

**THE HIGH COURT**

[2021] IEHC 250  
[Record No. 2019/341 S]

**BETWEEN**

**PROMONTORIA (ARAN) LIMITED**

**PLAINTIFF**

**AND**

**JASZAI LIMITED AND LASZLO FRIED**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Mark Sanfey delivered on the 6th day of April, 2021.**

**Introduction**

1. In this application, the plaintiff seeks judgment against the first named defendant in the sums of CHF 12,216,750.45 and \$4,448.36, and judgment in the sum of €7,000,000 against the second named defendant in respect of an alleged liability under a guarantee of the sums owing by the first named defendant ('Jaszai').
2. The application was heard in conjunction with a motion in proceedings entitled "The High Court, Record No. 2014/4723 P, between Michael McAteer, Aengus Burns, Ulster Bank Ireland Limited and Promontoria (Aran) Limited, plaintiffs and Laszlo Fried, Laslo Jewellers, Jaszai Limited and Claddagh Jewellers Limited, defendants", ('the plenary proceedings'). As is apparent from the title, the parties to the present summary proceedings were each a party to the plenary proceedings. The application in the plenary proceedings was for summary judgment in favour of Promontoria against Mr. Laszlo Fried, and for certain reliefs sought by receivers appointed in respect of properties occupied by Jaszai and Claddagh Jewellers Limited. There was no order for consolidation of the two proceedings, and the plaintiff proffered a single set of written submissions in relation to the two proceedings.
3. During the hearing of the present application, counsel for the defendants complained that the plaintiff sought to rely on evidence proffered in both applications, rather than on the separate evidence proffered in support of the present application. The defendants also complained about reliance by the plaintiffs in argument on matters which emerged during the hearing of two other related matters listed and heard just prior to the hearing of the two applications, and in particular in proceedings involving an application under s.212 of the Companies Act 2014 in relation to Claddagh Jewellers Limited, the fourth named defendant in the plenary proceedings.
4. In any event, this judgment deals with the application against each of the two defendants for judgment in the summary proceedings. It should however be read in conjunction with the judgment of this Court in relation to the application in the plenary proceedings, delivered by me on 6th day of April 2021, as that judgment sets out in greater detail the background to the disputes in both proceedings, and also findings by the court which are relevant to the reliefs sought in the present application.

**The application for judgment against the first named defendant**

5. The plaintiff ('Promontoria') issued the summary summons on 10th April, 2019, and the present application on 8th October, 2019. The application is grounded upon the affidavit

of Stephen McKeever, sworn on 7th October, 2019. Mr. McKeever describes himself as “Head of Asset Management (Ireland) employed by Link ASI Limited (formerly known as Capita Assets Services (Ireland) Limited) (the ‘Servicer’) ...”. It is clear from his averments, both in the present proceedings and in the plenary proceedings, that Mr. McKeever is not an employee of either Promontoria or Ulster Bank Ireland Limited, from whom Promontoria alleges that it acquired the facilities and securities the subject of these proceedings in March 2015.

6. Mr. McKeever refers to a facility letter (‘the facility letter’) from Ulster Bank Ireland Limited (‘the bank’) to Jaszai of 21st December, 2009, to which I referred in detail at para. 6 of my judgment in the plenary proceedings. On 17th June, 2010, Mr. Fried signed his acceptance of the facility and the terms and conditions in the letter on behalf of Lazlo Jewellers Limited (as Jaszai was then called). The facility (‘the Jaszai facility’) was expressed to be secured by, *inter alia*, a “...letter of guarantee in the amount of €7m signed by Laszlo Fried...”. A “continuing guarantee” of 17th February, 2006 in favour of the bank, and signed by Mr. Fried, is exhibited. The facility letter is expressed to be subject to “the Bank’s Standard Terms And Conditions Governing Business Lending to Companies”, and a copy of these terms and conditions is also exhibited.
7. Mr. McKeever exhibits the global deed of transfer and deed of assignment which he contends effected the assignment of the facilities and securities from the bank to Promontoria. These documents were relied upon by Promontoria in the plenary proceedings also, and I referred to them at para. 16 of my judgment.
8. It is contended that the Jaszai facility was repayable on demand, and that a letter of demand was sent by the bank to Jaszai on 12th April, 2013. This letter, which is exhibited, demands repayment of the sums of CHF 11,111,678.04 and \$3,588.73. By letter of 4th April, 2019, the servicer, on behalf of Promontoria, made a formal demand of Jaszai in writing for the sums of CHF 12,143,274.62 and \$4,448.36, which Promontoria contends is “the total sum combining principle [sic] and interest owing by Jaszai in respect of the loan facility as at the date of the loan demand” [para. 18]. Mr. McKeever avers that, as of the date of the affidavit, the sums owing by Jaszai are CHF 12,216,750.45 and \$4,448.36.
9. By two separate letters of 5th April, 2019 sent to two different addresses, Promontoria – not the servicer as averred by Mr. McKeever at para. 21 of his affidavit – wrote to Mr. Fried making demand in writing “for the repayment forthwith by Laszlo Fried to the plaintiff of the sum of €7m...the total sum owing by Laszlo Fried in respect of the guarantee as at the date of the loan demand” [para. 21]. Mr. McKeever avers that Mr. Fried has not paid the said sum, and that neither he nor Jaszai have a *bona fide* defence to the proceedings “either in law or on the merits...”.

**Mr. Fried’s affidavit**

10. Mr. Fried swore an affidavit on behalf of both defendants on 29th January, 2020 in reply to that of Mr. McKeever. The points which he makes are essentially the same as those made by him in the plenary proceedings in response to the application against him by

Promontoria for summary judgment. In the interests of brevity, I summarise them as follows: -

- (1) Mr. McKeever's affidavit does not specify "what interest rate has been and is currently being charged, how the sums claimed were calculated, the period of calculation or what elements, such as fees or penalties, comprise the sums sought. Without such basic information, it is impossible to properly understand the plaintiff's claim" [para. 4, 23 to 24];
- (2) Issue is taken with Mr. McKeever's means of knowledge as he "professes no connection with Ulster Bank Ireland Limited. Moreover, he does not claim to hold any position within the Plaintiff company..." [para. 5, 21 to 22];
- (3) It is asserted that the Swiss Franc loan in the facility is not in fact a demand facility;
- (4) There is insufficient certainty as to which of a number of guarantees given by Mr. Fried and transferred by the bank to Promontoria is being relied upon [paras. 8 to 9];
- (5) No consideration was given for the guarantee [para. 10];
- (6) Mr. Fried was entitled to the protections afforded by the Consumer Credit Act 1995 as amended [para. 11];
- (7) The purported assignment of the loan facility from the bank to Promontoria is either unsubstantiated due to the level of redaction in the exhibited document, or in any event is invalid and ineffective for a number of stated reasons [paras. 14 to 20];
- (8) If the facility is a demand facility, no proper demand referring to an event of a default has taken place [paras. 25 to 26];
- (9) There was in any event a restructuring agreement with the bank concluded by negotiations with bank personnel in 2011 and 2012 by which the bank is bound, and which requires Jaszai and Mr. Fried to repay a sum of €17,000 per month over a period of fifteen years subject to all just credits [paras. 27 to 34].

### **Discussion**

11. Both sides delivered written submissions addressing the issues in both the plenary and the present summary proceedings. Submissions were also made at the hearing by Mr. Marcus Dowling BL (as he then was) for the plaintiff, and Mr. Martin Hayden SC for the defendants.
12. In the plenary proceedings, I held that, applying the principles as set out by the Court of Appeal in *Promontoria (Aran) Limited v. Burns* [2020] IECA 87, the evidence of Mr. McKeever as to the debt said to be due by Mr. Fried was inappropriate and inadmissible: see paras. 87 to 102 of the judgment in that regard. I see no material distinction between the evidence given by Mr. McKeever in the plenary proceedings and the evidence

given by him in the present proceedings. Both affidavits comprise inadmissible hearsay, and for the same reasons.

13. In fact, Mr. McKeever's evidence in the present application does not go so far as his evidence in the application in the plenary proceedings, in that, in the present application, Mr. McKeever relies solely on "certificates of balance" – and not "true copy statements of account" as erroneously described by him in his affidavit – as to the amounts owing, whereas he at least exhibited statements of account from the date of the alleged transfer of the Laszlo Fried facility to Promontoria in the plenary proceedings. These certificates are from the servicer – not from Ulster Bank or even Promontoria. They are utterly inadequate to establish the debt due from Jaszai.

14. Even if the evidence of Mr. McKeever were admissible, it seems to me that his evidence goes nowhere near to observing the strictures of the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84 as regards the information required in summary proceedings to show how the debt is calculated. As Clarke CJ stated in that case: -

"6.7 ...it does not seem to me to be too much to ask that a financial institution, availing of the benefit of a summary judgment procedure, should specify, both in the special indorsement of claim and in the evidence presented, at least some straightforward account of how the amount said to be due is calculated and whether it includes surcharges and/or penalties as well as interest...a person confronted with a claim or a court confronted with a question of whether there is *prima facie* evidence for that claim is entitled to at least enough detail to know the basis on which the sum claimed is calculated. The defendant is entitled to that information to decide whether there is any point in pursuing a defence or, indeed, potentially expending monies on procuring professional advice in that regard. The court is entitled to that information to enable it to form an assessment as to whether there is sufficient evidence to say that the debt has been established on a *prima facie* basis. Neither the defendant nor the court should be required to infer the methodology used, unless that methodology would be obvious to a reasonable person or is actually described in the relevant documentation placed before the court...

8.3 ...the observations in the summary judgment jurisprudence, which indicate that a defendant should not be given leave to defend if the basis put forward for resisting the plaintiff's claim amounts to mere assertion, cut both ways. A plaintiff, in order that a *prima facie* claim to the precise debt can be established, must do more than merely assert. While the basis for there being a claim in general terms was fully set out by the Bank, it does not seem to me that the evidence as to why the precise sum claimed was said to be due amounted to anything much more than assertion. In particular, it is not clear as to what calculation led to the assertion that the sum claimed was the precise amount due, nor as to the amount of capital and interest and whether the total included surcharges and/or penalties."

15. The complaints of the defendants in the present case that they are unable to understand how the amount claimed is calculated are justified. There is merely a bald assertion of the amount due in the special indorsement of claim, and only the uninformative "certificates of balance" exhibited to Mr. McKeever's affidavit for corroboration. There is no evidence before me that any other information, either prior to the present motion or since it issued, was proffered by Promontoria to clarify how the debt was calculated.
16. Counsel for Promontoria attempts to circumvent these difficulties in the following way: it is submitted that Jaszai and Mr. Fried "have made express admissions in relation to the fact and amount of the Jaszai Facility... in the accounts filed by them in the Companies Registration Office..." [para. 11 written submissions]. Counsel refers to the provisions of s.892 of the Companies Act 2014 ('the 2014 Act') which state as follows: -

"(1) A copy of or extract from any document registered with and kept by the Registrar shall be admissible in evidence in all legal proceedings and be of the same evidential effect as the original document if it had been certified as a true copy under the signature of the Registrar, an assistant registrar or another officer authorised by the Minister".
17. Counsel also refers to s.884 of the 2014 Act which creates certain presumptions that documents purporting to be signed by a person are deemed, in the absence of evidence to the contrary, to be signed by that person. It is submitted that the accounts for the year end 30th April, 2013 for Jaszai categorised the Jaszai facility as "an amount falling due within one year", and that reference is made to Mr. Fried's guarantee. It is pointed out that the balance expressed in the 2013 accounts to be due on the loan as of 30th April, 2013 of €9,074,763 – which the submissions suggest is the equivalent of CHF 11,111,678, although this is not stated in the accounts, or anywhere on affidavit – and the acknowledgement of the debt over the course of successive accounts from 2008 onwards amount to a "course of dealing", and comprises sufficient evidence to establish Promontoria's claim. It was submitted that these admissions of debt are in particular fatal to the defendant's argument that there was a restructure of the debt agreed with the bank, although it must be said that, as in the plenary proceedings, Promontoria did not advance any evidence from the representatives of Ulster Bank alleged to have agreed the restructure with a view to controverting Mr. Fried's claim in this regard.
18. Objection was taken by counsel for the defendants to reliance by the plaintiff on these accounts. The accounts were in fact exhibited to Mr. McKeever's second affidavit in the plenary proceedings, rather than to his affidavit in the present proceedings. It was contended that the accounts were not in fact certified, and that as such, "...it is presumed that the plaintiffs are seeking to rely on material that is either not before this Honourable Court or, if it is, has not been served on the first and third defendants' solicitor..." [para. 10 written submissions]. The defendants also objected to reliance by the plaintiff on statements which emerged during the course of the s.212 proceedings. I am of the view that any such matters were not in evidence before me in the present proceedings, and I have not taken them into account for the purpose of this judgment.

19. I do not think that the plaintiffs can rely on the accounts in the manner for which it contends in order to establish a debt on the part of Jaszai. For a start, even if those accounts are to be taken as establishing a course of dealing and a definitive debt, they do so only up to 30th April, 2013. There is no admissible or adequate evidence of the debt after that date. Promontoria's case is that the facilities were subsequently transferred to it by the bank. There is no evidence at all of any course of dealings between Promontoria and Jaszai. The court is being asked to infer that the loan balance from 2013 is still due and owing, in the absence of any admissible or detailed corroborative evidence.
20. Neither am I prepared to hold that Mr. Fried is under an obligation to engage with the allegation that Jaszai owes the debt by reason of the existence of a series of abridged unaudited accounts ending in accounts for a year end some six and a half years before the issue of the present application. If documentation were exhibited showing an indebtedness of Jaszai up to a period sufficiently proximate to the issue of the present application, and sufficiently detailed to allow an understanding of the composition of the debt, it might be that a court would conclude that a failure to respond by the defendants might be capable of constituting an admission in accordance with the principles set out by Charleton J in *Ulster Bank v. O'Brien* [2015] 2 IR 656. However, I do not think that the documentation proffered in the present case is remotely adequate to that purpose.
21. I am in any event uncomfortable, notwithstanding the ingenuity of counsel's submissions, with reliance on documentation which, although publicly available, is not exhibited to an affidavit in the proceedings, and which is being pressed into service solely due to the failure on behalf of the plaintiff to observe basic principles of summary procedure and presentation of evidence, which even before they were examined and clarified in *Burns* and *O'Malley*, were clearly applicable to the present application.
22. As there is no evidence of the primary debt, the claim against Mr. Fried on the guarantee cannot succeed. Under the terms of the guarantee, Mr. Fried "...hereby guarantees payment to the Bank on demand of all present or future or actual or contingent liabilities of the Debtor to the Bank...". Paragraph 12 of the guarantee states that "...a certificate by an Officer of the Bank as to the amount for the time being due from the Debtor to the Bank shall be conclusive evidence for all purposes against the Guarantor". As we have seen, there are certificates, but not by "an Officer of the Bank", or even by an officer of Promontoria. There is no admissible evidence before the court of the debt due by Jaszai, and accordingly the claim under the guarantee must fail.

### **Conclusion**

23. For the reasons set out above, the plaintiff's application will be dismissed. I will give the parties fourteen days from delivery of this judgment to make written submissions in relation to the orders which may be appropriate, and in particular as to the costs of the present application.