mr Bell was an impressive witness dealing with quite arcane points of revenue law and doing so at times without prior notice. It does not seem necessary to me that I should go into these points in detail. On one of the subordinate points I consider that Mr McAteer made a fair case of saying that an alternative interpretation to that put forward by Mr Bell would have been a reasonable interpretation, although Mr Bell's interpretation seems correct in law to me. But on the main issue I consider the evidence of Mr Bell to be wholly convincing. In order to obtain the relief available under statute the investment had to be "employed" within 12 months of receipt, pursuant to Section 289(1)(c) of the Income and Capital Taxes Act 1988 as amended. This was not done. Indeed it does not seem to have been done at all. There are limitations on the form that employment could take and I accept Mr Bell's evidence that nothing which Roe Developments Limited did with the investment constituted employment which complied with the statutory provisions. It might arguably have constituted land dealing but that was a non-qualifying investment expressly excluded under Section 297(2)(a) of the 1988 Act. It is probable, on the facts, that the relief would have failed for other reasons, particularly the loan, helpfully set out by Mr Bell but there can be no doubt that it failed for this reason. In such circumstances under Section 300(1)(a)(b) "the relief shall be withdrawn".

[10] I have carefully taken into account the evidence of Mr McAteer himself and the very thorough closing submissions which he prepared for the court. I note that Mr Sean Devine was awarded new shares which could have complied with the EIS relief if they had been properly employed. In this respect his case differs from that of his wife. But I find that they were not so

employed, as Mr McAteer's own associate Mr McGill volunteered to the Revenue.

[11] I note Mr McAteer's contention that the company and he had made all reasonable efforts to invest the money within the 12 months and that the fault lay with the company's solicitors. I find that that is not the case. I find that in any event his burden as the plaintiff's tax adviser and, quaere, as a director of the company would have extended to informing the solicitor in writing that such a time limit existed and that such a conveyance, if otherwise compliant, would need to be completed. I am not satisfied that that was the case and I am entirely satisfied that there is no evidence of any reminder to the solicitor, which would have been appropriate in the circumstances, that the time limit was crucial and/or imminent. It seems that Mr McAteer had many balls in the air at this stage and allowed this one to drop. I take into account a number of very valid points put in cross-examination to the defendant by counsel for the plaintiff but I consider I need not set them out seriatim for the purposes of this judgment. There may have been some well intentioned plans but they were not brought to fruition.

[12] I find against the defendant as accountant and tax adviser both in tort and in contract on the primary issue here. As a result of his failure to ensure that the monies were employed in a way consistent with the statutory requirements, or to take reasonable case to ensure that was done the plaintiff lost tax relief in the sum of £20,000. It is not therefore necessary for me to rule on the extent of the duty of care of Mr McAteer as a director of the company and the extent of any breach of any such duty of care. I incline towards the view that on the facts of this case he did owe a duty to ensure investment of the monies lawfully and that he was in breach of that duty but I need not reach a final conclusion on that matter in the circumstances.

[13] Having considered the evidence I do not consider there was contributory negligence on the part of the plaintiff who was a layman whom at that time reposed considerable trust in the defendant.

[14] In his amended statement of claim the plaintiff claims damages of £27,336.88 with interest thereon at 8% pursuant to the Judicature Act "being the amount of money which he had to pay to HMRC in claw back from the EIS." I have some unease about this claim. Although the point was not taken in quite this way by Mr McAteer it seems to me that the correct position is as follows. The plaintiff had the use of the £20,000 by way of tax relief. The Revenue, reasonably, claimed interest on that tax relief which had been incorrectly claimed. That interest was paid. However the plaintiff had the use of the £20,000 for the period in question. One could approach it, as Mr McAteer did in his closing submissions, as a calculation of the interest he, the plaintiff, would have earned on the money while he had it. However it seems clear that in the period in question the plaintiff was expanding rapidly and

successfully as a builder and developer. There seems to be no evidence that he put the money in a bank but rather that he used it in the general expansion of his business. I conclude on the balance of probabilities that he put the money to a use at least as fruitful as the interest which he subsequently had to pay to the Inland Revenue. I consider therefore that the sum to which he is entitled is £20,000 with interest from the date of the writ i.e. 3 August 2006. I assess the rate of interest at 6%, consistently with the other actions which I have had to decide between these parties, amounting to £2850 and giving a total award of £22,850.