BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL N0.11 OF 1998

BETWEEN:

HESKITH NEWTON **Appellant**

and

DUFFS VALLEY CORPORATION LIMITED **Respondent**

BEFORE: THE HON. MR. SATROHAN SINGH JUSTICE OF APPEAL
THE HON. MR. ALBERT REDHEAD JUSTICE OF APPEAL
THE HON. MR. ALBERT MATTHEW JUSTICE OF APPEAL(AG.)

Appearances: Mr. Gerard Farara Q.C., Miss Anne Marie Robinson with him for the Appellant
Mr. John Carrington for the Respondent

JUNE 22, 1999

JUDGMENT

SATROHAN SINGH JA:

On December 10, 1996, the appellant filed **Suit No. 253 of 1996** against the respondent. The last pleading in that Suit was the appellant=s reply filed on April 7, 1997. The Suit then remained dormant for over one year. On June 15, 1998, the appellant, realising that his Suit would then be caught by the abandonment rule in **034 R11 (1) (a) of the Rules of the Supreme Court 1970**, wrote to the respondent=s solicitors seeking a waiver of this stern rule. This request was refused by the respondent in a letter of June 18, 1998: This obviously left the appellant with the firm impression that the respondent would be exercising its right afforded by the aforementioned rule to have the matter deemed abandoned.

With that obvious state of mind, the appellant filed a fresh **Suit No. 73 of 1998** identical to **Suit No. 253 of 1996.** In that new Suit, the respondent entered an

appearance, and filed a **Defence** and **Counterclaim**. The appellant filed a **Reply** and **Defence to the Counterclaim**. The appellant then sought directions for trial. During the pendency of that application, **Benjamin J** heard a **ASummons to Dismiss Action**,@ filed by the respondent in the said matter. On November 11, 1998 the learned judge adopting a A**purist**@ approach granted the application and ordered that **Suit No. 73 of 1998** be dismissed Awith costs (whether agreed or taxed up to the filing of the entry of appearance to be borne by the Plaintiff@ (appellant). Fourteen days after this order, the appellant obtained an order from the Court deeming **Suit No. 253 1996** abandoned.

The **Summons to Dismiss** was based on the grounds that the action was frivolous, and vexatious and an abuse of the process of the Court and that it was oppressive to the respondent. The reason being that the identical **Suit No. 253/1996** had not yet been terminated. The learned judge exercised his discretion against the appellant on the ground of abuse of process only. This appeal challenges this order of **Benjamin J**. The sole issue is whether, on the aforementioned facts, the learned judge exercised a proper judicial discretion. I would now address the concept of abuse of process.

ABUSE OF PROCESS

Order **18 R19 8 of the Rules of the Supreme Court 1970**, empowers the Court to dismiss an action on the ground that it is frivolous or vexatious or otherwise an abuse of the process of the Court. It is a discretionary power. The exercise of this power to strike out is the exercise of a serious discretion. The discretion is wide and must be exercised judicially. It must be exercised sparingly and with great caution.

An abuse of process of the Court arises where its process is used, not in good faith and not for proper purposes, but as a means of vexation or oppression or for

ulterior purposes, or, more simply, where the process is misused. **[Halsbury Laws 4th Edition Vol 37 paragraph 434.]**

THE DISCRETION

An appeal will not be entertained from an order which it was within the discretion of the Judge to make, unless it be shown that he exercised his discretion under a mistake of law **(Evans -v- Bartlam) {1937} AC 473)** or in disregard of principle **(Young -v- Thomas (1892) 2 Ch. 134): Birkett -v- James (1977) 2 All ER 80 H.L: Tolley -v- Morris (1979) 2 All ER 56 H.L.** or under a misapprehension as to the facts, or that he took into account irrelevant matters **(Egerton -v- Jones (1939) 3 All ER 889)** or failed to exercise his discretion **(Crowther -v- Elgood (1887) 34 Ch. D 691),** or the conclusion which the Judge reached in the exercise of his discretion was Aoutside the generous ambit within which a reasonable disagreement is possible@ **(G -v- G (1985) 2 All ER 225 H.L.).**

The facts upon which the learned judge exercised his discretion have been set out at the beginning of this judgment. They show (1) **Suit No. 253 of 1996** caught by the abandonment rule **(2)** The respondent refusing the appellant=s request for a waiver of the said rule, in effect, a so called compliance by the appellant with **03R6** (notice to continue action) **(3)** Reliance by the appellant on the respondent=s representation that the abandonment entitlement will not be waived. That left the action Ain a procedural coma, on life support, waiting for the plug to be pulled and death to be pronounced@ according to Mr. Farara. **(4)** Such reliance being compounded by the respondent filing full pleadings, inclusive of a counterclaim in the fresh Suit, and waiting until after the Summons for Directions was filed to move the Court with the Summons to dismiss.

Given these circumstances, I fail to discern any factor whereby it can be said that the appellant, when he filed the second action, did not act in good faith, or for a

proper purpose, or that he misused the process for an ulterior purpose or as a means of vexation or oppression against the respondent.

To the contrary, I consider the respondent=s manipulations of the legal processes as tantamount to kidnapping justice and hiding it within the law. What the respondent caused the judge to do was just not cricket. It was most unfair.

A proper exercise of the judicial discretion afforded to the Judge, was to adjourn the summons to dismiss, giving the appellant the opportunity to terminate 253/96, or, for the Judge there and then to deem 253/96 abandoned based on the respondent=s letter of refusal to waive his right. But, on these facts, to dismiss the appellant=s fresh Suit was to do a grave injustice to the appellant. It involved an error in principle in the exercise of the judge=s judicial discretion. I also fail to see any prejudice to the respondent by the presence of the first action, when the evidence is pellucid that not only did it intend to have the said action deemed abandoned, but that in fact it was so abandoned fourteen days after this Suit was dismissed. I can also see no affront to the administration of justice in the context of this case. We consider the Judge=s reasons for not staying the proceedings to be wrong in principle. No question of multiplicity of proceedings could have arisen. The first action was virtually dead.

Given these circumstances, this Court is powered to substitute its own discretion for that of the Judge. [Birkett -v- James Supra]. Acting judicially, I do so in favour of the appellant. Accordingly, I would allow this appeal and set aside the judgment of the trial judge. The respondent=s summons to dismiss the appellant=s **Suit No. 73 of 1998** will itself stand dismissed. The appellant will have his costs in this Court and the Court below to be taxed if not agreed and paid by the Respondent.

SATROHAN SINGH
JUSTICE OF APPEAL

I concur

ALBERT REDHEAD
JUSTICE OF APPEAL

I concur

ALBERT MATTHEW
JUSTICE OF APPEAL (AG.)