Privy Council Appeal No. 37 of 1992

Barbuda Enterprises Limited *Appellant*

v.

The Attorney General of Antigua and Barbuda *Respondent*

FROM

THE COURT OF APPEAL OF THE EASTERN CARIBBEAN SUPREME COURT (ANTIGUA AND BARBUDA)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH MAY 1993

Present at the hearing:-

LORD KEITH OF KINKEL
LORD BRIDGE OF HARWICH
LORD BROWNE-WILKINSON
LORD SLYNN OF HADLEY
LORD WOOLF

*[Delivered by **Lord Bridge of Harwich**]*

This is an appeal from a judgment of the Eastern Caribbean Court of Appeal brought by leave of that court. The issue it raises is procedural. It concerns the interpretation and application of a provision of the relevant rules of court which has the draconian effect that, if a plaintiff fails to take the appropriate steps within specified time limits to have his action set down for hearing, the action is automatically struck out and cannot be restored.

The appellant ("the plaintiff") sued the Attorney General of Antigua and Barbuda and four other defendants in an action begun by writ dated 20th October 1987. The nature of the litigation is immaterial. The Attorney General alone defended the action. As against the other defendants the plaintiff obtained an injunction and judgment in default of defence for damages to be assessed. As between the plaintiff and the Attorney General pleadings were closed when the plaintiff's reply was delivered on 21st January 1988. The plaintiff issued a summons for directions dated 28th April 1988 and on 27th

May 1988 the court gave directions relating to the amendment of pleadings and discovery of documents. Discovery proceeded pursuant to the directions given, but the next formal step taken by the plaintiff was to make a request to the Registrar dated 30th March 1989 that the action be set down for trial, duly giving notice of the request to the Attorney General. On 8th June 1989 the plaintiff gave notice of application under the original summons for directions seeking certain further directions, but this had not been heard when, on 9th November 1989, the Attorney General issued a summons seeking an order that the application be struck out in reliance on Order 34 of the Eastern Caribbean Rules of the Supreme Court 1970.

Order 34 is headed "Setting down for trial action begun by writ". The provisions of the Order which it is material to consider read as follows:-

"1.-(1) When a cause or matter has become ripe for hearing, it shall be the duty of the plaintiff ... to file, within six weeks thereafter, a request that it be set down for trial.

...

3.-(1) Subject as hereinafter provided a cause or matter shall be ripe for hearing when -

(a) the defendant is in default of appearance or has failed to deliver a defence and the plaintiff has complied with the provisions of Order 13 or Order 19 as the case may be;

(b) the pleadings have been closed by the delivery of a reply, or, if no reply has been delivered, after the time for delivery of a reply has expired;

(c) an order has been made under Order 14 or under Order 25 or under any other Order giving directions as to the trial of the cause or matter.

(2) If there are any interlocutory proceedings pending, a cause or matter shall not become ripe for hearing until the determination of such proceedings unless the Court otherwise orders.

...

6. The Registrar shall on the day on which a request for setting down has been filed, enter the cause or matter on the Hearing List and such entry shall be made in the order in which each request is filed.

7.-(1) A cause or matter shall be deemed deserted if no request for setting down is 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 on the application of any party or a consent to revivor and a request for setting down signed by all the parties thereto have been filed.

...

11.-(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) ...

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

On the hearing of the Attorney General's summons, Mitchell J. held as follows:-

(i) that the action became ripe for hearing under Order 34, rule 3(1)(c) when the order was made on the plaintiff's summons for directions on 27th May 1988;

(ii) that the six weeks allowed by rule 1(1) for filing a request that the action be set down for trial accordingly expired on 14th July 1988;

(iii) that, since no request for setting down was filed within the following six months, the action was "deemed deserted" pursuant to rule 7(1) on 14th January 1989;

(iv) that since there had been no order for revivor nor consent to revivor under rule 7(2), the request for setting down dated 30th March 1989 and the notice of application for further directions dated 8th June 1989 were of no effect; and

(v) that, accordingly, the action was "deemed altogether abandoned and incapable of being revived" pursuant to rule 11(1) on 14th July 1989.

The Court of Appeal affirmed these conclusions and it is from this decision that the plaintiff now appeals to Her Majesty in Council.

Before considering the issues, their Lordships observe that Order 34 of the rules applicable in the Eastern Caribbean Supreme Court has no counterpart in the English Rules of the Supreme Court. The Order does, however, reproduce the main features of a provision previously embodied in rules of court in British Guyana and Barbados, subject to a significant difference in the definition of the circumstances in which an action becomes ripe for hearing.

The two primary arguments relied on by the appellant in the courts below and before the Board were, first, that Order 34 has no application as between a plaintiff and one of several co-defendants after the plaintiff has obtained judgment against the other co-defendants; secondly, that the plaintiff's failure to comply with the time limits prescribed by Order 34 was a mere irregularity giving the court a discretion whether to set aside the proceedings under Order 2 or to extend time under Order 3. Both these arguments were, in their Lordships' judgment, rightly rejected.

So far as the first argument is concerned, the "cause or matter" to which the relevant provisions of Order 34 refer must be a cause or matter which is pending, in the sense that it still requires to be determined by a trial as between the plaintiff and one or more defendants. If the plaintiff has obtained judgment, whether in default of defence or otherwise, against defendant A, but must still proceed to trial against defendant B, Order 34 does not, of course, affect the validity of the judgment against defendant A, but that is no reason why it should not apply to the conduct of the proceedings as against defendant B.

With respect to the second argument, the courts below held that the general provisions of Orders 2 and 3 cannot have been intended to derogate from the precise and specific provisions of Order 34. A line of authority established by decisions of the courts in British Guyana and Barbados on the operation of rules in similar terms to Order 34 shows that, once an action has become ripe for hearing and the plaintiff has failed to set it down for hearing within the time limited and for six months thereafter, it becomes "deserted" and cannot be restored to life by anything less than an order for or consent to revivor. If, within the following six months, no application for or consent to revivor has been filed, the action is then dead and incapable of being revived. Harsh as it may seem, this is, in their Lordships' judgment, the inescapable consequence of the plain language of Order 34 and the court has no discretion to relieve against it.

There remain for consideration, however, two important questions as to when an action begun by writ becomes ripe for hearing under Order 34, rule 3. First, how is it to be determined whether in any case paragraph (b) or paragraph (c) of rule 3(1) is the operative provision to be applied in deciding when the action becomes ripe for hearing? Secondly, if paragraph (c) is the operative provision, what constitutes an "order ... giving directions as to the trial of the cause or matter"?

Unfortunately the first of these two questions was scarcely addressed by the courts below and no point was taken on the second. In the ordinary way, the Board is reluctant, when hearing an appeal from the Commonwealth, to pronounce upon issues without the benefit of the opinion of the judges of the court from which the appeal comes. In

this case, however, there are two reasons why their Lordships think it right to determine these two further questions, which were fully argued before them. First, Order 34 is, as already observed, draconian in its effect and its provisions should, in their Lordships' judgment, be subject to the strictest scrutiny to ensure that the necessary conditions for its operation have been satisfied before it can properly be applied to put a plaintiff out of court. Secondly, if the construction which their Lordships put upon Order 34 should lead to any unforeseen difficulty in its effect on the practice and procedure of the Eastern Caribbean Supreme Court, this can readily be met by an appropriate amendment of the Rules of Court under section 17 of the West Indies Associated States Supreme Court Order 1967 (S.I. 1967 No. 223).

Order 25 of the Eastern Caribbean Rules of the Supreme Court 1970, which is headed "Summons for directions", corresponds very closely to Order 25 of the English Rules of the Supreme Court in the form which that Order took following the comprehensive revision of the rules in the 1960's. There was no comparable provision in the British Guyana and Barbados Rules from which the prototype of Order 34 is taken. Hence the important distinction between the Eastern Caribbean Order 34 and the provisions of the British Guyana and Barbados rules, on which it is modelled, lies in the reference, in rule 3(1)(c) to the time when "an order has been made ... under Order 25 ... giving directions as to the trial of the cause or matter" as one of the times when an action may become ripe for hearing. To appreciate the significance of this in the context of Order 34, rule 3 it is essential to bear in mind the central role of the summons for directions in the Eastern Caribbean, as in the English, procedural code. By Order 25, rule 1(1) in every action begun by writ, subject only to the exceptions listed in rule 1(2), the plaintiff must take out a summons for directions within one month after the close of pleadings and its purpose, as rule 1(1) states, is to ensure that:-

> "(a) all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with, and
>
> (b) such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof."

Summarising the effect of rule 2 and the subsequent rules, the court is under a duty, on the hearing of the summons for directions, so far as possible, to ensure that all interlocutory matters are dealt with and to adjourn the hearing, if necessary, for that purpose; to consider of its own motion whether costs can be saved by ordering the

admission of statements and documents in evidence (rule 3); and to endeavour to ensure that the parties make all admissions and agreements as to the conduct of the proceedings which ought reasonably to be made (rule 4). Complementary duties are put upon the parties by rules 6 and 7 headed respectively "Duty to give all information at hearing" and "Duty to make all interlocutory applications on summons for directions". In short the whole thrust of Order 25 is to ensure that all interlocutory issues which will determine the shape of the trial are determined in a single comprehensive interlocutory proceeding. It is thus not surprising to find it provided by rule 2(4) that:-

> "(4) Except where the parties agree to the making of an order under Order 33 as to the place or mode of trial before all the matters which, by the subsequent rules of this Order, are required to be considered on the hearing of the summons for directions have been dealt with, no such order shall be made until all those matters have been dealt with."

Mitchell J. said in his judgment:-

> " Accordingly, the pleadings in this cause were closed by the delivery of the reply on 21st January 1988 and then became ripe for hearing.
>
> According to the provisions of Order 34 Rule 1(1) when a cause or matter has become ripe for hearing, it shall be the duty of the plaintiff or other party in the position of the plaintiff to file within six weeks thereafter, a request that it be set down for trial.
>
> No request for hearing was filed until 30th March 1989 a long time after that initial six week period after 21st January 1988 had elapsed on 3rd March 1988.
>
> ...
>
> However, before the cause became deserted on 3rd September 1988 ..., there was filed on 5th May 1988 a summons for directions, and an order of the Court was made on that summons on 27th May 1988.
>
> According to the provisions of Order 34 Rule 3(2) 'if there are any interlocutory proceedings (such as a summons for directions) pending, a cause or matter shall not become ripe for hearing until the determination of such proceedings unless the Court otherwise orders'.
>
> It followed, therefore, that the cause would not have become ripe for hearing until after 27th May 1988 when the summons for directions was determined."

The judgment of the Court of Appeal does not in terms address the question whether paragraph (b) or paragraph (c) of Order 34, rule 3(1) is to be applied in determining

when an action becomes ripe for hearing, but simply proceeds on the footing that the relevant date in this case was 27th May 1988, when an order was made on the summons for directions.

Their Lordships, with all respect, cannot follow the reasoning in the passage cited from the judgment of Mitchell J. Under Order 34, once a cause or matter has become ripe for hearing by the operation of one of the paragraphs of rule 3(1), the duty to file a request for setting down under rule 1 arises and, if it is not complied with either within the six weeks allowed by rule 1 or within the further six months allowed by rule 7(1), the cause or matter then becomes "deserted". There is nothing in rule 3(2) which can interrupt this timetable. It would be necessary to rewrite the rule altogether to produce the result that a cause or matter, having first become ripe for hearing at the close of pleadings, should cease to be ripe when a summons for directions was taken out and then become ripe once again when an order giving directions as to the trial was made.

There thus arises an obvious difficulty, in any case which passes beyond the pleading stage, in construing rule 3(1) in a way which gives effect to the operation of both paragraphs (b) and (c). The duty to file a request for setting down can only arise once, and when it has arisen, it must be complied with. But the summons for directions under Order 25 will in all cases follow the close of pleadings. Hence, if the duty to set down always arises under paragraph (b) when the pleadings are closed, there can never be any room for the operation of paragraph (c) when an order giving directions as to the trial is made under Order 25.

Their Lordships think that the only sensible construction to resolve this difficulty is dictated by the terms of Order 25 itself. In any case governed by Order 25 rule 1(1), the plaintiff, at the close of pleadings, is under a duty to take out a summons for directions. In one sense of the word "pending", it may be said that, as soon as that duty arises, the interlocutory proceedings which will of necessity ensue under the summons for directions are pending. If Order 34, rule 3(2) is read in this sense, it prevents the improbable and highly inconvenient result which must otherwise follow that the duty to take out a summons for directions and the duty to set down for trial arise simultaneously and also prevents the reference to Order 25 in Order 34, rule 3(1)(c) from being wholly otiose. Accordingly, in their Lordships' judgment, in any case which is governed by Order 25, rule 1(1), the action will not become ripe for hearing at the close of pleadings, but only by the operation of Order 34, rule 3(1)(c) when an order is made under Order 25 giving directions as to the trial of the cause or matter. This may leave only a very limited scope for the operation of rule 3(1)(b) in relation to cases which are excepted from the operation of Order 25, rule 1(1). But however

that may be, their Lordships believe that this construction accords with the underlying purpose of Order 34 which must be to ensure that actions are set down for trial when they are ready for trial and not before. It would be absurd that a complex action should be treated as ripe for hearing when many interlocutory issues await resolution under the summons for directions. The plaintiff, when he makes his request for setting down, is required to give an estimate of the length of the trial (see Form 24 in Appendix A to the Rules) and it would again be absurd to require such an estimate to be made before the various interlocutory matters which will be dealt with under the summons for directions and which will significantly affect the length of the trial have been determined.

This leads on immediately to consideration of the second question. What constitutes an "order ... made ... under Order 25 ... giving directions as to the trial of the cause or matter"? Here again, their Lordships consider that a purposive approach indicates that what is required to satisfy this provision is that all necessary directions relating to the trial should have been given before the cause or matter can become ripe for hearing. This might lead to an unacceptable degree of uncertainty if it were not for the provisions of Order 25, rule 2(4). But this makes it clear that what puts the stamp of finality on the process of dealing with the summons for directions is the making of an order as to the place and mode of trial. Such an order, in their Lordships' judgment, is essential to complete the process of "giving directions as to the trial of the cause or matter" under Order 34, rule 3(1)(c).

In this case no order as to the place or mode of trial was ever made and consequently the action never became ripe for hearing. Their Lordships can well appreciate that, in the context of the various local jurisdictions under the aegis of the Eastern Caribbean Supreme Court, it may be a foregone conclusion that most actions will be tried in the local court by judge alone and that consequently the making of an order as to place and mode of trial may be regarded as a mere formality which will perhaps often be overlooked. But this consideration cannot provide any escape from the conclusion that a defendant who seeks to rely on the strict provisions of Order 34 to defeat the plaintiff's action against him must be in a position to show that the requirements necessary to bring those provisions into operation have themselves been strictly complied with.

Accordingly, their Lordships will humbly advise Her Majesty that the appeal ought to be allowed and the orders of Mitchell J. and the Court of Appeal set aside. Since the point which has proved decisive of the appeal was not taken in the courts below, their Lordships will make no order with respect to the costs below; but the respondent must pay the appellant's costs before the Board.