

*Privy Council Appeal No. 58 of 1995*

**Ena Lewis Appellant**

v.

**(1) Henry St. Hillaire and**

**(2) Raulford Baptiste Respondents**

FROM

**THE EASTERN CARIBBEAN COURT OF APPEAL**

**(SAINT VINCENT AND THE GRENADINES)**

-----

JUDGMENT OF THE LORDS OF THE JUDICIAL

COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 22nd May 1996

-----

*Present at the hearing:-*

Lord Keith of Kinkel

Lord Jauncey of Tullichettle

Lord Steyn

Lord Hope of Craighead

[Delivered by *Lord Steyn*]

-----

1. This appeal from a judgment of the Eastern Caribbean Court of Appeal (Saint Vincent and the Grenadines) raises a short but important point of construction on Order 34, rule 11(1)(a) of the Rules of the Supreme Court (Revision) 1970, which came into operation in each of the West Indies Associated States on 17th April 1971: Statutory Instruments 1970, No. 2. The relevant part of the rule provides that a cause shall be deemed altogether abandoned and incapable of being revived if prior to the filing of a request for hearing or consent to judgment or the obtaining of judgment one of three conditions is fulfilled. The condition relevant in the present case is the circumstance that -

"(a)any party has failed to take any proceeding or file any document therein for one year from the date of the last proceeding had or the filing of the last document therein; ..."

Specifically, the question is whether paragraph (a) is to be given a broad interpretation or whether it is to be confined to causes or matters which are "ripe for hearing" as specially defined elsewhere in the rules.

#### The forensic story.

On 17th October 1991 Ena Lewis, the appellant, issued a generally endorsed writ. She claimed against the respondents a declaration, an injunction and damages in respect of a parcel of land situated at Greggs in Saint Vincent. On 4th November 1991 the respondents entered an appearance. During the next 22 months neither party took any procedural step in the proceedings.

2. On 31st August 1993 the respondents filed a summons supported by an affidavit applying for an order under the provisions of Order 34, rule 11, that the action had been abandoned and was incapable of being revived. It was common ground that the applicable part of the rule was paragraph (a).

3. On 8th October 1993 the application came before Cenac J., a High Court judge, for hearing. He reserved judgment. On 12th November he ruled that Order 34, rule 11(1)(a) only applies where the cause is "ripe for hearing" under Order 34, rule 3(1), to which their Lordships will turn in due course. Since it was common ground that the action was not "ripe for hearing" in the prescribed sense the judge dismissed the application.

4. On appeal the Court of Appeal reversed the decision of Cenac J. There were two judgments: one by Sir Vincent Floissac C.J. and one by Satrohan Singh J.A. with Dennis Byron J.A. concurring. The Court of Appeal unanimously adopted a broad construction of paragraph (a) and ruled that it was not a pre-condition to that paragraph applying that the action had to be "ripe for hearing" in terms of the rules. The Court of Appeal substituted an order that the action was deemed to be altogether abandoned and incapable of being revived.

#### The contextual scene of Order 34, rule 11(1)(a).

It is now necessary to set out in broad terms the matrix in which the relevant provision of the rules must be considered. It is common ground that the court has an inherent power to strike out an action for want of prosecution if the requirements laid down in *Birkett v. James* [1978] A.C. 297, at page 318, are fulfilled. This power is a discretionary power exercisable only where (a) there has been inordinate and inexcusable delay and (b) such delay has given rise to a substantial risk that it is not possible to have a fair trial of the issues or is such as is likely to cause or to have caused prejudice to the defendants. In addition the court has a

general inherent power to strike out an action in cases of a deliberate failure to comply with a peremptory order of the court. Again, however, the power is a discretionary one albeit a narrowly circumscribed one. Furthermore the court is given certain express powers to strike out actions for failure to comply with specific requirements of the rules. Thus there is a power to strike out an action for failure to serve a statement of claim (Order 34, rule 19(1)), for failure to give discovery (Order 24, rule 16(1)) and for failure to take out a summons for directions (Order 25, rule 1(1)). So far the relevant powers of the court bear a striking resemblance to the powers of the High Court in England.

5. But it is plain that the legislature considered that this battery of discretionary powers was insufficient to combat the mischief of delays in civil litigation. That calculation is understandable since, apart perhaps from striking out for deliberate disobedience of court orders, the need to prove prejudice has caused great practical difficulties in striking out cases for want of prosecution. The legislature accordingly enacted the special provisions of Order 34, rule 11, which are not in any way modelled on English rules.

6. The relevant rule forms part of Order 34, the heading of which is "Setting down for trial action begun by writ". Order 34, rule 1(1) provides:-

"When a cause or matter has become ripe for hearing, it shall be the duty of the plaintiff or other party in the position of plaintiff to file, within six weeks thereafter, a request that it be set down for trial."

7. Order 34, rule 3(1), reads as follows:-

"Subject as hereinafter provided a cause or matter shall be ripe for hearing when -

(a) the defendant is in default of appearance or has failed to deliver a defence and the plaintiff has complied with the provisions of Order 13 or Order 19 as the case may be;

(b) the pleadings have been closed by the delivery of a reply, or, if no reply has been delivered, after the time for delivery of a reply has expired;

(c) an order has been made under Order 14 or under Order 25 or under any other Order giving directions as to the trial of the cause or matter."

8. Order 34, rule 7, is to the following effect:

" (1) A cause or matter shall be deemed deserted if no request for setting down is filed within six months after the expiration of the period fixed for the filing of such request.

(2) When an action has been deemed deserted, no further proceedings may be taken therein, unless and until an order for revivor has been made by the Court on the application of any party or a consent to revivor and a request for setting down signed by all the parties thereto have been filed.

(3) ..."

9. The critical provision is rule 11(1). It provides:-

"A cause or matter shall be deemed altogether abandoned and incapable of being revived if prior to the filing of a request for hearing or consent to judgment or the obtaining of judgment -

(a) any party has failed to take any proceeding or file any document therein for one year from the date of the last proceeding had or the filing of the last document therein; or

(b) no application for or consent to revivor has been filed within six months after the cause or matter has been deemed deserted; or

(c) if the cause or matter has not, on the request of any party been entered on the Hearing List within six months from the date of any order of revivor."

10. The question before their Lordships is the proper construction of paragraph (a) of rule 11(1) as viewed in the context set out.

#### The arguments.

There was no unanimity on the point in the Saint Vincent courts. The Court of Appeal overruled the decision of a High Court Judge. Moreover, in a subsequent case in the British Virgin Islands *Gustavus Alvanley Frett (by his personal representatives Gwen Alva Frett and Dericks Atley Frett) v. Idalia Davies & Haldane Davies* (unreported: Judgment delivered 18th September 1995), one member of the court, Liverpool J.A., expressed disagreement with the decision of the Court of Appeal in the present case. The majority followed the decision of the Court of Appeal in the present case.

11. Given this difference of opinion their Lordships propose to examine the point in some detail. On the other hand, it is important to bear in mind that the question at issue is one under a rule of the Supreme Court of Saint Vincent which has no counterpart in the Rules of the Supreme Court of England. Generally, such procedural questions are best resolved by the courts of the country concerned. And the Board will be reluctant to interfere with decisions of the Court of Appeal in such cases: *Isaacs v. Robertson* [1985] A.C. 97, at page 102G.

12. There are substantial grounds for preferring a broad interpretation of the relevant rule. First, the starting point must be the language of paragraph (a). It is expressed in broad terms. Nothing in paragraph (a) expressly links it with the definition of "ripe for hearing" in rule 3 or the concept of a cause or matter which has been "deserted" in rule 7. Such a link can only be established by implying words of qualification. The law is clear: words may only be implied in a statutory provision, primary or subordinate, if a strict test of necessity is satisfied. The question is whether there is any warrant for such an implication. Secondly, their Lordships turn to paragraph (a) in its contextual setting in rule 11(1). Paragraph (b) is expressly linked with the concept of "deserted". Paragraph (c) also contemplates a "deserted" cause. Both paragraphs plainly and unarguably make clear that only cases "ripe for hearing" fall within their terms. In these circumstances it is a legitimate aid to construction that where the legislature had in mind restricting the operation of paragraphs (b) and (c) to cases "ripe for hearing" it provided so clearly. That enhances the significance of the absence of words of qualification in paragraph (a). Thirdly, the purpose of rule 11(1) is significant. The legislature plainly had in mind the creation of a more effective remedy to deal with the mischief of endless delays in civil litigation than is provided by discretionary powers to strike out for want of prosecution. That is clear even from the terms of paragraphs (b) and (c). A broad construction of paragraph (a) promotes this legislative purpose. Moreover, it became clear in argument that if paragraph (a) is restricted to cases "ripe for hearing", it will have no or virtually no scope for independent operation. The narrow interpretation fails to give a meaningful interpretation to paragraph (a). On the contrary, it emasculates paragraph (a). In combination these factors strongly support the conclusion of the Court of Appeal.

13. In a lucid argument counsel for the appellant put forward a number of contrary arguments. He invited their Lordships to approach the case from the point of view of English conceptions of civil procedure. That cannot be right. The genesis of Order 34, rule 11, is not the rules of the English Supreme Court. Counsel referred their Lordships to the decision of the Board in

*Barbuda Enterprises Limited v. Attorney-General of Antigua and Barbuda* [1993] 1 W.L.R. 1052. That case concerned an alleged abandonment under Order 34, rule 11(1)(b).

Realistically, counsel accepted that the judgment throws no light on the interpretation of paragraph (a). Counsel also emphasised that rule 11(1) appears in an order concerned with setting down of cases and therefore cases ripe for hearing. That is true but unremarkable. Order 34 became the repository for a number of disparate provisions. In any event, even on a broad construction of paragraph (a), there is nothing surprising about its inclusion in Order 34. Counsel also said that potentially harsh results will flow from a broad interpretation of paragraph (a). That is no doubt right. On the other hand, the period of one year is not ungenerous. And there is also the consideration that where a solicitor neglects to comply with paragraph (a) of rule 11(1) the client may well have an action for damages against the solicitor. In any event, the legislature subordinated considerations of individual hardship to the public interest in dealing with the mischief of delays in civil litigation. Finally, counsel relied on Order 3, rule 6. It reads as follows:-

"Where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed ...."

14. Counsel submitted that a broad construction brings Order 34, rule 11(1)(a) in conflict with Order 3, rule 6. Their Lordships disagree. The party who wishes to proceed can lawfully waive the point that an action is abandoned under Order 34, rule 11(1)(a). And, if it is not raised by any party, the court cannot take the point of its own motion: *Isaacs v. Robertson supra*, page 102E/F, per Lord Diplock. In circumstances where a party is content not to take the point under rule 11(1)(a) the other parties are protected by Order 3, rule 6, which requires that they be given notice of the intention to proceed.

15. Having carefully considered the arguments in favour of a narrow construction of paragraph (a) of rule 11(1) their Lordships are left in no doubt that the Court of Appeal's broad interpretation best matches the legislative intent. It is not a pre-condition to rule 11(1)(a) applying that the action is "ripe for hearing". Accordingly, the Court of Appeal's order that the action was deemed altogether abandoned and was incapable of being revived was right.

### Conclusion.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondents' costs before their Lordships' Board.

© CROWN COPYRIGHT as at the date of judgment.