Private law restrictions on development: *Fearn and others v Board of Trustees of the Tate Gallery* [2023] UKSC 4; [2023] 2 WLR 339

David Sawtell

The facts

- Four flats in a modern development in central London called Neo Bankside.
- Overlooked by a new extension of the Tate Modern known as the Blavatnik Building.
- Visitors to the viewing gallery are able to see directly into the living accommodation of the claimants' flats.
- Visitors to the viewing gallery frequently look into their flats and take photographs.

The claim

- Claim for an injunction requiring the Tate Modern to close or screen the part of the gallery which gives views into their flats.
- Relied on private nuisance; alternatively, section 6 of the Human Rights Act 1998 and article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

First instance

[2019] EWHC 246 (Ch); [2019] Ch 369

Mann J

- Claim dismissed.

Court of Appeal

[2020] EWCA Civ 104; [2020] Ch 621

Sir Terence Etherton MR, Lewison, Rose LJJ (single judgment)

- Appeal refused, different grounds: mere overlooking not capable of giving rise to a cause of action in nuisance.

(https://www.39essex.com/information-hub/insight/david-sawtells-analysis-development-implications-recent-court-appeal)

Supreme Court

[2023] UKSC 4;
[2023] 2 WLR 339

- Lord Leggatt (Lord Reed and Lord Lloyd-Jones agreed)
- Lord Sales dissenting (Lord Kitchin agreed)

Scope of the tort

- Both Lord Leggatt and Lord Sales made it clear that nuisance is a ‘tort to land’.
- The harm that the law protects a claimant from is diminution in the utility and amenity value of the claimant’s land, not personal discomfort to the persons who are occupying it.
- The tort has a wide ambit; must be a **substantial interference** with the **ordinary use** and enjoyment of the neighbours’ land.
- Lord Leggatt referred to Mann J’s example of the viewing tower, built only to enable views into neighbours’ gardens.

Test of ‘reasonableness’

- Lord Leggatt and Lord Sales differed on the test of ‘reasonableness’.
- Lord Leggatt considered it “*entirely open-ended and lacking in content”* [20].
- Cited Lord Goff’s speech in *Cambridge Water Co v Eastern*
- *Counties Leather plc*[1994] 2 AC 264.

Test of 'reasonableness'

"…although liability for nuisance has generally been regarded as strict, [it] has been kept under control by the principle of reasonable user - the principle of give and take as between neighbouring occupiers of land, under 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 66, 83, per Bramwell B. The effect is that, if the user is reasonable, the defendant will not be liable for consequent 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."

Test of ‘reasonableness’

- Lord Leggatt – the phrase ‘reasonable user’ was a shorthand for Bramwell B’s principle in *Bamford v Turnley.*
- Referred to the Court of Appeal decision in *Barr v Biffa Waste Services Ltd* [2013] QB 455: reasonableness was a shorthand for the traditional common law tests.

Test of ‘reasonableness’

- Lord Leggatt considered that the level of visual intrusion was a substantial interference with the ordinary use and enjoyment of the claimants’ properties.
- “*Inviting members of the public to look out from a viewing gallery is manifestly a very particular and exceptional use of land*.”
- There was a private law nuisance.

Test of 'reasonableness'

- Lord Leggatt considered that Mann J went wrong by considering 'reasonableness' in all the circumstances (noting that *Barr v Biffa Waste Services* had apparently not been cited to him); therefore concluded that operating a viewing gallery was not an inherently unreasonable activity in the neighbourhhood.
- Lord Leggatt: "*Nowhere did the judge consider whether the operation of a viewing gallery is necessary for the common and ordinary use and occupation of the Tate's land.*" [55]

Prophylactic measures not relevant

- Lord Leggatt also considered that Mann J went wrong by considering the design of the flats.
- [Jonathan Morgan: "*Perhaps people who live in glass houses shouldn't stow thrones*": (2019) Cambridge Law Journal, 78(2), 273-276]
- Lord Leggatt: relevant to the question of sensitivity to the ordinary use of neighbouring land. Focus is on the defendant's use.
- Not a good defence to refer to possible remedial measures.
- (Left open question of "*extreme cases*" of unusual design or construction).

Public interest

- ‘Public interest’ in the viewing gallery is irrelevant when it comes to liability.
- Becomes relevant when it comes to remedy (i.e. whether or not to grant an injunction, or damages in lieu of an injunction).

Lord Sales' dissent

- The unifying principle underlying the tort is reasonableness between neighbours: *Cambridge Water Co v Eastern Counties Leather plc*[1994] 2 AC 264. Differed in his interpretation of Lord Goff's speech.
- Reasonableness is to be judged objectively.
- Principle of reasonable reciprocity and compromise: "give and take".
- Also agreed that the extreme degree of visual intrusion would be a serious interference with claimants' ability to enjoy their property.

Lord Sale's dissent

- Lord Sales regarded 'reasonableness' as taking into account the interests of both the claimant and the defendant and their competing interests.
- The fundamental principle remains that of reasonable user, not common and ordinary.
- "*In a situation like the present where the respective use of its land by each of a claimant and a defendant falls outside existing standards of common and ordinary use of land in the locale, I can see no principled justification why unusual use of land by the defendant should necessarily have to give way to unusual use of land by the claimant without any attempt to balance the competing interests*." [227]

Lord Sales' dissent

- Considered that Mann J's approach to the application of the 'give and take' test was correct.
- The judge was also correct to take into account self-help measures that were available to the Claimants which it was not unreasonable to take.
- "*The owners of the flats in Neo Bankside could not turn the operation of the viewing gallery into a nuisance by reason of the development of their own property according to a design which was out of line with the norm for the area.*" [278]
- Would have dismissed the appeal (for different reasons to the Court of Appeal).

Overlooking versus intrusion

Attorney General v Doughty (1752) 28 ER 290

- Claim for an injunction to stop the construction of buildings which would "*intercept the prospect from Gray's Inn gardens".*
- Hardwicke LC: "*I know no general rule of common law, which warrants that, or says, that building so as to stop another's prospect is a nuisance. Was that the case, there could be no great towns ; and I must grant injunctions to all the new buildings in this town*".

(see David Howarth, 'Nuisance, planning and human rights: throwing away the emergency parachute' (2020) CLJ 79(3) 394.

Overlooking versus intrusion

- Both Lord Leggatt and Lord Sales criticised the Court of Appeal's equation of overlooking with intrusion: they agreed that intensive degree of visual overlooking by large numbers of people amounts to visual intrusion and hence can amount toa nuisance.
- Both agreed with the Court of Appeal that overlooking *by itself* cannot give rise to liability in nuisance.

Extreme facts?

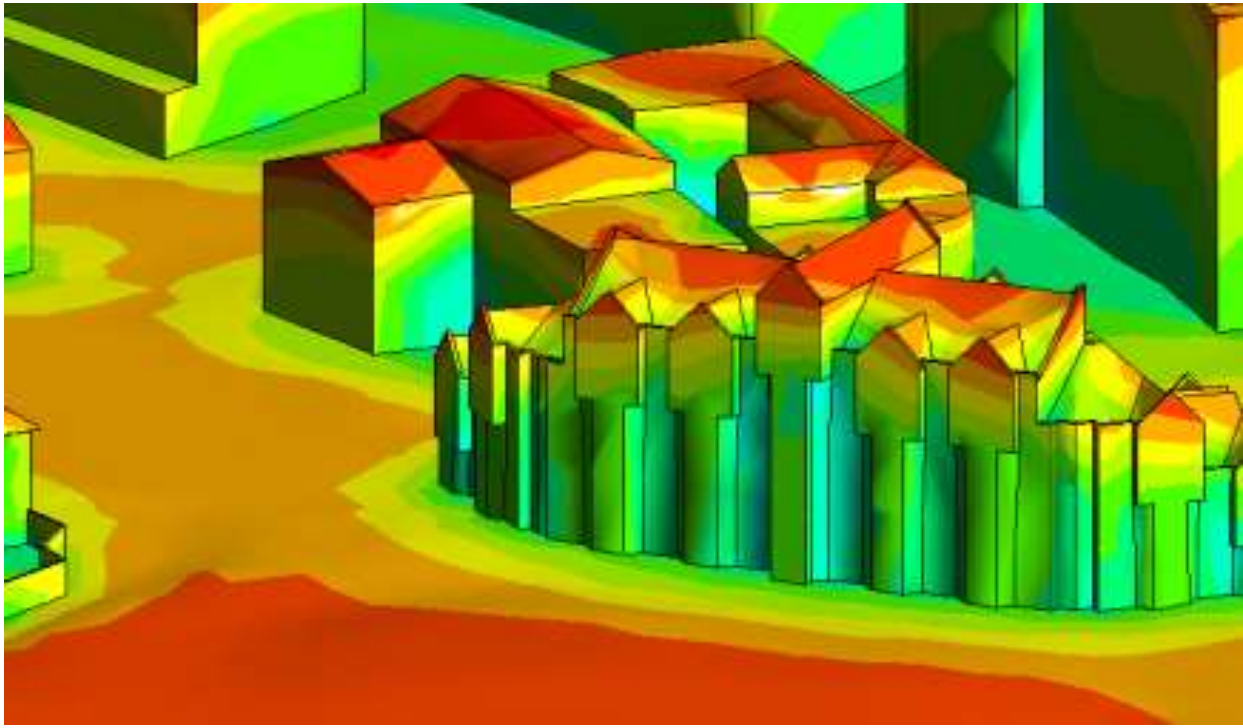
Watchtower located in Serra das Talhadas, Portugal, designed by Álvaro Siza https://www.archdaily.com/964260/alvaro-sizas-new-steel-frame-watchtower-for-ecotourism-in-portugal)

Extreme facts?

- Very unusual to have a purpose-built viewing platform directly adjacent to residential dwellings.
- The dwellings themselves are unusually open in their design.

Implication: 3D development?

- Need to consider land usage and property rights in three-dimensional space.
- Already familiar when carrying out a rights of light analysis.



Thank you for listening

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