Has the recent Supreme Court decision in Fearn & Others v Board of Trustees of the Tate Gallery opened the floodgates for claims in nuisance based on overlooking?

In short, no.

By the time *Fearn* reached the Supreme Court, the question for determination was a narrow one, confined to whether the lower Courts had erred in denying the Claimants a remedy under the tort of private nuisance. The majority judgment reviewed the existing law and found it had been incorrectly applied to the facts and that a remedy was therefore due.

The key test was whether a neighbour was making "common and ordinary" use of their land, rather than making "unreasonable use" of it. In this case, the Tate's construction of a viewing gallery was not "common and ordinary" use of its land and a breach had occurred.

Given the Supreme Court neither overruled nor re-interpreted existing law, merely clarified how it should be applied, it seems unlikely any flood of new claims will follow owing to swathes of neighbours suddenly being judged to not be making common and ordinary use of their land.

The fear in Fearn remains a concern

In essentially preserving the status quo, *Fearn* perhaps kept firmly shut far bigger floodgates.

The first instance decision[1] makes clear that the understandable concern of the Claimants was chiefly one of privacy (their Article 8 Human Rights Act 1998 claim also failed).

The case illustrates a long-standing problem with English Law and its lack of a clear and simple right to privacy, with Claimants forced to try and 'piggy-back' on other causes of action (e.g., nuisance or misuse of private information) to obtain a remedy.

Nothing to see here

Fearn was a missed opportunity for the Courts to develop the law and provide an easier remedy for intrusion on privacy. In the coming years, this is apt to become an ever-greater problem – the rise of drones equipped with cameras, and the fact almost everyone has a smartphone camera in their pocket, will surely lead to increased concerns over invasions of privacy on private land.

Everyone deserves a right to privacy on their own land – free not just from sustained 'overlooking' as in *Fearn*, but also from more furtive and short-lived intrusions.

Private nuisance, restricted to *uses* of land, seems an unsatisfactory cause to plead for fleeting and difficult-to-police photography or recording originating from neighbouring land. Pleading trespass from an intrusive drone is fraught with similar problems.

[1] [2019] EWHC 246 (Ch)

An overlooked ray of hope?

The Supreme Court did re-affirm[2] the point that *"[a]nything…which materially interferes with the claimant's enjoyment of rights in land is capable of being a nuisance."* There is, perhaps, still hope that the Courts may yet develop more robust rulings to protect privacy more generally, including via the tort of private nuisance itself, beyond issues which debate a neighbour's common and ordinary use of their land.

It will hopefully only be a matter of time before we see a test case arising from a drone or other camera intrusion resulting in someone being inhibited from enjoying the use of their own land in privacy.

Words: 493

21 May 2023

Phil Spencer – phil.spencer@bclplaw.com
Associate, Real Estate Disputes
Bryan Cave Leighton Paisner LLP

Governor's House
5 Laurence Pountney Hill
London
EC4R 0BR

[2] At [16]