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ROYAL COURT
(Samedi Division)

1st February, 1989

Before: The Bailiff, sitting alone.

Between	James Barker	Plaintiff
And	Barclays Bank PLC	Defendant

Determination of plea in bar,
raised in the defendant's answer
to the plaintiff's statement
of claim.

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

JUDGMENT

THE BAILIFF: This particular judgment concerns the second of the pleas in bar which the defendant bank entered to the action instituted by the plaintiff, namely that at the time the plaintiff, through his advocate, instituted the action, which was on the 11th February, 1986, he had no locus standi because on the 31st May, 1985, an order had been made against his property, both real and personal, that is to say an order for a dégrèvement and réalisation.

The sequence of events, I think, are worth setting out. As I have said, Mr. Barker's property, both real and personal, were made subject to judicial process on the 31st May, 1985. On the 10th of October, 1985, there was a recommendation by two Jurats that notwithstanding the dégrèvement and réalisation, Mr. Barker should be allowed to make a remise de biens. However, on the 29th October, 1985, the Royal Court refused to allow him to make the remise de biens, and as a result of that Mr. Barker instituted proceedings by way of doléance, on the 8th November, 1985. As I have said, he instituted the present proceedings, in Jersey, on the 11th February, 1986, To conclude the cycle of the main events, on the 21st March, 1986, the Superior Number accorded Mr. Barker his doléance, and the remise again got under way. I am not concerned with what happened after that because what the Jurats did or did not do, or agree or disagree with Mr. Barker, is not pertinent to the present judgment.

The position is that at the time Mr. Barker sent or caused to be sent the summons starting the present action against the defendant, his property, real and personal, had been dealt with by the Royal Court, a dégrèvement and réalisation had been ordered, and attorneys had been named to conduct the proceedings, in accordance with the statutory law on the subject. Therefore the question which I had to ask myself was this: what rights does a person in that position have, during dégrèvement and réalisation proceedings, to institute a claim. From reading the papers it is clear to me that the claim which Mr. Barker says he has against Barclays Bank, arises out of a failure, he says, by the bank to honour certain undertakings it gave in relation to one of his properties in Jersey. The details of that undertaking are not important for the purposes of this judgment. But there is no doubt it is a claim which, if pursued satisfactorily, might result in a substantial payment to Mr. Barker. One would therefore normally expect to have, as part of the evidence to substantiate that claim, some documents.

It is now worth looking at the relevant article of our law dealing with the question of réalisation, the "Loi (1904) (Amendement No. 2) sur la propriéte foncière", and the relevant article, Article 5. (I should add here that in this case there had been, I think, at one stage, a désastre but that had been lifted, so again the question of désastre does not arise). Article 5 states:

"S'il n'y a pas eu de désastre préalable" (well, there had been, but Mr. Mr. Barker had been reinstated, so that doesn't apply) "sur les biens du cessionnaire, l'Attourné sera tenu de prendre possession sans délai et d'avoir la garde des bien-meubles, titres, papiers et évidences du cessionnaire desquels il prendra inventaire".

It seems to me, as I have said, that if there were in existence any papers to substantiate Mr. Barker's claim, as there may be, - and I don't wish to express a view on that, I've no evidence one way or the other - then the attorneys would have been entitled, in fact would have been required by the law, to take possession of all those papers, when it would have become clear to them that amongst those papers would have been some that showed the existence of a possible claim against Barclays Bank, and they would have included such a claim on the inventory. It states therefore in the second paragraph of Article 5:

"L'inventaire terminé, l'Attourné precédera à opérer la rentrée des dettes actives du cessionnaire".

So that it is a question of the attorneys' deciding whether the debts which are due to the cessionnaire are good or bad or whether they should be pursued. It says clearly:

"S'il lui est nécessaire d'avoir recours aux tribunaux il pourra poursuivre le recouvrement desdites dettes tant en vacance qu'en terme, quelle que soit la nature de la réclamation".

It really is quite a simple point and although I am very indebted to Mr. Sinel for his careful research and interesting submission that I should make a distinction between title and usage which I intend to do, nevertheless there is nothing in the law, quite the contrary, which prohibits the attorneys, from taking action, not only to recover a simple debt; for example - I think it is common knowledge that Mr. Barker was in the wine trade - had somebody bought some wine from him and owed him some money for the wine. I am unable to see any difference in principle between that sort of debt and a putative claim which is also a debt and which we have here. It is really quite a simple point as I say that the attorneys have the right to

take all the papers and it follows from that right and from their legal duty to enforce those claims, that that right is vested in them. That does not mean to say that their title to that right expires if they choose not to pursue it during the term of their attorneyship, if I can call it that; not at all. Just as the Royal Court decided (which decision was upheld in the Court of Appeal) that the rights to Mr. Barker's property were in abeyance until the final act of the dégrèvement and not until the réalisation only, the same position, I think, arises in the case of 'biens-meubles'. Mr. Sinel suggested that I look at the position where the Vicomte is seized of the property of a person "en désastre" and suggested that there was a comparison to be drawn: where a person "en désastre" can make an application in his name it followed that a person under "réalisation" could likewise make an application in his own name. I do not find the analogy to be exact. The question is not whether someone in Mr. Barker's position can come to the Court to make an application. It is conceded by Mr. Bailhache that someone in his position can always come to the Court to make an application and that is all that was being done in the case of someone "en désastre". This goes beyond it; in this case a person's goods are subject to réalisation and the attorneys have a duty under Article 5 of the 1904 Law of instituting an action of their own motion.

It seems to me that by analogy if the attorneys do not wish to pursue the action, it is so to speak left on ice until after the matters are concluded. If, of course, they notify the cessionnaire that they do not propose to pursue it, he will of course be entitled to come to the Court to ask for directions, but that is not to say that it gives him the right of his own motion under the circumstances to launch an action. Therefore on this particular point I find for the defendant.

Authorities

re Barker: 5th February, 1987, as yet unreported.
re Barker (1985-1986) J.L.R. 120, 186, 196 & 284.
Dalloz Nouveau Répertoire Vol. 2: Faillite p.558.
Re. Bonn (1971) J.J. 1771.
Loi (1832) sur les Decrets: Articles 2, 4 & 5.
Loi (1839) sur les Remises de Biens.
Loi (1880) sur la Propriété Foncière.
Loi (1904) (Amendement No. 2) sur la Propriété Foncière.
Representation of Instant Build (1977) Ex. 467.
Maxwell on the Interpretation of Statutes p.12.
National Assistance Board -v- Wilkinson (1952) 2 Q.B. 648.
Dicey and Morris "Conflict of Laws", Vol. 1 (11th Edn.) p.p. 389-400.
Cooper -v- Resch: 21st October, 1985, Unreported; and (1985-86) J.L.R. N.6.
Re Barker, 29th December, 1986, Unreported.
Réalisation re Henry George Howell (1911) Ex. 285.