GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.5 OF 1997

BETWEEN:

BNP TRADERS COMPANY LIMITED

Appellant

and

OTWAYS INVESTMENTS LIMITED

Respondent

Before: The Hon. Mr. C.M. Dennis Byron Chief Justice [Ag.]
The Hon. Mr. Albert Redhead Justice of Appeal
The Hon. Mr. Albert Matthew Justice of Appeal [Ag.]

Appearances: Miss R. Joseph for the Appellant
Mr. D. Knight, Q.C. for the Respondent

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1997: July 11;
September 15.

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*Civil Procedure* - Abandonment of a cause of action - Interpretation & application of Order 34 rule 11(1)(a) - Distinction between paragraphs (a), (b) and (c) of Order 34 rule 11(1) - Lewis v. St. Hillaire [1995] 48 WIR 134 considered - Gustavus Frett v. Idalia Davies Civ. App. No. 2 of 1995 (Tortola) considered - Whether Order 34 rule 11(1)(a) provided for automatic dismissal of a case on the expiration of the time prescribed, or whether there was need for an application by one of the parties - The question of waiver by a defendant. Appeal dismissed.

JUDGMENT

MATTHEW J.A. [Ag.]

This appeal concerns the application of Order 34, Rule 11 [1][a] of the Rules of the Supreme Court which is as follows:

> "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."

In fairly recent times this Court has on two occasions pronounced upon Order 34 Rule 11[1][a] and one would have thought that there might not have been need to deliver another written decision but learned Counsel for the appellant has urged that a particular circumstance which was not directly dealt with before arises in this case and in fact Counsel has used one of the two decisions referred to as authority for submitting that in this particular case the matter ought not to be deemed abandoned and incapable of being revived.

In Lewis v St. Hillaire [1995] 48 W.I.R. 134 this Court held that the importation of the concept of ripeness for hearing into Order 34, Rule 11[1][a], which incidentally was what the Judge at first instance did, would have the effect of rendering that rule otiose. The Court went on to say for that 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. A clear difference was shown between the application of Order 34, Rule 11[1][a] on the one hand and Order 34, Rule 11[1][b] or [c] on the other hand. In the said case after the appellant had issued a generally endorsed writ and the respondent had entered appearance neither party took any procedural step in the proceedings during the next twenty-two months. It was then that the respondent took out a summons for an order under the provisions of Order 34, Rule 11[1][a]. As stated earlier the Judge at first instance dismissed his application. The Court of Appeal reversed the decision of the Judge and the Judicial Committee of the Privy Council upheld the decision of the Court of Appeal.

This Court had occasion to consider the same rule in Tortola after its decision in Lewis v St. Hillaire but before the Privy Council's ruling in that case. That was Civil Appeal No.2 of 1995, Gustavus

Frett v Idalia Davies. In that case, the writ was served on February 25, 1992 and appearance entered three days later.

No further step was taken in the action until July 15, 1993 when personal representatives of the plaintiff who had died, sought to be substituted for him. An order was made to that effect on November 19, 1993.

Despite that delay the respondents through their solicitors consented in writing in accordance with the provisions of Order 3, Rule 5[1] on June 2, 1994, that is some twenty-seven months after the appearance was entered to the appellant filing his statement of claim out of time.

When new solicitors for the respondents sought to challenge the validity of the written consent given by the former solicitors and to argue that the provisions of Order 34, Rule 11[1][a] were automatic, the Court was unanimous that a Party in whose favour the rule applied could waive it.

It is now necessary to examine the course of this case more closely to be able to apply the relevant procedural rule.

The appellant, a tenant, issued a writ of summons against the respondent, a landlord, on May 21, 1987 seeking a declaration, certain injunctions, damages, other relief and costs. The respondent entered appearance on the following day and the appellant filed its statement of claim on May 25, 1987. Certain injunctive relief were granted on May 21, 1987 and the record indicates that a consent order was entered on June 5, 1987.

The next step taken in the proceedings seems to have been a notice pursuant to Order 3, Rule 6 of the Supreme Court 1970 that the appellant intended to proceed in the matter after the expiration of one month from the date of the notice by applying for judgment in default of defence. The notice was dated November 8, 1993 and it was addressed to the chambers of the respondent’s Counsel.

On February 15, 1994 the Registrar of the Court signed judgment in default of defence and adjudged that the defendent do pay to the plaintiff damages to be assessed and costs to be taxed.

By summons dated September 19, 1996 the appellant sought to have its damages assessed and that summons was addressed to the respondent in care of its Counsel. By notice dated November 13, 1996 Counsel for the respondent stated that on the hearing of the summons for assessment of damages fixed for November 15, 1996 he would submit that the action had been abandoned under Order 34, Rule 11[1][a].

St. Paul J. heard the matter on December 13, 1996 and agreed with the submission of learned Counsel for the respondent and he set aside the judgment in default. The appellant is not satisfied with the judgment and has appealed to this Court.

## Grounds of Appeal

Learned Counsel for the appellant advanced two grounds of appeal which were dealt with together but which I shall for convenience set out separately. They are as follows:

1. The learned trial Judge erred in law in that he failed to consider or properly to consider the principles on which a matter is deemed abandoned under Order 34, Rule 11[1][a] of the Rules of the Supreme Court, and in particular to consider or properly consider that judgment for damages to be assessed had been entered on the 15th day of February, 1994.

2. The learned trial Judge erred in that no application to strike out the action under Order 34, Rule 11[1][a] of the Rules of the Supreme Court 1970 had been made by the defendant and the learned trial Judge regarded the said Order 34 Rule 11[1][a] as an automatic provision which the Court could apply sui motu.

Learned Counsel for the appellant submitted that after six years had elapsed the appellant gave notice to proceed and the respondent took no action and so the appellant proceeded to judgment and it was

only at the assessment of damages stage that the respondent sought to invoke Order 34, Rule 11. Counsel relied on the authority of Frett referred to above and submitted that it was for the respondent to make a formal application to dismiss the action.

Learned Counsel for the respondent submitted that the judgments of the Court already written on Order 34, Rule 11[1][a] were sufficient to dispose of this case and to dismiss the appeal. Counsel emphasised that Frett's case establishes that a period of delay in excess of one year can be waived but there clearly has been no waiver in this case by the respondent.

Learned Counsel for the appellant, it seems to me, places some significance on the fact that judgment for damages to be assessed had been entered on February 15, 1994 and that the learned trial Judge should have borne that in mind when he applied the principles on which a matter is deemed abandoned.

This calls for some inquiry about Order 3, Rule 6 for this was the precursor to the entry of judgment on February 15, 1994. Order 3, Rule 6 is 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. A summons on which no order was made is not a proceeding for the purpose of this rule."

In Lewis v St. Hillaire it was conceded that Order 3, Rule 6 appeared to be inconsistent with Order 34 in general although it was sought to show how judicial dicta of the Privy Council sufficiently indicated how the apparent inconsistency should be resolved. Sir Vincent Floissac, Chief Justice, stated at page 140:

> "……nevertheless Order 34, rule 11[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. Order 3, rule 6, does not deprive the defendant of that right. The notice required to be given by Order 3, rule 6, is merely a means of ascertaining

> whether the defendant waives that right or consents to the continuation of the action."

In my judgment, one cannot read into the effect of Order 3, Rule 6 a compulsion on the part of the respondent to act as soon as he is served with a notice for as stated in the above quotation, Order 3, Rule 6 does not deprive him of his right acquired under Order 34, Rule 11[1][a].

In his judgment in Frett, Singh J.A. speaking of Order 3, Rule 6 states at page 14:

> "This rule affords a plaintiff a right to proceed with his action after a year's delay provided he gives one month's notice to the defendant of his intention to so proceed and provided that such defendant waives his right under O.34 R.11 or consents to the continuation of the action."

What this boils down to is that although the party for whose benefit the rule was made can waive it in the interest of the other party who was in default, the latter cannot by himself enforce the continuation or restoration of an action. It follows that the appellant's default judgment dated February 15, 1994 cannot acquire validity simply by giving notice under the provisions of Order 3, Rule 6 of the Rules of the Supreme Court 1970.

As regards the second ground of appeal it would have to be conceded that the respondent did not activate the proceedings under Order 34 as St. Hillaire had done in Lewis v St. Hillaire. It is also true that all three Members of the Court in Frett's case were of the view that the provisions of Order 34, Rule 11[1][a] did not provide an automatic dismissal of a case on the expiration of the time prescribed as learned Counsel for the respondents in that case were advancing. The Court intimated that our adversarial system of civil litigation presupposed an application by one of the parties.

The position here is really whether it is fair to the learned trial Judge to say that he regarded Order 34, Rule 11[1][a] as an automatic

provision which the Court could apply sui motu when one full month before he heard the matter he knew or could have known form the relevant files that learned Counsel for the Respondent would be resisting the assessment based on Order 34, Rule 11[1][a] as he had intimated in this notice dated November 13, 1996 and the fact that there was a hearing on December 13, 1996 where both sides participated. So the Court did not in fact apply the Rule sui motu.

It follows that I do not agree that the respondent need initiate action under Order 34 to deem a matter abandoned although I recognise the desirability of his so doing. If the respondent had acted on the appellant's notice dated November 8, 1993 as they did in their notice dated November 13, 1996 much time and expense might have been avoided.

For this reason I am minded to dismiss the appeal and make no order as to costs.

ALBERT MATTHEW
Justice of Appeal [Ag.]

I Concur.

C.M. DENNIS BYRON
Chief Justice [Ag.]

I Concur.

ALBERT REDHEAD
Justice of Appeal