

EXAMPLE 2 – LONGER 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 Beta 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

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.
2. The Pursuer is a businessman operating in the Edinburgh area. He was formerly a director of a company called Edinburgh Widget Limited (**EWL**). EWL is now in liquidation. The Defender provides banking services to the Pursuer. The Defender used to provide banking services to EWL and to several other corporate entities in which the Pursuer has or had interests. Prior to the events hereinafter described, both the Pursuer and EWL were successful.
3. The Defender assigned a relationship manager to the Pursuer. That was initially the Defender's David Smith. Mr Smith left employment with the Defender in or around March 2017. Latterly, the Defender assigned a number of different relationship managers to the Pursuer and EWL.
4. The Pursuer is an engineer. Over time he established and developed a number of businesses in the Edinburgh area. By 2012 these included an engineering consultancy and property development business. In 2013, the Pursuer acquired the whole share capital of EWL, a manufacturer of widgets, and became a director of EWL. In 2013, EWL traded from factory premises at Small Street, Edinburgh.
5. In 2015, the Pursuer decided that EWL's factory premises at Small Street were too small. He decided that he could grow the widget-making operations by moving to larger premises and by expanding the business to include the manufacture of a wider range of widgets. The concept involved having the production of several types of widget all under one roof. At that time, the Pursuer owned a derelict factory premises at Larger Street, Edinburgh. The Pursuer applied for, and was granted, planning permission to develop the derelict factory premises to form a new building which would incorporate facilities for manufacturing all of the types of widget that the Pursuer wished to make.
6. At around the same time, the Pursuer spoke to Mr Smith about the EWL development. The Pursuer told Mr Smith about the proposal and the potential that he saw for EWL. He

asked for Mr Smith's view on the proposal. Mr Smith was very enthusiastic about the proposal for developing the derelict factory premises at Larger Street in order to grow the widget-making business. The Pursuer and Mr Smith discussed the funding of the proposal. The Pursuer's intention was to seek funding from the Defender and Edinburgh Enterprise (**EE**). Toward that end, the Pursuer produced a detailed business plan and grant application in or around April 2015. The plan envisaged: (i) that work on the EWL development would commence in around October 2015 and be completed by June 2016; (ii) capital funding of £3,000,000 would be required for the development and that this would come from grant funding, bank funding and the Pursuer's own resources; and (iii) that a bank overdraft would be required for the first five years of the business' trading after the initial development works were completed and the new premises fitted out. The 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. The reason why such extensive overdraft funding was required was due to the cash-flow model that would apply to the new business. Suppliers of raw materials to the business would require to be paid immediately before production of the widgets could start. However, there would then be a long lag period during which the widgets would be made and tested before the finished products could be sold to retailers. Thereafter there would be a further lag period before retailers would make payment for the products supplied to them. Normally retailers of widgets operate on a 30-day payment regime. In total, the time between paying for raw materials and receipt of sales revenues would have been around six months. The new business would need significant cash-flow funding during that period.

7. The Pursuer submitted his business plan to EE. EE agreed to provide funding. In or around May 2015, the Pursuer discussed the development again in detail with Mr Smith. He and Mr Smith had several extensive and detailed discussions about the development and the Defender's involvement in it. Mr Smith was made very well aware of the Pursuer's full intentions, including the structure of the funding that would be required, both in respect of capital funding and an on-going overdraft facility for cash-flow purposes, as hereinbefore condescended upon. Mr Smith was given a copy of the Pursuer's business plan. The Pursuer and Mr Smith discussed that document in considerable detail, and on several occasions in or around May 2015 and thereafter.
8. By 1 July 2015, the Pursuer and Mr Smith, acting for and on behalf of the Defender, had reached agreement in relation to the Defender's proposed role as funder of the development and the business post-completion of the development. It had been agreed that the Defender would provide capital investment of £2,000,000 to allow for

construction of the new factory premises plus an additional 'capital' overdraft of £500,000. That latter sum was for the purposes of paying for one-off 'capital' costs, such as the initial training of staff. It was not intended to cover the cash-flow requirements of the business as hereinbefore condescended upon. Mr Smith and the Pursuer had discussed those cash-flow requirements. It was agreed between them that the Defender would provide EWL with an overdraft of the amounts set out in the Pursuer's business plan for those cash-flow requirements. Mr Smith stated unequivocally to the Pursuer that the Defender would provide EWL with an overdraft as set out in the Pursuer's business plan. It was agreed that EWL would provide the Defender with weekly management accounts once the business began trading from the new factory premises. These would show what levels of overdraft were needed from time-to-time, up to the relevant limit then applicable.

9. In a letter dated 1 July 2015, Mr Smith wrote to Jane Brown of EE. In that letter, he set out some of the terms of the agreement that he had reached with the Pursuer. He confirmed that the Defender had been engaged in "long term discussions" with the Pursuer about the proposed development, and that the Defender had been provided with the Pursuer's business plan. As hereinbefore condescended upon, the Pursuer's business plan clearly stated that, once the business began to trade from the new factory premises (i.e. after the development work was complete), EWL would need cash-flow funding of £2,000,000. However, the letter to Ms Brown only mentioned the Defender's lending in respect of the £2,000,000 capital investment and the £500,000 in respect of the one-off capital and training costs. It omitted to mention that the Defender would also be providing between £2,000,000 and £1,500,000 by way of an overdraft over the first five years of trading.
10. The public funding of around £750,000 for the development was secured in around August 2015. The Defender put in place loan documentation between it and EWL. On or around 1 September 2015, the Defender asked the Pursuer to sign a personal guarantee in favour of the Defender in respect of the debts of EWL. The Pursuer duly signed the 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. Before signing the personal guarantee, Mr Smith and the Pursuer discussed the whole arrangements that were to be put in place between the Defender and EWL, including the capital investment and the later ongoing cash-flow support that was all part and parcel of the deal. It was quite clear to Mr Smith that the Pursuer would only be willing to enter into the personal guarantee on the basis that the Defender was

going to be providing the funding that had been discussed and agreed between the pursuer and Mr Smith. Mr Smith was well aware that the Pursuer would not have agreed to sign the personal guarantee on any other basis. In particular, Mr Smith knew that the Pursuer would not have signed the personal guarantee if the Pursuer knew that, having provided funding for the development of the new factory premises and obtained a personal guarantee from the Pursuer, the Defender was not going to provide EWL with the agreed overdraft at the end of the development phase. It was well understood between the Pursuer and Mr Smith that, if EWL's cash-flow was not supported by the Defender in the agreed manner, the development and EWL would fail, rendering the development futile and leaving EWL, and the Pursuer as guarantor, in substantial debt to the Defender. It was well understood by Mr Smith that EWL would need that cash-flow support to allow it to trade once the new factory premises had been developed and fitted out and that, in the absence of cash-flow support in the form of the agreed overdraft, the business would not be able to afford to buy in raw materials necessary to sustain the entire business. Mr Smith knew that, if the agreement that he had reached with the Pursuer for the overdraft, and in consequence of which the Pursuer signed the personal guarantee, was not honoured, the entire development was futile and that the Pursuer would be bound to incur liability for the full amount of the personal guarantee.

11. In the foregoing circumstances, there was a binding agreement between the Pursuer and Mr Smith, acting for and on behalf of the Defender, whereby it was agreed that, if the Pursuer signed the personal guarantee (and, in the event of EWL defaulting, made payment of the maximum sum in the personal guarantee) then, at the end of the development phase and for the period of five years thereafter, the Defender would provide an overdraft to EWL of the sums set out in the Pursuer's business plan. In terms of that agreement, the Pursuer duly signed the personal guarantee. Thereafter, the Defender was bound to make available an overdraft of £2,000,000 for the first and second years of trading after the development, £1,750,000 for the third and fourth years and £1,500,000 for the fifth year. By signing the personal guarantee, the Pursuer thereby became liable for the debts of EWL, up to a maximum limit of £1,500,000 plus certain other costs and expenses. He has accordingly fulfilled that part of the parties' bargain.
12. The development works to construct the new factory premises were completed in around October 2016. The resulting building was a state-of-the-art facility. It was the only facility of its kind in the UK at that time. At that time, EWL sought payment from the Defender of the £500,000 and the use of the agreed overdraft to allow it to trade. However, by that stage, the Defender was withdrawing support for small to medium-sized business, such

as EWL, owing to the then prevailing economic conditions. EWL requested payment of the £500,000 in November 2016. Notwithstanding the agreement that was in place between the Pursuer and the Defender, the Defender initially refused to provide any overdraft funding to EWL. It refused to provide either the agreed £500,000 or the larger agreed overdraft facility to EWL. EWL's ability to trade was immediately put in jeopardy. The Defender eventually paid over the £500,000 on or around 1 April 2017. However, in the absence of provision of the agreed 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.

13. In January 2018, the Defender wrote to the Pursuer demanding payment from him of £1,500,000 in terms of the personal guarantee. The Pursuer and EWL questioned why the Defender failed to make available the agreed funding at the end of the development works, when EWL began to trade from the new factory premises. The Defender's position is that it never agreed to, nor intended to, make available any overdraft beyond the £500,000 referred to above. It appears to be the Defender's position that Mr Smith did not agree to provide the additional overdraft. That is incorrect for the reasons hereinbefore condescended upon.
14. Standing the Defender's position that it never intended to make available any overdraft beyond £500,000, the representation that it would make available five years of overdraft in the sums set out above was a negligent misrepresentation of the Defender's intentions. That negligent misrepresentation induced the Pursuer to enter into the personal guarantee. But for the negligent misrepresentation, he would not have done so.
15. *Separatim*, 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 agreed funds. But for the Defender's breach of contract, EWL would have been able to trade profitably and to meet all of its debts as and when they fell due. In that case, the Defender would not have been able to petition for EWL's administration and no demand would have been made on the Pursuer under the personal guarantee.
16. In the circumstances aforesaid, 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. Accordingly, decree should be pronounced as first concluded for. 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 said interim order.

17. *Separatim*, 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 entirely failed to perform its obligations under the parties' agreement and so cannot now demand performance by the Pursuer of his obligation to make payment under the personal guarantee. In those circumstances, the Defender is not entitled to demand performance by the Pursuer of his obligation to make payment under the personal guarantee. Notwithstanding that, the Defender has indicated that it intends to try to enforce the personal guarantee against the Pursuer. In the event that it did seek to enforce performance by the Pursuer, the Defender would be committing a wrong. Accordingly, decree should be pronounced as second concluded for. 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.
18. *Separatim, esto* the personal guarantee is otherwise enforceable (which is denied), as a result of the Defender's breach of contract aforesaid, the Pursuer has suffered a 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. In these circumstances, 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 as concluded for should be granted pending resolution of this action which will determine the issue of the Defender's breach of contract.
19. As a result of the Defender's breach of contract, the Pursuer has suffered loss and damage. As the Defender was well aware, the Pursuer is the sole shareholder in EWL. The Defender knew, or ought to have known, that if it breached the agreement that it had entered into with the Pursuer, EWL's ability to trade would be seriously jeopardised, as actually occurred. It was entirely foreseeable that breach of the said agreement would cause the Pursuer, as sole shareholder in EWL, to suffer loss and damage in the form of a loss of the value of his shares. Had the Defender not breached its agreement to make overdraft funding as aforesaid available to EWL, the Pursuer would have had shares in EWL 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 sum third concluded for.

20. The Defender has made erroneous claims against the Pursuer and served a defective charge on him with a view to having him sequestrated. 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 of said personal guarantee should be pronounced as first concluded for.
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 in respect thereof.
6. The sum sued for being a reasonable estimate of the Pursuer's loss and damage decree as third concluded for should be pronounced.

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