

Case Name: *Fearn & Ors v Board of Trustees of the Tate Gallery* [2023] UKSC 4 (01 February 2023)

Full case: [Click Here](#)

Commentary: This appeal to the Supreme Court is a case concerning the Tate Modern (the “Tate”) and no doubt you have seen many summaries and blogs on this case already. In 2016, the Tate opened a new extension – a 10 storey building with a viewing platform on the top floor. The Claimants own flats in a neighbouring block of flats to the Tate that are roughly the same height above ground as said viewing platform. Unfortunately, the flats are mainly constructed of glass and from the south side of the viewing platform, visitors are able to ogle directly into the Claimants’ flats.

The viewing platform was open every day of the week and was visited by 500,000-600,000 people each year. Unsurprisingly, many visitors displayed an interest in the interiors of the Claimants’ flats, with some particularly nosy visitors bringing binoculars for a better view. Photos of the Claimants’ flats have also appeared online. The Claimants sought an injunction requiring the Tate to prevent visitors from viewing their flats from the viewing platform, or, alternatively award damages. The claim was based on the common law of nuisance.

The Supreme Court (by a majority of 3:2) allowed the appeal.

The majority judgment

a) Principles of the tort of private nuisance

Nuisance is a use of the land which wrongfully interferes with the ordinary use and enjoyment of neighbouring land. For an interference to be a nuisance, it must be substantial as judged by the standards of the ordinary person. Even when there is a substantial interference, the defendant will not be liable if it is doing no more than making a common and ordinary use of its own land. You must then look at the character of the locality to determine what is an ordinary use of land.

It does not matter for the purposes of a nuisance claim that the defendant is using its land reasonably or in a way that is beneficial to the public. When judging whether one person’s use of the land has infringed another’s rights, the public utility of such a use is not relevant. The benefit of the land use to the wider community may have a place in deciding what type of remedy to grant – i.e. awarding damages instead of an injunction might be more appropriate. This consideration does not justify denying a victim of

having a remedy at all.

b) The application of the law

The trial judge found that the Claimants' flats are under near constant observation by visitors to the viewing platform. The ordinary person would consider this level of intrusion to be a substantial interference with the ordinary use and enjoyment of their home.

Inviting members of the public to admire the view from a viewing platform could not be said to be a common and ordinary use of the Tate's land. This is despite the fact of being an art museum in a built-up area of south London. It was found that the Tate is therefore liable to the Claimants in nuisance. The High Court will decide the appropriate remedy.

c) Errors of the trial judge

The trial judge made three errors of the law, allowing them to reach the wrong conclusion:

1. Applied the wrong test by asking whether the Tate was making an "unreasonable" use of its land. The test should have been whether the use was a common and ordinary use.
2. Considered that the Claimants had exposed themselves to visual intrusion into their homes because they had chosen to live in flats with glass walls. It is right that if the defendant had been making an ordinary use of its land, the Claimants could not have complained about any visual intrusion resulting from the design of their flats. As was the case here, where a defendant is using its land in an abnormal and unexpected way, you cannot argue that the nuisance would not have been suffered if the victim's property had been of a different design or construction.

3. The trial judge considered that it was reasonable to expect the claimants to take measures to avoid being seen from the viewing platform. This wrongly placed the responsibility on the victim to avoid the consequences of the Defendant's abnormal use of their land.

d) The error of the Court of Appeal

Although the Court of Appeal recognised that the trial judge had made the above errors, the court decided that the claim must fail because "mere overlooking" cannot give rise to liability for nuisance. This is true, a person cannot complain of nuisance because their flat is overlooked by another building or because people on the top floor of a that building can look into their homes for a peek inside. This is not the complaint made in the present case. The complaint in this case is that members of the public can peer into the Claimants' flats from a viewing platform that is open every day of the week. It was found that there is no reason why constant visual intrusion cannot give rise to liability for nuisance.

For completeness, the minority judgment is set out below.

The minority judgment

The minority judgment considered that the appeal raised two questions:

- 1) Whether it is possible, in principle, for the tort of private nuisance to apply in the case of residential property subject to the visual intrusion of people looking into the living areas of the property.

Comment

The minority agree that this is possible.

- 2) If 1) is possible, whether the Appellants have established that there is an actionable private nuisance by reason of the visual intrusion experienced from the viewing platform.

Comment

This depends on the principles of reciprocity and compromise

applicable to the Appellants and the Tate and the application of a standard of objective reasonableness informed by the character of the relevant locality – rather than focusing on whether the use of the land is “ordinary”. It was found that the judge was better placed than the appeal court to determine the answer to this question 2).

The judge was entitled to find that the use of the Appellants’ land in the particular locality was not ordinary and that it was possible for them to take normal screening measures to limit the effect of any visual intrusion and consequently, according to the objective standard of reasonableness the Tate had not committed a nuisance.

See [Simonicity](#) for further discussion.

Case summary prepared by Amy Penrose