#042 12 NOV 1996

SAINT LUCIA

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

Suit No. 382 of 1990

BETWEEN:

FELINA FELIX

Plaintiff

and

1. **ADMINISTRATOR GENERAL for the succession of IGNATIUS FELICIEN**
2. **AGNES FELICIEN**
3. **MICHELE ETIENNE**

Defendants

Miss F. Byron-Cox for Plaintiff
Mr. O. Larcher for Defendant No. 2.
Mr. H. Deterville for Defendant No. 3.

1996: September 25;
October 2.

J U D G M E N T

MATTHEW J. (In Chambers).

Summons by Defendant No. 3 on application to deem matter deserted or abandoned or dismissed for want of prosecution filed on May 28, 1996 at folio 138 of file.

On November 23, 1990 the Plaintiff filed a writ of summons indorsed with a very lengthy statement of claim asking for 9 heads of relief and costs against the three Defendants.

All three Defendants were served with the writ on November 23, 1990, the same day it was filed.

On November 27, 1990 the Plaintiff also filed a petition for the issue of a writ of injunction with supporting affidavit and exhibits which she eventually obtained on February 3, 1991 against Defendants 2 and 3.

There were other lengthy interlocutory proceedings which are not material to this decision.

Entry of appearance was filed on November 29, 1990 for Defendant No. 2, and on November 30, 1990 for both Defendant No. 1 and Defendant No. 3.

A defence was filed for Defendant No. 1 on December 21, 1990; a defence and counterclaim was filed on behalf of Defendant No. 3 on December 21, 1990; and a defence and counterclaim was filed on behalf of Defendant No. 2 on February 20, 1991.

The Plaintiff duly entered defences to the counterclaims of Defendants Nos. 2 and 3.

It appears that Defendant No. 1 died at Victoria Hospital in Castries on November 28, 1991 and upon application by the Plaintiff the Court made an order on April 28, 1993 that the Plaintiff be at liberty to institute proceedings against the Administrator General as the representative of the succession of **IGNATIUS FELICIEN** named as Defendant No. 1 in suit 382 of 1990.

The order was filed on June 9, 1993 and on February 2, 1994 there was filed an affidavit of service by Petura Morris, solicitor's clerk to the effect that on Friday, January 28, 1994 she personally served the Administrator General with the copy of the order made on April 28, 1993.

The next document filed was the application of Defendant No. 3 referred to above which came in 27 months after the preceding document filed.

Learned Counsel for the third Defendant submitted that he was not pursuing the application to deem the matter deserted in view of the decision in **BARBUDA ENTERPRISES LTD.** v. **A.G. OF ANTINGUA 1993**

1 WLR 1052.

Counsel relied on the authority of **ST. HILLAIRE v. LEWIS Civil Appeal No. 21 of 1993 and FRETT v. DAVIES Civil Appeal No. 2 of 1995** and stated that his application to deem the matter abandoned and incapable of being revived was based on Order 34, Rule 11 (1) (a).

Counsel went further to ask that the matter be dismissed for want of prosecution under the inherent jurisdiction of the Court and in this context made references to the Privy Council decision in **Lewis v. St. Hillaire** and the affidavit of the third Defendant especially paragraphs 2 to 7.

Counsel further asked that the injunction against Defendant No. 3 be lifted.

In her reply learned Counsel for the Plaintiff accepted the authority of the Barbuda case and she referred to a case decided by this Court, No. 614/93 **GIRARD v. WAYNE.** Counsel also made reference to **ST. HILLAIRE v. LEWIS.** The substantial point made by Counsel was that since in this case the pleadings were closed the case should be viewed as falling under Order 34 Rule 11 (1) (b).

As regards the application under the inherent jurisdiction of the Court Counsel referred to the case of **BIRCKETT v. JAMES 1978 A.C. 297** where at pages 325 and 327 Lord Salmon spoke about the question of prejudice to the Defendant whereas in this case the Defendant has only spoken about hardship.

Counsel said that the delay was caused by the death of Defendant No. 1 and the difficulty that followed in obtaining representation for his estate. I should note here that this matter of the representation of Defendant No. 1 was settled since April 1993.

The application concerns a period after April 1993, that is the period February 2, 1994 to May 28, 1996.

I agree with learned Counsel for the Applicant that it is a matter of semantics to distinguish between a matter being harsh and it or another being prejudicial. I see nothing in **BIRCKETT v. JAMES** to support that contention of learned Counsel for the Plaintiff.

The Applicant has clearly relied on Rule 11 (1) (a) of Order 34. The Rule reads this -

> "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 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."

Both in the Barbuda case and the Girard case the applications were brought under Rule 11 (1) (b) of Order 34. Learned Counsel for the Plaintiff correctly stated that the cases have drawn a distinction between the applications brought under Rule 11 (1) (a) on the one hand and Rule 11 (1) (b) and (c) on the other hand.

Counsel submits that because the pleadings were closed this case comes under Rule 11 (1) (b). I do not agree. The pleadings may have been closed but 27 months elapsed and the Plaintiff had not filed the request for hearing.

I rule that this matter be deemed abandoned and incapable of being revived. I also dismiss the claim for want of prosecution and I order that the injunction granted to the Plaintiff on February 13, 1991 in this matter be discharged.

The Plaintiff is to pay the costs of the Applicant in the sum of $750.00.

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