THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

COMMONWEALTH OF DOMINICA

DOMHCVAP 2015/0005

DOMHCVAP 2015/0009

BETWEEN:

[1] FREDERICK BARON
[2] ATHERTON MARTIN
[3] SEVERIN MC KENZIE
[4] JOAN ETTIENNE

Appellants

and

BLAIRCOURT PROPERTY DEVELOPMENT LTD.

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Sydney Bennett	Justice of Appeal [Ag.]

Appearances:

Mrs. Cara Shillingford-Marsh for the Appellants
Mrs. Heather Felix-Evans for the Respondent

2022: April 26;
November 23.

Civil Appeal – Trespass – Whether the appellants had lawful business in connection with Blaircourt property – Whether the appellants departed from the Blaircourt property within a reasonable time after being asked to leave - Approach of appellate court on review of trial judge's factual findings - Whether the judge erred in law and in fact in the treatment of the

evidence insofar as each appellant's evidence was not considered individually – Whether a judgment in other proceedings constituted admissible evidence – Exclusive possession - Proper party to bring claim - Whether the respondent was the proper party to bring the claim

Blaircourt Property Development Ltd. ("Blaircourt") is the registered proprietor of 1.2 acres of land at Guillette (Savanne Paille) in the Commonwealth of Dominica. The Blaircourt property consists of seven buildings that house eight separate dwelling houses known as villas, each building is separated from the others by a driveway. The villas were constructed to house professors at Ross University School of Medicine. Blaircourt filed a claim in the lower court alleging that on 5th December 2009, the appellants, along with ten to twelve other people, wrongfully entered its property by driving and parking their vehicles thereon and walking the grounds thereof; and, in the case of Atherton Martin("Martin"), Severin Mc Kenzie ("Mc Kenzie"), and Joan Ettienne ("Ettienne"), entered at least two vacant villas without its permission or license. Blaircourt also claimed that the appellants stayed on its property for thirty minutes before leaving, despite Renneth Alexis ("Alexis"), its owner and managing director, repeatedly asking them to leave.

Each appellant filed a defence denying trespassing on the property and claimed that they stayed on the public road. Martin, Mc Kenzie, and Ettienne also denied entering the vacant villas, claiming that they stood on the public road and observed the buildings from there. In their defence, the appellants also claimed that their presence at Guillette was of public interest and curiosity. It was partly an investigation into how the Dominica Cabinet's approval of a full suite of financial concessions to Blaircourt to construct the villas were diminishing the public purse. As a result, the villas have been elevated to the level of public consideration, concern, and interest.

The trial judge found the appellants liable for trespass and awarded damages against them, inclusive of exemplary damages. Being dissatisfied with the decision, the appellants filed several grounds of appeal. Blaircourt conceded the grounds of appeal relating to exemplary damages and filed a counter-notice of appeal challenging the quantum of damages awarded for trespass. The issues which arose for consideration on appeal were primarily against (i) the factual finding of the judge that the appellants are liable in trespass with respect to Blaircourt's property; (ii) whether the appellants departed from the Blaircourt property within a reasonable time or with reasonable expedition after being asked to leave; (iii) whether Blaircourt was the proper party to bring the claim; and (iii) whether a judgment in another matter constituted admissible evidence in the case.

Held: allowing the appeal, setting aside the order and declaration of the learned judge, awarding prescribed costs in the court below to the appellants and twenty five percent on appeal; and dismissing the counter-notice of appeal, that:

1. It is a function of the trial judge who has seen and heard the witnesses to form his own evaluation of the credibility or reliability of the evidence. The mere fact that a trial judge has not expressly mentioned a particular piece of evidence does not mean that he overlooked it. An appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into consideration.

Matteo Volpi v Gabrielle Volpi and another [2022] EWCA Civ 464 applied; **Henderson v Foxworth Investments Ltd and another** [2014] UKSC 41 applied; **Re F (Children)** [2016] EWCA Civ 546 applied; **Watt (or Thomas) v Thomas** [1947] AC 484 applied.

2. The difficulties attendant upon a successful prosecution of an appeal against factual findings and the chariness of an appellate court in overturning findings of fact of a trial judge are well established. Where any finding involves an evaluation of facts, an appellate court must take into account the fact that the judge has reached a multi - factorial judgment, which takes into account his assessment of many factors. The correctness of the evaluation is not undermined by challenging the weight the judge has given to elements in the evaluation, unless it is shown that the judge was plainly wrong and reached a conclusion which on the evidence he was not entitled to reach.

   Perry v Raleys Solicitors [2019] UKSC 5 considered; **Langsam v Beachcroft** [2012] EWCA Civ 1230 applied**; Henderson v Foxworth Investments Lt and another** [2014] UKSC 41 applied; **Fage UK Ltd and another v Chobani Ltd and another** [2014] EWCA Civ 5 applied.

3. The duty of the trial judge to give reasons for decision is necessary for due process and the administration of justice. Fairness requires that the parties, moreso the losing party, should be in no doubt as to why they lost or won. The extent of the duty or the reach of what is required to fulfill it depends on the subject matter. The judgment needs to make it clear both to the parties and to the appellate court, the judge's reason for his conclusion on the critical issues. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view.

   Flannery and another v Halifax Estate Agencies Ltd (Trading as Colleys Professional Services) [2000] 1 WLR 377 applied; **English v Emery Reinbold & Strick Ltd**. [2002] EWCA Civ 605 applied**; Fage UK Limited v Chobani UK Limited** [2014] EWCA Civ 5 applied.

4. It is well established that a person entering private property should have a lawful or legitimate purpose for so doing. The entry must be justified by showing that the entry was with the consent of the occupier or the entrant otherwise had lawful authority to enter the premises. There is an implied licence to any member of the public coming on lawful business to come through the gate and knock on the door. The purpose for entering has to be legitimate and involve no interference with the occupier's possession or injury to any person present. A desire to satisfy one's curiosity is not a lawful purpose for entering private property.

   Entick v Carrington [1558-1774] All ER Rep 41; **Roy v O'Neill** [2020] HCA 45 applied; **Robson and another v Hallett** [1967] 2 QB 939 applied; **Halliday v Nevill** [1984] HCA 80 considered.

5. The proper claimant in trespass is the person who has or is deemed to be in possession. Where land is vacant the owner has sufficient possession to sue in trespass. It was unchallenged that only villas 2,6 and 7 were occupied by tenants at the time. Villas 3 and 4 were vacant and unoccupied at the material time and thus were in possession of Blaircourt. Therefore, Blaircourt was authorized to bring the claim in trespass.

6. An authority to enter land may be revoked and if revoked, the entrant has no authority to remain on the land but must leave as soon as is reasonably practicable. When a licence is revoked, and as a result of which, something has to be done by the licencee, a reasonable time must be implied in which he can do so. There is no evidence that after the licence was revoked, the appellants sought to ignore or ignored the revocation by remaining on the Blaircourt property or delayed in leaving. Thus, it is reasonable to infer that the appellants left the property with reasonable expedition or within a reasonable time after being told to leave. In the circumstances, they would not be considered as trespassers.

   Murat Kuru v State of New South Wales [2008] HCA 26 applied; **Robson and another v Hallett** [1967] 2 QB 939 applied.

7. The general principle is that factual findings by one judge cannot bind another judge in different proceedings. The rule extends to render factual findings made by judges in civil cases inadmissible in subsequent proceedings unless the party against whom the finding is sought to be deployed, is bound by it by reason of an estoppel per rem judicatum. The rule precludes reliance on criminal convictions in subsequent civil proceedings and applies to findings of fact in civil proceedings.

   Hollington v F. Hewthorn and Company Limited and another [1943] KB 587 applied; **Calyon (a company incorporated under the laws of the Republic of France) v Irene Michailaidis & ors** [2009] UKPC 34 applied; **Rogers and another v Hoyle (Secretary of State for Transport and another intervening)** [2015] QB 265 applied.

8. On the issue of costs, the general rule is that costs follow the event. The unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order having regard to all the circumstances. It is not automatic that the costs of the successful party will be reduced because it lost on some issues. The more significant and self-contained the issues on which the successful party has lost, the more likely it is that some downwards costs adjustment for that failure is appropriate.

   The Serious Fraud Office and another v Litigation Capital Limited and others [2021] EWHC 2803 applied.

JUDGMENT

[1] **BAPTISTE JA**: This appeal, in which several grounds have been filed, is informed by the judgment and order of Thomas J (Ag.) that Atherton Martin ("Martin"), Frederick Baron ("Baron"), Severin Mc Kenzie ("Mc Kenzie") and Joan Ettienne ("Etienne") together ("the appellants") are liable in trespass with respect to the property of Blaircourt Property Development Ltd. ("Blaircourt") and awarding damages against them, inclusive of exemplary damages. Blaircourt has conceded the grounds of appeal relating to exemplary damages and filed a counter-notice of appeal challenging the quantum of damages awarded for trespass.

Background

[2] Blaircourt is the registered proprietor of 1.2 acres of land at Guillette (Savanne Paille) in the Commonwealth of Dominica. The Blaircourt property is a group of seven buildings containing eight separate dwelling houses which are referred to as villas, each building is separated from the other by a driveway. The villas were built to provide accommodation for professors at Ross University School of Medicine.

[3] Blaircourt filed a claim in the court below alleging that on 5th December 2009, the appellants along with ten to twelve other persons, without its licence or consent, wrongfully entered its property by driving and parking their vehicles thereon and walking the grounds thereof; and as regards Martin, Mc Kenzie and Ettienne, entered at least two vacant villas. Blaircourt further alleged that the appellants remained on its property for thirty minutes before leaving, despite the repeated requests of Renneth Alexis ("Alexis"), its owner and managing director, to get off.

[4] Each appellant filed a defence denying trespassing on the property by driving and parking their vehicles thereon and walking the grounds thereof, contending that they remained cautiously on the public road. Martin, Mc Kenzie and Ettienne also denied

entering vacant villas, stating that they stood on the public road and visually observed the buildings from that vantage point.

[5] In paragraph 3 of their defence each appellant alleges that their presence at Guillette was a matter of public interest and curiosity. It was partly an inquiry into how the Cabinet of Dominica's approval of a full suite of financial concessions to Blaircourt to construct the villas were diminishing the public purse. Thus, elevating the villas in the realm of public consideration, concern and public interest.

[6] In support of its case, Blaircourt relied on the evidence of Irma Laville ("Laville"), Renneth Alexis ("Alexis") and Lovelle Ravalliere ("Ravalliere"). Ravalliere's evidence was that she looked out of her bedroom window which faces the villas and saw several vehicles parked on the villas' property, more specifically in the driveway outside the 3rd and 4th villas. She saw a few persons walking around the villas and observed two or three persons leaving the third villa and entering the fourth villa. As a result she alerted Alexis.

[7] Alexis gave evidence of being awakened from sleep by a shout. He jumped out of bed and saw about four or five vehicles parked in the driveway of the Blaircourt property and several persons on different parts of the property and the public road. There was no vehicle parked on the public road. All the vehicles were on the driveway between villas one to four. All the vehicles were on Blaircourt property. He said that this will make much sense because if all the vehicles were on the road, then they would be blocking the road because it is pretty narrow.

[8] Alexis stated that he recognised Baron standing in the driveway between the second and third villas. He had not consented to people being on his property. Following his request to leave, several other persons came out from different parts of the Blaircourt property. Martin came out of the blue villa and McKenzie came out of the green villa. He said to Mc Kenzie: "Sev, you that doing me that boy?". Mc Kenzie laughed when he repeated his request to leave the property. He had repeated his

request for the trespassers to leave the property about twice, before they moved to the vehicles parked on the Blaircourt property.

[9] Laville's evidence was that Martin was parked in the driveway right next to the third villa (blue in colour). The other vehicles were parked in the driveway of the first and second villas. She saw a red - skinned young girl, another lady (very short, dark skinned, wearing glasses and dressed in a jeans jacket) and Martin enter the blue building. One of the ladies had a camera. She could hear them laughing inside the blue building. At some point she saw Martin and his group leave the blue building and walk down the road. Alexis came out of his house and shouted, "get out of my property". At that time, two of the females, including the one with the camera, were standing in the parking lot of his house.

[10] In accordance with the order of the court, written submissions were submitted by both sides. Thomas J (Ag.) noted that the appellants' submissions rested entirely on an implied licence to enter the premises, in reliance on **Robson and another v Hallett**.[1] Having heard and read the evidence and considered the written submissions of counsel, Thomas J (Ag.) concluded as follows:

> "… quite apart from the [appellants] not seeking permission to enter the villas, the implied licence was revoked by Renneth Alexis immediately after he emerged through the gate. And further the [appellants] had no lawful business in connection with the Blaircourt property."

The learned judge held that the appellants were liable in trespass.

Grounds of appeal

[11] Many of the grounds of appeal filed are identical. At its core, the appeal is against the factual finding of Thomas J (Ag.) that the appellants are liable in trespass with respect to Blaircourt's property. The difficulties attendant upon a successful prosecution of such an appeal have been well articulated and the chariness of an appellate court in overturning findings of fact of a trial judge is long established. The

[1] [1967] 2 QB 939.

constraints on interfering with factual findings were recently summarised in **Perry v Raleys Solicitors**[2] at paragraph 52:

> "They may be summarized as requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached."

In so far as Blaircourt has filed a counter- notice of appeal challenging the quantum of damages awarded, it is equally settled that an appellate court is chary about interfering with the quantum of damages which commends itself to the trial judge in the exercise of his discretion.

Grounds of appeal-Frederick Baron

[12] The first four grounds of Baron's appeal will be dealt with first. Baron alleges in ground 1 that the learned judge erred in law and fact in treating his evidence in so far as the evidence of the appellants was not considered individually. Ground 2 alleges that the judge misdirected himself in law and was plainly wrong in finding that Baron had conceded being on the Blaircourt property. Ground 3 states that the judge misdirected himself and was plainly wrong in finding that Baron entered unto the Blaircourt property. Ground 4 contends that the trial judge failed to consider Baron's evidence in so far as he denied being on the said property.

Treatment and consideration of evidence

[13] Grounds 1 and 4 can be considered conjointly as they both deal with the consideration of evidence. The following legal principles are instructive:

i) The judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence.[3] Appeals are telescopic in nature, focusing narrowly on particular issues as opposed to viewing the case as a whole.[4] The learned trial judge would have had regard

[2] [2019] UKSC 5.
[3] See Housen v Nikolaisen [2002] 2 SCC 33 at para 14.
[4] Ibid.

to the whole sea of the evidence presented to him, whereas an appellate court will only be island hopping.[5]

ii) As stated in **Re F (Children)**[6] at paragraph 22:

> A judgment "has to be read as a whole and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Moslyn J in SP v EB and KP [2014] I FLR 228, para 29, there is no need for the judge to "incant mechanistically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre - flight checklist."

iii) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it, however pre-eminently a matter for him, subject only to the requirement that his findings be such as might reasonably be made. An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.[7]

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[5] Per Lewison LJ at paragraph 114 of Fage UK Ltd and another v Chobani UK Ltd and another [2014] EWCA Civ 5.
[6] [2016] EWCA Civ 546.
[7] See Henderson v Foxworth Investments Ltd [2014] UKSC 41 at para 57.

iv) In **Langsam v Beachcroft**[8] at paragraph 72 it was stated:

> "… where any finding involves an evaluation of facts, an appellate court must take into account [the fact] that the judge has reached a multi - factorial judgment, which takes into account his assessment of many factors. The correctness of the evaluation is not undermined, for instance, by challenging the weight the judge has given to elements in the evaluation unless it is shown that the judge was clearly wrong and reached a conclusion which on the evidence he was not entitled to reach."

v) Viscount Simon in **Watt (or Thomas) v Thomas v Thomas**[9] stated:

> "If the evidence [taken] as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses , the appellate court will bear in mind that it has not enjoyed the this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight."

vi) In **Housen v Nikolaisen**[10] the Supreme Court of Canada stated at paragraph 72:

> "… this court has previously held that "an omission is only a material error if it gives rise to a reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (Van de Pere, [v Edwards, [2001] 2 SCR 1014] supra, at para. 15). In the present case, it is not clear from the trial judge's reasons which portions of the evidence … she relied upon, or to what extent. However, as we have already stated, the full evidentiary record was before the trial judge, and absent further proof that omission in her reasons was due to her misapprehension or neglect, of the evidence, we can presume that she reviewed the evidence in its entirety and based her factual findings on this review. … We reiterate that it is open to the trial judge to prefer the testimony of certain witnesses over others and to place more weight on

[8] [2012] EWCA Civ 1230.
[9] 1947] AC 484.
[10] [2002] 2 SCC 33.

some parts of the evidence than others, particularly where there is conflicting evidence … The mere fact that the trial judge did not discuss a certain point or certain evidence in depth is not sufficient grounds for appellate interference:"

vii) The mere fact that a trial judge has not expressly mentioned a particular piece of evidence does not mean that he overlooked it. An appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into consideration.[11]

[14] At paragraph 19 of his judgment, Thomas J (Ag.) stated: "with respect to the [appellants], evidence was given by Atherton Martin, Frederick Baron, Severin McKenzie, Joan Ettienne … who deny the [respondent's] contention of trespass." Baron's evidence was that he did not trespass the Blaircourt property; he remained on the public road. The learned judge heard and accepted the evidence of Alexis that Baron was on the Blaircourt property without his permission. Witness choice is an essential part of the judicial function. In the face of the conflicting evidence, it really boiled down to who the judge believed and whose evidence he accepted. This is a matter peculiarly within the purview of the trial judge.

[15] Having regard to the relevant principles, the assertion in ground 1 of Baron's appeal that the learned judge erred in law and fact in treating his evidence in so far as the evidence of the appellants was not considered individually, is not substantiated or maintainable. The learned judge sat through the entire case. Being immersed in all aspects of the case, he was able to test the evidence at first hand and his ultimate judgement would reflect his total familiarity with the evidence. He had the full evidentiary record before him and would have considered the evidence as it related to each appellant, inclusive of Baron.

[11] Supra, n.7 at paragraph 48.

[16] The allegation in ground 4 that the learned judge failed to consider Baron's evidence that he was not on the Blaircourt property, likewise, cannot succeed. An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken all the evidence into his consideration. In my judgment, no compelling reason to the contrary has been shown to rebut the assumption. Counsel's submission that the weight of the evidence shows that Baron was on the public road at all material times, does not hold traction. Weight is a contextual evaluation for the judge who reads, hears and sees the evidence of the witnesses and it is inappropriate for this court to interfere with that evaluation unless it is perverse.[12]

[17] Weight is always a matter of judgment, and judgment, unless it is perverse, is very difficult to appeal successfully. Findings which are soundly grounded in the evidence are not perverse. 'Perversity is always a difficult furrow for an appellant to plough.'[13] 'Perversity is a high hurdle. It is reaching a decision which flies in the face of reason or would cause there to be astonished gaps from the objective observer.'[14] From the evidence of Alexis, the judge was entitled to conclude that Baron was not on the public road at all times. The judge's finding that Baron trespassed the Blaircourt property was not perverse.

[18] Further, as the judge's finding necessarily involved an evaluation of facts, this court is enjoined to take into account that the judge has reached a multi - factorial judgment, which takes into account his assessment of many factors. The correctness of the evaluation is not undermined by challenging the weight the judge gives to elements in the evaluation unless it is shown that the judge was plainly wrong and reached a conclusion which on the evidence he was not entitled to reach.[15] The appellant has not demonstrated that the judge was plainly wrong or reached a conclusion he was not entitled to reach.

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[12] See Manzi v Kings College NHS Foundation Trust [2018] EWCA Civ 1882.
[13] Royal Wolverhampton Hospitals NHS Trust v Evans [2015] EWCA Civ 1059, para 36.
[14] The Queen on the application of Johnson v Bristol Crown Court [2017] EWHC 2528 (Admin) at para 40.
[15] Supra, n. 8.

Ground 2:

[19] The complaint in ground 2 of Baron's appeal resides in paragraph 33 of the judgment of Thomas J (Ag.) where the learned judge stated that:

> "It is conceded by the [appellant] that they remained on Blaircourt property after being asked to leave their implied licence would have been revoked but having left on demand no trespass can be said to occurred (sic)."

Learned counsel Mrs. Shillingford – Marsh, submits that the learned judge erred in capturing the appellant's submission, which was:

> "The [appellants] will conceded (sic) that **had** they remained on the Blaircourt premises after being asked to leave, their implied licence would no doubt have been revoked but **having left on demand no trespass can be said to have occurred**."[16] (bold mine)

In my judgment, there is no merit in this ground. From a plain reading of the sentence (paragraph 33) it is pellucid that there was a typographical error or omission in that the word "had" is missing in the first line between the words "that" and "they". If it was not so, the sentence as it stands would be illogical.

[20] Learned counsel also takes issue with paragraph 37 of the judgment where the learned judge stated:

> "The matter of reasoning with respect to the issue of trespass hardly arises in that quite apart from the witnesses for the claimant placing the 1st,4th, and 6th defendants [the 2nd, 3rd and 4th appellants herein] in the villas on the Blaircourt property on the day in question, the appellants themselves conceded that they were on the said property at the material time and date."

Mrs. Shillingford- Marsh argues that no such concession was made. Mrs. Felix-Evans, learned counsel for the respondent, contends that it was however open to the learned judge, on the evidence, to make a finding of fact or draw a reasonable inference that Baron was on the Blaircourt property.

[16] See paragraph 16 of the Appellants' submissions

Reasoning and conclusion

[21] Having regard to the nature of the challenge, it is important to consider the context in which the learned judge made the statement in paragraph 37 of his judgment. At paragraph 29, Thomas J (Ag.) stated that in accordance with the order of the court, submissions were submitted by both sides. At paragraph 31, he noted that in the case of the appellants, the submissions rested entirely on an implied licence.

[22] At paragraph 32, Thomas J (Ag.) referred to paragraphs 11 and 12 of the appellants' written submissions which state:

> "11. The [appellants] are therefore asking this Honourable Court to form the conclusion that the claimant by conduct has created an implied licence … in that the Claimant Corporation [through] its representative have been forewarned of the possibility of a visit by the [appellants] and others and were with such knowledge failed to take any reasonable steps that would allow this Honourable Court to conclude that an implied licence had been revoked and was not apparent.
> 12. The contention of the [appellants] is further confirmed by the fact that none of the villas had a gate at the point of entry and, there was no sign saying, 'no visitors' and the situation was further compounded by the fact that the Claimant Corporation even went as far as to leave the front door of each villa unlocked."

[23] At paragraph 34 Thomas J (Ag.) further stated:

> "It is further submitted that the [appellants] had a right to be on the property and [in] this regard reliance is placed on paragraph 3 of their defence and the following words:
>
> > "That his presence along with the other [appellants] at Guillette on the subject day was a matter of public interest and curiosity and in part an inquiry as to how the public purse was being diminished by the approval on the 9th day of October 2007 by the Cabinet of the Government of Dominica to the Claimant Company to receive a full suite of financial concession to assist in the construction of the subject 'villas'. The [appellants] will aver that the granting of such financial [concessions] elevated the villas in the realm of the public consideration, concern and lawful interest."

[24] Thomas J (Ag.) further quoted paragraphs 22, 23 and 25 of the appellants' written submissions:

> "22. As such, the [appellants] contend that there was a genuine public interest in the construction of the villas [which] created a lawful intrusion at Blaircourt on that day. In fact, it is clear that the Claimant Corporation's representative was fully aware of such interest and seemed almost to be expecting the intrusion with a relish that required in his mind the use of a firearm to ward of (sic) the unarmed inquisitive citizens.
>
> 23.The [appellants] contend that a far simpler mechanism of deterrence would have been the use of a sign indicating trespassers are not welcomed.
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> 25. The [appellants] contend that even if there was no public interest component attached to the Blaircourt property there would still have been a legitimate right for the [appellants] to walk up the front door of any of the villas in order to knock, look or peacefully speak to any of the inhabitants therein. There would not have been a legitimate right to push open the front door and enter. Had the [appellants] conducted themselves in such a way there would clearly have been a trespass."

[25] As indicated earlier, Thomas J (Ag.)'s statement that the appellants themselves conceded that they were on the Blaircourt property at the material time and place has to be viewed in context. The context indicates that (i) the written submissions of the appellants rested entirely on an implied licence to be on the Blaircourt property; (ii) the appellants' alleged right to be on the property, relying on paragraph 3 of the defence; and (iii) the advancing by the appellants of an alleged genuine public interest in the construction of the villas, occasioned by the suite of financial concessions by the Government thereby creating a lawful intrusion at the Blaircourt property on that day. Further, the appellants contend that even if there was no such public interest attached to the property, they had a legitimate right to walk up the front door of any of the villas in order to knock, look or peaceably speak to any of the inhabitants there.

[26] These matters formed the substrata of and clearly informed the judge's statement. In that regard the learned judge could hardly be faulted. This also explains the judge's statement that the matter of reasoning with respect to trespass hardly arises. The judge noted at paragraph 38, '[w]hat the [appellants] contend in this matrix is

that they had an implied licence to go on the property in the circumstances.' In my judgment, in any event and quite importantly, independent of the impugned statement regarding the appellants conceding being on the Blaircourt property, there was a proper evidential basis for the learned judge's finding that Baron trespassed onto the Blaircourt property, therefore precluding appellate interference. It was open to the trial judge to make a finding of fact that Baron entered the Blaircourt property and was not on the public road at all times as he alleged.

[27] Finally, by way of observation, the written submissions in the court below which the judge referred to do not form part of the record. It is also unclear as to whether there were closing oral submissions. In **Pimlico Plumbers Limited and another v Smith**[17], at paragraph 119, Etherton MR stated:

> "We were told by counsel that final submissions to the ET were all in writing and there were no closing oral submissions. In a complex and important case like the present one, that course is unsatisfactory, carries considerable risk and should be avoided if at all possible. It does not give the ET the opportunity to question and test the case of each side in the light of the evidence and to clarify submissions which are or appear to be inconsistent or unclear."

The observations of Etherton MR are quite salutary. Closing oral submissions give the court the opportunity to clarify submissions which are or appear to be unclear or inconsistent

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Upsetting factual findings

[28] Ground 3 states that the judge misdirected himself and was plainly wrong in finding that Baron entered onto the Blaircourt property. This is an appeal against a finding of fact and engages the well - established principles governing appellate interference with such findings. It is a long-settled principle that an appellate court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.[18] As explained in **Henderson v Foxworth Investments Ltd and another**[19] at paragraph 62**:**

[17] [2017] EWCA Civ 51.
[18] See McGraddie v McGraddie and another [2013] UKSC 58.
[19] [2014] UKSC 41.

> "The adverb "plainly" does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

[29] In **Fage UK Ltd and another v Chobani UK Ltd and another**[20] Lewison L.J stated that an appellate court should not interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The reasons cited for this approach include:

(1) The expertise of the trial judge is in deciding what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

(2) The trial is not a dress rehearsal. It is the first and last night of the show.

(3) In making his decisions the trial judge will have regard to the whole of the sea of the evidence presented to him, whereas an appellate court will only be island hopping.

[30] It is not for an appeal court to come to an independent conclusion as a result of its own consideration of the evidence. Whether the appellate court would have reached the same conclusion as the judge is not the point.[21]

[31] In **Volcafe Ltd v Cia Sud Americana de Vapores SA**[22] Lord Sumption said at paragraph 41:

> "… A trial judge's findings of fact should not be overturned simply because the Court of Appeal would have found them differently. It must be shown that the trial judge was wrong: i.e., that he fundamentally misunderstood the evidence, or that he plainly failed to take relevant evidence into account, or that he arrived at a conclusion which the evidence could not on any view

[20] [2014] EWCA Civ 5 at paragraph 114.
[21] See Volpi v Volpi [2022] EWCA Civ 464.
[22] [2018] UKSC 61.

support. Within these broad limits, the weight of evidence is a matter for the trial judge. There is a world of difference between the impression which evidence makes on a judge who has followed it as it was deployed and the impression that an appellate court derives from cold transcripts."

[32] In **Volpi v Volpi**[23] at paragraph 2, Lewison LJ set out the well settled principles governing appellate approach in an appeal against factual findings:

"

i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong.

ii) … What matters is whether the decision under appeal is one that no reasonable judge could have reached.

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre – eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable."

Discussion

[33] There was clear evidence from Alexis that he saw Baron standing in the driveway between the second and third villas. The learned judge evidently accepted that evidence, as he was entitled to do, despite Baron's denial he was on the premises and his assertion that he remained on the public road. There was nothing about the judge's factual finding which leads to a conclusion that he was plainly wrong. The judge arrived at his conclusion, having considered the conflicting testimony of the witnesses who he saw and heard. 'It is settled law that where any finding turns on the judge's assessment of credibility of a witness, an appellate court will take into

[23] Supra, n. 21.

account that the judge had the advantage of seeing the witness give their oral evidence, which is not available to the appellate court'.[24] In my judgment, there was no material error of law, or the making of a critical finding of fact which has no basis in the evidence, neither is there a demonstrable misunderstanding of relevant evidence or a demonstrable failure to consider relevant evidence.

[34] In seeking to impugn the judge's finding of fact that Baron was on Blaircourt's property, Mrs. Shillingford - Marsh points out that neither Ravalliere nor Laville stated that they saw Baron on the property. Further, Alexis was the only witness seeking to place all four appellants on the property. Counsel posits that Alexis' evidence was laden with inconsistencies and contradicted undisputed evidence from other witnesses. Further, Alexis' evidence contradicts the clear evidence of Baron who stated that he was higher up on the public road when he saw some persons running up.

[35] The matters relied upon in seeking to impugn the judge's factual finding, constitute an implicit but impermissible invitation to this court to conduct its own assessment of the evidence to determine whether it would have reached a different conclusion. It is not for the appellate court to conduct a fresh evaluation of the evidence to see whether it would have reached a different conclusion. 'There is a world of difference between the impression which evidence makes on a judge who has followed it as it was deployed and the impression that an appellate court derives from cold transcripts.'[25] Having heard the evidence at trial and weighed it, the judge was best equipped to arrive at his conclusion that Baron was on the Blaircourt property.

[36] Given the constraints governing appellate interference with findings of fact, the matters relied upon to upset the judge's findings fall far short of what is required to engender appellate interference. There was a clear evidential basis for the judge's finding that Baron was on the Blaircourt property, and it cannot be properly

[24] See paragraph 72 of Langsam v Beachcroft LLP [2012] EWCA Civ 1230.
[25] Supra n 22.

advanced that no reasonable judge could have reached the conclusion that Baron was on the said property.

Reasons

[37] Mrs. Shillingford-Marsh submits that the learned judge was plainly wrong in finding Baron liable in trespass since he failed to provide any good reason for such a finding and that his reasoning was based on a misapprehension of the evidence. In my view, this submission is unsustainable.

[38] As explained by Henry LJ in **Flannery and another v Halifax Estate Agencies Ltd (Trading as Colleys Professional Services)**,[26] the duty to give reasons is a function of due process and therefore, of justice. Its rationale has two principal aspects. Firstly, fairness requires that the parties, moreso the losing party should be in no doubt as to why they lost or won. Secondly, a requirement to give reasons concentrates the mind, with the resulting decision much more likely to be soundly based on the evidence than if it is not. The extent of the duty or the reach of what is required to fulfill it depends on the subject matter. Thus, in the case of a straightforward factual dispute, whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge, having no doubt summarised the evidence, to indicate that he believed X instead of Y. The judge must explain why he has reached his decision. The question is always what is required of the judge to do so.

[39] The approach in **Halifax** was affirmed in **English v Emery Reinbold & Strick Ltd**.[27] Phillips MR stated that what was required must depend on the nature of the case, but a judgment needs to make it clear both to the parties and to the appellate court the judge's reason for his conclusion on the critical issues. At paragraph 19, Phillips MR further explained that there is no requirement for the judge to identify and explain every factor which weighed in his consideration of the evidence. The position

[26] [2000] 1 WLR 377.
[27] [2002] EWCA Civ 605.

is however different with respect to issues, the resolution of which are critical to the judge's decision. These issues should be identified and the manner in which he resolved them explained. It is not possible to provide a template for that process. If such issues are factual, it may be enough to say that one witness was preferred to another because he manifestly had a clearer recollection of the material facts, or the other gave answers which demonstrated that his recollection could not be relied upon.

[40] In **Fage**, Lewison LJ, stated at paragraph 115:

> "…The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties, and if needs be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at length with matters that are not disputed. It is sufficient if what he shows the basis on which he has acted."

[41] In **The Queen on the Application of Johnson v Bristol Crown Court**[28] the test was expressed at paragraph 24 as:

> "… does the losing party know sufficiently why they have lost, and the other party has won? It is an essential aspect of justice that the individual who is on the losing side knows why. It is important for two other reasons as well. First it demonstrates to an appellate court or court of review what the reasons are for a decision. Secondly, it demonstrates to the public, this being a public hearing, that justice has indeed been done. It may act additionally as an aide - memoir to the decision-making body concerned to make sure that it does indeed have proper reasons for the decisions which it is reaching and has dealt with the matters which it should consider."

The court recognised at paragraph 25, that "there are limitations… [in that] a judgment does not have to dot every I nor cross every T. It does not have to deal with any or every matter, only those matters which it is necessary to deal with the central matter of dispute".

[28] [2017] EWHC 2528 (Admin).

[42] The legal framework was summarised in **Fine Ladies Bakery Limited v EDF Energy Customers Limited**[29] at paragraph 36:

> "A judgment must make it apparent to the parties "why one has won and the other has lost "(English v Emery Reimbold & Strict Ltd, [2002] EWC Civ 605, para 16.) There is no duty on a judge to deal with every argument presented by counsel on each side (English v Emery, para17). However, "the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment" (English v Emery, para 19)."

A judge is entitled to express the reasons for his decision briefly, but the reasons must be sufficient to explain why he reached that decision. What is required depends on the nature of the case and no universal template is possible.

[43] Having regard to the legal framework pertaining to the giving of reasons, I am of the view that the judge performed his essential judicial role and there could be no doubt as to the reasons why the judge reached his conclusion that Baron trespassed on the Blaircourt property. These reasons were sufficiently apparent from the judgment. The case was not factually complex. The learned judge dealt with the central matter of the dispute and found that Baron was on the Blaircourt property without Alexis' permission, had no lawful reason for being there and any implied licence he had was revoked by Alexis.

Grounds of appeal - Joan Etienne

[44] Grounds 1,2 and 3 of Etienne's appeal are identical to those of Baron. These grounds are: (1) the judge erred in law and fact in not considering the appellants' evidence individually; (2) the judge misdirected himself and was plainly wrong in holding that the appellants had conceded being on the Blaircourt property; (3) the judge was plainly wrong in finding that Etienne entered onto Blaircourt's property; and (4) the

[29] [2020] EWHC 87 (QB).

judge misdirected himself and was plainly wrong in finding that Etienne entered one of the villas.

[45] Etienne's evidence was essentially that she remained on the public road and started taking photographs of the cottages. She stated that: 'I can say that I maintained my presence on the public road'. There is no reason to conclude that the learned judge was not cognisant of her evidence. He sat through the entire case, had the full evidentiary record before him and his ultimate judgment would reflect his total familiarity with the evidence. The principles of law and the Court's reasoning and conclusion with respect to grounds 1 and 2 discussed in Baron's appeal are also applicable to grounds 1 and 2 of Etienne's appeal. These grounds are not sustainable.

[46] Grounds 3 and 4 are appeals against findings of fact and the principles of law applicable to appellate interference with such appeals discussed earlier, equally apply to these grounds. The question can be summarised as whether there was evidence to support the challenged findings that Etienne entered the Blaircourt property and entered one of the villas or were these findings ones which no reasonable judge could have reached.

[47] Laville gave evidence that she saw Martin accompanied by a red skin young girl and a dark short lady who was wearing a blue jacket and glasses, entering the door right by the air condition into the villa. Martin had a mustard shirt with a brown folder in his hand. Laville also stated that when she saw Martin arrive, he came out of the jeep and went into the blue villa. The door was open, and they entered it. She also saw them leave the villa. One of the ladies had a camera in her hand. Laville stated that she is sure that she saw Martin and Etienne coming out of the villa. She saw them enter the building.

[48] Etienne's evidence was that she along with Martin, Mc Kenzie and others went to see the cottages that were under construction at Savanne Paille. On entering the

public road in front of the cottages, the driver of the vehicle in which she was in, parked in the driveway close to one of the cottages. She disembarked and was walking on the public road alongside the cottages. She was in possession of her camera and began taking photographs of the cottages while standing on the public road. She had a blue jacket on.

[49] In that regard, Etienne's evidence supported the description of Laville as one of the persons she saw entering the blue building (villa 3) with Martin. It was open to the judge to accept the evidence of Laville and not to accept the evidence of Etienne that she remained on the public road at all times. It was open to the judge to make a finding of fact on the evidence, that Etienne had entered the Blaircourt property not only by entering the grounds but also the blue villa. There was a clear evidential basis for the judge's findings. It cannot be said that the finding was plainly wrong.

[50] Mrs. Shillingford- Marsh contends that Laville did not say in her witness statement that she saw Etienne on the property. Counsel also submits that her purported identification evidence given five years after the incident and at trial should be disregarded as grossly unreliable. There was no identification parade and Etienne was the only female defendant present in the court room when Laville made the identification. Counsel relies on **R v Turnbull**.[30]

[51] Mrs. Felix-Evans decried the propriety of bringing up the issue of identification for the first time on appeal. Counsel posits that the proper place to have dealt with the issue of whether Etienne was in fact the person Laville saw enter the blue villa with Martin, was before the trial judge. There is much force in Mrs. Felix-Evans' position. A trial, as Lewison LJ reminds us, is not a dress rehearsal. It is the first and last night of the show.

[52] As Mrs. Felix-Evans submits, there was no confusion or inconsistency in the description of the person Laville said she saw enter the villa with Martin and a red-

[30] [1976] 3 All ER 549.

skinned lady. It is true that Laville did not know the person's name at the time, and it was the first time she had seen Etienne and in court at the trial was the next time she saw her. I agree with Mrs. Felix-Evans that this did not diminish the quality of Laville's evidence of the description of one of the persons she saw enter the blue villa with Martin. That description was never challenged. There was no issue arising that the description Laville gave of one of the ladies she saw enter the blue villa with Martin did not suit the description of Etienne. What Etienne challenged was that she entered the Blaircourt property and the blue villa. For these reasons, the matters raised by Mrs. Shillingford-Marsh do not undermine the cogency of the judge's findings.

Grounds of appeal - Atherton Martin

[53] Ground 1 contends that the judge erred in law and fact in not considering the evidence of Martin individually. Ground 2 states that the judge erred, misdirected himself and was plainly wrong in finding or holding that Martin had conceded being on the property. These two grounds are identical to that of Baron and Ettienne and as such the legal reasoning and conclusion would be the same. These grounds cannot be sustained.

[54] Ground 3 alleges that the judge erred and was plainly wrong in finding that Martin had entered the Blaircourt property. Ground 4 complains that the judge was plainly wrong in finding that Martin had entered one of the villas. These two grounds represent a challenge to the judge's factual findings and as such the well settled legal principles pertaining to appellate interference with such findings referred to earlier are applicable.

[55] Martin's evidence was that he walked up and down the public road looking at the villas and stayed on the public road at all times. Further, from his observation, he can say the same for all the group members. In cross - examination, he resiled from the latter position.

[56] There was clear evidence which informed the judge's findings that Martin entered the Blaircourt property and one of the villas. Alexis gave evidence that he saw Martin coming out of the blue villa and Mc Kenzie coming out of the green villa. In cross -examination he stated that: '… I saw Mr. Atherton Martin coming from villa 3 which is the blue building; with my two eyes I saw him coming out walking out from the door ...'[31] In response to a suggestion that he did not see Martin or Mc Kenzie coming from within either of the villas. Alexis responded thus: 'Well, that's your suggestion but this is not true … I saw Atherton Martin coming out from the blue villa first when I shouted when I made the first shout get out of my property'.[32] Alexis also stated: 'When I – My Lord, when I shouted out the first time that's when I saw Athie Martin coming out from the building' and that 'I saw Atherton Martin coming out from the blue building'. [33]

[57] Laville gave evidence that she saw Martin and two females entering the door by the air condition into the villa. Martin had a mustard shirt with a brown folder in his hand. Laville also stated that when she saw Martin arrive, he came out of the jeep and went into the blue building. She is sure that she saw Martin and Etienne coming out of the villa. She saw them enter the building.

[58] In my judgment it was clearly open to the judge on the evidence to make a finding of fact that Martin entered on the Blaircourt property not only by entering the grounds but by entering the blue villa.

[59] Mrs. Shillingford - Marsh contends that the evidence of Blaircourt's witnesses was so discredited that they should not be believed. In support thereof, Mrs. Shillingford-Marsh posits that Laville said in her witness statement that she saw Martin enter the building. Laville also stated that Alexis did not point the gun in his hand at anyone.

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[31] Volume 3 Electronic Appeal Bundle-Transcript of Proceedings, pg. 16, lines 9 to10.
[32] Supra, n. 31 at pg. 32, lines 18 to 19.
[33] Supra, n.31 at pg. 41 line 25- pg. 42 lines 1 to 2.

Counsel asserts that Laville was not a credible witness. Also, Ravalliere did not say in her witness statement that she saw Martin enter the building.

[60] It appears to me that learned counsel seeks to persuade the appeal court to form its own evaluation of the credibility or reliability of witness evidence when this is quintessentially a function of the trial judge who has seen and heard the witnesses. It is not for the appeal court to come to an independent conclusion as a result of its own consideration of the evidence. Whether the appeal court would have reached the same conclusion as the judge is not the point. The question is whether the judge's finding is rationally supportable.[34]

[61] This court sees no basis to interfere with the judge's finding.

Grounds of appeal- Severin Mc Kenzie

[62] Ground 1 alleges that the judge erred in law and fact insofar as he did not consider Mc Kenzie's evidence and did not address the inconsistencies between the appellant's evidence and Alexis' evidence. Ground 2 states that the judge was plainly wrong and misdirected himself in so far, he held or found that Mc Kenzie conceded being on the Blaircourt property. Ground 3 complains that the judge was plainly wrong in finding that the Mc Kenzie entered onto the Blaircourt property. Ground 4 alleges that the judge was plainly wrong in finding that the Mc Kenzie entered one of the villas.

[63] In so far as Mc Kenzie alleges in ground 1 that the judge erred in not considering his evidence, this ground has no substance. The applicable law was stated when a kindred point was raised in Baron's appeal. This court is entitled to assume that the trial judge has taken all the evidence into account, there being no compelling reason to the contrary. The judge had the full evidential record before him, and his ultimate judgement reflects his familiarity with the evidence. With respect to the complaint that the judge did not address the inconsistencies between Mc Kenzie's evidence

[34] Supra, n. 21 at paras 65-66 per Lewison LJ.

and that of Alexis, the issue of inconsistency in evidence is best addressed by the trial judge as the judge of the facts. The judge having heard the evidence and being immersed in the trial, decides whose evidence he believes and what weight or importance to give to the evidence.

[64] The complaint in Ground 2 - that Mc Kenzie conceded to being on the Blaircourt property - is a ground common to all the appellants. In as much as it is an identical ground, the Court's reasoning and conclusion would also apply to Mc Kenzie's appeal.

[65] Grounds 3 and 4 seek to challenge the judge's factual findings that Mc Kenzie entered the Blaircourt property and one of the villas. Mc Kenzie's evidence was that at all times he remained on the public road and never entered any of the villas. He did not realise the purpose of his visit, which was to view the architectural designs of the villas.

[66] The applicable law relating to appellate interference with factual findings referred to earlier, is accordingly engaged. Alexis gave evidence that he saw Mc Kenzie standing on the Blaircourt property. Further, he saw Mc Kenzie coming out from the green building which is villa 4. He also stated:

> "I did not come close to Mr. Severin McKenzie because I saw Mr. Mc Kenzie when I was standing in front of my gate coming out from the green building [villa 4] and that is some distance away, much more than 15 feet. McKenzie did not tell me put gun away. I remember when I saw Mr. McKenzie coming out from the building …" [35]
>
> "I remember when I saw Mr. McKenzie coming out from the building, I was shocked to see him and that's when I said: "Sev, you are doing me that boy?" That's my word to him. And he smile."[36]

[35] Supra, n.31 at pg 21, lines 18 to 24.
[36] Supra, n.31 at pg 22, lines 6 to 9.

[67] It was open to the judge on the evidence to make a finding of fact that Mc Kenzie entered upon the Blaircourt property not only by entering the grounds but by entering the green villa, villa 4. There is no basis to upset the judge's factual findings.

No lawful business, trespasser and no trespass sign

[68] Grounds 5, 6 and 7 will be considered conjointly. These grounds are common to all the appellants. They respectively allege that: (5) the learned judge misdirected himself and was plainly wrong in finding that the appellants had no lawful business in connection with Blaircourt property; (6) the judge erred in law and misdirected himself by finding that in the absence of having lawful business to conduct on a property, a person enters as a trespasser and; (7) the judge erred in law in not considering that in the absence of a ' no visitors' or 'no trespasser' sign, persons could have lawfully entered the Blaircourt premises.

[69] Mrs. Shillingford-Marsh contends (contrary to the finding of the judge) that the appellants did not enter the Blaircourt property. In the alternative, relying on **Robson**, even if they had entered, such entry would not have been unlawful in the absence of a 'no visitors' or 'no entry' sign. Counsel further posits that it is indisputable that all the appellants left the vicinity of Blaircourt within a reasonable time after Alexis shouted, 'Get off my property'. Mrs. Shillingford-Marsh also argues that the appellants were on lawful business, being present to view the Blaircourt villas and this is not a crime in the Commonwealth of Dominica. Counsel also invokes section 12 of the **Constitution of the Commonwealth of Dominica**[37] ("the Constitution") that a person shall not be deprived of his freedom of movement, that is to say, the right to move freely throughout Dominica. Counsel argues that the appellants had every right to visit for the purpose of viewing the villas.

[70] Mrs. Felix - Evans argues that a desire to satisfy one's curiosity is not a lawful reason, neither does a genuine interest in the observance and practice of good government in the Commonwealth of Dominica, give one an implied licence to enter

[37] Chapter 1:01 Schedule 1, Revised Laws of the Commonwealth of Dominica.

private property. Counsel submits that in the absence of evidence that the appellants entered the Blaircourt property for the purpose of conducting lawful business, the case of **Robson** does not assist them, whether in respect of their presence on the property before or after Alexis came out and ordered them to leave. Mrs. Felix - Evans further submits that even if they had entered on lawful business, **Robson** would assist them only to the extent that they were on the property to inquire whether they can be admitted. There was no such evidence. The evidence was that they entered for the purpose of satisfying their curiosity. The evidence is that all, except Baron, entered at least one of the vacant villas – villas 3 and 4. They had no implied licence to enter the property.

The common law right of entry

[71] In addressing grounds 5, 6, and 7, a convenient starting point would be a consideration of the common law right of entry. The policy of the law is to protect the possession of property and the privacy and security of its occupier. A person who enters the property of another must justify that entry by showing that he or she either entered with the consent of the occupier or otherwise had lawful authority to enter the premises.[38] Consent to an entry is implied if a person enters for a lawful purpose. This implied licence extends to the driveway of a dwelling-house. The licence to enter may be withdrawn by giving notice of its withdrawal. A person who enters and remains on property after the withdrawal of the licence is a trespasser. Once the licence to be on the property is revoked, a person must be given a reasonable time to leave.

[72] In **Robson**, the police had entered the residential premises through the gate and walked to the front door under a lawful licence to make enquiries of the occupants concerning a possible offence which had taken place that evening. Lord Parker CJ said at page 951:

> "[T]he occupier of any dwelling house gives implied licence to any member of the public coming on his lawful business to come through the gate, up the steps, and knock on the door of the house. "

[38] See Entick v Carrington and another [1558-1774] All ER Rep 41 at p 45.

[73] In **Halliday v Nevill**[39] the majority of the High Court of Australia held at paragraph 6:

> "The most common instance of such an implied licence relates to the means of access, whether path, driveway, or both, leading to the entrance of the ordinary suburban dwelling - house. If the path or driveway leading to the entrance of such a dwelling is left unobstructed and with entrance gate unlocked and there is no notice or other indication that entry by visitors generally or particularly designated visitors is forbidden or unauthorized, the law will imply a licence in favour of any member of the public to go upon the path or driveway to the entrance of the dwelling house for the purpose of lawful communication with, or delivery to, any person in the house. Such an implied or tacit licence can be precluded or at any time revoked by express or implied refusal or withdrawal of it."

[74] In **Roy v O'Neill**[40] in an illuminating opinion, Keiffel CJ stated at paragraph 11:

> "It is well understood that the law of trespass requires that for a person to lawfully enter private premises there must be permission or an invitation from the occupier respecting that entry. The common law also recognises that such a rule would be unworkable in our society if it were strictly applied so as to render all visitors who did not have express permission from the occupier, trespassers. It recognises that it is in the interests of the occupier, entrants and society more generally that there be a qualification to the law of trespass. It effects that qualification by implying a permission, on the part of an occupier, for persons to enter upon premises and approach a dwelling to engage in lawful purposes. It balances its recognition of that implied permission by acknowledging that an occupier may negate the permission, by sufficiently indicating that entry is not permitted, and that an occupier may revoke the permission at any time, by requiring the visitor to leave the premises."

[75] Keiffel CJ also noted at paragraph 13 that '[a]lthough a purpose of speaking with the occupier or another person present at the premises is the most common lawful purpose in entering residential premises, it is not the only category of purpose that will qualify for the law to imply a licence'. He further stated:

> "In Halliday v Nevill, it was explained more generally that the path or driveway of premises is held out by the occupier 'as the bridge between the public thoroughfare and his or her private dwelling upon which a passer - by may go for a legitimate purpose that in itself involves no interference

[39] [1984] HCA 80.
[40] [2020] HCA 45.

with the occupier's possession nor injury to the occupier, his or her guests or his, her or their property'."

Keiffel CJ opined that:

"These factors may be understood to provide the limits of the licence to enter which the law will imply. They are consonant with the law of trespass, to which the implied licence effects a qualification. An approach which requires that the purpose both be legitimate and involves no interference with possession or injury to those present is comprehensible and workable. It requires no fine distinction to be drawn, unguided, as to what are permissible or impermissible purposes; rather one looks to the effects of the purpose carried out upon the occupier's rights and the impact on those present."

[76] At paragraph 15, Keiffel CJ referred to **Robson** and stated that the purpose of the police in entering the premises to undertake the business of police by making enquiries may also be understood, in accordance with **Halliday**, not to involve an interference with the occupier's possession or injury to any person present. In addressing the concept of injury, the Chief Justice at paragraph 16 stated that 'injury' is a broader concept in the law of trespass than in some other torts and may include an affront to a person's dignity or apprehension of harm.

Discussion

[77] Was the judge wrong in finding that there was no lawful purpose in entering the Blaircourt property? The learned judge considered the averment in paragraph 3 of the defence that the presence at Guillette was a matter of public interest and curiosity. In part it was also an inquiry as to how the public purse was being diminished by the approval of the Cabinet of the Government of Dominica for Blaircourt to receive a full suite of financial concessions to assist in the construction of the villas. The granting of such financial assistance elevated the villas in the realm of the public consideration, concern and public interest.

[78] In paragraph 40 of his judgment, Thomas J (Ag.) stated:

"In their pleadings the [appellants] aver that the concession allegedly granted to permit the building of the villas was a matter of public interest as

> the public purse was being diminished. But before that stage is reached the question of the implied licence in this context must be addressed."

At paragraph 41, the learned judge correctly stated that presence on the property at the material time does not alone constitute the implied licence. The further requirement is that the person must have a lawful reason for doing so. The judge reasoned that whether the appellants had lawful business to conduct can only be judged on the evidence before the court.

[79] As illustrated earlier, the requirement that a person entering private property should have a lawful reason for so doing or should enter on lawful business is well - established in the case law. The underlying theme from the cases is that the entry on private property has to be for a lawful or legitimate purpose or lawful business. Consent to entry is implied if a person enters for a lawful purpose.[41] **Robson** speaks to an implied licence to any member of the public coming on his lawful business to come through the gate and knock on the door. **Halliday v Nevill** speaks to an implied licence to go upon the path or driveway to the entrance of a dwelling house for the purpose of a lawful communication with or delivery to any person in the house. The purpose for entering has to be legitimate and involve no interference with the occupier's possession or injury to any person present.[42]

[80] There is no evidence that the appellants entered the Blaircourt property for the purpose of conducting lawful business or for a lawful or legitimate purpose. There was no evidence that they entered the Blaircourt property to inquire whether they could be admitted or for the purpose of lawful communication with or delivery to any person. The unobstructed nature of the driveway leading to the entrance of the villas and the absence of any indication by notice, like a 'no trespass' sign or otherwise that entry by visitors is forbidden, would have allowed the implication of a licence in favour of any member of the public to go on the driveway for a lawful or legitimate purpose. However, as indicated, no lawful or legitimate reason was

[41] Entick v Carrington [1558-1774] All ER Rep 41.
[42] See Roy v O'Neill [2020] HCA 45.

established by the evidence, as the judge rightly found. A desire to satisfy one's curiosity is not a lawful purpose for entering private property.

[81] For all the reasons stated, grounds 5, 6 and 7 of the grounds of appeal cannot be sustained.

Reasonable time to leave

[82] Mrs. Shillingford -Marsh submits that the appellants left the public road and departed from the vicinity of the Blaircourt property within a reasonable time after being asked to leave. The issue, to my mind, is not whether the appellants left the public road or the vicinity of the Blaircourt property within a reasonable time after being asked to leave. The critical question is: did the appellants depart from the Blaircourt property a reasonable time or with reasonable expedition after being asked to leave? The learned judge made no finding on that issue, although it formed a subject of interrogation during Alexis' cross - examination.

[83] During cross - examination Alexis was asked: "When you told them to leave, did they leave?" To which he replied: "After three consecutive times asking them to leave my property." Alexis stated that around two minutes passed between the first and third shouts to leave. Further when he shouted get off his property, people began running away; not everyone began moving away. He saw some women running down. He did not mention any of the appellants. Alexis was also asked in cross - examination: "How soon after you told people to get off your property did people disperse away? How quickly?" He replied that after the third occasion, someone said "okay we are leaving". I note that this person is not an appellant. Alexis did not mention any of the appellants.

[84] In **Murat Kuru v State of New South Wales**[43] at paragraph 43 it was stated that an authority to enter land may be revoked and if revoked, the entrant no longer has authority to remain on the land but must leave as soon as is reasonably practicable.

[43] [2008] HCA 26.

In **Robson** at 953 Lord Parker CJ said "It seems to me that when a licence is revoked as a result of which something has to be done by the licencee, a reasonable time must be implied in which he can do so, in this case to get off the premises: no doubt it will be a very short time …" Upon the licence being revoked the appellants have a reasonable time to leave the premises, by the most appropriate route. Provided that they did so with reasonable expedition, they would not be trespassers while so doing.[44]

[85] The undisputed evidence is that Alexis said "get off my property" three consecutive occasions and about two minutes elapsed between the first and last occasion. The implied licence would have been revoked after the first occasion. Thereafter, the appellants would have had to leave the property in a reasonable time or with reasonable expedition. There is no evidence that after the licence was revoked the appellants sought to ignore or ignored the revocation by remaining on the Blaircourt property or delayed in leaving. While there is no evidence as to the exact amount of time they remained on the premises after the licence was revoked, it is reasonable to infer that the appellants left the property with reasonable expedition or within a reasonable time after being told to leave. In the circumstances, they would not be trespassers while so doing.

The Constitution

[86] Mrs. Shillingford- Marsh submits that the appellants were all on lawful business at Savanne Paille, being present to view the villas and this is not a crime in the Commonwealth of Dominica. Counsel relies on section 12 of the Constitution that: 'A person shall not be deprived of his freedom of movement that is to say, the right to move freely throughout Dominica …'.

[44] Lord Diplock in Robson and another v Hallett [1967] 2 Q.B. 939 at pg 954.

[87] Reliance on section 12 is misconceived in the circumstances of this case. The section does not give an absolute right to move freely throughout Dominica. Section 12 cannot be read in a vacuum. It must be pointed out that section 7(1) of the Constitution provides that: 'Except with his own consent, a person shall not be subjected to … the entry by others on his premises'. Section 7(2) goes on to state that nothing contained in or done under the authority of any law shall be held inconsistent with or in contravention of this section to the extent that the law in question makes provision listed in (a) to (d). None of the matters listed are applicable to this matter.

Grounds 8, 9 and 10

[88] Grounds 8, 9 and 10 concern the judge's award of exemplary damages. In **Underwood and another v Bounty UK Limited and another**[45] the court stated at paragraph 55:

> "Claims for exemplary damages are wholly exceptional. The cases in which such damages can properly be claimed are very few; those in which they are awarded fewer still. It is never appropriate to add a claim for exemplary damages simply to mark how upset the claimant is about the defendant's conduct, or as some sort of negotiating strategy." "… as a matter of principle claims for exemplary damages should only be pleaded where there is a proper basis to do so and supported by admissible evidence."

The respondent quite properly conceded grounds 8, 9 and 10.

Proper party to bring claim

[89] Grounds 11 and 12 will be considered together. Ground 11 alleges that the learned judge erred in law in not considering the legal implications of Blaircourt being a landlord and of the villas being rented out to tenants. Ground 12 states that the learned judge erred in law in upholding the claim for trespass in circumstances where Blaircourt did not have exclusive possession of the property and did not have the right to bring the claim.

[45] [2022] EWHC 888 (QB).

[90] In support of those grounds Mrs. Shillingford-Marsh states that Blaircourt's evidence is that some of the villas were occupied by tenants. Counsel relies on paragraph 4 of the witness statement of Ravalliere which states that the villas were rented out to professors at Ross University. There are 7 buildings housing 8 villas. Mrs. Shillingford - Marsh also relies on paragraph 43 of the judgment of Thomas J (Ag.) and states that the judge found 'that the villas which were allegedly entered were occupied by Ross University Professors.'

[91] Mrs. Shillingford-Marsh submits that Thomas J (Ag.) erred in not considering whether Blaircourt was a proper claimant. Counsel submits the tenants of Blaircourt were vested with exclusive possession and as such Blaircourt could not have properly commenced proceedings in trespass against the appellants. In support of her submission, Mrs. Shillingford-Marsh cites paragraphs 19-10 of **Clerk and Lindsell on Torts**[46] that trespass is actionable at the suit of the person in possession of land. A tenant in occupation can sue, but not a landlord, except in cases of injury to the reversion.

[92] Mrs. Felix - Evans argues that the clear evidence is that only villas 2, 6 and 7 were occupied at the material time and that was not challenged by the appellants. Their line of cross - examination showed that they accepted that villas 3 and 4, being vacant at the material time, were in possession of Blaircourt, which was the proper party to bring the claim.

Analysis and conclusion

[93] The proper claimant in trespass is the person who has or is deemed to be in possession. Where land is vacant the owner has sufficient possession to sue in trespass. Alexis' evidence is that by the end of November 2009 the villas were fully completed and well furnished. By December 2009 there were already tenants occupying villas 2,6, and 7. The undisputed evidence is that only villas 2,6 and 7 were occupied by tenants at the time. There was no challenge to that evidence.

[46] 19th edn, Sweet and Maxwell, 2006.

The evidence was that Martin and Ettienne entered villa 3, the blue building. Mc Kenzie entered villa 4, the green building. In my judgment, villas 3 and 4 were vacant at the material time; being unoccupied, they were in possession of Blaircourt. Blaircourt was authorized to bring the claim in trespass.

[94] At paragraph 43 of his judgment, the learned judge stated:

> "This can only be judged based on the evidence before the court. In this regard the court notes there is no documentation before the court to support the assertion of financial concessions contained in an alleged decision of the Cabinet. And with that comes a lack of the nature of the concession and what would have been lost by way of governmental revenue. **The further question is that since the concern was concession to help in the construction, the further question is what enquiry could be conducted by entering the villas occupied by Ross University Professors.** The matter is made plain by the evidence that one of the persons who entered on the property is a qualified architect by profession and who said in his evidence that he was observing the architectural designs of the building when he heard a loud noise to the east of where he was standing." [Emphasis added.]

[95] Mrs. Shillingford-Marsh relies on the highlighted part of paragraph 43 of the judgment of Thomas J (Ag.) to state that the judge found 'that the villas which were allegedly entered were occupied by Ross University Professors'.

[96] Mrs. Felix - Evans casts doubt as to whether the judge's statement in paragraph 43 as highlighted, amounted to a finding of fact that that the villas entered by the appellants were 'occupied by Ross University professors', as opposed to a statement loosely made by the judge in analysing the reasons given by the appellants for going to view the villas. Mrs. Felix-Evans however states that if it was a factual finding, it was one which on the evidence, it was not open to the judge to make. I agree.

[97] I will address both aspects of the matter. The evidence is pellucid that only villas 2, 6 and 7 had been occupied by tenants at the material time. The villa which Blaircourt's witnesses said were entered by Martin and Etienne was villa 3, the blue building. Mc Kenzie entered villa 4, the green building. Villas 3 and 4 were

unoccupied. In my judgment, there was no basis in the evidence on which the learned judge could have made a finding that any of the villas entered into were occupied by Ross University professors. Such a finding of fact would be rationally insupportable. No reasonable judge could have made such a finding.

[98] The second aspect is contextual. Looking at the context, the reasoning and surrounding circumstances addressed by the judge in the paragraphs leading to paragraph 43, it is evident that the judge was not making a finding that the specific villas entered were occupied by Ross University professors. The judge considered paragraph 3 of the defence, the question of implied licence, the question of concession and the important question of whether the appellants had lawful business to conduct. In the context of the inquiry and what was postulated by the appellants, the judge simply posed the legitimate question that since the concern was the issue of concession to help construct the villas, what inquiries could be conducted by entering the villas occupied by Ross professors. This also has to be seen in the context that the villas were built to accommodate Ross professors.

[99] In conclusion, the judge's statement did not constitute a finding of fact that the villas entered into were occupied by Ross professors. Accordingly, the appellants could not rely on it to defeat Blaircourt's right to institute the claim in trespass.

Judgments in other proceedings

[100] Ground 13 states that the learned judge erred in his finding of facts and contradicted himself in finding that the appellants were on Blaircourt property when Alexis exited his home, having held in the case of **Joan Etienne v Renneth Alexis**,[47] that Alexis assaulted Etienne on the public road. Mrs. Shillingford-Marsh submits that the weight of the evidence demonstrates that Ettienne was on the public road when she was assaulted by Alexis.

[47] DOMHCV2011/0182 delivered 22nd December, 2014 (unreported).

[101] Learned counsel refers to paragraph 41 of the judgment in **Joan Etienne v Renneth Alexis** where the judge stated:

> "The matter of defence of property cannot arise since the evidence is that the alleged assault took place on the public road. With that said the court accepts as fact that the incident took place on the public road at Savanne Paille."

Mrs. Shillingford-Marsh argues that this means that Alexis could not have seen Etienne inside any of the villas as he alleged because he was on the public road and Etienne was on the public road with him when he exited his house and entered unto the public road. Mrs. Felix - Evans posits that the trial judge could not go outside of the evidence of the trial in this trespass case to make findings of fact or draw inferences. It is therefore improper for the appellants to rely on a judgment given in another trial.

The law

[102] A convenient starting point for discussing this ground of appeal is the rule in **Hollington v F. Hewthorn and Company Limited and another**.[48] There is a general principle of law that factual findings by one judge cannot bind another judge in different proceedings. The rule extends to render factual findings made by judges in civil cases inadmissible in subsequent proceedings (unless the party against whom the finding is sought to be deployed is bound by it by reason of an estoppel per rem judicatum).[49] The rule precludes reliance on criminal convictions in subsequent civil proceedings.[50] It also applies to findings of fact in civil proceedings.

[103] In **Hollington,** the plaintiff sought to rely in civil proceedings for negligence, upon the defendant's driver's criminal conviction for careless driving, as evidence of his negligence. The Court of Appeal held that both on principle and authority, evidence of the conviction in the magistrate's court for careless driving was inadmissible in the subsequent action for negligence.

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[48] [1943] KB 587.
[49] See Rogers and another v Hoyle (Secretary of State for Transport and another intervening) at para 32.
[50] Ibid at para 36.

[104] In **Calyon (a company incorporated under the laws of the Republic of France) v Irene Michailaidis & Ors**,[51] Lord Rodger said at paragraph 28 that **Hollington** continues to embody the common law as to the effect of previous decisions:

> "In principle the judgment, verdict or award of another tribunal is not admissible evidence to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties. The leading authority for that proposition is Hollington v F. Hewthorn & Co. Ltd. [1943] K.B. 587, in which a criminal conviction for careless driving was held inadmissible as evidence of negligence in a subsequent civil action."

[105] In **Rogers and another v Hoyle (Secretary of State for Transport and another intervening)**,[52] Clarke LJ said at paragraph 39:

> "As the judge rightly recognised the foundation on which the rule [in Hollington v Hewthorn] must now rest is that findings of fact made by another decision maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it ('the trial judge'), and not another. The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person , however distinguished , and however thorough and competent his examination of the issues may have been , risks the decision being made , at least in part , on evidence other than that which the trial judge has heard in reliance on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision making is not one. The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have regard."

At paragraph 49 Clark LJ stated: 'In essence … the foundation of the rule must now be the preservation of the fairness of a trial in which the decision is entrusted to the trial judge alone'.

[106] Having regard to the applicable law, the finding by Thomas J (Ag.) in **Joan Etienne v Renneth Alexis** that the assault occurred on the public road, in no way constituted admissible evidence in the case in trespass brought by Blaircourt giving rise to this

[51] [2009] UKPC 34.
[52] [2015] QB 265.

appeal. Thomas J (Ag.) decided the trespass case for himself on the evidence that he received, and in the light of the submissions on that evidence made to him. To act on the finding in the assault case that the assault occurred on the public road, while deciding a different case, a case of trespass, would run afoul of the rule in **Hollington v Hewthorn**. The ground of appeal accordingly fails.

Counter-notice of appeal

[107] Blaircourt in its counter notice, alleges that the learned judge erred or misdirected himself on the facts in stating or suggesting at paragraph 43 of his judgment that the villas the appellants entered were 'occupied by Ross University Professors' in the absence of any pleadings or evidence that villas 3 and 4, the blue and green villas respectively, were occupied at all. This matter has already been disposed of.

[108] In its counter - appeal, Blaircourt also challenges the quantum of damages awarded. Mrs. Felix -Evans submits that damages of $5,000.00 would have been a more appropriate and reasonable award of compensation rather than the $1,500.00 the learned judge awarded against Martin, Etienne and Mc Kenzie. The award in respect of Baron $1,500.00 should be affirmed.

[109] This ground falls away in light of the Court's findings that the appellants left the Blaircourt property at a reasonable time after Alexis revoked their implied licence.

[110] In conclusion, the appeal is allowed on the narrow ground that after the appellants' implied licence was revoked, they left the property within a reasonable time.

[111] On the issue of costs, the principle under the **Civil Procedure Rules 2000** that costs should follow the event is very important. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order having regard to all the circumstances.

[112] There is no automatic rule that the costs of the successful party will be reduced because it lost on some issues. There are various factors which are likely to weigh in the balance when determining whether to make such an order, although these are generally matters of weight rather than independently determinative considerations. The more significant and self - contained the issues on which the successful party has lost, the more likely it is that some downwards costs adjustment for that failure is appropriate.[53]

[113] The appellants won on the discrete point relating to departing within a reasonable time after the implied licence was revoked, but they lost on every other issue. This justifies a deduction from the costs payable by the respondent. The ultimate question is what is a just costs order in the circumstances. Standing back and looking at the matter in the round, I consider this to be a case where a departure from the general rule is appropriate. In the circumstances, a just outcome would be that the appellants are awarded ten percent of prescribed costs on appeal.

Order

[114] It is ordered that:

(1) The appeal is allowed.

(2) The orders and declaration of the learned judge that:

a. The defendants are liable in trespass with respect to the Blaircourt property.

b. Atherton Martin, Severin Mc Kenzie, and Joan Etienne must each pay $1,500.00 and Frederick Baron $1,000.00 as damages to the claimant.

c. The defendants each pay the claimant, $5,000.00 as exemplary damages; and

d. The claimant is entitled to prescribed costs,

[53] See The Serious Fraud Office and another v Litigation Capital Limited and others [2021] EWHC 2803 (Comm).

are set aside.

(3) The appellants are awarded prescribed costs in the court below and twenty five percent on appeal.

(4) The counter - appeal is dismissed.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar