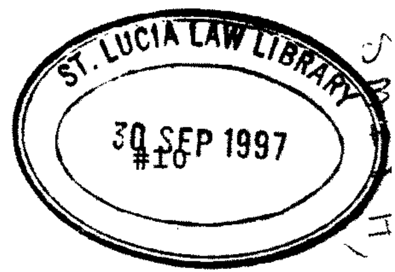

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1996

Suit No. 278 of 1991

BETWEEN:

MICHAEL SHINGLETON SMITH

Plaintiff

and

1. HICKSON CHARLES
2. MACNORA CHARLES
3. WILLIAM CHARLES
4. BOYCE CHARLES
5. WHYCLIFF CHARLES
6. INDAS CHARLES

Defendants

Mr. M. Gordon for Plaintiff
Mr. M. Foster for Defendants

1996: January 24;
February 9.

J U D G M E N T

MATTHEW J. (In Chambers).

This judgment pertains yet again to an application of Order 34 Rule 11 of the Rules of the Supreme Court whereby the Defendants request an order that the action be deemed abandoned and incapable of being revived because the Plaintiff had failed to take any proceeding for one year from the date of the last document filed.

These applications continue to come before the Chamber Judge despite two Privy Council decisions, two recent Court of Appeal decisions and several by this Court. Learned Counsel made reference to all these sources in their submissions.

The trouble is that the factual situations differ all the time and the particular issue here is the first that I can recall dealing with. I am almost tempted to echo the words of a young assiduous Counsel who practices regularly in the Chamber Courts week after

week that the rule is a humbug and should be done away with. In the meantime it has to be applied and interpreted.

On July 26, 1991 the Plaintiff brought an action against the Defendants for trespass to his land. On August 2, 1991 the Defendants entered appearance and on March 10, 1992 they filed a defence and counterclaim. About 22 months later the Defendants filed a request for hearing. Eighteen months later the Defendants filed the summons to deem the matter abandoned because more than one year had elapsed between the filing of the defence and counterclaim by the Defendants on March 10, 1992 and the filing of the request for hearing by the said Defendants on February 3, 1994.

The Plaintiff's sole answer to the summons is that the Defendant had waived their right to have the Court deem the matter abandoned. In support of that submission learned Counsel for the Plaintiff relied on the words of Sir Vincent Floissac, Chief Justice, in the decision of the Saint Vincent case, Civil Appeal No. 21 of 1993 between Henry St. Hilaire and Railford Baptiste against Ena Lewis and specifically to the words:

> *"nevertheless Order 34 Rule 11(1) confers upon a defendant a procedural right which he is entitled to waive if he considers it that it is in his interest so to do."*

Counsel also mentioned the decision of the High Court in Suit No. 614 of 1993 between DANIEL GIRARD and RICK WAYNE decided on October 18, 1995. Of course none of these decisions state that the filing of the request for hearing amounts to waiver.

Learned Counsel for the Defendants seem to be blowing hot and cold in his reply and submitted that it would be for the Court to decide whether filing a request for hearing was enough to establish waiver by the Defendants after twelve months had expired between the filing of the defence and counterclaim and the request for hearing.

In St. Hillaire's case the learned Chief Justice referred to the two Privy Counsel decisions in the matter, namely:
BARBUDA ENTERPRISES LTD. v. A.G. of ANTIGUA 1993 1 W.L.R. 1052; and ISSACS v. ROBERTSON 1984 3AER, 140. The learned Chief Justice was guided by the authoritative dicta in those two cases and then went on to make the pronouncement relied upon by learned Counsel for the Plaintiff. In particular he cited the words of Lord Diplock in the latter case, namely:

> *"The rule, which is for the benefit of the defendants, is not one on 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."*

In the other recent Court of Appeal decision, Civil Appeal No. 2 of 1995 originating from Tortola, GUSTAVUS FRETT and IDALIA DAVIES, the doctrine of waiver was actually applied. The form of waiver was different to the kind sort to be applied here. In FRETT the respondents, through their solicitors, consented in writing to the continuation of the action after a lapse of 27 months.

Although mention was made of waiver in the St. Vincent case the facts did not call for the application of waiver. In that case the appellants had entered appearance in the cause or matter on November 4, 1991 and thereafter neither party took any proceeding or filed any document therein until August 31, 1993 more than 21 months later.

So I come back to the sole issue in this case, namely, whether the filing of the request for hearing by the Defendants about 22 months after the filing of their defence and counterclaim constituted waiver to deprive them of an order under Order 34 Rule 11(1)(a) of the Rules of the Supreme Court.

In DANIEL GIRARD against RICK WAYNE I sought to analyse the

decision of the Privy Council in the Barbuda case and I said the Privy Council referred to the effect of our rule unknown to the U.K. rules as draconian but they said harsh as it may seem, in their judgment, the inescapable consequence of the plain language of Order 34 is that the Plaintiff's action can become deserted and thereafter abandoned and cannot be restored to life and the Court had no discretion to relieve against it. The Court then sought to apply the rule to the letter.

On this question of waiver I referred to paragraph 1471 of Volume 16 of the Fourth edition of Halsbury's Laws of England which states in part:

> *"Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereby asserted, and is either express or implied from conduct . . . . waiver must always be an intentional act with knowledge."*

Now if the solicitor for the Defendants who must be aware or ought to have been aware of the effect of Order 34 Rule 11(1) (a) signs a document asking for the matter to proceed in my judgment he must be deemed to have waived the effect of the rule.

I refer again to the passage cited from Lord Diplock's speech in Issacs' case that it may be to the interest of the Defendants that the action should proceed, particularly if the limitation period for the cause of action has not expired. I deduce from that speech that Lord Diplock is saying that even if the Defendants were to succeed on the summons, if the limitation period for the cause of action had not expired the Plaintiff could yet institute a fresh suit on the matter. So the Defendants must not think they could be excused from answering the suit merely because they happen to be successful on such a summons. All they could achieve is a delay in trial and costs.

In this case the action for trespass was instituted on July 26, 1991. My reading of Articles 2103, 2112, 2119, 2121 and 2122 of the Civil Code, the last four being exceptions to the first, would not cause me to conclude that this action is close to the expiry of the limitation period.

I would therefore dismiss the summons. A Plaintiff who is as dilatory in the pursuit of his claim is not worthy of costs and so I make no order to that effect.

....
A.N.J. MATTHEW
Puisne Judge