

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 620 OF 1993

BETWEEN

MARIA FRANCOIS

Plaintiff

And

EUSTACE FREDERICK
O'BRIAN FEALLING

Defendant

Appearances:

Mrs. Petra Jeffery Nelson for Plaintiff

Mr. Michael Gordon for Defendant

1999: September 24

October 29

JUDGMENT

- [1] **d'Auvergne, J:** On the 21st day of May 1999 the Second Defendant filed a summons to deem matter abandoned. This Summons was supported by an affidavit of Raquel Du Boulay a Solicitor employed with the firm which represents the said Second Defendant. She deposed to the following. That on the 13th day of October 1994 a defence was filed on behalf of the Second Defendant; that the Plaintiff filed a reply to that Defence on the 31st day of March 1995. that on the 16th day of April 1996 a request for hearing dated 4th April 1996 was filed by the Plaintiff and that since more than 12 months had elapsed between the filing of the reply and the request for hearing she craved The Court's indulgence to deem the matter abandoned and incapable of being revived and the costs hereof.

ARGUMENTS

- [2] Learned Counsel for the Plaintiff contended that the Defendant is estopped from raising the point, namely, delay prior to the filing of a request for hearing where a request for hearing had been filed.
- [3] She quoted Page 6 of **St Hillaire v Lewis Civil Appeal NO21 of 1993** Page 2 of **Frett v Davies Civil Appeal NO 2 of 1995** and **Robert Brisbane et al vs Staher Civil Appeal NO 11 of 1992**. She argued that the Second Defendant's inaction allowed the Plaintiff to believe that she could exercise her rights to proceed to trial notwithstanding the Plaintiff's delay.
- [4] Learned Counsel for the Second Defendant merely stated that it was in the Court's discretion whether or not the said Defendant is prevented from using Order 34.

CONCLUSION

- [5] First of all I want to state that the Court file shows that on the 30th of April 1999 **Summons for Direction** was entered on behalf of the Plaintiff and that the application under review does not state exactly under what sub section of **Order 34 Rule 11** that the application is brought. From the arguments however I have arrived at the conclusion that **Order 34 Rule 11 (1)(a)** was intended.
- [6] **Order 34** deals with **Setting down for Trial Action begun by Writ** and **Order 34 Rule 11** deals with:

When cause or matter abandoned

11. (1) 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
 - © 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.
- (2) The instituting of a cause or matter which has been deemed altogether abandoned shall be of no effect in interrupting any period of limitation.

[7] Learned Counsel for the Plaintiff argued that since the Second Defendant chose not to exercise the right or power to apply to the Court for an order dismissing the cause before the request for hearing had been filed some twelve and a half months later he should not then be allowed to do so. She cited a passage from **Frett vs Davis** where **Byron J A** as he then was quoted **Halsbury Laws of England 4th Edition Vol 16 para. 1471**, the essence of which is a party will not be allowed to renege on his promise or assurance made either by words or conduct to another if such a promise or assurance was intended to affect the legal relations between them.

[8] In **Frett vs Davis** the respondents through their solicitors consented in writing (some 27 months after the appearances were entered) to the appellants filing their statement of claim out of time which was eventually duly filed and served. Four and a half months later through their new Solicitors the Respondents challenged the validity of the written consent which had been given by the former solicitor. They claimed that the matter had been deemed abandoned and incapable of being revived under **Order 34 Rule 11 (1) (a) of the rules of the Supreme Court** viz

that the Plaintiffs had failed to take any proceedings or to file any document for one year from the document **Entry of Appearance**.

[9] It was held that the Court would exercise its equitable jurisdiction in estoppel and that the Respondents had waived their right under Order 34 Rule 11. 1(a).

[10] In my judgment this is not the position of the Second Defendant who had done nothing by word or conduct to indicate that he waived his procedural right under Order 34 rule 11 1 (a)

[11] In **Henry St Hillaire v Lewis** noted earlier and which was confirmed by the Judicial Committee of the Privy Council (48 WIR (1995) Page 134) Sir Vincent C.J as he then was had this to say at pages 6 and 7. “**Rule 11 (1) (b) rule 11 (1) (c)** of Order 34 relate to abandonment consequential and conditional upon desertion which arises when the plaintiff has failed to file a request for trial within the prescribed time after the cause or matter has become ripe for hearing. The concept of ripeness for hearing is evidently intended to be relevant only to concept of desertion. The importation of the concept of ripeness for hearing into Order 34 rule 11 (1) (a) WOULD HAVE THE EFFECT OF RENDERING THAT RULE OTIOSE. For this reason, Order 34 rule 11 (1) (a) must be understood and held to apply to causes or matters which never became ripe for hearing and which consequently could not be deemed to have been deserted.

Attention has been drawn to the prefatory words of Order 34 rule 11(1). The suggestion is that the words “if prior to the filing of a request for hearing or consent to judgment or the obtaining of judgment” signify that there can be no abandonment of a cause or matter unless the cause or matter became ripe for hearing with the result that the plaintiff was under a duty to file a request for hearing. This suggestion overlooks the fact that the operative word is the word “prior” the significance of which is purely temporal.

In my judgment the prefatory words simply mean that as between a plaintiff and a particular defendant, a cause or matter cannot be deemed to have been abandoned

by reason of any of the defaults specified in Order 34 rule 11(1), if at the time of the default, a valid request for hearing had already been filed or judgment had already been obtained against or consented to by that defendant.

[12] Simply put, the matter need not be ripe for hearing for **Order 34 Rule 11(1)(a)** to apply.

[13] In **Barbuda Enterprises Ltd v Attorney – General of Antigua and Barbuda (1993) 42WIR 183 Lord Bridge** said at page 190 para. (d)

“.....the action will not become ripe for hearing at the close of pleadings, but only by the operation of order 34 rule 3(1)© when an order is made under order 25 giving directions as to the trial of the cause or matter.....”

[14] Applying the dicta of Lord Bridge to the present case I find that this matter was not ripe for hearing.

[15] In my judgment, after considering all the decisions on the subject, the simple question is, Was any document filed between 31st of March 1995 and 31st march 1996? If the answer is “NO” then the party who defaulted would be caught under the strict and harsh procedural rule of Order 34 Rule 11 (1)(a) of the Rules of the Supreme Court.

[16] Based on the above I find that the Second Defendant has satisfied me that the matter under review is to be deemed abandoned and incapable of being revived.

My order is as follows

[17] Suit 620 of 1993 is deemed abandoned and incapable of being revived.

[18] That the Plaintiff do pay costs to the Second Defendant to be agreed or otherwise taxed.

A handwritten signature in black ink, appearing to read 'Suzie d'Auvergne', written in a cursive style.

Suzie d'Auvergne
High Court Judge