# THE HIGH COURT

**[2025] IEHC 23**

**[Record No. 2023/63S]**

**BETWEEN**

**PATRICK DIGAN**

**PLAINTIFF**

**AND**

**LEONORA O'BRIEN**

**DEFENDANT**

**JUDGMENT of Mr Justice Barr delivered *ex tempore* on 17 January 2025.**

**Introduction.**

**1.** In this application, the plaintiff seeks summary judgment against the defendant in the sum of €158,687.65, in respect of a loan allegedly made to the defendant in the sum of €90,000, plus interest at the rate of 10% per annum from the date of the making of the loan.

**2.** In its essence, the plaintiff's claim can be summarised in the following way: in 2010, a company called Pharmapod Ltd (hereinafter "the company") was registered by the defendant. It was a start-up company which intended that it would develop and exploit a cloud-based platform, to reduce medication errors for patients by enabling pharmacists to share patient information.

**3.** At some stage after its incorporation, the defendant became a shareholder and director in the company. He states that in total he invested approximately €666,000 in the company.

**4.** In 2017, the company had severe cash flow difficulties. It was in negotiations with various parties to find substantial investment for the company. In April 2017, while negotiations were ongoing between the company and the Canadian Pharmacists Association (the "CPA"), the company needed an investment of approximately €180,000 to enable it to survive while the negotiations were ongoing.

**5.** It is the plaintiff's case, that in April 2017, it was agreed between the plaintiff and the defendant, who was the promoter and director of the company, that the plaintiff would invest €90,000 in the company, and would lend a further €90,000 to the defendant to enable her to make a similar investment in the company in order to keep it afloat.

**6.** The plaintiff states that he paid his €90,000 to the company and also paid in the €90,000 that he had lent to the defendant and which she, in turn, was to lend to the company.

**7.** While the company obtained an investment of approximately €1.88 million from the Canadian Pharmacists Association, it subsequently lost that investment when it had to repay it to the CPA for breach of warranty.

**8.** The plaintiff demanded repayment of the loan from the defendant by way of letter from his solicitor dated 21 September 2022. The plaintiff states that the defendant has failed, refused and neglected to repay the said sum, or any part thereof. The plaintiff claims that he is entitled to summary judgment against the defendant in respect of the sum claimed.

**9.** In response, the defendant states that the agreement that was reached between them was that the plaintiff would make a payment to the company of €180,000 in order to keep it afloat. She undertook to act as guarantor in respect of repayment to him of the sum of €90,000. She states that her liability to act as guarantor only arose for the period while the negotiations were being undertaken in relation to obtaining further funding for the company, or in the event that the

company was unsuccessful in obtaining further funding. She states that as the company did in fact obtain further funding from the CPA, her liability as guarantor of repayment of the sum of €90,000 from the company to the plaintiff, was extinguished.

**Key Dates**.

| | |
|---|---|
| 14 December 2010 | Pharmapod is registered. |
| April 2017 | The company was experiencing cash flow difficulties. |
| 25 April 2017 | Offers made by the plaintiff to help alleviate the company's difficulties while seeking further investment. He offered to provide €180,000 over three months, made up of an equity investment in the company of €90,000, and a loan of €90,000 to the defendant to enable her to make a similar investment or loan to the company. These offers were contained in largely identical emails sent by the plaintiff to the defendant at 19.16 hours and at 22.38 hours on 25 April 2017. |
| 26 April 2017 | Meeting of board of directors of the company was held at 12.00 hours by conference call. The plaintiff was not present at that meeting. The board resolved to accept the proposal made by the plaintiff. |
| 26 April 2017 | An email and attachment was sent by the defendant to the plaintiff at 14.33 hours appearing to agree to the terms as by the plaintiff in his offer on the previous day. |
| 28 March 2018 | Following successful negotiations, the CPA agrees to invest approximately €1.88 million in the company. An Investment Agreement is drawn up between the defendant, the investors in the company, the CPA, and the company itself. |

| | |
|---|---|
| October 2021 | The CPA obtains repayment of its investment due to breach of warranty. The company is put into receivership. |
| June 2022 | The company is put into liquidation. |
| 21 September 2022 | The plaintiff's solicitor sends a letter of demand to the defendant seeking repayment of €90,000 plus interest at 10% per annum. |
| 5 October 2022 | The defendant's solicitor denies liability on the part of his client. Further correspondence ensues. |
| 2 March 2023 | Summary Summons is issued by the plaintiff. |

**Submissions of the Parties.**

**10.** The plaintiff states that his claim against the defendant is very simple. It is based almost entirely on the letter of acceptance of his proposal which was attached to the email sent by the defendant to the plaintiff following the board meeting held on 26 April 2017. That attachment was in the following terms:

> *"'Dear Paddy,*
>
> *Further to the email you sent to me yesterday (April 25 2017), with the following proposal:*
>
> *1. Every month for no more than three months I will make an equity investment of €30 K per month.*

*2.a. During this period, in parallel, I will lend Leonora €30 K per month which she shall use solely to provide a bridging loan to the company.*

*2.b. This loan will be at an interest rate of 10% pa and will be guaranteed personally by Leonora. The interest will be payable annually.*

*2.c. In the event of a default, I may seek to have the capital and interest paid in ordinary shares at the equivalent of the last equity valuation.*

*3. If and when Pharmapod commences paying a Directors remuneration, I expect to be paid double the next best paid non-exec director (includes chairperson).*

*4. Any modification to this proposal may result in its withdrawal.*

*Regards,*

*Paddy.'*

*I thank you for the proposal and agree to the terms as you have outlined above.*

*Yours sincerely,*

*Leonora O'Brien April 26 2017"*

**11.** The plaintiff states that on the basis of that document which was attached to the defendant's email, and which was been signed by the defendant, it is uncontroverted that he was to make a loan to her of €90,000 which she was to use to provide a bridging loan to the company.

**12.** The plaintiff states that as he made the relevant payments directly to the company on the days and in the amounts as set out in his grounding affidavit, coming to a total of €180,000, which was made up of his equity investment of €90,000, and the loan to the defendant of €90,000, he is entitled, under the terms of that agreement, to obtain repayment of the loan and interest from the defendant.

**13.** In response thereto, counsel on behalf of the defendant, made a number of points. First, he made a preliminary objection that the plaintiff was not entitled to obtain summary judgment on foot of an alleged agreement that had not been exhibited in any of his affidavits. In this regard, it was pointed out that the plaintiff, in his grounding affidavits, had referred to an attachment to an email sent by the defendant on 26 April 2017, which had been signed by the defendant and which also had the signature of one "*Anne Keogh*" as witness. No such agreement bearing the signature of Ms Keogh had been exhibited to the grounding affidavits.

**14.** Secondly, without prejudice to the preliminary objection, it was pointed out that the terms of the letter that had been attached to the defendant's email made it clear that she was to be a guarantor of some of the funds that were to be provided by the plaintiff to the company. In particular, it was clear from the documents exhibited to the grounding affidavit, that the loan that was referred to in paragraph 2a of that attachment, was to be guaranteed personally by the defendant. That was clearly stated in paragraph 2b. It was submitted that where the liability of the defendant was to be as guarantor, there could be no question that she was the beneficiary of the

loan, as it is not possible to be both a recipient of a loan and the guarantor of repayment of that loan at one and the same time.

**15.** Furthermore, the defendant's counsel pointed to the fact that the company's accounts for the relevant period clearly showed that the company was indebted to the plaintiff in the sum of €180,000. There was no mention in those accounts of any loan having been made in the relevant period by the defendant to the company in the sum of €90,000. It was submitted that as the plaintiff had been a member of the Board of Directors at the relevant time, and had signed off on the accounts, he could not now seek to make a claim against the defendant that ran contrary to those accounts.

**16.** Finally, it was asserted that in the Investment Agreement which had been concluded between the existing investors in the company, including the plaintiff and the defendant, and the CPA, it was provided that any prior agreements existing relating to the company were terminated by that agreement dated 28 March 2018.

**17.** In this regard, counsel pointed to clause 13 of that agreement, which provided under the heading "*Termination of Existing Agreements*" that the parties had irrevocably and unconditionally agreed that with respect to any existing agreements between any of them in respect of the company, that with effect from completion of the investment agreement, such agreements would be terminated, with the intention that their relationship shall be governed exclusively by the Investment Agreement. It was submitted that in light of that agreement, which was almost a year subsequent to the exchange of emails in April 2017, that any rights which the plaintiff had in respect of the liability of the defendant to guarantee repayment of the loan of €90,000 made to the company, had been extinguished by virtue of the investment agreement of 2018.

**18.** It was submitted that in these circumstances, there was an arguable defence by the defendant to the plaintiff's claim, which had been demonstrated in the affidavits and in the documents before the court. It was submitted that the matter should be remitted to plenary hearing.

**The Law.**

**19.** Summary judgment procedure is only suitable when there is a clear *prima facie* legal entitlement on the part of the plaintiff to the sum claimed. Usually when such applications are being moved, the plaintiff has a very strong case that money is owed to him by the defendant and the real question before the court is whether the defendant has established sufficient evidence in her affidavit to cross the threshold that she has at least an arguable defence to the plaintiff's claim, such that she should be allowed to resist judgment being marked against her in a summary manner and should be allowed to have the matter remitted to plenary hearing.

**20.** The approach which the court should take to an application such as this, is well settled in law. The relevant test was set down by the Supreme Court as far back as 1996 in *First National Commercial Bank v Anglin* [1996] 1 IR 75. In that case Murphy J, giving the judgment of the court, endorsed the following test laid down in *Banque de Paris v DeNaray* [1984] 1 Lloyd's Law Rep 21, which had been referred to in the judgment of the President of the High Court and reaffirmed in *National Westminster Bank PLC v Daniel* [1993] 1 WLR 1453:-

> "*The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or bona fide defence*."

**21.** The test set down in the *Anglin* case has been applied in a number of cases in the intervening years. The appropriate test was more recently set out in *Aer Rianta CPT v Ryanair Limited* [2001] 4 IR 607 in which case Hardiman J stated as follows at page 623:-

> "*In my view the fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendants affidavits fail to disclose even an arguable case?*"

**22.** In *Harrisrange Limited v Duncan* [2003] 4 IR 1, McKechnie J having analysed the relevant case law, set out a helpful summary of the relevant principles. It is not necessary to set these out in this judgment, as they are very well known.

**23.** The court has also had regard to the dicta of Moriarty J in *Allied Irish Banks v Killoran* [2015] IEHC 850, where he warned that the court should not accord substantive relief to defendants in summary judgment motions who raise spurious, fanciful or conjectural contentions to resist judgment. He advised that courts must be alert to defendants who seek merely to defer the evil day on the basis of arguments that do not pass muster, and must remain mindful of the de minimis rule in assessing summary judgment applications.

**24.** In *Feniton Property Finance DAC v McCool* [2022] IECA 217, the court noted that "*the fundamental question to be addressed is whether there is a fair and reasonable probability of the defendant having a real bona fide defence, in law, on the facts or both*". The court stated that in addressing this question the court must proceed with caution. Murray J, delivering the judgment of the court, stated as follows at para. 11:

> "*At the same time, while the court must be cautious in granting summary judgment, and while the requirement that a defendant establish a fair and reasonable*

*probability of the defendant having a defence is a relatively low threshold, it is a threshold: it is neither in the public interest nor in the interests of the parties that straightforward claims for a debt or liquidated demands should require to be determined by plenary hearing, with the additional delay and cost that such a hearing involves and the additional burden thereby placed on the resources of the courts (see Promontoria (Aran) Ltd. v. Burns [2020] IECA 87 ('Burns' at para. 4). The defendant must, accordingly, lay a basis on which the court can conclude that there is in truth an issue to be tried, and that that issue is neither simple nor capable of being easily determined (see Prendergast v. Biddle, Unreported, Supreme Court, 31 July 1957). Thus, in IBRC Ltd. v. McCaughey [2014] 1 IR 749, Clarke J. (as he then was) stated that the type of factual assertions which may not provide an arguable defence are those that amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence may be available, or which comprise facts which are in and of themselves inconsistent or contradictory.*"

**Conclusions**.

**25.** The preliminary objection taken by the defendant that the plaintiff's application must fail because he had not exhibited the version of the agreement on which he purports to seek judgment, while being somewhat technical, is not without substance.

**26.** In his first affidavit sworn on 27 April 2023, the plaintiff referred to the email which had been sent by the defendant at 14.33 hours on 26 April 2017, which purported to accept his proposal. He stated that that email attached a letter recording the terms as slightly amended by the defendant and which had been signed by the defendant and witnessed by one Anne Keogh, a director of the

company. He purported to exhibit a copy of that attachment. However, the actual attachment was not exhibited to that affidavit.

**27.** The plaintiff exhibited the copy of the attachment on which he relies in this application for summary judgment in his affidavit sworn on 20 July 2023. In a further affidavit sworn by the plaintiff on 21 November 2023, he stated that the document which had been exhibited in his previous affidavit had been prepared and signed by the defendant. He stated that it contained her unequivocal agreement to the proposal on foot of which he had advanced monies on her behalf. He stated that the attachment appeared on its face to be signed by one Anne Keogh, to whom the email had been copied and, in the body of the email the defendant had gone on to say: "*Anne of (sic) you can run this down to Paddy? Many thanks*."

**28.** The plaintiff seeks to have judgment marked on foot of the written agreement dated 26 April 2017, which he alleges was signed by the defendant, and was witnessed by one Anne Keogh, who appended her signature thereto. However, he did not exhibit that document. Instead, he has exhibited another document. On this somewhat technical ground, the plaintiff is not entitled to have judgment marked summarily against the defendant on the basis of a version of the document that has not been exhibited.

**29.** However, that is not the only ground on which I would refuse this application for summary judgment. I am satisfied that the defendant has raised at least an arguable defence that the true import of the agreement reached between the company, the plaintiff and the defendant in April 2017, was that the plaintiff would provide an equity investment in the company of €90,000, and that in respect of a further investment of €90,000, the defendant would provide some form of guarantee that that sum would be repaid to the plaintiff by the company, which guarantee was of

a limited duration, lasting until the company was successful in obtaining funding, which it appears to have obtained by the following year.

**30.** This line of defence is arguable due to the following facts: firstly, in the signed attachment to the email from the defendant dated 26 April 2017, while there is reference to a loan being made by the plaintiff to the defendant, there is also reference to her being a guarantor of that loan. A person cannot be a borrower and a guarantor in respect of repayment of the same loan.

**31.** Secondly, the defendant accepts that he made all the payments directly to the company in a number of separate payments. There is no evidence that he ever sent any letter or email to the defendant informing her that he was making these payments pursuant to any loan agreement with her, or by way of a loan to her.

**32.** Thirdly, the company's accounts, which have been exhibited before the court, noted that the company was indebted to the plaintiff in a sum greater than the payments that had been made by the plaintiff to the company in the sum of €180,000. So, presumably, the sum recorded in the accounts included the totality of the payments that had been made by him during that period. More importantly, the company's accounts did not acknowledge receipt of any loan from the defendant during that period.

**33.** It was argued on behalf of the plaintiff that these statements as occurring in the company's accounts, were simply a mistake made by the accountants because they may have seen that all the payments were made directly by the plaintiff to the company. That argument is somewhat weakened by the fact that the plaintiff was at all material times, a director of the company, so he would have signed off on the accounts. The fact that he did not correct them, supports the defendant's assertion that the entirety of the payments were made by the plaintiff to the company

as part of his equity investment in the company, or as part of a combined equity investment and loan by him to the company.

**34.** Fourthly, it is noteworthy that the plaintiff did not seek repayment of the alleged loan from the defendant until September 2022. The defendant states that supports her case in that it was agreed that the plaintiff would invest in the company until funding was obtained and that she would guarantee the repayment of €90,000 thereof by the company until the negotiations on funding had concluded.

**35.** It is also noteworthy that there were no terms in the alleged loan agreement as to when or in what manner the €90,000 loan would be repayable by the defendant to the plaintiff. Nor is there any evidence as to why the plaintiff did not seek repayment of the loan from the defendant prior to September 2022.

**36.** Furthermore, the court accepts that the terms of the Investment Agreement entered into in March 2018, could support her contention that all previous agreements between the investors in the company in relation to the liability of the company towards any of them, including any guarantees in respect of repayments of loans by the company to any of the investors, were terminated by virtue of clause 13 of the investment agreement.

**37.** In all these circumstances, the court is not satisfied that it is very clear that the plaintiff is entitled to the sum claimed, or conversely, that the defendant has no arguable defence to the claim. The court is satisfied that it will only be possible to ascertain the true nature of the agreement entered into between the parties in April 2017 when oral evidence has been heard on these issues.

**38.** Accordingly, the court refuses the relief sought by the plaintiff in his notice of motion dated 27 April 2023, which was filed on 3 May 2023. The plaintiff's action will be remitted for plenary hearing. The court will hear the parties on a timeline for delivery of pleadings.