The Tort of Nuisance - Overlook it at your peril

Chris Bryden and **Georgia Whiting** of **4 King's Bench Walk** examine the tort of private nuisance, a complex area which they warn has the potential to affect construction professionals in far-reaching (and evolving) ways.

KEY POINTS

- The tort of private nuisance is a complex area of law, and one which has the potential to affect construction professionals in far-reaching (and evolving) ways.
- The article considers the case of ***Hunter v Canary Wharf [1998] 1 WLR 434***, a case which has led to significant academic commentary as to the extent of the tort;
- Given the importance of a television (or, say, a 4G signal) in modern life, it is not clear whether the reasoning of the House of Lords would be so pertinent had this case been tried today.
- The Supreme Court decision in ***Coventry v Lawrence [2012] EWCA Civ 26*** represented a departure from previous case law when considering if damages in lieu of an injunction ought to be granted in respect of an actionable nuisance.
- A more recent case considered is that of ***Fearn & Ors v Board of Trustees of the Tate Gallery [2020] EWCA Civ 104***, which demonstrates the potentially evolving nature of nuisance, as well as its potential limits.
- The Supreme Court has given permission to appeal, and the authors provide an overview of the likely arguments to be deployed in respect of the same.

Private nuisance protects the owner of an interest in land from interference occasioned by the use of neighbouring land. Such interference can range from tree roots encroaching on an owner's land causing subsidence, straying cricket balls from a neighbouring pitch, to noise pollution created during construction works. The recent case of ***Fearn & Ors v Board of Trustees of the Tate Gallery [2020] EWCA Civ 104*** demonstrates the potentially evolving nature of nuisance, as well as its potential limitations, and this article considers the genesis of the law in this area by reference to the same.

From an historical perspective it has been said that the law of private nuisance is, in essence, a hangover from the Victorian era, as it serves to only protect those with a property right from such harm. Accordingly, those with only a transitory right in property (and those who it often follows are the most vulnerable in society) are prevented from bringing such an action despite there otherwise being an actionable nuisance affecting their enjoyment of property.[1] This is nowadays a distinction often without a difference, as most persons with an interest in land can avail themselves of the tort, but the proprietary nature of the right remains.

One well-known case which demonstrates this difficulty is the case of ***Hunter v Canary Wharf [1998] 1 WLR 434***. It was made clear in that case that a private nuisance is primarily a wrong to the owner or occupier of the land affected; thus a freehold owner legally in occupation can sue, and a tenant can sue if they are in occupation; but mere occupation without any kind of proprietary or possessory interest in the land is not sufficient to enable a party to bring a claim. It was also held that interference with a terrestrial television signal could not of itself amount to an actionable nuisance, as it was equivalent to loss of a view or prospect. Good news for developers arguably; but a case which

[1] Lees, E. (2021). Is Nuisance Fit for Purpose in the 21st Century?. Available at: *https://www.law.ox.ac.uk/research-and-subject-groups/property-law/blog/2021/01/nuisance-fit-purpose-21st-century* (Accessed [4 May 2021)

has led to significant academic commentary as to the extent of the tort; given the importance of a television (or, say, a 4G signal) in modern life, it is not clear whether the reasoning of the House of Lords would be so pertinent had the case been tried today.

A further recent case has at a higher level of authority reconsidered the decision in ***Hunter,*** with the Supreme Court in ***Coventry v Lawrence [2012] EWCA Civ 26*** being tasked with addressing five key issues as follows:

1. Can the terms of planning permission influence the outcome of a private nuisance claim?
2. Can 'the right to commit nuisance' by noise develop into an easement or be acquired by prescription?
3. Is it a defence to show that the claimant acquired, or moved into, his/her property after the nuisance had started?
4. Is it open to a defendant to rely on his/her activities as constituting part of the character of the locality in relation to nuisance claims?
5. When an actionable nuisance has been established, should the courts be able to choose not to award an injunction and award damages instead?

In terms of planning permission, the Court acknowledged that there was a role, albeit limited, for local planning permission to play when considering what amounts to a nuisance. In terms of the second issue, it was affirmed that a right to transmit sound waves over neighbouring land (which would otherwise be an actionable nuisance) was capable of developing into a positive easment. It was further confirmed that it was no defence to such a claim for the defendant to argue that the claimant came to the nuisance (albeit changing the use of the property could constitute a defence). In terms of the fourth issue, a defendant, faced with a contention that their activities give rise to a nuisance, can rely on those activities as constituting part of the character of the locality, but only to the extent that those activities do not constitute a nuisance. Finally, the Court confirmed that it is open to a defendant to seek damages as an alternative to an injunction.

Arguably, this case ought to be of comfort to developers and other construction professionals, firstly, in respect of the role (albeit limited) that planning applications can play in respect of a claim for nuisance. Whilst there is no basis upon which a statutory scheme such as planning can extinguish private law rights (i.e. they cannot 'authorise' a nuisance), the terms of planning permission may be considered in assessing reasonableness for the purposes of a nuisance, for example, time restrictions imposed by the planning authority. As such, early and careful consultation and planning can limit the risks inherent to developers in this area.

Secondly, this case represented a departure from previous case law when considering if damages in lieu of an injunction ought to be granted in respect of an actionable nuisance. Prior to this case, there were a number of well-known authorities in which it was considered that damages in lieu of an injunction ought be reserved for 'exceptional cases'. This rationale followed the guidelines laid down in the 1895 case of ***Shelfer v City of London Electric Lighting [1895] 1 Ch 287*** which provided that damages could be awarded in lieu of an injunction if:

1. The injury to the claimant's legal rights is small;
2. the injury is capable of being estimated in money;
3. the injury can be adequately compensated by a small money payment; and
4. it would be oppressive to the defendant to grant an injunction.

In ***Coventry***, the position was somewhat restated, such that it is clear that, whilst the burden is on the defendant to persuade a court to award damages rather than an injunction, the matter is one for the discretion of the court. The ***Shelfer*** guidelines are simply guidelines, if relevant at all, and are not principles to be rigidly applied.

Thus, the position restated as per ***Coventry*** ought to be of some comfort to developers, as the difference between damages awarded for any actionable nuisance in comparison to an injunction requiring the demolition of a partially built (or completed) building is clearly capable of being significant.

A more recent case of interest is that of ***Fearn & Ors v Board of Trustees of the Tate Gallery [2020] EWCA Civ 104***, which demonstrates the potentially evolving nature of nuisance, as well as its potential limits. The Tate Modern is an internationally renowned art gallery located in a former Bankside power station in London. Due to its success since

first opening its doors in 2000, it was expanded, with the top floor of a new building constructed adjacent to its premises providing panoramic views of London. Some 30 metres away from the Tate can be found four multi-storey apartment blocks, offering similarly impressive views of the City by way of wall to ceiling glass, which had been constructed previously. The difficulty for the owners of the apartments was that the tourists visiting the Tate had a very clear view into the private apartments, such that they could photograph the interiors of the same as they so wished. A number of the owners of the apartment blocks brought legal action seeking an injunction by way of nuisance by overlooking, which invaded their privacy.

At first instance, the High Court concluded that the apartment owners could have taken steps to prevent viewing the interior of the flats, for example, by installing net curtains which could be closed during gallery opening hours. It was held that it would be wrong to allow a self-induced incentive to gaze, and to infringe privacy and exposure, to be able to create a liability in nuisance.

The Court of Appeal disagreed with the Judge's analysis; however, it upheld the decision for different reasons. It was held that the vast majority of judicial analysis in respect of the claimed infringed right of the Claimants was that mere overlooking cannot give rise to a cause of action in private nuisance and that there were policy reasons to the effect that the law should not be extended in this regard. In particular, it would be difficult to apply an objective test in nuisance for determining whether there had been a material interference with the amenity value of the land in question. Further, the Court held that it was necessary to take into consideration the fact that there are other protections and controls to protect landowners from overlooking, such as planning law. Overall, the Court of Appeal considered that, if this was an area which required changing, it was appropriate for Parliament to make such changes, as opposed to evolving the common law position. The reasoning was consistent with the analysis in ***Hunter***, which had reviewed the development of the law throughout the 19th Century, being its primary genesis.

Interestingly, whilst the Court of Appeal initially refused permission to appeal, such permission was subsequently grated by the Supreme Court directly, with the full hearing likely to take place in December 2021. It is considered that likely arguments will include a contention that the analysis by the Court of Appeal of the "unifying principle" of reasonableness between neighbours was erroneous. The issue will likely be whether a material interference has been established with the land and that if so, such interference is unreasonable. There is a question of policy as to whether overlooking can be included in the tort of nuisance (no reported case ever previously having established the same) and the interrelation between the tort of nuisance and the developing law of privacy, deploying articles 6 and 8 of the European Convention on Human Rights. There is a real question of whether the overlaying of article 8 on the tort of nuisance will sit with the tort and whether Parliament instead should be required to legislate in such areas. The Court of Appeal decision does not fully grapple with the application of Article 8 and if the Supreme Court appeal is successful (which the authors consider is unlikely) developers may have a whole host of new considerations to apply alongside the grant of planning permission that have a far wider ramification.

Conclusion

As it stands, there are obvious and less obvious risks to developers- certain areas of nuisance appear to be well defined and clear. However, the law is likely to continue to reflect the limited scope of the tort and it would be surprising if the Supreme Court were to extend it to the extent contended. Given however permission has been granted it is clearly required reading for all those who advise developers regardless of its conclusions **CL**