BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NOS. 14 and 15 OF 2002

BETWEEN:

RUDOLPH GEORGE

Appellant

and

IVAN CHINNERY

Respondent

CYRIL ROMNEY

Appellant

and

LUCIA PENN AND CALVIN PENN

Respondent

Before:

The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Adrian Saunders — Justice of Appeal
The Hon. Mr. Ephraim Georges — Justice of Appeal [Ag.]

Appearances:

Mr. Joseph Archibald QC; Miss. Anthea Smith with him for both Appellants
Mrs. Dancia Penn QC; Mr. Clyde Williams with her for all three Respondents

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2003: June 19;
September 29.

JUDGMENT

[1] REDHEAD, J.A.: Both appeals involve a determination under the Old Rules (1970 Rules of the Supreme Court) as to whether the cause or matter in each of the suits was deemed

abandoned by Virtue of Order 34 Rule 11. Although the facts in Civil Appeal No. 14 – Rudolph George v. Ivan Chinnery- are different from those in Civil Appeal No. 15 - Cyril Romney v Lucia Penn et al -, the issue which is to be decided in both cases is the same and therefore both cases were heard together.

[2] In the case of George, the Testator, Albert Chinnery, appointed the respondent, Ivan Chinnery executor of his will.

[3] By that same will he left a share in a two-story building to the appellant and his brother.

[4] On the 16th October 1996 the appellant commenced proceedings in the High Court of the British Virgin Islands by issuing a Writ of Summons in which he sought a declaration that he was entitled to a half share in the property.

[5] On 21st February 1997 the appellant applied by way of summons for an interlocutory injunction. This was heard in September 1997. The judge ordered that the case be adjourned for a report for a settlement. The learned judge also ordered the appellant and the respondent to exchange pleadings while settlement negotiations continued. A statement of claim was filed on 23rd March 1998 and the defence filed on 18th June 1998. On 3rd July 1998 Summons for Directions was filed. This was heard on 27th July 1998. The order made on that Summons was filed on 27th July, 1998.

[6] No further documents were filed or proceedings had in this case until October 2001 when the case was set down for Case Management Conference by the Court Office.

[7] On 12th November 2001 Solicitors for Ivan Chinnery applied by way of Notice of Motion for an order that this case was deemed abandoned.

[8] In a written judgment Rawlins J. made the Order, stating inter alia

> "… This case is deemed abandoned and incapable of being revived as of 27th July 1999 by the Operation of Order 34 rule 11(i)(a) of the 1970 Rules. It could also

have been deemed abandoned on or about 5th December 1999 by the Operation of Order 34 11(i)(b) of the 1970 Rules."

[9] The appellant is dissatisfied with this ruling and has appealed to this Court.

[10] The Grounds of Appeal are;

(a) The learned trial Judge erred in law when he applied the Rules of Supreme Court 1970 instead of the Civil Procedure Rules 2000 when determining the application to strike the matter from the Court's list.

(b) The learned trial Judge was wrong in law when he failed to give any or sufficient consideration to Part 1 of the Civil Procedure Rules 2000, that is the overriding objective.

[11] The facts of Cyril Romney are as follows: The original claimant, William Smith, was the husband of Iris Penn-Smith. She died intestate and without issue on 2nd November 1993. Mr. Smith obtained Letters of Administration to her estate as the sole Administrator on 3rd May 1999. He died on 7th February, 2002. An application for probate of his will was filed on 19th March, 2002.

[12] Mr. William Smith instituted action by Writ of Summons, generally endorsed, on 29th August 1996. He sought a declaration that he was entitled to be the sole registered proprietor of the matrimonial home in which he resided with his wife prior to her death, and land therewith, notwithstanding the provisions of the Intestates Estates Act Cap 34 of the Laws of the British Virgin Islands. On 21st January 1997 Solicitors for Mr. Smith issued an ex parte summons for leave to serve the writ on Mr. Roland Penn out of the jurisdiction. On 17th April, 1997 Dancia Penn & Co. entered appearance on behalf of Mr. Roland Penn.

[13] No further documents were filed or proceedings had until 29th June 2000.

[14] On that date Solicitor for the Respondent issued a summons to dismiss the action on the ground that the matter should be deemed abandoned under the provisions of Order 34

Rule 11(i) of the 1970 Rules. They prayed in the alternative, that the action be dismissed for want of prosecution as an abuse of the process of the Court.

[15] Rawlins J. in granting the respondent's application ordered:

> "It is hereby ordered that this case was deemed abandoned and is incapable of being revived by the operation of Order 34 Rule 11 (i)(a) of the 1970 Rules with effect from the 17th day of April 1996."

[16] This appellant is also dissatisfied with the judge's ruling and has appealed to this Court.

[17] The Grounds of Appeal filed by the appellant are:

(a) The learned trial Judge erred when he applied the Rules of the Supreme Court 1970 instead of the Civil Procedure Rules 2000 when determining the summons to dismiss the Action.

(b) The learned trial Judge was wrong when he failed to give any or sufficient consideration to Part 1 of the Civil Procedure Rules 2000, that is the overriding objective.

[18] I deal with Rudolph George's appeal first. No. 14 of 2002. Rawlins J in a careful written judgment traced the history of this matter from the time of its filing up to the date the last document was filed.

[19] Order 34 Rule 11(i)(a) of Supreme Court Rules 1970 mandated:

> "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 document therein (b) no application for or consent to revivor has been filed within six months after the matter has been deemed deserted."

[20] The provision is quite clear and without any ambiguity.

[21] The last document as noted above, was filed in this matter or 27th July 1998. Was there anything done by the respondents which would be regarded as a waiver so as to prevent the respondents benefiting from the rule? (See Gustave Alvanley Frett by his personal representatives Gwen Alva, Derrick Atley Frett and Idalla Davies, Haldane Davies – Respondents Civil Appeal No. 2 of 1995 – British Virgin Islands).

[22] In an affidavit deposed to and filed by Ms. Michelle Matthew on 19th March 2002 by paragraph 14 she swore as follows:

> "By letter dated 26th August 1998. Astra Penn wrote to legal practitioners for the claimant seeking an extension of time of exchanging Lists of Documents; and to reopening negotiations with a view to settling the matter and therefore arranging a meeting between the parties and Counsel on their own behalf."

[23] One thing that is beyond doubt, on that date 26th August, 1998, the matter was not deemed to be abandoned, so in my judgment there could have been no waiver on the date.

[24] Was this letter a "proceeding" for the purpose of the satisfaction of the rule?

[25] Mr. Archibald QC in his skeleton arguments submitted.

> "As stated in the case of Mundy v Butterly & Co. Ltd (1932) 2 Ch 229 and in Barrow v Caribbean Publishing Co. Ltd. 11 14 I.R. 461 a "proceeding" is defined as "something in the nature of a formal step, either an application to the Court or at least a step taken by a litigant in prosecution of the action being a step which is required by the rules."

[26] In Barclay Davit Co. Ltd v Samuel Taylor and Sons (Brierley Hill) Ltd. 1946 2 Ch.d. 41. The Court was called upon to interpret "proceeding" in the English R.S.C. Ord. 26 r 6.

[27] At page 45 Romer L.J. said:

> "I think the rule intended a proceeding which is to have the effect of continuing the action – not a proceeding which has the effect of putting an end to the action."

[28] I make the observations that regarding the communication i.e. the letter dated 26th August from Ms. Astra Penn. There was no response from the other side to this communication initiated by the respondents. The second comment is that it was an invitation to meet with a view to discontinuing the action. In my opinion that could hardly be regarded as a proceeding.

[29] The more fundamental question that has to be considered for the determination of this matter, in my view, is when was this matter deemed abandoned.

[30] Byron J. A. (as he then was) in Gustave Alvaney Frett (Supra) at page 1 in holding that Order 34 Rule 11(i)(a) of the Rules of the Supreme Court 1970 empowers the Court to deem the cause abandoned and incapable of being revised because more than one year had elapsed after the entry of appearance on 4th August 1991 before any party took any proceeding or filed any document in the matter. He also agreed with the opinion expressed in St. Hilaire and Baptiste v Lewis Civil Appeal No. 2 of 1992 St. Vincent and the Grenadines that the party benefiting from that rule could waive it.

[31] At page 2 of the judgment Byron J.A. said:

> "I do not construe Order 34 rule 11 (i)(a) to substitute an automatic dismissal on the expiration of the time prescribed, for an order of the Court to make an application of a party to the cause. It's language does not require that interpretation and that is a clear indication that such a construction was not intended in any event an automatic dismissal would involve a serious departure from existing practice."

[32] In Isaac v Robertson 43 WIR 126 at 129. Lord Diplock after referring to Order 34 rule 11 (i)(a) said:

> "Both Glasgow J and the Court of Appeal were of the opinion that, upon the facts as to the course of the proceedings in the instant case, the rule had become applicable before 31st May 1979 when the interlocutory injunction was granted; the only, but crucial, difference between the judge and the Court of Appeal being that the former held (erroneously) that the rule operated ipso jure to render the interlocutory injunction an order which the Court was obliged upon its own initiave to treat as having never being made, whereas the Court of Appeal held (rightly) that the rule entitled the defendant as defendant in the action to apply for an order setting aside the interlocutory injunction if he elected to make such application. The rule, which is for the benefit of defendants, is not upon which a defendant is under any compulsion to rely."

[33] There could be no doubt having regard to authorities that Order 34 rule 11 (i)(a) does not act as an automatic dismissal of an action that is caught on the expiration of the requisite time prescribed by the rule.

[34] Rawlins J. decided in paragraph 22 of his judgment:

> "Since abandonment applies from the operative date unless there is a waiver, the application herein by the defendant was a mere formality.
>
> If the matter falls under the operation of order 34 rule 11 (i) of the 1970 Rules. It would have been deemed abandoned and incapable of being revived at a date in 1999. this was prior to the commencement of CPR 2000. Its continued existence in the system after the operative date depended upon whether the defendant waived his right and permitted to continue. In the absence of waiver, this case was already deemed abandoned and incapable of being revived prior to the commencement of CPR 2000."

[35] For a determination of this matter it would be necessary to consider the time of the filing of the application for an order deeming the matter to be abandoned.

[36] The application to strike out was filed by the respondent on 12th November, 2001. Mr. Archibald QC, argued that if the application to strike out was made after the new rules came into effect then CPR 2000 ought to apply, for he contended that in the Preamble of CPR 2000, which states that "Those rules are deemed to have come into effect in each of the member states and territories of the Eastern Caribbean Supreme Court on 31st December, 2000."

[37] The short point for consideration made by Miss Dancia Penn QC, in her written submission is that there was no waiver under Order 34 or 11 (i)(a) and as such the matter is to be deemed altogether abandoned and incapable of being revived as at July 27, 1999.

[38] That being so there was no suit in existence at the commencement of CPR 2000 on December 31, 2000 to which those rules could be applied.

[39] In my considered opinion there would have been no suit in existence if there was an automatic dismissal of the suit on 27th July 1999 but from the authorities referred to above Frett v Davies (Supra) Isaacs v Robertson (Supra). The dismissal of the suit can only occur when the application is made for an order deeming the matter abandoned.

[40] No application was made until well after the CPR 2000 Rules had come into force and moreover Part 73(3) of CPR 2000 Mandates:

> "If a trial date has not been fixed in proceedings commenced before the commencement date;
>
> (a) The Court office must fix a date, time and place for a case management conference under part 27 after a defence has been filed and give all parties at least 28 days notice of the conference, and
>
> (b) These rules apply from the date of the case management conference."

[41] It is quite clear from the history of this case that no trial date had been fixed for the hearing.

[42] The last events which occurred in this case history are that on 24th July, 1998 the Summons for Directions were heard. The order made on the Summons for Directions was filed on 27th July, 1998. In October 2001 the case was set down for Case Management Conference pursuant to a notice issued out of the court office. It seems that it was as a result of the action by the Court in setting down the case for Case Management that galvanized the solicitors for the respondents into action into filing the application on 12th

November for an order that this case was deemed abandoned in 1999 and incapable of being revived.

[43] In light of the foregoing I have absolutely no doubt that CPR 2000 apply to this case and therefore the learned trial judge erred in law in striking out the case. The appeal is allowed. The case is remitted to Case Management.

[44] I now analyze briefly the history of Cyril Romney.

[45] The issue as I had stated before was whether the matter was deemed abandoned.

[46] The learned trial judge so held and dismissed the action.

[47] At paragraph 22 of his judgment Rawlins J. said:

> "In my judgment in Rudolph George v Ivan Chinney… No 1996 BVIHCV/0228. I have considered submissions that were made by Counsel for the parties on this issue. The relevant analysis, finding and decision on the issue are at paragraphs 20 to 23 of that judgment… In that case the application to dismiss was filed after the commencement of CPR 2000. I found that this did not preclude the operation of Order 34 rule 11 (i)(a) of the 1970 Rules. In this case the application to dismiss was filed prior to the commencement of CPR 2000. It is even more clear on my reasoning on this issue in the Rudolph George Case that the commencement of CPR 2000 did not preclude the operation of 0rder 34 rule 11 (i) of the 1970 Rules on the application before me in this case"

[48] The respondent's summons to dismiss was dated and filed on 29th June, 2000. Mr. Archibald QC argued that the summons was not perfected, although filed on 29th June 2000, until 28th February, 2002 when the Affidavit in Support of Summons was filed. Learned Counsel contended that there was no application before the Court until the affidavit was filed on 28 February, 2002.

[49] The Court could not have made any pronouncement on the summons until it was supported by an affidavit.

[50] I am persuaded by this argument, as I think Mr. Archibald must be correct. Once again unless there is an automatic dismissal on the expiration of the time prescribed by Order 34 Rule 11 (i)(a) it is clear that up to 28th February, 2003 this case would still be alive and in the system.

[51] CPR 2000 repealed the Rules of the Supreme Court (Revision) 1970.

[52] In July 2000 and October 2000 there were applications before the judge. On each occasion these applications were adjourned. The motion came before Benjamin J. on 1st November, 2000, it was adjourned and eventually heard by him on 22nd November 2000. The order of the Court on that date was:

> "It is ordered that the application for postponement made by the Applicant/Defendant be granted and that the matter be adjourned to 17th January, 2001 for final report in the course of settlement."

[53] There was a hearing on 17th January, 2001 and on 23rd January an order was filed that reads:

> "By consent, it is ordered that the matter be adjourned to 23rd February before a Master."

[54] Part 73(3) of CPR 2000 (referred to above) is relevant.

[55] I entertain no doubt in my mind that having regard to the above that CPR 2000 are applicable to this case and the learned trial judge erred when he held that it was deemed abandoned by the operation of Order 34 11(i)(a) of the Supreme Court Rules 1970.

[56] Both appeals are therefore allowed and the Orders pronounced by the learned trial Judge in both these appeals are set aside.

[57] Costs to each of these appellants in the sum of $9333.

A. J. Redhead
Justice of Appeal

I concur

Ephraim Georges
Justice of Appeal [Ag.]

[58] SAUNDERS J.A.: I agree that these appeals must be allowed for the reasons given. Order 34 of the old Rules of the Supreme Court generated much litigation and happily, courts and practitioners alike are no longer required to address its provisions in the new Civil Procedure Rules 2000.

[59] I think the cases, referred to by my brother Redhead, J.A., illustrate that a matter was never automatically deemed abandoned. Neither the court nor the litigant could assume that because a certain set of events had occurred, a matter was *ipso facto* abandoned. The matter was still alive up to the point in time a court ordered that it had been deemed abandoned. The hearing on the application for such an order was not of a mere *pro forma* nature. The hearing was adversarial. The respondent could for example argue that the relevant events required to trigger the rule had not in fact occurred; or that the time had not in fact run; or that notwithstanding the occurrence of these circumstances, the applicant had waived his right to insist upon the rule. It was then for the court to determine whether it should deem the matter abandoned after considering all the circumstances. The order of the court might then have retrospective effect but it cannot be said that prior to the making of the order the matter was dead.

[60] The new CPR 2000 having repealed the old Rules, the opportunity to argue that a matter has been deemed abandoned pursuant to Order 34 has been thereby removed. There is now no rule in existence pursuant to which a litigant can ask a court to deem a matter abandoned and the appeals should therefore be allowed.

[61] In each of these cases the application to deem the matter abandoned was made *after* the new CPR 2000 had come into being. In those circumstances the court could not give relief that was available under a rule that had been repealed.

Adrian Saunders
Justice of Appeal