

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.7 OF 2005

BETWEEN:

VINCENT LEWIS

Appellant/Defendant

and

GRACE NORMAN

Respondent/Claimant

Before:

The Hon. Mr. Michael Gordon, QC

Justice of Appeal

The Hon. Mr. Denys Barrow, SC

Justice of Appeal

The Hon. Mr. Hugh A. Rawlins

Justice of Appeal

Appearances:

Mr. Charlesworth Brown for the Appellant/Defendant

Mr. Septimus Rhudd for the Respondent/Claimant

2006: July 18;
July 19.

JUDGMENT

[1] **RAWLINS, J.A.:** This is a case of animal trespass and damage to property. The claimant, Grace Norman, the respondent in this appeal, alleged that on 6th January 2003, a number of goats owned by the defendant/appellant, Vincent Lewis, entered her land and de-pastured it, causing damage and loss. The learned trial judge agreed. She found in favour of Ms. Norman and awarded her 75% of her claim or \$10, 200.54, because some of the damaged plants survived. She also awarded her prescribed costs.

[2] Mr. Lewis appealed on the following 5 grounds:

1. The trial judge erred in law and misdirected herself when she failed to have any or any sufficient regard to Ms. Norman's

admission during cross-examination that she had no personal knowledge that goats which are owned by Mr. Lewis trespassed on her premises and damaged her fence and plants on the 6th day of January, 2003.

2. The trial judge erred in law and misdirected herself when she ruled that Ms. Norman's hearsay evidence was admissible to prove facts of her case.
3. The trial judge erred in law and misdirected herself when she failed to have any or any sufficient regard for the rule against hearsay in relation to Ms. Norman's evidence.
4. The trial judge erred in law and misdirected herself by failing to strike out the admitted hearsay evidence from Ms. Norman's witness statement.
5. The trial judge erred in law and misdirected herself when she found on a balance of probabilities that Ms. Norman had proved her case when there was no admissible evidence for such a finding.

[3] The focal point of the appeal revolves around the issue of the admission of hearsay evidence and the judge's finding that Ms. Norman had proved her case, on a balance of probabilities, with the assistance of that evidence. These are essentially issues of fact, which invite this Court to look at the evidence. First, however, I shall state, briefly, the applicable legal principles which govern appeals from findings of fact.

The applicable principles

[4] It is trite principle that an appellate court will not impeach findings of facts and inferences of a first instance or trial court that saw and heard witnesses give their evidence, except in certain circumstances. An appellate court may interfere in a case in which the reasons given by a trial judge are not satisfactory, or where it is clear from the evidence that the trial judge misdirected himself. Where a trial judge misdirects him or herself and draws erroneous inferences from the facts, or finds facts and draws inferences on no or no clear evidential bases, an appeal

court is in as good a position as the trial judge to evaluate the evidence and determine what inference should be drawn from the proved facts.¹

The evidence

- [5] Ms. Norman stated, in her witness statement, that Mr. Lewis owns more than 250 goats, and that he often allows them to roam unattended and unsupervised in her neighborhood. She admitted in her evidence that he accompanies them on some occasions when he lets them out to feed. She said that on 6th January 2003, Mr. Lewis' goats were roaming freely through her neighborhood when they pushed down her fence and entered the property on which she resides causing the damage for which she claimed. She said that when the goats entered her property on that day, Mr. Lewis was not present and the goats were not under any supervision or control. Mr. Lewis did not deny that his goats were out and feeding on the day in question. He insisted, however, that he was present guiding, directing and tending his flock as he usually does from his car, and further, that they did not push down Ms. Norman's fence or enter her property.
- [6] When Ms. Norman was cross-examined, she could not say how many goats entered her land. It is significant, however, that she did not see the goats enter her property. She admitted that she could not tell the Court what happened on that day from her own personal knowledge. She further admitted that the evidence contained in her witness statement concerning the entry of the animals onto her land was based on hearsay. She agreed that the statement did not tell the court the source of the information on which that evidence was based. In response to a suggestion by Mr. Brown, learned Counsel for Mr. Lewis, she admitted that she could not state as a fact that Mr. Lewis' goats were on her land on 6th January, 2003.

¹ See, for example, *Asot A. Michael v Astra Holdings Limited and Robert Cleveland v Astra Holdings Limited*, Antigua and Barbuda Civil Appeals Nos. 17 and 15 of 2004 (16 May 2005); *Francis v Boriel*, St. Lucia Civil appeal No. 13 of 1995 (20 January 1997) and *Grenada Electricity Services Ltd. v. Isaac Peters*, Grenada Civil Appeal No. 10 of 2002 (28th January 2003).

[7] In her judgment, the learned judge stated that had Counsel for Mr. Lewis made a no case submission at the close of Ms. Norman's case he might have succeeded. She stated, however, that the gist of Ms. Norman's case was that she knew that Mr. Lewis' goats were in the habit of trespassing on her property. There is, however, no evidence on the record to support this. Ms. Norman's evidence is that Mr. Lewis' goats are usually allowed to roam unattended and unsupervised in her neighborhood on most afternoons during the week. The judge noted Ms. Norman's admission that she could not say with certainty that Mr. Lewis' goats had trespassed upon her property and caused the damage alleged. The judge stated, however, that Ms. Norman was asking the Court to find, by reasonable inference from the evidence, that they did enter her land and caused damage to the plants therein.

[8] The learned judge found that Mr. Lewis' evidence had confirmed Ms. Norman's evidence that Mr. Lewis owns a large herd of goats which he often allows to roam freely at afternoons. She further noted that Mr. Lewis had said in his evidence that there was a drought at the time. The judge further noted that there was evidence that Ms. Norman's garden was lush at the time of the alleged trespass compared with other areas in the neighborhood. She continued her analysis of the evidence, as follows:-

"Having heard from the Defendant's own mouth how the goats wander off to feed in groups in different areas and having regard to their number, approximately 200, the Court finds it incredible that he could exercise such control as he claims and properly supervise them by driving along the road in his car, in front, beside or behind them. The Court therefore finds that on a balance of probabilities the Defendant was negligent in supervising his goats and that as a result they trespassed on the Claimant's property that afternoon and caused damage, mainly destroying a portion of her fence and some of her plants. The extent of the damage is sufficiently proved by the several photographs exhibited objection to which was not taken."

- [9] It has been seen that the 5th ground of appeal states that the learned judge erred when she found, on a balance of probabilities, that Ms. Norman proved her case when there existed no admissible evidence to ground such a finding. The reference to “admissible evidence” though in ground 5 of the appeal, is reflective of the statements contained in grounds 1-4 of the appeal. Compendiously, they state that the judge erred when she failed to strike out Ms. Norman’s evidence which she (Ms. Norman) admitted was based on hearsay and that the judge also erred by relying on that evidence from which she drew the inference that she did. Mr. Rhudd submitted that Rule 29.5(2) confers a discretion upon the court to strike out or not to strike out “inadmissible matter” including hearsay evidence from a witness statement. According to Mr. Rhudd, where a Court does not strike out hearsay evidence, the Court could determine the weight that is to be attached to it. He further submitted that the application to strike out was out of time because it was raised at the end of the case.
- [10] The application to strike out could not have been made at pre-trial review or *in limine* because it only became clear that the statements were based on hearsay when Ms. Norman admitted it in cross-examination. The application could have been made at that stage or at the close of the case for Ms. Norman. That it was made at the close of the case and after Mr. Lewis gave evidence was of no moment, however.
- [11] In my view, there was no basis for the judge’s finding in the face of Ms. Norman’s admission that she could not state as a fact that Mr. Lewis’ goats trespassed and caused damage to her property on the 6th January, 2003. Neither Ms. Norman nor Mr. Lewis presented any objective evidence, admissible or otherwise, on which the learned judge could have based the finding which is referred to in paragraph 8 of this judgment by inference. In the highest tradition of legal practice and profession, Mr. Rhudd, learned Counsel for Ms. Norman, accepted this during the hearing before us.

[12] In the premises, the learned Judge erred to the extent that she purported to find, on the basis of no direct evidence, an inference that Mr. Lewis' goats entered Ms. Norman's land and caused the damage which Ms. Norman complained of. I shall therefore allow the appeal, and, in the absence of reasons why costs should not be awarded to the party that prevails, the respondent will pay Mr. Lewis prescribed costs in the proceedings in the court below and in this court, to be calculated on a presumed award of \$10,200.24.

The Order

[13] In the foregoing premises, I would allow the appeal; set aside the order of the High Court herein, which is dated the 2nd day of March, 2005 and award prescribed costs to the appellant, Mr. Lewis, in the High Court and in these appeal proceedings, to be calculated on \$10,200.24

Hugh A. Rawlins
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Denys Barrow, SC
Justice of Appeal