Can looking into a neighbouring property amount to nuisance?

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We have encountered several disputes stemming from a perceived interference of privacy created by one property looking into another.

The recent UK Supreme Court case of Fearn v Board of Trustees of the Tate Gallery [2023] UKSC 4 explored whether interference with privacy by looking into another property can amount to an actionable nuisance.

Private nuisance is an unreasonable interference with a person's right to the use or enjoyment of their interest in land. Settled case law has held that cases of "overlooking" generally will not amount to a nuisance where a property is used in a "usual and reasonable manner."

Importantly, Fearn establishes that visual intrusion arising from an "abnormal use" of a property may give rise to a nuisance claim.

The facts

In 2016, the Tate Modern art museum (**Tate**) opened a viewing gallery on top of the Blavatnik Building. It provides 360 degree-views over London and attracts around 500,000 visitors a year. It is open daily from 10am and can stay open as late as 10pm on occasions. Events held at the viewing gallery generate considerable income for Tate.

Viewing gallery visitors can see straight into glass-walled flats located approximately 34 metres away, exposing the flat's interiors (and their occupants) to the public. The evidence showed that visitors posted photos of the flat interiors on social media which, understandably, the residents were not particularly pleased about.

The residents sought an injunction to prevent the public from viewing their flats from the viewing gallery, or alternatively an award of damages.

The High Court and Court of Appeal

The High Court held that the extent of viewing was a material intrusion into the privacy of the residents, however, that in itself could not give rise to a successful nuisance claim. The Court considered that using the top floor of the Blavatnik Building as a viewing gallery was reasonable. The residents were, in part, responsible for their own misfortune because they failed to take remedial action to protect their privacy by lowering blinds or installing curtains.

The Court of Appeal held that the High Court's reasoning was wrong in law. However, the Court of Appeal came to the same conclusion as they considered that "mere overlooking" could not amount to a private nuisance.

The Supreme Court

The Court held that the nature and the extent of the viewing was beyond the "necessary natural consequences of the common and ordinary use" of Tate's property. Inviting several thousand visitors daily to look out at the view from a building cannot be regarded as a common or ordinary use of land. This was not a case of mere "overlooking". The resident's complaint was founded on the sheer scale of intrusion of privacy.

The majority rejected Tate's argument that the flats being glass-walled made them more vulnerable to inward viewing. It is irrational to say that the glass walls are abnormal or unusual, especially in a modern high-rise block in such a central area of London.

The majority was not swayed by the fact Tate had complied with all requisite planning law. Planning law and the law of nuisance carried out different functions. Planning law did not seek to compensate violations of privacy rights. Therefore, planning laws are not a substitute for the protection provided by the common law of nuisance.

The majority further considered that it is not an acceptable defense to nuisance to require the residents to take remedial measures to avoid the adverse impact of Tate's acts. The residents are not expected to live behind curtains or blinds drawn all day to avoid the intrusion caused by Tate's abnormal use.

Tate could not avoid liability for nuisance by arguing that it is in the public interest to maintain the viewing intact. Public benefit is not a determinative factor in terms of establishing the liability for nuisance. Once the liability has been established, then the public benefit may be considered to determine whether an injunction is given, or damages are awarded. The case was referred back to the High Court to determine the appropriate remedy.

Key takeaways

The case dealt with a very particular set of facts involving a reasonably extreme intrusion of privacy, so we do not expect a flood of nuisance cases to be made on the same basis. However, the case provides strong precedent that intrusion of privacy can amount to an actionable nuisance in certain circumstances.

Neighbors looking into your home is very unlikely to be an actionable nuisance. However, if your neighbor carries on a business activity which involves large numbers of people looking into your property, this may be an actionable nuisance.