THE HIGH COURT

Between:

ALLIED IRISH BANKS PLC

Plaintiff

– AND –

DX AND TX

Defendants

JUDGMENT of Mr Justice Max Barrett delivered on 17th July, 2019.

1. This is an application for summary judgment against Mr DX and Ms TX, as guarantors, in respect of a capped all sums guarantee executed by Mr DX on 21.10.09 and a like guarantee executed by Ms TX on the same date, in respect of certain non-consumer loan facilities granted to Mr JX. The defendants contend that this matter should go to plenary hearing. In this regard they have pointed to the poor mental health of Mr JX, Mr DX averring, *inter alia*, as follows in this regard:

> *"4. This Honourable Court will note that…my son 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 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 had capacity.*
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> *6.* [The affidavit of an AIB official]*…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 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 the loan agreement, or that he was under a sufficiently serious disadvantage to have the loan voided as improvident, this Honourable Court would be bound to find that the guarantees provided by myself and my wife are similarly void and of no effect."*

2. A few points might be made:

> (i) it is clear from the evidence before the court that the defendants and Mr JX lived in the same residence at all relevant 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.
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> (ii) that Mr JX is treated by AIB as a "*vulnerable customer*" under the Consumer Protection Code indicates that, when one has regard to the definition of "vulnerable consumer" in that Code, AIB itself can only have taken the view that in treating with Mr JX as a consumer, he "*has limited capacity to make his…own decisions and…requires assistance to do so".* The Central Bank gives the example in this regard of "persons with…mental health difficulties".
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> (iii) the affidavit in which an AIB official "*appears to suggest that* [JX]*…was suffering from depression at the time of the loan agreement*" does not so suggest and there is an affidavit sworn by the relevant official indicating that he was in no position to identify whether Mr JX was suffering from mental illness.
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> (iv) AIB was entitled to commence these proceedings against the guarantors only and was/is not required to join Mr JX to these proceedings; the defendants maintain that this somehow indicates AIB, to use a colloquialism, to be 'running from the truth' that such joinder would reveal as to Mr JX's capacity. With respect, it shows nothing of the sort: AIB is simply not doing what it is not obliged to do; there is nothing wrong in that.
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> (v) As to the improvident transaction contention, six points might be made:
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> > (a) the jurisdiction applies where there has been consent, but the contracting party is weak and vulnerable and the terms are unconscionably improvident;
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> > (b) when it comes to an assessment of the improvidence of a transaction, context is critical;
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> > (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 undervalue.

3. When one has regard to the above, the sole defence that appears to be left standing is the issue of capacity. Mr JX is treated by AIB as a "*vulnerable customer*" under the *Consumer Protection Code*. This means, when one has regard to the definition of "*vulnerable consumer*" in that *Code*, that AIB itself can only have taken the view that in treating with Mr JX as a consumer, he has "*limited capacity to make his…own decisions and…requires assistance to do so.*" It appears to be sometime in 2015 that AIB took the decision to commence treating Mr JX as a "*vulnerable consumer*", following notification to it of Mr JX's mental health issues. Whether such "*limited capacity*" presented at the time when the guaranteed loan facilities were agreed is unclear; however, there is medical evidence before the court that Mr JX was experiencing difficulty with his mental health back in 2009. Even so, 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.

4. The hurdle that the defendants must cross to succeed in having the within matter sent to plenary hearing is notably low. As Hardiman J. stated in the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, 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 defendant's affidavits fail to disclose even an arguable defence?"*

5. In *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1, 7, McKechnie J. summarised as follows the relevant principles to be brought to bear when a court approaches the issue of whether to grant summary judgment or leave to defend:

> *"(i) the power to grant summary judgment should be exercised with discernible caution;*
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> *(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case…*
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> *(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff…*
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> *(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;*
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> *(v) where, however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;*
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> *(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;*
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> *(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the defendant says credible?'…*
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> *(viii) this test is not the same as and should not be elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;*
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> *(ix) leave to defend should be granted unless it is very clear that there is no defence;*
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> *(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;*
>
> *(xi) leave should not be granted where the only relevant averment is the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;*
>
> *(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."*

6. Worth mentioning also is the nature of the assertions that a defendant must bring to bear in order that a matter will be sent to plenary hearing. As Charleton J. noted in *National Asset Loan Management Ltd v. Barden* [2013] IEHC 32, "*The mere assertion on affidavit of a defence is insufficient. A defence must, if the matter is to be remitted to plenary hearing, have some reasonable foundation*." Here it does: there is the medical evidence pointing to mental health issues back in 2009, and there is the quite striking feature that the very bank that disputes the claim of incapacity in 2009 presently treats Mr JX as a man of "*limited capacity*".

7. Mindful of the *Aer Rianta* test and of, *inter alia*, the "*discernible caution*" which McKechnie J. indicates must be brought to bear when it comes to exercising the power of summary judgment, the court considers it appropriate to send the within matter to plenary hearing.

8. Because this judgment touches on the mental health of Mr JX, a most personal matter, the court has elected to anonymise the identity of him and the defendants in this judgment.