THE HIGH COURT

Record No. 2015/900S

Between:

AIB MORTGAGE BANK

Plaintiff

– and –

SAMUEL VAN EEDEN AND ZELDA VAN EEDEN

Defendants

JUDGMENT of Mr Justice Max Barrett delivered on 5th April, 2016.

Part 1

Key Issue Presenting
1. AIB Mortgage Bank (AIB) seeks summary judgment for the balance that remains outstanding on a loan following the sale by AIB of the property that was mortgaged by way of security for that loan. Dr and Mrs Van Eeden, the relevant borrowers, contend that the dispute now arising is a matter that ought to go to plenary hearing.

Part 2

Background Facts
2. In January 2007, AIB Mortgage Bank (AIB)agreed to advance €1.65m to Dr and Mrs Van Eeden for the purchase of a residential property in Malahide. On 7thFebruary, 2007 the advance was made. In June 2007, the Van Eedens entered into a form of 'all sums due' mortgage with AIB, which mortgage covered the property in Malahide. In or about August 2008, the Van Eedens defaulted on their loan repayments. In October 2009, AIB demanded repayment of all that was owing to it. In March 2010, the Circuit Court granted AIB possession of the Malahide property. In May 2012, the property was sold for the remarkably low sum of €305k. In May 2015, AIB issued a summary summons in respect of the balance of the amount owing under the loan agreement.

Part 3

Contentions Made
3. The Van Eedens contend that this case is not a matter which ought to be dealt with by way of summary summons but ought instead to go to a full hearing. They offer a number of reasons why this is so.

4. First, the Van Eedens contend that the loan agreement makes no reference to the totality of the sum owing becoming payable upon default. This is not so. Clause 8 of the "*General Terms and Conditions of Offer of Mortgage Loan*", under the Heading "*DEMAND FOR MORTGAGE LOAN REPAYMENT*" states as follows:

> "*The Bank may, subject to due compliance with any statutory requirements, if applicable exercise the right to demand early repayment of the Mortgage Loan balance outstanding and accrued interest thereon…"*

5. The term "*Mortgage Loan*" is defined in clause 1 of the said terms and conditions as "*the Loan offered to the Customer in Part 1"*, and when one turns to Part 1 of the loan agreement entered into with the Van Eedens, the "*Loan offered*" is the €1.65m loan and the "*Customer*" is defined as both Dr and Mrs Van Eeden.

6. Second, the Van Eedens contend that pursuant to the 'all sums due mortgage' AIB sought enforcement of amounts that were owing under other credit arrangements between them and AIB. This seems an irrelevance to the within proceedings, in which recovery of the amount under the mortgage loan agreement is all that has been sought. It appears to the court from what it has seen, read and heard that upon default under the home loan, all applicable credit accounts were treated as being in default and the full sum owing was quite legitimately rolled into the amount in respect of which the particular 'all sums due' mortgage applied. Be that as it may, this aspect of matters, for the reason just stated, appears irrelevant to the present proceedings.

7. Third, the Van Eedens make objection to the fact that a document entered into between them and AIB makes mention in clause 2.3 to the "*other Lender*". It is eminently clear from the "*Letter of Offer of Mortgage Loan*" and the "*Particulars of Offer of Mortgage Loan*" that the Lender is AIB and these proceedings are being brought by AIB, which is the "*Bank*" referred to in the General Terms and Conditions and the "*Bank*" referred to in clause 8 of same (as quoted above). The court sees nothing wrong in the fact that clause 2.3 of generic General Terms and Conditions would state that "*The Customer acknowledges that, where appropriate and required, the Bank may enforce the terms of this Offer document on behalf of both itself and the other Lender*." [Emphasis added]. In this case, it is neither necessary nor appropriate that AIB plc (the only possible "*other Lender*" within the terms of the General Terms and Conditions) be a party to these proceedings – and indeed it is not party to these proceedings.

8. Fourth, the Van Eedens make objection to the fact that, per clause 5.4 of the General Terms and Conditions, "*Without prejudice to the rights conferred by Condition 8*" AIB is entitled to charge an interest surcharge on arrears throughout the period of default. With respect, it is a little late for the Van Eedens to be making objection to clause 5.4 now. Whenever one is minded to enter a loan agreement, that is always the best time to consider, and usually the opportune – and invariably the best – time for a prospective borrower to make objection, and amendment, to the provisions relating to what is to happen when and if default occurs, not sometime after – here well after – default has occurred. The Van Eedens contracted into clause 5.4 and that clause now applies.

9. Fifth, the next objection made by the Van Eedens is that if there was some structural deficiency in the property in Malahide which led to the slide in value, that is a matter for AIB as it was satisfied to take a mortgage of the property. If only. Absent contrary agreement (of which there is none), the fact that the bank was satisfied to take a mortgage over the Malahide property as security

for its debt does not relieve the Van Eedens of liability for the balance of the debt outstanding when the proceeds of sale of that property prove insufficient to discharge the entirety of the debt outstanding.

10. Sixth, the Van Eedens object that AIB did not get a better price for the Malahide property when it was sold. They are undoubtedly disappointed – who would not be? – that their house saw a remarkable 82 per cent drop in value between 2007 and 2012. However, there is some suggestion in the papers, as indeed there was in court, that this drop in value may not just have been due to the crash in property values circa. and post-2008, but also because of some structural difficulty that was found to be presenting in the property. Plus the notion that a bank would not seek the best price for a property that it sells as mortgagee in possession is perhaps a little suspect when it is likely inmost cases, and may well be the case here, that the greatest part of the debt that is readily recoverable by the bank will depend on the sale price obtained for the property it sells as mortgagee. Certainly the court does not see in the foregoing any ground for contending, as has been contended, that AIB is estopped by its own actions from seeking to recover the difference between the sale price obtained and the balance of debt now outstanding.

11. Seventh, the Van Eedens contend that the within proceedings are out of time, that AIB had six years to commence proceedings for the debt owing from the date of default, that this six-year period expired sometime in 2014, and that the summary summons that commenced the within proceedings issued in May 2015. Here AIB, to borrow a phrase, 'hits rocky ground'. Whereas an issue as to the applicable limitation period should be an issue to which there is a simple and easy answer, here such an answer does not present. This issue could readily and firmly been 'hit on the head' by AIB, for example, in the affidavit evidence that was placed before the court. But it was not. Circuit Court proceedings for possession were commenced, it appears, within time. However, apart from the eventual order for possession that issued from the Circuit Court, this Court has no idea as to the detail of the Circuit Court summons, or as to what was pleaded before the Circuit Court. The court, in truth, knows little more than that there was a default in 2008, at which point AIB became entitled under clause 8 of the "*General Terms and Conditions of Offer of Mortgage Loan*", as quoted above, to demand the entirety of the balance outstanding, AIB has contended before the court that despite that initial default having occurred the greater part of a decade ago, there continued and continues to be a repeat default each time a monthly payment went or goes un-paid under the subsisting loan agreement, and that this means that the present application has been brought within time. Where the truth of all this lies seems properly a matter for a trial judge at plenary hearing – and AIB has no-one but itself to blame that this lack of clarity on what should be a straightforward point has not been properly addressed and thus continues to arise in what seems otherwise to the court to be a relatively straightforward summary application.

Part 4

Applicable Law

12. The hurdle that the Van Eedens must cross to succeed in having matters sent to plenary hearing is 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?"*

13. In *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1, 7, McKechnie J. summarised the relevant principles 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;*
>
> *(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…*
>
> *(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…*
>
> *(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;*
>
> *(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;*
>
> *(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;*
>
> *(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?'…*
>
> *(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;*
>
> *(ix) leave to defend should be granted unless it is very clear that there is no defence;*
>
> *(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."*

Part 5

Conclusion

14. To borrow from the terminology of Hardiman J. in *Aer Rianta*, when it comes to the statute of limitations point raised by Dr and Mrs Van Eeden, it is not very clear that they have no case or that there is no issue to be tried and – despite the fact that a limitations point ought to be simple and easily determined – for the reasons stated above, it is not as simple as it should be and cannot easily be determined at this time. In this respect, it appears to the court that the Van Eedens have not failed to disclose even an arguable defence. Bearing all of the foregoing in mind, and bringing that "*discernible caution*" to matters to which McKechnie J. refers in *Harrisrange*, the court will refer this matter to plenary hearing. For the avoidance of doubt, the court notes in passing that while it is referring matters to plenary hearing by reference to the limitations point only, nothing in this judgment is intended to, or does, restrict the Van Eedens from raising any and all such lines of argument as they may wish to raise at that plenary hearing.