It's curtains for claims for overlooking

Given the headlines and the opinion pieces which followed the Supreme Court decision in *Fearn v Tate*, one might be forgiven for thinking that the Court had done something revolutionary, heretical, or just a little bit silly.

One might have supposed that the Supreme Court had created, or at least affirmed, a new cause of action for overlooking - an invitation to neighbours to squabble about balconies, blinds and full-height windows.

But claims for visual intrusion are not new to the law. Nuisance claims involving nosy neighbours appear as early as the fourteenth century, and have resurfaced from time to time in England and in other common law jurisdictions ever since.

Why then, might the Tate decisions have caused such excitement?

The danger of reasonableness

The danger, loosed by the court at first instance, was to suggest that claims for nuisance require a free-ranging assessment of what may be reasonable in the give and take between neighbours.

This mistake is understandable: it is often said that nuisance is an "unreasonable" interference with property rights, or that a "reasonable user" will not be liable in nuisance. These convenient shorthands are easily mistaken for legal tests.

Such a broad and unprincipled approach could indeed have opened the floodgates for neighbours to argue about the relative merits and reasonableness of intrusions and privacy.

A reminder of the law

Fortunately, that is not the law. The majority decision of the Supreme Court reminds us that the law of nuisance is more principled and more focused than this. We are reminded of two important points:

First, a nuisance is a *substantial* interference with the *ordinary* use of the claimant's land, by an *extraordinary* use of land by the defendant, taken in the context of the locality. Trifling annoyances, annoyances affecting extraordinary or sensitive claimants, or annoyances caused by an ordinary use of the defendant's land, are not actionable.

Second, the *fear* of visual intrusion is not protected. As a matter of policy, neither the mere presence of buildings (or, indeed, viewing platforms), nor the *potential* of a visual intrusion, is actionable at law.

The narrow application

Only actual visual intrusions, of such duration and intensity as to be considered unusual in the context of the neighbourhoods in which they occur, can amount to a nuisance by overlooking.

Claims which meet these criteria ought to be extremely rare. Most visual intrusion will take the form of snatched glances from windows or from the street, as people go about their day-to-day lives. The Supreme Court has made clear that such intrusions are not a nuisance.

By issuing a clear reminder of the strict parameters of the law of nuisance, the Supreme Court will deter prospective litigants and their advisors from unmeritorious claims, and will provide a roadmap to defendants and courts to dismiss such claims at the earliest opportunity.

Therefore, where the court at first instance may have inched the floodgates open, the Supreme Court has since slammed them well and truly shut.

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