

ROYAL COURT
(Samedi Division)

1st February, 1989

Before: The Bailiff, and
Jurats Lucas and Hamon

Between
And

James Barker
Barclays Bank PLC

Plaintiff
Defendant

Determination of pleas in bar,
raised in the defendant's answer to
the plaintiff's statement of claim;
Judgment on preliminary issue raised by
plaintiff that the defendant is estopped
from pursuing plea in bar set out in
paragraph 1(b) of its answer, by virtue
of its having waived its right to do so.

Advocate P.C. Sinel for the plaintiff,
Advocate W.J. Bailhache for the defendant.

JUDGMENT

THE BAILIFF: The plaintiff in this action is Mr. James Barker who, during 1986 and 1987, was subject to a number of proceedings brought against him by various creditors which culminated in his being allowed to make a Remise de Biens which meant that his affairs for the purposes of his financial matters

were placed into the hands of the Court and two Jurats were nominated to conduct the Remise. In the course of that Remise it became apparent that one of the creditors, the defendant in this case, Barclays Bank PLC, would have to agree to certain arrangements being made in order that a good title could be given to purchasers of properties which had been handed over to the Jurats for the purposes of the Remise. In order that the Jurats could sell the properties it was necessary either that Barclays Bank should join in the contract, or give an undertaking that after the contracts had been passed they would be paid in full and cancel their charges.

As a result of discussions with the Jurats, Mr. Benest who was advising them on the legal aspects of the Remise thought it right to seek from Barclays Bank or from their advisers, Advocate Boxall, of Bailhache and Bailhache, an undertaking concerning those secured charges with which we are not concerned but it was just part of the arrangements that had to be dealt with before the Remise could proceed.

However, Mr. Barker had also instituted proceedings against Barclays Bank and there was some doubt about these proceedings as at the time he was the subject of a dégrèvement (which was to become a Remise), (I should add that Mr. Barker disputes that he owed them any money because he took the view, upon which we express no opinion, that the amount of money that Barclays owed him because of some alleged wrongdoing by them, would be a great deal more than the secured charges which they undoubtedly had against some or all of his properties in Jersey).

Therefore it was thought proper by Mr. Benest to obtain an undertaking from Mr. Boxall that Barclays Bank would not plead estoppel or waiver by Mr. Barker in respect of that litigation which would mean that he would have to start again.

However, this present argument goes a little wider than that. Mr. Sinel for Mr. Barker contends that the evidence which we have heard before us today and the two letters to which I am now going to refer in a little more detail, indicate that the bank was not going to take procedural points but would content itself with defending the substantive arguments.

As a result of meetings with the Jurats, as I have said, Mr. Benest wrote to Mr. Boxall on the 3rd December, and he there refers in his letter to a telephone conversation with Mr. Boxall, which Mr. Boxall himself recalls. Mr. Benest writes as follows:

"I refer to our telephone conversation and should be grateful if you would kindly confirm that Barclays Bank PLC shall not plead an estoppel or waiver by James Barker in the litigation he has instituted against the bank consequent upon the repayment of the capital and interest related to the bank's security charge against Mr. Barker's properties".

The reason why Mr. Benest wrote that letter is, as I have said, to ensure that Mr. Barker's claim would not be prejudiced by the mere fact of the Remise. What Mr. Benest has said in his evidence was that he thought he should point out to the Jurats that the mere fact of repayment should not or would not prevent Mr. Barker from pursuing his claim. It is in the light of that piece of evidence that we must construe the letters.

Mr. Boxall agreed that there had been a further conversation after that letter which merely confirmed what it had been asked to confirm, but in order to ensure that there should be no misunderstanding he wrote a reply which in fact is almost word for word with the request asked for in Mr. Benest's letter of the 3rd December. The reply was on the 16th January, 1987.

The narrow issue for the Court is to decide whether the words of those letters and the evidence we have heard means in the words of Mr. Bailhache that all the bank had agreed to do on that occasion was to say that it would not take the point that the repayment (which was made of course by the Jurats in the name of Mr. Barker) of the secured charges and the interest, would operate as a waiver by Mr. Barker of his claim. In other words that the claim could be pursued. But the bank did not say that it would thereby preclude itself from taking procedural and preliminary points in addition to the substantive arguments for the defence.

This Court has always inclined, if at all possible, to take a wider view where there is a dispute as to evidence, rather than a narrower view where that wider view would, in the opinion of the Court, lead to justice between the parties. However, that practice can only ensue when there is some doubt about the evidence. We think there is no doubt on the evidence before us that both, from what we have heard from Advocate Boxall and Advocate Benest and looking at the letters which passed between them, that all that the bank did through its advocate was to say that the fact there had been a repayment by Mr. Barker of the capital and interest due to it, would not preclude him from continuing his action against the bank. It did not take into account any procedural defences which were open to the bank irrespective of whether the Remise was brought or not and are still open to the bank and accordingly we find that we must reject the submission of the plaintiff that the bank is not entitled at this stage to take the two procedural points which we have before us and which we shall now proceed to adjudicate upon and hear Mr. Bailhache.

n.b. no authorities.