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THE SUPREME COURT REVIEWS THE PRINCIPLES APPLICABLE TO PRIVATE NUISANCE

By Stuart Armstrong

Fearn and others (Appellants) v Board of Trustees of the Tate Gallery (Respondent) [2023] UKSC 4

FACTS

The Blavatnik Building is part of the Tate Modern. Its top floor contains a viewing gallery with 360-degree views of London. Hundreds of thousands visit the gallery each year, with up to 300 people permitted at any one time. The claimants own nearby flats, situated approximately 30 metres from the viewing gallery. The walls of the flats were predominantly made of glass. As a result, anyone on the viewing gallery could see directly into the flats and visitors frequently took photographs of the interior of the flats (some of which were posted on social media). The Claimants sought an injunction or damages.

DECISION OF THE HIGH COURT AND COURT OF APPEAL

The trial judge dismissed the claim, on the ground that the use of the top floor as a viewing gallery was reasonable and the claimants were authors of their own misfortune: they chose to buy flats with glass walls and they could take remedial measures such as installing net curtains.

The Court of Appeal dismissed the claimants' appeal on the ground that "overlooking" could not, in law, amount to nuisance.

THE SUPREME COURT'S DECISION

The Supreme Court (by a majority of 3 to 2) allowed the claimants' appeal.

In giving the judgment for the majority, Lord Leggatt made clear that there is no limit to what could potentially constitute a nuisance. Anything (short of trespass) which materially interferes with a claimant's enjoyment of rights in land was capable of being a nuisance.

He also made clear that the question is not whether the use of the defendant's land was reasonable or unreasonable. The first question is whether the defendant's use of land has caused a substantial interference with the ordinary use of the claimant's land.

However, the defendant's activity will not give rise to liability if that activity is itself necessary for the ordinary use of the defendant's land and if it is "conveniently done" i.e. with proper consideration for the interests of the neighbouring occupiers.

Lord Leggatt also stated that "coming to a nuisance" is not a defence. Even if, therefore, a defendant's activity was occurring before the claimant acquired his land, that would not be a defence. (This point was not directly in issue because the claimants purchased their flats before the viewing gallery opened.)

In applying the relevant principles to the fact, it was clear that the number of people able to look directly into the claimants' flats was intrusive and did substantially interfere with the claimants' enjoyment of their

flats. Also, the prevalence of smart phones increased the intrusiveness and meant was foreseeable that a number of visitors would take photographs.

Lord Leggatt held that the act of inviting members of the public to look out from a viewing gallery was not an ordinary use of land. Rather, it was “a very particular and exceptional use of land”.

The fact that the claimants’ flats had glass walls was a potentially relevant factor as it affected the amount of visual intrusion the claimants could be expected to tolerate. It did not provide a defence in this case, however. The key was whether the defendants’ use was common and ordinary. Owners of buildings could not complain if they were more vulnerable to inward views if the nearby buildings were used in a common and ordinary way. That was not the case, however, where the use by the neighbour was exceptional (as here).

Further, it was not a defence that a claimant would not have suffered material inconvenience if not for having an abnormally sensitive property. (Lord Leggatt did, however, leave open the possibility that there may be extreme cases where the design or construction of a building was so unusual and so far from anything that could be expected that its physical attributes might provide a defence.)

Lord Leggatt also stated that it was not a defence that the claimant could take remedial steps. Again, a crucial distinction was drawn between a lack of privacy caused by the ordinary use of nearby premises and a lack of privacy caused by the defendant’s special use of his property. A defendant cannot place a burden on a claimant to mitigate the impact of a special use of the defendant’s property.

He also rejected the Court of Appeals’ decision that “mere overlooking” could not give rise to nuisance. It was correct that the mere fact that one building overlooked another could not, in itself, give rise to nuisance. Also, merely looking at someone’s property would not amount to nuisance. However, the fact that the Tate actively encouraged people to visit, and look out from, the viewing gallery, seven days a week, did amount to nuisance. Nonetheless, cases where there was visual intrusion of sufficient duration and intensity so as to be actionable would be rare.

Finally, Lord Legatt stated that the public interest is not relevant to liability, only remedy. Clearly, there would be an issue as to whether an injunction was appropriate (and if so, on what terms) or whether damages should be awarded in lieu.

The Supreme Court did not decide the issue of remedy, and remitted the matter to the High Court. Lord Leggatt suggested that relevant matters to be considered would include: whether there was any public interest in maintaining a 360 degree gallery “capable of overriding the claimants prima facie remedy of an injunction”; whether the Tate could impose remedial measures sufficient to avoid an injunction; the scope of any injunction; and quantification of any damages.

Read the judgment here: <https://www.bailii.org/uk/cases/UKSC/2023/4.html>

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