The nuisance next door

Andrew Francis takes a good look at *Fearn v Tate Gallery Trustees*: what lessons can property practitioners learn from the Supreme Court's judgment?

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IN BRIEF

- The Supreme Court's majority judgment in *Fearn and others v Board of Trustees of the Tate Gallery* held the Tate liable in nuisance to the owners of flats who claimed visual intrusion by those visiting the Tate's public viewing platform.
- This decision opens the way to consideration of the relationship between private nuisance and property law rights and obligations.

'On the facts found by the judge, this is a straightforward case of nuisance' (per Lord Leggatt, at para [7] in *Fearn and others v Board of Trustees of the Tate Gallery* [2023] UKSC 4, [2023] All ER (D) 02 (Feb) ('*Fearn*')).

That simple statement is as good an introduction to the judgments in *Fearn* as one is likely to get. It forms a useful entry to the 133 paragraphs of the majority judgment and the 150 paragraphs of the minority judgment. The reasons for that length are: first, the need to define the principles of law applicable to private nuisance and their application to the facts; and second, the difference between the majority and the minority over the definition of those principles.

As we shall see below, the tenants of the flats who sought to establish liability in private nuisance against the Tate Gallery were the victors. But, as the Duke of Wellington said about the outcome of the battle of Waterloo, it was 'the nearest run thing you ever saw in your life'. So it was in *Fearn*. Mathematically, the claimants' victory does not add up. Six judges at all levels found against their claim. Only three, those being the majority in the Supreme Court, were in the claimants' favour. But that is the product of precedent in our courts.

> *"The cause of action in private nuisance rests upon the law of tort"*

Background

The relationship between neighbours is frequently bedevilled with disputes over land use. These may be related to building, or activity on land which affects neighbouring landowners' (including lessees') enjoyment of their land. The effect on enjoyment may often be greater than on the value of the property affected. Over many centuries, the courts have created and refined the law of private nuisance in order to protect those with an interest in land from what might be described as 'unneighbourly' activities.

The cause of action in private nuisance rests upon the law of tort. In this context, that is designed to protect the use and enjoyment of *land*. A claim in private nuisance should be distinguished from disputes based upon trespass, contracts, covenants and easements. In such cases, the rights and obligations should have a 'bright line' clarity, providing greater protection compared with that in private nuisance. The terms of covenants and easements may be drawn to give protection by preventing not only 'nuisances' but also 'annoyances' and 'disturbances'.

Sometimes the law of private nuisance may overlap the protection under 'black letter' property rights and obligations. This is a point to which references are made below. It is also important to note that the fact that the activity has the benefit of planning permission (or may not require it) is irrelevant to whether or not a private nuisance has been committed. The same principle applies to the ability to enforce other private law rights, such as those under covenants or easements.

Fearn v Tate Gallery Trustees

It is against this background that the Supreme Court delivered judgment on 1 February 2023 in *Fearn*. The dispute arose out of the ability of visitors to the Tate Modern Museum (the Tate) to look into some flats on four floors of the nearby NEO Bankside building from the viewing gallery on the south side of the Tate. The flats were about 34 metres from the viewing gallery and had large floor-to-ceiling windows.

The claimants' case in private nuisance was based upon the visitors to the Tate using the viewing gallery to look into the flats and photograph the occupiers etc. That made life unpleasant and uncomfortable for the flat owners. Curtains and other screening methods were not really a simple solution to the problem. The claim for an injunction was brought in private nuisance and under the Human Rights Act 1998 in 2017.

Following the trial hearing before Mr Justice Mann J in November 2018, judgment was delivered by on 11 February 2019. He dismissed the claim, finding that the use of the viewing platform was neither a private nuisance, nor a breach of the privacy protection in Art 8 of the European Convention on Human Rights (ECHR). The claimants appealed that judgment.

On 12 February 2020, the Court of Appeal dismissed the appeal on a number of grounds, including the fact that 'mere overlooking' from one property to another was not capable of giving rise to a cause of action in private nuisance, and that as the real issue in the claim was one of privacy, the law of private nuisance should not be extended to cover such claims, but rather left to Parliament to legislate upon it.

The appeal from the Court of Appeal to the Supreme Court was heard in early

December 2021. On 1 February 2023 a majority in that court (Lords Leggatt, Reed P and Lloyd-Jones) allowed the appeal, with Lords Sales and Kitchin dissenting.

The importance of the decision

There are five main reasons why the decision is important.

The law of private nuisance

First, the judgment of the majority contains clear statements of the core principles of the law of private nuisance. Paras [9]–[88] of the judgment delivered by Lord Leggatt for the majority are a 'must-read' for any property lawyer. This is because the principles are clearly stated and reasoned, and take account of modern conditions as between the interests of landowners. Most of the authority on the law of private nuisance in relation to land derives from decisions which are at least 120 years old, and in terms of their language and their reflection of economic and social conditions and standards then current, they can be hard to apply. With more modern decisions of the higher courts, it is gratifying that we have now an up-to-date statement of the core principles. Both the majority and the minority of the justices made it clear that the law of private nuisance was quite adequate to deal with the violation of the claimants' rights, and that this was *not* a case where either the law of privacy, or Art 8 of the ECHR needed to be invoked.

Ordinary use

Second, the decision is a reminder that there is no conceptual limit on what can constitute a private nuisance. The question is whether the activity complained of *substantially* interferes with the *ordinary* use and enjoyment of the claimant's land. The other aspect to this requirement is that if *the defendant's activity* about which the complaint is made is no more than an *ordinary* use of their land, there will be no liability in private nuisance. Thus there is reciprocity here.

However, the majority made it clear that the test of liability is not based on whether the offending use is reasonable. Therefore, in *Fearn*, the correct question was not whether the Tate's operation of the viewing gallery was a reasonable use of its land (as Mann J had done), but whether that use was a *common and ordinary* one. The Supreme Court found that the viewing gallery was not being so used, but rather it was being used 'in an exceptional manner.'

The Supreme Court also held that there was no policy reason why the objective test would be difficult to apply, and the fact that planning permission had been granted was not relevant to whether the objective test for private nuisance had or had not been satisfied. The latter point is consistent with the Supreme Court's judgment in *Lawrence and another v Fen Tigers Ltd and others* [2014] AC 822. While the dissenting minority agreed that the visual intrusion caused by the use of the viewing gallery was capable of amounting to a private nuisance, they disagreed with the majority on the nature of the objective test and considered that unreasonableness of the defendant's use of his land must be found. This was because regard must be had to the principle of reasonable reciprocity and compromise, or 'give and take'. Space does not permit a full analysis of the dissenting judgment of Lord Sales and Lord Kitchin, which is of course of interest in its own right.

> *"The relationship between neighbours is frequently bedevilled with disputes over land use"*

Annoying or inconvenient

Third, the question whether a claim in private nuisance can be found should be answered on an objective basis, having regard to what an ordinary, or average person in the claimant's position might find annoying or inconvenient. Because the claim is concerned with the use and enjoyment of *land*, whether the claimant might feel personally unsafe, or uncomfortable does not form the basis of such a claim. Conduct which relates to the latter may fall within the law of stalking, or harassment, but not private nuisance in relation to 'the victim's' interest in its *land*.

Grand designs

Fourth, while the nature and locality of the parties' land and buildings will be relevant to the objective test, the sensitivity caused by the design of the claimant's building (which in *Fearn* was due to the large windows) is not a defence where the defendant is not using its property in an ordinary way, as was the case in *Fearn*.

The Supreme Court held that it was wrong to place the burden on the claimants to mitigate the effect of the exceptional use of the viewing gallery by curtains, or blinds etc, and that the dismissal of the claim based on 'mere overlooking' was wrong, both as a matter of principle and also because the claim was not based on 'overlooking', but rather upon the particular use made of the viewing gallery by its visitors with the Tate's permission.

Proper remedies

Finally, as the public interest was engaged in respect of the use being made of the viewing gallery, the Supreme Court held that this issue was not relevant to the question of liability for private nuisance, but rather where, liability having been found, the question to be decided is that of the proper remedy to grant. In this respect, the Supreme Court considered briefly the present state of the law as set out nine years ago in *Lawrence*, and remitted the case to the High Court to determine the appropriate remedy.

What lessons can we learn?

Fearn opens the way to consideration of the relationship between private nuisance and property law rights and obligations, such as under covenants and easements. Generally, the presence of enforceable covenants and easements will provide greater protection than where that is absent. However, where such protection is absent, private nuisance may have a role to play where the objective application of the principles set out in *Fearn* establishes liability.

While the effect of the basic freedom to build on one's land as part of its common and ordinary use (and in the absence of any material covenant, or easement) may prevent a claim in private nuisance, the irony of the position in *Fearn* is that the tenants' claim did not arise as a result of the construction of the Tate's building (both it and NEO Bankside were constructed at the same time) but rather because of *the use of that building* and its effect upon the enjoyment of the claimants' flats.

While the claimants were successful in the end, it may be worth speculating on whether their position would have been stronger from the outset if they had the benefit of a restrictive covenant against nuisance being committed at the Tate. If they had the benefit of a covenant covering 'annoyances' and other 'disturbances', it is suggested that they would have been in such a position from the outset. The moral of the story is probably that as property lawyers we should be mindful of not just the 'absolute' rights under easements and covenants etc, but also the more 'fluid' rights in private nuisance. Therefore, should we not be reaching to the shelf upon which *Winfield & Jolowicz on Tort* sits at the same time as we are reaching for *Megarry & Wade: The Law of Real Property*? NLJ

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