

THE HIGH COURT

[2024] IEHC 701

[Record No. 2022/209S]

BETWEEN

LINKED RECOVERIES LIMITED

PLAINTIFF

AND

PAUL DUNNE

DEFENDANT

JUDGMENT of Mr. Justice Mícheál P. O’Higgins delivered on the 22nd day of

November 2024

Introduction

1. This is an application for summary judgment. The plaintiff seeks an order pursuant to O. 37 r. 4 of the Rules of the Superior Courts granting liberty to enter final judgment against the defendant in the sum of €87,103.53, which sum is said to be due and owing by the defendant arising out of a loan contract no. LF5950 dated the 26th October 2018. Pursuant to that contract a company called Linked P2P Limited trading as Linked Finance issued a loan of €104,000 to Digital Skills Enablement Services Limited (“the borrower”) repayable in accordance with the terms and conditions of the loan contract and the key contract terms. After the deduction of the completion fee and application fee, the total sum of €100,235 was advanced to the borrower. The loan was subject to an interest rate of 10% and was repayable over 24 months by equal monthly repayments of €4,799.07 inclusive of principal and interest.

2. There is no substantial dispute on any of the relevant facts. The loan contract was accepted in writing on the 26th October 2018 on behalf of the borrower by the defendant in his capacity as director of the company. In consideration of Linked Finance entering the loan agreement with the borrower, the defendant signed a personal guarantee whereby he agreed to, *inter alia*, guarantee the due performance of each and every term and condition of the loan contract, and in the event of the borrower defaulting, pay on demand all sums due under the loan contract. The defendant signed the personal guarantee on the 26th October 2018.

3. The borrower subsequently defaulted on its repayment obligations under the loan contract, which said default has continued as of the date of commencement of the proceedings. On foot of the default of the borrower, it is said that the defendant became liable to discharge the sums due under the personal guarantee.

4. The proceedings were issued by way of summary summons dated 7th July 2022 seeking judgment in the sum of €87,103.53 and a notice of motion seeking liberty to enter final judgment was issued on the 2nd September 2022. The matter came before the Deputy Master of the High Court on a number of occasions and following an exchange of affidavits, the matter was transferred to the judges list and came before me for hearing on the 17th October 2024. The plaintiff was represented by a solicitor and counsel and the defendant appeared as a litigant in person.

Legal principles – summary judgment

5. The parties are agreed that in order to be permitted to defend a claim for summary judgment, a defendant must make out an arguable case, namely whether the defendant can show a reasonable probability of having a real or *bone fide* defence as per *Aer Rianta Cpt v. Ryanair Limited* [2001] 4 IR 607.

6. In *Harrisrange Ltd. v. Duncan* [2003] 4 IR 1, McKechnie J. set out a number of factors that a court should consider when deciding if an arguable case has been raised. In particular, he stated:

“... (xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence...”

7. In *Feniton Property Finance DAC v. McCool* [2022] IECA 217 the Court of Appeal (Murray J.) described the test as follows:

“A court in exercising the jurisdiction to grant an application for summary judgment must proceed with care and caution. The fundamental question it must address on such an application is whether there is a fair and reasonable probability of the defendant having a real or bona fide defence, in law, on the facts or both. This is not the same thing as a defence which will probably succeed or even a defence whose success is not improbable. If the court concludes that there is a fair and reasonable probability of the defendant having a defence thus understood, the court must refuse to enter judgment. In interrogating that issue, the court must satisfy itself before entering judgment that it is ‘very clear’ that the defendant has no defence.”

(my emphasis)

8. In *McGrath v. O’Driscoll & Others* [2007] 1 ILRM 203, Clarke J. stated that:

“So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straight forward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion of summary judgment.”

Replying affidavit of the defendant

9. In his replying affidavit sworn on the 12th January 2023, Mr. Dunne states that he was formerly a director of Digital Skills Enablement Services Limited and that Linked P2P Limited, trading as Linked Finance, advanced a sum of circa €100,000 to Digital Skills Limited and that Linked Finance recorded the date these monies were issued as the 12th October 2018. He says that Digital Skills Limited was incorporated in 2009 and for many years was a successful and growing company, at one point employing 40 people, and at the time of receiving the monies from Linked Finance was in good financial health, hence why the loan was approved. He avers that between October 2018 and May 2019 Digital Skills Limited made its required monthly loan repayments to Linked Finance. However, during 2019 Digital Skills Limited ran into commercial difficulties arising from losing a key supplier partnership with a university partner. The directors and management of Digital Skills Limited made great efforts to try to resolve these difficulties and kept creditors, including Linked Finance, informed of these efforts with regular updates. He avers that with great regret the directors of Digital Skills Limited were ultimately unsuccessful in their efforts to turn the situation around, and Digital Skills Limited entered voluntary liquidation on the 27th January 2020.

10. Mr. Dunne avers that he personally sacrificed a significant income during the period in attempting to save the business in 2019, including in the total year only drawing a salary of €27,274, compared to much higher salary earnings in previous years. He says that in the voluntary liquidation of Digital Skills Limited in January 2020 and in the period thereafter, he personally experienced significant financial loss and hardship and has been trying to rebuild since. Due to factors such as the impact of COVID lockdowns from March 2020, this has taken much longer than he would have expected. He avers that Eugene McLaughlin of EML & Associates was appointed as liquidator of Digital Skills Limited on the 27th January

2020. He says that on concluding the voluntary liquidation process in June 2021, Mr. McLaughlin confirmed that the Director of Corporate Enforcement was satisfied with the conduct of the directors of Digital Skills Limited.

11. Having set out the background to the matter and having acknowledged that the monies were advanced to the company which have not been repaid, Mr. Dunne then identifies a number of suggested frailties in the plaintiff's proofs, as follows: he notes that on the signature page of the alleged personal guarantee, there is an electronic signature of his own name, Paul Dunne, signing on behalf of himself. He also notes that there is no witness to his electronic signature and the space for the signature of the witness has been left blank. He says that since there is no witness to this electronic signature, that the existence of a valid and enforceable personal guarantee has neither been established, nor provided by the plaintiff.

12. In para. 13 of his affidavit, Mr. Dunne says that the alleged personal guarantee is sufficiently unclear and contradictory and there is a lack of certainty as to the identity of parties to the agreement such that the existence of a valid and enforceable personal guarantee has neither been established nor provided by the plaintiff. He developed this point in oral argument before me. He pointed out that on pg. "1 of 6" of the Linked Finance loan contract the lenders are identified in the following way "*The Lender(s) whose names and addresses are set out in Schedule 1*". Then beneath that, in the box for the name of the lenders, the following appears "*See attached schedule in following email*". In point of fact, no schedule to the document was provided nor was any email containing any schedule exhibited to the plaintiff's affidavits or produced in court.

13. Mr Dunne further points to what might be termed as certain technical blemishes in the guarantee, which he identifies at paras. 13 (a), (b) and (c) of his affidavit.

14. Elsewhere, Mr. Dunne avers that the grounding affidavit of Annmarie Monaghan attempts to claim that he signed an alleged personal guarantee in his "capacity as a director of

the borrower”. Mr. Dunne contends that if he is being pursued in this matter by the plaintiff as an individual who is no longer a director of the borrower, then he says that the alleged personal guarantee should have been in compliance with European Union legislation, namely the Distance Marketing of Consumer Financial Services Directive (“the Directive”) which was transposed into Irish law under the European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004 and a subsequent amendment in 2005. He says that the alleged personal guarantee included in the plaintiff’s grounding affidavit is not compliant with this legislation and is therefore not legal. He contends that this is so on three grounds:

- (a) The alleged personal guarantee was negotiated by distance, over the internet, and away from the business premises of Linked P2P Limited, trading as Linked Finance. He says this is not compliant with the Directive and is not lawful.
- (b) Suppliers of financial services are obliged to provide the consumer with comprehensive information on the supplier, the product, the distance contract, redress and compensation prior to the conclusion of the contract. He says this did not occur. He says the plaintiff has not provided evidence to confirm they provided him with such comprehensive information in this regard.
- (c) Consumers have a fourteen day right of withdrawal with such contracts, and the alleged personal guarantee does not include such a “cooling off” period.

On this basis he says that the existence of a valid and enforceable personal guarantee has neither been established nor provided by the plaintiff.

15. At paras. 16 and 17, he says that the alleged loan agreement details the name of the signatory as Linked Contracts and that the signature reads “LF Contracts”. He says the plaintiff has not provided evidence that this is the signature of a natural person with the identity and name of “Linked Contracts” that has been authorised to sign agreements on

behalf of the plaintiff. Thus, he contends that the existence of a valid and enforceable loan agreement has neither been established nor provided by the plaintiff.

16. At para. 18 he notes that in the copy of a signature page of the alleged loan agreement, there is an electronic signature of himself, Paul Dunne, signing on behalf of the borrower, acting in his capacity as a director of the borrower. He notes that there was no witness to the electronic signature of *himself* on the document.

17. At para. 19 Mr. Dunne says that documents provided by the plaintiff record that the loan was issued in advance of the signing dates of the alleged loan agreement and in advance of the alleged loan agreement being provided to the borrower. Thus, he says that the existence of a valid and enforceable loan agreement or the existence of a valid and enforceable personal guarantee has neither been established nor provided by the plaintiff.

18. At para. 20, Mr. Dunne avers that in her affidavit, Ms. Monaghan swears under oath that she is employed as a debt recovery manager by the plaintiff, Linked Recoveries Limited. He says that elsewhere in the public domain, on the professional network LinkedIn, Ms. Monaghan details her employer to be “Linked Finance”, clearly referring to Linked P2P Limited trading as Linked Finance, and not the plaintiff. He says that the plaintiff has, to date, not provided evidence that Ms. Monaghan is in fact employed by “Linked Recoveries Limited”, nor that Ms. Monaghan was authorised by the plaintiff to make this sworn affidavit. On this basis, he says that the veracity of the affidavit grounding the plaintiff’s motion has not been established by the plaintiff.

19. All told there were six affidavits filed in the motion – three by Annmarie Monaghan for the plaintiff, and three by the defendant himself. There were also affidavits of service filed which need not trouble the court.

20. Arising from the exchange of affidavits, counsel for the plaintiff has helpfully summarised the defendant’s “pleaded” grounds of defence as giving rise to the following issues:

- (i) Whether the electronic signature of the defendant is sufficient proof of his acceptance of the personal guarantee, and whether the alleged failure by the plaintiff to provide an original of the loan agreement and/or guarantee affects whether there is a valid and enforceable agreement between the parties.
- (ii) Whether a lack of witness of the electronic signature of the defendant renders the personal guarantee invalid/unenforceable.
- (iii) Whether any of the provisions of the Directive is determinative of the validity of the guarantee.
- (iv) Whether Annmarie Monaghan is entitled to swear affidavits on behalf of the plaintiff.

21. In addition to the pleaded grounds of defence, the defendant now makes an additional argument concerning whether the plaintiff, Linked Recoveries Limited, has demonstrated that it is entitled in law, to bring this claim based upon the personal guarantee signed by the defendant. This argument concerns whether the plaintiff has established that the benefit of the guarantee has been assigned or transferred to the plaintiff. This was an issue raised by the court, not the defendant, but in oral submissions before the court the defendant has sought to adopt the point and now objects to summary judgment being granted on this separate ground as well.

Fair procedures

22. I have carefully considered whether it would be appropriate and fair to the plaintiff to permit the defendant to rely on a ground of defence that was not set out in his affidavits and

which, therefore, the plaintiff had no opportunity of addressing in its affidavits. Having reserved my decision on the application, I had a further opportunity of considering the appropriateness of allowing the defendant to advance this argument. I am satisfied that, in the particular circumstances of the case, it would be appropriate and in the interests of justice to allow the point to be argued. I have come to that view for the following reasons. Firstly, the point raised by the court, which the defendant seeks to now adopt and rely upon, is not an issue of fact but an issue of law, namely whether the documents before the court demonstrate an assignment of the personal guarantee from Linked Finance to the plaintiff, Linked Recoveries Limited, so as to enable the plaintiff to bring this suit on the guarantee.

23. Secondly, counsel for the plaintiff indicated that he was in a position to deal with the point raised by the court on the basis of the materials already before the court. Counsel did not seek an adjournment either to obtain further documentation or research the issue further.

24. Thirdly, counsel indicated that it was the plaintiff's position that there was, in fact, no separate deed of assignment, transferring the benefit of the guarantee from Linked Finance to Linked Recoveries Limited. However, counsel submitted, this transfer had been affected under and by virtue of an automatic transfer of the interest arising from the terms and wording of the contract itself.

25. Fourthly, I considered that the point was sufficiently fundamental and relevant to warrant allowing the argument at least to be advanced.

26. Fifthly, I have made some allowance for the fact that the defendant is a litigant in person who, as one would hope and expect, conducted himself properly and respectfully before the court. In his submissions, the defendant has sought to rely on the point.

27. Sixthly, no submission was made to the court that it would be contrary to fair procedures to allow the defendant to rely on the point.

28. In all these circumstances, I have decided I should exercise my discretion to permit what I will call “*the assignment point*” to be relied upon as part of the defendant’s defence, notwithstanding its absence from the defendant’s affidavits.

Discussion of the assignment point

29. As I have already pointed out, I regard the assignment point that has now been advanced by the defendant as being a fundamental point that potentially raises substantive, as well as technical issues. The assignment point touches on the very entitlement of the plaintiff to bring the case. Since the plaintiff’s only cause of action is its action on the personal guarantee, absent the court being satisfied as a matter of law that the plaintiff enjoys the benefit of the guarantee, the plaintiff’s motion should be refused. The plaintiff was not a party to the loan contract nor was it a party to the guarantee.

30. The plaintiff makes a number of points in answer to the “*assignment point*”. Firstly, counsel submits that the loan contract, properly construed, includes the loan agreement between the lenders and the borrower, and the guarantee agreement between the lenders and the defendant. Counsel relies on the fact that the loan contract and the guarantee are included in one set of documents, carrying the pagination “*page 1 of 6*” all the way through to “*page 6 of 6*”. Counsel urges that the “*Linked Finance loan contract*” is this six-page document with the same formatting and pagination and, in essence, is intended to be read collectively as including the “*personal guarantee*”.

31. Separately, counsel relies on para. (v) of the definitions section of the “key contract terms” on p. 5 where the following is stated:

“‘*Loan contract*’ means this *Loan Contract*, which includes the *Terms of Service*”
(my emphasis).

32. Counsel also relies on para. 9 of the “key contract terms” on p. 6 where, under the heading “*Assignment*”, the following is stated:

“Each of the Borrower and the Lenders agree that this Loan Contract may be assigned and/or novated to such third party as Linked Finance shall nominate (notwithstanding the fact that Linked Finance is not a party to this Loan Contract). On the occurrence of an Event of Default this Loan Contract shall be automatically assigned and novated to Linked Recoveries. Linked Recoveries shall (subject to deduction of the fees set out in the Terms of Service) account to the Lenders for any amounts recovered under this Loan Contract.”

33. The plaintiff relies on the wording of para. 9 in support of the contention that “*this Loan Contract*” embraces not just the loan agreement, but also the personal guarantee. Relying on the second paragraph of para. 9 above, the plaintiff submits that the wording demonstrates that the defendant knowingly signed up to the loan contract being automatically assigned once an event of default occurred. The plaintiff says that once the borrower defaulted on the loan, under and by virtue of para. 9, the loan contract (including the personal guarantee) was thereby assigned and novated to Linked Recoveries Limited. In those circumstances, says the plaintiff, Linked Recoveries Limited, as the party now enjoying the benefit of the personal guarantee, can bring this action on the guarantee against the defendant.

Potential difficulties with the plaintiff’s argument

34. In my view, there are a number of potential difficulties with the plaintiff’s arguments on this issue. I say “*potential*” because it is important to note that in ruling on this motion, I am not deciding the issues in the case. It seems to me it would not be appropriate for a judge hearing a summary judgment application to determine issues of law and/or issues as to contractual interpretation, as this would risk trespassing on the role of the trial judge, unless I

am satisfied the defendant has no defence. The question I have to decide, in accordance with the legal principles identified in the caselaw above, is whether the case is sufficiently clear-cut to enable the court to be satisfied that the defendant has no defence.

35. In my view, there are a number of “nuggets” or pointers in the contractual and guarantee documents that, at the very least, call into question the plaintiff’s core assertion that the benefit of the personal guarantee has, as a matter of law, been assigned to the plaintiff. Again, I am deliberately using the language “*call into question*” rather than using language suggestive of a finalised view, because, ultimately, these are issues for the trial judge.

36. The following pointers potentially assist the defendant’s side of the argument:

37. First, there is, at the very least a stateable case to be made that the loan agreement and the personal guarantee are separate instruments. While they are contained within the one set of documents, they are separate instruments; they achieve different functions; involve different parties; and have different signatory pages.

38. Secondly, as I have noted, in the definitions section on p. 5 of the Linked Finance loan contract, at para. 1(v), “*Loan Contract*” is defined as meaning “*this Loan Contract, which includes the Terms of Service*”. The loan contract and the Terms of Service appear to be tied in. But there is no mention of the guarantee being tied in.

39. Thirdly, the Terms of Service, at p. 142 of the court’s booklet (included as an exhibit to the second supplemental affidavit of Annmarie Monaghan) defines “*Loan Contract*”:

“(i) *in the case of an unsecured Loan, the contract entered into between the lender(s) and the borrower (which includes this Agreement), regulating the terms of supplying the Borrower with the loan;*”

40. The document therefore defines “*Loan Contract*” as the contract entered into between the lenders and the borrower. Since the defendant is neither one of those things, there is an

argument to be made that the “*Loan Contract*”, as referenced in the Terms of Service, does not include the guarantee.

41. On the same page of the Terms of Service, “*Loan*” is defined as meaning the loan contract entered into between the lender(s) and a borrower via Linked Finance. Again, the defendant is not the borrower.

42. Fourthly, on p. 2 of the Terms of Service (on p. 143 of the court’s booklet), the following is stated:

“Each Loan is subject to a Loan Contract. Each Loan Contract is a separate agreement from this Agreement and is made only between the relevant Lender(s) and Borrower...”

43. Again, the defendant is neither a lender nor a borrower in this instance.

44. Fifthly, on p. 4 of the Terms of Service at paras. 2.2 and 2.3, there is express reference to guarantees. It may be argued that the omission to include express reference to guarantees elsewhere in the documents may not be accidental.

45. Sixthly, on p. 8 of the Terms of Service (at p. 149 of the court’s booklet), at para. 8.1(c), the following is stated:

“(c) If we exercise our right to attempt to collect payment for a second time and the payment fails again or there occurs an Event of Default (as defined in the Loan Contract), all legal right, title and interest in the relevant Loan shall be assigned and/or novated to Linked Recoveries Limited in accordance with the provisions of the Loan Contract and the Borrower, each of the Lenders shall be deemed to consent to such assignment and/or novation and, in accordance with the Loan Contract, each Borrower and Lender appoints any director of Linked P2P as its/their attorney to execute any instrument of transfer required in connection with such assignment and/or novation.”

46. It could be said, therefore, that under the express Terms of Service, all rights in the “*Loan*” are assigned; However, there is no reference to all rights in the *guarantee* being assigned.

47. Moreover, *the borrower*, as opposed to the guarantor, is said to be the party that is deemed to consent to such assignment and/or novation.

48. Seventhly, by way of general observation, the documents exhibited by the plaintiff seem to use different words “*Loan*”, “*Loan Contract*” and “*Loan Agreement*” (see the personal guarantee on p. 4 of 6) interchangeably, without consistency. This could be said to give rise to uncertainty.

49. Eighthly, returning to the main wording relied on by the plaintiff, para. 9 under the heading “*Assignment*” (at p. “6 of 6” of the “*Linked Finance loan contract*” – see p. 21 of the court’s booklet) provides that each of the borrower and the lenders agree that this loan contract may be assigned and/or novated.

50. Since that is the principal piece of wording relied on by the plaintiff to show a transfer of the personal guarantee to the plaintiff, and since that wording refers to the borrower and the lenders – but does not refer to the guarantor – it could be argued that para. 9 does not do what the plaintiff says it does, namely, effect the all-important transfer of the legal interest in the personal guarantee to the plaintiff.

51. I also take into account in a general sense the defendant’s criticisms of the state of the documents - his submission that the identity of the lender(s) is unclear, and that aspects of the documents give rise to uncertainty.

52. Taking all matters into account, it seems to me that whether one views these points individually or collectively, there are enough issues present to warrant further exploration at a full hearing. As I have endeavoured to emphasise, I am not deciding these legal issues in this motion. Rather, I am simply identifying potential issues of relevance which attain a threshold

of arguability and which may bear on the correctness of the interpretation urged by the plaintiff. In my view, these points are required to be addressed in the context of a full hearing.

53. I turn now to apply the legal principles identified in the caselaw on granting summary judgment. Borrowing the words of Clarke J. in *McGrath v. O'Driscoll & ors* [2007] 1 ILRM, I feel the issues I have summarised above are not “*relatively straightforward*” so as to render them suitable for determination on a summary motion. There would be a risk of an injustice being done to the parties, were I to seek to determine these questions within the limited framework of a motion of summary judgment. In all the circumstances, I am not satisfied that it is “very clear” that the defendant has no defence.

54. In these circumstances, I propose to decline the plaintiff’s motion. This renders it unnecessary for the court to address the other, more technical, issues canvassed by the defendant.

SIGNED: Mícheál P. O’Higgins

Appearances:

For the Plaintiff: Gary Hayes BL instructed by OSM Partners LLP, 87 Harcourt Street,
Dublin 2

The defendant appeared as a litigant in person.