Hilary Term
[2023] UKSC 4
On appeal from: [2020] EWCA Civ 104

JUDGMENT

Fearn and others (Appellants) *v* Board of Trustees of the Tate Gallery (Respondent)

before

Lord Reed, President
Lord Lloyd-Jones
Lord Kitchin
Lord Sales
Lord Leggatt

JUDGMENT GIVEN ON
1 February 2023

Heard on 7 and 8 December 2021

Appellants
Tom Weekes KC
Jacob Dean
Richard Moules
(Instructed by Forsters LLP)

Respondent
Guy Fetherstonhaugh KC
Aileen McColgan KC
Elizabeth Fitzgerald
(Instructed by Herbert Smith Freehills LLP (London))

Appellants:
(1) Giles Fearn
(2) Gerald Kraftman
(3) Ian McFadyen
(4) Helen McFadyen
(5) Lindsay Urquhart

LORD LEGGATT (with whom Lord Reed and Lord Lloyd-Jones agree):

A. INTRODUCTION

1. On the top floor of the Blavatnik Building, which is part of the Tate Modern art museum on Bankside in London, there is a public viewing gallery. It is a popular visitor attraction. From the viewing gallery visitors can enjoy 360-degree panoramic views of London. When the claim was brought, about 5½ million people were visiting the Tate Modern each year and, of them, several hundred thousand (between 500,000 and 600,000 on one estimate) visited the viewing gallery, with a limit of 300 people at any one time. Entry to the museum and the viewing gallery is free but the top floor of the Blavatnik Building is also available to hire for external events. Such events are very important financially to the Tate Modern because they bring in significant income.

2. Unfortunately for the claimants in this case, visitors to the viewing gallery can see straight into the living areas of their flats. The flats in question are located on, respectively, the 13th, 18th, 19th and 21st floors of a block which is part of the nearby Neo Bankside residential and commercial development. The distance between the two buildings is about 34 metres and the flats on the 18th and 19th floors - which are the most affected - are at about the same height above ground level as the viewing gallery. The walls of the Neo Bankside flats are constructed mainly of glass. The trial judge found that, on the southern walkway of the viewing gallery, "[a] major part of what catches the eye is the apparently clear and uninterrupted view of how the claimants seek to conduct their lives in the flats. One can see them from practically every angle on the southern walkway": [2019] Ch 369, para 203.

3. The viewing gallery opens when the museum opens at 10am every day of the week. When it first opened in 2016, the viewing gallery closed when the museum closes, at 6pm on Sunday to Thursday and at 10pm on Fridays and Saturdays. In response to complaints about the viewing gallery, the closing time on Sunday to Thursday was later moved forward slightly to 5.30pm and on Fridays and Saturdays the south and west sides of the viewing gallery were closed at 7pm, with only the north and east sides staying open until 10pm. (An exception was made for one Friday each month when the whole viewing gallery stayed open until 10pm.) These were the opening hours at the time of the trial.

4. In this action the claimants are seeking an injunction requiring the Board of Trustees of the Tate Gallery to prevent members of the public from viewing their flats from the relevant part of the viewing gallery walkway; or alternatively, an award of damages. Their claim is based on the common law of private nuisance.

5. The trial judge, Mann J, found as facts that a very significant number of visitors to the Tate's viewing gallery display an interest in the interiors of the claimants' flats. Some look, some peer, some photograph, some wave. Occasionally binoculars are used. Many photographs showing the interiors of the flats have been posted on social media. The judge found that the extent of the viewing and interest shown in the claimants' flats is a material intrusion into the privacy of their living accommodation, using the word "privacy" in its everyday sense. He held that intrusive viewing from a neighbouring property can in principle give rise to a claim for nuisance. But he nevertheless concluded that the intrusion experienced by the claimants in this case does not amount to a nuisance. The judge's reasoning, which I will examine in due course, was in essence that the Tate's use of the top floor of the Blavatnik Building as a public viewing gallery is reasonable and that the claimants are responsible for their own misfortune: first, because they have bought properties with glass walls and, second, because they could take remedial measures to protect their own privacy such as lowering their blinds during the day or installing net curtains.

6. On appeal, the Court of Appeal (Sir Terence Etherton MR, Lewison and Rose LJJ) found that the judge's reasoning involved material errors of law and that, if the principles of common law nuisance are correctly applied to the facts of this case, the claim should succeed. Nevertheless, they dismissed the appeal. They did so on the ground that "overlooking", no matter how oppressive, cannot in law count as a nuisance. By way of cold comfort to the claimants, they explained that "even in modern times the law does not always provide a remedy for every annoyance to a neighbour, however considerable that annoyance may be": [2020] Ch 621, para 79.

7. In my opinion, the Court of Appeal was right to hold that the judge incorrectly applied the law but wrong to decide that the law of nuisance does not cover a case of this kind. On the facts found by the judge, this is a straightforward case of nuisance. As I will explain later, I suspect that what lies behind the rejection of the claim by the courts below is a reluctance to decide that the private rights of a few wealthy property owners should prevent the general public from enjoying an unrestricted view of London and a major national museum from providing public access to such a view. To the extent that this is a relevant consideration, however, its relevance is to the question of remedy and whether or not it is appropriate to prohibit the defendant's activity by granting an injunction: it cannot justify permitting the defendant to infringe the claimants' rights without compensation.

8. To make good these conclusions, I will begin by recalling the relevant core principles of the common law of private nuisance and showing how they apply to the facts of this case. I will then explain how, in my view, each of the courts below misapplied those principles.

B. CORE PRINCIPLES OF PRIVATE NUISANCE

(1) The scope of private nuisance

9. In his classic article "The Boundaries of Nuisance" (1949) 65 LQR 480 Professor Francis Newark described private nuisance as a "tort to land" - by which he meant that its subject matter is wrongful interference with the claimant's enjoyment of rights over land. He declared his willingness "in the spirit of the old reformers" to nail the following thesis to the doors of the Law Courts and defend it against all comers:

> "The term 'nuisance' is properly applied only to such actionable user of land as interferes with the enjoyment by the plaintiff of rights in land."

As generally in the law of property, the legal concept of land includes here not only the earth itself but also buildings and other things which are physically attached to it and rights, for example easements, which attach in law to the land.

10. In *Hunter v Canary Wharf Ltd* [1997] AC 655 the House of Lords emphatically endorsed this thesis: see especially pp 687G-688E (Lord Goff of Chieveley), 696B (Lord Lloyd of Berwick), 702H, 707C (Lord Hoffmann) and 723D-E (Lord Hope of Craighead). By a majority of four to one (Lord Cooke of Thorndon dissenting), the House of Lords decided that, because the interest protected by the tort of private nuisance is the use and enjoyment of land, only a person with a legal interest in the land can sue. Generally, the required interest is a right to exclusive possession of the land. That requirement is satisfied by the claimants in this case who are the leasehold owners of their flats under 999-year leases.

11. It follows from the nature of the tort of private nuisance that the harm from which the law protects a claimant is diminution in the utility and amenity value of the claimant's land, and not personal discomfort to the persons who are occupying it: see eg *Hunter* [1997] AC 655, 696B-D (Lord Lloyd), 705G-707C (Lord Hoffmann), 724F-725A (Lord Hope); *Williams v Network Rail Infrastructure Ltd* [2019] QB 601, para 43. As Professor Newark put it in his article, at pp 488-489:

> "… the interest of the plaintiff which is invaded is not the interest of bodily security but the interest of liberty to exercise rights over land in the amplest manner. A sulphurous chimney in a residential area is not a nuisance

because it makes householders cough and splutter but
because it prevents them taking their ease in their gardens."

(2) Nuisance can be caused by any means

12. A second fundamental point, directly relevant in this case, is that there is no conceptual or a priori limit to what can constitute a nuisance. To adapt what Lord Macmillan said of negligence in *Donoghue v Stevenson* [1932] AC 562, 619, the categories of nuisance are not closed. Anything short of direct trespass on the claimant's land which materially interferes with the claimant's enjoyment of rights in land is capable of being a nuisance.

13. Frequently, such interference is caused by something emanating from land occupied by or under the control of the defendant which physically invades the claimant's land. This may be something tangible, as where - to take a recent example - an incursion of Japanese knotweed from neighbouring land gave rise to a claim: see *Williams v Network Rail* [2019] QB 601. Or it may be something intangible, such as fumes, noise, vibration or an unpleasant smell. In all such cases, however, the basis of the claim is not the physical invasion itself but the resulting interference with the utility or amenity value of the claimant's land. Moreover, there is no requirement that the interference must be caused by a physical invasion and, as commentators have pointed out, there are many cases which do not fit this model: see C Essert, "Nuisance and the Normative Boundaries of Ownership" (2016) 52 Tulsa L Rev 85, 96-98; D Nolan, "The Essence of Private Nuisance" in Ben McFarlane and Sinéad Agnew (eds), *Modern Studies in Property Law*, vol 10 (2019) 71, 81-83. So, for example, a nuisance may be caused by obstructing access to land (eg *Guppys (Bridport) Ltd v Brookling* (1983) 14 HLR 1); by a withdrawal of support for the claimant's land (eg *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836); by obstruction of an acquired right to light (eg *Jolly v Kine* [1907] AC 1) or to a flow of air (eg *Bass v Gregory* (1890) 25 QBD 481) through a defined aperture; or by preventing connection to a public sewer (*Barratt Homes Ltd v Dŵr Cymru Cyfyngedig (No 2)* [2013] 1 WLR 3486).

14. In the New Zealand case of *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525, the interference consisted in a dazzling glare caused by the deflection of the sun's rays off the glass roof of the defendant's building. Similarly, in one American case a large neon advertising sign on a building directly opposite bedrooms of the plaintiff's hotel was held to cause a nuisance when illuminated at night: *Shelburne Inc v Crossan Corp*, 95 NJ Eq 188; 122 A 749 (NJ Ch 1923). In the *Bank of New Zealand* case, at p 530, Hardie Boys J rightly saw a "dearth" of similar cases as presenting "no great obstacle" to the claim, since "nuisance is one of those areas of the law where the courts have

long been engaged in the application of certain basic legal concepts to a never-ending variety of circumstances …"

15. In principle, the sight of something for which the defendant is responsible may be so offensive as to amount to a nuisance. In *Thompson-Schwab v Costaki* [1956] 1 WLR 335 the Court of Appeal upheld the grant of an interim injunction to restrain the use of the house next door to the claimant's house as a brothel. The court rejected a submission that the sight of prostitutes and their clients coming and going from the defendant's premises was not capable of constituting a nuisance as a matter of law, holding that whether a nuisance was established would depend on the facts found at the trial. See also *Laws v Florinplace Ltd* [1981] 1 All ER 659 (sex shop on a residential street). American case law provides further examples of interference with the enjoyment of land caused by offensive sights, such as *Foley v Harris*, 286 SE 2d 186 (Va 1982) where the keeping of numerous junked, abandoned and disabled vehicles on the defendant's land was held to be a nuisance.

16. In this case we are concerned, not with a sight to which an occupier of land is subjected when looking out, but with the interference caused by people constantly looking in. Leaving the actual facts of this case aside for the moment, it is not difficult to imagine circumstances in which an ordinary person would find such visual intrusion an intolerable interference with their freedom to use and enjoy their property. A colourful illustration is provided by a mediaeval case heard at the London Assize of Nuisance in 1341: see Misc Roll DD: 5 Nov 1339 - 15 Dec 1346, number 365. According to the case record:

> "The [plaintiff] complains that John le Leche, fishmonger, has a leaden watch-tower (garritam) upon the wall of his tenement adjoining hers in the same par[ish] upon which he and his household (familiares) stand daily, watching the private affairs of the pl[aintiff] and her servants. The def[endant], present upon the land before the mayor and aldermen, admits the nuisance, and freely undertakes to remove it within 40 days subject to the customary penalty."

17. In his judgment in the present case Mann J gave a similar (hypothetical) example of a landowner "who erects a viewing tower whose only purpose is to enable views into the gardens and houses of other neighbours, and who then charges an entry fee to allow members of the public to come in and do just that": [2019] Ch 369, para 169. It is obvious that, as a matter of fact, such an activity could substantially interfere with the ordinary use and enjoyment of the neighbours' land. There is in these circumstances no legal reason why it would not be actionable as a private nuisance.

(3) "Unreasonable" interference

18. At a general level, the law of private nuisance is concerned with maintaining a balance between the conflicting rights of neighbouring landowners - "between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with": *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 903 (Lord Wright). It is evident that, if such a balance is to be maintained, not every interference with a person's use and enjoyment of their land can be actionable as a nuisance. It is sometimes said, as if it were a governing principle, that to give rise to liability the interference must be "unreasonable". However, the term "unreasonable" in this statement has no explanatory power: see in particular Allan Beever, *The Law of Private Nuisance* (2013), p 10 ("It is presented as an explanation of the operation of the law, but it does not, cannot, explain anything"). The requirement that the interference must be "unreasonable" is just another way of saying that - as it is also put - the interference must be "unlawful" (see eg *Winfield and Jolowicz on Tort*, 20th ed (2020), para 15-010, and the cases there cited); or that to give rise to liability an activity must "unduly" interfere with a person's use or enjoyment of land (see eg *Clerk & Lindsell on Torts*, 23rd ed (2020), para 19-01; *Lawrence v Fen Tigers Ltd* [2014] UKSC 13; [2014] AC 822, para 3, per Lord Neuberger of Abbotsbury).

19. The authors of *Winfield and Jolowicz on Tort*, para 15-017, explain that the term "unreasonable" in this context "signifies what is legally right between the parties taking account of all the circumstances of the case." In other words, it is no more than a way of stating a conclusion about whether the defendant's activity is lawful and is not itself a legal standard or test which assists in reaching such a conclusion.

20. In their judgment in this case the Court of Appeal rightly emphasised that liability for 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", and that the requirements of the common law as to what a claimant must prove, and 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": [2020] Ch 621, para 38. Provided this is understood, no harm is done in using the language of "reasonableness". The risk of this form of expression, however, is that it might be mistaken for an actual test for determining liability, albeit one that is entirely open-ended and lacking in content. On occasion the best the law can do is to ask an impartial judge to decide what he or she intuitively feels is reasonable or right between the parties in all the circumstances of the case. But the common law aspires to be more principled than this. As I will describe, there are principles, settled since the nineteenth century, which run through the cases and govern whether interference with the use and enjoyment of land is

"unlawful" or "undue" or (if the term is to be used) "unreasonable". These principles are not formulae or mechanical rules. They involve judgment in their application. But they provide clear standards rooted in values of reciprocity and equal justice.

21. In applying these principles, the first question which the court must ask is whether the defendant's use of land has caused a *substantial* interference with the *ordinary* use of the claimant's land. The two evaluative judgments involved in this test each merit some elaboration.

(4) The interference must be substantial

22. Courts have adopted varying phraseology to express the point that the interference with the use of the claimant's land must exceed a minimum level of seriousness to justify the law's intervention. The terms "real", "substantial", "material" and "significant" have all been used. Put the other way round, the courts will not entertain claims for minor annoyances. As Lord Wensleydale said in *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642, 653-654:

> "the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected."

23. The test is objective. What amounts to a material or substantial interference is not judged by what the claimant finds annoying or inconvenient but by the standards of an ordinary or average person in the claimant's position. As famously expressed by Knight Bruce V-C in *Walter v Selfe* (1851) 4 De G & Sm 315, 322, the question is whether the interference ought to be considered a material inconvenience "not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people"; see also *Barr v Biffa Waste Services Ltd* [2013] QB 455, para 36(ii). The objective nature of the test reflects the fact that the interest protected by the law of private nuisance is the utility of land, and not the bodily security or comfort of the particular individuals occupying it: see para 11 above.

(5) The ordinary use of land

24. Fundamental to the common law of private nuisance is the priority accorded to the general and ordinary use of land over more particular and uncommon uses. In

Fleming v Hislop (1886) 11 App Cas 686, 691, the Earl of Selborne L-C encapsulated this well when he defined a nuisance as "what causes material discomfort and annoyance *for the ordinary purposes of life* to a man's house or to his property" (emphasis added). In the earlier case of *Ball v Ray* (1873) LR 8 Ch App 467, 470, the same judge, when Lord Chancellor, had expressed the converse proposition that:

> "if either party turns his house, or any portion of it, to *unusual purposes* in such a manner as to produce a substantial injury to his neighbour, it appears to me that that is not according to principle or authority a reasonable use of his own property; and his neighbour, shewing substantial injury, is entitled to protection." (emphasis added)

The "unusual purpose" for which the defendant in *Ball v Ray* was using his house (in a residential street) was as a stable for keeping horses. Mellish LJ (at p 471) agreed with the Lord Chancellor that:

> "when in a street like Green Street the ground floor of a neighbouring house is turned into a stable, we are not to consider the noise of horses from that stable like the noise of a pianoforte from a neighbour's house, or the noise of a neighbour's children in their nursery, which are noises we must reasonably expect, and must to a considerable extent put up with."

See also *Broder v Saillard* (1876) 2 Ch D 692, another case concerning a stable in a residential street, where this passage was quoted with approval and the principle applied.

25. One aspect of this core principle is that an occupier cannot complain if the use interfered with is not an ordinary use. In *Robinson v Kilvert* (1889) 41 Ch D 88 the claimant rented a warehouse in which he stored a particularly delicate and sensitive type of paper. Heat rising from the defendant's cellar underneath the warehouse floor damaged the paper although it would not have affected ordinary paper and was not sufficient to interfere with "the ordinary use of property for the purposes of residence or business" (p 94). The Court of Appeal held that the defendant was not liable in nuisance. Cotton LJ, at p 94, rejected the notion that something can be 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." As Lord Robertson said, giving the

judgment of the Privy Council in *Eastern and South African Telegraph Co v Cape Town Tramways Co Ltd* [1902] AC 381 at 393:

> "A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure."

26. The trial judge in the present case in an appendix to his judgment (at paras 228-233) was in my view quite right to recognise the continuing validity of this principle and to reject contrary dicta of Buxton LJ in *Network Rail Infrastructure Ltd (formerly Railtrack plc) v Morris (trading as Soundstar Studio)* [2004] Env LR 41, paras 32 and 35-36, suggesting that it is no longer apt.

27. The other aspect of this core principle is that, even where the defendant's activity substantially interferes with the ordinary use and enjoyment of the claimant's land, it will not give rise to liability if the activity is itself no more than an ordinary use of the defendant's own land. In the leading case of *Bamford v Turnley* (1862) 3 B & S 66 at 83, Bramwell B formulated a test which has since been regularly cited, approved and applied, including at the highest level. He gave what were then contemporary examples of acts such as "burning weeds, emptying cess-pools" and "making noises during repairs" which (unless done maliciously and without cause) would not be treated as nuisances, even when they caused material inconvenience or discomfort to neighbouring owners. He then said at pp83-84:

> "There must be, then, some principle on which such cases must be excepted. It seems to me that that principle may be deduced from the character of these cases, and is this, viz, that *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*." (emphasis added)

Bramwell B justified this principle in the following way:

> "There is an obvious necessity for such a principle as I have mentioned. It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal

> nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live."

28. Subsequent cases have shown that this justification is not limited, as Bramwell B suggested, to situations where the reciprocal nuisances "are of a comparatively trifling character." The rule of "give and take, live and let live" applies wherever a nuisance results from the ordinary use of land. In *Southwark London Borough Council v Tanner* [2001] 1 AC 1 adjoining flats had been built without sound insulation, with the result that, as described by Lord Hoffmann at p 7:

> "The tenants can hear not only the neighbours' televisions and their babies crying but their coming and going, their cooking and cleaning, their quarrels and their love-making. The lack of privacy causes tension and distress."

The noise from the neighbours' activities thus caused a substantial interference with the ordinary use and enjoyment of the claimants' flats. But the House of Lords held that this interference was not an actionable nuisance because the neighbours were doing no more than making normal use of their own flats. The two conditions of Bramwell B's test were satisfied, as the acts complained of were (i) necessary for the common and ordinary use and occupation of land, and (ii) "conveniently done" - that is to say, done with proper consideration for the interests of neighbouring occupiers: see pp 16C-D (Lord Hoffmann) and 21A-B (Lord Millett). Lord Hoffmann stated, at p 15F-G:

> "… I do not think that the normal use of a residential flat can possibly be a nuisance to the neighbours. If it were, we would have the absurd position that each, behaving normally and reasonably, was a nuisance to the other."

"Reasonable user"

29. In Cambridge Water Co v Eastern Counties Leather plc [1994] 2 AC 264, 299, Lord Goff said that:

> "although liability for nuisance has generally been regarded as strict, … [it] has been kept under control by the principle of reasonable user - the principle of give and take as between neighbouring occupiers of land, under which '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:' see *Bamford v Turnley* (1862) 3 B & S 62, 83, per Bramwell B. The effect is that, if the user is reasonable, the defendant will not be liable for consequent harm to his neighbour's enjoyment of his land; but if the user is not reasonable, the defendant will be liable, even though he may have exercised reasonable care and skill to avoid it."

It can be seen that in this passage Lord Goff was expressly endorsing the principle formulated by Bramwell B in *Bamford v Turnley* and was using the phrase "reasonable user" as a shorthand for this principle, under which "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." Unfortunately, this point has sometimes been overlooked and these remarks treated as if Lord Goff had been suggesting that the applicable test is one of the "reasonableness" of the defendant's use of land in a general, undefined sense. The misunderstanding is ironic, as the very issue decided in *Bamford v Turnley* was that it is <u>not</u> a defence to liability that the defendant's use of his land is reasonable.

30. The complaint in *Bamford v Turnley* was that "the brick-kilns of the defendant, by immitting corrupted air upon the plaintiff's house, had rendered it unfit for healthy or comfortable occupation": see (1862) 3 B & S 66, 74. The jury returned a verdict for the defendant, after being directed that they must do so if they were of the opinion that making bricks, notwithstanding the interference caused to the plaintiff, "was, under the circumstances, a reasonable use by the defendant of his own land." The question on appeal was whether the judge's direction to the jury was correct in law. The Court of Exchequer Chamber (by a majority of five to one, with Pollock CB dissenting) held that the direction was not correct and substituted a verdict for the plaintiff. Although the main judgment was given by Williams J, it is the concurring judgment of Bramwell B which has been repeatedly cited and regarded as a classic statement of the relevant legal principles. Bramwell B explained (at p 83) why it did not assist the defendant that his use of his land to manufacture bricks was found by the jury to be reasonable. The reason was that "what has been done was not the using of land in a common and ordinary way, but in an exceptional manner - not unnatural nor unusual, but not the common and ordinary use of land."

31. The point that it is no answer to a claim for nuisance to say that the defendant is using its land reasonably has been reiterated in many later cases: see eg *Broder v Saillard* (1876) 2 Ch D 692, 701; *Reinhardt v Mentasti* (1889) 42 Ch D 685, 690;

Attorney General v Cole & Son [1901] 1 Ch D 205; *Southwark London Borough Council v Tanner* [2001] 1 AC 1, 20; *Barr v Biffa Waste Services Ltd* [2013] QB 455, paras 60-72; and see also Allan Beever, *The Law of Private Nuisance* (2013) pp 9-13. In *Southwark* Lord Millett (with whom Lords Slynn, Steyn and Clyde agreed) addressed directly Lord Goff's description in *Cambridge Water* of Bramwell B's principle as "the principle of reasonable user", saying, at p 20:

> "The use of the word 'reasonable' in this context is apt to be misunderstood. It is no answer to an action for nuisance to say that the defendant is only making reasonable use of his land."

Lord Millett went on to reiterate that the principle which limits the liability of a landowner who causes a sensible interference with his neighbour's enjoyment of his property is that stated by Bramwell B in *Bamford v Turnley*, and that where the two conditions of that test are satisfied, no action will lie against the landowner "for that substantial interference with the use and enjoyment of his neighbour's land that would otherwise have been an actionable nuisance" (p 21).

32. In *Barr v Biffa Waste Services Ltd* the residents of a housing estate complained of unpleasant smells emanating from a landfill site used as a waste tip by the defendant. The trial judge dismissed the claims in nuisance of all but two of the claimants. In reaching this decision, the judge applied a test (for which he relied principally on the passage quoted above from Lord Goff's speech in *Cambridge Water*) of "whether or not the use of the land in question can be described as reasonable in all the circumstances": [2011] EWHC 1003 (TCC); [2011] 4 All ER 1065, para 205. The judge also said, at para 256(c):

> "Reasonable user has been equated to the principle of 'give and take' … Although that principle was originally said *not* to arise in cases where the use was 'not unnatural nor unusual but not the common and ordinary use of land' (*Bamford v Turnley* (1862) 3 B & S 62), the modern law of nuisance focuses on whether, in all the circumstances, the user is reasonable, and 'give and take' will usually be an element of that assessment, regardless of whether the use of the land could be said to be common or not …"

33. In allowing the claimants' appeal, the Court of Appeal firmly rejected this view of the law, describing it as "unsupported by authority, and misconceived": see [2013]

QB 455, paras 60-72. Carnwath LJ (with whom the other members of the court agreed) discussed the concept of "reasonable user" at some length, observing (at para 46) that the phrase "reasonable user" is "at most a different way of describing old principles, not an excuse for re-inventing them". He pointed out that in *Cambridge Water* Lord Goff was not seeking to redefine the ordinary law of nuisance but rather was citing the well established principles formulated by Bramwell B in *Bamford v Turnley* (para 65) and was using the phrase "reasonable user" "as no more than a shorthand for the traditional common law tests" (para 71). He referred to Lord Millett's comments in *Southwark* on Lord Goff's use of the expression and noted that Lord Millett's own summary of Bramwell B's principles did not use a test of reasonableness. Carnwath LJ reiterated that "reasonable user" "should be judged by the well settled tests" formulated by Bramwell B (para 72). That is an important reminder, which I would endorse.

Reciprocity

34. The underlying justification for those "well settled tests" was spelt out by Lord Millett in *Southwark*, when he explained (at p 20) that:

> "The governing principle is good neighbourliness, and this involves reciprocity. A landowner must show the same consideration for his neighbour as he would expect his neighbour to show for him."

This explanation gets to the nub of the rule of "give and take, live and let live" stated by Bramwell B in *Bamford v Turnley*. It is a principle of equal justice, a form of the golden rule that you should "do as you would be done by". Put negatively, people cannot fairly demand of others behaviour which they would not at the same time allow others to demand of them. See further Ernest J Weinrib, *The Idea of Private Law* (2012) pp 190-194; C Essert, "Nuisance and the Normative Boundaries of Ownership" (2016) 52 Tulsa L Rev 85, 103-106.

35. This principle of reciprocity explains the priority given by the law of nuisance to the common and ordinary use of land over special and unusual uses. A person who puts his land to a special use cannot justify substantial interference which this causes with the ordinary use of neighbouring land by saying that he is asking no more consideration or forbearance from his neighbour than they (or an average person in their position) can expect from him. Nor can such a person complain on that basis about substantial interference with his special use of his land caused by the ordinary use of neighbouring land. By contrast, a person who is using her land in a common and

ordinary way is not seeking any unequal treatment or asking of her neighbours more than they ask of her.

The freedom to build

36. I have mentioned already that in *Hunter v Canary Wharf Ltd* the House of Lords confirmed that only a person with an interest in the affected land may sue for nuisance. A second issue raised on that appeal was whether interference with television reception is capable of giving rise to a claim for nuisance. The House of Lords did not give an absolute answer to that question. The law lords did not exclude the possibility that the ability to watch television might be regarded as so important a part of the ordinary enjoyment of property that interference with it could amount to an actionable nuisance. That might have been so where the interference was caused by a special or particular use of the defendant's land, as was claimed in *Bridlington Relay Ltd v Yorkshire Electricity Board* [1965] Ch 436 (where the point was left open as the claim failed on the facts). In *Hunter*, however, the cause of the interference with television reception was the size and design (with metal cladding) of a building erected on the defendant's land. The House of Lords reaffirmed the general rule at common law that anyone may build whatever they like on their land, unless this violates an agreement not to do so or an acquired right to light or to a flow of air through a defined aperture: see pp 685D-F (Lord Goff), 699C-H (Lord Lloyd), 709A-H (Lord Hoffmann) and 726B-H (Lord Hope). It followed that interference with the use of the claimants' land caused by the mere presence of a building on the defendant's land could not give rise to a claim for private nuisance. The same principle explains why no claim lies for interference with a view or prospect.

37. The right to build (and demolish) structures is fundamental to the common and ordinary use of land, involving as it does the basic freedom to decide whether and how to occupy the space comprising the property. It follows that interference resulting from construction (or demolition) works will not be actionable provided it is, in Bramwell B's phrase, "conveniently done", that is to say, in so far as all reasonable and proper steps are taken to ensure that no undue inconvenience is caused to neighbours: see *Andreae v Selfridge & Co Ltd* [1938] Ch 1.

(6) The locality principle

38. It is also well settled that what is a "common and ordinary use of land" is to be judged having regard to the character of the locality. In *Sturges v Bridgman* (1879) 11 Ch D 852, 865, Thesiger LJ giving the judgment of the Court of Appeal expressed this in a famous statement that "what would be a nuisance in Belgrave Square would not

necessarily be so in Bermondsey". In saying this, he was not, as is sometimes mistakenly supposed, suggesting that inhabitants of an upmarket neighbourhood are entitled to greater legal protection than those of a poorer neighbourhood - an approach which would be entirely contrary to equal justice. The facts were that Dr Sturges, a physician living in Wimpole Street in London, built a consulting room at the end of his back garden. On the other side of the party wall from the new consulting room was the kitchen of the defendant, Mr Bridgman, who carried on business as a confectioner. Mr Bridgman had in his kitchen two large mortars set in brickwork built up against the party wall and worked by two large pestles held upright by horizontal bearers attached to the wall. Dr Sturges complained that, when the pestles and mortars were used, noise and vibrations caused serious disturbance.

39. At the trial Sir George Jessel MR found the evidence of nuisance clear and "all one way" (p 855). The principal defence was that the defendant had acquired a prescriptive right to continue using the pestles and mortars as a result of having done so without interruption for more than 20 years. The judge and the Court of Appeal rejected this argument. The principle on which such a right can be acquired is that the other party has acquiesced in a wrong for the prescribed period of time. In this case no such acquiescence could be inferred as the use of the pestles and mortars only became a nuisance and thus an actionable wrong when the consulting room was built.

40. Mr Bridgman's counsel objected that this reasoning would lead as its logical consequence to "the most serious practical inconveniences". A hypothetical example was posed of a person who builds a new home, not in a residential area such as Belgrave Square, but in an industrial district such as (what were then) "the tanneries of Bermondsey". It was said that if the new homeowner could complain that the activities of the tanneries were a nuisance, this would have the potential in a locality devoted to a particular trade or manufacture to put a stop to such trade or manufacture altogether. This was the context in which Thesiger LJ made his much quoted remark. The court's answer to this objection, at p 865, was that:

> "where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance, Judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong."

41. The fact that the claim in *Sturges v Bridgman* succeeded reflects the fact that in 1873, when Dr Sturges built his consulting room, it could not be said that the locality

was one devoted to manufacture, as Wimpole Street was primarily residential, with professionals, including many members of the medical profession like Dr Sturges, conducting business from their homes: see AWB Simpson, "The Story of *Sturges v Bridgman*: The Resolution of Land Use Disputes between Neighbors" in G Korngold and A Morriss (eds), *Property Stories* (2004), p 9.

(7) Coming to a nuisance is no defence

42. A further rule, also illustrated by *Sturges v Bridgman*, is that "coming to a nuisance" is not a defence. In other words, it is not in itself a defence to a claim for nuisance that the defendant was already using his land in the way now complained of before the claimant acquired or began to occupy the neighbouring land. Nor is it a defence that the defendant's activity did not amount to a nuisance until the claimant's land was built on or its use was changed. This may initially seem counterintuitive. Mr Bridgman and his father before him had been using one of the pestles and mortars in their kitchen in the same place and to the same extent for some 60 years and the other for well over 20 years before Dr Sturges built his consulting room. It may at first sight appear unjust that Mr Bridgman was required to stop an activity which had been carried on for such a long time. This situation does not arise in the present case, as the claimants were already occupying their flats when the Tate's viewing gallery was opened. But it is worth noticing the reasons why Mr Bridgman's longstanding use of his property did not give him a defence, and why indeed it would have been unjust if it had done so, because those reasons shed further light on the principles which underpin the law of nuisance. The rationale for the approach taken by the common law can be seen by comparing the alternatives.

43. One alternative approach would be to treat an activity as an actionable nuisance even though it is not interfering with any actual use of the claimant's property if it impairs a potential use. Such an approach would have allowed Dr Sturges (or his predecessor in title) to bring an action to stop the use of Mr Bridgman's pestles and mortars before the consulting room was built even though that use was then causing no material inconvenience, on the basis that the noise and vibrations would prevent the ordinary use of any new room that his neighbour might later wish to build against the party wall. There are good reasons why the law does not permit such a claim. First, requiring actual interference to be shown allows someone in Mr Bridgman's position to make use of his land, at least for the time being, in a way that benefits him and is not inconveniencing his neighbour. Second, the potential conflict of use might never actually arise. For example, Mr Bridgman's neighbour might never have chosen to build a new room on the other side of the party wall, or Mr Bridgman might have installed new kitchen equipment which did not cause the same noise and vibrations, or his premises might have been converted to a different use. It is not

desirable to have litigation about possible future conflicts that may never actually occur.

44. A second theoretical possibility would be to allow a person to acquire a right to continue a use of land through long uninterrupted use during a period when the neighbouring landowner has no right to prevent such use because the neighbour is not at that time using her own land in such a way that the activity is a nuisance. However, such a regime would be equally objectionable. It is wrong in principle that a person should be able to acquire rights over neighbouring land and diminish his neighbour's rights over her own land without the neighbour's consent or acquiescence, simply by his unilateral action in carrying on an activity at a time when the owner or occupier of the neighbouring land has no power to prevent it.

45. These points were explained with conspicuous clarity in the judgment of the Court of Appeal in *Sturges v Bridgman* by reference to an example of a blacksmith's forge "built away from all habitations, but to which, in course of time, habitations approach." Thesiger LJ said, at p 865:

> "It would be on the one hand in a very high degree unreasonable and undesirable that there should be a right of action for acts which are not in the present condition of the adjoining land, and possibly never will be any annoyance or inconvenience to either its owner or occupier; and it would be on the other hand in an equally degree unjust, and, from a public point of view, inexpedient that the use and value of the adjoining land should, for all time and under all circumstances, be restricted and diminished by reason of the continuance of acts incapable of physical interruption, and which the law gives no power to prevent."

Thesiger LJ pointed out that, if the blacksmith wished to protect himself from the risk of future claims for nuisance, he might do so "by taking a sufficient curtilage to ensure what he does from being at any time an annoyance to his neighbour."

46. The general rule that coming to a nuisance is not a defence was confirmed by the Supreme Court in *Lawrence v Fen Tigers Ltd* [2014] UKSC 13; [2014] AC 822. There is discussion (obiter) in the judgments of Lord Neuberger and Lord Carnwath in that case of the possibility that a use of the defendant's land which pre-dates a change in use of the claimant's land may nevertheless support a defence by contributing to the

character of the locality. The points discussed may in future need to be revisited but do not arise for decision on this appeal.

(8) The public interest

47. The last core principle that I need to mention is the principle that it is not a defence to a claim for nuisance that the activity carried on by the defendant is of public benefit: see eg *Clerk & Lindsell on Torts*, 23rd ed (2020), para 19-107. I will come back to this principle later in this judgment.

C. APPLYING THE LAW IN THIS CASE

48. I have summarised the legal principles which the court must apply in this case. I confess that their application to the facts found by the trial judge seems to me entirely straightforward. Mann J found that the living areas of the claimants' flats are under constant observation from the Tate's viewing gallery for much of the day, every day of the week; that the number of spectators is in the hundreds of thousands each year; and that spectators frequently take photographs of the interiors of the flats and sometimes post them on social media. It is not difficult to imagine how oppressive living in such circumstances would feel for any ordinary person - much like being on display in a zoo. It is hardly surprising that the judge concluded that this level of visual intrusion would reasonably be regarded by a homeowner as a material intrusion into the privacy of their living accommodation. On his findings it is beyond doubt that the viewing and photography which take place from the Tate's building cause a substantial interference with the ordinary use and enjoyment of the claimants' properties.

49. The Tate does not encourage visitors to peer into the claimants' flats. Indeed, in response to complaints from the claimants it posted a sign in the viewing gallery asking visitors to respect the privacy of the Tate's neighbours and instructed security guards to stop photography of the flats. However, the judge did not regard these steps as likely to achieve much, describing them as "not quite wholly useless": [2019] Ch 369, paras 69, 221. No attempt has been made, nor could realistically be made, to stop visitors from looking, sometimes intently, into the claimants' flats whenever the south side of the gallery is open; and in an age when most people carry a smartphone with a high powered camera it is a natural and foreseeable consequence of allowing thousands of visitors a week to look out from a viewing gallery from which they get a clear view of the claimants' living accommodation that a significant number will take photographs of the interiors of the flats, just as the judge found that they in fact do.

50. The judge characterised the locality in which the Tate Modern and the Neo Bankside flats are situated as "a part of urban south London used for a mixture of residential, cultural, tourist and commercial purposes." He noted that an occupier in that environment "can expect rather less privacy than perhaps a rural occupier might" and that "[a]nyone who lives in an inner city can expect to live quite cheek by jowl with neighbours": para 190. But he made no finding that there is any other viewing platform in that part of London; nor that operating a public viewing gallery is necessary for the common and ordinary use and occupation of the Tate's land. The Tate did not make, and could not credibly have made, any such allegation. Inviting members of the public to look out from a viewing gallery is manifestly a very particular and exceptional use of land. It cannot even be said to be a necessary or ordinary incident of operating an art museum. Hence, the Tate cannot rely on the principle of give and take and argue that it seeks no more toleration from its neighbours for its activities than they would expect the Tate to show for them.

51. I have indicated that it would not have mattered if the viewing gallery had already been operating when the Neo Bankside flats were built or when the claimants acquired their flats; and that even if the question of who was there first had been relevant, it would not have assisted the Tate. The claimants all bought their flats in 2013 or 2014. The Blavatnik Building including the viewing gallery was first opened to the public in June 2016. Although considerable time and evidence seems to have been devoted at the trial to investigating what the Tate and the developers of the Neo Bankside flats knew of each other's intended uses of their land at various stages of the planning process, I cannot see how this information could be relevant to whether or not the Tate is liable in nuisance; and counsel for the Tate have not argued on this appeal that it is.

52. Applying the well settled legal tests, therefore, the claim ought to succeed. The courts below, however, dismissed the claim - albeit for entirely different reasons from each other. I need therefore to address where and why the judge and the Court of Appeal each went wrong in their reasoning. Counsel for the Tate on this appeal put at the front and centre of their case the submission that the Court of Appeal's reasoning was correct. But they also relied as a fallback, if necessary, on the reasons given by the judge, and I will consider those reasons first.

D. THE JUDGE'S REASONS

53. The Court of Appeal identified where the judge went wrong. In their judgment they pointed out that the judge made two material errors of law: [2020] Ch 621, paras 97-102. I agree, although I would classify the errors under three heads rather than two.

(1) "Reasonable use" of the Tate's land

54. First, the judge applied the wrong legal test by framing the question he had to decide as "whether the Tate Modern, in operating the viewing gallery as it does, is making an unreasonable use of its land ..." The judge thought that this required an overall assessment bearing in mind the nature of the Tate's use of its land, the character of the locality 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": [2019] Ch 369, para 180. The judge thus made the same mistake, or cluster of mistakes, as the trial judge in *Barr v Biffa Waste Services Ltd* (see paras 32-33 above), a case that unfortunately does not appear to have been cited to him. He thought that an overall assessment was required of what - in an undefined sense - is "reasonable" in all the circumstances. He treated the rule of give and take as if it were an element of such an assessment of "reasonableness" rather than a principle of reciprocity and equal justice. And he asked himself whether the nature of the Tate's use of its land is "reasonable", instead of asking whether it is a common and ordinary use.

55. Having asked himself the wrong question, the answer given by the judge was, unsurprisingly, that operating a viewing gallery is not an inherently unreasonable activity in the neighbourhood: see para 196. Nowhere did the judge consider whether the operation of a viewing gallery is necessary for the common and ordinary use and occupation of the Tate's land. Had he done so, he would have been bound to conclude that, as in *Bamford v Turnley* itself, the Tate was not using its land "in a common and ordinary way, but in an exceptional manner."

56. That error is enough to vitiate the judge's legal analysis. But he also applied the law incorrectly in considering the impact of the Tate's activities on the ordinary use and enjoyment of the claimants' flats. Although the Court of Appeal dealt with them together, I think it convenient to address separately the judge's reasoning in relation to (a) the "sensitivity" of the flats and (b) the availability of "protective measures".

(2) "Sensitive" buildings

57. The judge considered that the developers in building the flats, and the claimants in choosing to buy them, had "created or submitted themselves to a sensitivity to privacy which is greater than would the case of a less glassed design" (sic); and that "[i]t would be wrong to allow this self-induced incentive to gaze … and self-induced exposure to the outside world, to create a liability in nuisance" (para 205).

58. The judge developed this idea by asking himself whether the claimants would have had a complaint if, instead of occupying flats with complete glass walls, they had lived in flats designed with "significant vertical and perhaps horizontal breaks to interrupt the inward view" (paras 201-202). As he acknowledged, no evidence or argument had been addressed to this question at the trial but the judge undertook the exercise anyway and hypothesised that, for the occupier of such an imaginary building, the vulnerability to the view from the gallery would not be sufficient to amount to a nuisance (para 203). The judge also drew an analogy with the principle that the liability of a defendant cannot be increased by the use of the claimant's property for a particularly sensitive purpose (para 204).

59. In addition, the judge attached weight to the fact that the corner area of each flat was originally conceived by the developers as a sort of indoor balcony, described as a "winter garden", which is separated from the rest of the flat by glass doors. In practice the "winter gardens" are used as part of the living accommodation of the flats although, because they are divided from the rest of the interior by glass, spectators can see other parts of the living accommodation as well. The judge concluded that the claimants are occupying "a particularly sensitive property which they are operating in [a] way which has increased the sensitivity", when "a differently built, but perfectly acceptable, property … would not have had the same degree of exposure" (para 211).

The "winter gardens"

60. The claimants are entitled to occupy their flats as they choose and I cannot see that it matters whether the use made of the "winter gardens" - as I understand it, generally in the Neo Bankside flats and not just by the claimants - as part of the living accommodation was or was not part of the developers' original conception. There is no suggestion that this use is unlawful and, for a flat which is entirely indoors, I find it hard to see in any case what difference it could make in terms of what constitutes a nuisance whether a particular area is described as "living accommodation" or as an "amenity space".

Relevance of the glassed design

61. Nevertheless, I agree with the judge's broader point that the glassed design of the claimants' flats and their sensitivity to inward view is a relevant factor. It is relevant to the visual intrusion that the occupants can be expected to tolerate. Where in my view the judge went wrong was in how he analysed this question. Critically, he did not distinguish between two different arguments, one of which is valid and the other of which is not.

Sensitivity to the ordinary use of neighbouring land

62. To begin with the valid argument, as anyone who walks around central London can observe, floor to ceiling windows are a common feature of modern, high-rise city buildings. Neither the Tate nor the judge suggested otherwise. Such windows are no doubt attractive to owners and occupiers because of the amount of light, sense of space and (particularly on floors high above ground level) extensive views which they afford. But the judge was plainly right to say that those advantages come at a price in terms of privacy. In an inner-city environment the occupier of a flat high above ground level must recognise the possibility that a building of similar height might be constructed nearby from which the occupants can see through their windows. That reflects the nature of the locality as described by the judge. To the extent that such a nearby building is used in a common and ordinary way - for example, as housing or offices - the fact that the interiors of flats with glass walls can be seen is something the owners have to put up with in accordance with the rule of give and take. Increased exposure to the outside world is an inevitable consequence of the design. The fact that the properties have been designed and constructed in a way which makes them particularly vulnerable to inward view cannot increase the liabilities of neighbours.

63. Suppose, for example, that on the site of the Blavatnik Building another block of flats of similar height had been erected. In such circumstances the fact that the occupants of these new flats could see straight into the claimants' living accommodation might have caused the claimants annoyance. But if the occupants of the new flats were doing no more than making normal use of their own homes and showing as much consideration for their neighbours as they could reasonably expect their neighbours to show for them, the claimants could not have complained of nuisance. Such a situation would be analogous to the facts of *Southwark*, where the claimants had to put up with noise incidental to the ordinary use and occupation of neighbouring flats despite the considerable annoyance resulting from the fact that the flats had been built without adequate sound insulation. In the same way, in accordance with the principle of reciprocity, each flat owner in my example would have to put up with being visible to her neighbour just as her neighbour would have to put up with being visible to her. It would be required by the rule of give and take, live and let live.

64. *Hirose Electrical UK Ltd v Peak Ingredients Ltd* (2011) 4 JPL 429, on which counsel for the Tate relied, further illustrates this point. The parties in that case occupied adjacent premises on a light industrial estate. The claimant complained of food smells entering its offices (owing to the porous nature of the party wall) from the food additive manufacturing unit next door. The deputy judge found that, having regard to the nature of the locality, the degree of interference was insufficient to

amount to a nuisance. This was sufficient reason in itself to dismiss the claim. But relevantly for present purposes the judge also found that the defendant was making an ordinary use of its industrial premises and was not conducting its operations in an unreasonable manner. Hence, by analogy with the *Southwark* case, the defendant was in any case not liable. The Court of Appeal affirmed these findings: [2011] Env LR 34. This is another example, therefore, of a case where the rule of give and take applied.

Sensitivity to abnormal use

65. It does not follow, however, and is not correct, that where a person is using land (in Bramwell B's phrase) not "in a common and ordinary way, but in an exceptional manner," it is a defence to argue that a neighbour would not have suffered material inconvenience were it not for the fact that she occupies an "abnormally sensitive" property. This further and different argument is advanced by the Tate in this case. But it is not supported by precedent and is unsound in principle.

66. I think it no coincidence that no authority has been cited to us in which such an argument has ever been accepted. Such an argument was made unsuccessfully in *Hoare & Co v McAlpine* [1923] 1 Ch 167, where heavy vibration from pile driving during construction works caused serious structural damage to an old hotel belonging to the plaintiffs. The defendant asserted that any damage was due to the abnormally unstable construction of the plaintiffs' building. Just as the judge did in this case, the defendant relied on an analogy with *Robinson v Kilvert* and the principle that a claimant who uses property to carry on "an exceptionally delicate trade" cannot complain of injury which would not have been suffered if the claimant had carried on any ordinary trade. The defence failed on the facts because Astbury J did not accept that the plaintiffs' building, although old and built much less robustly than more modern buildings, was "the delicate and fastidious erection which has been suggested by the defendants" (p 175). The judge did not find it necessary to decide whether as a matter of law such an argument could ever succeed, but observed (at p 176):

> "If the defendants' contentions of law were really apposite I should find it difficult to answer the query: 'When does an old building lose its ordinary right of protection against destruction?'"

67. I think this question is apt because it highlights the hopeless uncertainty and endless scope for argument that would arise if the sensitivity of the claimant's property were in general regarded as itself giving rise to a defence to a claim for nuisance. The law of nuisance would be unworkable, and the protection which it

provides to homeowners seriously enfeebled, if it were treated as an answer to a claim for nuisance - as the judge treated it in this case - that the claimant would not have had a complaint in nuisance if, instead of her actual property, she had lived in a "differently built, but perfectly acceptable, property" (see para 211).

68. Quite apart from its unworkability, such an approach would be wrong in principle. As discussed earlier, the reason for applying an objective test when assessing whether the defendant's activity causes sufficiently serious interference to amount to a nuisance is that the injury is, strictly speaking, to the utility and amenity value of the claimant's land, and not to the comfort of the individuals who are occupying it. The particular sensitivities or idiosyncrasies of those individuals are therefore not relevant, and the law measures the extent of the interference by reference to the sensibilities of an average or ordinary person. By contrast, it is the utility of the actual land, including the buildings actually constructed on it, for which the law of private nuisance provides protection - not for some hypothetical building of "average" or "ordinary" construction and design.

69. This reflects the basic right of a person at common law, discussed earlier, to occupy and build on their land as they choose. The right applies equally to claimants and defendants. I have referred to the general rule, affirmed by the House of Lords in *Hunter v Canary Wharf Ltd*, that interference with the use of land caused by the presence or construction or design of a building on the defendant's land is not actionable as a nuisance (see para 35 above). By the same token, it is not a defence for a defendant to argue that the interference was caused by the presence or construction or design of the claimant's building. So in *Sturges v Bridgman* (1879) 11 Ch D 852, for example, the fact that no nuisance arose until Dr Sturges' consulting room was erected did not afford a defence to the claim. Nor did it afford a defence that, as Mr Bridgman argued, *if* Dr Sturges had built his consulting room with a separate wall and not directly against the party wall, he would not have experienced any noise or vibration (see p 854). The same point could be made about countless other cases of nuisance. It is not a defence that the defendant's activity would not have caused a nuisance if the claimant's building had been differently constructed or designed.

70. Counsel for the Tate sought to draw support from *Southwark* and *Hirose*, mentioned above. Adopting the view expressed by the authors of *Winfield and Jolowicz on Tort*, 20th ed (2020), para 15-031, counsel submitted that the best explanation for the decision in *Southwark* is that the claim failed because the claimants' flats were abnormally sensitive to noise. Similarly, they submitted that the decision in *Hirose* should be explained on the ground that the physical attributes of the party wall made the claimant's property abnormally sensitive to the odours generated

in the adjoining unit. These cases were thus said to support a principle that it may be a defence that the claimant is occupying an abnormally sensitive property.

71. However, this explanation does not reflect what the House of Lords actually decided in *Southwark*. For very good reason, the House of Lords did not decide that the claim failed because the claimants only had themselves to blame for renting flats with inadequate sound insulation in circumstances where they would not have suffered a nuisance if they had occupied "normal" flats. There is no hint of such unsatisfactory reasoning in the judgments. Nor was *Hirose* decided on the ground that no claim lay because the party wall was porous and the claimant would not have been subjected to the smell if it had occupied a "normally" built unit. In each case the "sensitive" nature of the physical make-up of the building did not itself provide a defence. It was simply part of the factual setting in which the claim arose and had to be decided, neutral in itself. The reason why the defendant had a good defence in each case was because of the principle that "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." That principle applies equally whatever the construction or design of the claimant's (or the defendant's) property and does not depend on whether either property is adjudged to be abnormally sensitive.

Conclusion on the relevance of sensitivity in design and construction

72. To draw these points together, the general relevance of sensitivity in the design and construction of buildings is that it makes neighbouring owners more vulnerable to interference from one another's activities. But such sensitivity does not alter the principles by which their reciprocal rights and obligations are determined. If an occupier is merely using her premises in a common and ordinary way and acting with as much consideration for neighbouring occupiers as can reasonably be expected, then she will not be liable in nuisance. The design of the building may in that way result in an occupier having to put up with greater interference with the ordinary use and enjoyment of her property than she would otherwise have to put up with - but only to the extent required to enable her neighbour to use his own property for the ordinary purposes of life.

73. For that reason in *Southwark* to the extent that noise from their neighbours' normal daily activities caused the claimants annoyance and disturbance which they would not have suffered in differently built flats, no claim lay. The same was true in *Hirose* in so far as the ordinary use made of industrial premises by the defendant would not have caused annoyance if better protection had been afforded by the party wall. Likewise, where the living areas of flats in the Neo Bankside development can be

seen from the Blavatnik Building, the normal use of that building would not give rise to a claim. In so far as this results in the occupants of flats being exposed to visual intrusion to which they would not have been exposed in a differently designed building, this is again something they have to put up with in accordance with the general principles of common law nuisance.

74. The present claim, however, is not a claim of this kind. It is different because the nature and extent of the viewing of the claimants' flats goes far beyond anything that could reasonably be regarded as a necessary or natural consequence of the common and ordinary use and occupation of the Tate's land. Thus, the judge did not accept that, even in a part of London used partly for cultural purposes and which attracts tourists, making a viewing gallery available to members of the public is an activity which should actually be expected: [2019] Ch 369, para 193.

75. Inviting several hundred thousand visitors a year to look out at the view from your building cannot by any stretch of the imagination be regarded as a common or ordinary use of land. Equally, having thousands of people each day looking into the interior of your flat, often taking photographs (which are sometimes posted on social media) and occasionally using binoculars, cannot possibly be justified by the rule of give and take. A flat owner who objects to this use of neighbouring land is not demanding of her neighbour any more than she must allow him to demand of her. She is not seeking any special or unequal treatment. She is asking only for her neighbour to show the same consideration towards her as he would expect her to show towards him.

Extreme cases of abnormal construction

76. I should qualify the proposition that the physical attributes of a building cannot themselves give rise to a claim or defence to a claim in nuisance. Although the question does not arise for decision in this case, I would not wish to rule out the possibility that there could be extreme cases where the design or construction of a building is so unusual and far from anything that could actually be expected that it might do so.

77. *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525 may be an example of such a case. That was the case where (in the middle of the day during the summer months when the sun was at its brightest) glass roofing panels on the defendant's building deflected the sun's rays in such a way as to cast a dazzling glare through the windows of properties across the street. As Lord Lloyd noted in *Hunter*, at p 700A-C, it is not easy to reconcile the finding of nuisance in the *Bank of New Zealand* case with

the decision of the House of Lords in *Hunter* that the interference with television reception caused by the size of the defendant's building and its stainless steel cladding was not actionable. Lord Goff suggested that the *Bank of New Zealand* case might be explained on the basis that the design of the defendant's building had the effect of deflecting the sunlight at such an angle and in such a manner as to cause "a high intensity dazzle", such that the nuisance was caused not by the mere presence of the building but by something emanating from the defendant's land: see pp 685G-686C. However, this distinction is unconvincing since, as Lord Lloyd pointed out, even if the light rays are regarded as having emanated from the defendant's land, a nuisance need not be caused by something emanating from the defendant's land and may arise from a mere state of affairs (see para 13 above). Assuming the *Bank of New Zealand* case was correctly decided, it may therefore need to be explained on the basis that the interference caused by the design of the defendant's building was so unusual and unforeseeable as to be beyond anything that could actually be expected. Certainly, as Lord Lloyd said at p 700C, that case would seem to "go to the limit of the law of nuisance".

78. So far as I am aware there is no English or Commonwealth authority in which it has ever been decided, conversely, that the design of the claimant's building was so unusual and unforeseeable as to preclude a claim in nuisance. However, the authors of *Winfield and Jolowicz on Tort*, 20th ed (2020), para 15-031, refer to *Cremidas v Fenton*, 111 NE 855 (Mass 1916), an American case where the plaintiff complained of vibrations to his house caused by the operation of machinery from a factory adjoining his premises. The claim failed. It was found as a fact that the age and unsubstantial construction of the plaintiff's house were such that "it would shake or jar … even by a person walking across the floor" and that this condition was unavoidable unless all operation of the machinery was suspended. In the light of these findings, the Massachusetts Supreme Judicial Court felt unable to say that, as a matter of law, the decision to dismiss the claim was wrong. Again, the facts of this case seem to me indicative of the kind of extreme circumstances in which the abnormal construction of a building might possibly be relevant.

79. It is unnecessary to reach any concluded view on this question, however, since if there can be cases in which extreme abnormality of the physical attributes of a building may give rise to a claim or to a defence, the present case is on any view not one of them. There is no basis for regarding the glass walls of the claimants' flats as unusual, either in the context of modern high-rise blocks of flats generally or in the particular locality. Still less is there any basis for suggesting that the glassed design is so aberrant as arguably to put the flats in the category of highly abnormal buildings of which, if it exists, the buildings in the *Bank of New Zealand* case and *Cremidas v Fenton* may be examples. The overall architectural design of the Neo Bankside blocks of flats, which have exo-skeletons of steel as well as floor to ceiling windows alternating with

some wooden fascias, is striking. But that is not to say that floor to ceiling windows without vertical or horizontal breaks of the kind that it incorporates are unusual, let alone off the scale of anything that could actually be expected. In this action the Tate has never made any such allegation. Nor (so far as the judgment indicates) was there any evidence at the trial to that effect. Both parties adduced evidence from planning experts but the experts did not suggest that what they described in their joint report as the "fully glazed facades" of the Neo Bankside buildings are abnormal or unusual. And the judge made no such finding.

80. There was in these circumstances no factual foundation for the approach adopted by the judge of asking whether the use of the Tate's viewing gallery would have amounted to a nuisance if the claimants had lived in a hypothetical alternative building designed with "significant vertical and perhaps horizontal breaks to interrupt the inward view" (para 202). The judge's "imaginary building" was not based on any evidence or information about the type or extent of glass panelling which is normal or represents the outer limit of anything that could be expected in the neighbourhood. There was therefore no basis or yardstick for comparing the Neo Bankside flats with "flats designed with more wall and less window". To say, as the judge did, that a "differently built, but perfectly acceptable, property … would not have had the same degree of exposure" (para 211) is nothing to the point. There is no justification for regarding the windows of the claimants' properties as departing from some relevant norm, built as they are.

(3) The possibility of protective measures

81. As part of his "overall assessment" of reasonableness, the judge also thought it would be reasonable for the claimants to take protective measures to avoid being seen from the viewing gallery. He identified three measures as meriting consideration: [2019] Ch 369, para 214. The claimants' flats are fitted with solar blinds which they could lower during the day - albeit with the loss of their clear view of the outside world and of a certain amount of light. Secondly, they could install privacy film, which reflects the external light outwards - although it does not work when it is dark outside and seeking to install it might have planning implications. The third potential measure would be to install net curtains, which would have the same effect and drawbacks as lowering the blinds. Perhaps because of the uncertainty about the planning implications of privacy film, counsel for the Tate on this appeal emphasised the first and third of these possibilities and submitted that it would have been comparatively simple for the claimants to screen the views of the interiors of their flats by using their blinds or installing net curtains.

82. The judge acknowledged that it is not usually a defence to a nuisance claim to say that the claimant could take remedial steps to avoid the adverse consequences of the defendant's acts. For example, he noted that "[t]he victim of excessive dust would not be expected to put up additional sealing of doors and windows" and that "the victim of excessive noise would not be expected to buy earplugs": para 215. However, the judge thought that "this is an unusual case" and that "privacy is a bit different" in that it has become acceptable to expect those who want to enhance their privacy to protect their own interests. He saw this as part of the give and take expected of neighbouring property owners and concluded, at para 215:

> "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."

83. It is easy to identify where the judge went wrong here because he himself explained the reason. As he noted, it is not a good defence to a nuisance claim for the defendant to say that the claimant could take remedial steps to avoid the consequences of the defendant's acts. The reason why this is not a good defence is that, far from involving give and take, such an approach is all one way. It places responsibility for avoiding the impact of an activity which causes substantial interference with the ordinary enjoyment of property entirely on the victim rather than on the person who carries out the activity. Arguments of this kind are unsound when relied on to justify any invasion of property rights. It does not avail a trespasser to assert that he would not have wandered onto the claimant's land if the claimant had erected a fence, or a burglar to argue that the claimant's house would not have been burgled if the claimant had installed stronger locks. In the same way it is unsound to argue that the defendant's activity would not violate the claimant's enjoyment of rights in land if the claimant took measures to prevent this.

84. I cannot agree with the judge that "privacy is a bit different". In any context it is reasonable to expect those who want more protection from outside interference than the law provides to protect their own interests. For instance, a homeowner may be kept awake or find it impossible to concentrate as a result of noise arising from a normal use of a neighbouring property. If so, then their only recourse is self-protection, for example by using ear plugs. Similarly, someone who cannot stand the smell of their neighbour's cooking at mealtimes had better close their windows. Visual intrusion is just the same. If the interior of a person's home can be seen from the windows of houses across the street and the occupants wish to avoid being seen, it is for them to draw their blinds or take other measures of the kind suggested by the judge. But in all these cases the person whose activity causes the interference is using their property in a common and ordinary way. What is not acceptable is to place the

burden on the claimant to mitigate the impact of a special use of the defendant's property. To do so is inconsistent with the principle of reciprocity that underpins the law of nuisance.

85. In the *Bank of New Zealand* case the judge made this point clearly. One of the arguments made by the defendant was that the claimants could almost entirely alleviate the dazzling glare caused by sunlight reflected off the defendant's building by installing and then drawing when necessary darker curtains or blinds. Hardie Boys J rejected that argument (at p 534) on the ground that:

> "To expect these plaintiffs to provide sun barriers on their south-facing windows as part of the give and take of business in the central city would in reality be to require them to accept total responsibility for eliminating the defendants' nuisance. As I have stated, the law will not require that."

The same point applies here. The only material difference is that in the present case the interference which it is suggested that the victims should have to accept the responsibility for eliminating does not occur for only a few hours of the day at certain times of year as in the *Bank of New Zealand* case, but constantly for most of the day, day in and day out.

86. Similar attempts to throw responsibility on the victim have been rejected in other cases. In *Miller v Jackson* [1977] 1 QB 966 the Court of Appeal upheld a claim brought by the occupiers of a house built next to a cricket ground for nuisance caused by cricket balls being hit onto their land. It was argued by the club that the claimants could take measures to protect their property from the interference by, for example, fitting louvred shutters or unbreakable glass to their windows. In rejecting this argument, Geoffrey Lane LJ said, at p 985:

> "There is no obligation on the plaintiffs to protect themselves in their own home from the activities of the defendants. Even if there were such an obligation it would be unreasonable to expect them to live behind shutters during the summer weekends and to stay out of their garden."

87. In *Webster v Lord Advocate* 1985 SC 173 noise made in erecting metal stands between June and August for the annual Edinburgh Military Tattoo caused a nuisance to the owner of a flat overlooking the esplanade at Edinburgh Castle. It was suggested

that the flat owner could substantially reduce any annoyance or discomfort from noise by keeping her windows closed. In rejecting this argument, Lord Stott said, at p 181:

> "… I do not think that in dealing with such a situation the pursuer is required to do more than conform to the ordinary habits of life as a reasonable person. In my opinion that does not include a requirement to keep her windows shut throughout the better part of the summer, far less to instal an approved system of double glazing which, of course, would in any event be useless except when the window was closed. … one of the nice things about summer is that you are able to open your windows."

88. Exactly the same reasoning applies here. The claimants cannot be obliged to live behind net curtains or with their blinds drawn all day every day to protect themselves from the consequences of intrusion caused by the abnormal use which the Tate makes of its land. In circumstances where the claimants are doing no more than occupying and using their flats in an ordinary way and in accordance with the ordinary habits of a reasonable person, it is no answer for someone who interferes with that use by making an exceptional use of their own land to say that the claimants could protect themselves in their own homes by taking remedial measures.

E. THE COURT OF APPEAL'S REASONS: "MERE OVERLOOKING"

89. The Court of Appeal pointed out the errors in the judge's reasoning, much more succinctly than I have done. In their joint judgment they also explained how, if the established common law principles are applied to the facts of this case, those principles lead to the conclusion that the Tate is liable in nuisance. The Court of Appeal nonetheless dismissed the appeal. They said, at para 99:

> "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* 3 B & S 66 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 para 214) as 'remedial steps'…" (emphasis added)

The words I have italicised indicate the sole reason why the Court of Appeal did not find the Tate liable in nuisance: they decided that liability in nuisance does not extend to "overlooking". I agree with that proposition. But where I believe the Court of Appeal went wrong was in supposing that this claim is about "overlooking".

(1) The meaning of "overlooking"

90. It is important to be clear about what "overlooking" means. In ordinary speech the word refers to a spatial relationship between two places such that one affords a view, from a greater height, of the other - as in a statement such as "your flat overlooks my back garden." I agree with the Court of Appeal that the fact that a building or other structure erected on someone's land overlooks neighbouring land cannot give rise to liability in nuisance. That follows from the general principle discussed above that at common law anyone is free to build on their land as they choose, with the corollary that the mere presence or construction or design of a building (other than perhaps in extreme circumstances) cannot be an actionable nuisance. Thus, in this case the claimants cannot object under the common law of nuisance to the fact that the Tate has built the Blavatnik Building with a walkway around the top floor which overlooks their flats.

91. As well as using the word "overlooking" in its ordinary sense, the Court of Appeal in their judgment also use the term to mean looking at what is happening on land from a building which overlooks it. In this (I think unconventional) sense, the word "overlooking" refers to an action done by a person rather than a spatial relationship between two places. For example, the Court of Appeal's judgment refers (at para 51) to "a deliberate act of overlooking" and (at para 53) to "overlooking by a neighbour". If I say that I am overlooked by my neighbour, I would normally be understood to mean that my property is capable of being seen from my neighbour's property - not that my neighbour is engaged in an act of looking at me. Adopting the Court of Appeal's unconventional meaning of the term, however, I think that they are again right that in the ordinary course merely looking at what is happening on neighbouring land is not an actionable nuisance. It is hard to see how such an "act of overlooking" could by itself reasonably be regarded as anything more than a minor annoyance of a kind that neighbouring occupiers have to put up with under the rule of give and take, live and let live.

(2) The complaint in this case

92. Neither of these forms of "overlooking", however, is the subject of this claim. The claimants' complaint is not that the top floor of the Blavatnik Building (or its southern walkway) overlooks their flats; nor is it that in the ordinary course people in that building look at the claimants' flats and can see inside. In fact, the claimants made it expressly clear at the trial that they do not object to the fact that they are overlooked from the Blavatnik Building: see [2019] Ch 369, para 190. What they complain about is the particular use made by Tate of the top floor. They complain that the Tate actively invites members of the public to visit and look out from that location in every direction, including at the claimants' flats situated only 30 odd metres away; that the Tate permits and invites this activity to continue without interruption for the best part of the day every day of the week; and that this has the predictable consequence that a very significant number of the roughly half a million people who visit the Tate's viewing gallery each year peer into the claimants' flats and take photographs of them. To argue that this use of the defendant's land cannot be a nuisance because "overlooking" (in the Court of Appeal's sense) cannot be a nuisance is like arguing that, because ordinary household noise caused by neighbours does not constitute a nuisance, inviting a brass band to practise all day every day in my back garden cannot be an actionable nuisance; or that because the smell of your neighbour's cooking at mealtimes is something you have to put up with, noxious odours from industrial production cannot be an actionable nuisance. The conclusion simply does not follow from the premise.

93. This, in short, is the error in the Court of Appeal's reasoning. But I will also examine whether any of the reasons given by the Court of Appeal for the proposition that "overlooking" is not actionable as a nuisance provides any support for the contention that the activity complained of in this case is not actionable.

(3) The arguments concerning "overlooking"

94. I do not understand the Court of Appeal's judgment to suggest that there is any conceptual reason why visual intrusion cannot be an actionable nuisance. The judgment recognises that different categories of nuisance are merely examples and that no rigid categorisation of relevant factual situations is possible: see [2020] Ch 621, paras 32-33. Nor did the Court of Appeal adopt the theory that nuisance can only result from physical emanations from the defendant's land or physical invasions of the claimant's land - a theory which, for the reasons given at para 13 above, is not sustainable. Rather, their suggestion is that "overlooking" is one of a small number of specific types of interference with the use and enjoyment of land which are excluded from the scope of the law of private nuisance as a matter of legal precedent and policy.

(4) Precedent

95. As a matter of precedent, the Court of Appeal concluded that "the overwhelming weight of judicial authority" shows that "mere overlooking is not capable of giving rise to a cause of action in private nuisance" (para 74). As I have indicated, in discussing "mere overlooking", the judgment was addressing the wrong question. But if this statement was meant to suggest, as the Tate has argued on this appeal, that visual intrusion cannot give rise to a cause of action in private nuisance no matter how constant and oppressive, then I do not accept that any judicial authority has been cited which supports such a proposition.

96. The "weight of judicial authority" relied on by the Court of Appeal to show that "mere overlooking" cannot be an actionable nuisance is in fact very light. It consists principally of obiter dicta in three nineteenth century cases concerned with obstruction of an acquired right to receive light through a defined aperture. In each case the claimant sought an injunction to require the defendant to remove the obstruction and the defendant opposed the claim by arguing that the claimant had installed new windows and, in those circumstances, could not rely on the previously acquired right to light. In each case the court held that, in so far as the new windows occupied existing apertures through which there was a right to light, the defendant's obstruction of them was unlawful. It was in this context that remarks were made that the installation of new windows could not itself be the subject of complaint because "opening" (ie installing) a window overlooking a neighbour's land does not give rise to a claim in nuisance.

97. Thus, in *Chandler v Thompson* (1811) 3 Camp 80 at 82, Le Blanc J is reported as saying 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 that "he had heard it laid down by Lord Eyre CJ that such an action did not lie, and that the only remedy was to build on the adjoining land, opposite to the offensive window." There are further dicta to similar effect in *Turner v Spooner* (1861) 30 LJ (Ch) 801, 803, and in *Tapling v Jones* (1865) 20 CBNS 166, a decision of the House of Lords. For example, in *Tapling v Jones*, at p 179, Lord Westbury LC said that "invasion of privacy, by opening windows" is "not treated by the law as a wrong for which any remedy is given"; and Lord Chelmsford said, at pp 191-192, that "the owner of a house has a right at all times … to open as many windows in his own house as he pleases" and that "the only remedy in the power of the adjoining owner is to build on his own land, and so to shut out the offensive windows."

98. The Court of Appeal in the present case said that, while these statements were not part of the necessary reasoning of the decisions, 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 … is not actionable as a nuisance": [2020] Ch 621, para 61. As discussed above, I agree with that proposition. But all it shows is that the construction and design of the top floor of the Blavatnik Building does not give rise to a claim in nuisance. The judicial statements quoted provide no basis for asserting that as a matter of law being constantly watched and photographed by onlookers from neighbouring land cannot do so.

99. The other judicial authority on which the Court of Appeal relied is the decision of the High Court of Australia in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479. In that case the owner of land next to a racecourse allowed an observation platform to be built on his land from which a radio broadcaster could see the races and give a running commentary. The owner of the racecourse complained that this activity resulted in loss of business because many people who would otherwise have paid to watch the races listened to the commentary instead. The majority of the High Court held that the claimant had no right of action for (among other things) nuisance. Again, however, this was not a case of nuisance caused by visual intrusion. It could not reasonably be said that a single person looking onto the claimant's land while races were taking place caused even trifling annoyance. The real issue was whether the broadcasting of a commentary on the races was a nuisance. The claim failed because the majority of the court held that, as Dixon J put it at p 508, "the substance of the plaintiff's complaint goes to interference, not with its enjoyment of the land, but with the profitable conduct of its business". Again, this decision provides no support at all for the proposition that watching from a neighbouring property, however persistent and intrusive, can never amount to a nuisance.

100. Much more in point is the later Australian case of *Raciti v Hughes* (1995) 7 BPR 14837. In that case the defendants had installed on their property floodlights and camera surveillance equipment aimed at the plaintiffs' backyard. The floodlight system was activated automatically by a sensor in response to movement or noise on the plaintiffs' land. The illumination from the floodlights then enabled the camera to film and record on videotape what was happening on the plaintiffs' land. The judge granted an interim injunction, holding that both the bright light and the surveillance were capable in law of constituting an actionable nuisance.

101. To similar effect, in *Suzuki v Munroe* 2009 BCSC 1403 a court in British Columbia held that positioning a surveillance camera so that it continuously observed the entrance areas to the claimants' neighbouring property was an intolerable interference with the use and enjoyment of the claimants' property and constituted a private nuisance. The court cited several other Canadian cases in which video surveillance of a neighbouring property was held to amount to a private nuisance. One of those cases,

Wasserman v Hall 2009 BCSC 1318, was also cited by counsel for the claimants in their argument on this appeal.

102. The Court of Appeal sought to distinguish such cases, saying that watching and spying of the kind that occurred in *Raciti* "is quite different from just overlooking and what takes place on the Tate's viewing gallery" (para 72). I agree that it is quite different from just overlooking, but not that it is materially different from what takes place on the Tate's viewing gallery. In each case the activity complained of is constant observation and photography. It is true that in *Raciti* (and the two Canadian cases mentioned above) the defendants were found to be deliberately spying on their neighbours and it is not suggested that the purpose of the Tate's viewing gallery is to spy on the claimants' activities. But it is a predictable consequence of operating such a viewing gallery that, of the thousands of people who visit it each day, a very significant number will take an interest (as the judge found that they do) in how the claimants seek to conduct their lives in their flats.

103. It is unsurprising that there are only a few reported cases of nuisance resulting from visual intrusion. The circumstances in which land is used in an unusual way which gives rise to visual intrusion on a neighbouring property of sufficient duration and intensity to be actionable as a nuisance are likely to be rare. The potential for such claims has, however, been markedly increased by developments in technology. Being photographed or filmed from neighbouring property is a far greater interference with the ordinary use and enjoyment of land than simply being observed with the naked eye. In an article published in 1931 Sir Percy Winfield referred to an unreported case involving a family in Balham who by placing an arrangement of large mirrors in their garden were able to observe everything that happened in the study and operating room of a neighbouring dentist. Professor Winfield saw no reason why this activity should not have been actionable as a nuisance: see Winfield, "Privacy" (1931) 47 LQR 23, 27. Nor do I. But nowadays the ready availability of CCTV equipment means that no such ingenuity is required to place neighbouring land under constant observation. Similarly, the intensity of the interference in the present case is made possible by the fact that a large proportion of the population now carry a camera incorporated in their smartphone. And the sharing of images on social media adds a further dimension to the interference.

104. I conclude that, as well as being contrary to principle, the notion that visual intrusion cannot constitute a nuisance is not supported by precedent and indeed that such direct authority as there is positively supports the opposite conclusion.

(5) Policy arguments

105. What about reasons of policy? The Court of Appeal relied on three matters of policy which they said militate against "extending" the scope of private nuisance to encompass "overlooking" (para 80). No such policy reasons are in my view needed for resisting such an extension of the law. But I will consider whether any of the policy reasons given by the Court of Appeal for not extending nuisance to overlooking could justify creating a special exception from the ordinary principles of nuisance for interference caused by watching and photography.

Difficulty in drawing the line

106. The first policy reason given was that, unlike in the case of noise, dirt, smells and so on, in the case of viewing it would be difficult to apply the objective test at common law for deciding whether there has been a material interference with the amenity value of the affected land. The Court of Appeal said, at para 81:

> "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 Court of Appeal found it "difficult to envisage any clear legal guidance as to where the line would be drawn between what is legal and what is not."

107. This appears to be an argument that, because there may be cases of intrusive viewing in which it is difficult to decide whether or not the objective test of nuisance is met, there should be no liability in a case where the test is clearly met - of which the Court of Appeal seem (rightly in my view) to accept that this case is an example. This argument is deeply unpersuasive. The law would be utterly ineffectual if the possibility of hard cases were treated as a reason to deny relief in clear cases.

108. In any event I do not accept the premise of the argument. Applying the objective test, it seems self-evident that an ordinary or average person would not find "overlooking on a much smaller scale" just as annoying as the viewing of the claimants' flats from the Tate's viewing gallery by thousands of people every day (of whom a significant number take photographs). Nor do I accept that intrusive viewing is intrinsically more subjective or harder to judge than other forms of nuisance. For example, people vary significantly in their sensitivity to noise, not only as to volume

but as to different types of sound. There are smells which some people find seriously unpleasant and others do not. That is not to mention the cases of nuisance involving offensive sights. In none of these types of case is there a scientific test which a judge can apply, or more specific legal guidance which an appellate court can give, to identify where the line should be drawn. In each case the court just has to make a judgment about whether the nature and degree of interference exceeds what an ordinary person would regard as acceptable. I think that in practice courts seek to make allowance for variations in normal human reactions by building a margin into their assessment and requiring quite a high level of interference before finding an interference with the ordinary use of property to be sufficiently serious to amount to a nuisance. But of course there will be some finely balanced cases in which different judges applying the same test to the same facts may reach different conclusions. The possibility of such disagreement is inherent in the task of judging. There is nothing peculiar about assessing whether visual intrusion amounts to a nuisance which puts such cases beyond the pale.

Reliance on planning law

109. The second matter of policy raised by the Court of Appeal was a suggestion that planning laws and regulations would be a better medium for controlling "inappropriate overlooking" than the common law of nuisance (para 83). This seems to me to overlook (if I may use the term) the fact that, while both may sometimes be relevant, planning laws and the common law of nuisance have different functions. Unlike the common law of nuisance, the planning system does not have as its object preventing or compensating violations of private rights in the use of land. Its purpose is to control the development of land in the public interest. The objectives which a planning authority may take into account in formulating policy and in deciding whether to grant permission for building on land or for a material change of use are open-ended and include a broad range of environmental, social and economic considerations. While a planning authority is likely to consider the potential effect of a new building or use of land on the amenity value of neighbouring properties, there is no obligation to give this factor any particular weight in the assessment. Quite apart from this, as Lord Neuberger observed in *Lawrence v Fen Tigers Ltd* [2014] UKSC 13; [2014] AC 822, para 95:

> "when granting planning permission for a change of use, a planning authority would be entitled to assume that a neighbour whose private rights might be infringed by that use could enforce those rights in a nuisance action; it could not be expected to take on itself the role of deciding a neighbour's common law rights."

110. For such reasons, the Supreme Court made it clear in *Lawrence* that planning laws are not a substitute or alternative for the protection provided by the common law of nuisance. As Carnwath LJ said in *Biffa Waste*, para 46(ii), in a passage quoted with approval by Lord Neuberger in *Lawrence*, at para 92:

> "Short of express or implied statutory authority to commit a nuisance … there is no basis, in principle or authority, for using such a statutory scheme to cut down private law rights."

The practical as well as legal irrelevance of planning permission in this case is apparent from the judge's finding that no consideration was given to overlooking in the planning process for the Tate extension: [2019] Ch 369, paras 58-63.

Invasion of privacy

111. Finally, the Court of Appeal suggested 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": [2020] Ch 621, para 84. They pointed out that there are already other laws which bear on privacy, including the law relating to confidentiality, misuse of private information, data protection, harassment and stalking. They expressed the view that this is an area which is better left to the legislature to decide whether any further laws are needed rather than for the courts to extend the law of private nuisance (para 85).

112. This again assumes that applying the common law of nuisance to the activity complained of in this case would require an extension of the law, rather than simply the application of well settled tests. As discussed above, I consider this to be a wrong assumption. A further point is that "privacy" is a very broad term which encompasses an assortment of more specific concepts and human interests. As the list given by the Court of Appeal indicates, various legally distinct wrongs are all capable of being described as "invasions of privacy". The watching and photography that takes place from the Tate's viewing gallery can be said to fall under that broad description. Contrary to what is said by the Court of Appeal, however, the claimants' complaint is indeed one of damage to interests in property. The concepts of invasion of privacy and damage to interests in property are not mutually exclusive. An important aspect of the amenity value of real property is the freedom to conduct your life in your own home without being constantly watched and photographed by strangers. Damage to that interest might in some cases also give rise to other causes of action, for example harassment, though they do not here. The (sole) issue in this case is whether the

viewing and photography to which the claimants are subjected on a daily basis violates the claimants' rights to the use and enjoyment of their flats. No new privacy laws are needed to deal with this complaint. The general principles of the common law of nuisance are perfectly adequate to do so.

113. For the same reason, I regard the claimants' reliance on the right to respect for private life guaranteed by article 8 of the European Convention on Human Rights as an unnecessary complication and distraction in this case. There is no need or justification for invoking human rights law when the common law has already developed tried and tested principles which determine when liability arises for the type of legal wrong of which the claimants complain.

F. THE PUBLIC INTEREST

114. I have pointed out where I believe the judge and the Court of Appeal respectively were mistaken in their analyses of the claim. How did those courts come to make different errors of law which nevertheless led them both to dismiss the claim? I think there is a common explanation. It is that both courts were influenced by what they perceived to be the public interest in the use made of the Tate's viewing gallery. To be clear, I do not suggest that it is wrong to take account of the public interest. What is wrong is to treat it as relevant to the question of liability for nuisance rather than only, where liability is established, to the question of what remedy to grant.

(1) How the courts below took account of the public interest

115. The way in which consideration of the public interest seems to me to have fed into the judge's assessment was through his finding that the operation of the viewing gallery is a "reasonable" use of the Tate's land. It is not that the judge ignored the harm caused to the claimants (although he wrongly discounted it for the reasons discussed above). But he saw his task as being to conduct a balancing exercise, in which the "reasonableness" or otherwise "per se" of the Tate's use of its land had to be weighed against the interests of the claimants in the use of their flats: see [2019] Ch 369, paras 180, 203, 220. I have already explained why that approach is contrary to settled principles but it is worth asking what it means to say that a particular use of land is reasonable or unreasonable in itself.

116. It is difficult to give this test a coherent meaning unless it is understood as a way of asking whether the defendant's land use is of public benefit. So far as I can see, this was how the judge approached the question (at paras 196-199). He thought it

necessary to evaluate "the importance of the southern view" from the viewing gallery (para 196), which I take to be a judgment about the benefit of making a full 360-degree view accessible to the public. Earlier in the judgment he described such a panoramic view of London as "rather splendid" and said that "members of the public will find it very attractive" (para 5).

117. Counsel for the Tate submit that this was indeed how the judge approached the matter and positively advocate this approach. In their submissions to the Court of Appeal they argued that the judge was correct to balance the "utility and general benefit to the community" of the Tate's use of the viewing gallery against the claimants' interests: see [2020] Ch 621, 627B and H. And in their written case on this appeal (para 126) they submit that the judge was right to consider the reasonableness of the Tate's use because "the court is inevitably concerned with the utility or general benefit to the community of a defendant's activity".

118. The Court of Appeal evidently shared the judge's view that any decision about whether to restrict the use of the viewing gallery should take account of the public interest. They considered that "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" (para 83). But they saw this task as outside the competence of the common law of nuisance. Hence their proposal that such issues should be left to planning laws or, if these are not adequate for the task, to Parliament to formulate any further laws that are perceived to be necessary: see paras 84-85.

119. The Court of Appeal's discussion was directed at "overlooking". But the difficulties that concerned the Court of Appeal about reconciling the different public and private interests in a use of land which materially interferes with the ordinary use of neighbouring land can occur in relation to almost any form of nuisance. In *Lawrence*, for example, the interference consisted of noise from motor sports carried on at the defendant's stadium and adjoining track. The question whether to restrict those activities potentially affected the interests of many people who derived enjoyment or economic benefit from taking part in or watching the various motor sports. Industrial activities which cause atmospheric pollution to neighbouring land may have substantial economic importance including for those employed in the undertaking. These are classic cases falling within the scope of the law of nuisance. The difficulties of reconciling the different public and private interests involved in such cases have not been treated as a reason for the courts to abstain from granting any remedy for violations of private rights in respect of land use, and instead to leave such matters to the planning system or the legislature. And rightly so. The result of such abstinence

would in practice simply be to leave the rights of individuals without any effective protection. That was what the Court of Appeal did here.

120. The correct approach - for which the leading authority is now this court's decision in *Lawrence* - where significant considerations of public interest are raised is for the court to take this factor into account, not in determining liability, but, where liability is established, in deciding whether to grant an injunction or to award damages.

(2) Why the public interest is not relevant to liability

121. I said I would come back to the principle that a defendant cannot avoid liability for nuisance by arguing that its activity is of public benefit. The reason is simply that private nuisance is a violation of real property rights (see paras 10-11 above). The very nature of property rights requires that, as a general principle, they be respected by all others unless relinquished voluntarily. The fact that it would be of general benefit to the community to use your land for a particular purpose - say, as a short-cut or as a place for taking exercise - is not a reason to allow such use without your consent. The same applies to nuisance. It is not a justification for carrying on an activity which substantially interferes with the ordinary use of your land that the community as a whole will benefit from the interference. In *Sturges v Bridgman*, for example, no one thought it relevant to examine the public utility of Mr Bridgman's use of his land for making confectionery or to seek to compare this with the public utility of Dr Sturges' use of his consulting room. (Although the economist Ronald Coase was understood by some to have proposed such an approach in a famous essay, it is entirely inconsistent with the common law: see RH Coase, "The Problem of Social Cost" (1960) 3 JL & Econ 1; and David Campbell & Matthias Klaes, "What Did Ronald Coase Know about the Law of Tort?" (2016) 39 Melb U L Rev 793.) The point of the law of private nuisance is to protect equality of rights between neighbouring occupiers to the use and enjoyment of their own land when those rights conflict. In deciding whether one party's use has infringed the other's rights, the public utility of the conflicting uses is not relevant.

122. Property rights are not absolute. There are circumstances in which they may be subordinated to the general good of the community - a classic example being the expropriation of land needed for a major infrastructure project. But it is fundamental to the integrity of any system of property rights that, in any such case, the individuals whose rights are infringed or overridden receive compensation for the violation of their rights. In other words, the public interest may sometimes justify awarding damages rather than granting an injunction to restrain the defendant's harmful activity, but it cannot justify denying the victim any remedy at all.

123. The seminal decision in which this is most clearly articulated is *Bamford v Turnley* (1862) 3 B & S 66, which I have already discussed. I return to it because the approach advocated by counsel for the Tate of taking account of the utility and general benefit to the community of the defendant's land use by asking whether it is "reasonable" was expressly and unequivocally rejected in that case.

124. In a passage of his judgment which is as justly celebrated as his exposition of the "rule of give and take, live and let live", Bramwell B demolished the argument that the defendant's activity "is lawful because it is for the public benefit." He said, at pp 84-85:

> "Now, in the first place, that law to my mind is a bad one which, for the public benefit, inflicts loss on an individual without compensation. But further, with great respect, I think this consideration misapplied in this and in many other cases. The public consists of all the individuals of it, and a thing is only for the public benefit when it is productive of good to those individuals on the balance of loss and gain to all. So that if all the loss and all the gain were borne and received by one individual, he on the whole would be a gainer. But whenever this is the case, - whenever a thing is for the public benefit, properly understood, - the loss to the individuals of the public who lose will bear compensation out of the gains of those who gain. It is for the public benefit there should be railways, but it would not be unless the gain of having the railway was sufficient to compensate the loss occasioned by the use of the land required for its site; and accordingly no one thinks it would be right to take an individual's land without compensation to make a railway."

Bramwell B returned to this theme in *Brand v Hammersmith and City Railway Co* (1867) LR 2 QB 223, 230-231.

125. The key insight in this passage is that the public is not some abstract entity with interests of its own which need to be balanced against the interests of private individuals. Rather, in Bramwell B's pithy phrase, the public "consists of all the individuals of it". Hence, to say that something is for the public benefit means only that, in the overall balance of loss and gain, the benefits to the individuals who gain outweigh the loss to those who lose. So when land is used to carry on an activity - whether it be operating a railway, manufacturing bricks, operating a viewing gallery or anything else - which benefits many people but damages the amenity value of neighbouring land, the relevant question to ask is on which individuals should the loss

fall. Should it be borne by the individuals on whom the loss is inflicted or by those who gain from the activity? Once the problem is seen in this way, the answer is obvious. Bramwell B was ahead of his time in perceiving what is now a commonplace of economics that it is in the interests of economic efficiency that the external costs of an activity should be internalised. But his more fundamental point is a point about justice. It is most unjust to allow those who benefit from a use of land which inflicts loss on a neighbour to do so without either stopping the activity or compensating the loss.

126. The real issue, therefore, in a case where it is said that a continuing activity which causes a nuisance is for the public benefit is not whether the individuals harmed by the activity should have to bear the loss - which on any view would be unjust. It is whether it is sufficient to compensate the loss by awarding damages or whether the activity should be stopped by an injunction.

Damages in lieu of an injunction

127. For a long time the English courts generally took a very restrictive approach to this question. Historically, only the Court of Chancery had the power to grant an injunction, whereas only the common law courts could award damages. Although Lord Cairns' Act (the Chancery Amendment Act 1858) gave the Court of Chancery the power to award damages in lieu of an injunction, which all courts acquired following the Judicature Act 1873, some judges were reluctant to exercise it. A highly influential case was the decision of the Court of Appeal in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, where the plaintiff complained of noise and vibrations caused by the running of turbines used by the defendant company to generate electricity, an activity of obvious benefit to the community. The trial judge found that the interference amounted to a nuisance but awarded damages in lieu of an injunction. The Court of Appeal reversed that decision. Lindley LJ said, at pp 315-6, that:

> "ever since Lord Cairns' Act was passed the Court of Chancery has repudiated the notion that the Legislature intended to turn that Court into a tribunal for legalizing wrongful acts; or in other words, the Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrongdoer is in some sense a public benefactor (eg, a gas or water company or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed."

AL Smith LJ set out some criteria, at pp 322-323, intended as "a good working rule" for when damages might properly be granted in substitution for an injunction. The main criteria were that "the injury to the plaintiff's legal rights … can be adequately compensated by a small money payment" and that "it would be oppressive to the defendant to grant an injunction".

128. In later cases these criteria were often, but not always, applied. One of the cases in which a broader approach was adopted was *Miller v Jackson* [1977] 1 QB 966, the case of a nuisance caused by cricket balls being hit onto the plaintiffs' land. The Court of Appeal (by a majority) declined to grant an injunction and awarded damages having regard to what they saw as the public interest in not preventing cricket from being played.

129. The topic was reviewed by the Supreme Court in *Lawrence*. All the members of the court agreed that, in the words of Lord Carnwath at para 239, "the opportunity should be taken to signal a move away from the strict criteria derived from *Shelfer*". Different opinions were expressed, however, about how far this move should go. Lord Sumption saw "much to be said for the view that damages are ordinarily an adequate remedy for nuisance and that an injunction should not usually be granted in a case where it is likely that conflicting interests are engaged other than the parties' interests" (para 161). This drew a protest from Lord Mance, who emphasised that "the right to enjoy one's home without disturbance is one which I would believe that many, indeed most, people value for reasons largely if not entirely independent of money" (para 168). The majority agreed with Lord Neuberger, for whom the court's power to award damages in lieu of an injunction "involves a classic exercise of discretion, which should not, as a matter of principle, be fettered" (para 120). Lord Neuberger recognised that nevertheless "it is appropriate to give as much guidance as possible so as to ensure that, while the discretion is not fettered, its manner of exercise is as predictable as possible" (para 121). But I think it fair to say that - perhaps because of the divergent opinions of the Justices - there is little in the way of such guidance to be gleaned from his judgment. Lord Neuberger ended his discussion of this issue by acknowledging that "we are at risk of introducing a degree of uncertainty into the law" but said that "in so far as there can be clearer or more precise principles, they will have to be worked out in the way familiar to the common law, namely on a case by case basis" (para 132).

G. REMEDY

130. As I have concluded that on the facts found in this case the Tate is liable in nuisance, the question arises of what remedy the court should grant. Desirable as it is, however, for there to be a final resolution of these proceedings, I am driven to the

view that the question is not one which this court can decide. It was not raised as an issue in the appeal and we have not heard any argument on the subject of remedies. Moreover, the question was left unresolved at the trial because of the judge's conclusion on liability and, for the same reason, did not arise in the Court of Appeal.

131. The judge commented on remedies only briefly at the end of his judgment (paras 222-223). He declined to indicate whether, if the claim had succeeded, an injunction, as opposed to damages, would in his view have been an appropriate remedy. He observed that, had he been minded to grant an injunction to restrain use of the viewing gallery, it would not have extended beyond the southern section of the gallery. But he also said it was unlikely that, had he found there was a nuisance, he would have ordered any specific remedies. He indicated that in that event there might have been alternative remedial measures (such as installing louvres) which the Tate could put in place as an alternative to closing the part of the gallery or paying damages, but that "it would have been for the Tate to have proposed something."

132. In the circumstances, if the parties cannot reach agreement on a solution, a further hearing will be required to address the question of remedy, which should take place before a judge of the Chancery Division. Without constraining the matters on which the court may choose to hear argument, they may need to include: (i) whether there is a public interest in maintaining the gallery with a 360-degree view capable of overriding the claimants' prima facie remedy of an injunction; (ii) whether any remedial measures which the Tate may propose are sufficient to avoid an injunction or damages; (iii) the scope of any injunction; and (iv) questions of quantification of any award of damages.

133. I would therefore allow the appeal, hold that the Tate's use of the viewing gallery gives rise to liability to the claimants under the common law of nuisance and remit the case to the High Court to determine the appropriate remedy.

LORD SALES (dissenting, with whom Lord Kitchin agrees):

134. This case is concerned with the law of private nuisance. It raises two questions. First, is it possible, in principle, to find that a private nuisance exists in the case of a residential property by reason of visual intrusion by people looking into the living areas of the property? Secondly, if that is possible, have the claimants (the appellants in the appeal) established that there was an actionable private nuisance by reason of the visual intrusion which they have experienced in the circumstances of this case entitling them to injunctive relief?

135. The trial judge, Mann J, answered the first question in the affirmative, but answered the second question "no". The Court of Appeal (Sir Terence Etherton MR, Lewison and Rose LJJ) answered the first question in the negative, so the second question did not arise. But, in case they were wrong on the first question, they also expressed the view that the judge had erred in his approach to and conclusion on the second. The claimants appeal to this court. In order to succeed on the appeal they have to win on both points. In relation to the second question a further, more mundane issue arises regarding the interpretation of what Mann J said about the facts of the case.

Factual background

136. The claimants own flats in a striking high-rise residential development called Neo Bankside located opposite the Tate Modern art gallery on the South Bank in central London. The claimants claim injunctive relief requiring the Board of Trustees of the Tate Gallery (I will refer to them as "the Tate") to prevent members of the public, or any other licensees, from observing the claimants' flats from certain parts of a viewing gallery which has been constructed on the top floor of a new extension to Tate Modern ("the viewing gallery"). The extension is called the Blavatnik Building.

137. Neo Bankside consists of four blocks of flats designed by Richard Rogers and Partners (subsequently, Rogers Stirk Harbour + Partners). To a substantial degree, the flats in Neo Bankside are constructed of glass. They have floor-to-ceiling windows. This allows residents good views out, but also exposes them (absent screening) to view from outside.

138. The trial took place over four days, with a significant volume of evidence on both sides. The judge also conducted a site visit. In his judgment Mann J examined the facts in meticulous detail: [2019] EWHC 246 (Ch); [2019] Ch 369. A full account of the design, planning and construction history of the flats and the viewing gallery can be found there. For the purposes of understanding the issues in the appeal it is sufficient to provide a summary of the facts.

139. The claimants are the original long leasehold owners of four flats in Block C of Neo Bankside (since the judgment of the Court of Appeal, the first appellant, Mr Fearn, has sold the long lease of his flat and the fifth appellant, Ms Urquhart, has let hers and no longer lives there). The design, planning process and construction of Neo Bankside took place between 2006 and September 2012. The claimants' flats are directly opposite the Blavatnik Building, which includes the viewing gallery. The viewing gallery

runs around all four sides of the top floor, Level 10, and allows visitors to Tate Modern to enjoy a 360-degree panoramic view of central London.

140. 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 the flats 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 been adapted to 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, albeit they do not provide much screening. The remainder of the flats, comprising bedrooms and the like, do not have floor-to-ceiling glass, but instead have more conventional window type apertures, and the action is not concerned with these parts.

141. Tate Modern is free and open to the public. The process of development of the Blavatnik Building took place between 2006 and 2016, including its design, the obtaining of planning permission and its construction. The viewing gallery is a particular feature. It provides a striking view of London to the north, west, and east, with a less interesting view to the south. Neo Bankside is located on the south side. The viewing gallery has been open to the public since the Blavatnik Building was completed in 2016. Access to it is free to visitors to Tate Modern. 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.

142. Originally, the viewing gallery was open when the art gallery was open: 10am to 6pm Sunday to Thursday and 10am to 10pm on Friday and Saturday. However, in response to complaints from flat owners, from April 2018 the Tate shortened the opening times for the viewing gallery. It was closed to the public at 5.30pm on Sunday to Thursday, and on Friday and Saturday the south and west sides (from which the flats at Neo Bankside can be viewed) were closed from 7pm. The Tate also posted notices on the south side asking visitors to respect the privacy of Tate Modern’s neighbours and instructed security guards to stop people taking photographs of the flats and their occupants, but the judge found that these latter measures were not likely to achieve

much. There is a monthly event called Tate Lates, which takes place on the last Friday of each month, and for which the whole viewing gallery remains open until 10pm. The viewing gallery also hosts internal events and external commercial events which are important for Tate Modern to bring in income. In its first 17 months 52 external events were hosted there.

143. Block C is the block of Neo Bankside which is closest to the Blavatnik Building. The winter gardens of Block C are roughly parallel to it. 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 the use of the windows on one side of their flat.

144. 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. Mann J found that there was a significant number of people using the viewing gallery who demonstrated a visual interest in the interiors of the flats, including by looking, peering in, taking photographs and waving to the occupants. He accepted that their numbers and the level of interest were such that a homeowner would reasonably regard this as intrusive so far as the use of the south side of the viewing gallery was concerned (by contrast, the western side of the viewing gallery is at an oblique angle to the flats, offering only a limited view into them).

145. The claimants' evidence is that they find close scrutiny in this manner by viewers in the viewing gallery completely oppressive. The judge found that the use of the viewing gallery constituted a material intrusion into the privacy of the living accommodation of the flats going well beyond what would be expected if the flats were overlooked by windows in residential or commercial buildings; unlike the viewing gallery, these would not have the primary purpose of providing a place to view. He found that, while sensitivity to the visual intrusion experienced might vary from person to person, the claimants' feelings about it were not unreasonable.

146. Mann J found that many of the photographs of the flats were taken because of the architectural interest of block C or the general scenic interest of the view, but

Instagram posts commented on the fact that one could see right into the flats and he concluded that this supported the claimants' case that part of the interest on the part of at least some of the people posting this material was in the view of the interiors of the flats and that there was a significant discrete interest in what one can see by looking into the flats. This finding is not surprising. As Mann J observed later in this judgment, a major part of what attracts the eye of the external viewer is the clear and uninterrupted view of how the claimants seek to conduct their lives in the flats. It is human nature that some people will display this sort of interest.

147. The judge found that there were significant remedial steps which the claimants could take to protect their privacy: (i) lowering their solar blinds, which would reduce the light in the flats somewhat, but not to an oppressive degree; (ii) installing privacy film, to let light in while obscuring the view from outside; and (iii) installing net curtains (ie of a kind one frequently finds in hotels with large floor-to-ceiling windows) or using other forms of screening.

148. 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. Planning policy for the South Bank encourages the construction of viewing galleries in buildings of significant height. However, 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, it did not foresee the level of intrusion which resulted. In broad terms, the design and construction of the Blavatnik Building with the viewing gallery in its final form took place in parallel with the design and construction of Neo Bankside, without the effects of the one on the other so far as visual intrusion was concerned being fully appreciated or addressed.

The proceedings below

149. The claim form was issued on 22 February 2017 claiming an injunction requiring the Tate to prevent members of the public or any other licensees from observing the claimants' flats from the whole of the southern walkway of the viewing gallery, fronting directly onto the flats, and also the southern half of the western walkway. The claimants maintained that the Tate's use of those parts of the viewing gallery unreasonably interfered with the claimants' enjoyment of their flats so as to be a nuisance. They also alleged that the Tate was a public authority for the purposes of section 6 of the Human Rights Act 1998 ("the HRA") and that its use of the viewing gallery infringed their rights under article 8 of the European Convention for the

Protection of Human Rights and Fundamental Freedoms ("the ECHR") (right to respect for private and family life and the home).

150. Mann J dismissed the claim based on section 6 of the HRA on the grounds that the Tate does not exercise functions of a public nature and is not a public authority within the meaning of the HRA. The claimants were not given permission to appeal to the Court of Appeal on that point. This court is only concerned with the claim based on the tort of private nuisance. However, the claimants seek to rely on article 8 of the ECHR for support for their claim in tort.

151. Mann J held that, in an appropriate case, the law of nuisance is in principle capable of protecting privacy in a property by preventing it from being overlooked, at least in the domestic home. Any doubt about that had, in his view, been removed by article 8 and the HRA. However, he held the Tate was not liable in nuisance in the circumstances of this case (and, for the purposes of article 8, the claimants had no reasonable expectation of privacy) because, in operating the viewing gallery as it does, it is not making unreasonable use of its land, bearing in mind the nature of the use, the locality in which it takes place, and that a landowner, like the claimants, is expected to have to put up with some “give and take” in the use of land appropriate to modern society and the particular locale. The developers of Neo Bankside, in building the flats with glass walls for the living accommodation, and the claimants as successors in title, who chose to buy the flats, had created or submitted themselves to sensitivity to privacy. The claimants had exacerbated this effect by moving part of their living accommodation into the winter gardens.

152. In the judge’s view, the fact that the architectural style means that there is increased exposure to the outside world should not be taken to alter the balance between the competing interests of neighbouring landowners which would otherwise exist if, for example, Neo Bankside had comprised flats in the same location with a more conventional design involving solid walls with windows. In such a case, the Tate’s use of the viewing gallery would not have constituted a nuisance. The availability of remedial measures to the owners of flats in Neo Bankside was also relevant to how the balance should be struck. Mann J made his assessment on the basis of the use to which the Tate was actually putting the viewing gallery, with the reduced opening times, the posting of notices and the instructions to security personnel which were in place. The Tate gave an undertaking to continue those protective measures.

153. The Court of Appeal dismissed the claimants’ appeal on the nuisance issue, but for different reasons. In their opinion, contrary to the judge’s view, the tort of nuisance could not provide a remedy for “mere overlooking”. The weight of authority was contrary to the idea that mere overlooking can give rise to a cause of action in

nuisance and there were policy reasons against extending it to cover such a case. Unlike in relation to such annoyances as noise, dirt, fumes, noxious smells and vibrations (all of which may give rise to a cause of action in nuisance), it would be difficult to apply an objective test to determine whether there had been a material interference with the amenity value of the affected land; there were other ways of protecting owners of land from overlooking, in particular through planning controls; and the real point at issue is invasion of privacy rather than damage to an interest in property (which is the focus of the law of nuisance), and there are already other laws which deal with invasions of privacy and, insofar as these might require supplementation, that is a matter for the legislature rather than something to be addressed by the extension of the common law tort of nuisance. There was no infringement of article 8 rights which might support the extension of the tort and the judge had been wrong to rely on article 8 in support of his conclusions. Since, on the court's view, there was no scope for application of the tort, there was no basis on which the Tate could be expected or required to give undertakings as to its use of the viewing gallery, so the undertaking given to Mann J to limit the opening hours of the viewing gallery was discharged.

154. On the other hand, if the tort were capable of extending to protection against being overlooked (ie against intrusive visual surveillance), the court did not consider that the judge was correct in his conclusion on the balance to be struck. In the view of the Court of Appeal, the judge had erred by approaching the question whether the tort was made out by asking whether the Tate's use of the viewing gallery was reasonable and by reliance on the factors of self-induced sensitivity and the availability to the claimants of the remedial steps he identified.

The appeal to this court

Issue (1): The ambit of the tort of private nuisance: can visual intrusion be a nuisance?

155. At trial, the Tate conceded that deliberate overlooking, if accompanied by malice, could give rise to a nuisance. Mann J held that, even without the HRA, the tort of nuisance would in principle have been capable of protecting privacy rights in the home and that any doubt on that score had been removed by article 8 and the HRA. When the claimants appealed, the Tate did not seek to challenge that ruling by way of a respondent's notice. However, shortly before the hearing in the Court of Appeal the court requested submissions on the issue of principle of whether the tort extends to cases of "overlooking" (ie visual intrusion). Accordingly, the parties presented arguments on this point, with the Tate contending that it did not and the claimants maintaining that it did.

156. As mentioned above, the basis for the Court of Appeal's decision was its ruling that "mere overlooking" is incapable of giving rise to a cause of action in private nuisance. In his forceful submissions on this point Mr Tom Weekes KC, on behalf of the claimants, challenges this ruling.

157. Much of the law relating to the basic ground rules in respect of the tort of private nuisance is common ground. Mann J and the Court of Appeal approached it in the same way. Private nuisance is a tort concerned with real property and the violation of rights pertaining to real property. 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, ie 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 ("*Hunter*"), 687G-688E (Lord Goff of Chieveley, citing FH Newark, "The Boundaries of Nuisance" (1949) 65 LQR 480, 482: it is a tort "directed against the plaintiff's enjoyment of rights over land"), 696B (Lord Lloyd of Berwick), 702G-H, 706B and 707C (Lord Hoffmann) and 723D-F and 724D (Lord Hope of Craighead: the tort is concerned with cases where the claimant has a right to the land and there is "an unlawful interference with his use or enjoyment of the land or of his right over or in connection with it").

The principle of reasonableness between neighbours

158. The unifying principle underlying the tort is reasonableness between neighbours: *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 ("*Cambridge Water*"), 299 per Lord Goff, with whom the other members of the Appellate Committee agreed: "although liability for nuisance has generally been regarded as strict, at least in the case of a defendant who has been responsible for the creation of a nuisance, even so that liability has been kept under control by the principle of reasonable user – the principle of give and take as between neighbouring occupiers of land, under which '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' [citing the judgment of Bramwell B in *Bamford v Turnley* (1862) 3 B & S 66, 83: see below]. The effect is that, if the user is reasonable, the defendant will not be liable for consequent harm to his neighbour's enjoyment of his land …". An issue on this appeal is the relationship between the general principle of reasonable user stated by Lord Goff and questions relating to "the common and ordinary use and occupation of land", in Bramwell B's language.

159. Reasonable user, as the controlling principle identified by Lord Goff, is an objective matter. In *Lawrence v Fen Tigers Ltd* [2014] UKSC 13; [2014] AC 822 ("*Lawrence*") Lord Neuberger (giving the leading judgment, with which the other

members of the court expressed broad agreement) endorsed the principle of reasonable user set out by Lord Goff in *Cambridge Water*: paras 5 and 55. At para 179, Lord Carnwath referred to Lord Goff's principle of reasonable user and quoted with approval, as he had done in his previous judgment in the Court of Appeal in *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312; [2013] QB 455 ("*Biffa Waste*"), at para 72, the following passage from Tony Weir*, An Introduction to the 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."

Lord Neuberger (para 5) agreed that reasonableness in this context is to be assessed objectively. It is a corollary of the objective nature of the test, and the focus of the tort on property rights, that it is not a defence to say that the claimant has "come to the nuisance" (ie acquired property knowing that a neighbour was already carrying on some activity to which objection is later taken): *Lawrence*, paras 47-52 and 58 (Lord Neuberger).

160. The centrality in the law of nuisance of reasonableness between neighbours emerges from consideration of the classic cases in the nineteenth century, which repay close reading even today: *Bamford v Turnley* and *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642 ("*St Helen's Smelting Co*"). In those cases the courts identified the principles of law which balanced the desirability of productive development of land against protection for neighbouring landowners with regard to the use of their own land.

161. In *Bamford v Turnley* the claimant alleged that the defendant was liable for nuisance for burning bricks on the defendant's land with a view to using them to construct a house on the land, which resulted in a bad smell affecting the amenity associated with occupation of the plaintiff's land. The jury found for the defendant. On appeal, the lawfulness of the direction to the jury was in issue, by which they had been told to find for the defendant if they thought that the place 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. By a majority (Pollock CB dissenting), the Exchequer Chamber held that this was a misdirection. The principal judgment for the majority was that of Erle CJ, Wilde B and Williams and Keating JJ. They held that it was not a defence merely to say that the defendant's use

of his own land had been reasonable. As counsel for the claimant put it (p 67), the only question was "whether there is a real substantial injury to the [claimant], he being supposed to be of ordinary character and nerves, and with reference to the state of the neighbourhood", which was residential rather than industrial.

162. Bramwell B gave a concurring judgment which has become a classic statement of the law in this area. It has been cited and approved many times: eg in *Cambridge Water,* at p 299, and *Southwark London Borough Council v Tanner* [2001] 1 AC 1 ("*Southwark*"), 15-16 and 20. Bramwell B observed (p 82), "[t]he defendant has done that which, if done wantonly or maliciously, would be actionable as being a nuisance to the [claimant's] habitation by causing a sensible diminution of the comfortable enjoyment of it." The fact that the defendant's use of his own land was reasonable, taken by itself, was not a defence. His justification for his action ("that the nuisance is not to the health of the inhabitants of the [claimant]'s house, that it is of a temporary character, and is necessary for the beneficial use of his, the defendant's, land, and that the public good requires he should be entitled to do what he claims to do [ie to make productive use of his own land by building a house on it]": p 82) was no answer. Bramwell B identified the relevant principle as follows (pp 83-84):

> "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 nor unusual, but not the common and ordinary use of land. There is an obvious necessity for such a principle as I have mentioned. It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live."

This is a principle of reasonable reciprocity and compromise which I consider is highly relevant in the present case.

163. The dissenting judgment of Pollock CB is also illuminating. He emphasised (pp 79-80) that it could not be laid down as a legal doctrine:

> "that anything which, under any circumstances, lessens the comfort or endangers the health or safety of a neighbour, must necessarily be an actionable nuisance. That may be a nuisance in Grosvenor Square which would be none in Smithfield Market, that may be a nuisance at midday which would not be so at midnight, that may be a nuisance which is permanent and continual which would be no nuisance if temporary or occasional only. A clock striking the hour, or a bell ringing for some domestic purpose, may be a nuisance, if unreasonably loud and discordant, of which the jury alone must judge; but although not unreasonably loud, if the owner, from some whim or caprice, made the clock strike the hour every ten minutes, or the bell ring continually, I think a jury would be justified in considering it to be a very great nuisance. In general, a kitchen chimney, suitable to the establishment to which it belonged, could not be deemed a nuisance, but if built in an inconvenient place or manner, on purpose to annoy the neighbours, it might, I think, very properly be treated as one";
>
> and he referred to "[t]he compromises that belong to social life …".

(Cf *Sturges v Bridgman* (1879) 11 Ch D 852, 865, per Thesiger LJ, emphasising the importance of the norms of behaviour in the particular locality: "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey"; quoted in *Lawrence*, para 4, per Lord Neuberger).

164. The difference between Pollock CB and the majority was narrow. It concerned the interpretation of the direction given by the trial judge. Pollock CB observed (pp 80-81), "[i]f the act complained of be done in a convenient manner, so as to give no unnecessary annoyance, and be a reasonable exercise of some apparent right, or a reasonable use of the land, house or property of the party under all the circumstances, *in which I include the degree of inconvenience it will produce,* then I think no action can be sustained, if the jury find that it was reasonable" (emphasis added). That is how, in his view, the direction to the jury and its finding should have been interpreted. The difference between Pollock CB and the majority depended on whether one interpreted the direction as referring to reasonable use of the defendant's land, looked at solely from his point of view (which all agreed was incorrect), or to reasonable use of the defendant's land, taking account of the interests of both the claimant and the defendant. In this way, in my view, Pollock CB, like Bramwell B, also emphasised that

the underlying principle was one of overall reasonableness, involving reciprocity and compromise, taking account of the competing interests of both landowners. This view has persisted since then. In a note in (1937) 53 LQR 3, Professor Goodhart said that the governing principle is one of reasonableness in which "what is reasonable depends both upon [the defendant's] circumstances and on those of his neighbour". I will return to this when I deal with the second issue, below.

165. In view of the submissions made by Mr Weekes, it is important to emphasise this difference between the principle of reasonable user as set out by Lord Goff in *Cambridge Water* and explained by Lord Neuberger in *Lawrence* and the distinct idea of reasonable use which the defendant sought to invoke in *Bamford v Turnley*, which was disapproved by the court in that case. As Lord Millett was careful to explain in *Southwark*, p 20, in discussing complaints of nuisance in relation to noisy activities in adjoining flats:

> "The use of the word 'reasonable' in this context is apt to be misunderstood. It is no answer to an action for nuisance to say that the defendant is only making reasonable use of his land … What is reasonable from the point of view of one party may be completely unreasonable from the point of view of the other. 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. The governing principle is good neighbourliness, and this involves reciprocity. A landowner must show the same consideration for his neighbour as he would expect his neighbour to show for him."

Carnwath LJ (as he then was) likewise emphasised the importance of this distinction between these different concepts of reasonableness in *Biffa Waste*, at paras 60-72. At para 69 he cited the passage from Lord Millett's speech in *Southwark* and at para 72 he said that the matter was set out "simply and accurately by Tony Weir" in the statement quoted above (para 159). Liability turns on the issue of reasonableness as between the two parties located in a particular locality, not on the reasonableness of the defendant's use in the abstract.

166. It is because the objective principle of reasonable user ("give and take"), in the sense of reasonable reciprocity and compromise, governs the law in this area that a defendant has a defence to a claim in nuisance where, as Bramwell B put it, it uses its land in a way which is "common and ordinary" for the locality. Provided that what it does is "conveniently done", then the defendant will clearly have made out a defence

according to that principle. This is a simple form of defence, which will give the answer in many situations. It was the straightforward answer to the claim in nuisance in *Southwark*. As Lord Hoffmann said, p 15, "I do not think that the normal use of a residential flat can possibly be a nuisance to the neighbours. If it were, we would have the absurd position that each, behaving normally and reasonably, was a nuisance to the other"; and see pp 20-21 per Lord Millett.

167. However, whilst a defendant will ordinarily not be liable in nuisance when its use is "common and ordinary", it does not follow that a defendant will necessarily be liable for nuisance where a relevant interference with the claimant's enjoyment of their land is caused by use by the defendant which is not "common and ordinary". Moreover, even in a standard type of case, where the defendant says that its use of its land is "common and ordinary", the requirement that its use is "conveniently done" means that the fundamental principle remains that of reasonable user. In both types of case an assessment is required of reasonableness in the relevant objective sense, taking account of a range of factors such as the duration and extent of the interference, whether the interference was reasonably foreseeable (a matter considered at some length in *Cambridge Water*) and whether the claimant's own use of its land had the effect of aggravating the conflict between the parties' respective uses of their land. I return to these points when I consider the second issue on the appeal, below.

168. The second of the classic nineteenth century authorities is *St Helen's Smelting Co.* In that case the owner of an estate in Lancashire complained that his hedges, trees and shrubs were being damaged by pollution from the defendant's copper-smelting works over a mile away. The defendant pointed out that the area was full of factories and chemical works and that if the claimant was entitled to complain, industry would be brought to a halt. Lord Westbury LC said (pp 650-651):

> "My Lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, 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. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property."

169. In *Hunter* Lord Hoffmann analysed this passage at pp 705-707. As he pointed out, Lord Westbury LC was not seeking to suggest that there were two torts of nuisance, one relating to material injury to property and the other concerned with causing "sensible personal discomfort" such as that arising from excessive noise or smells. There is one tort, concerned in both types of case with injury to land. In the latter case, the injury to the land is because "its utility has been diminished by the existence of the nuisance". Referring to *Bone v Seale* [1975] 1 WLR 797, which concerned a nuisance arising from smells from a pig farm, Lord Hoffmann observed "the value of the right to occupy a house which smells of pigs must be less than the value of the occupation of an equivalent house which does not"; in the case of a transitory nuisance, "the owner or occupier is entitled to compensation for the diminution in the amenity value of the property during the period for which the nuisance persisted"; as he said, "the injury to the amenity of the land consists in the fact that the persons upon it are liable to suffer inconvenience, annoyance or illness"(p 706).

The wide ambit of private nuisance

170. As regards the first issue in this appeal, the formulations adopted in the case-law from *Bamford v Turnley* onwards to explain the ambit of the tort are relevant. Bramwell B referred to "a nuisance to the [claimant]'s habitation by causing a sensible diminution of the comfortable enjoyment of it". According to that formulation, there is no reason to say that visual intrusion which, at a certain level of intensity, may indeed cause a sensible diminution of the comfortable enjoyment of one's home should fall outside the scope of the tort. Similarly, Pollock CB took the tort to be concerned with, among others, things which "[lessen] the comfort … of a neighbour", and again there is no good reason to think that this would not cover visual intrusion. Lord Westbury in *St Helen's Smelting Co* referred to matters producing "sensible personal discomfort", and the same point applies.

171. In *Hunter* Lord Goff approved (p 688B) a statement by Professor Newark that nuisance protects against the invasion of the claimant's "liberty to exercise rights over land in the amplest manner." Lord Lloyd referred (p 696B) to "interference with land or the enjoyment of land". The formulation employed by Lord Neuberger in *Lawrence*, at para 3, refers to action (or sometimes a failure to act) "which causes an interference with the claimant's reasonable enjoyment of his land, or … which unduly interferes with the claimant's enjoyment of his land".

172. A range of authorities provide further support for the wide ambit of the tort. Mr Weekes placed particular reliance on *J Lyons & Sons v Wilkins* [1899] 1 Ch 255, CA. That case concerned the picketing (or, as it was called, watching and besetting) by union members of premises used by the claimants for the production of leather goods, in the course of a strike, with a view to dissuading workers from going in and persuading the claimants to change their mode of business. No violence, intimidation or threats were used. The claimants applied for and obtained injunctive relief at first instance and this was upheld on appeal. The case turned on the construction of a statutory provision which made it an offence to watch or beset the house or other place where a person resided or worked with a view to compelling him, "wrongfully and without legal authority", to do or abstain from doing something. Lindley MR held (pp 267-268) that what had been done fell within the scope of the provision because to watch or beset a man's house without some reasonable justification is a nuisance at common law, since "[s]uch conduct seriously interferes with the ordinary comfort of human existence and ordinary enjoyment of the house beset". In support of this view he cited *Bamford v Turnley*; *Walter v Selfe* (1851) 4 De G & Sm 315, concerning smoke and smells, in which Knight-Bruce V-C found a nuisance because the defendant's activities would "diminish seriously and materially the ordinary comfort of existence to the occupier [of the claimant's dwelling house]" (p 323); *Crump v Lambert* (1867) LR 3 Eq 409, concerning smoke, smells and noise, in which Lord Romilly MR (pp 413-414) took the principle established by *St Helen's Smelting Co* to be "whether the annoyance is such as materially to interfere with the ordinary comfort of human existence"; and *Broder v*

Saillard (1876) 2 Ch D 692, a noise case, in which Jessel MR stated the principle (p 701) to be that "a man is entitled to the comfortable enjoyment of his dwelling house".

173. Chitty LJ agreed with Lindley MR that a nuisance existed (pp 271-272), saying that for the purposes of the tort "the annoyance [caused by the conduct of the defendant] must be of a serious character, and of such a degree as to interfere with the ordinary comforts of life", and that the picketing in the case "would undoubtedly constitute a nuisance of an aggravated character". Vaughan Williams LJ did not consider that a nuisance was made out on the facts, but accepted (pp 273-274) that in principle watching and besetting could be carried on in such a way as to amount to a nuisance.

174. In *Hubbard v Pitt* [1976] QB 142 the majority in the Court of Appeal (Stamp and Orr LLJ) relied on *Lyons & Sons v Wilkins* as authority for the proposition that picketing a property could constitute a nuisance.

175. In my judgment the formulations of the relevant principle above are authoritative and are of a width which - leaving aside questions of balancing of interests, which is the second issue in the appeal - covers instances of intense visual intrusion at the level which has occurred in this case. Also, the rationale given for the tort, which underlies these formulations, is capable of covering the present case.

176. A person of ordinary sensitivity would regard the extreme degree of visual intrusion experienced by the claimants in this case as a serious interference with their ability to enjoy their property as a domestic habitation. Anyone would be likely to regard living their lives within their own home under the gaze of a multitude of strangers as having a highly inhibiting and unpleasant effect. An important aspect of the enjoyment of the rights of property in one's own home is that one can live there with a reasonable degree of privacy and without intrusion by others, hence the well-known saying that a person's home is their castle. Over the years there have been a number of judicial statements which acknowledge this dimension of the enjoyment of a residential property. The judge cited *Semayne's Case* (1604) 5 Co Rep 91a, 91b; *Morris v Beardmore* [1981] AC 446, 465; and the (dissenting) judgment of Thomas J in *Brooker v Police* [2007] 3 NZLR 91, paras 256-258. It would be odd to single out this aspect of enjoyment of the rights of property in one's own home as not deserving protection under the tort, when other aspects of such enjoyment which are protected (such as not to be subjected to unreasonable noise, smells, dust or vibrations) might often be less disturbing as interferences with that enjoyment.

177. Although *Lyons & Sons v Wilkins* was not a case of visual intrusion as such, the decision shows that the tort is not tied to things which involve some physical intrusion upon the claimant's land. Further examples which establish the same point are *Thompson-Schwab v Costaki* [1956] 1 WLR 335 and *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525. In *Thompson-Schwab* the sight of prostitutes and their clients entering neighbouring premises was held to constitute a nuisance. In *Bank of New Zealand v Greenwood* a nuisance was found where the glass roof of a verandah on a building was so positioned as to direct an intense and dazzling glare into the claimant's property which was too bright for the human eye to bear.

178. In *Hunter* Lord Goff said (p 685G-H), "for an action in private nuisance to lie in respect of interference with the plaintiff's enjoyment of his land, it will generally arise from something emanating from the defendant's land", such as "noise, dirt, fumes, a noxious smell [or] vibrations". Mr Fetherstonhaugh KC for the Tate submits that such a formulation is not apt to cover the visual intrusion into the claimants' flats which occurs in this case. However, it is clear that Lord Goff was not laying down a requirement that there be emanations as an inflexible rule of law. He pointed out that sometimes an activity on a neighbour's land may be so offensive to neighbours as to constitute a nuisance without the element of invasion by emanation, citing *Thompson-Schwab* and *Bank of New Zealand v Greenwood*.

179. In my view, intense visual intrusion into someone's domestic property is capable of amounting to a nuisance. The use of the viewing gallery as a site for viewing the area to the south of Tate Modern, in a way which allows and encourages an unusually intrusive degree of visual overlooking of the claimants' flats by large numbers of people, falls within that category of case.

Authority on visual intrusion as a nuisance

180. In an article entitled "Privacy", (1931) 47 LQR 23, Professor Winfield debated the possibility that English law might recognise infringement of privacy as a tort in its own right and speculated that the tort of nuisance might cover the case of a person staring into the room of a dwelling house. He referred (p 27) to a case in 1904 "in which a family in Balham, by placing in their garden an arrangement of large mirrors, were enabled to observe all that passed in the study and operating-room of a neighbouring dentist, who sought in vain for legal protection against 'the annoyance and indignity' to which he was thus subjected". Professor Winfield expressed the view that a claim in nuisance should have been available, because such conduct "seriously interferes with the ordinary comfort of human existence and the ordinary enjoyment of the house [so beset]". It is, I think, significant that this was the view of one of the

leading authorities on the law of tort. Professor Winfield referred to *Lyons & Sons v Wilkins* as authority which supported his view, as indeed I think it does.

181. Authority from other common law jurisdictions supports the proposition that forms of visual intrusion are capable of constituting a nuisance.

182. In *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 ("*Victoria Park Racing*") the owners of a racecourse brought an action in nuisance against defendants who had erected a tall platform on adjoining land from which to look over fences erected around the course so as to watch races and make broadcasts commenting on them. The racecourse owners complained that the broadcasts meant that fewer paying customers came to watch the races. By a majority, the High Court of Australia dismissed the claim on the basis that the defendants had not interfered with the claimants' land or the enjoyment thereof.

183. In the minority, Rich and Evatt JJ emphasised the width and flexibility of the principles governing the tort and referred to Professor Winfield's article and his example of the Balham dentist. In their view, visual intrusion was capable of constituting a nuisance and did so in the case at hand. In the majority, Latham CJ and Dixon J relied on *Tapling v Jones* (1865) 20 CB (NS) 166; 11 HL Cas 290 and other cases concerned with construction of windows overlooking neighbouring property (referred to as "opening windows"), which I discuss below, to conclude that the natural rights attaching to land do not include freedom from inspection from neighbouring occupiers. Latham CJ stated (p 494) "[a]ny person is entitled to look over the [claimant's] fences and to see what goes on in the [claimant's] land. If the [claimant] desires to prevent this, the [claimant] can erect a higher fence" and take other measures of self-help to protect its privacy. Dixon J likewise referred (p 508) to a statement by Lord Chelmsford in *Tapling v Jones* that a claimant in this sort of case is left "to his self-defence against an annoyance of this description", by erecting barriers to protect himself from view.

184. McTiernan J also referred to *Tapling v Jones*, noting that the claimant implicitly accepted that the defendants were entitled to build on their land as they pleased and then view out from the platform, but adopted an intermediate position. He emphasised that the claimant only sought relief to restrain broadcasting of commentary on the races rather than removal of the platform. However, as he observed (pp 523-524), it had not been shown "that the broadcasting interferes with the use and enjoyment of the land or the conduct of the race meetings or the comfort or enjoyment of any of the [claimant's] patrons … "; it was conceivable that it might in a suitable case be an adjunct to the actionable nuisance of watching and besetting premises discussed in *Lyons & Sons v Wilkins*, as the list of actions which might

constitute nuisance was not closed, but it could not be an actionable nuisance "at least unless it causes substantial interference with the use and enjoyment of the premises". This approach allows for the possibility, in principle, that visual intrusion could constitute a nuisance if it causes substantial interference with the use and enjoyment of the claimant's land. This was not a case concerned with visual intrusion into a residential property. For the reasons set out above, such intrusion may be capable of causing substantial interference with the use and enjoyment of such property.

185. In *Raciti v Hughes* (1995) 7 BPR 14,837 the defendants installed on their property some floodlights and surveillance cameras set up in such a way as to illuminate the claimant's backyard and record on videotape what happened there. The first instance court in New South Wales held that, by analogy with watching and besetting cases like *Lyons & Sons v Wilkins*, the deliberate attempt to snoop on the privacy of a neighbour and record their actions on videotape was an actionable nuisance.

186. In British Columbia it has also been held in decisions at first instance, in the context of disputes between neighbouring homeowners, that visual intrusion is capable of amounting to a nuisance. In *Wasserman v Hall* (2009) BCSC 1318 a nuisance was found to be made out where, living in a rural area, the claimants were subject to permanent surveillance from security cameras installed by the defendant which were trained on their property. The judge held that this was intolerable in the circumstances and amounted to unreasonable and substantial interference with the use and enjoyment of their property. In *Suzuki v Munroe* (2009) BCSC 1403 the court held there was a nuisance arising from the installation by the defendant of a surveillance camera permanently trained on the front yard, driveway and entrance to the claimants' home. Continuous observation by a surveillance camera in the circumstances was "an intolerable interference with the use and enjoyment of the neighbouring property" (para 99).

187. In *Martin v Lavigne* (2011) BCCA 104 the Court of Appeal for British Columbia implicitly accepted that visual intrusion into a residential property might amount to a nuisance, but dismissed an appeal against the finding of the trial judge that the intrusion complained of (namely that the defendant had regularly stared into the claimants' flat, which had floor-to-ceiling windows looking out onto a public footpath where the defendant would walk) was not sufficiently substantial or serious to be actionable. In relation to his submissions on the second issue in this appeal, Mr Fetherstonhaugh called attention to the comment by Smith J, giving the leading judgment, that if the claimants were home when this occurred, "one must wonder why they did not simply turn away … or close their window coverings, or simply ignore him" (para 29).

188. An obiter comment by Griffiths J in *Baron Bernstein of Leith v Skyviews & General Ltd* [1978] QB 479 also illustrates the strong instinctive reaction of a common lawyer on the question whether visual intrusion of an extreme kind could constitute the tort of nuisance. The case concerned the taking of a photograph of the claimant's home from the air. The claimant objected to this and sued in trespass, not nuisance. The judge observed that the reason for this was that the taking of a single photograph could not be an actionable nuisance. However, he also observed (p 489G) that if a claimant "was subjected to the harassment of constant surveillance of his house from the air, accompanied by the photographing of his every activity", he was "far from saying that the court would not regard such a monstrous invasion of his privacy as an actionable nuisance for which they would give relief."

Cases on the opening of windows

189. The Court of Appeal considered that cases on the opening of windows, including in particular *Tapling v Jones*, supported their conclusion that the law of nuisance cannot, in principle, extend to protection against visual intrusion or being overlooked from another property. In my view, however, they do not have that effect.

190. The authorities on the opening of windows emphasise the point that a landowner can, in principle, build what they like on their land. However, the principal issue which arises in the cases is not concerned with the ambit of the law of nuisance, but the question of acquisition of rights to light by prescription. Where a landowner constructs a window ("opens a window") which overlooks a neighbour's property they can acquire an easement of light ("a right to light") in respect of that window through prescription by the effluxion of time. If such a right is acquired, it has the effect of preventing the neighbour from building on their own land in such a way as to block the light to the window. In *Tapling v Jones* the relevant prescription period was 20 years. The House of Lords held that the only way in which the neighbour could prevent such a right arising is by building on his own property to block the light.

191. At the beginning of his speech, Lord Westbury LC was concerned to correct certain conceptual confusions, one of which was connected with a phrase often used in such prescription cases, that there was an "invasion of privacy, by opening windows". Lord Westbury LC observed (p 179):

> "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 [ie to prevent B from acquiring an easement of light by prescription]…"

(See also p 185, per Lord Cranworth, and pp 191-192 and 196 per Lord Chelmsford).

192. In my view, this observation and those of Lord Cranworth and Lord Chelmsford were not at all directed to the operation of the law of nuisance. Lord Westbury's statement was aimed at clearing the ground for a discussion of the law of prescription in relation to easements of light. Kindersley V-C made a similar remark in *Turner v Spooner* (1861) 30 LJ (Ch) 801, another opening windows case. Referring to the question of privacy, he said (p 803) that "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." But again he was not seeking to make any statement about the operation of the law of nuisance. The same is true of another similar statement in an opening windows case on which Mr Fetherstonhaugh sought to rely: *Chandler v Thompson* (1811) 3 Camp 80, 81-82.

193. However, I think the emphasis given by Lord Westbury LC and the other Law Lords in *Tapling v Jones* to the possibility of self-help by the person who does not wish to be overlooked has some relevance to the discussion of the second issue, below. That possibility made it acceptable that the law should not prevent a landowner (B) from building what he liked on his own land. A rough balance between the interests of a landowner to make use of his own land and of a neighbour to enjoy his land was therefore achieved in this way. The same comment applies in relation to the discussion of *Tapling v Jones* by the majority in *Victoria Park Racing*, in the context of the law of nuisance.

194. In my view, once it is recognised that the law of nuisance operates in a more nuanced way in relation to visual intrusion than was discussed in *Tapling v Jones*, and it is accepted that this may afford a neighbour the opportunity of going to law to seek relief to prevent the landowner from using his land as he wishes, the question whether there are adequate means of self-help available to the neighbour becomes of still greater importance. If there are reasonable and adequate means of self-help, the use of the law of nuisance to prevent development of the landowner's land becomes more

difficult to justify. As Latham CJ put it in *Victoria Park Racing*, p 494, "the law cannot by an injunction in effect erect fences which the plaintiff is not prepared to provide". It seems to me that the principle of reasonable reciprocity and compromise which the law has adopted as the mechanism to balance the competing interests of neighbouring landowners has to take account of reasonable measures of self-protection which may be available.

Historical, legal and policy considerations

195. The Court of Appeal referred to a range of factors which, in their opinion, supported the view that visual intrusion cannot, as a matter of principle, found a claim in nuisance. With respect, I do not find these persuasive.

196. With reference to the opening windows cases, the Court of Appeal said that the absence at common law of a right to light, short of an easement acquired by prescription, or to air flow and prospect (ie a view), is "mirrored by the absence of a right to prevent looking into a residence" (para 75). The reasons given for the former position, and in particular for a general rule that no right to a prospect could be acquired by prescription, in terms of a concern that such a right would constrain building in towns and cities (see *Attorney General v Doughty* (1752) 2 Ves Sen 453, 453-454; *Dalton v Henry Angus & Co* (1881) 6 App Cas 740, 824; *Hunter*, p 699F per Lord Lloyd), also applied to limit the ambit of the law of nuisance in relation to visual intrusion from neighbours. They said (para 78), "[i]t is logical that the same policy consideration underlies … the absence of any successful claim for overlooking, despite the very long history of a cause of action for nuisance" and also the opening windows cases; cheek-by-jowl living in cities meant that overlooking was commonplace and indeed inevitable through the period when the great cities were being constructed.

197. However, whilst some degree of being overlooked from neighbouring properties is indeed a normal feature of life (and not just in cities) and therefore bound to have to be tolerated according to the principle of "give and take", it does not follow that all visual intrusion must be tolerated, no matter how oppressive and how destructive it might be of the ordinary amenity to be expected in relation to a residential property. If the relevant bar for application of the tort is set high, as it must be for something as normal and inevitable as the possibility of people being able to look into a property through a window or across a fence, then there is no reason to think it will unduly constrain urban development or would have done so in the past.

198. The principle of "give and take" provides the appropriate way to balance the competing interests which arise in relation to visual intrusion, just as it does for other

forms of intrusion such as by sound, smell or vibration. By contrast, where an easement exists it is an absolute property right, which is not subject to such a principle. This means that acquisition of a right to a prospect as an easement would be far more damaging in relation to, and indeed destructive of, rights to build on land and a far greater threat to the development of towns and cities than the law of nuisance ever could be. In my view, the equation by the Court of Appeal of the policy arguments against recognition of these very different sorts of rights cannot be sustained.

199. The Court of Appeal pointed out (para 79) that *Hunter* shows that the law does not always provide a remedy for every annoyance to a neighbour. It was held there that the construction of a very tall building which interfered with reception of television broadcasts in the claimants' homes did not give rise to a cause of action because of the general principle that at common law anyone may build as they like upon their land. It is certainly right that not every annoyance will fall within the scope of the law of nuisance and the general principle referred to is indeed important. But it is subject to limits set by the general law of nuisance. Nothing said in *Hunter* indicates that the tort of nuisance is incapable of application in relation to extreme forms of visual intrusion which are destructive of the usual enjoyment of rights in relation to a residential property.

200. The Court of Appeal said (para 81) that "[u]nlike 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"; and "[i]t 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". However, the absence of clear legal guidance of the kind referred to by the Court of Appeal is a general feature of the law of nuisance, as much in relation to noise, smells and the like as in relation to visual intrusion. In none of these areas does the law lay down a clear bright-line rule, but instead applies a standard of reasonableness according to the principle of "give and take", having regard to the character of the neighbourhood and other relevant features of the particular case. That is why the courts have emphasised since Victorian times that the question whether an actionable nuisance has occurred is one for the jury or the judge as the trier of fact. There is no significant difference in the question posed in a visual intrusion case, according to the principle of "give and take", and in the manner in which it has to be addressed by a court, than in relation to the other forms of intrusion destructive of the amenity of property referred to by the Court of Appeal.

201. At para 81 the Court of Appeal also pointed out that overlooking is frequently a ground of objection to planning applications and noted that "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". However, other forms of activity which can give rise to claims in nuisance, such as the generation of noise, smoke or smells, are also matters which may be addressed in objections to planning applications, so this does not give rise to any point of distinction. More fundamentally, as this court pointed out in *Lawrence*, at paras 77-95 per Lord Neuberger, the planning regime is concerned with issues of the public interest, not with resolving questions of individual rights. So it is not surprising, and is not a matter of particular concern, that a cause of action in nuisance may be found to exist in a case where an objection to the grant of planning permission founded on similar matters has been rejected. A grant of planning permission pursuant to the administrative processes under the planning regime cannot remove private rights which neighbouring landowners may have. See also *Hunter*, p 710D, per Lord Hoffmann and *Lawrence,* paras 156 (Lord Sumption), 165 (Lord Mance) and 193 (Lord Carnwath).

202. At paras 82-83 the Court of Appeal considered that, following certain observations by Lord Hoffmann in *Hunter*, p 710A-C, it was inappropriate to "enlarge" (the term used by Lord Hoffmann) the right to bring actions at common law in circumstances where the planning system now regulates the right of landowners to build as they please on their land, and takes better account of the competing interests at stake than the common law can do. However, in my view, recognition that the law of nuisance extends in an appropriate case to a right to be protected against intense visual intrusion does not represent an enlargement of the tort, but only an acceptance that this falls within the formulation and rationale of the well-established legal rule which governs in this area (see para 175 above). Further, the "give and take" principle incorporates an appropriate degree of flexibility to adjust the operation of property rights between neighbouring landowners to take account of the competing interests at stake in a manner which is carefully tailored to the particular case.

203. By contrast, the interest at issue in *Hunter* regarding television reception was more remote from the traditional forms of amenity associated with the use of residential property and accordingly it could properly be said that the issue there was whether the existing tort should be enlarged to cover that new form of amenity. Thus Lord Goff (pp 685A-686H), Lord Lloyd (p 699D) and Lord Hoffmann (pp 708H-710A) considered the relevant analogy to be with a building erected so as to interfere with a neighbour's view or flow of air, which are interests which the law of nuisance does not protect. It was against the background of that analysis that Lord Hoffmann made the comments about enlargement of the tort on which the Court of Appeal fastened.

204. Finally, at para 84, the Court of Appeal considered that what is really at issue in this case is invasion of privacy rather than damage to interests in property, which is the province of the law of nuisance. Invasion of privacy is the subject of legislation and involves questions which should be left to the legislature. However, the claimants have been careful to put their case in a way which is based on an allegation of damage to their property rights in respect of their flats. The question is whether they have made out that case. In my opinion, there is no good reason to rule out such a claim as a matter of principle.

205. If the Court of Appeal were correct in their view that visual intrusion is incapable of providing the basis of a claim in nuisance, the Tate would be entitled to cease to apply the restrictions and safeguards it has put in place up to now to protect the claimants' amenity in their flats to some degree. But those are matters of good neighbourliness for which in the circumstances of this case, in my view, there should be scope for provision to be made. Again, the conclusion is that it is the principle of reasonable "give and take" which provides the better mechanism to reconcile the competing property interests in issue, rather than ruling that there can in principle be no claim in private nuisance in a case such as this.

Article 8 of the ECHR

206. No part of the reasoning above depends in any way upon article 8 of the ECHR and the HRA. In my view, the basic concepts of the English law of nuisance are already adapted to cover the circumstances of the present case and reference to article 8 is unnecessary and unhelpful. The claimants do not need to rely upon article 8 to make good their case on the first issue in this appeal.

207. Mr Weekes referred to article 8 as the foundation for an alternative submission in case the claimants were unsuccessful on their primary submission on the first issue. Mann J said (para 170) that if there were any doubt that the tort of nuisance is capable, as a matter of principle, of protecting privacy in the home he would have considered it had been removed by article 8. However, it is clear from his analysis overall that he reached his decision regarding the potential for a claim in nuisance based on visual intrusion and his decision regarding the fair balance to be struck between the parties' property rights according to the "give and take" principle without relying on article 8 or an analysis of the operation of the rights under article 8.

208. The Court of Appeal (paras 86-95) made some well-directed criticisms of the judge's reference to article 8. In my respectful opinion, the judge did not analyse the position regarding the application of article 8 in a case concerning a clash of property

rights between two sets of private persons with the care which would have been required had the case really turned on this. It is by no means clear that article 8 imposes a positive obligation on a state to intervene in some way in a dispute between private parties of the kind which arises in this case. Nor is it clear whether article 8 requires the state to extend or qualify the property rights of one or other of the parties as a departure from whatever balance the state's own law has itself struck between the competing interests, once one takes account of the usual margin of appreciation allowed to a state in striking a balance between competing interests and rights of private persons, particularly when they are covered by Convention rights such as article 1 of the First Protocol to the ECHR (right to protection of property). It is also by no means clear that the Tate (as opposed to the individuals who make use of the viewing platform and actually look into the claimants' flats) is properly to be regarded as the relevant party which engages in intrusion into the home or the privacy of the claimants for the purposes of analysis under article 8. But it is not necessary to lengthen this judgment by exploring any of these issues.

Issue (2): Was there a nuisance in this case? Application of the principle of reasonable reciprocity and compromise ("give and take")

Introduction

209. The reason why a principle of reasonable reciprocity and compromise, or "give and take", should apply in relation to the tort of nuisance seems clear. On the one hand, if one landowner uses their land in a way which impinges in a material way on the enjoyment of a neighbour's property, if no remedy is given that means that the neighbour has in some sense to bear the cost of the landowner's use. But on the other hand, if a court grants injunctive relief to prevent that use and to protect the use to which the neighbour puts their land, that will have the effect of forcing the first landowner to bear the cost of the neighbour's use: to the extent that relief is given, the first landowner will be deprived of their usual right, as emphasised in *Hunter*, to build as they please on their own property or use it as they wish. There is no reason why the rights of one landowner must necessarily prevail over those of the other. A balance has to be struck between them. Each of them is entitled to expect a degree of good neighbourliness and toleration on the part of the other.

210. In several of the Victorian cases, the principle applied was expressed in the Latin maxim "sic utere tuo ut alienum non laedas" (use your own property in such a way as not to injure another's property), which sought to capture the same idea as the expression "give and take". The maxim was criticised by Lord Wright in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 ("*Sedleigh-Denfield*"), 903, as lacking in precision. As he pointed out, "[a]n occupier may make in many ways a use of his land

which causes damage to the neighbouring landowners and yet be free from liability". However, both formulas provide a useful reminder that the aim of the tort of nuisance is that the freedom of neighbouring landowners regarding the use of their property should be maximised in a symmetrical way, so far as possible. An occupier is not confined to using their property in a way which matches the ways in which neighbours use theirs. Rather, as Lord Wright put it "[a] balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with."

211. As now emphasised in the leading authorities, where the freedom of one landowner is in conflict with the freedom of another, the governing principle is that the respective user of each of them should be reasonable. In *Sedleigh-Denfield* Lord Wright (at p 903) stated the test by reference to "what is reasonable according to the ordinary usages of mankind living in … a particular society". As Lord Neuberger explained in *Lawrence*, para 5, citing Lord Goff's speech in *Cambridge Water* and Bramwell B's judgment in *Bamford v Turnley*, "liability for nuisance is 'kept under control by the principle of reasonable user – the principle of give and take as between neighbouring occupiers of land …'". Reasonable user means reasonable having regard to the rights and interests of both neighbours, so that a fair balance is maintained between them, judged in the context of the character of the particular neighbourhood where they are located.

212. The application of the "give and take" principle as a way of modulating and reconciling the property rights of neighbouring landowners is particularly important where the issue is visual intrusion or overlooking. Many types of nuisance, such as those to do with smell, vibration and noise, naturally tend to occur over relatively short distances. But lines of sight may be open across considerable distances, and where a landowner can look out from their property then others can look in. Particularly in an urban environment, a degree of overlooking and visual intrusion is inevitable.

213. The Court of Appeal's concern regarding the potential for the tort of nuisance, if it extends to visual intrusion, to stymie development and interfere unduly with the property rights of other landowners if not kept within careful bounds is not misplaced. If the tort is not restricted in its effect at the stage of issue (1) (contrary to the view of the Court of Appeal), it falls to the application of the principle of "give and take" to ensure that the tort does not have an excessive impact on the ordinary property rights of other landowners.

214. In striking the appropriate balance between the competing property interests, I can see no good reason why one should leave out of account reasonable self-help

measures which might be available to the person complaining about visual intrusion. The "ordinary usages of mankind" living in a city include employing a degree of self-help to protect oneself against visual intrusion by neighbours, by using curtains, blinds and the like. Further, in the opening windows cases the courts were careful to explain that the potential for a property-owner to acquire rights to light as an easement by prescription was balanced by the ability of a neighbour to protect themselves by building on their own property. The judges in the majority in *Victoria Park Racing* also emphasised the measures available to the claimants to engage in self-help to protect their interests. Latham CJ made the telling observation (para 194 above) to the effect that they should not rely upon the court to supply by injunction what they could have achieved by reasonable measures of self-help for themselves. In *Martin v Lavigne* Smith J made a similar point in the context of another claim framed in nuisance (para 187 above).

215. Standing back from the authorities and looking at the matter generally, a degree of toleration of some annoyance is expected as an aspect of good neighbourliness, with the object of allowing other landowners to enjoy their own rights of enjoyment of their property to the fullest extent reasonably possible. As Lord Millett said in *Southwark*, p 20, "[a] landowner must show the same consideration for his neighbour as he would expect his neighbour to show for him". In my view, this includes being willing to live with what may be a new and unusual use of a neighbour's land, if it is in accordance with the objective principle of reasonable use, in order to accommodate the same interest in free development of land which both landowners have. Since that is so, if the claimant is able to take measures reasonably available to them and consistent with the ordinary habits of life which a reasonable person could be expected to adopt, which would allow for accommodation of reasonable use of land by a neighbour, that is in my view a relevant factor which can and should be taken into account. But in deciding whether possible self-help measures should be brought into account in deciding whether an actionable nuisance exists, a great deal will depend on the nature of the nuisance alleged. Potential exposure to visual intrusion is an inevitable feature of urban living and it is usual for people to use screening measures of one sort or another to protect themselves to some degree.

216. The purpose of the "give and take" principle is to allow the court to determine the point at which a reasonable reconciliation between the property rights of different landowners can be achieved, and the opportunities for one or other to take action themselves to help achieve that are relevant. In that regard I do not consider that there is any difference in principle between self-help measures which are reasonably available to the claimants in this case and the possibility for action on the part of the Tate to reduce the impact of the viewing platform on the claimants' properties by closing it at certain times, putting up notices and so forth. In each case some action may be required by the party which is in a position to take it so as to reduce the

friction created by their desire to enjoy the amenity of their own property and to exercise their right to use their land as they wish. A court can impose an appropriate standard of behaviour on a defendant by requiring an undertaking to be given or issuing an injunction. Conversely, it can in effect require an appropriate standard of behaviour from a claimant by refusing to grant relief in circumstances where it thinks that relevant self-help measures are available, in the light of which it would be unreasonable to prevent the defendant from using its land in the manner complained of. This is simply an effect of the basic point made in para 209 above.

217. By the same token, I consider that it may be a relevant factor that one party or the other has conducted themselves in a manner which, although reasonable in itself, has, by the standards appropriate to the area in which they are situated, tended to increase the degree of friction between their property rights and those of neighbours without sound justification. This underlying point manifests itself in a number of ways in the authorities.

218. In *Broder v Saillard* (above) the defendant constructed stables against the wall of a neighbouring residential property. The noise from the stables kept the neighbours awake at night. Jessel MR accepted that the defendant's use of his property was reasonable from his own point of view but held that a nuisance was made out because, given the residential nature of the neighbourhood, he had chosen to locate the stables in a position which was not proper for the keeping of horses (p 701). The defendant's action, albeit reasonable as judged from his perspective, had not taken sufficiently into account the interest of the neighbours in being able to enjoy their own property in a way which was in keeping with the uses of land in that area. So, in the present case, the construction and use of the flats as the claimants wish, without having to resort to screening measures, can readily be seen to be reasonable as judged from their perspective. The Court of Appeal emphasised this point. But the flats were constructed to an open design which was unusual for the area and in my view the judge was entitled to take this into account in applying the different reasonableness test implicit in the "give and take" principle when assessing whether the use of their land meant that the law should give a remedy to prevent the Tate from using its land as it wished. The Tate's operation of the viewing gallery was reasonable as judged from its own perspective and was also reasonable as judged by the standards to be expected in the area where both properties were located.

219. The fact that a claimant has "come to the nuisance" - ie has moved into a property knowing that a neighbour carries on a particular activity which might create annoyance - is no defence because, as Lord Neuberger observed in *Lawrence* (para 52), "nuisance is a property-based tort, so that the right to allege a nuisance should, as it were, run with the land." This feature of the tort explains why the "give and take"

principle is an objective one to be applied in the light of the nature of the neighbourhood in which the relevant properties are located.

220. However, Lord Neuberger went on to discuss (paras 53-58) the different question of whether, in the light of the "give and take" principle, a defendant's use of land which is not a nuisance, given the nature of the locality, can become so by reason of the way in which the claimant has chosen to build on or use their own land. Can the claimant's new use of their land make something which was not a nuisance become a nuisance? Lord Neuberger suggested (paras 55 and 58) that the answer should be "no", and that the pre-existing activity on the defendant's land, which was originally not a nuisance to the claimant's land, should be treated as part of the character of the neighbourhood. As he observed (para 55), "After all, until the claimant built on her land or changed its use, the activity in question will, ex hypothesi, not have been a nuisance."

221. The present case does not give rise to this precise issue, in that the Tate had not constructed its viewing gallery before the Neo Bankside development took place. The development of Neo Bankside and the development of the Tate extension took place at the same time. However, assessed in terms of the established character of the neighbourhood at the time both developments took place, in which tower blocks had ordinary windows for looking in and out, Mann J found that the construction and use of the viewing gallery would not have been a nuisance in relation to any residential block of ordinary construction for the area. Thus it can be said, in line with Lord Neuberger's observations in *Lawrence*, that the building by the owners of Neo Bankside on their land to change its use to residential tower blocks with a degree of openness in terms of floor-to-ceiling windows unusual for the area should not be taken to have the effect of turning the Tate's unexceptionable use of its land into a nuisance.

222. Mann J made a similar point by reference to another strand of authority relevant to the operation of the "give and take" principle, the nuisance cases about sensitive users illustrated by *Robinson v Kilvert* (1889) 41 Ch D 88. In that case, heat emanating from the defendant's property had a detrimental effect on paper being produced on neighbouring land by the claimant, but only because of the unusual degree of sensitivity of the claimant's paper. It would not have affected the production of normal paper. The judge quoted this statement by Cotton LJ, at p 94:

> "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."

223. Mann J observed (para 205):

> "There is a clear analogy here. 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 [be] 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. I remind myself that the first designs for these flats did have some privacy protection built in."

The judge made the same point about the use to which the claimants had put the winter gardens: paras 208-211. They had been designed as a form of glazed balcony but had been converted by the claimants for use as an ordinary living area. As the judge observed, one does not expect so much privacy on a balcony. In converting the winter gardens to internal living areas the owners of the flats had "created their own additional sensitivity to the inward gaze".

224. Before leaving this discussion of the authorities, I should comment on a further submission made by Mr Weekes. He says that the appropriate way for the rights and interests of the claimants and the Tate to be balanced against each other is by a finding that the Tate has committed the tort of nuisance, leaving the balance to be struck in a more tailored way by adjustment at the remedies stage. Although the law in this area does allow for a degree of fine-tuning of the balance at the remedies stage, I do not consider that this justifies the approach urged by Mr Weekes. As explained above, the right of action in nuisance is an aspect of the right of property in land in the context of a particular neighbourhood. That is why "coming to a nuisance" is not a defence; nor is it generally a defence that the defendant has taken the utmost care in carrying on their activity (see *Hunter*, p 696F per Lord Lloyd, citing *Read v J Lyons & Co*

Ltd [1947] AC 156, 183). It is appropriate that such rights should be determined according to a reasonably clear objective standard, as provided by the "give and take" principle. The tort depends on what, in the circumstances of the particular area, is to be regarded as the protectible interest of the claimant regarding their reasonable use of their land. This is primarily a matter of objective right affecting the property itself, to be governed by application of the "give and take" principle, not a matter of remedy and the application of a discretion regarding adjustment between the particular claimant and the particular defendant.

Alternative approaches

225. Mr Weekes submitted that the decisive feature of the present case is that the Tate's use of its property falls outside the "common and ordinary" use of land in the locale, however one might characterise the nature of the use by the claimants of their land. Lord Leggatt considers that the claimants' use of their land was "common and ordinary" in the locale and on that basis focuses on asking whether the defendant's use of its land is "common and ordinary" by the standards of the locale (together with asking whether it involves a substantial interference with the claimants' enjoyment of their land). By contrast, as I read Mann J's judgment, he clearly did not find that the claimants' use of their land was "common and ordinary" by the standards of the locale, having regard to the nature of the nuisance alleged and the way in which the land at Neo Bankside had been developed with a heightened degree of visual openness and how the claimants had chosen to use the winter gardens: see below. In my opinion, in that context and more generally the relevant question is whether the use meets an objective test of reasonableness encapsulated by the reciprocity principle of "give and take" as developed in the modern authorities. That test is critically informed by the nature of the locale but also takes account of the general rule, as emphasised in the authorities, that a landowner may use its own land as it sees fit. Not every new use of land which is not in accordance with common and ordinary usage in a locale is an actionable nuisance, since otherwise there would be no scope for development and change and the vibrancy of modern life would be stultified.

226. The difference between these approaches is important for the outcome of this appeal. Since the Tate's use of its land is causing a significant interference with the claimants' enjoyment of theirs, having regard to the manner in which they wish to use it, and the use by the Tate is not common and ordinary, it is said that the claimants' complaint in nuisance is made out. In my respectful opinion, however, the principle of reasonable user explained by Tony Weir and endorsed in *Lawrence* cannot be reduced to a simple question whether the defendant's use is common and ordinary. Instead, in an unusual case like the present, it requires a broader consideration of the circumstances of the case, including whether the claimants' own use of their land is

common and ordinary for the locale, whether by their use they have made themselves particularly vulnerable to the type of intrusion of which they now complain and whether there are measures of self-help available to them of a comparatively modest and normal kind which would reduce that intrusion to an acceptable degree in the context of the locale. There are sound reasons why it is appropriate to adopt an approach based on an objective standard of reasonableness in the context of the particular locale.

227. First, I consider that elevating the question of whether the defendant has acted in accordance with the existing common and ordinary use of land in a locality into, in effect, the be all and end all of the test for nuisance (provided there is a significant impact), as Mr Weekes urged, would seriously distort the tort. Such an exclusive focus places excessive weight on one side of what is an inextricably two-sided relationship. It means that if a defendant's use of its land is outside such user a claimant only has to show that the defendant's use has a significant unwelcome impact on the claimant's use of its own land in order for its claim to succeed. The court is disabled from looking at the way in which the claimant has chosen to use its own land and whether the possible adoption of reasonable measures by the claimant might represent the best way to minimise and resolve the friction between the two competing uses. In a situation like the present where the respective use of its land by each of a claimant and a defendant falls outside existing standards of common and ordinary use of land in the locale, I can see no principled justification why unusual use of land by the defendant should necessarily have to give way to unusual use of land by the claimant without any attempt to balance the competing interests.

228. There is no reason why the whole burden of minimisation or avoidance of such friction should fall upon the defendant. A fair balance between the two competing interests is what is required. In striking that balance, the general right of each of the claimant and the defendant to use its land as it wishes should be accommodated so far as is possible and is consistent with the equivalent competing interest of the other party. That seems to me to be the essence of the give and take or reasonable user principle. In particular, it is difficult to see why the claimant should acquire an enforceable claim in tort against the defendant when the friction between the competing uses of land, or a significant part of it, arises because the claimant is not using its land according to existing standards of common and ordinary use in the locale. In the present case there is no indication that any neighbouring landowner would have a claim in nuisance against the Tate apart from persons using their land in the unusual way the claimants have done.

229. Second, a claimant landowner and a defendant landowner may each wish to use their property in ways which are not in themselves common and ordinary according to

the standards of the locale, and the test to govern any conflict between those uses has to be capable of accommodating such situations in a just manner. A principle of "give and take", or reasonable reciprocity and compromise between neighbours, has to include give and take and reciprocity in relation to the desires of neighbouring landowners to use their land in new ways. As Lord Wright explained (see para 210 above), the relevant balance has to take account of the right of the defendant landowner "to do what he likes with his own" as well as the right of a neighbour "not to be interfered with" (ie in using their land as they would like). As to the latter side of the balance, I would not favour limiting a neighbour to being able to bring a claim in nuisance only in cases where its own use is common or ordinary (cf para 25 above), since it seems to me that this also does not sufficiently recognise the usual right of a landowner to be able to use its land as it wishes, including in novel ways: see para 242 below.

230. Third, it seems to me that to make a claim in nuisance turn on the question whether the defendant's use of its land is common and ordinary would result in the law of nuisance having a disproportionate impact on the general right of a landowner to use its land as it wishes and would cause stultification of development of land to an unnecessary and unjustified degree. If land can be developed for new uses in ways which reasonable accommodation on both sides would allow, the law of nuisance should not prevent it.

231. To make the exposure of the defendant to a claim in nuisance depend upon common and ordinary usage of its land is in my view too conservative as regards development of land and conflicts with the general policy of the law that a landowner should be free to use its land as it wishes. The history of the development of the country's urban areas has been one of innovation, and the common law should be slow to adopt rules that may prevent this continuing into the future. The risk involved with giving undue emphasis to common and ordinary use by the defendant is that localities may become trapped in time, with landowners unwilling to do something different for fear of legal reprisals from any neighbour who might object by reason of its unwelcome effect on their land. The general policy of the common law is to favour freedom for property owners to use their land as they wish, including by their choice of building design. It is for this reason that there is a general rule that no right to a prospect can be acquired by prescription and why it is right that great care should be taken that the operation of the tort of nuisance should not interfere unduly with such freedom: see paras 196-198 above. In my view, an approach which focuses predominantly on the question whether a defendant's use is common and ordinary for the locality would give excessive power to neighbours to block (or impose costs on) development which they do not like, potentially frustrating new uses of land which are objectively reasonable and which can be accommodated without undue intrusion upon neighbours' use of their own land according to the standards of that locality.

232. Fourth, although questions of common and ordinary usage of land by a defendant and by a claimant may often be central in working out the application of an objective standard of reasonableness in a locale, I do not think that they are capable in themselves of providing a solution across the whole range of cases with which the law of nuisance has to deal. In my view, it is necessary to have recourse to a more general principle of objective reasonableness, as has been stated in the cases.

233. Where the defendant's use of its land is common and ordinary by the standards of the locale, and its activities have been carried on in an appropriate manner with due regard for the interests of neighbours, the conclusion is that such use is objectively reasonable and there is no actionable nuisance: see eg *Hirose Electrical UK Ltd v Peak Ingredients Ltd* (2011) 4 JPL 429 and the use of neighbouring flats in the *Southwark* case. Bramwell B put it succinctly in *Bamford v Turnley*, p 83, in his positive statement that "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". If those conditions are fulfilled, the answer is simple, that the defendant has made out a defence: see *Southwark*, p 21, per Lord Millett. That is to say, in such a case the defendant will have established that its activity was reasonable, according to the relevant objective standard.

234. However, it does not follow from this that *only* acts which constitute common and ordinary use of land in a particular locale avoid being actionable nuisances. In a vibrant and changing modern society I think the principle of reasonable reciprocity, or give and take, has to be wider than that. The fact that there are simple cases of the kind just referred to does not exhaust the requirement to find a suitable legal mechanism capable of governing the full range of situations which may arise. In some cases the courts' reasoning does not depend upon whether the defendant has been using its land in a common or ordinary way. Other factors come into play as well.

235. In looking to see whether a nuisance has been committed, courts often examine whether the claimant's use of its land, as interfered with by the defendant's activity, is common and ordinary according to the standards of the locale. If it is, that may be a highly relevant factor indicating that the defendant will be required to moderate its actions to respect that use according to the principle of reasonable reciprocity. This is the explanation for *Hoare & Co v McAlpine* [1923] 1 Ch 167, *Webster v Lord Advocate* 1985 SC 173, *Miller v Jackson* [1977] QB 966 and the authorities discussed in paras 172-174 above. The fact that the courts examine issues of this kind indicates that a broader test of objective reasonableness is being applied than simple examination of whether the defendant's use of its land is common and ordinary. The cases in which unusual sensitivity of the claimant's activities is treated as important, such as *Robinson v Kilvert*, demonstrate the same point.

236. What appears from the focus in appropriate cases on an examination of whether the defendant's use and the claimant's use of their land is common and ordinary is that the character of the locale is highly significant in setting the legitimate expectations that a landowner (whether claimant or defendant) may have regarding what use may be made of its land according to an objective standard of reasonableness.

237. In the present case, the Tate's use of its land by operation of the viewing gallery was not a common and ordinary use of land in the locale, so it could not simply say that it had a defence on that basis. However, in my view that is not sufficient to render the Tate liable to a claim in nuisance by any neighbouring landowner who could say that the resulting interference with its interests was significant or substantial.

238. Nor did the judge consider that the claimants' use of their land, by adopting an unusually open form of design for residential living in the relevant urban locale and using the winter gardens as they did, was a common and ordinary use of land in that locale. So they were not in a position, for their part, simply to claim that the Tate was obliged to moderate the use of its land to accommodate their use of their land according to the objective standard of reasonableness applicable in that locale.

239. It followed that the judge had to identify an objective standard, by reference to the nature of the locale, against which to test whether the Tate's use of its land was unreasonable according to the relevant objective approach, as judged by the standards applicable in that locale. That is what he did, in what I consider to be an entirely acceptable way: see below. The judge's analysis plainly did not depend just on an assessment that the Tate's use of its land was reasonable from its point of view. Nor was it an assessment of reasonableness made in the abstract without reference to the particular features of the locale.

240. Fifth, the whole law of nuisance is shot through with the need for assessments of reasonableness which take account of the interests on both sides. An objective test of reasonable reciprocity and compromise is clear and workable. Even where there is common and ordinary use in broad terms by both claimant and defendant, the give and take principle requires such assessments of reasonableness to be made, since (in Bramwell B's words in *Bamford v Turnley*) the defendant will commit no nuisance only if the offending use is "conveniently done", ie reasonably and with proper regard to the interests of the other party. Lord Hoffmann made this point in *Southwark*, at p 16, in discussing *Sampson v Hodson-Pressinger* [1981] 3 All ER 710 (in which use of a terrace over the plaintiff's roof was held to be a nuisance because of noise): "in my opinion this decision can be justified only on the basis that having regard to the construction of the premises, walking on the roof over the plaintiff's flat was not a use

of the flat above which showed reasonable consideration for the occupant of the flat beneath. It was not, in Baron Bramwell's phrase, 'conveniently done'"; suitable soundproofing was required; conversely, if there had been normal and ordinary user "in a way which shows as much consideration for the neighbours as can reasonably be expected", there would not have been an actionable nuisance. See also para 200 above. Reasonableness is not a concept without explanatory power in this context. I do not think that there is anything inappropriate about applying an equivalent test of objective reasonableness, by extension, in the circumstances of the present case.

241. Although I would decide this appeal on the basis that the judge has not found that either the Tate's use of its land or the claimants' use of theirs was common and ordinary for the area, I also have reservations whether a modified version of the argument presented by Mr Weekes, to say that so long as a claimant's use of its land is common and ordinary for the area (which, on the judge's findings, is not this case) then any interfering use by the defendant of its land which is not common or ordinary for the area will qualify as a nuisance (cf paras 48-52 of Lord Leggatt's judgment above), meets the points above. As I have said, the fact that the claimant's use is common and ordinary is an important factor, but it may be that a comparatively modest adjustment in the claimant's use of its land which it would be reasonable to expect it to adopt would be capable of accommodating the defendant's use by reducing the friction between the competing uses to an acceptable level. If that is so, the claimant's user should not of necessity trump the ordinary right of the defendant to use its property in a new way, so as to eliminate all question of whether there is scope for a reasonable accommodation of the two uses. In my view, the tort does not operate according to such a mechanistic rule. In principle, an objective test of reasonableness (albeit one which has regard to the ordinariness or otherwise of the use on either side of the equation) is appropriate to frame the balancing of interests which is required in such a case, as in others. This is something which will be highly dependent on the particular facts and a matter for assessment by the trial judge. Since an objective test of reasonableness is necessary to deal with cases where neither of the competing uses is ordinary for the area, I see no sound reason why such a test should become irrelevant just because the claimant's use of its land is ordinary.

242. Conversely, I think it would be inappropriate to limit the right of a claimant to sue in nuisance to cases where its use of its own land is common and ordinary. It has an equal and opposite right to use its property in new ways, and unreasonable interference by a defendant with that right would constitute a nuisance. What might have been a reasonable use of land by the defendant in the context of the original ordinary use of the claimant's land might cease to be reasonable (or "convenient"), according to an objective standard, when the claimant seeks to adopt a new use. Also, it is possible that the interference by a defendant landowner might be so intrusive, according to an objective standard of reasonableness appropriate for the locale, that a

nuisance could be established even if the use interfered with is not an ordinary use. These considerations all point in favour of the appropriateness of a more open-textured objective reasonableness standard, which is fact-sensitive in its application across the whole range of possible cases. As I have observed at para 205, it is because the Tate's use of its land is capable of giving rise to liability in nuisance and is part of the reason that friction has arisen that conditions as to its use can be imposed, and that is so even though the claimants' use of their land is not common or ordinary in this locale.

243. Sixth, a test based on common and ordinary use by the defendant is contrary to the way the relevant principle is formulated in the modern authorities. The words used by Bramwell B in *Bamford v Turnley* are not a statute and should not be interpreted as such. It is fair to say that he focused in that case on the question of whether the defendant's use of his land was common and ordinary, but the "rule of give and take, live and let live" is a general test of objective reasonableness. It is that formulation which has been approved in the recent cases at the highest level, where it has been described as a rule of reasonableness; deliberately so in my opinion (see paras 158-159 above).

244. As Lord Carnwath noted in *Lawrence* (para 179) there has been some academic criticism of the criterion of reasonableness as not having explanatory force (see Allan Beever, *The Law of Private Nuisance* (2013), pp 9 et seq); but nonetheless in his judgment in *Biffa Waste* (para 72) and again in *Lawrence* (para 179) he affirmed Tony Weir's summation of the objective reasonableness test (para 159 above). In *Lawrence*, at para 5, in a part of his judgment with which all the other justices concurred and which is central to his analysis, Lord Neuberger agreed with Lord Carnwath's judgment at para 179 and affirmed that reasonableness is to be assessed objectively. So that particular criticism has been rejected.

245. I do not consider that this is surprising. An objective test of reasonableness informed by the standards of the locale provides a satisfactory test with determinate explanatory effect. There are many areas of the law where an objective test of reasonableness is applied as the appropriate standard to govern relations between parties with conflicting interests, and there is nothing unusual about its adoption as part of the common law of nuisance. Moreover, as Beever himself acknowledges, the conventional view among commentators is that the question of the reasonableness of the defendant's conduct, judged according to an objective standard, is central: see eg WVH Rogers, *Winfield and Jolowicz on Tort*, 18th ed (2010), p 714); Professor R Buckley, *The Law of Negligence and Nuisance*, 6th ed (2017), pp 259-260; J Murphy, *The Law of Nuisance* (2010), p 5; N McBride and R Bagshaw, *Tort Law*, 6th ed (2018), pp 399 and 404; and Tony Weir (para 159 above) and Professor Goodhart (para 164 above).

Accordingly, I think that the alternative approach does not affirm established principle, but instead would constitute a major change in the law, by elevating one factor (whether the defendant's use of its land is common and ordinary) to unjustified prominence.

246. Lord Leggatt and I interpret Lord Goff's speech in *Cambridge Water* (para 158 above) in different ways. As I understand his judgment, Lord Leggatt interprets Lord Goff's use of the term "reasonable user" as a shorthand for "common and ordinary use". In my opinion, however, Lord Goff was endorsing an objective reasonableness test informed by the basic principle of give and take, according to which (as one example) if a defendant's use of its land is common and ordinary and is carried on in a "convenient" (ie reasonable) manner, that will satisfy the test. I find it difficult to see why Lord Goff would describe the principle as one of "reasonable user" if he intended that to have no wider conceptual role to play beyond examination of whether the defendant's use of its land was common and ordinary.

247. Moreover, Lord Goff's reasoning in the case shows that he did indeed intend that the principle as so formulated should have a wider analytical role. The question was whether the defendant was liable for spillage of certain chemicals used in tanning on the defendant's land, which seeped onto the claimant's land with the result that it could not make use of an expensive borehole to extract water. Although the case was primarily concerned with the rule in *Rylands v Fletcher* (1868) LR 3 HL 330, Lord Goff also examined the law of nuisance. He was clear that the defendant's use of its land for storage of chemicals was not "natural or ordinary" (p 309) and it was plain that the use had caused a substantial interference with the claimant's enjoyment of its land. There was no suggestion that the claimant's use of its land was other than ordinary. Yet, as Lord Goff explained, the defendant was not liable in nuisance. This was because the defendant could not reasonably have foreseen that its use would cause harm to the claimant, and on this basis the defendant's use of its land did not infringe the principle of reasonable user (p 306). In my view, this conclusion shows that Lord Goff was referring to a wider test of reasonable user which took account of the fact that the defendant's use of its land was not common or ordinary, but allowed for that factor to be outweighed by other factors relevant to application of that test.

248. Similarly, Lord Wright's influential formulation in *Sedleigh-Denfield* (para 211 above), often cited, is based on the concept of reasonableness between neighbours. The defendants in that case were held liable in nuisance for flooding of a neighbour's land arising from the blocking of a narrow drainage culvert on the defendants' land by leaves and debris. The culvert had been laid by a stranger who was a trespasser, but the defendants were aware of its existence. There was no suggestion that the claimant's use of his land, as interfered with by the flooding, was other than ordinary.

The House of Lords did not ask whether the defendants' use of their land was common or ordinary. Lord Atkin, for example, analysed the case in terms of the knowledge of the defendant of the culvert and "the reasonable expectation that it might be obstructed and of the result of such obstruction" (p 896). Lord Wright applied the principle of reasonableness which he had articulated. Lord Romer likewise said that the occupier of land "is liable for a nuisance existing on his property to the extent that he can reasonably abate it" (p 919) and held that the defendants "ought … as reasonable persons to have recognized the probability, or at least the possibility of a flood occurring" (p 920).

249. That reasonableness in the relevant sense is the governing principle of liability in nuisance was again explicitly affirmed by Lord Cooke of Thorndon in *Delaware Mansions Ltd v Westminster City Council* [2001] UKHL 55, [2002] 1 AC 321, with whose speech the other members of the Appellate Committee agreed. The case concerned liability in nuisance for remedial expenses in relation to intruding tree roots. At para 29 Lord Cooke said: "… I think that the answer to the issue falls to be found by applying the concepts of reasonableness between neighbours (real or figurative) and reasonable foreseeability which underlie much modern tort law and, more particularly, the law of nuisance. The great cases in nuisance decided in our time have these concepts at their heart"; he referred in particular to *Sedleigh-Denfield*.

250. Finally, I do not think that it is possible to bracket the design of buildings from other uses made of land. The way in which a landowner builds on its land is a mode of use of that land. To say otherwise would create an uncertain and unjustified boundary between building on land and other kinds of use of land. To take this case, the friction between the Tate's use of its land and the claimants' use of their land arose in part from the design of the buildings constructed on their respective properties and in part from the use to which the claimants put the winter gardens. The Tate's building design incorporated a viewing platform; the predominantly glass design of the claimants' flats meant that their residential areas were particularly exposed to view. An approach based on the principle of reasonable reciprocity and compromise and objective reasonableness allows these factors to be taken into account in a principled manner.

251. Lord Leggatt accepts that the physical attributes of a building could be relevant in "extreme cases of abnormal construction". However, in my opinion there is no sound basis for limiting the significance of choice of building design in this way. I also consider that such a dividing line would be unclear and capable of producing arbitrary distinctions between cases.

252. For these reasons, it is my view that an approach based on the principle of reasonable reciprocity and compromise and application of a standard of objective

reasonableness informed by the character of the relevant locality is preferable to one based simply on whether the defendant's use of its land is "common and ordinary".

The approach of an appellate court

253. In *Lawrence* Lord Neuberger said (para 59) that "[t]he assessment of the character of the locality for the purpose of assessing whether a defendant's activities constitute a nuisance is a classic issue of fact and judgment for the judge trying the case." See also *Lawrence*, para 190, per Lord Carnwath: in cases concerning whether a change in the intensity or character of an activity constitute a nuisance, it is "a matter for the judge, as an issue of fact and degree, to establish the limits of the acceptable". As noted above, the question whether a nuisance is established in a particular case in the light of the assessment of the character of the locality has also always been treated as a matter for the jury or the judge as the trier of fact. An appellate court will be slow to second-guess their assessment unless there is a misdirection regarding the test to be applied.

254. This reflects the nature of the "give and take" principle, which turns on issues of reasonableness in the use of property and reasonableness as between neighbours. In *Biogen Inc v Medeva plc* [1997] RPC 1, a case in which the House of Lords declined to interfere with an evaluative judgment by the first instance judge regarding the obviousness of an invention, Lord Hoffmann explained (p 45) the reason why an appellate court should be slow to intervene in cases involving, like this one, questions of fact and degree in the application of an established and open-textured legal principle:

> "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, la vérité est dans une nuance), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation. It would in my view be wrong to treat *Benmax* [*Benmax v Austin Motor Co Ltd* [1955] AC 370] as authorising or requiring an appellate court to undertake a de novo evaluation of the facts in all cases in which no question of the

> credibility of witnesses is involved. Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation."

See also *In re Grayan Building Services Ltd (in liquidation)* [1995] Ch 241, 254 per Hoffmann LJ: "generally speaking, the vaguer the standard and the greater the number of factors which the court has to weigh up in deciding whether or not the standard [… has] been met, the more reluctant an appellate court will be to interfere with the trial judge's decision".

255. Lord Hoffmann's observation in *Biogen* is particularly apposite in the present case, where Mann J had heard a great deal of evidence about the precise degree of visual intrusion experienced by the claimants and conducted a site visit. It would have been impossible for him to express every nuance of the evidence which led him to his conclusion. As it is, he produced a formidable judgment explaining his reasons for his conclusions in considerable detail. Neither the Court of Appeal nor we can hope to match the way in which he was steeped in the detail of the case.

Mann J's decision

256. Having decided that in principle the law of nuisance can apply in cases of invasion of privacy by visual intrusion in relation to a residential property, Mann J turned to consider whether the claimants had established an actionable nuisance on the facts of this case. At para 130(iv) he directed himself by reference to Lord Neuberger's judgment in *Lawrence*, paras 3-5. At para 180 Mann J again explained that he based his judgment on the law as outlined by Lord Neuberger in *Lawrence* and asked whether "the Tate …, 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".

257. Mann J found that the history of the grant of planning permission for the Blavatnik Building to the Tate provided no helpful guidance. He characterised the locality as an inner-city urban environment with a significant amount of tourist activity, in which anyone would expect to live cheek by jowl with neighbours; and he noted that the claimants acknowledged this to the extent that they did not object to the fact that they were overlooked from the windows of the Blavatnik Building: para 190. He found

that the Tate was making reasonable use of its land; the operation of a viewing gallery was not an inherently objectionable activity in the neighbourhood: para 196.

258. Having made a site visit, Mann J was well placed to make findings as to the nature of the locale: para 87. At para 130 he cited *Sturges v Bridgman* and *Sedleigh-Denfield* and was well aware that the assessment of nuisance needed to be made taking into account the characteristics of the area (see also para 180). In characterising the locality as he did, Mann J established what the reasonable standard of privacy was for the particular locale. This provides the necessary context for the discussion at paras 200-206 of whether hypothetical flats "designed with more wall and less window" would have had cause for complaint.

259. Mann J's object was to assess whether a building designed more in keeping with the standards of privacy to be expected in the locale at Neo Bankside would suffer a greater degree of invasion of privacy than would be reasonable for that locale, which he characterised as "a modern urban, cultural tourist-attracting environment" (para 203). He concluded that it would not, meaning that the owners/occupiers/developers of a dwelling designed with an especially heightened vulnerability to the external gaze in that locale also could not complain: para 203.

260. His assessment was that the claimants' use of their land, by adoption of the open design of the flats, is unusual by the standards of the locality. He stated that in using their properties as dwellings the claimants are "[a]t one level … using their properties in accordance with the characteristics of the neighbourhood" (para 200), thereby indicating that at another level they are not. He expanded on this at para 201 by referring to the specific complaint of the claimants, "that their everyday life in the flats is on view because of the nature of the view … [ie] the complete (or largely complete) view that one has of the living accommodation from the viewing gallery"; and by pointing out that this "arises (obviously) because of the complete glass walls of the living accommodation". He therefore explained that he would consider whether the claimants would have had a complaint if they had lived in flats designed "with more wall and less window", since if so they would still have a complaint in nuisance irrespective of the particular design they had adopted (ie there would have been undue interference with their property rights according to the objective reasonableness test appropriate for the particular locality). If, on the other hand, they would not have a complaint in nuisance in such circumstances, then he would have to consider whether they would none the less have a cause of action, arising out of the glass construction.

261. That Mann J considered the claimants' flats to be atypical for residential use in the locale is apparent from his description of them as "particularly sensitive" due to an

"increased exposure to the outside world": paras 206 and 211. Though not of itself unreasonable, Mann J considered that the atypical design of the flats in the context of the standards of privacy reasonably to be expected in that locale was a relevant factor in determining the overall reasonableness as between the parties, according to an objective assessment. In my view, that analysis cannot be faulted.

262. He found that the claimants would have had no valid complaint if they had lived in flats constructed according to a conventional design, "with more wall and less window": paras 200-203. Against the background of that assessment, he turned to the second issue he had outlined in para 201 and in that context drew the analogy with the nuisance cases about sensitive users to which I have referred above. He concluded that it would be wrong for the self-induced incentive to gaze into the flats associated with their exceptionally open design to create a liability in nuisance: paras 204-211.

263. The judge also relied on the ability of the claimants to take self-help measures, if they chose, in the form of blinds, privacy film, curtains or other kinds of screening to protect their privacy; he noted that these might detract from their living conditions, "but not to an unacceptable degree": paras 213-215. As he rightly observed, the victim of excessive dust would not be expected to put up additional sealing of doors and windows and the victim of excessive noise would not be expected to buy earplugs, but "privacy is a bit different"; susceptibilities and tastes differ and it is "acceptable to expect those wishing to enhance it to protect their own interests" to some degree (para 215). He referred to a point made by some of the claimants about the presence of children in the flats, but pointed out that they did not have relevant rights in nuisance of their own as they are not landowners and held that their interests did not add anything substantial to the significant interests of their parents or grandparents associated with their property rights: para 217.

264. At the end of this section of his judgment Mann J said (para 220) that the assessment he had carried out was the usual one applicable to nuisance, but also added that he would have made the same assessment to conclude that the claimants did not have a reasonable expectation of privacy for the purposes of analysis under article 8 of the ECHR. It is clear that his assessment of the appropriate balance of interests for the purposes of application of the law of nuisance did not depend in any way upon his analysis of the position under article 8.

Criticisms by the Court of Appeal

265. The Court of Appeal criticised Mann J's judgment on this issue on two grounds: (i) he was wrong to draw the analogy with sensitive users of property as illustrated by

Robinson v Kilvert (above): the claimants had no undue sensitivity as individuals and their activity in using their flats (ie without employing screening) was "ordinary and reasonable" and did not fall foul of the objective reasonable user test for nuisance; there was no finding that the viewing gallery is "necessary" for the common and ordinary use and occupation of the Tate within Bramwell B's statement in *Bamford v Turnley* set out above; and (citing *Miller v Jackson* [1977] QB 966) there could be no question of any need on the part of the claimants to take any self-help steps to prevent the visual intrusion which was happening: paras 98-99; and (ii) there was no suggestion that the claimants are using their flats otherwise than in a perfectly normal fashion as homes, and the judge's approach to balance their interests against those of the Tate was contrary to the general principles of private nuisance: paras 100-102.

Assessment

266. Mr Weekes supported the reasoning of the Court of Appeal on this issue.

267. Mr Weekes also submitted that Mann J had made an elementary error similar to that made by the trial judge in *Bamford v Turnley*, as criticised by the appeal court in that case, of asking simply whether the Tate's use of its own property was reasonable, assessed without reference to the interests of the claimants as neighbouring landowners.

268. In my view, this submission cannot be sustained. It is clear that the judge addressed the relevant question, which was the application of the "give and take" principle, and that he considered the reasonableness of the Tate's use of its property in the wider sense explained by (in particular) Lord Goff in *Cambridge Water* and Lord Neuberger in *Lawrence*, taking into account the interests of the claimants as well as the Tate and having regard to the nature of the neighbourhood in seeking to identify a reasonable balance between them.

269. I also consider, with respect, that the criticisms of Mann J's judgment by the Court of Appeal are wrong. In essence the Court of Appeal asked whether the claimants' use of their own property, judged without reference to the interests of the Tate as a neighbouring landowner, could be said to be reasonable. Having concluded that it was reasonable according to this standard, they thought that the judge fell into error by treating the claimants' interests and rights as regards the use of their property as falling to be qualified by reference to the use to which the Tate wished, reasonably, to put its own property. But in my view that is to misapply the "give and take" principle and, in effect, repeats the error of the trial judge in *Bamford v Turnley* from the opposite direction. It gives excessive weight to the reasonableness of use by one of the

landowners whose interests conflict, in this case the claimants, assessed without reference to the reasonable interests of the other landowner regarding the use of their own property. Proper application of the "give and take" principle means that the reasonable interests on both sides regarding the free use of their respective properties have to be taken into account.

270. In my judgment, the first reason given by the Court of Appeal gives insufficient weight to the reasonable interest of the Tate in making use of its own property as it wishes in a particular way, by operating the viewing gallery, which the judge found to be reasonable when assessed by reference to the nature of the locality. The Court of Appeal said that this use was not "necessary" (quoting Bramwell B) for the common and ordinary use of the Tate's property. In framing the balance between competing rights and interests in this way I consider that the Court of Appeal inappropriately treated the language used by Bramwell B like the text of a statute and lost sight of the underlying principle which he was seeking to lay down. In consequence, they distorted the "give and take" principle by setting the interest of the claimants to use their property in a way which was reasonable (judged from their own perspective) against a requirement that the Tate's use of its property had to satisfy a higher standard of being "necessary". There is no good reason in principle why the test should be weighted against one of the competing property owners in this way. The Tate's use of its property to create a viewing platform may not have been conventional, but in my opinion the Court of Appeal's approach fails to acknowledge that the "give and take" principle is directed to reconciling the competing freedoms of property owners to use their property as they see fit, as was emphasised in *Hunter*.

271. In my view, the judge's approach to the application of the "give and take" test was correct. Property owners in this part of London have to expect to be overlooked to a significant degree and the risk of people being able to look through their windows from neighbouring properties is an inevitable part of community life in the area. It is normal to expect people to use curtains, blinds and other screening measures to limit the annoyance which that might cause. As the judge rightly observed, the nature of the nuisance alleged (visual intrusion) is significant. He found that the Tate's viewing gallery would not have constituted a nuisance if Neo Bankside had been built and the winter gardens had been used in a way which did not involve heightened sensitivity to that form of intrusion and which did not invite "the consequence of an increased exposure to the outside world", beyond that to be expected by the "appropriate measure" for the area: paras 205-206 and 208-211.

272. However, the owners of the land at Neo Bankside chose to develop it by building striking buildings of architectural distinction likely to attract attention and the gaze of strangers. The particular design emphasised an open aspect for the inhabitants

looking out and necessarily thereby created a particular degree of openness to people looking in. The building was constructed so as to involve a heightened degree of sensitivity to the ordinary feature of being overlooked in this particular urban environment and by their use of the winter gardens the claimants increased their exposure to visual intrusion still further. The owners of the flats at Neo Bankside could not acquire any right vis-à-vis neighbouring landowners to maintain their aspect looking out, since that would interfere to an unacceptable degree with the rights of neighbouring landowners to develop their own land for use as they wished. Nor in my view could they acquire any right against being overlooked and subjected to visual intrusion which would be seriously burdensome in terms of preventing neighbouring landowners developing their own land for use as they wished, to a degree beyond that which would be regarded as reasonable for the area.

273. In assessing what was a reasonable balance to strike between the competing interests and property rights of the claimants and the Tate in the context of the particular neighbourhood and in light of the nature of the particular nuisance alleged (ie by visual intrusion), I consider that the judge was entitled in the circumstances to have regard to the availability of self-help measures which it was not unreasonable to expect them to take.

274. *Miller v Jackson* (above) does not rule this out as a matter of principle. It was a very different case, involving dangerous invasion of the claimants' property by flying cricket balls struck from the neighbouring cricket ground. They broke windows and tiles on the roof and created the risk of personal injury to the claimants, particularly when using their garden. As Lord Neuberger emphasised in *Lawrence*, at para 54, the case was concerned with nuisance through physical encroachment on property and potential physical damage to the claimants and their property, rather than by an assault on the senses. There was no difficulty in that case in finding that a physical encroachment of that kind clearly did interfere with the ordinary amenity attaching to the property, and the issue was whether this conclusion was affected by the fact that the claimants refused offers by the defendants to provide certain protective measures. The claimants claimed injunctive relief to compel the defendants to stop playing cricket on the ground until they had erected a barrier of sufficient height to prevent the encroachment by cricket balls. The defendants said that the claimants should have accepted alternative protective measures, for which the defendants offered to pay, by fitting unbreakable glass or shutters and by fixing a net over the garden to stop the balls landing there. The majority in the Court of Appeal (Geoffrey Lane and Cumming-Bruce LJJ) held that a nuisance was made out. Geoffrey Lane LJ said (p 985) that there was no obligation on the claimants to protect themselves in their own home from the activities of the defendants; in any event it would have been unreasonable to expect them to live behind shutters and stay out of their garden; and the net idea was impracticable, in that it would have required the construction of supports in the

garden and it was not reasonable to expect the claimants to consent to that. Cumming-Bruce LJ agreed with these points. These observations were directed to the particular circumstances of that case and do not suggest that the availability of self-help measures is irrelevant in every case. The position in *Miller v Jackson* is consistent with the test set out in para 215 above.

275. By contrast, in this case the prior and more difficult question is whether overlooking, which does not normally constitute a nuisance, is occurring in circumstances sufficiently unusual to make it an actionable form of annoyance. As Mann J emphasised (para 215), application of the "give and take" principle in relation to visual intrusion should take account of the distinct nature of the annoyance involved. The case-law which addresses this kind of nuisance most directly refers to the relevance of self-help measures which it is reasonable to expect the claimant to make use of: *Victoria Park Racing* and *Martin v Lavigne*.

276. As to the second point of criticism by the Court of Appeal, again I consider that the judge was correct in the approach he adopted. The Court of Appeal misapplied the "give and take" approach by taking insufficiently into account the interests of the Tate as property owners.

277. In his submissions, Mr Weekes emphasised that the use to which the claimants wish to put their flats, to live in them without the need for any kind of screening against visual intrusion from the outside, is reasonable. So it is, looking at it solely from their point of view. But in my judgment, though that is of course a relevant factor, it cannot be a sufficient basis for the grant of an injunction to prevent the Tate using its property as it wishes reasonably to do, any more than the reasonable use by the defendant of his own property in *Bamford v Turnley* was a sufficient ground for refusing the grant of an injunction, which would have had the effect of requiring the claimant to put up with the detrimental impact on his property arising from such use.

278. A prominent feature of this case is that, according to the judge's findings, both the claimants and the Tate wish to use their respective properties in ways that are reasonable from their respective self-regarding perspectives, but in circumstances which were not established as common or ordinary for the area at the time their respective properties were developed. In my view, Mann J was right to assess their competing claims against an objective standard involving comparison with the established usual design for a residential block in the area, with normal window arrangements. Assessed against that standard, the Tate's operation of the viewing gallery did not involve a nuisance. The owners of the flats in Neo Bankside could not turn the operation of the viewing gallery into a nuisance by reason of the development

of their own property according to a design which was out of line with the norm for the area.

279. For these reasons, I consider that the various criticisms made of the judge cannot be supported. His approach to the application of the "give and take" principle was correct. The factors to which he referred and to which he gave particular weight were relevant and he was entitled to make the assessment he did. In my opinion, there are no good grounds on which an appellate court could interfere with that assessment.

Conclusion

280. For the reasons given above, which differ from those given by the Court of Appeal but reflect those given by Mann J, I would have dismissed this appeal.

Remedy and Disposal

281. I should comment briefly on one matter arising from the disposal of the appeal which the majority favour, in view of the fact that the question of remedy is to be remitted to a court at first instance. Other than when a split trial has been ordered to address liability and remedy in separate hearings, the ordinary rule is that it is incumbent on a party to litigation to bring forward their whole case at trial: see, eg, *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24; [2020] Bus LR 1196, paras 235-243. This rule reflects the public interest in the efficient and proportionate resolution of disputes and the requirement of fairness in litigation. Parties are entitled to know where they stand at trial so that they can make their decisions relating to the conduct of the litigation with an appreciation of what issues are to be determined then. Also, they ought not to be vexed by the reformulation of claims in successive suits: see, in particular, the explanation of the rule in *Henderson v Henderson* (1843) 3 Hare 100 by Sir Thomas Bingham MR in *Barrow v Bankside Members Agency Ltd* [1996] 1 WLR 257, at 260.

282. The application of the principle of finality in the context of this case, when it is remitted, will need to be considered. In *Lawrence*, Lord Neuberger said (para 149) that "a defendant who wishes to argue that the court should award damages rather than an injunction should make it clear that he wishes to do so well in advance of the hearing, not least because the claimant may wish to adduce documentary or oral evidence on that issue which she would not otherwise consider relevant." This statement implies that the principle of finality should apply in a nuisance claim, including in relation to a decision to award damages in place of an injunction. There

seems to be good reason to expect the same approach from a claimant, if they wish to argue for damages as a fall-back option if injunctive relief is refused, so that the court can address all issues with finality at the trial.

283. In the present case, there was no order for a split trial. Mann J recorded (para 27) that the only remedy claimed in the particulars of claim was injunctive relief and that Mr Weekes said that if an injunction was not available he would seek damages instead; as Mann J observed, "[t]hat would need an inquiry, which was not conducted at the trial." It is not clear whether the judge was simply noting Mr Weekes's position or was intimating that the claimants would be entitled to proceed in this way, by asking to come back for an additional hearing. At paras 222-223, Mann J contemplated that, had he found that there was a nuisance, further consideration would have needed to be given to the question of remedy. Quite what this may properly involve, having regard to the principle of finality, is something which the first instance court will need to consider when the case is remitted to it.