All the world's a stage

Private nuisance, from overlooking to knotweed: what is the remedy? **Andrew Francis** presents a property drama in five acts

IN BRIEF

▶ As a number of recent cases have shown, claims in private nuisance are just as much a feature of the landscape of property disputes as those based on other rights and obligations, such as under easements and covenants.

Act 1: Overlooking

London, Bankside: Most of us will by now be familiar with the judgment of the Supreme Court handed down on Wednesday 1 February 2023 in *Fearn and others v Board of Trustees of the Tate Gallery* [2023] UKSC 4, [2023] All ER (D) 02 (Feb). This judgment upheld the claimant tenants' claim based on private nuisance to the enjoyment of their flats caused by visitors to the Tate Gallery overlooking those flats from the viewing gallery on the south side of the Tate Gallery's building at Bankside in London. The Supreme Court gave us a modern framework to use in tortious private nuisance claims where real property interests are affected (see '*Fearn v Tate Gallery Trustees*: the nuisance next door', *NLJ*, 24 February 2023, pp9–10).

One crucial issue which was left open by the court and remitted to the High Court was what (if any) remedy should be granted for the breach of the claimants' rights caused by the private nuisance found to have been caused by the defendant.

The issue of the remedy is no doubt of considerable importance to the claimants. It might be said that the question of the remedy was and remains 'the elephant in the room' in that dispute. Now they have got this far, the claimants will want to know what can be done either to stop a recurrence of the nuisance caused by the overlooking, or to compensate them for the loss suffered by them (both past present and future) or to make practical arrangements to mitigate the effect of the nuisance. The balance to be struck between the parties in *Fearn* in terms of remedies will lie at the heart of the practical and final outcome in this litigation.

At this stage, speculation on what the High Court might do (assuming no agreed compromise) is dangerous. Whether this will be a case where specific relief is ordered, such as the closing of the relevant part of the viewing gallery, or one for damages, or where other measures might be ordered, is open to discussion. The judgment of the majority in *Fearn* refers to these issues at paras [126]–[133] and the minority do so at paras [224] and [281]–[283]. What seems reasonably certain is that the backdrop will be defined by the principles set out by the Supreme Court over nine years ago in *Lawrence and another v Fen Tigers Ltd and others* [2014] AC 822, relating to the proper exercise of the discretion to grant an injunction, or damages in lieu.

Act 2. Knotweed

Nant-y-Moel, South Wales: Hot on the heels of *Fearn*, on Friday 3 February 2023 the Court of Appeal handed down its judgment in *Davies v Bridgend County Borough Council* [2023] EWCA Civ 80, [2023] All ER (D) 29 (Feb).

By contrast with the neo-modern buildings on Bankside, the location of this dispute was Mr Davies' 19th century terraced house in the Ogmore Valley, at No 10 Dinam Street, Nant-y-Moel, about ten miles north of Bridgend in South Wales. The rear garden to his house at No 10 backed onto open land owned by Bridgend County Borough Council. Part of that land had been used as a railway line serving the collieries in the area. When the line closed, the land was acquired by Bridgend Council for use as open space and as a pedestrian and cycleway running up the valley. Unfortunately for Mr Davies, Japanese knotweed had been present on the land for over 50 years. By the time Mr Davies bought No 10 in 2004 (as an investment), the knotweed had spread into its garden. In 2017, Mr Davies became concerned about the knotweed. He told the council about it. The parties started an effective treatment programme, but the risk of infestation remains. Without a joint approach, control of the knotweed by Mr Davies alone would have been futile.

In about 2020, Mr Davies sued the council in private nuisance for damages. They included the diminution in value of No 10 caused by the knotweed. At the trial of the claim in November 2021, the district judge found that a duty of care was owed to Mr Davies by the council under the tort of private nuisance and that this duty of care was broken between 2013 and 2018, when the treatment started. However, the district judge dismissed the claim on the ground that the damages based on diminution in value of No 10, while caused by the presence of the knotweed, were irrecoverable in private nuisance. The reason for this was based on the judgment of the Court of Appeal in *Network Rail Infrastructure Ltd v Williams and another* [2018] EWCA Civ 1514. That claim also concerned knotweed, which had spread from a railway line owned by Network Rail Infrastructure to Mr Williams' property at Maesteg, about six miles west from Nant-y-Moel. The district judge held that *Williams* prevented the claimant from recovering damages for economic loss based on diminution in the value of the claimant's property. On Mr Davies' appeal to the circuit judge, heard in May 2022, the judge dismissed the appeal for the same reason, relying on *Williams*, stating that it established the proposition that damages for diminution in value of No 10 due to knotweed was not recoverable in private nuisance.

The question for the Court of Appeal was whether the judges below were right in their reliance on what they thought *Williams* decided on this issue.

The Court of Appeal held that the judges below were wrong. Act 3 tells us why.

Act 3: Putting things straight

The Court of Appeal: The court was faced with deciding an important question. Could the claimant recover damages for the residual loss in value of

his property ('blight') caused by the effect of the knotweed, even when it had been eradicated? The amount claimed was £4,900. While that was a small amount, the principle attached to it was important. Other heads of loss had either been awarded, or failed below, or had been dropped by the claimant.

The answer to the question above was 'yes'. This was because all the elements of the tort of private nuisance having been established, there was no reason why the economic loss claimed could not be recovered. The elements were:

1. The knotweed had caused interference with the amenity of No 10.
2. There had been encroachment by the knotweed.
3. Physical damage was not required where loss of amenity was proved.
4. There was a failure for some years by the council to take reasonable steps to bring the nuisance to an end, while Mr Davies tried to remove the knotweed.
5. These requirements are tempered by the principle of reasonableness between neighbours and that was satisfied.

It seems curious that the judges below misinterpreted *Williams*. Were they 'beguiled' by the references in *Williams* to 'pure economic loss'? What they seem not to have done was to consider the position where the five elements of the tort have been satisfied, for in such a case the loss caused is recoverable, even though that loss is 'economic'; eg diminution in value of the claimant's property.

Act 4: The entry of other property-related rights

The strolling players: Not present on the stage in either *Fearn* or *Davies* were other rights and obligations represented by the 'strolling players' of restrictive covenants, easements and trespass. In this article, space prevents negligence, *Rylands v Fletcher* (1868) LR 3 HL 330 and statutory duties being on the stage and considered.

We must not forget these strolling players. If covenants, or other 'black-letter' property rights had been in place, no doubt Mr Davies' claim for the damages representing the loss in value of No 10 would have been determined in his favour by the district judge (or even paid in settlement by the council).

In many property disputes, private nuisance in tort must not be overlooked where a claim in tort might be the only option, such as where covenants are unenforceable. But where there is a covenant against 'nuisance', what extra protection does that covenant give beyond that of private nuisance in tort? Why is the covenant there? Would the claimants in *Fearn* have been better off if they had a 'no nuisance' covenant in their favour? This question is hard to answer with certainty. Unless other 'offensive' activities etc are expressed (such as 'annoyances', which have a wider scope—see *Davies v Dennis* [2009] EWCA Civ 1081, [2009] All ER (D) 230 (Oct)), relying on a nuisance covenant alone may only give the claimant an advantage where the context in which the covenant was imposed, or some other evidence will assist in proving breach; eg in a 'high-class' estate. It is also arguable that the remedy, such as damages for economic loss, should be recoverable on the principle that damages for breach of covenant are assessed on the assumption that the covenant (contract) would have been performed.

Finally, in respect of easements, such as rights of way, or rights of light, if the right exists, any interference with it, if actionable, will found a cause of action. In essence, the interference is a nuisance to the easement. Unlike a tortious claim in private nuisance, there can be no doubt that damages can be recovered for the economic loss caused by the breach of the right. These can be assessed on the 'negotiating damages' basis, as was done in *Beaumont Business Centres Ltd v Florala Properties Ltd* [2020] EWHC 550 (Ch), [2020] All ER (D) 113 (Mar)—for example, if the ability to create the nuisance enables the defendant to make a profit such as by noisy or smelly activities. If there is a case for an injunction to restrain a private nuisance, there seems no reason why damages should not be assessed in the same way. This was one issue in *Fen Tigers*, which was a private nuisance claim relating to noise. Thus, in *Davies* if there had been no remediation by the council, and if the claimant had sought a mandatory injunction to require the council to treat the knotweed, but was refused that relief as a matter of discretion, it seems logical that damages in lieu would be awarded for the loss in the value of No 10.

Act 5: The denouement

What thoughts can we take away at the end of the drama?

The final act shows us how private nuisance claims and remedies are entwined with other property rights and obligations, and the script is based on *Fearn* and *Davies* as set out above.

The theme of the final act is, first, that claims in private nuisance are just as much a feature of the landscape of property disputes as those based on other rights and obligations, such as under easements and covenants. The second theme is that where the elements of the tort of private nuisance *are* satisfied, there is no *policy* reason why damages for loss to the claimant's economic interests, such as the loss in the value of his property, should not be awarded. It is these two themes which we should remember when we walk into the foyer and out of the theatre into the brightly lit street. **NLJ**

Andrew Francis, barrister at Serle Court (*www.serlecourt.co.uk*).