

EXAMPLE 2 – ABBREVIATED VERSION

IN THE COURT OF SESSION

(Commercial Action)

SUMMONS

in the cause

JOHN DOE, residing at 1 Main Street, Edinburgh EH1 1AB

Pursuer

against

ALPHA PLC, a company incorporated under the Companies Acts (company number SC987654) and having its registered office at 100 Main Square, Glasgow G1 1YZ

Defender

Elizabeth II, by the Grace of God, of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith, to ALPHA PLC.

By this summons, the Pursuer craves the Lords of our Council and Session to pronounce a decree against you in terms of the conclusions appended to this summons. If you have any good reason why such decree should not be pronounced, you must enter appearance at the Office of Court, Court of Session, 2 Parliament Square, Edinburgh EH1 1RQ, within three days after the date of the calling of the summons in court. The summons shall not call in court earlier than 21 days after the date of service on you of this summons. Be warned that, if appearance is not entered on your behalf, the Pursuer may obtain decree against you in your absence.

Given under our Signet at Edinburgh on

CONCLUSIONS

1. For production and reduction of a personal guarantee by the Pursuer in favour of the Defender in respect of the debts of Edinburgh Widget Limited, dated 7 September 2015, and for interim suspension thereof.
2. For interdict against the Defender from taking any steps to enforce the personal guarantee or to sequestrate the Pursuer for failing to make payment of the sum in the personal guarantee; and for interim interdict.
3. For payment by the Defender to the Pursuer of the sum of TWO MILLION POUNDS (£2,000,000) STERLING, with interest thereon at the rate of eight per cent a year from the date of citation until payment.
4. For the expenses of the action.

CONDESCENDENCE

Parties and jurisdiction

1. The Pursuer is John Doe. He resides at 1 Main Street, Edinburgh EH1 1AB. The Defender is Alpha plc, a company incorporated under the Companies Acts (company number SC987654) and having its registered office at 100 Main Square, Glasgow G1 1YZ. The Defender is domiciled in Scotland. So far as the Pursuer is aware, there are no proceedings between the parties pending before any other court which concern the present cause of action. There is no agreement between the parties prorogating the jurisdiction of any other court in relation to the subject-matter of the present action. This Court has jurisdiction accordingly.

The relationship between the Pursuer and the Defender

2. The Pursuer is a businessman operating in the Edinburgh area. In 2013, the Pursuer acquired the whole share capital of, and became a director of, a company called Edinburgh Widget Limited (**EWL**). EWL manufactured widgets. EWL is now in liquidation.
3. The Defender provides banking services to the Pursuer. The Defender used to provide banking services to EWL. The Defender assigned a relationship manager, David Smith, to the Pursuer and EWL.

The EWL development and funding

4. Prior to 2016, EWL traded from factory premises at Small Street, Edinburgh. In 2015, the Pursuer decided that he could grow EWL's business by moving to larger premises. The Pursuer obtained planning permission to develop derelict factory premises that he owned at Larger Street, Edinburgh (the **Development**).
5. At around the same time, the Pursuer spoke to Mr Smith about the Development and the funding of it. Mr Smith was very enthusiastic about the Development. The Pursuer's intention was to seek funding for the Development from the Defender and Edinburgh Enterprise (**EE**). In or around April 2015, the Pursuer produced a detailed business plan. The Pursuer's business plan was provided to both EE and the Defender. The plan envisaged:
 - (i) that work on the Development would commence in around October 2015 and be completed by June 2016;
 - (ii) that capital funding of £3,000,000 would be required for the Development;

(iii) that the capital funding would comprise grant funding of £750,000 from EE, funding of £2,000,000 from the Defender, and funding of £250,000 from the Pursuer's own resources; and

(iv) that the Defender would provide an overdraft for the first five years of EWL's trading after completion of the Development. The overdraft was required to support EWL's cash-flow during that period. The Pursuer's plan showed an overdraft of £2,000,000 in the first and second years, £1,750,000 in the third and fourth years, and £1,500,000 in the fifth year.

6. In May and June 2015, the Pursuer and Mr Smith had several extensive and detailed discussions about the Defender's funding of the Development. By 1 July 2015, the Pursuer and Mr Smith, acting for and on behalf of the Defender, had reached agreement about the Defender's funding of the Development. The Defender agreed to provide to EWF:

(i) capital investment of £2,000,000 for the Development;

(ii) a 'capital' overdraft of £500,000 for the purposes of paying for one-off 'capital' costs, such as the initial training of staff (the **Capital Overdraft**); and

(iii) an overdraft, for cash-flow purposes, of £2,000,000 in the first and second years after completion of the Development, £1,750,000 in the third and fourth years after completion of the Development, and £1,500,000 in the fifth year after completion of the Development (the **Cash-flow Overdraft**).

EE agreed to provide funding of £750,000 for the Development.

7. The Defender put in place loan documentation between it and EWL. As a condition of providing the agreed funding to EWL, the Defender required the Pursuer to sign a personal guarantee in favour of the Defender in respect of the debts of EWL. The Pursuer signed a personal guarantee on 7 September 2015. The personal guarantee had a maximum limit of £1,500,000. The Pursuer signed the personal guarantee without the benefit of legal advice.

The Defender's failure to provide the overdraft facility

8. The Development was completed in around October 2016. At that time, EWL sought provision from the Defender of the Capital Overdraft and the Cash-flow Overdraft, to allow it to trade. Despite initially refusing to do so, the Defender eventually provided the Capital Overdraft to EWL on or around 1 April 2017. However, the Defender did not make the Cashflow Overdraft available to EWL. In the absence of provision of the Cash-

flow Overdraft, EWL could not trade as anticipated. On 1 December 2017, EWL entered administration following presentation of a petition by the Defender. On 3 March 2019, EWL entered liquidation.

9. In January 2018, the Defender wrote to the Pursuer demanding payment from him of £1,500,000 in terms of the personal guarantee. The Defender's position is that it never agreed to, nor intended to, make available the Cash-flow Overdraft to EWL.

The Defender's negligent misrepresentation

10. The Defender negligently misrepresented that it would make the Cash-flow Overdraft available to EWL. That negligent misrepresentation induced the Pursuer to enter into the personal guarantee. But for the negligent misrepresentation, he would not have done so.

The Defender's breach of contract

11. Separately, the Defender is in breach of its agreement with the Pursuer. As a result of that breach, EWL entered administration and thereafter liquidation. EWL would not have entered administration, and thereafter liquidation, if the Defender had not failed to provide it with the Cash-flow Overdraft.

The remedies sought and the need for litigation

12. The Pursuer was induced to enter into the personal guarantee by the Defender's negligent misrepresentation. The personal guarantee falls to be reduced at the instance of the Pursuer. The Pursuer seeks interim suspension of the personal guarantee to preserve the *status quo* and to prevent the Defender from seeking to enforce it. The balance of convenience favours the grant of that interim order. Decree should be pronounced in terms of the first conclusion.
17. Separately, the Defender is attempting to benefit unlawfully from its own breach of contract by demanding payment from the Pursuer under the personal guarantee. Furthermore, the Defender has failed to perform its obligations under the parties' agreement and so cannot demand performance by the Pursuer of his obligation to make payment under the personal guarantee. The Pursuer seeks interim interdict to prevent the Defender from seeking to enforce the personal guarantee pending resolution of this action and to preserve the *status quo*. The balance of convenience favours the grant of said interim orders. Decree should be pronounced in terms of the second conclusion.
18. Separately, if the personal guarantee is enforceable (which is denied), as a result of the Defender's breach of contract, the Pursuer has suffered loss that is at least equal to and

co-extensive with the Defender's entitlement to claim payment under the personal guarantee. But for the Defender's breach of contract, the personal guarantee would not have been called up and no liability under it would have arisen. It is equitable that the Pursuer should be entitled to set off his resulting claim for damages against the Defender's entitlement to payment under the personal guarantee. Interim interdict and interim suspension should be granted pending resolution of this action.

19. As a result of the Defender's breach of contract, the Pursuer has suffered loss and damage. The Pursuer is the sole shareholder in EWL. Had the Defender not breached its agreement to make the Cash-flow Overdraft available to EWL, the Pursuer's shares in EWL would have been worth around £2,000,000. As a result of the Defender's breach of contract, those shares are now worthless. The Pursuer has accordingly suffered a loss of £2,000,000. The Defender is liable to make reparation to the Pursuer in respect of that loss and damage. That is the third conclusion.
20. The Defender has made erroneous claims against the Pursuer and sought to enforce the personal guarantee. This action is necessary.

PLEAS-IN-LAW

1. The Defender having induced the Pursuer to enter into the personal guarantee by means of its negligent misrepresentation the personal guarantee should be reduced and decree of reduction should be pronounced in terms of the first conclusion.
2. The balance of convenience favouring maintenance of the *status quo* interim suspension of said personal guarantee should be granted.
3. The Defender having wrongfully threatened to seek to enforce the personal guarantee interdict should be pronounced in terms of the second conclusion.
4. The balance of convenience favouring maintenance of the *status quo* interim interdict should be granted.
5. The Pursuer having suffered loss and damage as a result of the Defender's breach of contract is entitled to damages from the Defender.
6. The sum sued for being a reasonable estimate of the Pursuer's loss and damage decree should be pronounced in terms of the third conclusion.

IN RESPECT WHEREOF

SCHEDULE OF DOCUMENTS

1. Edinburgh Widget Limited Business Plan and Grant Application, dated April 2015
2. Letter from David Smith of Alpha plc to Jane Brown of Edinburgh Enterprise, dated 1 July 2015
3. Facility letter for term loan dated 7 September 2015
4. Personal Guarantee dated 7 September 2015
5. Facility letter for overdraft facility dated 1 April 2017