Neutral Citation Number: [2020] EWCA Civ 104

Case No: A3/2019/0485

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS (CHANCERY DIVISION)
Mann J
[2019] EWHC 246 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/02/2020

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE LEWISON
and
LADY JUSTICE ROSE DBE

- -

Between :

Giles FEARN (1) **Gerald KRAFTMAN (2)** **Ian MCFADYEN (3)** **Helen MCFADYEN (4)** **Lindsay URQUHART (5)**	**Appellants/ Claimants**
- and -	
THE BOARD OF TRUSTEES OF THE TATE GALLERY	**Respondent/ Defendant**

- -
- -

Tom Weekes QC and **Richard Moules** (instructed by **Forsters LLP**) for the **Appellants**
Guy Fetherstonhaugh QC, **Elizabeth Fitzgerald** and **Aileen McColgan** (instructed by **Herbert Smith Freehills LLP**) for the **Respondent**

Hearing dates : 21 & 22 January 2020

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Approved Judgment

Sir Terence Etherton MR, Lord Justice Lewison and Lady Justice Rose DBE:

1. This is an appeal from the order of Mann J dated 12 February 2019 dismissing the claim of the appellants for an injunction requiring the Board of Trustees of the Tate Gallery ("the Tate") to prevent members of the public, or any other licensees, from observing the claimants' flats from certain parts of the viewing gallery at the Tate Modern ("the viewing gallery"), which is on the top floor of an extension to the Tate Modern.

2. The case, and this appeal, raise important issues about the application of the common law cause of action for private nuisance to overlooking from one property to another and the consequent invasion of privacy of those occupying the overlooked property.

The factual background

3. The Judge described the factual background over many paragraphs. The following is a very brief summary, sufficient to understand the context of this appeal. Reference should be made to the Judge's judgment for a full account of the design, planning and construction history of the flats and the viewing gallery. It can be found at [2019] EWHC 246 (Ch), [2019] Ch. 369.

4. The claimants are the long leasehold owners of four flats in a striking modern development designed by Richard Rogers and Partners (subsequently, Rogers Stirk Harbour + Partners), comprising four blocks of flats known as Neo Bankside, on the south bank of the River Thames. The design, planning process and construction of the development took place between 2006 and September 2012. The claimants' flats are in Block C of Neo Bankside, and they are directly opposite a new extension of the Tate Modern called the Blavatnik Building. The Blavatnik Building includes the viewing gallery, which runs around all four sides of the top floor, Level 10, and allows visitors to the Tate Modern to enjoy a 360-degree panoramic view of central London.

5. The flats which are the subject of the claim are 1301, 1801, 1901, and 2101. The first two digits indicate the floor on which the flat is situated. The floor plans of each flat in Block C vary but each flat involved in this action comprises two parts: a general living space, and a triangular end piece known as a "winter garden". The winter gardens have floor-to-ceiling single-glazed windows, which are separated from the flat by double-glazed glass doors. They have the same heated flooring as the rest of the accommodation but are separated from the rest of the accommodation by a lip and the double-glazed doors. Although the winter gardens were initially conceived by the developers as a type of indoor balcony, in the case of all the claimants' flats the winter garden has become part of the general living accommodation. The other sides of the flats which enclose the living space of the accommodation, including the kitchen, dining, and sitting areas, are made up of floor-to-ceiling clear glass panels but equipped with wooden fascias which prevent a whole view of the interior of the dining and sitting areas.

6. Adjacent to Neo Bankside is the Tate Modern (which, as well as the defendants, we shall call "the Tate"). The Tate is free and open to the public. Between 2006 and 2016 the Tate designed, obtained planning permission for and built an extension known as the Blavatnik Building. One of the features of the Blavatnik Building is the viewing

gallery. The viewing gallery provides a striking view of London to the north, west, and east, with a less interesting view to the south. The viewing gallery has been open to the public since the Blavatnik Building was completed in 2016. The viewing gallery attracts hundreds of thousands of people a year (with one estimate at 500,000 – 600,000), with a maximum of 300 visitors at one time. Visitors spend 15 minutes on average in the viewing gallery. Originally, the viewing gallery was open when the museum was open: 10am – 6pm Sunday to Thursday and 10am to 10pm on Friday and Saturday. On 26 April 2018 the opening hours for the viewing gallery changed. It is now closed to public access at 5.30pm on Sunday to Thursday, and on Friday and Saturday the south and west sides are closed from 7pm and the north and east sides are closed from 10pm. There is a monthly event called Tate Lates, which currently takes place on the last Friday of each month, and for which the viewing gallery, other than the south side, remains open until 10pm. The viewing gallery also hosts financially lucrative commercial and internal events for the Tate. In its first 17 months 52 external events were hosted there.

7. The winter gardens of Block C are roughly parallel to the Blavatnik Building. The distance between the viewing gallery and the 18th floor flat in Block C is just over 34m. Absent a barrier, visitors to the viewing gallery can see straight into the living accommodation of the claimants' flats. The most extensive view is of the interior of flats 1801 and 1901, with less for flat 2101, and less again for flat 1301. The flats have been fitted with solar blinds which, when kept down, obscure the view of the interior of the flat from the outside during the day. In the evening, however, when the lights are on, shadows of occupants may be visible to onlookers. The solar blinds also obscure the views of the outside and deprive the occupants of their use of the windows on one side of their flat.

8. Visitors in the viewing gallery frequently look into the claimants' flats and take photographs, and less frequently view the claimants and their flats with binoculars. Photographs of the flats are posted on social media by visitors. On the platform Instagram there were 124 posts in the period between June 2016 and April 2018. It has been estimated that those posts reached an audience of 38,600. The Tate took two steps to attempt to address the problem: it posted a notice on the southern gallery asking visitors to respect the privacy of the Tate's neighbours and it instructed security guards to stop photography.

9. The designs for the Blavatnik Building always included a viewing gallery in some form; although its precise extent varied through successive iterations of the design. There is no planning document which indicates that overlooking by the viewing gallery in the direction of Block C was considered by the local planning authority at any stage. It is not likely that the planning authority considered the extent of overlooking. Further, while the Neo Bankside developer was aware of the plans for a viewing gallery, they did not foresee the level of intrusion which resulted.

The proceedings

10. The claim form in these proceedings was issued on 22 February 2017 claiming, as we have said, an injunction requiring the Tate to prevent members of the public or any other licensees from observing the claimants' flats from the part of the viewing gallery shown cross-hatched on the plan attached to the particulars of claim. By time of the trial the cross-hatching had been amended to cover the whole of the southern

walkway, fronting directly on the flats, and also the southern half of the western walkway. The particulars of claim alleged that the use of that part of the viewing gallery unreasonably interfered with the claimants' enjoyment of their flats so as to be a nuisance. The particulars of claim also alleged that the use of that part of the viewing gallery infringed the claimants' exercise of their rights, conferred by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), to respect for their private and family lives and their homes, and that therefore the Tate, as a public authority, was in breach of section 6 of the Human Rights Act 1998 ("the HRA 1998").

11. In its defence the Tate denied that its use of the viewing gallery unreasonably interfered with the claimants' ordinary enjoyment of their flats. It denied that the viewing gallery diminished the utility of the claimants' land or caused injury to their land. The Tate denied that it was a public authority for the purposes of the HRA 1998, and, insofar as it was a hybrid public authority for the purposes of that Act, the Tate alleged that its use of the relevant part of the viewing gallery was a private act. The Tate denied that it was in breach of section 6 of the HRA 1998. It denied that the claimants were victims of a breach of Article 8 of the Convention. It denied that its use of the relevant part of the viewing gallery interfered with the claimants' right to respect for their private and family lives and their homes. It alleged that, if there was any interference with such rights, such interference was justified under Article 8.2. The Tate alleged that it had taken all reasonable steps to ensure that its visitors did not cause any disturbance to its neighbours, including the claimants. The Tate denied that the claimants' legal rights had in any way been interfered with or breached by it, and that in the circumstances the claimants were entitled to the injunction sought or to any relief.

The trial

12. The trial of the action took place before Mann J over five days in November 2018. There was considerable oral and documentary evidence. The oral evidence included that of the claimants and their planning expert, and that of six witnesses for the Tate. They were its director since 2016, its head of audience experience, its head of business, corporate membership and events, its head of regeneration and community partnerships, an architect employed by the firm which designed the Blavatnik Building and an expert on planning and associated matters.

13. The Judge undertook a site visit.

The judgment

14. The Judge handed down an impressive, comprehensive and detailed judgment on 12 February 2019, in which he dismissed the claim. The judgment runs to 233 paragraphs and 68 pages.

15. The following is a very brief summary of its critical reasoning, which inevitably does not do adequate justice to the conscientiousness of the Judge in this difficult case.

16. The Judge summarised his conclusion on the facts on the level of intrusion as follows:

> "88. Gathering my findings above into one place, I find:

> (a) A very significant number of visitors display an interest in the interiors of the flats which is more than a fleeting or passing interest. That is displayed either by a degree of peering or study, with or without photography, and very occasionally with binoculars.
>
> (b) Occupants of the flats would be aware of their exposure to that degree of intrusion.
>
> (c) The intrusion is a material intrusion into the privacy of the living accommodation, using the word "privacy" in its everyday meaning and not pre-judging any legal privacy questions that arise.
>
> (d) The intrusion is greater, and of a different order, from what would be the case if the flats were overlooked by windows, either residential or commercial. Windows in residential or commercial premises obviously afford a view (as do the windows lower down in the Blavatnik Building) but the normal use of those windows would not give rise to the same level of study of, or interest in, the interiors of the flats. Unlike a viewing gallery, their primary (or sole) purpose is not to view.
>
> (e) What I have said above applies to the upper three flats in this case. It applies to a much lesser extent to flat 1301, because that is rather lower down the building and the views into the living accommodation are significantly less, and to that extent the gallery is significantly less oppressive in relation to that flat."

17. On the direct claim in privacy under section 6 of the HRA 1998 and Article 8 of the Convention, the Judge concluded (at [124]) that the Tate does not have, or in this case was not exercising, functions of a public nature within the HRA 1998. Accordingly, the direct privacy claim failed, and the Judge said that he did not have to consider how Article 8 would have operated had the Tate been a public authority.

18. Turning to the nuisance claim, the Judge said that, if there was a nuisance, it would have to be the kind of nuisance caused by interference with a neighbour's quiet enjoyment of their land, and the first issue was whether that type of nuisance is capable of including invasion of privacy.

19. Having reviewed the arguments of counsel for both sides, and the various cases on which they relied, the Judge said (at [169]) that, had it been necessary to do so, he would have been minded to conclude that the tort of nuisance, absent statute, would probably have been capable, as a matter of principle, of protecting privacy rights, at least in a domestic home. He considered (at [170]) that, if there were any doubt about that, then that doubt had been removed by the HRA 1998 and Article 8 of the Convention; and (at [174]) that, if it did not do so before the HRA 1998, since that Act the law of nuisance ought to be, and is, capable of protecting privacy rights from overlooking in an appropriate case.

20. In considering whether there is an actionable nuisance in the present case, he said (at [186] and [188]) that the planning permission for the Blavatnik Building provides little or no assistance as the level of consideration given to the overlooking, if there was any at all, was not apparent from the evidence placed before him; and the planning permission did not really address the viewing gallery, as opposed to the building as a whole, and so it was not possible to draw any conclusions from it as to the views of the planning authority on the relative importance of the viewing gallery to the area.

21. The Judge observed (at [190]) that the locality is a part of urban South London used for a mixture of residential, cultural, tourist and commercial purposes but the significant factor was that it is an inner city urban environment, with a significant amount of tourist activity. He said that an occupier in that environment can expect rather less privacy than perhaps a rural occupier might, and that anyone who lives in an inner city can expect to live quite cheek by jowl with neighbours.

22. The Judge said (at [196]) that there was nothing unreasonable about the use of the Tate's land per se, in its context. He took into account (at [198]) the restrictions imposed by the Tate on the use of the viewing gallery both in respect of times for viewing and the other steps mentioned above.

23. So far as concerns the claimants' flats, he said (at [200]-[204]) that, while at one level the claimants were using their properties in accordance with the characteristics of the neighbourhood as they were used as dwellings, the complete glass walls of the living accommodation meant that the developers, in building the flats, and the claimants as successors in title who chose to buy the flats, had created or submitted themselves to a sensitivity to privacy which was greater than would have been the case of a less glassed design.

24. The Judge said (at [204]) that there was a parallel with nuisance cases in which the claim had failed because the claimant's user which had been adversely affected by the claimant's activity was a particularly sensitive one and that an ordinary use would not have been adversely affected.

25. The Judge also considered (at [209]-[210]) that, by incorporating the winter gardens into the living accommodation, the owners and occupiers of the flats had created their own additional sensitivity to the inward gaze. He concluded (at [211]) that the claimants were, therefore, occupying a particularly sensitive property which they were operating in a way which had increased the sensitivity.

26. The Judge then said that there were remedial steps that the claimants could reasonably be expected to have taken on the basis of the "give and take" expected of owners in this context. He mentioned (at [214]) the following: (1) lowering the solar blinds; (2) installing privacy film; (3) installing net curtains; (4) putting some medium or taller plants in the winter gardens, although the Judge accepted that, as a matter of screening, medium height plants would not be hugely effective. The Judge said (at [215]) that, looking at the overall balance which had to be achieved, the availability and reasonableness of such measures was another reason why he considered there to be no nuisance in the present case.

The appeal

27. The claimants were given permission to appeal on only one of their grounds of appeal. That ground is sub-divided into four paragraphs. They can be summarised as being that the Judge wrongly: (1) disregarded interference with the claimants' use of their flats due to their large windows because he wrongly made the counterfactual assumption that the flats were situated in an imaginary building with significant vertical and perhaps horizontal breaks which interrupted the inward view from the viewing balcony; (2) failed to have regard to the use of the viewing gallery to photograph and film individuals in the claimants' flats, with the photos and videos sometimes being posted on social media, contrary to the rights conferred Article 8; (3) failed to hold that the installation in the flats of privacy film and net curtains would be problematic preventive measures as such installation would be in breach of the leases of the flats; and (4) held that, for the purposes of the claimants' claim under the HRA 1998 s.6, the Tate is a "hybrid" authority.

28. The claimants did not proceed with that last criticism on the hearing of the appeal.

29. In preparing for the hearing of the appeal we were concerned that there was no respondent's notice raising the issues of whether, contrary to the view of the Judge (1) there is no cause of action in private nuisance for overlooking, which, as a matter of policy, should be addressed by planning law and practice or some other common law or statutory regime, and (2) it was not right, if necessary, to extend the cause of action for private nuisance to overlooking in view of Article 8. At our request, the parties provided us with written submissions on those additional matters and counsel addressed them in the course of the oral hearing. At the end of the hearing, we gave permission for the Tate to file a respondent's notice formally raising them.

Discussion

A. <u>Is there a cause of action in private nuisance for overlooking?</u>

Relevant general principles of private nuisance

30. The principles of the cause of action for private nuisance were recently summarised by the Court of Appeal in *Williams v Network Rail Infrastructure Ltd* [2018] EWCA Civ 1514, [2019] QB 601, at [40]-[45]. What was said there may be broken down into the following headline points.

31. First, a private nuisance is a violation of real property rights. It has been described as a property tort. It involves either an interference with the legal rights of an owner or a

person with exclusive possession of land, including an interest in land such as an easement or a profit à prendre, or interference with the amenity of the land, that is to say the right to use and enjoy it, which is an inherent facet of a right of exclusive possession: *Hunter v Canary Wharf Ltd [1997] AC 655* 687G–688E (Lord Goff citing FH Newark, "The Boundaries of Nuisance" 65 LQR 480), 696B (Lord Lloyd), 706B and 707C (Lord Hoffmann) and 723D–E (Lord Hope).

32. Second, although private nuisance is sometimes broken down into different categories, these are merely examples of a violation of property rights. In *Hunter*'s case, at p 695C, Lord Lloyd said that nuisances are of three kinds:

> "(1) nuisance by encroachment on a neighbour's land, (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land."

33. The difficulty, however, with any rigid categorisation is that it may not easily accommodate possible examples of nuisance in new social conditions or may undermine a proper analysis of factual situations which have aspects of more than one category but do not fall squarely within any one category, having regard to existing case law.

34. Third, the frequently stated proposition that damage is always an essential requirement of the cause of action for nuisance must be treated with considerable caution. It is clear both that this proposition is not entirely correct and also that the concept of damage in this context is a highly elastic one. In the case of nuisance through interference with the amenity of land, physical damage is not necessary to complete the cause of action. To paraphrase Lord Lloyd's observations in *Hunter*, at 696C, in relation to his third category, loss of amenity, such as results from noise, smoke, smell or dust or other emanations, may not cause any diminution in the market value of the land, such as may directly follow from, and reflect, loss caused by tangible physical damage to the land, but damages may nevertheless be awarded for loss of the land's intangible amenity value.

35. Fourth, nuisance may be caused by inaction or omission as well as by some positive activity.

36. Fifth, the broad unifying principle in this area of the law is reasonableness between neighbours.

37. Overlooking from one property into another, if it is actionable at all as a private nuisance, would fall within Lord Lloyd's third category in *Hunter*. It is necessary, therefore, to consider in the present appeal certain aspects of that category in more detail than in *Williams*.

38. The first is what is often said to be the unifying principle of reasonableness between neighbours. Whether or not there has been a private nuisance does not turn on some overriding and free-ranging assessment by the court of the respective reasonableness of each party in the light of all the facts and circumstances. The requirements of the common law as to what a claimant must prove in order to establish the cause of action for private nuisance, and as to what will constitute a good defence, themselves

represent in the round the law's assessment of what is and is not unreasonable conduct sufficient to give rise to a legal remedy.

39. We consider below the authorities discussing what the claimant must prove when the allegation is that the defendant has materially interfered with the amenity of the claimant's land. If material interference is established, the question of whether the defendant can defeat the claim by showing that the use of their land is a reasonable use was answered by *Bamford v Turnley* (1862) 3 B&S 66. In that case the plaintiff alleged that the defendant was liable for nuisance for burning bricks in kilns on the defendant's land which resulted in a bad smell affecting the comfortable and healthy occupation of the plaintiff's land. The jury found for the defendant. What was at issue on appeal in the Exchequer Chamber was whether the Chief Justice had misdirected the jury when he told them that they were to find for the defendant if they were of the opinion that the spot where the bricks were burned was a proper and convenient spot and the burning of them was, under the circumstances, a reasonable use by the defendant of his own land. It was held on appeal that there had been a misdirection. In an influential judgment, which has been cited, approved and applied many times, including at the highest level (see, for example, *Cambridge Water Co. v Eastern Counties Leather plc* [1994] 2 AC 264 at 299, *Southwark London Borough Council v Tanner* [2001] 1 AC 1 at 15-16, 20) Bramwell B said (at p.83):

> "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. This principle … would not comprehend the present [case], where what has been done was not the using of land in a common and ordinary way, but in an exceptional manner - not unnatural or unusual, but not the common and ordinary use of land. … The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live."

40. It will be noted that there are two ingredients for such a defence for causing a nuisance to a neighbour: (1) the act must be "necessary" for the common and ordinary use and occupation of the land, and (2) it must be "conveniently" done. "Necessity" here plainly does not mean that the land would be incapable of occupation without the act being done at all. Its meaning is coloured by association with "the common and ordinary use and occupation of land and houses". "Conveniently" means that the act must be done in a way that is reasonable, having regard to the neighbour's interests. By way of illustration of both points, in *Southwark* (at p.16) Lord Hoffmann, commenting on Bramwell B's comments quoted above, said that it may be reasonable to have appliances such as a television or washing machine in one's flat but unreasonable to put them hard up against a party wall so that noise and vibrations are unnecessarily transmitted to the neighbour's premises.

41. In *Southwark* (at p.20) Lord Millett (with whom three other members of the appellate committee expressly agreed) said that the law of nuisance seeks to protect the competing interests of adjoining owners so far as it can by employing the control mechanism described by Lord Goff in *Cambridge Water (*at p.299) as "the principle of reasonable user – the principle of give and take", and that it is not enough for a landowner to act reasonably in his own interest: he must also be considerate of the interest of his neighbour. Lord Millett said that "[t]he governing principle is good

neighbourliness, and this involves reciprocity". He went on to explain, however, that the law gives effect to those broad concepts by the principle stated by Bramwell B in the passage in *Bamford* quoted above. It is that principle, he said, "which limits the liability of a landowner who causes a sensible interference with his neighbour's enjoyment of their property". Lord Millett extrapolated (at p.21) the following from Bramwell B's statement:

> "[Bramwell B's] conclusion was that two conditions must be satisfied: the acts complained of must (i) "be necessary for the common and ordinary use and occupation of land and houses" and (ii) must be "conveniently done", that is to say done with proper consideration for the interests of neighbouring occupiers. Where these two conditions are satisfied, no action will lie for that substantial interference with the use and enjoyment of his neighbour's land that would otherwise have been an actionable nuisance."

42. In *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312, [2013] QB 455, the Court of Appeal reversed the decision of the trial judge that the defendant was not liable in private nuisance for odours caused by the tipping of waste. The essential reasoning of the trial judge was that the claim failed because defendant's use of its land was reasonable, as the use was in accordance with planning permission and the waste management permit granted by the Environment Agency and was without negligence, and some level of odour was inherent in the permitted activity. The Court of Appeal held that the approach of the judge involved errors of law, and so the case had to be remitted to be tried on the correct principles.

43. Carnwath LJ, with whom the other two members of the court agreed, rejected the judge's approach (described at [45]) that, as the "controlling principle" of the modern law of nuisance is that of "reasonable user", then if the user is reasonable, the claim must fail absent proof of negligence. Carnwath LJ said (at [46]) that "reasonable user" "is at most a way of describing old principles, not an excuse for re-inventing them". Having reviewed various references to reasonable user, reasonableness and "give and take" in *Cambridge Water*, *Bamford*, *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642 and *Southwark LBC*, Carnwath LJ said as follows:

> "71. None of this history would matter if "reasonable user" in the present case was being used as no more than a shorthand for the traditional common law tests, as I understand it to have been used by Lord Goff [in *Cambridge Water*]. However, it is apparent that the judge, following Biffa's submissions, saw this concept as an important part of the argument for taking account of the statutory scheme and the permit, to which I will come in the next section.
>
> 72. In my view, these complications are unsupported by authority, and misconceived. "Reasonable user" should be judged by the well settled tests. …"

44. We turn to two other matters relevant to the loss of amenity category of private nuisance, which did not arise in *Williams* and so were not necessary to highlight there, but which are relevant to the present case.

45. As the cause of action for private nuisance is a property right, a claim can only be made by someone who has a right to the land affected or who is in exclusive possession of it. A licensee on the land, such as children or guests, has no right to sue: *Hunter*. As Lord Hoffmann said in that case (at pp.702H, 706B-C and 707C):

> "Nuisance is a tort against land, including interests in land such as easements and profits. A plaintiff must therefore have an interest in the land affected by the nuisance. … In the case of nuisances "productive of sensible personal discomfort," the action is not for causing discomfort to the person but, as in the case of the first category, for causing injury to the land. True it is that the land has not suffered "sensible" injury, but its utility has been diminished by the existence of the nuisance. It is for an unlawful threat to the utility of his land that the possessor or occupier is entitled to an injunction and it is for the diminution in such utility that he is entitled to compensation. …Once it is understood that nuisances "productive of sensible personal discomfort" (*St. Helen's Smelting Co. v. Tipping, 11 H.L.Cas. 642*, 650) do not constitute a separate tort of causing discomfort to people but are merely part of a single tort of causing injury to land, the rule that the plaintiff must have an interest in the land falls into place as logical and, indeed, inevitable."

46. The next point is that, in the case of the loss of amenity category of private nuisance, there must have been a material interference with the amenity value of the affected land, looked at objectively, having regard to the locality, and without regard to undue sensitivities or insensitivity on the part of the claimant. In *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [2014] AC 822, Lord Neuberger said (at [4]):

> "In *Sturges v Bridgman* (1879) 11 Ch D 852 , 865, Thesiger LJ, giving the judgment of the Court of Appeal, famously observed that whether something is a nuisance "is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances", and "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey". Accordingly, whether a particular activity causes a nuisance often depends on an assessment of the locality in which the activity concerned is carried out."

47. Lord Neuberger quoted (at [64]) the following passage from the speech of Lord Westbury in *St Helen's Smelting (*at p.650):

> "anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he

> should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop."

48. In *Barr* (at [72]) and in *Lawrence* (at [179]) Lord Carnwath quoted with approval the following passage from *Weir, An Introduction to Tort Law,* 2nd ed (2006) p. 160:

> "Reasonableness is a relevant consideration here, but the question is neither what is reasonable in the eyes of the defendant or even the claimant (for one cannot by being unduly sensitive, constrain one's neighbour's freedoms), but what objectively a normal person would find it reasonable to have to put up with."

49. Lord Neuberger in *Lawrence* (at [5]) said, with reference to that passage in Lord Carnwath's judgment, that he agreed that reasonableness in this context is to be assessed objectively.

Overlooking and the cause of action for private nuisance at common law

50. The Judge concluded (at [169]) that, had it been necessary to do so, he would have been minded to conclude that the tort of nuisance, absent statute, "would probably have been capable, as a matter of principle, of protecting privacy rights, at least in a domestic home".

51. He reached that conclusion on the basis of the following reasoning. Firstly, having surveyed the many cases cited by each side on the point (at [133]-[163]), he said (at [164]) that none of the cases go so far as to say that nuisance can never protect privacy, the one exception probably being the decision of the majority in the Australian case *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479. He said that he found the dissents in that case "somewhat compelling", and, furthermore, on the other side of the fence was another Australian case, *Raciti v Hughes* (1995) 7 BPR 14837, which presupposed that an action in nuisance is capable of being deployed to protect privacy. Secondly, he rejected (at [167]) a submission on behalf of the Tate that it was only in exceptional circumstances that loss of amenity resulting from something other than an emanation (such as noise, smell or smoke) could be upheld in nuisance. Thirdly, he said (at [168]) that, if the sight of something on the defendant's land can give rise to a nuisance claim, as in *Thompson-Schwab v Cotaki* [1956] 1 WLR 335 (in which an interlocutory injunction was granted restraining the defendants from using premises for the purpose of prostitution), then it should be noted that part of the privacy claim could be founded on the fact that the claimants find it oppressive to see the watchers watch them. Further, fourthly, if it were necessary to find an emanation, the Judge said (at [168]) that he would have been prepared to find that the gaze of a watcher from the viewing gallery is analogous

to an emanation for these purposes. Fifthly, he considered (at [169]) that Mr Fetherstonhaugh's acceptance that deliberate overlooking, if accompanied by malice, could give rise to a nuisance:

> "gives the game away at the level of principle. It implicitly accepts that, given the right circumstances, a deliberate act of overlooking could amount to an actionable nuisance"."

52. We respectfully do not agree with the conclusion or reasoning of the Judge on this issue for the following reasons.

53. Firstly, despite the hundreds of years in which there has been a remedy for causing nuisance to an adjoining owner's land and the prevalence of overlooking in all cities and towns, there has been no reported case in this country in which a claimant has been successful in a nuisance claim for overlooking by a neighbour. There have, however, been cases in which judges have decided and expressed the view that no such cause of action exists.

54. *Chandler v Thompson* (1911) 3 Camp. 80 was a case concerning obstruction of a right of light. Le Blanc J is reported to have observed (at p.82):

> "that although an action for opening a window to disturb the plaintiff's privacy was to be read of in the books, he had never known such an action maintained; and when he was in the Common Pleas he had heard it laid down by Lord C. J. Eyre that such an action did not lie, and that the only remedy was to build on the adjoining land, opposite to the offensive window."

55. In *Turner v Spooner* (1861) 30 LJ Ch 801 the plaintiff was the owner of a property with "ancient lights", that is to say a property which had the benefit of an easement of light. The plaintiff's property adjoined the defendants' property. The plaintiff replaced the frames of the ancient lights, which had, in part, been painted white and, in part, been fitted with small leaden lattices, with plate glass, which allowed much more light and air. The defendants objected and began to erect a wooden framework in the yard that abutted both properties within a few inches of the plaintiff's ancient lights. The plaintiff brought proceedings for an injunction for, among other things, removal of the wooden framework. The defendants contended that the increase in the amount of light was a new easement, and the defendants were entitled to reduce the light to its original amount. They also argued that there was interference with the privacy of the defendants, for which the court would grant relief. Kindersley V-C refused to grant an injunction. He held, on the first argument, that a mere increase in light through the same aperture did not give rise to a new easement. On the privacy argument, he said the following (at p.803):

> "With regard to the question of privacy, no doubt the owner of a house would prefer that a neighbour should not have the right of looking into his windows or yard, but neither this Court nor a Court of law will interfere on the mere ground of invasion of privacy; and a party has a right even to open new windows, although he is thereby enabled to overlook his neighbour's premises, and so interfering, perhaps with his comfort. "

56. The Judge said (at [159]) that the decision should not be taken further than as applying to acts such as opening windows which happen to overlook, and does not assist in the present problem "which relates to a structure whose whole purpose is to overlook by providing a view to those who visit for that purpose". We do not agree. While there is certainly a substantial difference of degree between the overlooking in *Turner* and the overlooking from the Tate's viewing gallery, the issue of principle as to whether or not an invasion of privacy by overlooking is actionable as a private nuisance is the same. We consider that *Turner* is authority that it is not.

57. In *Tapling v Jones* (1865) 20 CBNS 166, a decision of the House of Lords, the issue was whether the defendant was entitled to build next to the plaintiff's wall, in which there were ancient lights and new windows, in a way which blocked the light to all of those windows, there being no way in which the defendant could obstruct the new windows without at the same time obstructing the ancient lights. The House of Lords, upholding the decision of the lower courts, held that the plaintiff was entitled to damages for interference with his ancient lights. The speeches in the House of Lords considered generally the law relating to the opening of windows overlooking another property. They made clear that there was no cause of action for overlooking, however many new windows there might be, and that the only remedy of the adjoining owner was (in the case of windows which were not ancient windows) to build upon the adjoining land itself so as to obstruct the light to and the views from the new windows.

58. Lord Westbury LC said (at p. 178) that it might be useful to point out "some expressions which are found in the decided cases, and which may seem to have a tendency to mislead". Having addressed, in that context, the phrase "right to obstruct", he addressed the issue of overlooking and privacy, as follows:

> "Again, there is another form of words which is often found in the cases on this subject, viz. the phrase "invasion of privacy by opening windows." That is not treated by the law as a wrong for which any remedy is given. If A is the owner of beautiful gardens and pleasure grounds, and B is the owner of an adjoining piece of land, B may build on it a manufactory with a hundred windows overlooking the pleasure grounds, and A has neither more nor less than the right, which he previously had, of erecting on his land a building of such height and extent as will shut out the windows of the newly-erected manufactory."

59. Lord Carnworth said the following (at pp.185-186) on the same point:

> "Every man may open any number of windows looking over his neighbour's land; and, on the other hand, the neighbour may, by building on his own land within 20 years after the opening of the window, obstruct the light which would otherwise reach them. Some confusion seems to have arisen from speaking of the right of the neighbour in such a case, as a right to obstruct the new lights. His right is a right to use his own land by building on it as he thinks most to his interest; and if by so doing he obstructs the access of light to the new

> windows, he is doing that which affords no ground of complaint."

60. Lord Chelmsford said (at pp.191):

> "It is not correct to say that the plaintiff, by putting new windows into his house, or altering the dimensions of the old ones, "exceeded the limits of his right;" because the owner of a house has a right at all times (apart, of course. from any agreement to the contrary) to open as many windows in his own house as he pleases. By the exercise of the right he may materially interfere with the comfort and enjoyment of his neighbour; but of this species of injury the law takes no cognizance. It leaves everyone to his self-defence against an annoyance of this description; and the only remedy in the power of the adjoining owner is to build on his own ground, and so to shut out the offensive windows."

61. The Judge again distinguished those statements (at [161]) on the ground that they "do not necessarily deal with the case of a structure whose whole purpose is overlooking". We do not agree. While those statements were not, strictly, part of the *ratio*, or necessary reasoning of the decision, they are clear statements of the highest authority that the construction or alteration of premises so as to provide the means to overlook neighbouring land, whether or not such overlooking would result in a significant diminution of privacy and be the cause of justified annoyance to the neighbouring owner, is not actionable as a nuisance.

62. Before the Judge Mr Fetherstonhaugh placed weight on the decision of Parker J in *Browne v Flower* [1911] 1 Ch 219. In that case the plaintiffs, who were tenants of a ground floor flat in a building in respect of which Mrs Flower, as second mortgagee by subdemise, was entitled to the rents and profits, claimed an order for the removal of a staircase erected, with Mrs Flower's consent, on her adjoining land. The staircase was erected by another defendant, Mrs Lightbody, who was the tenant of another flat comprising rooms on the ground, first and second floors of the building, and who wished to subdivide her flat into two smaller flats and to provide a means of access to one of those smaller flats on the first floor. A person accessing the staircase would have a direct view into the plaintiffs' bedroom. The plaintiffs relied on the terms of covenants in Mrs Lightbody's lease not to do anything in her flat causing a nuisance to neighbouring premises; upon the principle of non-derogation from grant, that is to say that no one can be allowed to derogate from his or her own grant; and upon a breach of the covenant for quiet enjoyment in the plaintiff's lease.

63. Parker J dismissed the claim on the grounds that (1) so far as concerns the claim that Mrs Lightbody was in breach of her lease, she had not done anything on the premises demised to her: what was done was on adjoining land belonging to the lessor; (2) so far as concerns non-derogation from grant, the existence of the staircase did not render the plaintiff's premises unfit or materially less fit to be used for the purposes of a residential flat; and (3) the suggestion of a breach of the covenant for quiet enjoyment had not really been pressed, and in any event required some physical interference with the enjoyment of the demised premises and did not extend to a mere interference with the comfort of persons using the demised premises by the creation

of a personal annoyance. As the Judge observed, that last finding was disapproved, at least in the context of noise, by Lord Hoffmann in *Southwark LBC (*at p.11A-C).

64. In the course of his judgment, Parker J made some observations about privacy, including (at p.225) that the law does not recognise any easement of prospect or privacy, and (at p.227), in relation to non-derogation from grant, the following:

> "A landowner may sell a piece of land for the purpose of building a house which when built may derive a great part of its value from advantages of prospect or privacy. It would, I think, be impossible to hold that because of this the vendor was precluded from laying out the land retained by him as a building estate, though in so doing he might destroy the views from the purchaser's house, interfere with his privacy, render the premises noisy, and to a great extent interfere with the comfortable enjoyment and diminish the value of the property sold by him. … It is only the comfort of the persons so using the rooms [viz. those overlooked by the staircase] that is interfered with by what has been done. Either they have less privacy, or if they secure their privacy by curtains they have less light. Much as I sympathise with the plaintiffs, it would, in my opinion, be extending the implications based on the maxim that no one can derogate from his own grant to an unreasonable extent if it were held that what has been done in this case was a breach of an implied obligation."

65. The Judge did not think that *Browne* was of much assistance on the general question of principle which we are currently addressing. We agree. The reasoning of Parker J is closely related to the particular facts of that case and the particular causes of action alleged, none of which were for private nuisance.

66. As mentioned above, the Judge acknowledged that *Victoria Park Racing*, a decision of the High Court of Australia, is authority for the proposition overlooking is not an actionable nuisance. In that case the defendant Mr Taylor, who was the owner of property neighbouring a racecourse owned by the plaintiff, gave permission to another defendant, the Commonwealth Broadcasting Corporation, to erect an observation platform from which an employee of the company gave a running commentary on the races, which was simultaneously broadcast by the company. The plaintiff claimed that the broadcasting had caused large numbers of people, who would otherwise have attended the race meetings, not to do so but instead to listen to the broadcasts, as a result of which the plaintiff had suffered loss and damage. He sought injunctions against the defendants on the ground of, among other things, common law nuisance. The majority (Latham CJ, Dixon J and McTiernan J) held that the decision of the Supreme Court of New South Wales dismissing the claim should be affirmed. A narrow reading of the judgments of the majority is that the defendants had not interfered with the use and enjoyment of the plaintiff's land, but rather the effect of their actions was to make the business carried on by the plaintiff less profitable. In the course of their judgments, however, the majority considered and rejected the proposition that overlooking was an actionable private nuisance.

67. Latham CJ said (at p.494):

> "Any person is entitled to look over the plaintiff's fences and to see what goes on in the plaintiff's land. If the plaintiff desires to prevent this, the plaintiff can erect a higher fence. Further, if the plaintiff desires to prevent its notice boards being seen by people from outside the enclosure, it can place them in such a position that they are not visible to such people. At sports grounds and other places of entertainment it is the lawful, natural and common practice to put up fences and other structures to prevent people who are not prepared to pay for admission from getting the benefit of the entertainment. In my opinion, the law cannot by an injunction in effect erect fences which the plaintiff is not prepared to provide. The defendant does no wrong to the plaintiff by looking at what takes place on the plaintiff's land. Further, he does no wrong to the plaintiff by describing to other persons, to as wide an audience as he can obtain, what takes place on the plaintiff's ground. The court has not been referred to any principle of law which prevents any man from describing anything which he sees anywhere if he does not make defamatory statements, infringe the law as to offensive language, &c., break a contract, or wrongfully reveal confidential information. The defendants did not infringe the law in any of these respects."

68. Dixon J said (at p. 507):

> "It is the obtaining a view of the premises which is the foundation of the allegation. But English law is, rightly or wrongly, clear that the natural rights of an occupier do not include freedom from the view and inspection of neighbouring occupiers or of other persons who enable themselves to overlook the premises. An occupier of land is at liberty to exclude his neighbour's view by any physical means he can adopt. But while it is no wrongful act on his part to block the prospect from adjacent land, it is no wrongful act on the part of any person on such land to avail himself of what prospect exists or can be obtained. Not only is it lawful on the part of those occupying premises in the vicinity to overlook the land from any natural vantage point, but artificial erections may be made which destroyed the previously existing under natural conditions."

69. The Judge said (at [158]) that *Victoria Park Racing* "does not deal with the arguably different situation of looking into someone's home", and that it was not clear to him that the result would have been the same if what was being overlooked was the interior of someone's house. He also said (at [169]) that (the case not being binding on him) "[b]eing free to do so, I would prefer the reasoning of the minority in *Victoria Park Racing*". We consider, however, that the passages in *Victoria Park Racing* which we have quoted above are consistent with the views expressed by judges in this jurisdiction.

70. On this issue of actionability the Judge referred (in [134]-[147]) to a number of cases and some academic commentary relied upon by Mr Weekes, namely *Semayne's Case* (1604) 5 Co Rep 91a, *Morris v Beardmore* [1981] AC 446, *Brooker v Police* [2007] 3 NZLR, the judgments of the dissenting judges in *Victoria Park Racing,* the judgment of Callinan J in *Australian Broadcasting Corpn v Lenah Game Meats Pty Ltd* (2001) 28 CLR 199, *Baron Bernstein of Leigh v Skyviews & General Ltd* [1978] QB 479, the Australian case of *Raciti,* an observation of Lord Millett at page 23 of *Southwark,* commentary in Clerk & Lindsell on Torts 21st ed (2014) and an article on "Privacy" by Winfield (1931) 47 LQR 23.

71. The Judge analysed each of them. He did not consider that any of cases was clear, let alone binding, authority that overlooking from the Tate viewing gallery is capable in principle of giving rise to a cause of action in nuisance. That was true even of *Raciti*, which, as we have said above, the Judge mentioned (in [164]) as supporting the existence of cause of action in nuisance to protect privacy. That was a decision of Young J in the Equity Division of the Supreme Court of the New South Wales on an application for an interlocutory injunction. In that case the defendants installed on their property floodlights and camera surveillance equipment positioned so as to illuminate the plaintiff's adjoining backyard and record on videotape what occurred in the backyard. The floodlight system appeared to be activated by a sensor which switched on the floodlights with movement or noise in the backyard.

72. Young J granted the injunction both on account of the lights and the surveillance equipment. As regards the surveillance equipment, he said that, on the evidence, there was a deliberate attempt to snoop on the privacy of a neighbour and to record that private activity on video tape. Importantly, for present purposes, he said that the surveillance and accompanying recording "gets sufficiently close to watching and besetting". "Watching and besetting", that is to say watching or besetting a person's house with a view to compelling them to do or not to do what is lawful for them not to do or to do, without lawful authority or reasonable justification, has been held actionable as a common law nuisance: *J Lyons & Sons v Wilkins* [1895] 1 Ch 255. Whether pure watching and besetting, without more, is capable of amounting to a common law nuisance is debatable: *Hubbard v Pitt* [1976] Q.B. 142, 175-177 (per Lord Denning MR, referring to *Ward Lock and Co Ltd v The Operative Printers' Assistants' Society* (1906) 22 TLR 327). In any event, "watching or spying on a person" is now an offence and civilly actionable under the Protection from Harassment Act 1997 ss..2A and 3. It is quite different from just overlooking and what takes place on the Tate's viewing gallery. Moreover, as the Judge noted in the present case (at [146]), Young J in *Raciti* regarded the application for the interlocutory injunction before him as "virtually the hearing of a demurrer" and so it was only necessary for the plaintiff to establish that there was an arguable cause of action.

73. The Judge concluded his survey and analysis of the cases relied upon by the claimants on the issue of actionability as follows (at [148]):

> "Thus far on the authorities … Mr Weekes has not much to go on in trying to establish that the tort of nuisance is capable of covering the acts of which he complains. However, he seeks to bridge the gap by relying on the Human Rights Act 1998, and in particular Article 8. … He submits that when one balances

> all the factors which have to be balanced in a nuisance and privacy claim, there has been an actionable nuisance in this case."

74. We, therefore, conclude that the overwhelming weight of judicial authority, particularly in this jurisdiction, is that mere overlooking is not capable of giving rise to a cause of action in private nuisance. There is certainly no decided case to the contrary.

75. Secondly, in our judgment that is not surprising for historical and legal reasons. As can be seen from the cases we have mentioned, such as *Chandler*, *Turner* and *Tapling*, consideration in the case law of the existence of a cause of action in nuisance for invasion of privacy and overlooking has often been in the context of disputes over obstruction of windows. The absence at common law of a right to light, short of an easement after 20 years' use which satisfies the relevant conditions, and of general air flow and prospect, are mirrored by the absence of a right to prevent looking into a residence. The reason for the former (no general right to light, air flow and prospect) has been judicially explained as being that such a right would constrain building in towns and cities.

76. In *Attorney-General v. Doughty*, (1752) 2 Ves.Sen. 453, at 453-454, Lord Hardwicke LC said:

> "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 …"

77. In *Dalton v. Angus* [1881] 6 App.Cas 740 at 824, Lord Blackburn agreed with that reason and said:

> "I think this decision, that a right of prospect is not acquired by prescription, shows that, whilst on the balance of convenience and inconvenience, it was held expedient that the right to light, which could only impose a burthen upon land very near the house, should be protected when it had been long enjoyed, on the same ground it was held expedient that the right of prospect, which would impose a burthen on a very large and indefinite area, should not be allowed to be created, except by actual agreement."

78. As Lord Lloyd observed in *Hunter* (at p.600F) this was, therefore, purely a matter of policy. It is logical that the same policy consideration underlies both the absence of any successful claim for overlooking, despite the very long history of a cause of action for nuisance, as well as the clear statements in *Chandler* and *Tapling* and the actual decision in *Turner* negating any such claim. Familiar images of cheek-by-jowl buildings in cities such as London in the medieval and early modern period show that overlooking was commonplace and indeed inevitable when the great cities were being constructed.

79. Thirdly, as *Hunter* shows, even in modern times the law does not always provide a remedy for every annoyance to a neighbour, however considerable that annoyance may be. In that case the House of Lords confirmed the decision of the lower courts that the claimants had no claim in nuisance against the defendants who had constructed a very tall and large building which allegedly interfered with the reception of television broadcasts in the plaintiffs' homes. There was no cause of action because of the general principle that at common law anyone may build whatever they like upon their land. Lord Lloyd described (at p.699D) such a situation as "*damnum absque injuria*": a loss which the house-owner has undoubtedly suffered but which gives rise to no infringement of their legal rights.

80. Fourthly, in deciding whether, as a matter of policy, to hold that the cause of action for private nuisance is in principle capable of extending to overlooking, it is necessary to bear in mind the following three matters, all of which militate against any such extension.

81. Unlike such annoyances as noise, dirt, fumes, noxious smells and vibrations emanating from neighbouring land, it would be difficult, in the case of overlooking, to apply the objective test in nuisance for determining whether there has been a material interference with the amenity value of the affected land. While the viewing of the claimants' land by thousands of people from the Tate's viewing gallery may be thought to be a clear case of nuisance at one end of the spectrum, overlooking on a much smaller scale may be just as objectively annoying to owners and occupiers of overlooked properties. The construction of a balcony overlooking a neighbour's garden which results in a complete or substantial lack of privacy for all or part of the garden, with particular significance in the summer months, and which may even diminish the marketability or value of the overlooked property, would appear to satisfy the objective test. There would also be a question whether, in such a case, it makes any difference if there was more than one balcony or more than one family using the balcony or balconies. It is difficult to envisage any clear legal guidance as to where the line would be drawn between what is legal and what is not, depending on the number of people and frequency of overlooking. It is well known that overlooking is frequently a ground of objection to planning applications: any recognition that the cause of action in nuisance includes overlooking raises the prospect of claims in nuisance when such a planning objection has been rejected.

82. Further, when deciding whether to develop the common law by recognising that the cause of action for nuisance extends to overlooking, it is relevant to take into account other ways for protecting the owners of land from overlooking, including in particular planning laws and control. Lord Hoffmann said in *Hunter* (at p.710E), in which the appellate committee was asked to develop the common law by creating a new right of action against an owner who erects a building upon his land, it was relevant to take into account the existence of other methods by which the interests of the locality could be protected. He said the following on that topic (at p.710B/.C):

> " …we must consider whether modern conditions require these well established principles [of common law nuisance as to the right of landowners to build as they please] to be modified. The common law freedom of an owner to build upon his land has been drastically curtailed by the Town and Country Planning Act 1947 and its successors. It is now in normal cases

> necessary to obtain planning permission. The power of the planning authority to grant or refuse permission, subject to such conditions as it thinks fit, provides a mechanism for control of the unrestricted right to build which can be used for the protection of people living in the vicinity of a development. In a case such as this, where the development is likely to have an impact upon many people over a large area, the planning system is, I think, is a far more appropriate form of control, from the point of view of both the developer and the public, than enlarging the right to bring actions for nuisance at common law. It enables the issues to be debated before an expert forum at a planning inquiry and gives the developer the advantage of certainty as to what he is entitled to build.

83. Those comments are equally applicable in a case like the present one where there are complex issues about reconciling the different interests – public and private – in a unique part of London, with unique attractions, which draw millions of visitors every year. It is well established that planning permission is not a defence to an action for nuisance: see, for example, *Lawrence*. That, however, is a different issue to the question whether, as a matter of policy, planning laws and regulations would be a better medium for controlling inappropriate overlooking than the uncertainty and lack of sophistication of an extension of the common law cause of action for nuisance.

84. Finally, it may be said that what is really the issue in cases of overlooking in general, and the present case in particular, is invasion of privacy rather than (as is the case with the tort of nuisance) damage to interests in property. There are already other laws which bear on privacy, including the law relating to confidentiality, misuse of private information, data protection (Data Protection Act 2018), harassment and stalking (Protection Harassment Act 1997). This is an area in which the legislature has intervened and is better suited than the courts to weigh up competing interests: cf. *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406, esp. at [33], in which the House of Lords held that there is no common law tort of invasion of privacy and that it is an area which requires a detailed approach which can be achieved only by legislation rather than the broad brush of common law principle.

85. For all those reasons, we consider that it would be preferable to leave it to Parliament to formulate any further laws that are perceived to be necessary to deal with overlooking rather than to extend the law of private nuisance.

The significance of Article 8

86. As stated above, the Judge said (at [170]) that, if there were any doubt that the tort of nuisance is capable, as a matter of principle, of protecting privacy rights, at least in a domestic home, that doubt has been removed by Article 8. Having referred to *McKennitt v Ash* [2008] QB 73, he said (at [171]) that external prying into a home would contravene the privacy protected by Article 8, even without photography. He also said (at [174]) that, if it did not do so before the HRA1998, since that Act the law of nuisance ought to be, and is, capable of protecting privacy rights from overlooking in an appropriate case. He described this (in [177] as "developing the common law under the direction of statute".

87. We consider that there are a number of errors of principle in the way the Judge approached the issue of the relevance of Article 8.

88. In principle, the analysis should have been to ask whether, if the tort of nuisance does not otherwise extend at common law to overlooking: (1) there was nevertheless an infringement of Article 8; and (2) if so, whether it is appropriate to extend the common law in order to provide a remedy for the claimants and so avoid a breach of HRA 1998 s.6 on the part of the courts as a public authority.

89. The Judge, however, never made a finding of an infringement of Article 8 because, in effect, he found that in all the circumstances the claimants did not have a reasonable expectation of privacy in the absence of the protective measures which he considered they ought reasonably to have taken.

90. In any event, in determining whether or not Article 8 is engaged, it would be necessary to bear in mind that there has never been a Strasbourg case in which it has been held that mere overlooking by a neighbour or a neighbour's invitees is a breach of Article 8. The "mirror principle" articulated by Lord Bingham in *R(Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 A.C. 323 (that our courts should keep pace with, but not go beyond, Strasbourg), as clarified by Lord Brown in *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2; [2012] 2 A.C. 72, dictates caution about any conclusion as to the engagement of Article 8, let alone its infringement, in the case of mere overlooking.

91. Moreover, overlaying the common law tort of private nuisance with Article 8 would significantly distort the tort in some important respects. In the first place, as we have stated above, and all the authorities emphasise, the tort is a property tort and so mere licensees have no cause of action. Article 8 is not limited in that way and so will in principle confer a right on anyone who has a reasonable expectation of privacy: *Re JR38* [2016] AC 1131; *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983, [50], [82], [89]. As Lord Lloyd said in *Hunter* (at p.698B/C), to allow the wife or daughter of those who suffered from harassment on the telephone, whether at home or elsewhere, a remedy in private nuisance:

> "would not just be to get rid of an unnecessary technicality. It would be to change the whole basis of the cause of action."

92. Secondly, in assessing whether a person has a reasonable expectation of privacy for the purposes of Article 8, the court will take into account all the circumstances, including matters which are irrelevant to the cause of action for nuisance. For example, the particular sensitivity or insensitivity of the claimant to an invasion of privacy may be highly relevant for the purposes of Article 8, such as if the invasion of privacy is against a child as in *S v Sweden* [2013] ECHR 1128, 5786/08, but irrelevant in applying the objective approach to reasonable user in the tort of nuisance, as in *Robinson v Kilvert* (1889) 41 Ch D 88 (no nuisance for activity damaging a sensitive commercial process).

93. Thirdly, in determining whether or not there has been an infringement of Article 8, it is necessary for the court to consider justification under Article 8(2). That would give rise to a number of difficulties in the context of the tort of nuisance. In the context of the Convention, there can be a contest between the Article 8 rights of one party and

other Convention rights of the other party, such as freedom of expression under Article 10 and the peaceful enjoyment of possessions under Article 1 of the First Protocol, which involves a balancing exercise by the court. Such considerations have no place in the tort of nuisance.

94. Fourthly, even in a case where there has been an infringement of Article 8, Member States have a wide margin of appreciation as to the remedy both as regards respect for private life and respect for the home: *Von Hannover v Germany* [2004] Application no. 59320/00), [2004] EMLR 379 para. 104; *Powell and Rayner v United Kingdom* [1990] Application no. 9310/81, [1990] 12 EHRR 355, para 44; and cf. *McDonald v McDonald* [2016] UKSC 28, [2016] 3 WLR 45, [40]-[41]. As mentioned earlier, common law principles of confidentiality and misuse of private information, and statutory intervention, such as the Protection from Harassment Act 1997, the Data Protection Act 2018 and planning law and regulations, suggest that, if there is a legal lacuna as to remedy, that is best left to the legislature rather than to the courts fashion to fashion.

95. In all those circumstances, we see no sound reason to extend the common law tort of private nuisance to overlooking in light of Article 8.

B. <u>If the tort of nuisance applies, without an overlay of Article 8, was the Judge correct to dismiss the claim?</u>

96. In view of our decision that overlooking does not fall within the scope of common law nuisance this appeal must be dismissed.

97. In any event, however, we consider that the Judge made two material errors in applying the principles of common law nuisance to the facts of the present case. We shall comment on those briefly.

98. Firstly, the Judge said (at [205]) that the developers in building the flats, and the claimants as a successors in title who chose to buy the flats, had "created or submitted themselves to a sensitivity to privacy which is greater than would the case of a less glassed design"; and that "[i]t would be wrong to allow this self-induced incentive to gaze, and to infringe privacy, and self-induced exposure to the outside world, to create a liability nuisance". It was in that connection that he considered (at [201]-[202]) the counter-factual of a building with significant vertical and perhaps horizontal breaks to interrupt the inward view. He drew an analogy (at [204]-[205] and [211]) with nuisance cases which have established that doing something is not a nuisance if it adversely affects a particularly sensitive process or trade in an adjoining property but would not have affected any ordinary process or trade: see, for example, *Robinson v Kilvert*.

99. In the present case we are not concerned with any undue sensitivity of the claimants as individuals or what is being carried on in the flats which would fall foul of the objective reasonable user test for nuisance. In the context of the tort of nuisance, what is in issue is the impact of the viewing gallery on the amenity value of flats themselves. There being no finding by the Judge that the viewing gallery is "necessary" for the common and ordinary use and occupation of the Tate within Bramwell B's statement in *Bamford* quoted above, once it is established that the use of the viewing balcony has caused material damage to the amenity value of the

claimants' flats and that the use of the flats is ordinary and reasonable, having regard to the locality, there would be a liability in nuisance if (contrary to our decision) the cause of action extended to overlooking. There would be no question in those circumstances of any particular sensitivity of the flats, nor of any need on the part of the claimants to take what the Judge described (in [214]) as "remedial steps": *Miller v Jackson* [1977] 1 QB 966 (a claim for nuisance from cricket balls from the neighbouring cricket ground damaging the plaintiffs' house held not defeated by the plaintiffs' refusal of the defendants' offers to provide protective measures).

100. Secondly, and connected to the Judge's approach to the issues of sensitivity and protective measures, the Judge conducted an overall assessment of the reasonableness of the claimants, on the one hand, and the Tate, on the other hand, in the light of all the circumstances. He said (at [180]), for example:

> "The question is whether the Tate Modern, in operating the viewing gallery as it does, is making an unreasonable use of its land, bearing in mind the nature of that use, the locality in which it takes place, and bearing in mind that the victim is expected to have to put up with some give and take appropriate to modern society and the locale."

101. In relation to the protective measures which the Judge considered it would be reasonable for the claimants to take, he said as follows (at [215]):

> "The victim of excessive dust would not be expected to put up additional sealing of doors and windows; the victim of excessive noise would not be expected to buy earplugs. However, privacy is a bit different. Susceptibilities and tastes differ, and in recognition of the fact that privacy might sometimes require to be enhanced it has become acceptable to expect those wishing to enhance it to protect their own interests. I refer, for example, to net curtains. In the present case, if the occupiers find matters too intrusive they can take at least one of the measures referred to above. It will, of course, detract from their living conditions, but not to an unacceptable degree. Looking at the overall balance which has to be achieved, the availability and reasonableness of such measures is another reason why I consider there to be no nuisance in this case."

102. There was no suggestion in the present case that the claimants have been and are using their flats otherwise than in a perfectly normal fashion as homes. We consider that the Judge's balancing exercise, assessing what would be reasonable as between the claimants and the Tate, including protective measures which it would be open to the claimants to take to reduce the intrusion of privacy into their homes from the viewing gallery, is, for the reasons we have given above, contrary to the general principles of private nuisance.

Conclusion

103. For all the reasons above, we affirm the decision of the Judge, but for different reasons from those he gave, and we dismiss this appeal.