

JERSEY / JUDGMENT

Knapp v AG [2011] JRC 118 (24 June 2011)

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JUDGMENT

THE BAILIFF: 1. This is an appeal by Mr Knapp under Article 11(2) of the Dogs (Jersey) Law 1961 ("the 1961 Law") against an order made by Advocate P Harris, Relief Magistrate in the Magistrate's Court on 10th February 2011 that Mr Knapp's dog Jasper be destroyed pursuant to Article 11(1) of the 1961 Law. 2. At the conclusion of the hearing, the Court dismissed the appeal. We now give our reasons. The background 3. Jasper is a white Staffordshire bull terrier. Mr Knapp acquired him as a 'rescue' dog about two years before the incident in question. He soon discovered that, although Jasper was extremely friendly towards humans, he was very aggressive towards other dogs. 4. On 1st October 2009 the Magistrate's Court ordered under Article 11(1) that Jasper be kept under proper control and that, when in public, he be kept on a dog lead and muzzled. This followed a representation by Centenier Pallett of St Brelade which referred to three occasions upon which Jasper was alleged to have attacked other dogs. 5. The first occasion was on 2nd September 2009 when Jasper charged across the beach at Ouaisne and attacked two dogs belonging to a Mr Sharman. He attacked one of them for about 3-4 minutes. Mr Sharman attempted to release his dog from the jaws of Jasper by punching Jasper and hitting Jasper with his lead but Jasper would not let go of the other dog. Mr Sharman thought that his dog was going to be killed. In due course Mr Knapp arrived on the scene and helped pull Jasper off the other dog. 6. The representation referred to two other incidents. The first was on 6th September when it was alleged that Jasper attacked another two dogs being exercised on the beach near the Yacht Club at St Aubin and the second was on 15th September when it was alleged that Jasper ran at speed from some 100 yards away on the beach at La Pulente and attacked a dog which was being exercised by its owner. In each case the attacked dog had to be taken to the vet for attention to the injuries sustained. 7. The Magistrate heard evidence in relation to the first incident and held that the allegations were correct. On that basis he made the order that Jasper be kept under proper control. He did not hear evidence on the second two allegations and made no specific finding. Mr Knapp accepts that Jasper was involved in these three incidents but does not accept all the details as set out in the representation. 8. The incident which gave rise to the current proceedings occurred on the morning of Wednesday 26th January 2011. Sometime during the morning Mr Knapp inadvertently let Jasper escape from his flat at Thornton Hall, Upper King's Cliff, St Helier. When he realised that Jasper was missing he went to fetch him and he found him near the entrance to Thornton Hall. 9. That same morning, at some time between 10.30-11.00, Mrs Betty Smart, who lives nearby, was taking her two dogs for a walk in Upper King's Cliff when

they were attacked by a white dog. The dog killed her Shitzu, called Barnaby and injured the other dog, called Cindy. Mrs Smart herself received injuries to her hands as the white dog bit her hand when she tried to intervene. 10. The police were called. They went to Mr Knapp's flat where there was an altercation and Mr Knapp was arrested. They took Jasper into their custody. Mrs Smart and her grand-daughter subsequently identified Jasper as the dog which had carried out the attack and Jasper was subsequently taken to the Animal Shelter. Mr Knapp was interviewed on Thursday 27th January at 8pm. He admitted that Jasper was aggressive towards other dogs, that Jasper had escaped from his flat the morning of the incident for some 5-10 minutes or maybe longer. During the interview he accepted that it must have been Jasper who carried out the attack but it is right to point out that at no stage during the interview did the police inform Mr Knapp of the time when the attack had taken place. Subsequently, when he thought about it, Mr Knapp concluded that Jasper had escaped and been recovered by him before the incident took place. He concluded therefore that it could not have been Jasper that carried out the attack and it must have been some other dog. 11. On Friday 28th January, Centenier Scaife presented a representation to the Magistrate's Court alleging that Jasper had not been kept under proper control and had carried out the attack described above. The matter was adjourned to Tuesday 1st February for the hearing of evidence. The first issue before the Magistrate was whether he was satisfied that it was indeed Jasper who had carried out the attack. The second decision for him was that, if he was so satisfied, whether an order should be made that Jasper be destroyed. Proceedings before the Magistrate's Court 12. The Court has received the transcript of the proceedings in the Magistrate's Court. The first witness was Mrs Smart. She described how, when she was walking along Upper King's Cliff with her two dogs, she saw a white dog come from either Thornton Hall or Lyndridge Hall, which is a property close to Thornton Hall. The dog ran towards her, knocked her over and went for Barnaby. Mrs Smart tried to intervene but the dog bit her on the hands. 13. Her other dog, Cindy, managed to slip its lead and run off. The white dog then gave chase to Cindy. Mrs Smart saw that Barnaby was not moving and so went to her home. There she found Cindy wedged between a flower pot and a wheelie bin and the white dog nearby. Mrs Smart moved the wheelie bin backwards and forwards as much as she could towards the white dog. Whilst she was doing this Cindy ran away and the white dog also moved off. It transpired that Cindy had been bitten and was later taken to the vet. Mrs Smart estimated that the incident took place between 10.30 and 11.00am. 14. Subsequently, the police came and asked her to inspect a white dog which was in the Animal Shelter van. She said that it was the same kind of dog as had carried out the attack. It had two or three collars upon it when it was in the van whereas the attacking dog had only one collar on. She said that the dog in the van also had a red mark on its left side, which she thought at the time was blood. 15. In cross examination she said that she was not sure of the time of the incident but thought she had left home at about 10.30am and therefore the incident was between 10.30 and 11.00. She first saw the white dog outside the gates of Thornton Hall and was quite sure it could only have come from Thornton Hall or Lyndridge Hall. She confirmed that she did not notice any black patches on the dog in the van. She accepted that the dog did not bite her deliberately but it happened because her hands were in the way when the dog was attacking Barnaby. The dog only let go of Barnaby when it saw Cindy running away. 16. She said in cross examination that she was sure that it was the same dog that

she saw in the Animal Shelter van, not just the same type of dog as she had suggested in evidence in chief. It was put to her by Mr Knapp that her identification was unsatisfactory because there was only one suspect dog for her to inspect, namely Jasper, who was the dog in the van. Mrs Smart replied that she was a dog lover and would not have said that it was the same dog unless it were. She was adamant that the dog in the Animal Shelter van was the dog that had attacked her dogs. 17. Miss Ashley Masterman is Mrs Smart's grand-daughter. She was in her bedroom at her grandmother's house when she heard her grandmother shouting her name; her grandmother was clearly distressed. Miss Masterman ran downstairs and found her grandmother with blood on her hands saying that her dogs had been attacked. She said that the dog which had carried out the attack was outside and that Barnaby was dead. Miss Masterman went outside and saw a white dog near the back of her grandmother's car. Her grandmother was panicking and Miss Masterman closed the front door. She then telephoned the Animal Shelter followed by the police. Before they came, she went to inspect Barnaby but it was clear that he was dead. 18. Subsequently, the police asked her to go and look at a white dog which they believed was the attacking dog. She went to inspect the dog which was in the Animal Shelter van. She said that the dog in the van was the same dog that she had seen outside her grandmother's house. 19. In cross-examination by Mr Knapp, she confirmed that she had only looked at the dog in the van through the window in the back door of the van but she was sure it was the same dog as it had the same face. 20. PC de la Haye gave evidence that he and a colleague had been told to attend at Upper King's Cliff following reports of a dog attack. He saw the dead Barnaby and was then informed by his control room that a dog matching the description of the attacking dog lived at Flat 1 Thornton Hall; accordingly he and PC Smith attended at that address. Mr Knapp opened the door to his flat and they explained why they were there. As this was happening, Jasper came to the door and greeted them. According to the officer, Jasper had what appeared to be fresh and wet blood on his coat. They explained that they wished to take Jasper away because of his suspected involvement in the attack but Mr Knapp did not agree to this. As a result, PC Smith sought assistance and Acting Sergeant Fitzgerald arrived. According to PC de la Haye it was explained that Jasper had to be taken for reasons of safety to the public and risk of other dogs being injured or hurt. Mr Knapp continued to refuse to agree and eventually he was arrested. The officers together with a representative of the JSPCA, who had been present during these discussions, then took Jasper and placed him in the white Animal Shelter van. 21. PC de la Haye explained how he asked each of Mrs Smart and Miss Masterman in turn to look into the van to see whether they thought Jasper was the dog who had carried out the attack. He took care to keep them apart. He said that Miss Masterman said it was the same dog that she had seen outside her grandmother's house and Mrs Smart said it looked like the dog which had attacked Barnaby. After the identification, Jasper was taken off to the Animal Shelter in the van. 22. In cross-examination, PC de la Haye accepted that Jasper had greeted the police in a friendly manner when they came to the door of Mr Knapp's flat and confirmed that he had not tested the red substance on the coat; he had merely considered it to be blood. 23. Acting Sergeant Fitzgerald described how he attended at Flat 1 Thornton Hall where he found his two colleagues and Mr Chant of the JSPCA speaking with Mr Knapp. When he arrived Mr Chant was trying to persuade Mr Knapp to hand over Jasper, but with little success. Sergeant Fitzgerald said that, because there was a reasonable suspicion that Jasper had been

responsible for the attack on Mrs Smart's dogs, it was decided that Jasper should be removed from the premises and seized as evidence of that attack. He confirmed that Jasper was placid at the time. He made no mention of seeing any blood on Jasper although he was not asked specifically about that and said that he had not looked at Jasper closely. 24. Finally PC Cleave produced a transcript of the police interview with Mr Knapp referred to earlier. In that interview Mr Knapp confirmed that he had acquired Jasper as a rescue dog but had discovered that he had a problem of aggression towards other dogs which very little things could trigger. 25. He explained that he normally took him out of the flat with a flexi-lead and a muzzle. The back garden was enclosed but the front garden gave onto the drive that led out to the front entrance of Thornton Hall. He said that he had made a fatal mistake the previous day. He had taken Jasper out into the front garden through the French windows of the drawing room which was his normal habit. However, instead of coming back the same way, he had gone in through the front door of the building in order to collect his post. When he got back in the house he released Jasper from the lead and went to the kitchen to make himself some tea. After a while, perhaps 5 minutes, perhaps 10 minutes, perhaps longer he noticed that Jasper was not there. He went through to the drawing room and noticed that the French windows were still open. He realised that Jasper had escaped and so he ran as quickly as he could with Jasper's lead down the drive. At the end of the drive when he came to the entrance onto Upper King's Cliff, he saw Jasper. He then brought him back to his house. A while later the police arrived and informed him that they believed that his dog had attacked and killed a smaller dog and they needed to take Jasper away. 26. He confirmed during the interview that the Magistrate's Court had made an order in October 2009 and he invariably complied with this. It was simply an accident that he had left open the French windows the previous day. He accepted during the interview that it was Jasper that had carried out the attack but it is fair to say that at no stage did the officers mention the time of the attack to him. 27. That concluded the evidence brought by the Centenier in support of the representation. At that stage the Magistrate invited Mr Knapp to make any representations which he wished to on the first issue which the Magistrate had to consider, namely whether it was Jasper who had carried out the attack. He did not invite Mr Knapp to give evidence. Mr Knapp did then make submissions which, including interventions from the Magistrate, covered some 7 pages of the transcript. Mr Knapp submitted that he was certain that it could not have been Jasper who carried out the attack because Jasper was indoors with him at the time of the attack. He explained how his routine was the same every day and it was the same on that day. He would get up at 9 o'clock and by 9.30 he was dressed. The first thing he would do before breakfast or tea was to take Jasper out on the lead into the front garden. That is what he did on that occasion but, as explained in interview he had not come back through the French windows but had instead come back through the front door. He said he went to collect his mail, then went to the kitchen. He noticed at that time that Jasper was not there and that the French windows were open. He ran to recover Jasper who was standing quite casually near the entrance to Thornton Hall. He could only have been out of Mr Knapp's sight for some 5 minutes, perhaps 7. It could not have been more and therefore he was certain that Jasper was back indoors by 10 o'clock where he remained until the police arrived. He could not therefore have been responsible for the attack which occurred between 10.30 and 11.00. 28. In addition he criticised the identification of Jasper. He

said that although Jasper was white, he had black spots and none of the witnesses had mentioned this. Furthermore Jasper had been the only dog presented for identification. This was like an identification parade consisting only of the suspect and there was a natural inclination in a witness to identify the person or dog who was presented at the identification parade. It was an unsatisfactory and unreliable process. Furthermore, he pointed out that Mrs Smart had said that when she had first seen the white dog, it was standing in the middle of the road outside Thornton Hall near the sign on the front wall. This meant, he said, that she could not have possibly have been sure where the dog came from. The dog did not necessarily have to have come from Thornton Hall or Lyndridge Hall, it might have come from La Pouquelaye or from a field which was on the other side of the road. He also said that he had seen no blood on Jasper that morning and there was no blood shown in the photographs. In short, he submitted that the evidence was too tenuous to be satisfied that it was Jasper who carried out the attack, particularly given the potentially serious consequences for Jasper if he was found to have been the dog responsible. 29. The Magistrate then retired to consider his decision. On his return he gave a short judgment concluding that the dog which carried out the attack was both dangerous and not under proper control. The question was whether he was satisfied that that dog was Jasper. He concluded that he was so satisfied. He accepted the evidence of Mrs Smart and Miss Masterman as to identification and also the evidence of PC de la Haye to the effect that there had been blood on Jasper's coat. He referred to Mr Knapp's submissions that it could not have been Jasper because Jasper was back indoors before 10am and he mentioned the fact that at interview Mr Knapp had referred to Jasper being absent for perhaps 5-10 minutes or perhaps longer. He found that there was nothing to suggest that Jasper could not have been out of the property between 10.30 and 11.00. He concluded by saying that he found beyond any reasonable doubt that Jasper was the dog responsible for the attack. 30. The Magistrate then invited submissions on what order he should make. Mr Knapp submitted that Jasper should be spared and that he would keep him under proper control. However the Magistrate rejected that submission. He referred to the fact that there was already an order that Jasper be kept under proper control and that his finding showed not only that Jasper was dangerous but also that he was not being kept under proper control. He therefore ordered that Jasper be destroyed. 31. Mr Knapp appeals on the basis that the Magistrate was wrong to find that it was Jasper that had carried out the attack and was also wrong to order that he be destroyed. Nature of the proceedings and the appeal 32. Article 11(1) of the 1961 Law provides as follows:- "Where it is shown to the satisfaction of the Magistrate's Court, on a representation made by any person, that a dog is dangerous or is not kept under proper control, the court may make an order relating either:-

- a) that the dog shall be kept under proper control; or

- b) that the dog shall be destroyed: Provided that no order shall be made under this paragraph unless the owner of the dog has been given an opportunity of being heard." 33. Both Advocate Hollywood and Advocate Jones agreed that proceedings under Article 11(1) are civil in nature despite the fact that they are brought in the Magistrate's Court. In our judgment they are correct. This accords with the case law under the equivalent statutory provision in the United Kingdom - see for example *R v Nottingham Justices ex p Brown*

- [1960] 1 WLR 1315. it follows that the Magistrate must be satisfied to the civil standard i.e. on the balance of probabilities, that the dog in question is dangerous or not kept under proper control (note see case of Lord Hoffman). 34. The relevant provisions of Article 11 the 1961 Law dealing with the right of an appeal against an order under Article 11(1) are as follows:-
- "2) Where on a representation made under paragraph (1) the Magistrate's Court makes an order directing that the dog should be destroyed, the owner of the dog may, within the period of 7 days from the date of the order, appeal against the order to the Royal Court...
- 4) On any appeal under paragraph (2), the Royal Court may either dismiss the appeal or rescind the order made by the Magistrate's Court and, if thought fit, substitute therefore an order directing that the dog should be kept under proper control...
- 5) The decision of the Royal Court on any appeal under this Article shall be final and without further appeal.
- 7) Part 1 of the Civil Proceedings (Jersey) Law 1956 shall extend to the hearing of proceedings under the foregoing provisions of this article and the provisions of the said Part 1 shall have effect accordingly but as if references therein to the Petty Debts Court were references to the Magistrate's Court.
- 8) For the avoidance of doubt, it is declared that Part 5 of the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949 shall not apply in relation to any order made by the Magistrate's Court under paragraph (1)." 35. Article 12 of the 1961 Law confers a power to make rules for the purposes of proceedings under Article 11 and appeals therefrom, but no such rules have been made. 36. As to the test on appeal, Advocate Jones argued that the Court should apply the same test as on administrative appeals as articulated at paras 13-14 of *Anchor Trust Company Limited v Jersey Financial Services Commission*

- [2005] JLR 428 . Thus the Court should intervene where the decision of the Magistrate was unreasonable (but not necessarily *Wednesbury* unreasonable). However, where there were procedural errors before the Magistrate, the Court should then reach its own decision on whether the dog was dangerous or not kept under proper control. 37. Advocate Hollywood argued that the Court should adopt the same approach as the Court of appeal adopted in relation to appeals from the Royal Court, both on matters such as the admission of further evidence and in relation to the merits. 38. Both counsel agreed that the very restrictive wording of Article 11(4) meant that the Court was not able to remit the matter to the Magistrate's Court for a new hearing even if the Court considered that that would be the best course. Reluctantly, we agree that that is so. 39. The 1961 Law is silent as

to the correct approach on an appeal. However, as in the case of most appeals, the 1961 Law does not envisage trial by a court of appeal; it envisages trial by the Magistrate's Court. An appeal lies to correct error but not to re-hear the case afresh. Accordingly, in our judgment, in the ordinary case, the Court will simply be concerned to consider whether there was evidence before the Magistrate upon which he could reasonably and properly conclude that the dog in question was dangerous or not kept under proper control and whether the decision to order the dog's destruction was proportionate. However, where there are procedural defects in relation to the proceedings before the Magistrate's Court or where further evidence is admitted, this Court will have to reach its own conclusion on whether it is satisfied that the dog is dangerous or is not kept under proper control. Ultimately both Advocate Hollywood and Advocate Jones agreed that this was the correct approach. Grounds of appeal 40. Mr Knapp filed detailed grounds of appeal. During the hearing, he was much assisted by Advocate Jones, who had been appointed by the Bâtonnier as Amicus for the purpose of ensuring that all relevant points were before the Court. 41. We have carefully considered all the points raised in the grounds of appeal and during the hearing but we do not propose to mention them all. We would summarise the key contentions as follows:- (i) The proceedings before the Magistrate were unsatisfactory and unfair because Mr Knapp was not given sufficient time to prepare for the hearing and was not given any of the witness statements before the hearing. (ii) The Magistrate did not permit Mr Knapp or Major Coleman of the JSPCA to give evidence. (iii) The police had no lawful authority to enter Mr Knapp's home for the purposes of seizing Jasper. The Identification of Jasper by Mrs Smart and Miss Masterman was only possible because Jasper had been unlawfully seized. The Magistrate should therefore in his discretion have excluded the identification evidence as it was based on unlawfully obtained evidence. (iv) The Magistrate had wrongly refused to allow Mr Knapp to adduce photographs of other dogs with a view to testing the identification evidence of the two witnesses. (v) The Magistrate's conclusion that Jasper had carried out the attack was erroneous. 42. We propose first to deal with the procedure before the Magistrate. It is clear that Mr Knapp was never invited to give evidence. Where there is no dispute as to the facts and the question before the Court is merely whether to order that the dog be kept under proper control or destroyed, there will usually be no need for evidence and the matter can be dealt with by way of submissions. But that was not the position here. It was clear that Mr Knapp was disputing that it was his dog that had carried out the attack. If he had any evidence to give relevant to that point, he should have been invited to do so. It was clear from his submissions that he was asserting that, from his personal knowledge, he could say that Jasper could not have carried out the attack because he was inside the flat with Mr Knapp at the time the attack was carried out. It is true that Mr Knapp did not formally apply to give evidence, but he was a litigant in person and the responsibility lay upon the Magistrate to invite him to give evidence. We have some sympathy with the Magistrate as it is easy sometimes with litigants in person to overlook the distinction between evidence and submission. Nevertheless, this was clearly a significant procedural defect. 43. It became clear to this Court at the directions hearing that Mr Knapp should

have been given the opportunity of giving evidence before the Magistrate. Accordingly the Court ordered that Mr Knapp should have leave to give evidence before this Court, which he duly did. 44. In relation to Major Coleman, Mr Knapp did not make clear to the Magistrate what relevant evidence he had to give but it subsequently emerged that Major Coleman had seen Jasper later that day and could give evidence as to whether there was blood on him at that time. This Court therefore gave leave for Major Coleman to give evidence before us. So as to ensure that all relevant evidence concerning blood stains was before the Court, the Court also gave leave for PC Smith to give evidence, as he had not been called before the Magistrate's Court. 45. As to the lack of witness statements, it emerged during the hearing before us that the police had telephoned Mr Knapp on 31st January and left a message on an answer phone to the effect that the papers were available for collection at the Police Station. Mr Knapp told us - and we accept

- that he never received that message. Accordingly he had not seen the witness statements before the hearing and therefore was not in a position to prepare his case appropriately. Furthermore, Mr Knapp said that he was presented with three different versions of the Representation and was therefore not clear as to the case he had to meet. In our judgment there is nothing in this latter point. We have seen the different versions of the Representation and the changes are extremely minor. 46. We accept that the Magistrate's Court (whether acting civilly or criminally) is a court of summary jurisdiction and delays are to be avoided. Furthermore it is clear that Mr Knapp did not object to the fixing of 1st February for the hearing of the case nor did he ask for an adjournment on that date because he had not received the witness statements or had not had enough time to prepare. However he was a litigant in person. If he had been represented by an advocate, it seems to us highly unlikely that such advocate would not have protested at the lack of disclosure of the witness statements and perhaps sought an adjournment on that basis or on the basis that he was not yet in a position to present his case fully as he had not had time to take full instructions. It seems to us that, in the circumstances of this case, it was incumbent upon the Magistrate to be pro-active and to ensure that Mr Knapp was in possession of all the relevant material and was content to proceed on that day. We think that Mr Knapp was potentially placed at some disadvantage by the speed with which the matter went to trial coupled with the failure to ensure that he had advance sight of the witness statements. 47. In the light of these procedural defects, the most appropriate course would have been for this Court to remit the matter to the Magistrate's Court for re-hearing. However, because of the restricted terms of Article 11(2), that course was not open to us. Accordingly, we decided that the most appropriate course was to hear the further evidence which Mr Knapp wished to adduce, to hear any points which Mr Knapp or the Amicus wished to make as to points which they would have sought to extract from the Centenier's witnesses had Mr Knapp been given more time or been in possession of the witness statements and to reach our own decision on whether we were satisfied to the civil standard that it was Jasper that carried out the attack. In this way we sought to ensure that Mr Knapp suffered no prejudice as a result of the procedural defects in the Magistrate's Court. 48. We consider next the point concerning

whether it was lawful for the police to seize Jasper and whether the identification evidence should have been excluded. This was the subject of an interim hearing before the Bailiff alone. 49. The difficulty is that this point was not taken before the Magistrate's Court. Thus no questions were directed towards the police officers regarding the grounds upon which they thought they were entitled to enter the flat and seize Jasper, nor was the Magistrate asked to exclude the identification evidence on the basis that Jasper had been unlawfully detained and the police should not therefore have been in a position to ask for Mrs Smart and Miss Masterman to identify him. In general, it is not open to parties (even when not legally represented) to fail to object to the admissibility of evidence and then seek to appeal on the basis that such evidence should not have been admitted. It would require very strong grounds, particularly in civil proceedings, for such a point to succeed. 50. Advocate Hollywood relied upon Article 19(1)(c) of the Police Procedures and Criminal Evidence (Jersey) Law 2003 ("the 2003 Law") as justifying the entry and seizure. The relevant provision reads as follows:- "1)... a police officer may enter and search any premises:- ... c) for the purpose of saving life or limb or preventing serious damage to property." 51. She argued that the police were entitled to enter Mr Knapp's flat as there were reasonable grounds for suspecting that Mr Knapp's dog had just killed one dog, attacked and wounded another and injured Mrs Smart. They were therefore 'saving limb' (i.e. preventing injury to a person) and preventing serious damage to property (i.e. the death or injury of another dog). 52. Advocate Jones argued that the facts did not fall within these provisions of the statute. Before the provision could apply, there had to be a degree of imminence and danger which was not present in this case. In this context the Court was referred to *Baker v Crown Prosecution Service* 2009 EWHC 259 (Admin) at para 24 and to *Syed v DPP*

[2010] 1 Cr App R 34 at paras 11 and 12. 53. The Court accepts that, for an entry and search under Article 19(1)(c) to be lawful, the risk to life or limb or of serious damage to property must be reasonably regarded as imminent. There is clearly an issue as to whether that degree of seriousness and imminence existed in the present case when the police went to the flat. However, the point was not taken before the Magistrate's Court and no questions were put to the police witnesses concerning the grounds for their seizure of Jasper. We do not think it would be right to make a finding on the legality of the police action when they were not given the opportunity of justifying their action in the course of these proceedings. 54. Furthermore, as will appear shortly, because of our decision on the exclusion issue, it is not necessary for us to decide the point. However, for the purposes of this appeal, we are content to assume - without in any way deciding

- that the police were not entitled to enter Mr Knapp's flat for the purposes of seizing Jasper on the basis that the situation with which the police were presented did not reach the degree of imminence and seriousness which is necessary for entry and search under Article 19(1)(c). However, no evidence has been produced which would form the basis for any suggestion that the police were acting in bad faith. On the contrary, it is clear from the evidence before the Magistrate that the police had reasonable grounds for suspicion that Jasper was the dog responsible for the attack and that they wished to prevent any further attacks. Accordingly,

we proceed on the assumption that the police were acting in good faith in that they believed they were entitled to seize Jasper for the protection of members of the public and other dogs. 55. The question then arises as to whether, if the Magistrate had concluded that the seizure of Jasper was unauthorised, there would have been any grounds for him to exclude the identification evidence. 56. In English law, there was traditionally no discretion to exclude evidence in civil proceedings on the grounds that it had been unlawfully obtained - see Phipson on Evidence (17th Edition) para 39 - 34; and see *Vernon v Bosley*

- [1994] PIQR 337 per Hoffmann LJ at 339:- "Mr O'Brien submits that in a civil case a judge has no discretion to exclude admissible evidence. Put like that, I would agree. I think Otton J was quite right to give such a ruling in *Bradford City Council v K (Minors)* [1990] Fam. 140." The position was changed by rules made under the Civil Procedure Act 1997, but these of course have no application in Jersey. 57. The position in Jersey was reviewed by the Court of Appeal in *A v B*
- [2006] JLR 518 where Beloff JA said at paras 29 and 30:- "29. It is axiomatic that only relevant evidence is admissible in civil (or indeed criminal) proceedings. The issue in this appeal is the extent, if any, of the power of the court to exclude relevant evidence in the exercise of a discretion. The general rule is that such a power does not exist in the absence of express provision in statute or rule: this is the position in Scotland and Australia ... and in the majority of Commonwealth courts, Queensland and Canada apart This was also the common law position in England and Wales ... , although now modified by the Civil Procedure Rules, r.32.1(2).
30. It does not, however, follow that relevant evidence must always be admitted. Rules of law such as those relating to legal professional privilege may lead to its exclusion. It will also be excluded if its admission would be an abuse of the process of the court ... ; contrary to the public interest ... ; or if the court, having imposed time limits for the production of statements, holds that to allow evidence contained in such statements to be admitted where there has been disobedience to those orders would defeat the ends of justice, bearing in mind the court's obligations to litigants as a group and not merely to litigants of a particular case before it Furthermore, the court may consider the evidence of insufficient relevance to justify its admission when the consequent impact on the conduct of the case would be disproportionate...; otherwise it appears to be accepted that there is no common law discretion to exclude it. There is nothing in the common law of Jersey to contrary effect." (References omitted). 58. Advocate Jones argued that the seizing of Jasper by the police breached two convention rights of Mr Knapp under the European Convention of Human Rights, namely Article 8 (Right to respect private life) and Article 1 of the First Protocol (Right to Protection of Property). He argued that it would be an abuse of process to admit in civil proceedings evidence obtained in breach of a Convention right. In our judgment, that cannot possibly be so. Even in criminal proceedings, where there is a statutory discretion to exclude evidence improperly obtained, there is abundant authority for the proposition that the Court may choose not to exclude evidence under that provision

and to allow it to be adduced, notwithstanding that it has been obtained in breach of a Convention right. The admission of such evidence does not lead to the trial becoming unfair. See for example *Khan v United Kingdom*

(2001) 31 EHRR 822. 59. In our judgment, even if the point had been taken and the Magistrate had been persuaded that the seizure of Jasper was not authorised under Article 19(1)(c) of the 2003 Law and was therefore unlawful, there would have been no possible justification for him to have excluded evidence of the subsequent identification of Jasper by Mrs Smart and Miss Masterman on the basis that admitting such evidence would be an abuse of process or contrary to the public interest. We therefore reject this ground of appeal. 60. Turning to Ground (iv) as set out in paragraph 41 above, we see no reason to criticise the Magistrate for having refused to allow Mr Knapp to produce photographs which he apparently had of other dogs, with a view to testing the identification evidence of the two witnesses. This was a matter for the discretion of the Magistrate and he was perfectly entitled to take the view that this would not have been a fair process. 61. That brings us to the key issue which is whether, in the light of the further evidence which we have heard, we are satisfied that it was Jasper which carried out this attack. 62. Mr Knapp filed an affidavit which stood as his evidence in chief. He was then cross-examined by Advocate Hollywood. In essence his affidavit simply reiterated by way of evidence what he had said to the Magistrate in his submissions. He re-affirmed that his daily routine was the same and he would get up at 9am. From 9.30am until 10am he would take Jasper into the front garden leaving and returning via the French windows in the living room. However, on this occasion, rather than returning via the French windows, he came in through the front door of the property and released Jasper from his lead once he got into the flat. He had forgotten that the French windows were still open. He went into the kitchen to make his breakfast tea and after a very short time he noticed Jasper was not with him. He went to the kitchen door and looked for him and saw that the French windows were open. He then ran as fast as he could up the drive, taking Jasper's lead with him. He saw Jasper standing between the stone gateposts to the entrance to Thornton Hall. Jasper's appearance was casual and relaxed; he exhibited no tension or panting. Mr Knapp then took him back inside. He said that he had since re-enacted these events without Jasper's presence whilst timing them with a stopwatch. As a result he could depose with certainty that Jasper was out of his sight unsupervised for a period of only between 4 -5 minutes. 63. Having recovered Jasper, he finished making tea and sat at his breakfast table. He then carried out his routine medical tests and medication, recording results in his medical diary which was produced to us. He said that amongst the procedures was the need to calculate a suitable dose of insulin and then inject it. It was vital to know that at least 10 hours had passed since the previous injection and he also needed to confirm the date. He therefore always checked his watch, which shows the date as well as the time and which is never wrong. As a result, he could depose with absolute certainty that the time on that particular day when he injected his insulin was 10.03am. It was for that reason that he was certain that, if the attack on Mrs Smart's dog took place after 10am, then Jasper was not involved as he was

back inside the flat. He confirmed that the police had never mentioned the time of the attack during the interview and that is why he had assumed that Jasper must have been responsible for it. However, once he read the representation which was lodged on Friday (which he did over the weekend) he realised that the attack had taken place about 11am and that Jasper had been back with him by then. It was over that weekend that he re-enacted the incident and timed it with a stopwatch. He said further that Jasper always wore two collars in case one of them were to slip over his head. He accepted that he had not mentioned the re-enactment or the relevance of the timing of his taking insulin before the Magistrate's Court but said that he was reserving this for when he gave sworn evidence. He also accepted that he had referred to Jasper being absent for up to 10 minutes or longer at the police interview but said that this was before he timed the re-enactment with a stopwatch. However, the medical diary did not contain any record of time, merely the readings on particular dates. There was one entry for the morning and one for the evening. 64. Major Coleman also swore an affidavit which was taken as his evidence in chief and he was cross-examined by Advocate Hollywood. He is the Chief Executive of the JSPCA, which includes responsibility for the Animal Shelter. He knows Mr Knapp well; as a result he is familiar with Jasper. He confirmed that Jasper is friendly and welcoming to all human beings but exhibits strong aggression to other dogs. As to the events of the 26th January, he was at the Animal Shelter when Jasper was brought in and taken straight to the consulting room for a standard veterinary examination. Although he was not personally present at that examination, no mention was made by anyone of any blood on Jasper and he was sure that he would have been informed had this been the case. Not long afterwards, two police officers arrived and they asked for a further examination of Jasper. On this occasion, Major Coleman was present and he was sure that there were no blood stains on Jasper's coat nor did anyone else present make any mention of seeing any blood on Jasper. Under cross-examination, he confirmed that he had seen Jasper's aggression to other dogs whilst Jasper had been at the Animal Shelter and the JSPCA could not care for Jasper. As to the suggestion in Mr Knapp's ground of appeal that there was another white lurcher type dog in the Vallée des Vaux area which was known for wandering and aggression to other dogs, he confirmed that there was no possibility of anyone mistaking Jasper for that dog, as it had whippet in it and looked nothing like Jasper. 65. PC Smith gave evidence that he attended at the scene on the day in question. He had seen Barnaby's body and had then attended with PC de la Haye at Mr Knapp's house. He said that he had noticed what he would describe as drying blood on Jasper's back between his shoulders. He had not taken any part in the identification by Mrs Smart and Miss Masterman but had subsequently attended at the Animal Shelter where he had taken the photographs which were produced at the Magistrate's Court. He said that when he attended the Animal Shelter to take the photographs, the patch of blood was still on Jasper's coat. 66. In cross-examination it transpired that he had made no entry at the time in his note-book about the incident and had not been asked to make his witness statement until 10th April i.e. nearly three months after the incident. Before making his statement he had consulted the police I-log, which is the Police Service Control Room record of what

was said by various police officers at the time. Discussion 67. Mr Knapp submits that he did not do himself justice before the Magistrate's Court. As already stated, we accept that the hearing took place quickly and that he had not seen the witness statements in advance. However, apart from the question of the admission of the identification evidence -which we have already dealt with - neither Mr Knapp nor Advocate Jones has referred us to any material aspect of the evidence that the witnesses gave in the Magistrate's Court which he would have explored or questions that he would have asked had he had more time to prepare or seen the witness statements in advance. 68. We have now had the advantage of hearing Mr Knapp's evidence. However, it essentially repeated what he said to the Magistrate and the material was therefore before the Magistrate even if it was not in the correct form by way of evidence on oath. The only new material of any significance was his evidence that he had re-enacted Jasper's escape before the Magistrate's Court hearing in order to time it and the fact that he had checked the time on his watch at 10.03 when he took his insulin. He also raised for the first time the fact that the dog carrying out the attack had only one collar whereas, when he was identified in the Animal Shelter van, Jasper was wearing two collars. 69. As to Major Coleman's evidence, the key aspect was that he said there was no blood on Jasper when he saw him at the time of the second inspection and he was sure that there was similarly no blood on him at the time of the first inspection on arrival at the Animal Shelter because otherwise it would have been mentioned. As to PC Smith's evidence, we think it significant that he was not asked to recall this incident until nearly three months after it occurred, that he had no notes in his notebook from which to refresh his memory and that he had therefore refreshed his memory from the notes of others contained in the I-log. 70. We consider first the issue of whether there was blood on Jasper. In the Magistrate's Court PC de la Haye asserted that he saw blood on Jasper when they arrived at the flat. Similarly Mrs Smart said that when she saw Jasper in the van he had a red mark on his left side which she thought at the time was blood. However, Miss Masterman made no evidence of seeing any blood when she inspected Jasper in the van nor did Acting Sergeant Fitzgerald mention having seen blood. Mr Knapp asserted before the Magistrate's Court and maintained in his evidence before us that he at no stage saw any blood on Jasper. 71. In relation to the evidence which we have heard, PC Smith asserted that there was blood when he saw Jasper at the flat and that this blood remained on him when he subsequently took photographs of Jasper at the Animal Shelter later in the day. However, this has to be balanced against the fact that he was not asked to recall events until months after the incident. Contrary to the officer's evidence, Major Coleman asserted that there was no blood by the time of the second inspection and that he inferred there was no blood on Jasper at the time of the first inspection because of the lack of any report of the finding of such blood. 72. In all the circumstances, having regard to the new evidence which we have heard, we do not find on a balance of probabilities that there was any blood on Jasper when the police arrived at the flat and thereafter. Accordingly we discount that aspect of the case for the Centenier. 73. We have carefully considered all the evidence in the case and the submissions made by Mr Knapp and Advocate Jones. However, the Court is satisfied on the balance of probabilities that it

was Jasper which carried out this attack. We would summarise the Court's reasons as follows:- (i) It is accepted that Jasper is aggressive towards other dogs and he has a track record of behaving in such a manner, including running over to attack other dogs who are some distance away. (ii) We accept Mr Knapp's evidence that it was the first occasion since the Magistrate's Court order in 2009 that Jasper had escaped from his control and was out of his sight for a time. Yet that is the very morning on which a dog looking like Jasper attacked two other dogs in the immediate vicinity. (iii) Jasper was identified as being the dog which carried out the attack by Mrs Smart and her grand-daughter Miss Masterman. We accept that there was only one dog in the identity parade but nevertheless that it was noteworthy that Mrs Smart said she was a dog lover and would therefore not have said it was the dog which attacked her dogs unless it was. Both witnesses were adamant that Jasper was the dog which had carried out the attack. We accept that it may be difficult for a person who has seen a dog for a short while to be certain that it was actually the same dog but we are quite satisfied that the dog which carried out the attack looked exactly like Jasper. Mrs Smart, in particular, was in a position to have a good look at the attacking dog. She was on the ground very close to the attack, having been knocked over; so close she got bitten when she tried to intervene. (iv) Mr Knapp sought to argue that there was a white lurcher type dog from Vallée des Vaux which was known to wander and to have aggressive tendencies towards other dogs and it might well have been that dog which carried out the attack. However, we accept Major Coleman's evidence that he is familiar with that dog, that it is some form of whippet cross-breed and that it looks nothing like a Staffordshire Bull terrier such as Jasper. We discount the possibility of Mrs Smart and her grand-daughter having mistaken that dog for Jasper. (v) We have of course carefully considered Mr Knapp's evidence concerning the re-enactment and the timing of the taking of his insulin which he says was at 10.03am. However, we cannot accept that evidence. In the first place the medical diary contains no record of timing and it is hard to see therefore how Mr Knapp can be so certain that it was that particular day that he took his insulin at 10.03. Secondly, despite the fact that he says that he carried out the re-enactment the weekend before the Magistrate's Court hearing and that the noting of the time of 10.03am on the day of the incident was less than a week before the hearing, he did not mention either of these two points to the Magistrate. When pressed by Advocate Hollywood as to why he had not mentioned the point concerning the insulin and the time of 10.03 in the Magistrate's Court, Mr Knapp said that he was reserving the point for when he gave his sworn evidence. We do not find this answer to be credible. It is clear from the transcript that Mr Knapp was doing all he could in his submissions to convince the Magistrate that it could not have been Jasper that carried out the attack because of the timing and also that he did not at that stage appreciate that he was not being asked to give evidence and was proceeding by way of submission. He made no application to give evidence at any stage and, as a non-lawyer, this is not surprising. The suggestion that he deliberately decided to withhold an important point for use at a later time is simply not believable. Furthermore, even if he did carry out a re-enactment, its utility would depend entirely on how accurately he re-enacted exactly what happened on the day in question. All in all, while

the Court is quite willing to accept that Jasper escaped by mistake and that this may well have happened broadly in the manner described by Mr Knapp, it does not accept his evidence as showing that Jasper escaped earlier rather than at the time that the attack took place. (vi) The evidence of Mrs Smart was that she saw Jasper just outside Thornton Hall and that she believed the dog must have come from either Thornton Hall or Lyndridge Hall. Jasper lives in Thornton Hall and there is no suggestion of another aggressive white dog living at either of these addresses. (vii) If it was not Jasper that carried out the attack, it must have been the most extraordinarily unfortunate coincidence. On the only occasion that Jasper, a white dog with a history of attacking other dogs, escaped from the control of his owner since 2009, another white dog, who looked exactly like Jasper, appeared immediately outside Jasper's home, proceeded to attack Mrs Smart's dogs, and then disappeared completely back to wherever it had come from. 74. In all the circumstances, despite the deficiencies in the procedure before the Magistrate's Court, having given Mr Knapp the opportunity of calling any relevant evidence, having considered that evidence and having considered the submissions of Mr Knapp and Advocate Jones, we are left in no doubt that it was been established on the balance of probabilities that it was Jasper which carried out this attack. This means that the provisions of Article 11(1) have been fulfilled in that Jasper is both dangerous and was not kept under proper control on the day in question despite the existence of the 2009 order. 75. Having announced our decision on the first aspect of the appeal, we then heard submissions from Mr Knapp on whether we should uphold the order of the Magistrate that Jasper be destroyed. He assured us that the escape was a one off and that would not happen again. 76. No court likes to order the destruction of a dog and we have considered that matter very carefully. Nevertheless we are in no doubt that the order of the Magistrate was correct and should be upheld. We would summarise our reasons as follows:- (i) There is no doubt that Jasper is extremely aggressive towards other dogs. Indeed it was confirmed by Major Coleman that this tendency has been apparent even during Jasper's time at the Animal Shelter since the incident. (ii) We are equally in no doubt that, should he escape again in future, he would be highly likely to attack any other dogs which he came upon and that he would be likely to cause them injury or death. Although we accept that he is not intentionally aggressive towards humans, we are similarly in no doubt that any person seeking to intervene during such an attack would be at risk of injury, as indeed happened to Mrs Smart on this occasion. If a young child were to be in the immediate vicinity, the risk of serious collateral injury to such child cannot be ignored. (iii) We accept that Mr Knapp would do what he could to prevent Jasper escaping. However, Mr Knapp is elderly and not in particularly good health. In our judgment there must be a substantial risk of an inadvertent escape occurring again in future despite Mr Knapp's best intentions. (iv) We did give consideration to supplementing the order that Jasper be kept under proper control by providing that he must wear a muzzle at all times, even in Mr Knapp's home, except when he is fed or watered. However, we concluded that this would not be a satisfactory outcome for two reasons. In the first place this would still not exclude the possibility of an escape at a time when he was not muzzled because of inadvertence on the

part of Mr Knapp and secondly it was not clear to us that we would be doing much of a kindness to Jasper. (v) In all the circumstances, the welfare of other dogs and people must take precedence over Jasper and over the hardship which Mr Knapp will undoubtedly suffer by reason of Jasper being put to sleep. 77. For these reasons we dismissed the appeal. 78. As a postscript, we would say that the Court indicated when giving its original decision that Mr Knapp should be given the opportunity of visiting Jasper at the Animal Shelter until the Court's order is carried out and that he should be permitted to be present when the order is carried out. We understand that, for reasons which have not been disclosed to us, it is thought that these two suggestions cannot be complied with. We propose to hear submissions at the time of the formal issue of these reasons but we urge that all possible steps be taken to comply with the Court's wishes. It seems only reasonable and humane that Mr Knapp should be able to be with Jasper as he is put to sleep and should be able to visit him before then. Authorities Dogs (Jersey) Law 1961. R v Nottingham Justices ex p Brown

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