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*Judgment: approved by the Court for handing down* | *Delivered:* **24/4/08**
*(subject to editorial corrections)**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**CHANCERY DIVISION 2006 No. 52529**

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**SEAN DEVINE**

**-v-**

**DANIEL McATEER**
**AND**
**GAVIN McGILL**

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**DEENY J**

[1] In this action the plaintiff sues 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 in 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] This ruling relates to applications made by both defendants to dismiss the plaintiff's case at the conclusion of the plaintiff's evidence, which on 22 April 2008. I received helpful written and oral submissions from both defendants and from Mr Coyle.

[4] The parties tended to approach the matter under the separate headings of their liability as tax advisers or as directors of Roe Developments Limited and it is convenient in the circumstances to follow the same approach.

[5] Before turning to the two categories as they apply to each defendant I note that the plaintiff relies on paragraphs 14.29 and 14.30 of Valentine: Supreme Court Practice and in a dictum of Carswell J, as he then was, in O'Neill v DOE [1986] NI 290 at 292A to the following effect.

> "The issue at this stage of the case was whether there is any evidence upon which a reasonable jury, consisting of persons of ordinary reason and firmness, could if properly directed find in favour of the plaintiff."

The essence of the plaintiff's case here is that the relief referred to was withdrawn by HM Revenue because the monies subscribed for shares by Mr Devine were not invested within the statutory time limit of 12 months.

[6] With regard to the first defendant's liability as an accountant and tax adviser etc. I am satisfied that the plaintiff has met the necessary standard and that the defendant has a case to meet. The first defendant has a number of defences to the claim which include:

(a) That he had made all reasonable efforts to invest the money within the 12 months and that the fault lay with the company's solicitors;

(b) That there is still a possibility that the Revenue will reverse its decision of 2004 and 2005 with regard to the loss of relief;

(c) That in any event the plaintiff sold the shares in November 2004 which is an independent and significant breach of the scheme;

(d) That the plaintiff had gained overall from his relationship with Mr McAteer.

The court will consider these defences which have been extensively outlined by Mr McAteer in his cross-examination of the plaintiff's witnesses but they do not lead the court to dismiss the plaintiff's case at this stage. In accordance with the customary practice when refusing such an application I will say nothing further at this time.

[7] Mr Gavin McGill has been sued as the plaintiff's tax adviser also with regard to this loss of EIS relief. At one point the plaintiff sought to rely on the first defendant's statement of evidence which had been submitted to expedite matters but I pointed out that at this stage that it could not be evidence against the defendant. The evidence on behalf of the plaintiff was that Mr McGill had done some work for the plaintiff and his companies in the building and property development business but that such work was confined to PAYE and dealing with sub-contractors tax exemptions. There was no suggestion whatsoever in the plaintiff's evidence that Mr McGill ever gave or was asked for advice on income tax, capital gains tax or the enterprise investment scheme by Mr Devine. While not essential to the decision I now make it does not seem possible or appropriate for me to ignore my own judgment in Noel Duddy and Daniel McAteer T/as Duddy McAteer and Company v Sean Devine Limited and Others [2007] NIQB 89. Consideration was given in that case as to whether Mr Duddy was a partner of Mr McAteer in his accountancy practice in Derry while acting for the plaintiff in this action. It was never suggested at any time that Mr Gavin McGill was a partner in the same practice. There is no evidence before the court, as Mr McGill legitimately observed, that Mr Devine had sought any advice from Mr McGill on EIS or other personal tax matters. In the circumstances therefore I am satisfied that Mr McGill has no case to answer under that heading.

[8] I now turn to the more complex question as to whether the defendants have a case to answer in the way described by Carswell J in O'Neill in their capacity as directors of Roe Developments Limited [RDL]. It is part of the plaintiff's case that Mr McAteer was the controlling shareholder. I do not think the allegation that Mr McGill was "an associate of the first named defendant" could ground a cause of action. The evidence before the court is

clear that the relief was withdrawn because the money was not invested within the 12 month time limit. The real point for the consideration of the court at this stage is whether the defendants or either of them owed a duty of care as directors of the company to so conduct its affairs as to either ensure that the statutory 12 months time limit was complied with or to take reasonable care to achieve that object. For these purposes it is clear that there is evidence of a failure to take reasonable care on the present state of the evidence. But does the duty of a director of a company such as this, not the company itself, extend to an individual shareholder investor like Mr Devine, on the particular facts here?

[9] The starting point for the consideration of the law to be applied to this issue is the decision of the House of Lords in Hedley Byrne and Company Limited v Heller and Partners Limited [1964] AC 465. I say that because the case made by the plaintiff in this action has been a case of negligence. Breach of contract and breach of fiduciary duty were pleaded but the simple fact of the matter is that there was no written contract between the parties regarding this investment in RDL and the oral evidence has been of a nature directed to the tort of negligence rather than to any alleged oral contract. Nor has the case of fiduciary duty been established in respect of this loss of relief. In Hedley Byrne and Heller the House of Lords held, in principle, that an action would lie in tort against bankers in respect of the gratuitous provision of a negligently favourable reference from one of their customers, when they knew or ought to have known that the plaintiff would rely on their skill and judgment in furnishing the reference and the plaintiff in fact relied upon it and in consequence suffered financial loss. It will be recalled in that case that the duty of care was negatived by a disclaimer of responsibility under cover of which the reference was supplied. Lord Morris said at page 502:

> "My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference."

[10] I observe that the plaintiff's case is that the first defendant held himself out as an accountant skilled in tax matters who could advise him on such matters and whom he trusted to receive his monies for that purpose. The plaintiff however said that at the time of the investment he believed the money was going into a fund or pool and he was not aware of the specific investment in RDL. Mr McAteer pointed out that he had signed the necessary forms to become a shareholder in RDL but he said he merely signed what Mr McAteer put in front of him.

[11] There was no such allegation against Mr McGill. It is possible that he is a certified accountant like Mr McAteer although there does not seem to be any actual evidence of that before the court at the present time. Indeed in the Statement of Claim the plaintiff describes him as a bookkeeper to the plaintiff at all material times.

[12] I will quote further from Hedley Bryne and the speech of Lord Devlin at page 526:

> "A promise given without consideration to perform a service cannot be enforced as a contract by the promisee; but if the service is in fact performed and done negligently, the promisee can recover in an action in tort."

The judgment of Lord Devlin is of course extremely valuable in extenso but I will content myself with one further quotation from page 529:

> "Where there is an express undertaking, an express warranty as distinct from mere representation, there can be little difficulty. The difficulty arises in discerning those cases in which the undertaking is to be implied. In this respect the absence of consideration is not irrelevant. Payment for information or advice is very good evidence that it is being relied upon and that the informer or adviser knows that it is. Where there is no consideration, it will be necessary to exercise greater care in distinguishing between social and professional relationships and between those which are of a contractual character and those which are not. It may often be material to consider whether the adviser is acting purely out of good nature or whether he is getting his reward in some indirect form. The service that a bank performs in giving a reference is not done simply out of a desire to assist commerce. It would discourage the customers of the bank if their deals fell through because the bank had refused to testify to their credit when it was good."

[13] Clearly there is some analogy with the position here. Although there was no direct or contractual payment from Mr Devine to either defendant for conducting the company in a way that preserved his tax relief nevertheless they were conducting the company not for social or purely gratuitous reasons but as a business in which they were directors and shareholders and in which

they were using the capital provided by Mr Devine for the purposes of the company.

[14] That landmark decision was considered at length by the House of Lords in Henderson and Others v Merrett Syndicates Limited and Others [1995] AC 145. Their Lordships, and Lord Goff of Chieveley in particular, affirmed the principle from Hedley Byrne for this form of negligence of an assumption of responsibility by the defendant. Lord Goff at pages 180, 181 notes some criticisms of that approach eg. by Lord Roskill in Caparo Industries Plc v Dickman [1990] 2 AC 605 at 628. But he concludes that at least in cases such as the present one, which dealt with the duty of persons managing insurance syndicates at Lloyds of London on behalf of Names:

> "There seems to be no reason why recourse should not be had to the concept, which appears after all to have been adopted, in one form or another, by all of their Lordships in Hedley Byrne. … Furthermore, especially in a context concerned with the liability which may arise under a contract or in a situation 'equivalent to contract', it must be expected that an objective test will be applied when asking the question whether, in a particular case, responsibility should be held to have been assumed by the defendant to the plaintiff: see Caparo Industries Plc v Dickman [1990] 2 AC 605, 637, per Lord Oliver of Aylmerton. In addition the concept provides its own explanation why there is no problem in cases of this kind about liability for pure economic loss; but if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages for that other in respect of economic loss which flows from the negligent performance of those services. It follows that, once the case is identified as falling within the Hedley Byrne principle, there should be no need to embark upon any further enquiry whether it is 'fair, just and reasonable' to impose liability for economic loss – a point which is, I consider, of some importance in the present case. The concept indicates too that in some circumstances, for example where the undertaking to furnish the relevant service is given on an informal occasion, there may be no assumption of responsibility; and likewise that an assumption of responsibility may be negative by an appropriate disclaimer."

[15] These principles were further examined in the speech of Lord Steyn, with which the four other members of the House agreed, in Williams v Natural Life Health Foods Limited and Mistlin [1998] 1 WLR 830. There the plaintiffs had entered into a franchise agreement with the first named company. They traded at a loss for 18 months and then ceased trading. They sued the first defendant, the company for financial loss but when it was wound up they joined Mr Mistlin as a defendant on the basis of his assumption of personal responsibility in encouraging them to invest in the franchise. Hirst LJ in the Court of Appeal said at [1997] 1 BCLC 131, 152:

> "in order to fix a director with personal liability, it must be shown that he assumed personal responsibility for the negligent misstatement made on behalf of the company. In my judgment, having regard to the importance of the status of limited liability, the company director is only to be held personally liable for the company's negligent misstatements if the plaintiffs can establish some special circumstances setting the case apart from the ordinary; and in the case of a one man company particular vigilance is needed less the protection of incorporation should be virtually nullified. But once such special circumstances are established, the fact of incorporation, even in the case of a one man company does not preclude the establishment of personal liability. In each case the decision is one of fact and degree."

This passage was cited by Lord Steyn. He described the circumstances of responsibility in the following passage at p. 835F-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."

At page 836E Lord Steyn said:

> "That brings me to reliance by the plaintiff upon the assumption of personal responsibility. If reliance is not proved, it is not established that the assumption of personal responsibility had causative effect."

And at page 837B:

> "The test is not simply reliance in fact. The test is whether the plaintiff could reasonably rely on an assumption of personal responsibility by the individual who performed the services on behalf of the company."

[16] I also take into account the decision of the Court of Appeal in Partco Group Limited v Wragg [2002] 2 BCLC at 323 which upheld the statement of the law by Leveson J in the same report, at first instance. I quote from him at page 332D:

> "Whereas I do not go so far as to say that an express personal warranty is a necessary pre-requisite … I certainly endorse the view that the circumstances will be rare and that the communications which 'cross the line' must do something to identify an acceptance of personal (as opposed to corporate) responsibility."

[17] This last test reminds one of course that the plaintiff here is not suing the company, which indeed he successfully put into liquidation, but he is suing these individuals. I also take into account that the claim here does not relate to negligent advice but to negligent conduct of the company's affairs so that an essential time limit, laid down in the Act of Parliament, was not adhered to. I note that in their submissions orally to the court, when asked, both defendants accepted that a director should take reasonable care to observe the requirements of the enterprise investment scheme when they are running a company with shareholders under that scheme. In this particular case they were shareholders themselves and so were members of their family. Mr Devine's investment however was an additional and later investment.

But this concession on their part does not equate with them as directors owing a duty of care to the plaintiff. Something more is required to "cross the line". On the evidence before this court it seems to me that something more does exist in the evidence relating to the very close and dependent relationship between Mr McAteer and Mr Devine at the time of the investment and I refuse his application to dismiss the plaintiff's case on this ground.

[18] The position of Mr McGill is entirely different. As stated above the plaintiff's own evidence was that he had never discussed EIS with Mr McGill. He did not know that he was a director of RDL until much later. Mr Coyle relies on the fact that Mr McGill submitted the form for the relief and that it was he that wrote the very important letter to the Inland Revenue in December 2004 which triggered the withdrawal of the relief. But those are not actions contributing to an assumption of personal responsibility towards Mr Devine to protect his relief. The latter act, although obviously important in this case, took place after Mr Devine had agreed to sell his shares. It must be recorded that although bad faith is alleged by the plaintiff against Mr McAteer in other respects, especially the purchase and resale of Hennessey's Bar, the loss of the tax relief through non-compliance with the time limit is not alleged to be caused by bad faith but was clearly a matter of omission, apparently negligent. In his submissions Mr McGill admits to being a qualified accountant but he was not Mr Devine's accountant. Although it would appear from the dictum of Lord Goff that I do not have to decide whether the imposition of a duty here would be "fair, just and reasonable" in respect of Mr McGill I consider that it would not be. (This was not a case where printed material had been given to the potential investor assuring him, without a disclaimer of liability, that Mr McGill was a qualified accountant who would be an executive director of the company taking reasonable care to ensure that tax relief would be obtained by careful adherence to the Revenue requirements. Nor is it the same as a valuer signing a valuation for an identified client.) I therefore enter judgment for the second defendant Mr McGill against the plaintiff. The action continues against the first defendant.