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The Supreme Court on Visual Intrusion and Private Nuisance: Fearn v Board of Trustees of the Tate Gallery [2023] UKSC 4

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The facts of *Fearn and others v Board of Trustees of the Tate Gallery* are well-known.[1] On the South Bank of the River Thames, adjacent to the Tate Modern (the Tate), sit a cluster of four blocks of flats of striking design known as "Neo Bankside". Each flat is comprised of a main living space featuring floor-to-ceiling glass panels, punctuated by fascia, and an indoor balcony encased entirely in single-glazed glass.[2] An extension to the Tate, the "Blavatnik Building" (approved and built more or less at the same time as Neo Bankside)[3] features a viewing platform, and herein lies the problem.

It is estimated that several hundred thousand people visited the viewing gallery each year, with a limit of 300 people at any one time.[4] From its southside, it affords a clear view into several flats in Block C – at one point, the distance between the two is a mere 34 metres.[5] The long leasehold owners of four of the flats complained that members of the public were able to observe them going about their lives in their homes – a minority used binoculars to assist their purpose or took photographs and videos, of which a further minority uploaded to social media.[6] Their case was framed as an action in the tort of private nuisance and succeeded in the Supreme Court of the United Kingdom (the Supreme Court), contrary to the decision of Mann J at first instance[7] and the Court of Appeal,[8] both of which found for the Tate, but for different

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[1] [2023] UKSC 4, [2022] 1 WLR 4691.

[2] *Fearn* (n1) [140].

[3] 'The design, planning process and construction of Neo Bankside took place between 2006 and September 2012', *Fearn* (n1) [139] (Lord Sales); 'The process of development of the Blavatnik Building took place between 2006 and 2016, including its design, the obtaining of planning permission and its construction', *Fearn* (n1) [141] (Lord Sales).

[4] 500,000-600,000 per year on one estimate, *Fearn* (n1) [1].

[5] *Fearn* (n1) [143] (Lord Sales).

[6] ibid [144].

[7] [2019] EWHC 246 (Ch), [2019] 2 WLR 1335.

[8] [2020] EWCA Civ 104, [2020] 2 WLR 1081.

reasons.[9] It should be emphasised here that the case has been remitted to the High Court for determination of the appropriate remedy.[10]

The Supreme Court confirmed that the tort of private nuisance *is* capable of responding to a "visual intrusion".[11] Indeed, while the Supreme Court was split 3:2, the majority (Lord Leggatt, with whom Lord Reed and Lord Lloyd-Jones agreed) and minority (Lord Sales, with whom Lord Kitchin agreed) were at one on this point.[12]

The claimants were clear at trial that they did not object to the fact that they are overlooked from the Blavatnik Building;[13] undeniably, the claimants overlook the Tate and inevitably this is reciprocal. Rather, the nature of their complaint was the relentlessness of the act of overlooking from the viewing platform and that the Tate actively invited members of the public to the platform.[14]

The Supreme Court drew a distinction between "the act of overlooking" and "visual intrusion".[15] The boundary between the two is one of nature and degree,[16] consistent with other types of interference.[17] The "act of overlooking" includes looking at what is happening on neighbouring land,[18] whereas "visual intrusion" (described as 'constant and oppressive'[19]) amounts to substantial interference.[20]

It is clear that both the number of visitors to the viewing platform and the taking of photographs supported the finding of a visual intrusion.[21] What is not clear,

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[9] According to Mann J, the claimants, in living in properties with glass walls, had consented to the possibility that others may be able to look into their flats. Unlike Mann J, the Court of Appeal did not think that the authorities could be interpreted such that overlooking was capable of amounting to a private nuisance.

[10] *Fearn* (n1) [133] (Lord Leggatt).

[11] Cf *Fearn* (n8) [74]. Cf. Emma Lees, '*Fearn v Tate Galleries*: Privacy and the law of nuisance' (2021) 23(1) Environmental Law Review 49.

[12] *Fearn* (n1) [95] et seq (Lord Leggatt); *Fearn* (n1) [175] (Lord Sales).

[13] *Fearn* (n7) [190]; *Fearn* (n1) [92].

[14] *Fearn* (n1) [92].

[15] ibid [89].

[16] ibid (n1) [108].

[17] *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683 (QB) 689-91. See *Hunter v Canary Wharf Ltd* [1997] AC 655, 695; note: *Network Rail Infrastructure Ltd v Williams* [2018] EWCA Civ 1514, [2018] 3 WLR 1105 [41].

[18] *Fearn* (n1) [91].

[19] ibid [95] and [98].

[20] "Material" means the same as "substantial" here: *Walter v Selfe* (1851) 64 ER 849, 852 (Knight Bruce V-C); *Hirose Electrical UK Ltd v Peak Ingredients Ltd* [2011] EWCA Civ 987, [2011] 8 WLUK 138 [3].

[21] ibid [108].

however, is whether the act of taking photographs is essential to elevate the act of overlooking to visual intrusion.[22] Put differently, whether the taking of photographs is inherent in the act of overlooking being constant and oppressive,[23] or whether the number of visitors on its own is sufficient, perhaps given the ubiquity of smartphones.[24] As Lord Leggatt remarked:

> [T]he intensity of the interference in the present case is made possible by the fact that a large proportion of the population now carry a camera incorporated in their smartphone. And the sharing of images on social media adds a further dimension to the interference.[25]

It is worth noting that "constant" does not mean continuous here since the Tate had restricted its opening hours to afford their neighbours periods of reprieve.[26] If the taking (and uploading) of photographs to social media is not inherent in the act of overlooking being constant and oppressive, perhaps "*persistent* and oppressive" may have been a more apt description if it is the relentlessness of the activity which elevates its nature to an actionable nuisance, as appears to be the case.[27]

It is clear that the *number* of individuals in question is integral to "oppressive". If the viewing platform had been an unpopular addition to the Tate, one individual would have been insufficient.[28] Moreover, a small number of individuals would have been actionable by other means; for example, harassment[29] or misuse of private information (where the photographs are taken with the intention of gathering information for publication).[30] However, while the scenario in *Fearn* involving hundreds of thousands of visitors is a rarity,[31] it does not appear that *hundreds of thousands* of visitors are necessary to reach the "oppressive" threshold. Consider a similar scenario on a smaller scale – a maritime museum, for example, which incorporates a wrap-around terrace fronting nearby waterfront flats. There is no

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[22] Indeed, photographs have a degree of permanence equivalent with "constant".
[23] "watched *and* photographed", *Fearn* (n1) [98] (emphasis added); "constant observation *and* photography", (n1) [102] (emphasis added); "watching *and* photography", *Fearn* (n1) [105] (emphasis added).
[24] *Fearn* (n1) [49].
[25] ibid [103].
[26] Rather than staying open until 6pm on Sunday to Thursday and 10pm on Fridays and Saturdays, it closed to the public at 5.30pm Sunday to Thursday and on Friday and Saturday the south and west sides closed from 7pm and the north and east sides closed from 10pm, *Fearn* (n1) [3].
[27] ibid [99].
[28] ibid.
[29] Protection from Harassment Act 1997.
[30] *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 WLR 1232 [14] (Lord Nicholls).
[31] *Fearn* (n1) [103].

reason why *thousands* of visitors replicating the behaviour in *Fearn* could not be considered 'constant and oppressive' so as to elevate the act of overlooking to visual intrusion.[32] The point to stress here is the emphasis on *the degree* of the interference: while the Supreme Court has confirmed that nuisance is capable of responding to such an activity, the threshold of material/substantial intrusion remains a high one. It is also worth noting parenthetically that while Lord Leggatt uses the language of "neighbour",[33] as well as visitors and onlookers, it is difficult to conceive of a realistic scenario in which enough individuals with proprietary interests in the neighbouring land, as opposed to *visitors* to another's land, could meet the threshold. As such, it may be the case that inherent in 'oppressive' is the number of *visitors* and not individuals.

At first sight, this confirmation that the tort of private nuisance extends to visual intrusion appears to be the key takeaway from *Fearn*. Yet it masks a point of arguably greater significance: Lord Leggatt's reframing of the tort. Indeed, actions on the visual intrusion point require an arguable visual intrusion, whereas this reframing is likely to be discussed in every private nuisance case in years to come, irrespective of the type nuisance.

While it is still necessary for the claimant to possess the *Hunter* standing to sue,[34] for the defendant to have the capacity to be sued and for the claimant to establish a substantial interference, the tort's control mechanism appears to have been altered. Traditionally, an actionable nuisance hinged[35] upon the reasonable use of the property and reciprocal regard for the interests of neighbours,[36] referred to as the notion of a "reasonable user". It represented the principle of "give and take", "live and let live",[37] between neighbouring occupiers of land. As Lord Goff articulated in *Cambridge Water Co v Eastern Counties Leather plc:*

> [U]nder which 'those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action:' see *Bamford v Turnley* (1862) 3 B & S 62, 83, per Bramwell B. The effect is that, if the user is reasonable, the defendant will not be liable for consequent

[32] See the reference to "thousands" at ibid [108].
[33] ibid [91]. Cf. "onlookers" at ibid [98].
[34] *Hunter v Canary Wharf Ltd* [1997] AC 655 (HL), 688 (Lord Goff), 695, 698-9 (Lord Lloyd), 707 (Lord Hoffmann), 716 (Lord Hope), cf. 719 (Lord Cooke). Cf. *Khorasandjian v Bush* [1993] QB 727 (CA), 738-40 (Dillon LJ).
[35] *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, 299 (Lord Goff).
[36] *Hirose Electrical UK Ltd v Peak Ingredients Ltd* [2011] EWCA Civ 987, [2011] 8 WLUK 138 [1], citing *Cambridge Wate Co* (n35).
[37] *Bamford v Turnley* (1862) 122 ER 27, 33 (Bramwell B).

> harm to his neighbour's enjoyment of his land; but if the user is not reasonable, the defendant will be liable, even though he may have exercised reasonable care and skill to avoid it.[38]

It was well-established that the test was not one of reasonableness of the defendant's use of land[39] but reasonableness in the round, reciprocity requiring a careful weighing and balancing of each parties' interests.[40] Whether an interference had been "conveniently done", ie. "with proper consideration for the interests of neighbouring occupiers",[41] is necessarily an objective test.

Relevant to the traditional enquiry were the locality ("character of the neighbourhood")[42] and planning permission,[43] for example. Lord Leggatt, however, appears to have reduced the reasonable user enquiry to an analysis of "common and ordinary use" only.[44] A close reading of *Fearn* indicates that the tort has been reframed such that the position appears to be that once the claimant has proven an arguable case that the defendant's use of their land has caused an unreasonable interference with the common and ordinary use and enjoyment of their land, the onus is on the defendant to establish that it made only common and ordinary use of its own land – locality is relevant to the defendant's common and ordinary use but seemingly not the wider issue of balancing the competing rights of both parties. As such, the tort of private nuisance has been reduced to a two-stage enquiry which shifts the bulk of the hard work to the defendant and "reciprocity" appears to take on a new meaning, in sharp contrast to Lord Goff's leading formulation.

It is helpful to consider the scenario in which the Tate had not built a viewing gallery but had enclosed the space to use as an exhibition level, seeking to maximise the light by means of floor-to-ceiling windows. Suppose that members of the public frequently broke from admiring the art to admire the view – perhaps the view became

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[38] [1994] 2 AC 264, 299.

[39] *Fearn* (n1) [29]; *Bramford* (n37); *Southwark LBC v Mills* [2001] 1 AC 1 (HL), 20-21 (Lord Millett); *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312, [2012] 3 WLR 795 [66]–[72].

[40] *Fearn* (n1) [268]; *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 (HL), 299 (Lord Goff).

[41] *Southwark LBC v Mills* [2001] 1 AC 1 (HL), 20-21, citing *Bamford v Turnley* (1862) 3 B&S 62 (KB) 83-4.

[42] See for example: *Sturges v Bridgman* (1879) 11 Ch D 852 (CA), 865 (Thesiger LJ).

[43] *Coventry v Lawrence* [2014] UKSC 13, [2014] 2 WLR 433 [96] (Lord Neuberger), [156] (Lord Sumption), [169] (Lord Clarke).

[44] *Fearn* (n1) [246] (Lord Sales). See also Victoria Ball, 'The "property" in [Tate] modern nuisance: case comment on Fearn v Trustees of the Tate Gallery' (2023) 2 Conveyancer and Property Lawyer 205, 208.

more popular than any exhibition and these individuals observed the claimants going about their lives in their flats, with a minority taking photographs and uploading these to social media. The *nature* of the material interference with the amenity value of the claimant's land would be equivalent to *Fearn* – doubtless, the claimants still would have felt like they were "on display in a zoo"[45] because the Tate is a popular, busy attraction. However, in this scenario, the Tate would be entirely in keeping with the common and ordinary use of its land as an art museum. According to Lord Leggatt's reframing, therefore, the Tate would be afforded a defence. Presumably in this scenario, measures like installing signs and limiting the gallery's opening hours would strengthen the "conveniently done" point; that the Tate's interference with the claimant's enjoyment of their land was reasonably foreseeable[46] would not help the latter if the nuisance analysis did not reach remoteness[47] – the Tate would not have sought to put its land to an 'abnormal'[48] use as the majority stressed that it had in *Fearn*. The answer in this hypothetical would appear to be that the claimants ought to protect themselves by taking remedial measures despite the *nature* of the material interference being equivalent.[49]

In *Fearn,* crucial to Lord Leggatt's analysis was that the Tate's use of its land was *not* common and ordinary:

> This principle [of give and take] would not comprehend (…) where what has been done was not the using of land in a common and ordinary way, but in an exceptional manner - *not unnatural or unusual*, but not the common and ordinary use of land. (…) The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live." (*Bamford v Turnley* (1863) 3 B&S 66, per Bramwell B at 83).[50]

However, Lord Leggatt drew a distinction between 'common and ordinary use', on the one hand, and uses which are "unusual"[51] or "abnormal".[52] The use of different descriptors is unhelpful and the extent to which "unusual" and "abnormal" uses are conflated is uncertain. When discussing "sensitivity to abnormal use",[53] Lord

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[45] *Fearn* (n1) [48], although strictly speaking it is a tort which protects interests *in land* and not personal discomfort.
[46] *Cambridge Water Co* (n35).
[47] *Fearn* (n1) [49]. See also *Fearn* (n1) [92].
[48] ibid [88].
[49] ibid [84] and [88]. Cf. *Southwark LBC v Tanner* [2001] 1 AC 1, 16.
[50] *Fearn* (n1) [162] (emphasis added).
[51] 'The circumstances in which land is used in an unusual way which gives rise to visual intrusion on a neighbouring property of sufficient duration and intensity to be actionable as a nuisance are likely to be rare', ibid [103].
[52] ibid [88].
[53] ibid [65] et seq.

Leggatt cites *Robinson v Kilvert*[54] which is an authority for the principle that an occupier cannot complain if the use interfered with is not an ordinary use, ie. it is a "sensitive" use.[55] This is a principle he specifically endorsed as valid,[56] yet "sensitive use" is traditionally an objective test focussed on the claimant[57] and Lord Leggatt is clearly speaking to the defendant's use of its own land.[58] Consequently, it may be unwise to read "abnormal" as a shorthand reference to "sensitive" without further judicial clarification and it is difficult to escape the conclusion that Lord Leggatt's change in emphasis from the claimant to the defendant here is grounded in framing his analysis such that the claimants' flats, encased entirely in glass as they are in parts, was not a "sensitive" use of their land.

While Lord Sales shared the majority's view that private nuisance may respond to visual intrusion, providing it reached "a certain level of intensity",[59] he differed from the majority's approach in two key respects. Firstly, he interpreted Lord Goff's "reasonable user" requirement in *Cambridge Water* differently. Secondly, he was of the view that the "give and take" principle lent itself, in this context, to consideration of any reasonable self-help measures the claimants may have taken, in an effort to appropriately balance 'the property rights of different landowners'.[60]

The minority's approach is attractive in its pragmatism: the words of Bramwell B in *Bamford v Turnley* "are not a statute and should not be interpreted as such".[61] The principle of "give and take" has – or ought to have – at its core reciprocity between neighbours with competing interests in land. Consequently, it is not defensible for this

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[54] (1889) 41 Ch D 88.

[55] It is worth noting that the complaint in *Robinson,* that the defendant's use of their land – regulating the temperature in their cellar – impacted the delicate paper the claimant was stored on the floors above with the consequence that it *diminished in value* which is an economic loss not strictly pertaining to property rights, see: *Network Rail Infrastructure Ltd v Williams* [2018] EWCA Civ 1514, [2018] 3 WLR 1105.

[56] *Fearn* (n1) [26]; cf *Network Rail Infrastructure Ltd (formerly Railtrack plc) v Morris (trading as Soundstar Studio)* [2004] EWCA Civ 172, [2004] 2 WLUK 544 [32], [35] and [36] (Buxton LJ). Note: "his scepticism was rooted in an approach to nuisance centred on an open-ended test of reasonableness as between neighbours", Donal Nolan, 'Nuisance and Privacy' (2021) 137 LQR 1, 5.

[57] Nolan (n56), 5; see also: *Fearn* (n1) [218] (Lord Sales).

[58] James Goudkamp and Donal Nolan (eds), *Winfield & Jolowicz on Tort* (Sweet & Maxwell 2020) note that *Southwark LBC v Tanner* [2001] 1 AC 1 may be best explained as a case where the inadequate soundproofing made the flat abnormally sensitive to noise, which would be in step with a claimant centred approach to actionability [15-031].

[59] *Fearn* (n1) [170].

[60] ibid [216].

[61] ibid [243].

analysis to be stacked in favour of one party only,[62] particularly in light of the emphasis on landowners to use their land as they wish in *Hunter v Canary Wharf Ltd*.[63] In Lord Leggatt's view, however:

> It is a principle of equal justice, a form of the golden rule that you should "do as you would be done by". Put negatively, people cannot fairly demand of others behaviour which they would not at the same time allow others to demand of them.[64]

Lord Leggatt's interpretation, therefore, is a much narrower formulation of "reciprocity". It is submitted that Lord Leggatt's (mis)/(re)interpretation of Lord Goff's reasonable user enquiry represents perhaps the most significant failure of the case.[65] In reframing the tort of private nuisance to deliver a *narrow* construction of equal justice, it is likely that development will be stifled,[66] particularly since the planning policy for the South Bank actively encourages the construction of viewing galleries in buildings of significant height (of which the Tate is an example).[67] Moreover, the judgment may stifle development in a narrower sense by discouraging occupiers from modifying, even marginally, the use(s) to which they put their land, planning permission notwithstanding. It is not difficult to conceive of scenarios in which such concern may have detrimental, stifling effects on local communities.

As Lord Sales wisely pointed out, potential exposure to visual intrusion is an inevitable feature of urban living:

> The purpose of the "give and take" principle is to allow the court to determine the point at which a *reasonable reconciliation* between the property rights of different landowners can be achieved.[68]

To this end, he considered that self-help measures may be a necessary consideration[69] and although the point may have been misconstrued,[70] it is not uncontroversial in the context of related authorities.[71] Nevertheless, Lord Leggatt poured cold water on self-help measures such that it is difficult to see how these may

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[62] ibid [270]. See also Ball (n44) 211-12.
[63] *Hunter* (n17).
[64] *Fearn* (n1) [34].
[65] See ibid [269] (Lord Sales).
[66] ibid [225] and [230] (Lord Sales).
[67] ibid [148].
[68] ibid [215]-[216] (emphasis added).
[69] ibid [216]; Nolan (n56) 5.
[70] Nolan (n56) 5.
[71] For example: *Miller v Jackson* [1977] 1 QB 966 (note [274] (Lord Sales); *Webster v Lord Advocate* 1985 SC 173.

be resurrected in argument in future cases – they cannot conceivably form part of the "give and take" analysis.

The significance of the Supreme Court's decision in *Fearn* is difficult to overstate. The recognition that a visual intrusion can represent a substantial interference with the amenity value of an occupier's land and be an actionable nuisance is to be commended: it ensures the Victorian conception of a "nuisance" develops in step with the advent of technological developments. Nevertheless, the majority judgment falls short in failing to consider the realities of modern living in the round. In other words, it fails not in normative substance but in execution in failing to patently militate one novelty in a locality against another. As a result of Lord Leggatt's reframing, the analysis is profoundly disrupted such that the tort of private nuisance no longer accords with Lord Goff's interpretation of reciprocity formerly at the heart of the tort.