Fearn & Ors. v Board of Trustees of the Tate Gallery [2023] UKSC 4

On the look out

Introduction

"On the facts found by the judge, this is a straightforward case of nuisance."

(Lord Leggatt, at para. 7 in *Fearn & Ors. v Board of Trustees of the Tate Gallery).*

The relationship between neighbours in many parts of the United Kingdom and in particular in built-up areas is frequently bedevilled with disputes over land use. The activity which causes the dispute may be related to building on land, or other development work on it, or activity on land which affects neighbouring landowners' (including lessees') enjoyment of their land. The effect on amenities and environmental 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 in general terms 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; cf the law of tort protecting the person from injury. In the context of land ownership, the basis of a claim in private nuisance should be distinguished from the rights and obligations of those with an interest in land based upon trespass, contracts, covenants and easements. In such cases the rights and obligations may well have a "bright line" clarity compared to the protection and obligations in the tort of private nuisance. In some cases the terms of covenants and the grant of easements may be drawn so as to give additional protection, such as by expressly preventing not only nuisances but also annoyances and other occurrences, or to limit the way in which rights may be enjoyed or exercised so as to protect the interest of the neighbouring owner. In some cases the law of private nuisance may overlap the protection under the "black letter" property rights and obligations. This is a point to which references made below. It is also important to note in particular 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.

It is against this background that the Supreme Court delivered judgment on 1st February 2023 in *Fearn & Ors. v Board of Trustees of the Tate Gallery* [2023] UKSC 4 ("Fearn"). The well-publicised dispute in this case 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 looking into the flats, photographing the occupiers and in general terms making life unpleasant and uncomfortable for the flat owners and occupiers. Curtains and other screening methods were not a practical solution to the problem. The claim for an injunction was brought in private nuisance and

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under the Human Rights Act 1998 in 2017. Following the trial hearing before Mann J. in November 2018, judgment was delivered by Mann J. on 11 February 2019 in which 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 Article 8 of the European Convention on Human Rights ("ECHR"). The Claimants appealed that judgment and 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, and in the judgment handed down on 1st February 2023. A majority in that Court (Lords Leggatt, Reed and Lloyd-Jones JSC) allowed the appeal with Lords Sales and Kitchin JSC dissenting. It will be seen that there is a neat coincidence in respect of the dates of each judgment over the past three years.

The importance of the decision in *Fearn.*

There are five main reasons why the decision is important.

First, the judgment of the majority contains clear statements of the core principles of the law of private nuisance. Paragraphs 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, logically reasoned with analysis of authority and take account of modern conditions as between the interests of landowners. As anyone who has dealt with this area of law will be aware, 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 many cases they are much older than that. Both in terms of their language and also in respect of their reflection of Victorian economic and social conditions and standards, they can be hard to apply at the present time. This statement does not derogate from the fact that there are late 20th century decisions of the higher courts including the House of Lords on this law which are all examined in Fearn, but it is gratifying that we have an up to date statement of the core principles. Both the majority and the minority JSC 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 Article 8 of the ECHR needed to be invoked.

Secondly, 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 his land, there will be no liability in private nuisance. So there is reciprocity here. But, there is no prior condition in terms of the answer to that question which provides a defence to the claim based on the reasonable nature of the use about which the complaint is made. 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 "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 v Fen Tigers* [2014] AC 822; *"Lawrence"*. Whilst 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 fuller analysis of the dissenting judgment of Lord Sales and Lord Kitchin, which is of course of interest in its own right.

Thirdly, 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 claimants 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

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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.

Fourthly, whilst 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. In this context and in respect of the facts of that case 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 its permission.

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 in Lawrence (nine years ago) and remitted the case to the High Court to determine the appropriate remedy.

What lessons can we learn from *Fearn?*

Quite apart from the importance of the decision and the statement of the principles of law in it and their application, which is all relevant to the property lawyers' task of advising clients whether in contested matters, or in purely advisory cases (eg. reports on sales and acquisitions of land and other dealings with it) *Fearn* opens the way to consideration of two points which are worth some reflection. The first point relates to evidence. It might be said (even if this is a truism) that the evidence relating to a case is at the core of any advice given to a client. In the majority of cases that evidence – whether lay, or expert - must be obtained and when obtained, requires close examination and testing. The judgment of Mann J. is worth reading as an example of the application of this principle. The writer's experience in recent years is that this principle is often overlooked, or only appreciated at a late stage, particularly in assessing the prospects of success in litigation, or other risks. Now we have clear principles of law which can be applied in potential private nuisance matters, the focus can be on the evidence and its detailed examination. Such evidence will also be relevant to the question of the proper remedy, if liability is found. The second point concerns an issue which on the facts did not arise in Fearn. But suppose the Claimants had the benefit of a restrictive covenant protecting them against nuisances and annoyances and other disturbances caused by activity at the Tate? It is well settled that covenants which protect against annoyances and other activity which is wider than the scope of private nuisance will mean that the claimant is better off than simply relying on the scope of private nuisance. There is in fact a question which is not entirely resolved as to whether protection against nuisance under a covenant gives better protection than in a claim in tort. Would the Claimants have had a better prospect of succeeding even at first instance if they had relevant covenants in their favour? A similar question arises where there is a claim to interference with light. Even if the claimant cannot assert an easement of light, why should it not make a claim based on interference with the ordinary enjoyment of its land in private nuisance?

In summary, the decision in *Fearn* ought to lead those of us who are property lawyers and who naturally dwell in the familiar habitat of "black letter" law, to consider issues which relate to private nuisance in tort. Should we not be reaching to the shelf upon which Winfield and Jolowicz on Tort sits at the same time as we are reaching to the shelf housing Megarry and Wade on Real Property?

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