CASE NOTE

Fearn & Ors v The Board of Trustees of the Tate Gallery

[2020] EWCA Civ 104
Court of Appeal
On Appeal from the High Court of Justice
Chancery Division (Business and Property)
Mann J [2019] EWHC 246

Introduction

The Neo Bankside development is a striking modern development designed by Richard Rogers and Partners (now Rogers Stirk Harbour + Partners). It is on the south side of the River Thames and is adjacent to the Tate Modern, Britain's National gallery of international modern art, which is based in the former Bankside Power Station.

Neo Bankside was developed around the same time as a new extension to Tate Modern was being created, now known as the Blavatnik Building. The tenth floor of the Blavatnik Building contains a walkway which is open to the public and which affords a 360-degree panoramic view of London.

The floor to ceiling windows, a feature of Neo Bankside, give residents impressive views over London. However, if occupants of the flats can see out then outsiders can see in (absent protective measures being taken). This was the problem in this case. The panoramic view from the Tate's walkway included views of the interior of certain flats in Neo Bankside (to varying degrees, depending on their height within the block).

The claimants, the owners of four flats in Block C of Neo Bankside, the block that is directly opposite the Blavatnik Building, complained of being subject to scrutiny by visitors of Tate Modern. They said that visitors would wave, make gestures and take pictures, which were sometimes posted on social media. Tate had sought to address these concerns by putting up notices asking visitors to respect the privacy of local residents, by instructing security guards to stop anyone taking photographs of the flats, and by introducing more limited viewing hours on the walkway. The claimants said this was not enough and brought an action seeking an injunction requiring Tate to close part of the walkway.

The claimants argued that use of Tate's walkway unreasonably interfered with their enjoyment of their flats so as to be a nuisance (either as the law presently stood or as it needed to be developed taking into account the Human Rights Act 1998). They also alleged that use of the walkway infringed their privacy rights conferred by Article 8 of the European Convention for the protection of Human Rights and Fundamental Freedoms ('the Convention') and that the Tate, as a "hybrid" public authority, was in breach of section 6 of the HRA 1998 and was a body against whom the Act can be directly enforced.

The First Instance Decision

Mann J tried the claim at first instance. He dismissed the direct claim in privacy under section 6 of the HRA 1998 and Article 8 of the Convention, concluding that Tate was not exercising "functions of a public nature" within the HRA 1998. The direct privacy claim therefore failed at this first stage, with the consequence that the claimants were left with their claim in nuisance.

It was common ground that if there was a nuisance claim it would be the type of nuisance falling within Lord Lloyd's third category in *Hunter v Canary Wharf Ltd* [1997] AC 655, namely "nuisance by interference with a neighbour's quiet enjoyment of his land". Tate argued, however, that the law of private nuisance has no applicability to the kind of conduct relied on by the claimants. Mann J also dismissed the claim based on nuisance. However, he concluded, that:

> "… had it been necessary to do so I 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 went on to say:

> "If there were any doubt about that then in my view that doubt has been removed by the Human Rights Act 1998 and article 8. Article 8 contains a right to respect for an individual's "private and family life [and] his home"."

And:

> "It therefore seems to me that, if it did not do so before the Human Rights Act 1998, since that Act the law of nuisance ought to be, and is, capable of protecting privacy rights from overlooking in an appropriate case. If it did not do so there would be a gap in the protection of privacy in the home…"

Mann J's reasons for dismissing the claim in nuisance were as follows. He concluded that this was a case in which the claimants were occupying a particularly sensitive property, which they were operating in way which had increased the sensitivity. The claimant's complaint was that their everyday life in the flats was on view, but the problem arose because the claimants' flats had glass walls in their living accommodation. Drawing an analogy with the sensitive user principle (e.g. *Robinson v Kilvert* (1889) 41 Ch D 88[1]), Mann J considered whether the claimants would have had a complaint if they had lived in flats designed with more wall and less window. If the owner/occupier/developer of such a flat would still have a complaint in nuisance, then so must the claimants. He concluded, however, that there would be no claim in nuisance in those circumstances:

> "The developers in building the flats, and the claimants as successors in title who chose to buy the flats, have created or submitted themselves to a sensitivity to privacy which is greater than would the case of a less glassed design. It 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 in nuisance. Other architectural designs would have reduced the invasion of privacy to levels which should be tolerated; that is the appropriate measure in my view. If the claimants have a design which raises the privacy invasion then they have created their own sensitivity and will have to tolerate what the design has created."

Mann J also thought it necessary to consider whether the claimants could take protective measures, and, if so, whether it would be reasonable to expect them to do so, or whether they were entitled to the full extent of their privacy from the viewing gallery without having to take steps themselves. Mann J said this was part of the "give and take" that is expected of owners in this context. He then concluded that it was plain that some remedial steps could be taken. These included lowering the solar blinds, which the flats had all been fitted with; installing net curtains; or other forms of screening. Mann J recognised that although it was unusual for a nuisance claim to be met by the defendant saying that the claimant could take remedial steps to avoid the consequences of the act, he regarded this as an unusual case, saying that privacy is a bit different and susceptibilities and tastes differ. Mann J therefore concluded that "[l]ooking at the overall balance which has to be

[1] "But no case has been cited where the doing something not in itself noxious has been held a nuisance, unless it interferes with the ordinary enjoyment of life, or the ordinary use of property for the purposes of residence or business. It would, in my opinion, be wrong to say that the doing something not in itself noxious is a nuisance because it does harm to some particular trade in the adjoining property, although it would not prejudicially affect any ordinary trade carried on there, and does not interfere with the ordinary enjoyment of life."

achieved, the availability and reasonableness of such measures is another reason why I consider there to be no nuisance in this case."

The Court of Appeal's Decision

Permission to appeal was given on only one of the claimant's grounds of appeal and the appeal was concerned with the claim in private nuisance, not the direct claim under the HRA 1998. The Court of Appeal comprised the Master of the Rolls (Sir Terence Etherton), Lord Justice Lewison and Lady Justice Rose DBE. The Court upheld Mann J's decision, but for different reasons.

The Court of Appeal disagreed that this case was about undue sensitivity. It said that in the context of the tort of nuisance, what was in issue is the impact of the viewing gallery on the amenity value of the flats. Once it had been established that the viewing platform had caused material damage to the amenity value of the flats, and that the use of the flats was ordinary and reasonable having regard to the locality, there would be a liability in nuisance (if nuisance extended to overlooking). There was no question of any particular sensitivity or any need to take the "remedial steps" Mann J had identified.

The Court of Appeal summarised the relevant principles of private nuisance taking, as its starting point, the Court of Appeal's decision in *Williams v Network Rail Infrastructure Ltd* [2018] EWCA Civ 1514. Unlike *Williams,* however, this appeal was concerned with nuisance by interference with a neighbour's quiet enjoyment of land, so it was therefore necessary to explore this category in more detail than in *Williams*.

The Court's starting point was to take what has often been said to be the 'unifying principle' of reasonableness between neighbours. The court said:

> "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."

If a claimant establishes a material interference with the amenity of its land, the question of whether the defendant can defeat a claim by showing that the use of their land is reasonable was answered by *Bamford v Turnley* (1862) 3 B&S 66:

> "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. … The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live,"

The court then considered two other matters relevant to the loss of amenity category of private nuisance, and which did not arise in *Williams*. The first being that because 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. The second point was that in the case of loss of amenity there must have been a material interference with the amenity value of the land, looked at objectively, having regard to the locality, and without regard to undue sensitivities or insensitivities on the part of the claimant.

Having looked at the general principles the Court then turned to Mann J's *obiter* comment that had it been necessary to do so he would have concluded that the law of nuisance could protect privacy rights, at least in a domestic home. The Court of Appeal disagreed with this conclusion and the judge's reasoning on this issue.

It noted that despite hundreds of years in which there has been a remedy for causing nuisance to an adjoining owner's land there has been no reported case in which a claimant had been successful in a nuisance claim for overlooking by a neighbour. The court reviewed the many authorities which had been relied on by both parties, concluding that the overwhelming weight of judicial authority was that mere overlooking is not capable of giving rise to a cause of action in private nuisance. This was said to be unsurprising, for historical and legal reasons.

In deciding whether, as a matter of policy, it should hold that the cause of action for private nuisance is in principal capable of extending to overlooking it was necessary to bear in mind the following. First, it would be difficult to apply an objective test in nuisance for determining whether there had been a material interference with the amenity value of the affected land. Secondly, it is relevant to take account of other ways for protecting owners of land from overlooking, in

particular planning laws and control. Finally, what might be said to be really the issue in overlooking cases, and in the present case, is invasion of privacy rather than damage to an interest in property. There are already other laws which bear on privacy and this is an area in which the legislature is better suited than the court to weigh up competing interests. Privacy is an area which requires a detailed approach which can be achieved only by legislation, rather than the broad brush of common law principle. For these reasons the Court of Appeal found it would be preferable to leave it to Parliament to formulate any further laws perceived to be necessary, rather than to extend the law of private nuisance.

The Court of Appeal also disagreed with Mann J's approach to the relevance of Article 8. The correct approach was 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 so as to avoid a breach of HRA 1998 s. 6 on the part of the courts. There had been no finding at first instance of an infringement of Article 8. Further, overlaying the common law tort of private nuisance with Article 8 would significantly distort the tort in important respects. Overall there was no sound reason to extend the common law tort to overlooking in light of Article 8.

The appeal was accordingly dismissed and Mann J's decision affirmed, but for different reasons to those he gave.

Permission to appeal to the Supreme Court was refused.

Guy Fetherstonhaugh QC
Elizabeth Fitzgerald
Falcon Chambers