[2016] JMCA Civ 54

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA, HANOVER

RESIDENT MAGISTRATE'S CIVIL APPEAL NO 16/2015

BEFORE: THE HON MR JUSTICE MORRISON P (AG)
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA

BETWEEN	**CARL BARNETT**	**1ST APPELLANT**
AND	**WENDY BARNETT**	**2ND APPELLANT**
AND	**DONOVAN PEARCE**	**RESPONDENT**

Leonard S Green instructed by Chen, Green & Co for the appellants

Respondent unrepresented

7, 10 December 2015 and 28 November 2016

MORRISON P (AG)

[1] I have read the reasons for judgment of McDonald-Bishop JA and agree with her reasoning and conclusion. I have nothing to add.

PHILLIPS JA

[2] I, too, have read the reasons for judgment of my learned sister, McDonald-Bishop JA. I agree with her reasoning and conclusion and have nothing useful to add.

MCDONALD-BISHOP JA

Introduction

[3] This is an appeal against the judgment of the Resident Magistrate for the parish of Westmoreland delivered on 16 June 2015, following a trial at the sitting of the court in Savanna-la-mar. She adjudged the appellants, Mr Carl Barnett and Mrs Wendy Barnett, to be liable in damages to the respondent, Mr Donovan Pearce, in the sum of $108,000.00 plus costs in the sum of $2,516.00.

The background

[4] On 7 December 2015, we heard arguments from counsel for the appellants, the respondent being absent and unrepresented, and on 10 December, 2015, we gave our decision and made the following orders:

> "(1) The appeal is allowed.
>
> (2) The judgment of the learned Resident Magistrate dated 16 June 2015 is set aside.
>
> (3) Judgment for the appellants.
>
> (4) No order as to costs."

We promised then to reduce our reasons to writing, which we now do.

[5] By a plaint dated 18 June 2013, the respondent brought an action against the appellants to recover damages in the sum of $108,000.00. He claimed that the appellants' dogs entered on his goat farm, situated on the White Hall lands in the parish of Westmoreland, and killed eight goats belonging to him.

[6] In seeking to establish his entitlement to the specific sum claimed in damages, the respondent relied on a valuation report prepared by Mr Robert Smith, District Constable, who valued the loss sustained by the respondent at $98,000.00 plus $10,000.00 for valuation fee.

[7] The appellants challenged the claim. They denied that dogs belonging to them had caused any damage to the respondent's goats. They averred that the dogs they owned were not able to leave their premises at the material time because the premises were properly secured.

[8] The learned Resident Magistrate, after hearing the case presented by both sides, found that the respondent's evidence was "credible and forthright" and that the appellants were liable to him in damages in the sum claimed plus costs.

[9] The appellants were not satisfied with that decision of the Resident Magistrate and so they filed their appeal in which they set out three grounds of appeal as follows:

> "1) That the Learned Resident Magistrate erred in that she failed to make any or any proper analysis of the evidence presented by the Appellants and their witnesses and erroneously concluded that the [Appellants] were liable to pay damages for injury to

the [Respondent's] property notwithstanding compelling evidence to the contrary.

2) The Learned Resident Magistrate misunderstood the evidence of the Appellants and failed to fairly consider the evidence presented by them in coming to her conclusion.

3) The Learned Resident Magistrate failed to properly deal with the material discrepancy arising on the [Respondent's] case and wrongly found on a balance of probabilities that the Appellants were liable to pay the [Respondent's] damages."

The case at trial on the issue of liability

The respondent's case

[10] The case presented by the respondent before the learned Resident Magistrate on the issue of liability, was, in summary, as follows. On 6 May 2013, at about 5:00 am, he heard dogs rushing his goats that were tethered on the White Hall property in the parish of Westmoreland. The property was situated about half mile from the residence of the appellants who are husband and wife. The appellants lived in a gated community and he had known them and their residence before the day in question.

[11] He saw three "big black dogs" "hauling" and biting the goats. He described the dogs as being black Rottweilers. He chased away the dogs by stoning them and he then trailed them. He followed them through a barbed wire fence that led to the housing scheme in which the appellants lived. While chasing the dogs, the dogs jumped inside the appellants' yard. He saw the dogs enter the yard.

[12] He did not speak to the appellants at that time because it was too early but he returned later in the morning. At that time, he saw and spoke to the 2nd appellant who told him to go and get the police and take them to the house and that, if the injury to the goats was done by the appellants' dogs, she would compensate him.

[13] The respondent subsequently called the valuator and took him to where the goats were for the valuation to be done. He then reported the matter at the Negril Police Station. Two policemen later accompanied him to the appellants' house but the appellants were not seen. He returned in the evening with the police where he again spoke to the 2nd appellant. She asked how much was the value of the damage and he advised her. He tried to negotiate payment with her but she told him that she did not have any money and that she would speak with the 1st appellant when he arrived home.

[14] The respondent subsequently spoke to the 1st appellant who told him that he was not accepting responsibility for the injury to the goats and so would not be compensating him for the goats. The 1st appellant told him that his dogs had not escaped from his premises because the premises were securely fenced and so his dogs did not injure the respondent's goats.

[15] The respondent, however, insisted that the premises were not properly fenced. He contended that he saw damage to the fence at a point close to a tank, which he pointed out to the police who accompanied him to the premises. The police, he said, told the 2nd appellant to fix the fence, which was subsequently done.

[16] In explaining in cross-examination how the dogs gained entry to the appellants' premises after he trailed them, the respondent stated that although the appellants' house was completely fenced, "there is a hill where there is a tank on and they go there and jump the fence".

[17] He further explained in answer to the court on this point:

> "There's a rock in the corner of Mr. Barnett's fence. The dogs jump on the rock and jump the fence. Rock is about 3' from ground. Fence another 6' up."

The appellants' case

[18] The appellants gave evidence on their own behalf and also relied on the evidence of Mr Fernando Patterson, a security supervisor who was employed to Guardsman Security Company, as well as Constable Omarie Rowe, one of the policemen who accompanied the respondent to the premises, following his report at the Negril Police Station.

[19] The evidence adduced by the appellants and on their behalf will now be outlined. They denied that dogs belonging to them had killed the respondent's goats. They stated that they had four Rottweilers that were all black with brown spots. Two of the dogs were over 10 years old and suffering from hip dysplasia.

[20] At all material times, their entire premises were completely secured by a chain link fence. There was a concrete section at the bottom of the fence and the fence was approximately 6 to 7 feet high. The entire yard was secured so that the dogs could not

get out and no one could get in when the gate was closed. There was no damage to the fence in 2013. Neither the respondent nor the police who visited the premises had pointed out any opening in or damage to the fence that could allow dogs to go through. The dogs have never jumped over the fence. On the day in question, their dogs were in their yard and so did not go to the respondent's goat farm.

[21] Mr Patterson testified that the appellants were clients of Guardsman and that for nine years he would go to the appellants' premises from time to time to carry out security checks on behalf of the company. The premises, he said, were properly secured with metal fencing and the dogs could not leave the property. He was not able to enter the premises but he could walk around the perimeter with the assurance that the dogs could not get out. He had never seen a breach in or damage to the fence that could allow the dogs to escape. There was no place where the dogs could jump over the fence because if they could jump the fence, he would not have gone to the premises.

[22] Constable Rowe stated that at the time the respondent attended on the police station to make his report, the respondent told him that he did not witness the dogs attacking the goats. The respondent, he said, pointed to a young man who he said had witnessed the incident.

[23] Constable Rowe stated that when he went to the premises, he made checks of the perimeter fence to see if there was any breach or opening for the appellants' dogs to exit the premises. He found that the perimeter was secured. The respondent did not

point out to him any breaches or opening in the fence. He was present when the respondent was trying to negotiate payment with the 2nd appellant but she told him that she could not say that it was their dogs that were responsible for the damage. She told the respondent that she would speak to the 1st appellant and get back to him.

Findings of the Resident Magistrate

[24] The learned Resident Magistrate concluded, after a review of some aspects of the evidence, that:

> "[The respondent's] evidence was forthright and credible leaving the court sufficiently satisfied that the [appellants'] house is on an incline/hill and that it was possible for the dogs to jump the fence from some point at the back.
>
> On a balance of probabilities the Court finds:
>
> 1) That Negril Estate has an electronic gate and security post with the rest of the property being fenced by barbed wire attached to posts.
>
> 2) That animals and humans are able to enter/exit said scheme (Estate) through the barbed wire fence.
>
> 3) That the [appellants] are owners of Rotweiller dogs.
>
> 4) That there was an incline or hill to the back of the [appellants'] premises and that said dogs could jump over the fence at the back of the premises.
>
> 5) That Mr Pearce trailed the dogs to the home of the [appellants] on the morning in question.
>
> 6) That the valuator's alteration and correction of his report was due to a genuine mistake and that said correction was made prior to the matter getting to court.
>
> 7) That [the respondent's] goats died from injuries caused by dogs.

8) That the dogs which injured and killed the [respondent's] goats belonged to the [appellants]."

The submissions: a synopsis

[25] The kernel of Mr Green's submissions made on behalf of the appellants, was that the learned Resident Magistrate failed to properly adjudicate on the matter before her, in that, she did not give a balanced assessment of all the evidence presented and so came to a conclusion that was not only speculative but was also inconsistent with the established facts of the case. He argued that there were "critical non findings" in the reasons for judgment of the learned Resident Magistrate because she failed to provide any proper assessment of the evidence of the appellants' witnesses.

[26] Learned counsel argued, by reference to several aspects of the evidence, that in the face of "ample, overwhelming and credible evidence to the contrary", the learned Resident Magistrate wrongly found that the respondent's evidence was "forthright and credible". She failed, he said, to have regard to a material inconsistency/discrepancy in the respondent's evidence, which "invited the inference that Constable Rowe had spoken the truth when he gave evidence that the respondent told him that he did not see the dogs attack his goats".

[27] According to Mr Green, the learned Resident Magistrate had ventured into the realm of speculation in finding as she did that the appellants' house was on an "incline/hill" and that it was possible for the dogs to jump the fence from some point at the back. Therefore, he contended, she failed to apply the correct standard of proof to

find, as a fact, on a balance of probabilities that the dogs had jumped over the fence at the back of the premises. Therefore, it could not be said that the trial was just and fair.

[28] The respondent was not present during the hearing of the appeal and there was no representation on his behalf. Unfortunately, there was no response to the appeal from him.

The issues

[29] There were two basic questions that emerged for the consideration of this court on the grounds of appeal and the submissions made in support of them. They may be stated in these terms:

(i) whether the learned Resident Magistrate failed to properly and fairly analyse and consider the evidence of the appellants and their witnesses and, by so doing, erroneously concluded that the appellants were liable in damages to the respondent for injuries done to his goats; and

(ii) whether the learned Resident Magistrate failed to properly treat with a material discrepancy/ inconsistency in the evidence of the respondent and, by so doing, wrongly concluded that the appellants were liable in damages to the respondent.

The applicable law

(i) The statutory context

[30] The action brought by the respondent against the appellants for the injuries done to his goats derives its legitimacy from the Dogs (Liability for Injuries By) Act ("the Act") and so the finding of liability cannot be divorced from the provisions of the statute. Therefore, for there to have been liability on the part of the appellants, the learned Resident Magistrate had to be satisfied that they were brought within the ambit of the provisions of the Act.

[31] Section 2 reads:

> "2. The owner of every dog shall be liable in damages for injury done to any person, or any cattle or sheep by his dog, and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity or that the injury was attributable to neglect on the part of such owner. Such damages shall be recoverable in any court of competent jurisdiction by the person injured, or by the owner of such cattle or sheep killed or injured."

[32] In section 3, the "owner" of dogs is defined in this way:

> "3. The occupier of any house or premises where any dog was kept, or permitted to live or remain at the time of such injury shall be deemed to be the owner of such dog, and shall be liable as such, unless the said occupier can prove that he was not the owner of such dog at the time the injury complained of was committed, and that such dog was kept or permitted to

> live or remain in the said house or premises without his sanction or knowledge:…"

[33] In keeping with the applicable law, for the respondent to succeed in the action brought against the appellants, he would have to establish on admissible, credible and cogent evidence that, on a balance of probabilities, the appellants were the owners of the dogs that killed his goats. In other words, it was incumbent on him to satisfy the court, on a preponderance of the probabilities, that the appellants were the occupiers of premises where the dogs who killed the goats were "kept, permitted to live or remain" at the time of the damage.

(ii) The approach of the court in treating with the Resident Magistrate's findings of facts

[34] Based on the grounds of appeal and the orders sought by the appellants, it became readily evident to this court, from the very outset, that we were being asked by the appellants to disturb the decision of the learned Resident Magistrate on matters pertaining to issues of fact and her assessment of the evidence. It is against that background that we have approached our consideration of the appeal with the classic and authoritative guidance of their Lordships in **Watt v Thomas** [1947] AC 484 in mind. The core principle that has been repeatedly endorsed, adopted and applied by this court is, simply, this: This court can only justifiably interfere with the decision of the learned Resident Magistrate if it was plainly wrong and not because any of us would have decided the case differently, if we were the trial judge. We have not seen or heard the witnesses and, therefore, lacked the advantage that the learned Resident

Magistrate would have enjoyed in having seen and heard them. All that we have for our consideration is the judge's record of the evidence (not a verbatim transcript), which put us at a relative disadvantage.

[35] Indeed, the approach that this court should take in reviewing the decision of the trial judge was put beyond question by the Privy Council in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21, where upon endorsing the guidelines provided in **Watt v Thomas**, among other cases, their Lordships stated:

> "12. …It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'…This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts:…Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence…"

[36] Having considered the learned Resident Magistrate's findings within the context of the applicable law, and being mindful of our duty, it was our considered and collective view that she was plainly wrong in coming to her ultimate decision that the appellants were liable in damages to the respondent for the injury done to his goats by dogs. The primary reasons that led me to that conclusion will now be discussed.

Analysis and findings

[37] The gravamen of the appellants' complaint on grounds one and two concerned the treatment of the appellants' case by the learned Resident Magistrate while ground three raised the question whether she had properly assessed the evidence of the respondent in the light of discrepancy/inconsistency in his evidence. It is recognised, therefore, that the grounds of appeal are substantially and inextricably connected in so far as they raise the single question as to the treatment of the totality of the evidence by the learned Resident Magistrate. Therefore, for purposes of analysis, they have been combined and treated with collectively, where circumstances allow and for the sake of expediency.

[38] An apt starting point in evaluating the reasons for judgment of the learned Resident Magistrate is to note that she correctly recognised that "the matter arises" under the Act. The sole issue for determination on the question of liability, as a matter of law, was whether the dogs that had caused the injuries to the respondent's goats were owned by the appellants, within the meaning of the Act. However, in coming to her finding that "the dogs which injured and killed the [respondent's] goats belonged to the [appellants]", the learned Resident Magistrate did not specifically indicate that she had found, as a fact, that the dogs that were seen by the respondent "lived", were "kept" or "permitted to remain" on the premises occupied by the appellants at the material time.

[39] This omission, no doubt, emanated from the fact that there was no evidence from the respondent that the dogs were ever seen by him on the appellants' premises, either prior to or after the incident complained of. He said that he knew the appellants and the premises but no evidence was elicited from him as to whether he had seen the dogs at those premises before. So, there was no evidence of any prior knowledge on the part of the respondent as to the identity and ownership of these dogs and no one saw the dogs leave the premises of the appellants at the material time. In the absence of direct evidence connecting the dogs to the appellants, the success of the respondent's case hinged wholly upon his evidence that upon trailing the dogs, he saw them go inside the premises of the appellants. Therefore, the respondent, in seeking to establish the material fact that the appellants owned the dogs that killed his goats was, in effect, relying solely on an inference to be drawn that the dogs had exited those premises, they having entered the premises after he had trailed them following the attack on his goats. He was also relying on a further inference to be drawn that once the dogs exited those premises, they were owned by the appellants.

[40] It is for this reason that the learned Resident Magistrate, in seeking to ascertain whether the respondent had established the necessary connection between the dogs, the goats and the appellants, simply focused her attention on the question whether the dogs that the respondent had said he saw had, in fact, entered the appellants' premises. Having done so, she was content to conclude, inferentially, that they could have exited the appellant's premises and on that basis alone, she found that they belonged to the appellants. Whether this conclusion was one that she could have

properly made on the evidence before her, as a matter of law, was not the subject of appeal and so did not fall to be considered by this court. The point is made only because the factual deficiency in the respondent's case as to identity of the dogs and their ownership, through prior knowledge, would have warranted close and careful scrutiny by the learned Resident Magistrate of all the facts that were placed before her, before a definitive finding could be made that the dogs that injured the respondent's goats belonged to the appellants. It is on this basis that the question arises for consideration as to whether she properly adjudicated on the matter before her.

Insufficient and unfair treatment of the appellants' case: Grounds 1 and 3

[41] In advancing grounds one and two of the grounds of appeal, Mr Green argued that there are areas of "critical non findings" in the reasons for judgment, in that, the learned Resident Magistrate failed to consider or provide any proper assessment of the evidence of the appellants' witnesses. There is no finding that she either accepted or rejected any part of the evidence of those witnesses, he noted. It was critical for her to have done so, he said, in order for her to fairly weigh the evidence adduced at the trial and give a proper determination on a balance of probabilities. Learned counsel argued that an analysis of the testimony of the appellants' two witnesses was critical in order for the learned Resident Magistrate to have made a just and fair determination on the issue of whether the appellants' dogs were securely confined and fenced in an area that could not allow them to cause damage to the respondent's property. He pointed to several aspects of the evidence (which have been examined by this court) in advancing the argument that the learned Resident Magistrate erred in considering the evidence.

[42] A careful review of the reasons for judgment of the learned Resident Magistrate revealed that she did summarise some aspects of the evidence adduced by and on behalf of the parties. However, she failed to reveal her reasoning and finding in respect of some material aspects of the appellants' case that served to contradict material parts of the respondent's case.

[43] In this regard it is noted, that the most fundamental bit of evidence that the respondent had put forward to connect the dogs to the appellants was that he saw the dogs attacking the goats and that having seen them, he chased them and then trailed them to the appellants' home where they went inside the yard. However, there was, on the appellants' case, the evidence of Constable Rowe, the police officer to whom the respondent had made his report at the Negril Police Station, that the respondent had told him that he did not witness the dogs biting the goats. According to the officer, the respondent pointed to a young man who had accompanied him to the station who he said had witnessed the dogs biting the goats. The officer was not cross-examined or questioned by the court about that critical bit of evidence.

[44] The probability or possibility that the respondent may have been relying on hearsay and, above all, may not have been speaking the truth when he said he personally saw the dogs attacking his goats was one that emerged on the evidence of Constable Rowe and, so, warranted close investigation by the learned Resident Magistrate. This is so because the sighting by the respondent of the dogs attacking the

goats on the farm was a critical component of his case and Constable Rowe's evidence was a clear challenge to his credibility on this point.

[45] The learned Resident Magistrate, without any reference to this aspect of Constable Rowe's evidence, and without any indication as to what she made of it, ultimately stated that she found the respondent's evidence to be forthright and credible "leaving her sufficiently satisfied that the Barnett's [sic] house is on an incline/hill and that it was possible for the dogs to jump the fence from some point at the back".

[46] There was a critical need for the learned Resident Magistrate to pay specific attention to the disputed evidence as to whether, in the first place, the dogs were seen by the respondent attacking his goats and to expressly demonstrate how she resolved the conflict in arriving at her conclusion. In other words, she did not reveal her thought process relating to this important bit of evidence adduced by the appellants and so, given her silence on the matter, this court could only presume that she had paid no regard to it and so would have failed to assess its significance in coming to her findings that the respondent was credible and the appellants were liable.

[47] Another material aspect of the appellants' case, which was pointed out by Mr Green, as having not been assessed by the learned Resident Magistrate, relates to the respondent's evidence as to how the dogs gained entry to the premises. As already indicated, the entry of the dogs on the premises would have been an important component of the respondent's case because he had no other evidence that was capable of connecting the dogs to the appellants. So the questions whether the dogs

were seen entering the premises and how they did so were significant matters for careful evaluation by the learned Resident Magistrate.

[48] The respondent stated that the property was not properly fenced and he indicated that he had showed the damage to the fence to the police who accompanied him to the premises. There was no dispute that Constable Rowe had accompanied him to the premises. The police officer, however, testified that the respondent showed him no breach in or opening to the fence and that he had observed none upon his inspection of the perimeter. His evidence, in actuality, was that there was no point along the fence that could have facilitated the exit of the appellants' dogs from the premises.

[49] The appellants' themselves also gave evidence that there was no breach in the fence or damage to it and that neither the police nor the respondent had pointed out any damage to them. Mr Patterson, the security officer, also supported the appellants' evidence that there was no damage to the fence to allow the appellants' dogs access to the outside of the premises. The appellants and Mr Patterson all said that the dogs could not jump the fence. So, the main plank of the appellants' case was that the premises were secured in a way and to an extent that the dogs could not exit the premises when the gate was closed.

[50] There was thus a clear and serious conflict between the evidence of the respondent, and that of the appellants as to the existence of damage to the fence and that the damage was pointed out by the respondent to the police and to the appellants.

This major conflict warranted close investigation and a specific finding by the learned Resident Magistrate as to whom she believed and the reason for her belief. It was, therefore, incumbent on her to expressly indicate that she had regard to the conflict in the evidence and to reveal her thought process in resolving it. All she did, however, was to merely summarise the evidence without any attempt at a critical analysis of the competing contentions. As Mr Green noted, she never indicated whether she had accepted or rejected the appellants and/or their witnesses and the reason for so doing.

[51] The learned Resident Magistrate, without revealing her reasoning process, proceeded to summarily conclude that the respondent was credible and forthright in the face of diametrically opposed evidence that had a bearing on the question of his credibility. That cannot be said to have been a proper approach in her evaluation of the case.

[52] The issues to be resolved in the case turned on the credibility and reliability of the witnesses, particularly, the respondent who bore the burden of proof. Therefore, before any inference could have been drawn one way or the other that the dogs belonged to the appellants and that they attacked the goats, all the evidence that was adduced by the parties to the litigation was to be considered with the same fair standard of treatment and weighed in the same scale in order for the learned Resident Magistrate to ascertain wherein the truth lay. It follows that all matters that would touch and concern the issue of credibility, had to be demonstrably and critically

evaluated by the learned Resident Magistrate as the tribunal of fact in arriving at her decision.

[53] In this connection, the appellants were entitled to have their case properly and fairly weighed in the balance with the case for the respondent before an adverse finding was made against them. Also, as the losing party, they were entitled to know that their case was not accepted and the reason for it not being accepted, particularly, in relation to critical matters disputed by them that had the potential to undermine the credibility of the respondent's case. It was not enough and proper for the learned Resident Magistrate to have simply stated in a broad fashion, as she did, that she found the respondent's evidence to have been credible and forthright, without more.

[54] Several authorities from this court have made it quite clear that a trial judge sitting alone must provide a reasoned decision in cases before him and this is so regardless of the status of the court in which the judge sits or whether the matter is criminal or civil. See **R v Locksley Carroll** (1990) 27 JLR 259 (and the authorities cited therein) and the more recent decision of this court in **Eric Gordon v Constable Delroy D Clarke and Others** [2016] JMCA Civ 17.

[55] The same authorities have established that the trial judge in his reasoned judgment must set out the facts that he finds proved, and when there is a conflict of evidence, he must show his method of resolving that conflict.

[56] The reasons for the need for a reasoned decision revealing the thought processes of the trial judge were stated by Rowe P in **R v Locksley Caroll** to be, in summary, as follows:

(a) The party against whom the decision is made is entitled to know what facts are found against him and when there are discrepancies and inconsistencies in the evidence, just how the trial judge resolved them.

(b) The public has an equal interest in understanding the result of a trial so that it can have confidence in the trial process.

(c) The appellate court which has the duty to re-hear the case based on the printed evidence and the judgment of the trial judge should be assisted by the thought processes of the trial judge.

(d) If the trial judge inscrutably maintains silence as to the principle or principles which he applied to the facts before him, it becomes difficult if not impossible for the appellate court to categorise the decision as a reasoned one (per Carey JA in **R v Clifford Donaldson** (1988) 25 JLR 274).

[57] It also seems useful to specifically refer, in part, to the dictum of Rowe P in **R v Locksley Carroll** at page 266, where, in referring to the English Court of Appeal's decision in **Miles v Cain**, the Times Newspaper, 14 December 1989, he stated:

"The Master of the Rolls contrasted the role of the trial judge with that of the Court of Appeal when he said:

> "The most important task of the judge was to assess the character and credibility of the plaintiff, the defendant and the other witnesses. In so far as he did so on the basis of seeing them and hearing them, we are in no position to say whether he was right or wrong. But what we can consider, and have to consider, is whether he indeed approached the plaintiff's allegations with the caution which he declared 'that he would adopt; **whether and to what extent he cross-checked his assessment of their credibilities [sic] against the probabilities and improbabilities of their evidence...'** " (Emphasis added)

[58] Sinclair-Haynes JA, in **Eric Gordon v Constable D Clarke and Others**, at paragraph [91] of the judgment, usefully highlighted the instructive dictum of the learned Chief Justice, Sir David Simmons, in **Weekes v Advocate Co Ltd** (2002) 66 WIR 26, that:

> "[17] It should always be remembered that the duty of a judge sitting in a civil trial is two-fold. First, he must try to determine what happened (that is, 'find the facts'). And, secondly, he must apply relevant legal principles to the facts which he finds. **In discharging that first duty he must critically analyse and evaluate the evidence of the witnesses, attach such weight to the evidence as his judgment directs and then make up his mind. The weight to be attached to evidence involves an examination of its nature and texture to see where it leads. In coming to a conclusion, the reasons for reaching that conclusion must be apparent in the text of the decision.**" (Emphasis added)

[59] I have also found the guidance of Carey P (Ag), in **R v Lloyd Chuck** (1991) 28 JLR 422, to be particularly instructive, and worthy of reiteration, albeit that what was under consideration in that case was the treatment of evidence in a criminal case. The learned President stated at page 432:

> "Where there is conflicting evidence between Crown witnesses, [a Resident Magistrate] should state whose evidence he accepts and whose he rejects. In that case, it is expected that some reasons or explanation for the choice will be shortly stated. If a conclusion is derived from inferences, then the primary facts from which the inference or inferences are drawn should be stated. Findings in a summary form is not a licence for laconic statements, and we would think that clarity in expression is an advantage. The language therefore in which the findings are couched should demonstrate an awareness of the legal principles which are involved in the case. If he must warn himself, the findings must show he has done so."

[60] It is my view that notwithstanding the fact that the court was concerned then with the issue relating to how a Resident Magistrate should approach his findings of fact as required by section 291 of the Judicature (Resident Magistrate's) Act (now the (Judicature (Parish Court) Act), the principle would be equally, if not more, applicable to civil proceedings in which what is required are the reasons for the judgment pursuant to section 256 of the said Act.

[61] There is thus greater expectation that a trial judge in a civil case will provide a reasoned judgment, which means, in effect, that the reasons for arriving at the particular decision will be palpably clear in the text of the reasons for judgment. It

should not be left to the parties and this court to attempt to read the mind of a trial judge in order to ascertain the reasons underlying his decision.

[62] An examination of the reasons for judgment of the learned Resident Magistrate in this case, within the legal framework provided by the authorities noted above, has revealed that she failed to carry out her task in the manner required of her as a judge sitting alone. There is no indication that she had fully and critically evaluated and assessed the evidence adduced by the appellants against the background of the evidence adduced by the respondent on some material aspects of the case, as noted above. In essence, she had not "cross-checked her assessment of their [credibility] against the probabilities and improbabilities of the evidence" considered in its totality.

[63] It is fair to say, as contended by the appellants, that that there were "critical non findings" on the part of the learned Resident Magistrate because she failed to provide any proper analysis or assessment of the evidence adduced by the appellants. So, in the end, her reasons for forming the view that the respondent's evidence was credible and forthright, in the face of contradicting evidence from the appellants, which was left unresolved, were not evident on the face of her reasons for judgment or "apparent in the text of her decision".

[64] Accordingly, the learned Resident Magistrate would have erred by failing to sufficiently demonstrate that she had sufficiently, critically and fairly considered, evaluated and weighed all the material evidence adduced by the appellants in order to make a proper determination of the matters in dispute, on a balance of probabilities.

For all the foregoing reasons, I formed the view that there was merit in grounds one and two of the grounds of appeal.

Improper treatment of the respondent's evidence: ground 3

[65] It was also contended further by the appellants that the learned Resident Magistrate failed to properly treat with a material discrepancy/inconsistency in the respondent's case concerning how the dogs got onto the premises and by so doing wrongly found on a balance of the probabilities that the appellants were liable.

[66] According to learned counsel on their behalf, the evidence of the respondent was inconsistent, in that, he gave no proper account as to whether he saw the dogs jump over the appellants' chain link fence or went through the fence when he said that he had trailed the dogs to the home of the appellants. He pointed out that the respondent did not indicate in examination-in-chief that he saw the dogs enter the appellants' premises but that it was only during the course of cross-examination, when the issue arose that the premises were securely fenced, that the respondent gave evidence as to how the dogs entered the premises. Learned counsel maintained that the learned Resident Magistrate wrongly confused the evidence as to how the dogs came out of the premises and went to the farm where the goats were attacked, with the evidence as to how they came onto the Negril Hills compound. He argued that the learned Resident Magistrate's finding that the dogs "went through" the barbed wire fence of the Negril Hills compound is inconsistent with the weight of the evidence.

[67] Mr Green submitted further that there was a clear discrepancy on the case for the respondent, in that, he was contending, on the one hand, that the dogs could have left the premises through a fence that was "not proper" and which was subsequently fixed, while saying, on the other hand, that the dogs jumped over the fence by jumping on a rock. This, counsel stated, was an inconsistency in the respondent's evidence which invites the inference that Constable Rowe spoke the truth when he gave evidence that the respondent told him that he did not see the dogs attack his goats.

[68] This is what the learned Resident Magistrate stated, in full, on this aspect of the case:

> "The court additionally notes that despite the evidence of the [Respondent] about the condition to the back of the [Appellants'] premises – there being an incline, a rock and a tank- that was never explored or denied by the defence. [The Respondent] was never put to task about his evidence on how he saw the dogs get into the premises - they jumped on a rock and over the fence at that place where there is a tank. At no time did [the Respondent] see the dogs 'go through' anywhere to enter the Barnetts' premises. It was only to enter the scheme that they 'went through' the barbed wire fence."

[69] The respondent's evidence was clear that he followed the dogs through an opening in the barbed wire fence that led to the scheme in which the appellants' house is situated. However, he is recorded to have said this later in cross-examination:

> "When I go there I didn't see no fence fix.
> I follow the dogs and see where the dogs walk go inside.
> Yes, I saw where damage to fence.
> I point out that place to the police...."

[70] It must be admitted that the record of the notes of evidence is not as clear as one would have liked because the learned Resident Magistrate did not produce a verbatim note of the witnesses' evidence (which is not unusual as that has usually been the case in the Resident Magistrate's Courts). For that reason, some of the questions that were specifically asked of the witnesses and the exact wording of the answers given to them are not sufficiently recorded in the notes of evidence provided. So, in some instances, it was not clear what was specifically asked of the respondent to which he responded. Therefore, for instance, in the above extract, it is not clear whether he, in fact, said that the dogs walked through the fence at the appellants' premises as a result of the damage to the fence. In other words, the connection between the damage to the fence and the dogs walking inside the premises is not fully established on what is recorded.

[71] The learned Resident Magistrate's finding that at no time did the respondent say that he saw the dogs "walked through" the fence at the appellants' premises is, however, consistent with the recorded evidence and so this court has to rely on what is recorded since it forms the official record for the purposes of the appeal. Furthermore, the learned Resident Magistrate had the distinct advantage of seeing and hearing the witnesses, an advantage which this court does not enjoy. As a result, we would have to defer to her finding of fact, unless it is shown to be plainly wrong and that we could not definitively say because, based on the evidence recorded (albeit sketchy in some areas), it was open to her to so find.

[72] It means then, that contrary to the submissions of learned counsel, the finding of the learned Resident Magistrate that the respondent had said that the dogs walked through the barbed wire fence to enter the scheme and not the appellants' premises, would not be against the weight of the evidence. Therefore, there is no basis on which this court could disturb her finding in that regard.

[73] Notwithstanding the fact that the finding of the learned Resident Magistrate that the dogs walked "through" the fence only to get on the scheme compound cannot be disturbed, it must be admitted that the evidence from the respondent was not as clear and precise as it should have been. In the absence of any clear and established connection between the damage to the fence and how the dogs entered the premises, the appellants cannot at all be faulted in saying that the respondent was, seemingly, advancing two differing versions, which were not clarified by the learned Resident Magistrate.

[74] Part of the appellants' argument, in advancing this ground of appeal, was also that the learned Resident Magistrate had ventured into speculation in finding that the appellants' house was "on an incline or hill and that **it was possible for the dogs to jump the fence from some point at the back**".

[75] She, seemingly, accepted that the entry to the property was gained by the dogs climbing on a rock that was close to the tank and jumping the fence at that point. In coming to her finding in that regard, she, however, made no finding in respect of the respondent's evidence that there was damage to the fence and she did not expressly

establish the relevance of that evidence to the exit of the dogs from the premises, which was, ultimately, a material issue to be resolved. Indeed, her conclusion was that the house was on an incline/hill and that "**it was possible for the dogs to jump the fence from some point at the back**". She did not specifically identify the point at the back from which they could have jumped to be where the tank or rock was or where there was said to have been damage to the fence. There was, indeed, vagueness in this aspect of the learned Resident Magistrate's finding.

[76] We also observed that while the respondent did speak to seeing the incline, the tank and the rock at the premises, he had not specifically said they were situated at the back of the premises. In fact, his evidence was that he did not go to the back of the appellants' premises. This was his recorded evidence in exact terms:

> "I go by the main gate. **I don't know how his place set up by the back. I don't go by the back. Just the front I know**. **I go by the gate and pacify my stuff**." (Emphasis added)

[77] So, in the light of this clear pronouncement from the respondent that he had no knowledge about the condition of the appellants' premises at the back, there would have been nothing from the respondent to establish that there was something at the back of the premises that could have allowed the appellants' dogs access to the outside. It would mean then that the learned Resident Magistrate would have made a mistake when she stated that the evidence of the respondent "about the condition to the back" of the appellants' premises was that there was an incline, a rock and a tank.

[78] In fact, it was Constable Rowe, in response to a question from the learned Resident Magistrate, who indicated that "there's an incline going towards the back". This was the only evidence giving the location of the incline. The learned Resident Magistrate in her reasons for judgment stated in this regard concerning the officer's evidence:

> "He noticed that there was indeed an incline to the back of the Barnett's [sic] premises."

[79] There was, however, no evidence from Constable Rowe that there was a point "going towards the back" or "to the back" of the premises where he saw the incline that could have facilitated the exit of the appellants' dogs from the premises. The officer's evidence was, in fact, to the contrary because he had stated that having inspected the perimeter fence, there was nowhere that he observed from where the dogs could have jumped the fence or could go through the fence and exit the premises. The learned Resident Magistrate did not show that she took that evidence of Constable Rowe into account and how she treated with it in placing reliance on his evidence that there was an incline going towards the back of the house.

[80] For the learned Resident Magistrate to have properly reached a conclusion that there was "some point at the back" where the dogs could have exited the premises, there would have had to be some evidence as to how the back of the premises was set up or configured and the state of the fence at the back that could have allowed the

appellants' dogs access to the outside. There was no such evidence from the respondent and, certainly, none from the appellants.

[81] Notwithstanding the state of the evidence, the learned Resident Magistrate went on to find, as a fact, that "there was an incline or hill to the back of the [appellants'] premises and that said dogs could jump over the fence at the back of the premises". This finding of fact was obviously based on what she found to have been a possibility, and not on proven facts as she had indicated no primary fact from which her conclusion was derived. As Carey P (Ag) had instructed in **R v Lloyd Chuck**, "if a conclusion is derived from inferences, then the primary facts from which the inference or inferences are drawn should be stated". As such, it was difficult for this court to reject the appellants' contention that her finding in relation to how the dogs may have exited the premises was based on speculation rather than on inferences drawn from proven facts. I found that there was also merit in ground three.

Conclusion

[82] I formed the view that it was not permissible for the learned Resident Magistrate, on the state of the evidence, as a whole, to have made the ultimate finding of fact that dogs belonging to the appellants had injured the respondent's goats. Not only was it necessary for her to have first clarified and reconciled certain critical aspects of the respondent's evidence before coming to such a finding, which she failed to do, but she also failed to fairly evaluate and critically assess the appellants' evidence and that of their witnesses, bearing in mind that there was no evidence of prior knowledge

of the identity of the dogs, and no direct evidence that the appellants' dogs had exited the appellants' premises.

[83] The learned Resident Magistrate also failed to demonstrably resolve the conflicts between the evidence of the appellants and the evidence of the respondent, which had a bearing on the veracity and strength of the respondent's case that she found to have been credible and forthright. The learned Resident Magistrate also, erroneously, grounded her finding of liability on the part of the appellants on speculation rather than on properly proven facts or from inferences drawn from properly proven facts. She therefore failed to properly analyse the entirety of the evidence and such a failure was found to be sufficiently material to undermine her decision that the appellants were liable in damages to the respondent. This was an error on her part that, in my view, merits appellate intervention (**Beacon Insurance Company Limited v Maharaj Bookstore Limited** applied).

[84] It is for the foregoing reasons, and after careful consideration of all the circumstances, that I found that there is legitimate basis to agree with my learned colleagues that the decision should have been disturbed.

[85] Accordingly, the order in paragraph [4] was made after an assessment of all the circumstances of the case, not least of which, were the evidential pitfalls in the respondent's case and the resultant challenges to the overall credibility of his case.