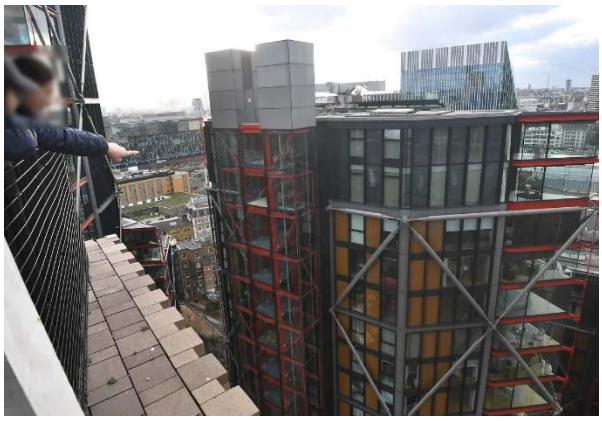
Fearn v Board of Trustees of the Tate Gallery
[2023] UKSC 4

Summary



The claimants sued the Tate Gallery in nuisance for maintaining a viewing gallery at the top of an extension (the Blavatnik Building) to the Tate Modern from which visitors to the gallery could look into triangular, glass-walled, areas of the claimants' flats known as the 'winter gardens'. The claimants' flats were in Block C of four blocks of flats known as 'Neo Bankside'. Neo Bankside and the Blavatnik Building were both designed at roughly the same time: 2006. Neo Bankside was completed in 2012, while the Blavatnik Building was only finished in 2016. The Blavatnik Building's viewing gallery attracted half a million visitors a year, and those visitors would frequently stare into, and take photographs, of the 'winter gardens', despite signs asking visitors to respect the Tate's neighbours' privacy.

The claimants commenced proceedings against the Tate Gallery for private nuisance in 2017. Their claim was dismissed at first instance by Mann J ([2019] Ch 369) on the basis that by choosing to live in flats with glass walls, the claimants had consented to the possibility that others could look into their property. The claimants appealed, but their claim was also dismissed by the Court of Appeal ([2020] Ch 621) on the basis that there was no authority in favour of the proposition that 'mere overlooking' of someone else's property was capable of amounting to a private nuisance. The claimants appealed again, and the UK Supreme Court held by a 3:2 majority that the claimants had a good claim in private nuisance against the Tate Gallery.

Lord Leggatt's judgment

Lord Leggatt gave the majority judgment, with which Lords Reed and Lloyd-Jones agreed. Lord Leggatt thought that *Fearn* was 'a straightforward case of nuisance' ([7]). That the claimants could sue in nuisance followed from the facts that:

(1) the law of private nuisance protects a claimant from 'a diminution in the utility and amenity value of the claimant's land, and not personal discomfort to the persons who are occupying it' ([11]);

(2) 'there is no conceptual or a priori limit to what constitutes a nuisance…the categories of nuisance are not closed' ([12]);

(3) liability in nuisance turns on whether 'the defendant's use of land has caused a *substantial* interference with the *ordinary* use of the claimant's land' ([21], emphasis in original);

(4) 'it is no answer to a claim for nuisance to say that the defendant is using its land reasonably' ([31]);

(5) instead, in judging whether there has been a substantial interference with the ordinary use of the claimant's land, the courts apply a rule of 'give and take, live and let live' where 'people cannot fairly demand of others behaviour which they would not at the same time allow others to demand of them' ([34]), which 'principle of reciprocity explains the priority given by the law of nuisance to the common and ordinary use of land over special and unusual uses' ([35]).

(6) 'it is not a defence to a claim for nuisance that the activity carried on by the defendant is of public benefit' ([47]).

Once these points are understood, Lord Leggatt contended, the outcome of the case is 'entirely straightforward' ([48]). It was 'not difficult to understand how oppressive living [in one of the flats overlooked by the Tate's viewing gallery] would feel for an ordinary person – much like being on display in a zoo' (ibid). Given this, it was 'beyond doubt that the viewing and photography which take place from the Tate's building cause a substantial interference with the ordinary use and enjoyment of the claimants' properties' (ibid). The Tate's maintenance of a viewing gallery both created 'a natural and foreseeable consequence' of the claimants' suffering that interference ([49]), and the Tate could not claim that 'operating a viewing gallery is necessary for the common and ordinary use and occupation of the Tate's land' ([50]). As a result, 'the Tate cannot rely on the principle of give and take and argue that it seeks no more toleration from its neighbours for its activities than they would expect the Tate to show for them' (ibid).

After discussing, and criticising, the reasoning underlying the first instance judge's and Court of Appeal's decisions in favour of the Tate (the relevant paragraphs of this part of Lord Leggatt's judgment will be discussed further in the 'Comments' section of this note), Lord Leggatt turned to the issue of what the remedy in this case should be. He conceded that the public interest could be taken into account in deciding whether to award a claimant who was the victim of a nuisance an injunction or damages *in lieu* of an injunction ([120]). But not having heard argument on the issue of remedies, he thought that the question of what remedy to award in this case was 'not one which this court can decide' ([130]). He therefore thought the case should be remitted to 'the High Court to determine the appropriate remedy' ([133]), assuming that the parties could not reach an agreement on a remedy ([132]).

Lord Sales' dissent

Lord Sales dissented, with the agreement of Lord Kitchin. Lord Sales took the view that the 'unifying principle underlying the tort [of private nuisance] is reasonableness between neighbours' ([158]). This 'objective principle' of 'give and take' between neighbours accounts for why a defendant cannot be held liable for using their land in a way that is both 'common and ordinary' for the defendant's locality and 'conveniently done' ([166]). But where a defendant does not use their land in a way is 'common and ordinary', that did not necessarily mean their use of land amounted to a nuisance 'since otherwise there would be no scope for development and change and the vibrancy of modern life would be stultified' ([225]; also [230-[231]).

Lord Sales thought that there was no reason why 'visual intrusion…should fall outside the tort' of private nuisance, provided that the intrusion reached 'a certain level of intensity [which caused] a sensible diminution of the comfortable enjoyment of one's home' ([170]). Lord Sales went on to observe that it would be 'odd' if the law on private nuisance did not protect one's ability to live in a house 'with a reasonable degree of privacy and without intrusion by others' when 'other aspects of [one's] enjoyment [of one's house] which are protected (such as not to be subjected to unreasonable noise, smells, dust or vibrations) might often be less disturbing as interferences with that enjoyment' ([176]). He argued that 'The principle of "give and take" provides the appropriate way to balance the competing interests which arise in relation to visual intrusion, just as it does for other forms of intrusion such as by sound, smell or vibration' ([198]).

Applying that principle to *Fearn*, Lord Sales thought that there was 'no good reason why one should leave out of account reasonable self-help measures which might be available to [a claimant] complaining about visual intrusion' ([214]) when trying to strike the right balance between 'the property rights of different landowners' ([216]). Where a defendant might

reasonably be expected to take steps to 'reduce the friction' between the defendant and claimant, a court might require 'an undertaking to be given or [issue] an injunction', while the court might refuse 'to grant relief [to a claimant] in circumstances where it thinks that relevant self-help measures are available, in the light of which it would be unreasonable to prevent the defendant from using its land in the manner complained of' (ibid).

In a case like *Fearn*, where the defendant's use of land was not 'common and ordinary', consideration of whether the use of land amounted to a nuisance turned on 'whether the claimants' own use of their land is common and ordinary for the locale, whether by their use they have made themselves particularly vulnerable to the type of intrusion of which they now complain and whether there are measures of self-help available to them of a comparatively modest and normal kind which would reduce that intrusion to an acceptable degree in the context of the locale' ([226]). Taking these factors into account, Lord Sales reached the conclusion – in line with that reached by Mann J – that the claimants could not complain of a nuisance. While the degree of visual intrusion in *Fearn* would amount to a nuisance where the claimant's property did not 'involve heightened sensitivity to that form of intrusion' ([271]), the Neo Bankside development involved 'striking buildings of architectural distinction likely to attract attention and the gaze of strangers' ([272]).

Comments

A straightforward case of nuisance?

It is hardly surprising that Lord Leggatt thought that *Fearn* was a straightforward case given the high degree of agreement between the majority and minority in *Fearn*. (Given this level of agreement, what is surprising is that it took well over a year to deliver the decision in *Fearn*, with arguments in the case being made on 7 and 8 December 2021, and judgment being handed down on 1 February 2023. Surely there was not that much to discuss?) Crucially, both the majority and minority agreed that (i) visual intrusion into someone else's premises was capable of amounting to a nuisance, and (ii) the principle of 'give and take, live and let live' (a phrase repeated, one way or another, 60 times in the judgments) was fundamental to determining whether an interference with the use value (to use a Marxist term) of someone's land amounted to a nuisance.

Despite this, the release of the decision in *Fearn* triggered more discussion on an email-based, worldwide Obligations Discussion Group than any other case in the history of the Group (which must have been running for about 20 years now). The main subject of discussion was over (i) – whether visual intrusion is capable of amounting to a nuisance. Lord Leggatt's position that 'Nuisance can be caused by any means' (heading above [12]) made this issue 'straightforward'; and there was nothing in Lord Sales' judgment to indicate that he fundamentally disagreed with this (the relevant paragraphs in his judgment are [170]-[179]).

However, it is not at all clear that nuisance is as flexible as the UK Supreme Court thought it is. Before *Fearn*, it had been thought that there were four ways of committing the tort of private nuisance: (1) being responsible for an *emanation* onto the claimant's land; (2) being responsible for an *encroachment* of something from your land onto the claimant's land; (3) being responsible for something being *obstructed* from going onto the claimant's land, when the claimant had a right, attached to the land, to have that thing come onto their land; (4) being responsible for a use of land that amounts to an *affront* to right-thinking people, with the result that the claimant's ability to use their land is interfered with. The facts of *Fearn* did not fall within any of these categories: there was no emanation or encroachment onto the claimants' land; no obstruction of something they had a right to receive; and no affront. *Fearn* has, then, expanded the categories of situations where a nuisance might be committed; and indeed, has

suggested it would be a mistake to think that there are any such categories in the sense that a given case has to be made to come under one such category in order to amount to a nuisance at all.

This is what makes *Fearn* controversial (and important), and has resulted in some commentators already reacting to it with some consternation. Some of *Fearn*'s critics seem to take the view that a private nuisance must involve a *physical interference* with either the claimant's land or some right attached to the land. On what we can call the *Physical Interference Limit* (or '*PIL*' for short), the correctness of finding a private nuisance in category (4) cases looks doubtful and those cases (such as *Laws* v *Florinplace* [1981] 1 All ER 659, where it was held arguable that the running of a sex shop in a residential area might amount to a nuisance to those living in that area) should be either overruled or re-rationalised as resting on some other basis (such as the law on public nuisance). If *PIL* is correct, *Fearn* is indeed a 'straightforward case' but in the other direction: as there was no physical interference with the claimants' land or a right attached to the land in *Fearn*, there was simply no way the claimants could have been allowed to sue the Tate in private nuisance.

The (implicit) rejection of *PIL* in *Fearn* has two obvious effects. First, it opens the doors to claims in private nuisance being made where a defendant has created a *bad view* that interferes with the use value of the claimant's land. (The standard exam problem question being one where a defendant erects on their own land, which adjoins the claimant's land, a fence daubed with abusive slogans on the side facing the claimant's property.) Previously, these claims would have been dismissed on the basis that there was no emanation onto the claimant's land (unless one wanted to argue that the photons radiating out from the bad view counted), no encroachment, no obstruction, no affront. But no more – it is very much a live question whether there is liability in such a case after *Fearn*.

Even more radically, *Fearn* opens the door to liability in cases involving an obstruction of something going on to the claimant's land, with the result that the use value of that land is diminished, when previously the claimant's claim in nuisance would have been dismissed on the basis that the claimant had *no right* to receive the thing obstructed.

The two key cases here are *Bradford* v *Pickles* [1895] AC 587 and *Hunter* v *Canary Wharf* [1997] AC 655. In both cases the claim in private nuisance – for interruption of water that would otherwise have flowed into the claimant's reservoir (in *Bradford*) and for blocking TV signals from going onto the claimants' properties (in *Hunter*) – was dismissed. There could be no right in the claimants to receive water running under the defendant's property in undefined channels when prior authority had established that the defendant had an unlimited right to take as much of that water as he liked and for any reason (*Bradford*), and just as there was no such thing as a 'right to a (decent) view', there could be no such thing as a right to receive TV signals (*Hunter*).

The results in these cases would be regarded as obvious under *PIL* – in neither case could the claimants argue that they had suffered a physical interference with either their land or some right attached to the land. But once you reject *PIL*, as *Fearn* has done, what is to stop the claimants in cases like these arguing that they have suffered an interference with the use value of their land that under the principle of 'give and take' should be regarded as a nuisance?

Bradford v *Pickles* was not mentioned in *Fearn*, but *Hunter* v *Canary Wharf* was. Lord Leggatt thought that the decision in that case was based on the 'general rule at common law that anyone may build whatever they like on their land, unless this violates an agreement not to do so or an acquired right to light or to a flow of air through a defined aperture' ([36]). Lord Leggatt went on to endorse this rule in emphatic terms: 'The right to build (and demolish) structures is fundamental to the common and ordinary use of land, involving as it does the basic freedom to decide whether and how to occupy the space comprising the property. It follows that interference from construction (or demolition) works will not be actionable provided it

is…"conveniently done", that is to say, in so far as all reasonable and proper steps are taken to ensure that no undue inconvenience is caused to neighbours' ([37]).

Lord Leggatt cites in support of that last point *Andreae* v *Selfridge & Co Ltd* [1938] Ch 1. But that was an emanation case, where the claimant complained of noise and dust created by the defendants' building works. If liability in a case like *Hunter* – where the defendants' building is obstructing something coming onto the claimant's land – now turns on whether the building work was 'conveniently done' then it seems that Lord Cooke was right to suggest in *Hunter* (at 721) that if the defendants in that case had erected their tower *maliciously* then they would have been held liable to the claimants in nuisance for blocking their TV signals. But he was (at the time) quite wrong say that, as *Bradford* v *Pickles* shows.

Lord Sales' explanation of *Hunter* was also somewhat unorthodox, observing that the issue at stake in that case was whether the tort of private nuisance should be 'enlarged to cover [the] new form of amenity' represented by watching TV, and the claimants' claim in *Hunter* failed because the House of Lords 'considered the relevant analogy to be with a building erected so as to interfere with a neighbour's view or flow of air, which are interests which the law of nuisance does not protect' ([203]).

It is clear that the rejection of *PIL* in *Fearn* has major implications in bad view or obstruction cases – and will be a major worry for developers, who are particularly susceptible to claims for creating bad views ('I can't bear looking out of my window any more because of that monstrous carbuncle') and obstructing things that would previously have gone onto the claimants' land, and enhanced its use value (as *Hunter* shows). (Developers will, however, gain some consolation from Lord Leggatt's words at [62] that 'In an inner-city environment the occupier of a flat high above ground level must recognise the possibility that a building of similar height might be constructed nearby from the occupants can see through their windows... To the extent that such a nearby building is used in a common and ordinary way – for example, as housing or offices – the fact that the interiors of flats with glass walls can be seen in something the owners have to put up with in accordance with the rule of give and take.')

So – the big question is whether the UK Supreme Court was right to reject *PIL*. The Court of Appeal was leery of doing this in *Fearn* on *policy* grounds – they thought rejecting *PIL* would make the law of private nuisance too unpredictable and difficult to apply. This is not a mean or irrelevant concern, but Lord Leggatt was right to observe that 'This argument is deeply unpersuasive. The law would be utterly ineffectual if the possibility of hard cases were treated as a reason to deny relief in clear cases' ([107]) – which is what he thought *Fearn* was. Lord Sales was similarly unimpressed with the Court of Appeal's reluctance to afford a remedy in 'overlooking' cases ([195]): 'the absence of clear legal guidance of the kind [demanded by] the Court of Appeal is a general feature of the law of nuisance, as much as in relation to noise, smells and the like as in relation to visual intrusion' ([200]).

Are there more *principled* reasons for adhering to *PIL*? Two might be given. The first is that physical interferences with a claimant's interests are the common law of tort's bread and butter – being punched on the nose, being locked in a room, being made sick by bad (and false) news about your husband or seeing a dead snail in your ginger beer bottle, being revolted by the smell of burning napalm drifting across your land in the morning.

In giving a remedy for non-physical interferences *Fearn* departs from this traditional focus of tort law on physical interferences with claimants' interests. In some ways, *Fearn* can be seen as taking the opposite stance to that taken by the House of Lords in another 3:2 case: *OBG Ltd* v *Allan* [2008] 1 AC 1. In that case, the House of Lords declined (Lord Nicholls and Lady Hale dissenting on this point) to extend the law on conversion to interferences with an intangible (a right to sue on a contract), preferring to keep the law on conversion focussed on its traditional role of protecting against physical interferences with tangible goods. By contrast, in rejecting *PIL*, *Fearn* extends (or perhaps we should say in light of category (4) affront cases,

confirms the extension of) the law on private nuisance to protecting people against non-physical interferences with the use value of their land.

Of course, none of this establishes that the common law of tort *should not* extend its reach to protect people against non-physical interferences with their interests. But it does indicate that if it does attempt to do this, it should do so with caution, attentive to two particular concerns that might be raised by such an extension: (1) physical interferences tend to be localised either in terms of how they occur or how they impact on other people, while a non-physical interference may not be so localised (think of how many people might be able to sue for visual intrusion from a helicopter business that regularly takes tourists through the canyons of skyscrapers in London); (2) physical interferences tend to be unwelcome regardless of who the claimant is, whereas a non-physical interference tends only to impact on the claimant because of the claimant's goals and desires (obviously, an exhibitionist would have had no problem living in Block C of Neo Bankside; and nor would someone who kept the 'winter gardens' part of their flat for its original use as an indoor balcony for viewing London, a use of land identical to that of Tate's viewing gallery).

A second reason for adhering to *PIL* might appeal to those who think of the common law of tort in Kantian terms, as concerned to ensure that each of us enjoys an equal right to determine what happens to the things that belong to us: our bodies, and our property. In the absence of a physical interference with your land, or a right attached to your land, *nothing* has happened to your land. Someone's staring at your land may reduce its usefulness to you, but the land remains as it was. In the same way, your staring at me in the gym might put me off ever visiting that gym again, and this might cause me a great deal of inconvenience in terms of finding another way of getting as much exercise as I was getting in that gym. But that inconvenience is neither here nor there when it comes to my rights to determine what happens to the things that belong to me. They are unaffected by your staring at me and my consequent inconvenience; so my rights to determine what happens to the things that belong to me are still intact.

Neither of these reasons are determinative. We do not need to be Kantians in thinking about the common law of tort (I, for one, am not), and it may be argued that tort law needs to recognise that in the 21st century intangible interests (such as in seclusion, time, leisure and access to intangible resources such as the Internet and digital currencies) will be far more important to people's flourishing than the sort of physical interests traditionally protected under the law of tort in the 19th and 20th centuries. But enough has been said to show that *Fearn* is far from a straightforward case of private nuisance.

Newark's error

While Lord Leggatt took the position that 'nuisance may be caused by any means', there was *one* limit on how a nuisance may be caused that he implicitly endorsed in his judgment. In setting out the 'Core Principles of Private Nuisance', Lord Leggatt began with a proposition laid out in Professor FH Newark's 'classic article' ([9]) 'The boundaries of nuisance' (1949) 65 *Law Quarterly Review* 480, at 489:

> 'The term "nuisance" is properly applied only to such actionable user of land as interferes with the enjoyment by the plaintiff of rights in land.'

When I read this sentence in Lord Leggatt's judgment, it shook me a little as Newark's article belongs in the same bin as Fuller and Perdue's 'Reliance interest in contract damages' (1936) 46 *Yale Law Journal* 52, and Calabresi and Melamed's 'Property rules, liability rules, and inalienability: one view of the cathedral' (1972) 85 *Harvard Law Review* 1089 – a bin marked 'Legal classics that are deeply and damagingly wrong'. Newark was wrong in 'The boundaries

of nuisance' about the rule in *Rylands* v *Fletcher* (and adopting his views caused the House of Lords to screw up that area of law in *Transco plc* v *Stockport MBC* [2004] 2 AC 1) and he was wrong about the law on private nuisance as well.

What's so wrong about the statement above? Let's set it out again, with the error highlighted:

> 'The term "nuisance" is properly applied only to such actionable *user of land* as interferes with the enjoyment by the plaintiff of rights in land.'

Newark's error is that there is no need to *use land* in order to commit the tort of private nuisance. For example, I imagine that the viewing gallery at the Tate Modern is currently closed. What if I cater for the frustrated desires of tourists to see London from a great height, and in particular look into the flats in the Neo Bankside development, by flying hot air balloons from the street outside the Tate Modern? Given the decision in *Fearn*, it is impossible to imagine that the claimants in *Fearn* would not be able to obtain an injunction against me even though the visual intrusion in my case comes from the air, not the Tate Modern.

Lord Sales adopts an even more restrictive view as to how the tort of private nuisance may be committed, saying that 'The unifying principle underlying the tort [of private nuisance] is reasonableness *between neighbours*' ([158], emphasis added). It is, of course, not the case that the law of private nuisance only operates between neighbouring landowners. One of the cases cited by Lord Sales (at [172]) – *J Lyons & Sons Ltd* v *Wilkins* [1899] 1 Ch 255 – shows that this is the case, while at the same time providing further support against Newark's thesis on the scope of private nuisance. In that case, the defendant trade unionists organised pickets to stand on the street outside the claimants' factory and the premises of one of the claimants' suppliers in order to persuade people not to work for the claimants. The claimants obtained an injunction against the picketing, on the basis that it amounted to a nuisance.

The reason for emphasising these points is that the 'principle of give and take, live and let live' that both Lords Leggatt and Sales see as lying at the heart of the law on private nuisance *only makes sense* if we think of the law on private nuisance as regulating *competing uses of land*. It is when the defendant's use of their land interferes with the use value of the claimant's land that it makes sense to ask whether under a 'principle of give and take, live and let live' (or, more succinctly, a 'principle of reciprocity') the defendant's interests should be allowed to prevail over the claimant's, or vice versa. But if it is possible for a defendant to commit the tort of private nuisance without themselves using any land at all, so that there is no reciprocal relationship between the defendant and the claimant, then the 'principle of give and take, live and let live' cannot play the sort of foundational role in the law on private nuisance that Lords Leggatt and Sales see it as playing.

A comparison may help to make this point crystal clear. It is very common for academics to say that the law on the economic torts is designed to regulate competition between business interests. This is incorrect. While some economic torts cases do involve a claimant suing a competitor (for example, *Lumley* v *Gye* (1853) 2 E & B 216 (one opera impresario suing another)), there are plenty of cases that do not (for example, *Brimelow* v *Casson* [1924] 1 Ch 302 (a music hall owner suing a trade union for music band members)). It follows that the economic torts may have the *effect* of regulating what market competitors may do to each other, but that is not their *intention*. But what if in an economic torts case, the UK Supreme Court endorsed (as they easily could) the proposition that 'The unifying principle underlying the economic torts is the need to maintain conditions of fair competition between business interests' and said that as a result, all economic torts cases are ultimately to be resolved by reference to the following principles of 'fair competition': 'act honourably, don't injure another, and give everyone their due'? It would be very difficult to reconcile this position with

the state of the law on the economic torts before the UK Supreme Court's decision given the plethora of economic tort cases that have nothing to do with claimants competing with defendants. But some sort of reconciliation would have to be made: the UK Supreme Court is the UK Supreme Court, after all.

I think something similar has happened in *Fearn*. The best way of reconciling *Fearn* with the law preceding it would be to say that after *Fearn*, the law on private nuisance is *primarily* concerned with regulating competing land uses, and does so by reference to a 'principle of give and take, live and let live' – but that the law on private nuisance *extends beyond* these kinds of cases to cases where the use value of the claimant's land is affected by an activity conducted by the defendant not on land but in the air or on the street, and whether that kind of activity amounts to a nuisance is decided by analogy with the competing land use cases.

Common and ordinary

Lord Leggatt makes the concept of a 'common and ordinary use of land' centrally important to how the 'principle of give and take, live and let live' applies. Before *Fearn*, the concept of a 'common and ordinary use of land' simply operated as a limit case on a defendant's potential liability in nuisance. It was understood that a defendant could not be held liable in private nuisance for a 'common and ordinary use of land, conveniently done'.

The leading (and perhaps only) example of this limit case at work was *Southwark LBC* v *Tanner* [2001] 1 AC 1, where it was held that the claimants' being made to listen through paper-thin walls to their neighbours' 'coming and going, their cooking and cleaning, their quarrels and their love-making' (7) was not capable of amounting to a private nuisance. The obvious reason why this was so is that the defendants could not be said to have done anything wrong to the claimants under English law by merely living their ordinary lives. (Lord Leggatt rightly rejected (at [70]-[71]) an alternative explanation of *Southwark*, as resting on the hypersensitivity of the claimants to noise from adjoining premises because of the thinness of the walls.)

But that seems to be history now. After Lord Leggatt's judgment in *Fearn* the concept of a 'common and ordinary use of land' now plays an expanded and hugely important role in the law of private nuisance with complaints about neighbours' building or demolition works ([37]), the locality rule ([38]-[41]), and rules about hypersensitivity ([25], [62]-[72]) all being interpreted through this lens. I think the following table illustrates how Lord Leggatt thinks the concept should apply in working out the 'principle of give and take, live and let live' as between claimant and defendant:

Was the use of land common and ordinary?	Claimant's land – Yes	Claimant's land – No
Defendant's land – Yes	No liability	No liability
Defendant's land – No	Claimant wins	?

Fearn fell into the shaded box. The claimant's use of land was 'common and ordinary' while the defendant's was not. The fact that the design of Block C might have made the claimant more sensitive to visual intrusion was neither here nor there: 'The law of nuisance would be unworkable, and the protection which it provides to homeowners seriously enfeebled, if it were treated as an answer to a claim in nuisance…that the claimant would not have had a complaint

in nuisance if, instead of her actual property, she had lived in a differently built, but perfectly acceptable, property' ([67]).

I have left the box where neither the claimant's nor the defendant's use of land was not common and ordinary with a question mark in it as it is not clear on Lord Leggatt's judgment how he would have resolved that case (see [35] where Lord Leggatt deals with a person putting their land to 'special use' and thereby interferes with 'the ordinary use of neighbouring land' and a person complaining of a 'substantial interference with his special use of land caused by the ordinary use of neighbouring land' – but not with the case of a special use of land being interfered with by a neighbour's special use of their land). An example of a case that falls into this box is *Hollywood Silver Fox Farm* v *Emmett* [1936] 2 KB 468. The defendant's use of land in maliciously setting off a gun near the pens on the claimant's land where he was raising silver foxes was obviously not 'common and ordinary, and conveniently done'. But the claimant's use of land to raise silver foxes was not 'common and ordinary' either – it was precisely because that use of land was so uncommon and extraordinary for that locale that the defendant objected to the claimant's using his land in that way, and wanted to bring that use to an end.

Lord Sales was not as enthused as Lord Leggatt with the potential for the concept of a 'common and ordinary use of land' to make sense of how the 'objective principle of reasonable user ("give and take"), in the sense of reasonable reciprocity and compromise, governs the law in this area' ([166]; see also [252]). (It should be noted that Lord Leggatt was equally unenthused with the idea that the concept of 'reasonable user' had any useful role to play in the law on private nuisance: [29]-[33].) As we have already seen, this disagreement led Lord Sales to take the view (i) that 'whilst a defendant will ordinarily not be liable in nuisance when its use [of land] is "common and ordinary", it does not follow that a defendant will *necessarily* be liable for nuisance where a relevant interference with their land is caused by use by the defendant which is not "common and ordinary"' ([167], emphasis added), and to take the view (ii) that the fact that the claimant's use of the land was 'common and ordinary' was only one factor to be taken into account in determining whether an interference with that use of land amounted to a nuisance ([226]).

And just as Lord Sales thought that a defendant should not necessarily be held liable in private nuisance where their use of land was not 'common and ordinary', he thought that 'it would be inappropriate to limit the right of a claimant to sue in nuisance to cases where its use of its own land is common and ordinary. It has an equal and opposite right to use its property in new ways, and unreasonable interference with that right would constitute a nuisance' ([242]). So Lord Sales would be open to finding for the claimant in the box that we have marked with a question mark, depending on the circumstances.

Whether there is an implicit suggestion in [242] that Lord Leggatt *would* 'limit the right of a claimant to sue in nuisance to cases where its use of land is common and ordinary' (in which case we would replace our question mark with 'No liability') is difficult to tell. It is more likely that he did not consider the situation because he did not need to do so. (Though see the already quoted [21]: 'the court must ask whether the defendant's use of land has caused a *substantial* interference with the *ordinary* use of the claimant's land.') But if *Hollywood Silver Fox Farm* v *Emmett* remains good law in England, we need to know how to decide whether a *not* 'common and ordinary use of land' that interferes with another *not* 'common and ordinary use of land' amounts to a nuisance – and, by definition, the concept of a 'common and ordinary use of land' will be of no help to us in doing that.

Whether a law of private nuisance that relies so much on the concept of a 'common and ordinary use of land' will work in a just and predictable manner remains to be seen. Lord Sales strikes a warning note at [242]: 'although questions of common and ordinary usage of land by a defendant and by a claimant may often be central in working out the application of an

objective standard of reasonableness in a locale, I do not think that they are capable in themselves of providing a solution across the whole range of cases with which the law of nuisance has to deal. In my view, it is necessary to have recourse to a more general principle of objective reasonableness…'.

Admittedly, the omens are not great – areas of the common law tend not to work well when they are made to be about just one thing. We have, after all, only just liberated ourselves from almost 90 years of judicial and academic agony triggered by Lord Atkin's insistence in *Donoghue* v *Stevenson* [1932] AC 562 'that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances' (580). *Donoghue* was another 3:2 case, and *Fearn* easily has the potential to come to be recognised as the equivalent of *Donoghue* v *Stevenson* for the law of private nuisance. We can but hope that the concept of a 'common and ordinary use of land' will enjoy a happier fate in helping to organise the law of private nuisance than Lord Atkin's 'neighbour principle' did in determining when one person will owe another a duty of care.

Two misapprehensions

I will finish up by dealing with two potential misapprehensions about the decision in *Fearn*.

The first is that *Fearn* is really an invasion of privacy case dressed up as a private nuisance case, in the same way as *Khorasandjian* v *Bush* [1993] QB 727 was really a harassment case dressed up as a private nuisance case. This is not true, as was made clear by both Lord Leggatt (at [112]) and Lord Sales (at [204]). The gist of the claimants' complaint in this case was that they were being *prevented* from using the 'winter gardens' portion of their flat as they wished as a result of the prospect of being looked at, and not that they were being looked at when they used the 'winter gardens' portions of their flat. A comparison might be drawn with *Spring* v *Guardian Assurance Ltd* [1995] 2 AC 296 – a case which is sometimes said to be a claim in defamation dressed up as a claim in negligence to evade the special limits on when a claimant can sue a defendant in defamation. *Spring* is not a claim in defamation because the focus of the claim in that case was not the fact that the claimant was defamed, but the effect that the defamation had had on the claimant in terms of sterilising their career. Similarly, the focus of the claim in *Fearn* was not that the claimants' privacy had been invaded, but that the effect that intrusion on their privacy had had on sterilising their use of the 'winter gardens' section of their flats.

The second is that *Fearn* is inconsistent with the decision of the High Court of Australia in *Victoria Park Racing and Recreation Grounds Co Ltd* v *Taylor* (1937) 58 CLR 479. In that case, the defendant owned land next to the claimant's racecourse. The defendant built a platform on his land to provide a view of the claimant's racecourse, and allowed a radio broadcaster to commentate on the races from the platform. The claimant sued in nuisance, arguing that the defendant's actions interfered with its use of the land by discouraging punters from attending the racecourse as they would listen to the radio instead. The claim was dismissed. In a sense, the decision in *Fearn* may be inconsistent with the *reasoning* of the High Court in *Victoria Park Racing* in that the High Court's decision may have been based on *PIL* (though see Dixon J's observation in *Victoria Park Racing* that 'It may be conceded that interferences of a physical nature, as by fumes, smell and noise, are not the only means of committing a private nuisance…') but there is little doubt that the UK Supreme Court in *Fearn* would have reached the same result as the High Court in *Victoria Park Racing*. Lord Leggatt agreed (at [99]) with Dixon J that 'The substance of the plaintiff's complaint goes to interference, not with its enjoyment of land, but with the profitable conduct of its business.'

Nick McBride