THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 308
Record Number: 2019/407
High Court Record Number: 2017/827S

Whelan J.
Noonan J.
Murray J.

BETWEEN/

ALLIED IRISH BANKS PLC

PLAINTIFF/APPELLANT

-AND-

DX AND TX

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 12th day of November 2020

1. The appellant ("the bank") brings this appeal against the judgment and order of the High Court (Barrett J.) given and made on the 17th and 24th July, 2019 respectively. The respondents ("Mr. and Mrs. X") have cross-appealed.

Background facts

2. Mr. and Mrs. X are the parents of JX who entered into a loan facility with the bank on the 19th October, 2009 for the sum of €400,000. The facility letter specified that the purpose of the loan was "working capital". The loan was to be repayable on demand or within a period of twelve months. Monthly interest payments were to be paid over the twelve months with the final payment including the capital sum. The facility letter provided that the security was to comprise two letters of guarantee, each in the sum of €400,000 from Mr. and Mrs. X respectively. Separate letters of guarantee were duly executed by Mr. and Mrs. X on the 21st October, 2019. The signatures of Mr. and Mrs. X on each guarantee are witnessed by a solicitor. The guarantees are accompanied by a letter of waiver in respect of legal advice although again, the signatures of Mr. and Mrs. X are witnessed by a solicitor.

3. The guarantees are in standard format and the guarantors agree to pay on demand to the bank all sums due by the borrower. Clause 12 of the guarantees is of importance in the context of these proceedings and it provides, insofar as relevant: -

"12. This guarantee shall apply to all monies in fact borrowed from the Bank by or debited to the account of the Borrower notwithstanding that such monies (or part thereof) may not be or may cease to be recoverable from the Borrower by reason of:- …

(ii) Any informality irregularity disability or incapacity…

AND if and so far as any such monies may not be recoverable by the Bank from the Borrower the Guarantor shall indemnify the Bank in respect thereof and shall be liable therefor as principal debtor."

4. It would appear that the facility continued beyond the period of twelve months originally envisaged with the interest payments being met by JX. In 2012, the payments became irregular and eventually stopped altogether in 2015. This appears to have led to some interaction between the bank and JX's solicitors because they forwarded to the bank a medical report from JX's doctor dated the 13th June, 2015 which suggested that he was suffering from depression and stress. The medical report also noted that JX had contemplated suicide on St. Patrick's day 2009 and had undergone a review in St. Michael's psychiatric unit at Mercy University Hospital in Cork in September 2011. He also attended a counsellor in 2013 for therapy. As noted in the grounding affidavit of Richard Stafford on behalf of the bank, on receipt of this medical report the bank classified JX as a vulnerable customer for the purposes of the Consumer Protection Code.

5. Ultimately a demand for payment was issued by the bank to JX on the 14th September, 2016 and was followed by demands for payment from Mr. and Mrs. X on foot of the guarantees on the 15th and 27th September, 2016. The summary summons was issued on the 11th May, 2017 followed by a motion for summary judgment on the 26th July, 2017.

6. In his first replying affidavit, Mr. X sets out the basis of the defence he advances on his own behalf and on behalf of his wife:

"4. This Honourable Court will note that Mr. Stafford has sworn that my son [JX] is considered a '*vulnerable customer*' within the meaning of the Consumer Protection Code. To be specific, [JX] has suffered from depression for many years. I understand that [JX] may have been symptomatic at the time he entered into the loan agreement grounding the within proceedings: however, my wife and I were not aware that he was symptomatic and would not have executed the guarantee had we known.

5. I believe and I am advised, but cannot definitively prove, that [JX] lacked capacity to enter into the loan agreement at the time it was agreed with the plaintiff bank. I have taken steps to have [JX] joined as a third party to these proceedings in order to ascertain the state of his health at the time of agreeing the loan and for the purpose of seeking an indemnity or contribution from him if he is found to have capacity.

6. Mr. Stafford's affidavit appears to suggest that [JX] was suffering from depression at the time of the loan agreement. If this was indeed the case, I understand that the plaintiff could have become aware of this had it taken reasonable steps in this regard, such as conducting a medical or psychological evaluation of [JX]. I am advised that the plaintiff's failure to do so and its extension of a €400,000 loan to [JX] in circumstances where he may have been under a serious disadvantage due to his mental health amounted to the transaction being so improvident from [JX's] perspective that the plaintiff was under a duty to ensure that [JX] obtained independent legal advice prior to the entering into the loan agreement. I understand that the plaintiff did not do so and I am advised that the loan to [JX] may be void accordingly which explains why the plaintiff has not sought to proceed as against [JX].

7. I understand that, should this Honourable Court find that [JX] lacked capacity at the time of entering into the loan agreement, or that he was under a sufficiently serious disadvantage to have the loan voided as improvident, this Honourable Court will be bound to find that the guarantees provided by myself and my wife are similarly void and of no effect."

7. This affidavit is replied to in a supplemental affidavit of Richard Stafford. At para. 4, he avers:

"4. I say that the first named defendant avers at paragraph 6 of his affidavit that my previously sworn affidavit '*appears to suggest that [JX] was suffering from depression at the time of the loan agreement*.' I say that my affidavit suggests no such thing and I refute the contention that my grounding affidavit makes the suggestion put forward by the first named defendant. I cannot say whether [JX] was suffering from depression or any other condition at the time the October 2009 agreement was entered into. However, I say and believe that the plaintiff has no record of being notified or otherwise being made aware or put on notice that [JX] suffered from any such condition at the time of the October 2009 loan agreement. I say that the first notification that the bank received in relation to [JX's] condition was received from [JX's] solicitor, as set out in paragraph 13 of my grounding affidavit. I say that this notification of [JX's] condition was in the form of a doctor's letter dated the 13th June, 2015, nearly six years after the date the loan agreement was entered into.

5. I say and believe that the plaintiff has no record of any issue arising as regards [JX's] capacity to enter into the loan agreement of October 2009 or to the effect that the loan agreement would be an improvident transaction requiring the plaintiff to advise [JX] to take independent legal advice."

8. He goes on to aver that the loan was a business loan, having previously averred in his first affidavit that the loan was for the purpose of restructuring JX's existing long-term farm development loan with the bank.

9. In his second affidavit responding to Mr. Stafford's supplemental affidavit, Mr. X exhibits a range of documentation pertaining to JX's medical condition which bear various dates in 2011 and 2012 in addition to the document from the general practitioner already referred to in 2015. The source of these additional documents is the Registrar to Dr. J. Dennehy, Consultant Psychiatrist attached to St. Michael's Unit at Mercy University Hospital Cork.

Judgment of the High Court

10. The trial judge set out the defence advanced by Mr. and Mrs. X as quoted above. The judge noted at para. 2(i):

> "It is clear from the evidence before the court that the defendants and Mr. JX lived in the same residence at all material times. With respect, if, as is averred, persons living with Mr. JX '*were not aware that he was symptomatic*' of depression, then the notion that AIB should or would know of Mr. JX's mental health issues is unconvincing; however, this, of course, does not have the consequence that Mr. JX was a man possessed of legal capacity if he was not."

11. On the issue of the proposed defence that the loan agreement with JX constituted an improvident transaction, the trial judge made the following observations at para. 2:

> "(iv) As to the improvident transaction contention, six points might be made:
>
> (a) the jurisdiction applies where there has been a consent, but the contracting party is weak and vulnerable and the terms are unconscionably improvident;
>
> (b) When it comes to an assessment of the improvidence of a transaction context is critical;
>
> (c) In *Carroll v. Carroll* [1998] IEHC 42, it was held that the improvident transaction jurisdiction could be met where (a) one party is at a serious disadvantage to another by reason of poverty, ignorance or otherwise, such that the weaker party could be taken advantage of, (b) the transaction was at an undervalue and (c) there was a lack of independent legal advice;
>
> (d) Stringent proof is required to establish the "serious disadvantage" (*Grealish v. Murphy* [1946] IR 35);
>
> (e) All the factors relevant to an analysis of whether a transaction was improvident must be viewed from the point in time that a transaction was entered into (*Secured Property Loans v. Floyd* [2011] IEHC 189);
>
> (f) Ultimately what the court is looking for to justify the invocation of this jurisdiction is some impropriety which shocks the conscience of the court.
>
> Here, there is nothing to suggest that the terms are unconscionably improvident and there is nothing to suggest that the transaction was at an undervalue."

12. Accordingly, the trial judge was of the view that the transaction at issue was not one that was capable of being viewed as improvident and he discounted that proposed defence. He then went on to consider the issue of capacity. In that regard the trial judge noted (at para. 3):

> "… It is a fairly striking feature of the within application that the very bank that disputes the claim of incapacity in 2009 presently treats Mr. JX as a man of '*limited capacity*' (just how limited is unclear). It does not seem to the court to matter that Mr. JX is so treated in the consumer context whereas the loan arrangements in issue were in the business context: if a man suffers from some level of incapacity, he suffers from that level of incapacity."

13. He then summarised the application of the relevant summary jurisdiction test as considered by the Supreme Court in *Aer Rianta v. Ryanair* [2001] 4 IR 607 and by McKechnie J. in the High Court in *Harrisrange Limited v. Duncan* [2003] 4 IR 1. He went on to hold that an arguable defence had been raised in the context of the capacity issue, although not on the improvidence issue, and on that basis referred the matter for plenary hearing. It is against that finding that the bank appeals and Mr. and Mrs. X cross-appeal the finding on improvidence.

Grounds of appeal

14. The primary grounds of appeal are that the trial judge entirely ignored Clause 12 of the guarantees and also erred in finding that because the bank was made aware in 2015 that JX was potentially vulnerable, that this had any relevance to the loan and guarantees executed six years earlier. The bank further contends that the trial judge was wrong to find that there was any evidence of lack of capacity in 2009. In their respondent's notice, Mr. and Mrs. X take issue with each of these pleas and cross-appeal on the grounds that the judge erred in finding that there was nothing to suggest that the loan transaction was unconscionably improvident. They further plead that the trial judge erred in refusing to allow Mr. and Mrs. X to seek discovery or raise particulars which might disclose the existence of an arguable defence. They also complain that the trial judge was wrong not to draw an inference from the fact that the bank was not pursuing JX, that suggested inference being that the loan to JX was void for improvidence.

15. While this was the case advanced by Mr. and Mrs. X in their respondent's notice before this court, counsel on their behalf in both written and oral submissions expressly conceded that the trial judge erred in holding that they had raised an arguable defence on the basis that JX lacked capacity and they now accept that no such arguable defence arises.

Arguments

16. This was a proper concession to make as the evidence did not support the conclusion that JX was suffering from legal incapacity in 2009 or indeed that the bank had, or could have had, any awareness of that fact prior to 2015, even if it were so.

17. Counsel for Mr. and Mrs. X relied on a number of well-known authorities in relation to improvident transactions, including, in particular, *Carroll v. Carroll* [1998] 2 ILRM 218

(High Court) and [1999] 4 IR 241 (Supreme Court) considered further below. Counsel also referred to some Australian authorities which appear to suggest that a transaction may be found to be improvident even in the absence of disadvantage to the affected party. It was contended on behalf of Mr. and Mrs. X that the evidence before the High Court did not out-rule the possibility of JX having been at a serious disadvantage *vis á vis* the bank when the loan was entered into in 2009.

18. Counsel argued that his clients were at a disadvantage in that, although JX had been joined as a third party before the High Court, the proceedings against him were stayed pending the outcome of the summary proceedings the subject of this appeal. Mr. and Mrs. X therefore had no opportunity to clarify whether JX was in fact under a disadvantage at the material time in terms of his mental health.

19. Counsel further contended on the authority of *Coutts & Company v. Browne* – Lecky [1946] 2 All ER 207 that where the loan underlying the guarantee was void as against the borrower, the guarantee would also fall. It was further contended that the proceedings should have been adjourned to plenary hearing to allow discovery to be sought by Mr. and Mrs. X so that they could gain access to JX's medical records and as against the bank, to demonstrate whether it was aware of any health issues affecting JX at the time of the loan. Reliance was placed on *GE Capital Woodchester v. Aktiv Capital Asset Investment Limited* [2009] IEHC 512. Finally, counsel submitted that the justice of the case required the claim to be adjourned to plenary hearing. The basis of this argument is that if judgment is entered against Mr. and Mrs. X, and the underlying loan is ultimately determined to be void or have been avoided, then this would result in an obvious injustice to Mr. and Mrs. X. *Anglo Irish Bank Corporation Limited v. Sherry* [2010] IEHC 271 was cited in support of that proposition.

20. In brief summary, the bank's response was that the issue of improvidence cannot arise in circumstances where there was no lack of adequate consideration and further no moral turpitude in the bank's conduct. Neither of these features were present in this case and therefore, no arguable defence had been raised. On the question of discovery, the same authority was relied upon for the proposition that discovery cannot be sought on the basis of attempting to put flesh on the bones of what is no more than a bare assertion. Counsel for the bank also submitted that conspicuously absent from the respondent's submissions was any reference to the effect of Clause 12 of the guarantees, which had been similarly overlooked by the High Court. In those circumstances no arguable defence had been raised.

Discussion

21. The judgment of Shanley J. in *Carroll v. Carroll* is relied upon by the respondents, and in particular the following passage (at p. 230):

> "Apart from the court's jurisdiction to set aside a transaction on the grounds of undue influence, there is also a jurisdiction to set aside as "*unconscionable*" other transactions where the parties to the transaction have unequal bargaining positions and the weaker party has not been adequately protected. Hanbury & Martin's

Modern Equity 4th Ed. (1991) at page 821 states that the jurisdiction will only be exercised where:-

> '*Firstly, that one party was at a serious disadvantage to another by reason of poverty, ignorance, or otherwise, so that circumstances existed of which unfair advantage could be taken; secondly, that the transaction was at an undervalue and thirdly, that there was a lack of independent legal advice*'".

22. This judgment was upheld in the Supreme Court, with the judgment of Denham J. (as she then was) dealing with the issue of improvident transactions, with which the other members of the court agreed. She cited with approval the judgment of the High Court in *Grealish v. Murphy* [1946] IR 35 in that respect.

23. Denham J. also referred to the fact that the judgment of the Privy Council in *Hart v. O'Connor* [1985] 3 WLR 214 was relied upon by the defendant. In that case the court's judgment was delivered by Lord Brightman who said (at. p. 233):

> "Their lordships turn finally to issue (C), whether the plaintiffs are entitled to have the contract set aside as an 'unconscionable bargain'. This issue must also be answered in the negative, because the defendant was guilty of no unconscionable conduct. Indeed, as is conceded, he acted with complete innocence throughout. He was unaware of the vendor's unsoundness of mind. The vendor was ostensibly advised by his own solicitor. The defendant had no means of knowing or cause to suspect that the vendor was not in receipt of and acting in accordance with the most full and careful advice. The terms of the bargain were the terms proposed by the vendor's solicitor, not terms imposed by the defendant or his solicitor. There was no equitable fraud, no victimisation, no taking advantage, no overreaching or other description of unconscionable doing which might have justified the intervention of equity to restrain an action by the defendant at law. The plaintiffs having in the opinion of their lordships failed to make out any case for denying to the defendant the benefit of a bargain that was struck with complete propriety on his side."

24. The law relating to unconscionable bargains or improvident transactions was more recently analysed by the High Court in *Secure Property Loans Limited v. Floyd* [2011] 2 IR 652. At p. 660, under the heading "*The law*" Laffoy J. summarised the relevant principles:

> "[24] It is the case that there exists an equitable jurisdiction under which a court may interfere to relieve the consequences of an unconscionable transaction. Counsel for the plaintiff referred the court to the commentary on the law on unconscionable bargain in McDermott on *Contract Law* (Butterworths, 2001) at paras. 14.148 to 14.168. In particular, he referred the court to the commentary on victimisation of the weaker party at paras. 14.159 *et seq*. and the citation of the decision in *Fry v. Lane* (1888) 40 Ch. D. 312.

[25] The essential preconditions to the intervention of the court to relieve the consequences of an unconscionable transaction have been variously laid down over the centuries. McDermott at para. 14.153 quotes the following passage from the judgment of Somers J. in *Moffat v. Moffat* [1984] 1 N.Z.L.R. 600:-

> 'The species of equitable fraud comprehended by the label unconscionable bargain does not lend itself to exhaustive definition. But at least it is a necessary element that an equity be raised against the party receiving or retaining the bargain or advantage - that is to say that the receipt or retention is unconscientious. It will have that character if the other party to the transaction was under a disability or disadvantage sufficiently serious to make it unfair to allow it to stand in favour of one who knew or ought to have known of the condition.'

McDermott goes on to consider what may constitute a position of disability or disadvantage and the requirement that the stronger party knew, or ought to have known, of the weaker party's disadvantage, before identifying the form which the victimisation of the weaker party may take. He states (at para. 14.159) that it may take the form of either the active extortion of a bargain or the passive acceptance of it in unconscionable circumstances and states that the relevant factors include:-

> '(a) inadequacy of consideration;
> (b) procedural impropriety, such as unfair pressure; and
> (c) lack of independent advice.'

That is consistent with the decision in *Fry v. Lane* (1888) 40 Ch. D. 312 where it was held that relief from an unconscionable bargain depended on three factors:-

> (i) the poverty and ignorance of the plaintiff;
> (ii) the consideration being at an undervalue; and
> (iii) the lack of independent advice.

[26] In other texts, the essential preconditions are identified by reference to other authorities. For instance, in Delany on *Equity and the Law of Trusts in Ireland* (4th ed., Thomson Round Hall, 2007) the following passage from the judgment of Peter Millett Q.C. in *Alec Lobb Ltd. v. Total Oil* [1983] 1 W.L.R. 87 at pp. 94 and 95 is cited:-

> 'First, one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken … secondly, this weakness of the one party has been exploited by the other in some morally culpable manner … ; and thirdly, the resulting transaction has been, not merely hard or improvident, but overreaching and oppressive. … In short, there must, in my judgment, be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself … which in the traditional phrase 'shocks the conscience of the court', and makes it against

equity and good conscience of the stronger party to retain the benefit of a transaction he has unfairly obtained.'"

25. Counsel for Mr. and Mrs. X drew to the court's attention the judgment of the High Court in *Prendergast v. Joyce* [2009] IEHC 199. In the course of the judgment in that case, Gilligan J. made the following observations concerning some of the authorities to which I have referred above (at para. 74):

> "4. It has also been suggested in a series of cases (*Hart v. O'Connor* [1985] A.C. 1000; *Alec Lobb (Garages) Ltd. v. Total Oil (Great Britain) Ltd.* [1983] 1 W.L.R. 87; *Louth v. Diprose* (1992) 175 C.L.R. 621) that to have a transaction set aside for improvidence, it must be established that the defendant acted in a manner which involved some element of moral turpitude. I am satisfied that this proposition does not represent Irish law. In *Carroll*, Shanley J noted at p. 223:
>
> > 'there is no suggestion from them [the donee's sisters, who were also the plaintiffs] that their son [sic] in any way bullied or cajoled their father into transferring the property to him.'"

26. Insofar as these observations appear to conflict with those of Laffoy J. in *Secured Property Loans v. Floyd*, I would respectfully prefer the reasoning and observations on the law of Laffoy J.

27. It seems to me that as an analysis of these authorities suggests that the court may set aside a transaction on the basis that it is improvident or unconscionable where the following factors are present;

(1) The parties do not meet on equal terms, such that one is vulnerable to being taken unfair advantage of by the other. The categories of vulnerability are not closed and must depend on the facts of each case.

(2) There is an inherent unfairness in the transaction, be it described as undervalue, or inadequacy of consideration, or otherwise.

(3) There is an element of impropriety or moral culpability in the conduct of the party seeking to retain the benefit of the transaction.

(4) The latter party knew, or ought to have known, of the other party's vulnerability.

(5) There is an absence of appropriate independent advice, be it legal or otherwise.

28. Counsel for the respondent relied on two Australian cases, *Blomley v. Ryan* [1956] 99 CLR 362 and *Commercial Bank of Australia v. Amadio* [1983] 151 CLR 467 as authorities for the proposition that it was not essential to show that the consideration was inadequate or that any detriment had been suffered by the vulnerable party. Insofar as dicta to that effect are to be found in those judgments, I am satisfied that they do not represent the law in this jurisdiction.

29. In the present case, it must be remembered that Mr. and Mrs. X are not suggesting any infirmity in the guarantees executed by them which are the subject matter of this claim. Rather they suggest that the infirmity lies in the underlying loan agreement with a different party, JX. It is notable that JX has sworn no affidavit in these proceedings, although he appears to have legal representation, and has taken no steps to challenge the loan contract on any of the grounds that his parents seek to do so here.

30. Most notably, Mr. and Mrs. X have not attempted to demonstrate or suggest that there was any inherent unfairness in the loan transaction entered into by their son. Nothing by way of inadequate consideration or perhaps unfairly excessive interest is suggested. That alone would be fatal to the argument but in addition, there is no credible basis on which it is asserted that the bank knew, or ought to have known, that JX was a vulnerable person in 2009, if such was indeed the case.

31. The trial judge seems to have considered that because the bank was made aware in 2015 of the medical report to which I have referred and on foot of that, treated JX as vulnerable, that could in some way be projected back to 2009 in imputing that knowledge to the bank. I cannot see how that could logically be so. There is no evidence of any kind before the court which suggests that the bank had any reason in 2009 to have any concern about JX's mental status, let alone that its agents were actually aware of it. I am satisfied therefore that the trial judge correctly concluded that no arguable ground of defence on the improvidence issue had been established by Mr. and Mrs. X.

32. Nor in my view does the prospect of obtaining discovery should the case be remitted to plenary hearing bring the respondents any further. Clarke J. observed in *GE Capital Woodchester* (at 16 – 17):

> "There will always be cases where the true nature of a defendant's defence will rest in evidence (whether documentary or otherwise) which will only become available through procedural devices such as discovery, interrogatories or the like. That is not to say that it is open to a defendant, on a summary judgment application, to make a vague and generalized contention which would amount to nothing more than an assertion that something useful to his case might turn up on discovery or the like. However, it seems to me that where a defendant satisfies the court that there is a credible basis for asserting that a particular state of facts might exist, which state of facts, if same were in truth to exist, could be established by appropriate discovery and/or interrogatories, then such defendant should be entitled to liberty to defend. It should, again, be emphasized that mere assertion is insufficient. A credible basis for the assertion needs to be put forward even if it is not, at the stage of the motion for summary judgment, possible to put before the court direct evidence of the assertion concerned."

33. This passage, relied upon by the respondents, does not avail them. The discovery is said to be necessary here first, against JX to demonstrate his mental state and secondly, against the bank to establish whether or not it might have known about that state at the material time. The first point to be made about this is that even if discovery were

available which could potentially establish that JX was suffering from an illness which affected his mental health, that alone cannot avail Mr. and Mrs. X for the reasons I have already explained. They would still be confronted with the same difficulty that they have neither demonstrated any unfairness in the transaction, nor that the bank was aware of JX's mental health status at the time.

34. Furthermore, it has to be said that this assertion does appear somewhat difficult to understand in circumstances where Mr. and Mrs. X, who apparently reside with their son JX, appear to have unfettered access to his medical records, presumably with his consent, as they have exhibited the relevant parts of same already in these proceedings. The second reason for seeking discovery as against the bank – the prospect of disclosing that it was aware of JX's mental health - is entirely speculative in circumstances where Mr. and Mrs. X are not even alleging that the bank had reason to be concerned about JX's mental health in 2009. It is also worth observing here that the loan in question was for business purposes. It is not disputed that it was for the purpose of restructuring an existing farm development loan. There is no evidence before the court concerning the pre-existing borrowings and certainly no suggestion that JX might have been vulnerable at the time of the original borrowing. The proposition that he might have been vulnerable in 2009 could not be regarded as transcending the level of mere assertion, if indeed it is even that. And if all those hurdles were surmounted and discovery was given for the reasons advanced, Mr. and Mrs. X are still in the difficulty that they have not even alleged that the transaction was unfair.

35. Yet a further obstacle confronts the respondents even if, despite all of the foregoing, they were in a position to credibly assert that the loan transaction was improvident. As noted above, they rely on the decision of the High Court of England and Wales in *Coutts & Company v. Browne – Lecky*. In that case a loan was advanced to an infant, which under the terms of the Infants Relief Act, 1874, was absolutely void. The court held that where the loan was void *ab initio*, it followed that a guarantee of that loan must also be void. One cannot guarantee a liability which does not exist.

36. That authority does not appear to me to be of assistance in this case for two reasons. The first is that even if the loan contract here was the result of an improvident bargain, it is not void *ab initio* but merely voidable at the suit of JX. In the absence of avoidance, it remains valid. The second reason is Clause 12, which in effect, substitutes the guarantors for the borrower in the event that the underlying loan contract is unenforceable by reason of disability or incapacity. In such circumstances, the guarantors in effect become the borrower and the guarantee becomes a contract of indemnity.

37. It is for the same reason that the argument insofar as based upon an alleged injustice must also fail. As already noted, that argument goes that it would be unfair for the guarantors to suffer judgment, only to see the borrower escape liability by effectively avoiding the contract. In reality, however, even if that happens, no injustice arises as Mr.

and Mrs. X become the principle debtors by virtue of Clause 12 and thus it might be said that the injustice of which they complain is in fact what they signed up to.

38. For all these reasons therefore, I am satisfied that, applying the *Aer Rianta* test, Mr. and Mrs. X have not shown that they have a fair or reasonable probability of having a *bona fide* defence herein. In the result, I would allow the bank's appeal, which is effectively conceded, and would dismiss the cross-appeal.

39. As the bank has been entirely successful in this appeal, my provisional view is that the bank is entitled to its costs in this court and in the High Court. If the respondents wish to contend for an alternative form of order, they will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental oral hearing on the issue of costs. If such hearing is requested and results in an order in the terms proposed herein, the respondents may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms proposed will be made.

40. As this judgment is being delivered electronically, Whelan and Murray JJ have indicated their agreement with it.