

**IN THE CARIBBEAN COURT OF JUSTICE**  
**Appellate Jurisdiction**

**ON APPEAL FROM THE COURT OF APPEAL OF GUYANA**

**CCJ Appeal No CV 004 of 2013**

**BETWEEN**

**GODFREY ANDREWS**

**APPLICANT**

**AND**

**LESTER MOORE**

**RESPONDENT**

**Before The Honourables**

**Mr Justice R Nelson  
Mr Justice J Wit  
Mr Justice D Hayton**

**Apearances**

**Mr Permanand Mohanlall, Mr Roopnarine Satram and Mr C V Satram for the  
Applicant**

**Mr Saphier Husain for the Respondent**

**JUDGMENT  
of  
Justices Nelson, Wit and Hayton  
Delivered by  
The Honourable Mr Justice Nelson  
on the 23<sup>rd</sup> day of July 2013**

- [1] This application is about the interpretation of rules of procedure designed to reduce the law's delays. The relevant rules for interpretation are contained in Order 32 of the Rules of the High Court (hereinafter referred to as "the High Court Rules"), especially Order 32

rule 9. These rules have no counterpart in the English Rules of the Supreme Court or the current Civil Procedure Rules.

[2] Order 32 rules 1, 3, 8 and 9 provide an opportunity for a vigilant defendant to give the quietus to proceedings against him or her where the plaintiff repeatedly defaults in progressing the proceedings. I shall return to Order 32 later in this judgment.

[3] The issues on this appeal are as follows:

(i) Was the present cause or matter in fact deserted in the light of facts now before the Court but beyond the ken of the Court of Appeal?

Those facts were:

(a) the Notice of Request for Hearing dated October 1, 1999 (item 13 of the Index of the Record of Appeal),

(b) the Request for Hearing dated October 1, 1999 (item 14 of the Index of the Record of Appeal),

(c) the Reply and Defence to Counterclaim dated April 16, 1999 (exhibit “D” to the Applicant’s affidavit in support of this application sworn to and filed on May 15, 2013 (“the Applicant’s first affidavit”)) and

(d) the Registrar’s receipt dated April 16, 1999 for filing fees paid in respect of the Reply and Defence to Counterclaim (exhibit E to the Applicant’s first affidavit).

(ii) Should this Court take these documents into account and order a supplemental Record of Appeal containing the documents described above to be prepared and filed in the Court of Appeal?

(iii) Apart from the documents above referred to, where no step has been taken in an action or no document filed for more than one year, and the parties proceed to a full trial and obtain judgment, can a cause or matter be properly deemed abandoned on appeal?

### **The factual background**

[4] For the purposes of determining this application, it is not necessary to rehearse the underlying facts in any detail. The Applicant is the title owner by transport No. 1341 of 1997 of a parcel of land described as the East Half of Lot No. 32, Section B, Victoria Village, East Coast, Demerara (“the disputed land”). The Applicant’s father had owned the land since 1936. On his death intestate, his legal personal representative gave the land to the Applicant in 1997. In earlier proceedings in 1989, the Respondent sought a declaration that he was the owner of the disputed land by adverse possession but in fact claimed he became the title owner in 1973 by way of gift from his grandmother. The Respondent’s petition was dismissed, and his appeal was also dismissed. In the proceedings below before Roy J, as he then was, counsel for the Respondent, Mr. B.E. Gibson, conceded that because of the decision in the 1989 action time could only run in favour of his client from September 6, 1995. The learned judge held that the Respondent was a trespasser.

[5] **The litigation history of the 1998 proceedings**

#### **High Court**

<u>DATE</u>	<u>PROCEDURAL STEP</u>
1. February 3, 1998	Writ issued

2.	August 25, 1998	Statement of Claim delivered
3.	January 20, 1999	Defence and Counterclaim delivered
4.	April 16, 1999	Reply and Defence to Counterclaim
5.	October 1, 1999	Request for Hearing
6.	November 13, 1999	Judgment in favour of Applicant  Applicant declared owner;  Respondent declared trespasser

### Appeal

1.	November 16, 2007	Respondent filed appeal
2.	February 14, 2013	Appeal called and adjourned. Both parties agree proceedings including decision a nullity
3.	February 22, 2013	Order of Roy J. vacated. Appeal dismissed.
4.	May 15, 2013	Application to CCJ for special leave.  Application out of time.

### The reasons of the Court of Appeal

[6] The Court of Appeal stated:

“At the commencement of the hearing of this appeal, the Court sought the views of Counsel appearing for the parties on its observation that at the time the matter was adjudicated on in the High Court, it appeared that on interpretation of the provisions of Order 32 Rule 9, the matter seemed deserted and in the absence of a consent to or an approved application for a revivor, it was not competent for the Judge to proceed to a hearing of the matter.”<sup>1</sup>

The Court of Appeal noted that counsel for the Applicant conceded that the cause was deserted at the time of the adjudication and that there was no revivor, though “abandoned” is the apt term for Order 32 rule 9. Indeed, the Notes of the Court of Appeal indicate that counsel for both parties considered the proceedings below a nullity.

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<sup>1</sup> Reasons of the Court of Appeal at pg. 1 and 2.

### **Arguments of the Respondent**

[7] The Respondent submitted that counsel for the Applicant having conceded in the Court of Appeal that the cause was deserted at the time of adjudication, the Applicant waived the right to raise the issue on appeal whether the cause was deserted or abandoned. Counsel for the Respondent contended that the documents discovered since the decision of the Court of Appeal could not be submitted from the Bar table or in affidavit since counsel on record for the Applicant in the Court of Appeal had stated that there was no other document to assist the court. Counsel for the Respondent questioned the authenticity of the documents discovered and now placed before the Court.

### **Countervailing considerations**

- [8] At the outset, it must be stated that this Court approaches its own Appellate Jurisdiction Rules 2005, the Court of Appeal Rules and the High Court Rules in the light of the principle enshrined in Rule 1.3 of the Appellate Jurisdiction Rules i.e. to enable this Court or the relevant court to deal with cases fairly and expeditiously so as to produce a just result. Gone are the days of arid technicalities.
- [9] In the instant case, it is manifest that two documents, items 13 and 14 of the Index of the Record of Appeal settled by the Registrar were inadvertently omitted from the Record of Appeal. The Applicant submitted that the Court of Appeal has power under section 8(a) of the Court of Appeal Act, Cap 3:01 “to order the production of any document ... connected with the proceedings, the production of which appears to it necessary for the determination of the case.” That same power is vested in this Court by section 11(6) of the Caribbean Court of Justice Act 2004 which provides: “The Court shall, in relation to any appeal to it in any case, have the jurisdiction and powers possessed in relation to that case by the Court of Appeal”.
- [10] This Court, in the interests of arriving at a just result and pursuant to section 8(a) of the Court of Appeal Act treats the Notice of Request for Hearing and the Request for Hearing, filed documents in the custody of the Registrar, as part of the Record. It further directs that a supplemental Record of Appeal be constituted containing those documents

as well as the Reply and Defence to Counterclaim, a pleading, which by Order II rule 2 of the Court of Appeal Rules is included in the definition of the “record”.

### **Was the cause or matter deserted at the material time?**

[11] The relevant rule is Order 32 rule 8 which provides that:

“8. (1) A cause or matter shall be deemed deserted if no request for hearing shall be 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 or a judge on the application of any party or a consent to revivor and a request for hearing signed by all parties thereto have been filed.”

[12] Thus, if no request for hearing has been filed within six months after the expiration of the 6 weeks period after the Reply and Defence to Counterclaim had been filed, the cause or matter is deserted. Since the Reply and Defence to Counterclaim had been filed on April 16, 1999 and the Request for Hearing on October 1, 1999 it is clear that the cause had not been deserted.

[13] Counsel, by failing to put the documents omitted from the Record of Appeal before the Court committed a grave dereliction of duty, which led the Court of Appeal into error.

### **The second issue in the case**

[14] Assuming there was no supplementary Record of Appeal, where no step has been taken in an action and no document filed for more than one year and the parties proceed to a full trial and obtain judgment, can a cause or matter be properly deemed abandoned on appeal?

[15] Order 32 rule 9 of the High Court Rules, so far as relevant provides:

“9. (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
  - (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".
- [16] For present purposes, there are only two aspects of this intricate rule on abandonment: (1) that an abandoned cause or matter cannot be revived and (2) that deemed abandonment can only take place prior to obtaining judgment.
- [17] Counsel for the Respondent contended both before the Court of Appeal and this Court that proceedings after a deemed abandonment leading to a judgment on the merits were a nullity, a contention which found favour with the Court of Appeal. However, as counsel for the Applicant pointed out, correctly in our view, by going through the process of trial and judgment without objection a defendant waives reliance on Order 32 rule 9(1). This result follows despite the phrase "incapable of being revived."
- [18] In *Lewis v St. Hilaire*<sup>2</sup> the Court of Appeal of the Eastern Caribbean States and the Privy Council analyzed Order 34 of the Rules of the Supreme Court 1970 of the Eastern Caribbean, which is almost identical to Order 32 of the High Court Rules.
- [19] Sir Vincent Floissac CJ adopted and relied on dicta of Lord Diplock in *Isaacs v Robertson* where Lord Diplock said of Order 34 rule 11(a), the equivalent of Order 32 rule 9(1)(a):
- "The rule, which is for the benefit of defendants, is not one upon which a defendant is under any compulsion to rely. It may be to his interest that the action should proceed, particularly if the limitation period for the cause of action has not expired."<sup>3</sup>

The learned Chief Justice went on to say:

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<sup>2</sup> (1995) 48 WIR 134.

<sup>3</sup> (1984) 43 WIR 126.

“... Order 34 rule 11(1) (equivalent to Order 32 rule 9(1)) confers upon a defendant a procedural right which he is entitled to waive if he considers that it is in his interest so to do.”<sup>4</sup>

Lord Steyn, dismissing the appeal, had this to say:

“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*<sup>5</sup> per Lord Diplock.”<sup>6</sup>

There is here an analogy with a limitation defence of which a defendant may or may not wish to take advantage.

- [20] Counsel for the Applicant made the further point that the words “prior to the obtaining of judgment” in Order 32 rule 9 suggest that there can be no issue of abandonment if judgment has been obtained in the matter. In other words, the effect of proceeding to judgment is that once abandonment is clearly waived the subsequent proceedings are not a nullity. Dicta of Sir Vincent Floissac CJ in *Lewis v St. Hilaire* suggest this conclusion:

“In my judgment, the prefatory words simply mean that, as between a plaintiff and 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.”<sup>7</sup>

- [21] Essentially, the learned Chief Justice was emphasizing in a negative way that if one of the three following defaults mentioned in rule 9(1) i.e.:
- (1) default in taking a step in the action for one year from the date of the last proceeding or filing of a document,
  - (2) no application for a consent to revivor six months after the cause becomes deserted, or
  - (3) the cause or matter is not on the Hearing List within six months after an order for revivor,

occurred sequentially before either the filing of a request for hearing or consent to judgment or the obtaining of judgment, then a deemed abandonment of the cause or

<sup>4</sup> Supra, fn 2 at pg. 140.

<sup>5</sup>(1984) 43 WIR at pages 129, 130.

<sup>6</sup> Supra, fn. 2 at p. 149.

<sup>7</sup> Supra, fn. 2 at pg. 139.

matter would arise. Conversely, no deemed abandonment could arise if a request for hearing was filed or the defendant consented to judgment or judgment was obtained against a defendant before one of the three defaults had occurred fully e.g. the suit had not been inactive for a full year. The present case establishes that where one of the antecedent defaults has occurred, and the parties nonetheless proceed to a full trial without objection by the defendant and judgment on the merits is pronounced, there is a waiver of the benefit of Order 32 rule 9 by the defendant.

- [22] For the reasons outlined above, this Court holds that the dismissal of the Applicant's appeal constitutes a potential miscarriage of justice and an egregious error of law. In the normal case, this ruling would suffice to grant special leave to appeal, but since this application was made out of time the Court must consider the circumstances of the delay.
- [23] The Applicant relies principally on the fact that successive lawyers accepted that the cause was deserted until the diligence of Mr. Satram discovered the three documents which made that conclusion untenable. On the unusual facts of this case, the Court accepts the Applicant's explanation of the delay particularly since it is apparent that the Applicant has a good arguable case. Although the Applicant has not explicitly set out the basis for invoking the jurisdiction of the CCJ, his counsel has in argument relied on section 8 of the CCJ Act.

### **Order**

- [24] Accordingly, the Court makes the following orders:
  - (1) The time for filing of the application for special leave to appeal is extended to May 15, 2013, the date of the application.
  - (2) Special leave to appeal the order of the Court of Appeal of February 22, 2013 is hereby granted and the application for special leave is treated as the hearing of the appeal.
  - (3) The order of the Court of Appeal dated February 22, 2013 is hereby set aside and the order of Roy J dated November 13, 2007 is hereby restored.

- (4) The appeal dated November 16, 2007 is remitted to the Court of Appeal for hearing on the merits.
- (5) The costs of the proceedings in this Court and in the Court of Appeal to date will abide the outcome of the appeal now remitted to the Court of Appeal.

**/s/ R F Nelson**

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**The Hon Mr Justice Nelson**

**/s/ D Hayton**

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**The Hon Mr Justice Hayton**

**/s/ J Wit**

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**The Hon Mr Justice Wit**