

**Neutral Citation no. [2007] NIQB 89**

Ref: **DEEC5928**

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

Delivered: **05/11/07**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
QUEEN'S BENCH DIVISION**

**BETWEEN:**

**NOEL DUDDY AND DANIEL McATEER T/A DUDDY McATEER  
& CO**

**Amended by Order of the Court of 12 September 2007 to  
DANIEL McATEER T/A DUDDY McATEER & CO**

**and**

**N R DEVINE LIMITED, SEAN DEVINE LIMITED, SEAN DEVINE T/A  
SEAN DEVINE CONSTRUCTION AND N & R DEVINE LIMITED AND  
MRS MARY DEVINE T/A M D PROPERTIES**

**DEENY J**

[1] The plaintiffs as originally named were accountants trading from 21 Clarendon Street, Derry. They were represented at the hearing of these actions by Daniel McAteer appearing in person. He informed the court that the partnership between he and Mr Duddy had been dissolved and that that gentleman was semi-retired and that he, McAteer, was entitled to the proceeds of the action on behalf of the partnership. In the events Mr Noel Duddy was called as a witness by the defendants. I need not dilate on his evidence at length but he gave the testimony that he had been a partner of Mr McAteer's for only one day, had thought better of it and had left the office and never returned. Mr McAteer gave further evidence about this himself and Mr Duddy was recalled and acknowledged that he had continued to do some work for or with Mr McAteer and attended at least one function where the partnership name was used for the entertainment of prominent local persons. However he did affirm that he was not claiming any of these fees and I directed that the title of the actions be amended to Daniel McAteer only.

[2] The plaintiff claims, in this group of removed civil bills and one action, the payment of fees which he says are due and owing by Mr Sean Devine and

his wife Mary or by companies controlled by them. At an early stage of the proceedings Mr John Coyle who appeared for the defendants helpfully indicated the nature of the defences which he would be advancing. It was necessary to ascertain this with regard to the length of hearing and the nature of his cross-examination. His clients are pursuing other claims against Mr McAteer some of which are listed for hearing in April and May of 2008. He ventured to submit that because of the alleged negligence, fundamental breach of contract and breach of confidence of Mr McAteer he should not succeed in these actions even if the fees were properly due and owing, which he disputed on instructions. I asked him for both the authority and the evidence for those propositions in brief form. He relied on the well-known authorities in Chitty on Contracts centring on Cutter v Powell [1795] 6 TR 320. But he sensibly acknowledged that he had no evidence of a contract between the plaintiff and the defendant which made payment of fees to the plaintiff for accountancy and taxation or indeed other work dependent on his performance in connection with other aspects of the defendant's business. With one exception he could not say that there was such a conditional link. Nor in law could he point to any modern authority which suggested that an accountant or other professional person in this place was disentitled to the entirety of his fees if it was established that some of his conduct was below professional standards. He would rely when the court came to it to the fee on the transaction known as the Billy Henderson Deal being subject to due performance but in other respects, the matter having been clarified, he would concentrate his fire on whether the fees were due and owing at all or at the rates and the amounts claimed. He reserved his right to apply to the court after judgment to ask for a stay on any payments to the plaintiff, if any such payments were ordered by the court, until the hearing and decision in the actions listed for the Spring of 2008. In the circumstances it was not necessary to hear at length from Mr McAteer but he made the valid point that in at least two respects, one of them mentioned on 5 September itself, the Ballymoney case, Mr Devine had brought actions against him which he then discontinued in full at a late stage close to trial, although without being willing to pay costs. I will bear that in mind at the appropriate time.

### **Duddy and McAteer v N & R Devine Limited**

[3] Having heard from the parties I ruled that I would take the evidence in the four cases separately, partly to avoid confusion and partly in ease of Mr McAteer who was both advocate and witness on this occasion. However I agreed that I would not give judgment in each case separately until I had heard the evidence in all the cases as there was inevitably significant overlap. I observe that three of these cases actually began life as Civil Bills but on the direction of Mr Justice Weir, my predecessor in the Chancery Division, they were removed and brought into the High Court. There was no subsequent application by either party to remit them back to the Court of the Recorder of Londonderry.

[4] The first case was against N & R Devine Limited. Mr McAteer furnished a file of papers. He had also served a Statement of Claim on the direction of the court at the request of the defendant, on 20 June 2007. It briefly relied on his invoice number 367 requesting payment of £1,969.80 plus VAT, which amounts to £2,314.52 for “professional services regarding the accounts and tax affairs of the above company for the year ended 30 June 2002.” An amended defence was served on 10 July 2007. As indicated above there was no actual contract between the parties but Mr McAteer had sent a letter of engagement on 10 May 2000 to Mrs M E Devine who was on the evidence both a director and the majority shareholder in N & R Devine Limited. A similar letter was sent on 16 June to Mr Sean Devine. Although Mr Coyle was justified in saying there was no letter to this particular company it would seem that the relationship was conducted in accordance with that letter of engagement.

[5] Mr McAteer furnished a lever-arch file of copy documents which he said supported the claim for fees. At page 14 of section 2 there was a copy of the Customer Ledger Card. That recorded that an invoice dated 31 January 2001 No 224 was in the sum of £2,056.25 (including VAT) and was paid on 12 March 2001 by the defendant. Page 15 of that section shows that invoice did indicate a series of tasks performed from the creation of the limited company on 8 July 1999. Of course the engagement letter would appear to have been after that date. He relied on it also as one of the two pieces of evidence justifying his rates for payment of himself and his employees i.e. that the invoice had been paid without protest or objection based on the same rates. I will return to that in a moment. Mr McAteer claimed that he had frequently discussed rates of pay with Mr Sean Devine. He contended that Mr Devine was close to or was a shadow director of the company and the driving force behind it. His wife owned 75% of the shares and his father owned 25%. This was not disputed by the defendant. He had told Mr Devine what his rates were and apart from some banter there had been no objection to them. Mr McAteer admitted that he had not printed off the rates from his computer for Mr Devine nor furnished him with a card as to what those rates were. In the event Mr Coyle did not seek to argue that the hourly rates were excessive.

[6] In opening the actions together Mr McAteer said that Mr Devine had wanted more than an accountancy relationship. His business was growing and he relied on Mr McAteer to a considerable extent for advice. Although a shrewd businessman he was apparently dyslexic and was happy for others to deal with documentary matters. Mr Devine was a builder engaged in building housing estates and, at times commercial premises. His wife owned a number of such premises which were let out for rent.

[7] He was sworn to give evidence in this particular matter of N & R Devine Limited and went through the documents in the file to which I have

referred. I do not find it necessary to go through that in detail. It does appear to show that his firm were providing accountancy services on a regular basis to the defendant. The defendant had no in-house qualified accountant at that stage although he had a person who performed some of those functions. The balances in management accounts were therefore in effect prepared in Mr McAteer's office. His invoice 367 on which he sues is for the work between 1 February 2001 and the end of the relationship, at Mr Devine's behest on or about 7 May 2002 a period of about 4½ months. This is what the witness said in evidence although the actual invoice claims for work carried out between 5 November 2001 and 6 May 2002. The documents which he relied on he told me were generated in his office and kept in his office.

[8] They included some correspondence between Mr McAteer and various professional people and companies in England relating to a property in England let to the Woolwich Building Society. Mr Coyle subsequently took the point that part of this could not be described as tax or accountancy services and was therefore outwith Mr McAteer's invoice and pleadings. Mr McAteer did acknowledge that the invoice was somewhat incomplete in that regard and said he would do it differently but he did point out that with regard to that property he would be asked by his clients about the taxation implications of any letting or sale. It may be therefore that some modest deduction would be appropriate from the invoice for these reasons.

[9] The plaintiff was subjected to a searching and skilful cross-examination by Mr Coyle. With regard to the rates Mr Coyle did not so far as I can see put to him that it was untrue that he had discussed rates with Sean Devine, including explaining the basis of them i.e. that he charged three times the cost to him of the employees time. These rates are set out at page 17 of section 2 on a timesheet which was sent to the defendant's solicitors, on 10 March 2004 by Mr McAteer's then solicitors, Messrs Harrisons, attached two replies to a Notice for Particulars. There does not seem to be any subsequent correspondence challenging those rates. In the event neither Sean Devine nor Mary Devine gave evidence in any of these actions to contradict Mr McAteer.

[10] Mr Coyle exposed the fact that the timesheet was based on diaries and manuscript timesheets kept by employees of his at the time. Mr McAteer said he had not deliberately destroyed them but he had not discovered them or included them in a list of documents. He did not know where they were but would search for them. The various actions brought by Mr Devine had been very damaging to his business and he had sold 21 Clarendon Street and moved to Queen Street but he had thought that he had taken his papers with him. He could not recollect what had happened to them but he could not remember what happened two or three years ago. He told the court that he could not remember when he was married. He undertook to search for the documents over the weekend. He accepted they were relevant and he did not

know why they were not included in the list of documents prepared by his solicitors.

[11] Mr Coyle established that a considerable amount of notation in some of the documents was in the hand of a Mr Gerry O'Connell. It then emerged that no fee had been charged for Mr O'Connell. He had left Mr McAteer's employment in or about November of 2001. As the fees claimed ran back to 5 November 2001 it therefore in fact demonstrated the correctness of the timesheet details for invoice number 367. The plaintiff had not claimed for fees for this man who had left at about the time the invoice fees commenced to be claimed. Likewise Mr Coyle had discovered some work done by Mr Paul Gallagher which did not appear in the timesheet i.e. the plaintiff had undercharged in that respect. Mr McAteer himself had only charged for three hours at his hourly rate of £90 per hour on 13 March 2002 but his diary entry for that day contains a note consistent with that. He had had several meetings with a banker and with a tax consultant on Mr Devine's behalf and he said in evidence that he believed Mr Devine was present at the meeting with at least one of those. He attributed part of the work on that day to N & R Devine Limited. Although not strictly relevant to this case it did emerge in this cross-examination that Mr McAteer agreed that he had agreed the fee in the Henderson deal at £10,000 but had not expressly agreed the fees for this company but they had paid his fees before and he had "repeatedly discussed my rates with Sean Devine and had also told Mary Devine and Patrick Devine of those rates." It is also right to say that part of the plaintiff's case now deviated from what had been pleaded in particulars e.g. the claim in the replies of the particulars of 10 March 2004 in response to the defendants Notice for Particulars that: "Sean Devine signed the engagement letter on behalf of the defendant." Mr McAteer was quick to deny responsibility for anything done by his solicitors on his behalf. That was part of generally a rather evasive approach to any unwelcome questions put to him by counsel. I am confident the solicitors would not have acted without instructions in that and other matters. In particular I am sure that they would have asked him to look for any relevant documents when he was providing Lists of Documents in pursuance to proper requests or orders of the court. His lists are not accurate. Confidence in his uncorroborated testimony was further weakened when he said that he could not remember the year he was married and had even forgotten what year this was. Nevertheless with the exception of the failure to disclose the original documents in the hands of his staff it did seem to me that Mr McAteer had proved that invoice 367 seemed justified, save that I reduce it by 5% for the English property work, which is outside the invoice, the letters of engagement relied on by the plaintiff and the pleadings. Therefore the sum of £2,198.79 on foot of this removed civil bill with interest at 6% from the date of the civil bill, 6 May 2003 until 5 November 2007 i.e. 3 years and 6 months at the special damages rate of 6% which I calculate to be £461.74 giving a total of £2,660.53.

## **Duddy and McAteer v Mary Devine t/a M D Properties**

[12] These proceedings commenced with a civil bill, which as indicated above Mr Justice Weir removed into the High Court. It was issued in the sum of £2,170.81, dated 6 May 2003. Again Mr McAteer produced a bundle of documents. It included a customer ledger card which showed three invoices outstanding. That was supported by the invoices and by a timesheet document for invoices 154 and 214. A third invoice 274 was in the sum of £1,175 i.e. £1,000 plus VAT. The plaintiff's evidence was that he had been retained by Mrs Devine at the same time as her husband i.e. approximately 10 May 2000 although he had done quite a bit of work for them before that date on a basis that seemed probationary. An engagement letter was before the court which was dated 10 May 2000 and addressed to Mrs Devine herself. She owned properties which she let out. She was a director of N & R Devine Limited. Although he met her less than Sean Devine he saw a good deal of her. He had discussed rates with her and apart from a joke about the size of Mr McAteer's house she had not otherwise objected.

[13] In his sworn evidence Mr McAteer said that invoice 274 was an agreed fee of £1,000 plus VAT to sweep up what had been done for Mrs Devine including her personal tax return for the year ended 31 March 2001, which would have included preparing a schedule of rents from her properties. In the file he was able to point to various papers underpinning the claim that members of his staff had done work for Miss Devine, particularly under invoice 154.

[14] However invoice 414 was rather different. It was in the sum of £360 plus VAT i.e. £423. It was levied for "review of your accounts and working papers for the year ended 31 March 2000 to identify payment of £100,000 from your bank account in support of investments and preparing a response to queries raised by L'Estrange & Brett on your behalf regarding the above and the tax treatment of same." In regard to that invoice the only underpinning material was a very brief note in Mr McAteer's own hand in his own diary for Saturday 28 December 2002. Firstly there was a reference to Sean Devine and the number 3 Saturday and Sunday. The number 3 looks as though it has been changed from the number 2. Below that is "Mary Devine numeral 2 (Sat and Sun)". Once more the 2 looks as though it has been changed from 1. Although given time to look for it overnight Mr McAteer was unable to find any working papers underpinning that. He could find no reference at all to his claim that he worked a similar number of hours on her affairs on or about 20 December. In particular although he claimed in evidence that he had written to L'Estrange & Brett to say he would do this work but he would charge this for it, no such letter was before the court. Nor was there any letter to L'Estrange & Brett explaining about the item referred to in the invoice or answering any queries of theirs at this time. I am satisfied this invoice has not been satisfactorily proved and I disallow it.

[15] With regard to the other matters Mr McAteer laid considerable stress, more than once on the absence of any complaint or expression of dissatisfaction from the Devines about his work until after disputes had arisen between them. I have concluded that he is entitled to succeed in regard to invoices 374 and 366 which come to a total of £1,747.81. Interest on that amount for 42 months from 6 May 2003 to 5 November 2007 amounts to £367.03 giving a total of £2,114.84.

### **Duddy and McAteer v Sean Devine Limited**

[16] The third removed civil bill issued on the same day is against Sean Devine Limited and is in the sum of £3,033.62. The defendant here was 100% owned by Mr Sean Devine said Mr McAteer. There was no engagement letter but there was one to Sean Devine himself. Again accountancy services were performed for the company. Invoice 225 in the sum £3,525 was paid by the company on 20 March 2001. This claim is for invoice 361 in the sum of £1,175 and invoice 369 in the sum of £1,858.62. The first of those sums was one of the monthly retainers which Mr McAteer says he had agreed with Sean Devine for management accounts. Most of them went to Sean Devine himself as part of the action to which I will come but this particular one went to the company. The files were looked at in court and there does not appear to be a duplication of monthly retainer, although it should be said there is no specific time sheet for this. There was a time sheet for invoice 369. Again there were names of employees including Mr McAteer himself and dates of which they worked. Again I was taken to a number of these to show that work was done on the days in question and again Mr McAteer relied on the absence of any complaint in the course of the relationship.

[17] In cross examination Mr Coyle did not put to him, let alone call evidence, that there was no agreement for the payment of £1,000 a month.

[18] However he did cross examine about the overlap between the two invoices. He pointed to the plaintiff's replies to a notice for particulars setting out that invoice 361 referred to management accountancy work for the accounting period ended 31 March 2002 while invoice 369 related to work for the period 5 November 2001 to 25 April 2002. I listened carefully to the answers of Mr McAteer but it does seem to me that there was a lack of clarity about this. He was tempted to resile from the description in his replies that this was management accountancy only. He retreated to telling the court for perhaps the fourth time that Mr Devine had made £400,000 out of a particular transaction in England involving a lease to a bank. When pressed about the absence of an engagement letter Mr McAteer did seek to say that he could recover for work done and time spent. I have to say that that was wisely, included by Messrs Harrisons, his then solicitors, at the fourth reply of 10 March 2004 i.e. an entitlement to "reasonable remuneration for the services

rendered". Again Mr McAteer had to acknowledge that there were no base line documents showing this work being done. Again he sought to justify this by saying that Messrs Cleaver, Fulton & Rankin were bombarding him with queries that he was refusing to deal with in the way that they sought.

[19] Mr McAteer did acknowledge to the court that there was in the papers an element of overlap between invoices 361 and 369. It seems to me that he has largely made this matter out but I must bear in mind that the onus is on him to prove his case and to show that this was reasonable remuneration for the work done by the individuals concerned. It would not be in accordance with his agreement with the Devines if the defendant company were to be charged a second time for work done on foot of the monthly retainer. Taking all these factors into account and my comments above with regard to the quality of the evidence I have concluded that the proper course is to discount invoice 369 by 20%. Therefore the award consists of £1,175 for invoice 361 and £1,486.89 by my calculations for invoice 369 giving a total of £2,661.89. Interest at 6% for 3 years and 6 months equals £558.99, leading to judgment in the sum of £3,220.88.

#### **Daniel McAteer v Sean Devine t/as Sean Devine Construction and N & R Devine Limited**

[20] Mr McAteer opened this action, begun by writ of summons issued 10 day of June 2003 under three headings. The first of these was the claim, already averted to that he had agreed with Mr Devine that he would receive £1,000 per month as retainer to prepare the management accounts of the company. As indicated above such sums had been paid in the past and nor was Mr Coyle instructed to dispute that there was such an agreement.

[21] The second head of the claim here was for unbilled work in progress at the time of the end of the relationship in 2001. The plaintiff said there had been no complaints about this work and that he had documentary evidence to support it. I will deal with this shortly. The third heading was his claim for approximately £10,000 in fees for the work on the Billy Henderson deal. Having looked at the correspondence and heard Mr McAteer I am persuaded by Mr Coyle that my decision on that aspect of matters should await the trial of the action scheduled for the Spring of 2008 and so I will not deal with that at this time.

[22] I heard the evidence of the plaintiff in this regard on Wednesday 12 September. As indicated above his evidence, which was not in the events contradicted, was that Mr Devine had agreed to pay him £1,000 per month for preparing the management accounts of Sean Devine Construction. The largest part of the claim relates to that although there was inevitably some overlap with other businesses within Mr Devine's group. In the particular case before me that covers invoices 349, 335, 327, 326, 320, 314 and 299 each in



the sum of £1,000 + VAT ie. £1,175. They run for the period ie. month ended 31 August 2001 to the period ended March 2002 (sic). In evidence Mr McAteer said that most of invoice number 276 was paid but £50 had been overlooked. He said the court could ignore invoice 368. Examining his statement of claim I find that invoice number 293 does not appear. I should say Mr Coyle did not take issue on this point. I think the reason must be that there is a typographical error in the statement of claim and that invoice number 276 as he said in evidence had only £50 left and that the invoice 293 was in fact still payable. I am proposing, perhaps indulgently to the plaintiff, to proceed on that basis.

[23] In addition invoice number 371 was in the sum of £4,598.72 for professional services regarding accounts and tax return for the year ended 31 March 2002. This was presented after the break-up of the relationship in May 2002. Again Mr McAteer relied on a bundle of documents showing work done by members of his staff or himself in connection with the affairs of the defendant. He pointed out that no dispute had been raised about the invoices until after he served a statutory demand upon the defendant for the amounts. There was an obvious potentiality for overlap between invoice number 371 and the management account invoices. More of the work on invoice number 371 came from the plaintiff himself. No management account bill is presented for April 2002 but that is because the work tended to be done in arrears ie. in May 2002 when the relationship broke down. There is a potential for overlap with the Billy Henderson deal as Mr McAteer himself acknowledged in examination-in-chief.

[24] Mr Coyle cross-examined him about his own reply stating that he was relying on the engagement letter of July 2000. He pointed out that this was confined only to accountancy and tax services and that Mr McAteer's claims went outside that. I have to say that while this was a valid point so far as it went the plaintiff's statement of claim of 20 June 2007 certainly claims fees for professional services and I think the plaintiff therefore is not to be denied on that pleading point. When taxed about the absence of documents or frailties in his replies Mr McAteer again resorted to criticising his former legal advisors. In the course of these hearings he criticised two leading firms of solicitors and one leading member of the Chancery junior Bar. This was not convincing evidence. When Mr Coyle taxed him with him not having the witnesses to prove that this was their actual work Mr McAteer said that he was fearful of incurring the costs involved in bringing them to court. One has to say however that it would have to be a very elaborate act of forgery otherwise and this was not alleged by the defendant.

[25] In closing the action Mr Coyle relied on a number of the points previously made and further relied on the strangeness of the plaintiff issuing proceedings in the name of a partnership which had lasted only a day or at most had limped on in a very limited fashion thereafter, but well before the

issuance of proceedings. He said his claim not to know how dear it was when taxed was incredible. I note that the absence of former employees or all of their working papers increases uncertainty regarding overlap.

[26] I have concluded that the plaintiff has made out his claim to invoice numbers 349, 335, 327, 326, 320, 314, 299 and 293 with an additional £50 of invoice 276 that comes to a total of £9,450. I have not been satisfied on the balance of probabilities that all the work claimed for in invoice 371 is separate and additional to other invoices. The court can only make an estimate of the overlap. I will therefore discount invoice number 371 in the sum of £4,598.72 by 30% and award the balance of that sum. That gives a figure of £3,219.10 which must be added to the £9,450 to give £12,669.10. Interest at 6% on that from the date of the writ, 6 June 2003 to 5 November 2007, a period of 42 months equals £2,660.51 giving a total of £15,329.61.

[27] Subject to any submissions by the parties I award the plaintiff the costs of the three removed civil bills, to be taxed in default of agreement. I reserve the costs of the action until the Billy Henderson matter is resolved.