BARBADOS.

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No.7 of 1998

BETWEEN:

ALIONTAIRE BUVARDO

(Appellant)

AND

HENDERSON FORDE

(Respondent)

Before: The Hon. Sir David Simmons K.A., B.C.H., Chief Justice, the Hon. ColinA. Williams and the Hon. Frederick L.A. Waterman, Justices of Appeal

2002: September 28, November 6

2003: January 28

Mr. Theodore Walcott and Ms. Karen Thornhill for the Appellant

Mr. Leslie Haynes Q.C. and Ms. Karen Culbard for the Respondent

REASONS FOR DECISION

SIMMONS CJ: On November 6, 2002, we dismissed the appeal in this matter and promised to giveour reasons later. We now proceed to doso.

[2] This is anappeal from a decision of Garvey Husbands J given on March 11,1998 in which he dismissed the appellant's claim for damages for negligence andgave judgment for the respondent in the sum of $2 314.00 together with interestthereon at 8% from the said date and his costs. A fender-bashing collision involving an awardof damages of [1] aMagistrates' Court's level has spawned two important questions of law in theCourt of Appeal.

[3] Counsel forthe appellant described the facts of this case as "very simple". We agree. On August 27, 1992,the appellant was driving his motor car MG 991 in a northerly direction on Green Hill Road, St. Michael. Near to the entrance of Johnson's Land was ajeep parked on the same side of the road as the appellant's car as he drove onhis left hand side going towards Warrens. Coming from the opposite direction, travelling South, was therespondent's mini-moke, A 159. A collision occurred close to the parkedjeep.

[4] The simpleissue of fact for the trial judge's determination was whether the respondent'smini moke swerved to its right and collided with theappellant's car or whether the collision was caused by the appellant's comingoff his side in attempting to pass the parked jeep and colliding with the righthand side of the mini moke.

[5] The trialjudge gave a written decision of 3 pages in which he succinctly reviewed theevidence of the witnesses and then concluded that he preferred the respondent'sversion of the facts to that of the appellant. Specifically, Husbands J found that the appellantwas overtaking the parked jeep and, in doing so, was solely to blame for thecollision.

[6] We gavepermission to argue the following 4 grounds of appeal.

(i) Thatthere was inordinate and inexcusable delay in delivering judgment;

(ii) That the appellant and his attorney-at-lawwere denied the opportunity to be present in court on the date of the judgment;[2]

(iii) That the decision was erroneous in point oflaw because of the failure of the trial judge to give reasons for his decision;

(iv) That the decision was against the weight ofevidence.

Ground4

[7] We take thisground first since it can shortly be disposed of. The principles of law applicable when anappeal raises issues of fact are well known and have been dealt with in numerouscases. Simply stated, those principleshold that a Court of Appeal will rarely upset the findings of primary factsmade by a trial judge, where those findings were based on the evidence ofwitnesses whom the trial judge has seen and heard and whose demeanourhe has been able to observe. Where,however, there is no proper evidence to support the findings, a Court of Appealmay disturb the findings.

[8] Theseprinciples have been stated and reaffirmed time and again throughoutCommonwealth jurisprudence, and in two local cases in 2002 – See Eudese Ramsay v. St. James Beach Hotels ServicesLtd (Magisterial Appeal No.4 of 1999) and Patricia Innissv. Angela Belgrave (Magisterial Appeal No.9 of 1999).

[9] In this case,HusbandsJ saw and heard the witnesses. He said that he had "examined the demeanour ofthe witnesses and reviewed all of the evidence" before coming to his conclusionthat it was more probable than not that the accident occurred as told by therespondent. We are satisfied that therewas an evidential basis upon which the trial judge could make his findings andconclusions and nothing urged by Mr. Walcott has persuaded us that the trialjudge was wrong on the facts. [3]

Ground 2

[10] No formalnotices were sent to the parties that the trial judge proposed to give hisdecision on March 11, 1998. Apparently, some communication may have beenmade from an official in the Registration Office but it does not appear that Mr.Walcott received it. He was therefore not in court on the date of the decision. Mr. HaynesQ.C. was. It did not occur to anyone incourt to enquire about Mr. Walcott's absence and the trial judge proceeded todeliver his written decision. Mr. Walcottwas careful not to submit that there was any actual bias in the fact that thedecision was given in his absence.

[11] We think thatthe omission to ensure notification of the appellant and/or his attorney-at-lawwas a genuine administrative error. Theappellant has not shown a miscarriage of justice and no real adverse consequenceswere occasioned to him. It is not thepractice in this jurisdiction to deliver judgments in the absence of theparties or their legal representatives and there are good reasons why theyshould be present. Counsel may wish tobe heard on the question of costs or to make an application for a stay ofexecution.

[12] We think thatwe should remind judges and the legal profession that a court always has theinherent power to adjourn a case at any stage in order to do justice betweenthe parties or in pursuit of the overall interests of fairness and justice.

In theabsence of any satisfactory evidence of all the circumstances which conspiredto deny Mr. Walcott's presence on March 11, 1998 and being assured that nosubstantial prejudice occurred and no [4]miscarriage of justice was occasioned, we hesitate to hold that there was anerror of law as submitted by the appellant.

Ground 3

[13] This groundraises matters of substance. It iscontended that the trial judge failed to give reasons for his decision therebycommitting an error of law.

In Eagil Trust v. Piggott-Brown [1985] 3 All.E.R. 119 at 122, Griffiths LJ reiterated theview he had previously expressed in R. v. Knights Bridge Crown Court ex parte International Sporting Club [1981] 3 All.E.R. 417 that "a professional judge should as arule give reasons for his decisions." The particularity with which he is required to set them out will dependon the circumstances of the case and the nature of the decision being given.

[14] Mr. Haynesdrew our attention to the latest English authority: English v. Emery Reimbold & Strick Ltd [2002]3 All.E.R. 385. There, Lord Phillips MR examined thedecision in Flannery v. Halifax Estate Agencies Ltd [2000] 1 All.E.R.373 where the Court of Appeal had allowed an appeal on the sole groundof the inadequacy of reasons offered by the trial judge.

[15] LordPhillips MR quoted from the judgment of Henry LJ in Flannerywhere that judge made the following comments on the general duty togive reasons at pages 377-378:

"(1) The duty is afunction of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requiresthat the parties – especially the losing party – should be left in no doubt whythey have won or lost. This isespecially so since without reasons the losing party will not know (as was saidin Ex p Dave) whether the court hasmisdirected [5] itself, and thus whether he may havean available appeal on the substance of the case. The second is that a requirement to givereasons concentrates the mind; if it is fulfilled, the resulting decision ismuch more likely to be soundly based on the evidence than if it is not. (2) The first of these aspects implies thatwant of reasons may be a good self-standing ground of appeal. Where because no reasons are given it isimpossible to tell whether the judge has gone wrong on the law or the facts,the losing party would be altogether deprived of his chance of an appeal unlessthe court entertains an appeal based on the lack of reasons itself. (3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is astraightforward factual dispute whose resolution depends simply on whichwitness is telling the truth about events which he claims to recall, it islikely to be enough for the judge (having, no doubt, summarized the evidence)to indicate simply that he believes X rather than Y; indeed there may benothing else to say. But where thedispute involves something in the nature of an intellectual exchange, withreasons and analysis advanced on either side, the judge must enter into theissues canvassed before him and explain why he prefers one case over theother. This is likely to applyparticularly in litigation where as here there is disputed expert evidence; butit is not necessarily limited to such cases. (4) This is not to suggest that there is one rule for cases concerningthe witnesses' truthfulness or recall of events, and another for cases wherethe issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and thatwill differ from case to case. Transparencyshould be the watchword."

[16] The obligationthat judgments should be reasoned is well established in the Strasbourgjurisprudence – See Torija v. Spain(1994) 19 EHRR 553, Ruiz v. Spain(2001) 31 EHRR 589. [6]

[17] At page 393 ofEnglishv. Emery, Lord Phillips MR accepted that there is no duty on a judge,in giving reasons, to deal with every argument presented by Counsel. It is enough if what the judge saysdemonstrates to the parties and, if need be, the Court of Appeal the basis uponwhich the judge acted.

[18] The Master ofthe Rolls said at paragraph [19]:

"[19] It follows that, if the appellate process isto work satisfactorily, the judgment must enable the appellate court tounderstand why the judge reached his decision. This does not mean that every factor which weighed with the judge in hisappraisal of the evidence has to be identified and explained. But the issues the resolution of which werevital to the judge's conclusion should be identified and the manner in which heresolved them explained. It is notpossible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify andrecord those matters which were critical to his decision. If the critical issue was one of fact, it maybe enough to say that one witness was preferred to another because the onemanifestly had a clearer recollection of the material facts or the other gaveanswers which demonstrated that his recollection could not be relied upon."

Approach of the Appellate Court

[19] Again LordPhillips MR offers important guidance to appellate courts as to howthey should approach these matters. Hesays at paragraph [26]:

"[26].....theappellate court should first review the judgment, in the context of thematerial evidence and submissions at the trial, in order to determine whether,when all of these are considered, it is apparent why the judge reached thedecision that he did. If satisfied thatthe reason is apparent and that it is a valid basis for the judgment, theappeal will be dismissed." [7]

[20] In thisappeal, the crucial issue was one of fact. Did the appellant attempt to overtake the parked jeep and in doing socome off his left and proper side and collide with the respondent's oncomingmini moke? Or,did the respondent swerve to his right and collide with the appellant'scar? We have reviewed the evidence atthe trial and the written judgment of the trial judge.

[21] In ourjudgment the trial judge correctly identified the issue, addressed his mind toit and resolved it. This is what he saidat page 33 of the record of appeal:

"There is nodispute that there was damage to the right front of the mokeand the right rear, from the right door and beyond of the motor car but thearea of dispute was how did the collision take place. The Court, having examined the demeanour of all the witnesses and reviewed all of theevidence, came to the conclusion that it was more probable than not that theaccident occurred as told by the defendant (respondent). Where was damage to the vehicles? To the right of both. If the plaintiff (appellant) was overtakingand the moke was travellingin the opposite direction, and a collision took place before the plaintiff hadcompleted the manoeuvre and returned to his leftside, the damage would have been on the right side of the car.

In the circumstances the Court foundthat the plaintiff was overtaking a parked vehicle and in doing so he collidedwith an oncoming vehicle and was solely responsible for the cause of thecollision."

[22] We are alsosatisfied that the trial judge's reasons for his decision are clearly apparentand were a sound basis for his decision. Accordingly, we find no merit in this ground of appeal. [8]

Ground 1

[23] There wassubstantial argument on this ground of appeal. Mr. Walcott submitted that the trial lasted two days, June 17 and 20,1996. It was a simple matter; yetjudgment was delayed until March 11, 1998. He says that such adelay between trial and judgment was inordinate and inexcusable. Counsel relies upon Goose v. Wilson Sandford and Co. (1998) Times Law Report 85 and Cobham v. Frett (2000)59 W.I.R. 161.

[24] In Goosev. Sandford, a strong Court of Appeal ofEngland held that when judgment was delivered 20 months after the hearing, the Courtof Appeal had to look with particular care at the findings of fact which werechallenged and was entitled to conclude that by reason of the long delay thetrial judge had denied himself the opportunity of considering in any meaningfulway the impression the witnesses had made on him when giving evidence aboutmatters which troubled him. The Court ofAppeal ordered a retrial in that case. PeterGibson LJ found the delay to be wholly unacceptable.

[25] His Lordshipalluded to some of the serious problems that were likely to arise if a judgedelayed for so long before giving judgment. He was of opinion that the successful party was denied justice duringthe period of delay and the loser's confidence in the correctness of thedecision was undermined when the judgment was eventually delivered. There were also considerations of stress andanxiety to be taken into account as well as the loss of public confidence inthe judicial process. Over and abovethose matters, Peter Gibson LJ [9] thought that excessively delayedjudgments had the potentiality to undermine the rule of law.

[26] Cobham v. Frettis Privy Council authority. It involvedan appeal from the British Virgin Islands. The case – a land dispute – came on for trialon May 9, 1994 before EphraimGeorges J. It continued on July13 and 14 when it was concluded. Judgment was given on August 4, 1995. There was no record ofany reason for the delay nor of any complaint orinquiry made by the parties. The recordof appeal contained copious notes of evidence and counsel's submissions. The judgment itself was some 31 pages.

[27] Delivering theadvice of the Board, Lord Scott of Foscote,held that the Court of Appeal of the British Virgin Islands(ByronCJ (ag.), Singh and RedheadJJA) was not entitled to substitute its own evaluation of the evidenceof the witnesses for that of Georges J. Agreeing that a delay of 12 months wouldnormally amount to excessive delay, LordScott held at page 170 that:

“if excessivedelay….is to be relied on in attacking a judgment, a fair case must be shownfor believing that the judgment contains errors that are probably, or evenpossibly, attributable to the delay. Theappellate court must be satisfied that the judgment is not safe and to allow itto stand would be unfair to the complainant.”

[28] TheirLordships refused to uphold the Court of Appeal’s reversal of GeorgesJ and found that there was no error of law on the part of the trialjudge.

[29] Mr. Walcottattempted to evaluate the facts and some of the discrepancies in the evidenceto suggest that the trial judge’s finding for the respondent was not supportedby the evidence. We are not [10] persuaded. Mr. Haynes, relying on the ratio decidendiof Cobham v. Frett,submited correctly that the appellant must establishthat errors were made in the judgment and were possibly attributable to thedelay.

[30] In ouropinion, the appellant has been unable to show that there were errors of facton the part of the trial judge which were attributable to the delay – longthough it undoubtedly was. The Cobham v. Fretttest has not been satisfied.

Disposal

[31] In the result,we merely reiterate our oral order of November 6, 2002. The appeal isdismissed. The appellant must pay therespondent’s costs certified fit for two attorneys-at-law. [11]

Chief Justice

Justiceof Appeal Justiceof Appeal