Fearn and others (Appellants) v Board of Trustees of the Tate Gallery (Respondent)
[2023] UKSC 4
On appeal from: [2020] EWCA Civ 104

Date:1 February 2023

Justices

Lord Reed, Lord Lloyd-Jones, Lord Kitchin, Lord Sales, Lord Leggatt

Background to the Appeal

The Tate Modern (the ***Tate***), a public art gallery in London, opened a new extension in 2016 called the Blavatnik Building. This building is ten stories high and, on its top floor, has a viewing platform which offers panoramic views of London.

The claimants own flats in a block of flats neighbouring the Tate that are at around the same height above ground as the viewing platform and have walls constructed mainly of glass. On the south side of the viewing platform, visitors can see directly into the claimants' flats.

At the time of the trial the viewing platform was open every day of the week and was visited by an estimated 500,000-600,000 people each year. The trial judge found that a very significant number of visitors display an interest in the interiors of the claimants' flats. Some look, some peer, some photograph, some wave. Occasionally binoculars are used. Many photographs have been posted online.

The claimants seek an injunction requiring the Tate to prevent its visitors from viewing their flats from the viewing platform, or alternatively, an award of damages. Their claim is based on the common law of nuisance.

The claims were dismissed by the High Court ([2019] EWHC 246 (Ch)) and, for different reasons, by the Court of Appeal ([2020] EWCA Civ 104). The claimants now appeal to the Supreme Court.

Judgment

The Supreme Court (by a majority of 3 to 2) allows the appeal. Lord Leggatt, with whom Lord Reed and Lord Lloyd-Jones agree, gives the majority judgment. Lord Sales, with whom Lord Kitchin agrees, gives a dissenting judgment.

Reasons for the Judgment

(i) Majority judgment

(a) Principles in the tort of private nuisance

The majority judgment reviews the core principles of the law of nuisance. In short, a nuisance is a use of land which wrongfully interferes with the ordinary use and enjoyment of neighbouring land. **[9]** -**[11]** To amount to a nuisance, the interference must be substantial, judged by the standards of the ordinary person. **[22]** Even where 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. **[27]** What constitutes an ordinary use of land is to be judged having regard to the character of the locality, eg whether it is a residential or an industrial area.

It is no answer to a claim for nuisance to say that the defendant is using its land reasonably or in a way that is beneficial to the public. **[47]** In deciding whether one person's use of land has infringed another's rights, the public utility of the conflicting uses is not relevant. **[121]** The benefit of land use to the wider community may be considered in deciding what remedy to grant and may justify awarding damages rather than an injunction, but it does not justify denying a victim any remedy at all. **[122]**

(b) The application of the law in this case

The trial judge made findings that the claimants' flats are under near constant observation by visitors to the viewing platform. There are hundreds of thousands of spectators each year and many take photographs and post them on social media. The ordinary person would consider this level of intrusion to be a substantial interference with the ordinary use and enjoyment of their home. **[48]**

By contrast, inviting members of the public to admire the view from a viewing platform is not a common and ordinary use of the Tate's land, even in the context of operating an art museum in a built-up area of south London. **[50]** The Tate is therefore liable to the claimants in nuisance. The court heard no argument on the appropriate remedy and so remitted the case to the High Court to decide this question. **[131]**-**[132]**

(c) The errors of the trial judge

The trial judge reached the wrong conclusion as a result of three errors of law:

1. The judge applied the wrong test by asking whether, in operating the viewing platform, the Tate was making an 'unreasonable' use of its land, instead of asking whether it was a common and ordinary use. **[54]**-**[55]**

2. The judge considered that the claimants had exposed themselves to visual intrusion into their homes by choosing to live in flats with glass walls. It is right that, if the Tate 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. **[62]**-**[63]**But where, as here, a defendant is using its land in an abnormal and unexpected way, it is no answer to a claim in nuisance to say that the claimant would not have suffered a nuisance if their property had been of different design or construction. **[72]**-**[75]**

3. The judge also held that it was reasonable to expect the claimants to take measures to avoid being seen from the viewing platform, such as putting up blinds or net curtains. This wrongly placed the responsibility on the victim to avoid the consequences of the defendant's abnormal use of their land. **[88]**

(d) The error of the Court of Appeal

The Court of Appeal recognised that the judge had made these errors but decided that the claim must nevertheless fail because "mere overlooking" cannot give rise to liability for nuisance. It is true that a person cannot complain of nuisance because their flat is overlooked by another building or because people on the top floor of that building can look into their homes and see inside **[90]**-**[91]**. However, that is not the complaint made in this case. The claimants' complaint is that the Tate invites members of the public to look out from a viewing platform from which they can, and many do, peer into the claimants' flats and allows this activity to continue without interruption for most of the day every day of the week. **[92]** There is no reason why constant visual intrusion of this kind cannot give rise to liability for nuisance and, on the facts found by the trial judge, it does in this case.

(ii) Minority judgment

The minority considered that this appeal raises two questions. First, whether it is possible, in principle, for the tort of private nuisance to apply in the case of a residential property subject to the visual intrusion of people looking into the living areas of the property. Secondly, if this is possible, whether the Appellants have established that there is an actionable private nuisance by reason of the visual intrusion they experience from the Tate's viewing platform [134].

On the first question, the minority agree that it is possible, as a matter of principle, for a private nuisance to exist where residential property is subject to visual intrusion **[158-169, 179]**. On the second question, they consider that the answer depends on principles of reciprocity and compromise applicable to the Appellants and the Tate alike and the application of a standard of objective reasonableness informed by the character of the relevant locality, rather than focusing on whether a defendant's use of its land is 'ordinary' **[158-169, 226-249, 252]**.

The judge was better placed than an appeal court to determine the answer to the second question. He had not misdirected himself and was entitled to find that the use of the Appellants' land in the particular locality was not ordinary, that it was possible for them to take normal screening measures to limit the effect of any visual intrusion they experienced and that according to an objective standard of reasonableness the Tate had not committed a nuisance. **[256-279]**

References in square brackets are to paragraphs in the judgment

Note