FORSTERS

Press coverage – Fearn v Tate

FEBRUARY 2023

BYFIELD
Reputation Counsel

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FINANCIAL TIMES

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01 February 2023

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theguardian

Tate Modern viewing platform invades privacy of flats, supreme court rules

Court finds owners of apartments opposite London gallery face unacceptable level of intrusion

The owners of luxury flats opposite Tate Modern's viewing gallery face an unacceptable level of intrusion that prevents them enjoying their homes, the supreme court has ruled.

In a majority judgment, the court determined that the flat owners faced a "constant visual intrusion" that interfered with the "ordinary use and enjoyment" of their properties, extending the law of privacy to include overlooking – albeit only in extreme cases.

Noting that some visitors to Tate Modern's viewing gallery, which is currently closed, photograph the interiors and post the images on social media, Lord Leggatt said: "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."

The case involves five owners of four flats in the Neo Bankside development on the South Bank in London taking action against the Tate over the estimated 500,000 visitors a year looking into their homes from the viewing platform 34 metres away. The platform, which opened in 2016, provides a panorama of the city as well as a direct view into their glass-fronted flats. The platform opened to the public in 2016, four years after the flats were completed.
The supreme court decision had been anticipated as potentially enshrining tenants' rights to privacy and potentially opening the floodgates to thousands of neighbour disputes.

However, Leggatt was clear in his opinion that this was a specific case, as the Tate's decision to open a viewing gallery was "a very particular and exceptional use of land", and did not mean that residents could complain of nuisance because neighbours could see inside their buildings.

The judgment does not contain a remedy, and this was deferred to the high court, suggesting it may involve either an injunction or damages paid to the owners.

Leggatt's ruling was supported by Lord Reed and Lord Lloyd-Jones, while a dissenting judgment was given by Lord Sales, with whom Lord Kitchin agreed. All of the judges disagreed with an earlier appeal court ruling that visual intrusion did not fall under the scope of the law of nuisance, but they were split on the appropriateness of the Tate's use of its land.

Sales agreed that it was possible for visual intrusion to be considered a private nuisance, but suggested that although the viewing platform was not an "ordinary" use of the Tate's land, it was reasonable. Citing "the principle of reasonable reciprocity and compromise, or "give and take", he noted that the flat owners could "take normal screening measures", such as putting up curtains. Leggatt said that asking the residents to put up curtains "wrongly places the responsibility to avoid the consequences of nuisance on the victim", noting that judges would not ask someone to wear earplugs to block out excessive noise.

FT
FINANCIAL TIMES

He also disagreed with the idea that the properties' glass walls meant the claimants were "responsible for their own misfortune".

The case has been running since 2017, when the owners of the flats applied for an injunction requiring the gallery to cordon off parts of the platform or erect screening to prevent what they said was a "relentless" invasion of their privacy. Judges in two courts ruled against the flat owners for differing reasons.
The case was subsequently taken up by the supreme court, a move considered by legal experts to indicate that it was considered a matter of public interest.

There were two main legal questions: whether "overlooking" constitutes a private nuisance, and whether the viewing gallery was a reasonable use of the Tate's land, given that it was in an art gallery.

Leggatt ruled against the earlier court of appeal decision, determining that this was a "straightforward case of nuisance". He acknowledged that the courts may have been influenced by what they perceived to be the public interest, and that there may have been "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".

In an initial high court ruling in 2019, Justice Mann accepted the argument that overlooking theoretically fell within the scope of existing legal protections against neighbourly intrusion into the home, the tort of nuisance, but argued that the glass-walled design of the flats and their location in central London came "at a price in terms oprivacy".

The flat owners subsequently appealed, and in 2020 the court of appeal ruled that overlooking could never be considered a private nuisance, though it argued that if it could then it would apply in this instance.

Natasha Rees, a partner at Forsters LLP and the lead lawyer advising the flat owners, said her clients were "pleased and relieved" that Leggatt had recognised how "oppressive" the viewing platform had been, and that they would work with the Tate to "find a practical solution which protects all of their interests".

James Souter, a partner at Charles Russell Speechlys, said the judgment was "a landmark moment extending the law of nuisance to protect against visual intrusion". He said the 3-2 split between judges showed "how finely balanced the case was even to the very end".

"Looking ahead, it will be interesting to see whether this case triggers more property owners to make similar claims where they feel they are being overlooked. However, the supreme court has made it clear that the circumstances where the new law will be applied will be rare but did highlight issues around CCTV and sharing of images from cameraphones on social media," Souter said.

Other lawyers pointed out that the case could influence developers. Adam Gross, a partner at Fladgate, said they may consider whether to build flats close to one another, or the placement of balconies.

Richard Cressall, a partner at the law firm Gordons and an expert in property disputes, said the ruling was "an extremely unexpected result" but he doubted there would be many cases like this one.

Donal Nolan, professor of private law at the University of Oxford, said the ruling was "a historic decision in that it is the first time that English law has recognised that a visual intrusion from neighbouring land can amount to the tort of private nuisance (and hence a violation of property rights)". He said the impact on residents and developers would "depend on how broadly or narrowly other courts interpret the decision".

A spokesperson for the Tate thanked the supreme court for its “careful consideration” and declined to comment further.

Flat owners win Supreme Court Tate Modern privacy case

On Wednesday, the UK’s highest court ruled by a majority in favour of the residents and found that the Tate’s viewing gallery was not a “normal” use of its land and was a “legal nuisance” to the homeowners.

Lawyers said the ruling was significant because the Supreme Court concluded that visual intrusion was capable of being a legal nuisance.

The common law of nuisance is designed to protect homeowners from the activities that unduly interfere with the use of their homes, such as a neighbour playing loud music late at night.

Greg Simms, legal director in Addleshaw Goddard’s real estate disputes team, said the ruling that overlooking can be considered a legal nuisance “is likely to worry developers”.
However, he added that it was unlikely that “ordinary” residential and commercial developments would be affected because most were not making “abnormal” use of their land.

The court heard that the platform — which in 2019 was visited by more than an estimated 500,000 people — had allowed the public to take photographs, use binoculars to see inside their flats and post pictures online. One resident described the “relentless intrusion” of living there.

Lord Justice George Leggatt, said in his ruling: “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.”

The five residents bought their luxury flats in 2013 and 2014. Other units in the development are listed for between £775,000 and £3.4mn.

The flat owners had applied for an injunction requiring the gallery to cordon off parts of the platforms or to erect screening to prevent the public from peering into their homes.
The case will now be sent back to the High Court for a judge to decide a solution for the flat owners.
The Tate’s viewing gallery has been closed since the Covid-19pandemic started in 2020.

Natasha Rees, senior partner at Forsters and the residents’ lead lawyer, said: “Our clients are both pleased and relieved that nearly six years after they began their claim the Supreme Court has now found in their favour.

“[They] now look forward to working with the Tate as valued neighbours to find a practical solution [that] protects all of their interests.”

Tate Modern said: “We thank the Supreme Court for their careful consideration of this matter . . . As the case is ongoing we cannot comment further.”

THE TIMES

Tate Modern viewing platform ruled a nuisance for exposed neighbours

Judges back residents who complained of visitors peering into their homes

Jonathan Ames

Wednesday February 01 2023, 12.00pm, The Times

The owners of four luxury flats overlooked by Tate Modern have won a Supreme Court privacy battle, with a judge describing their situation as “like being on display in a zoo”.

In a majority decision, judges overturned two earlier rulings as they backed a claim by residents of glass-fronted flats, who argued that hundreds of thousands of visitors to the gallery a year could see into their homes.

The judges backed the residents, who had seen rulings in the High Court and Court of Appeal go against them, in a three-to-two decision.

Giving the ruling, Lord Leggatt said that the “visual intrusion” of people looking into the flats from the Tate’s viewing platform was “a clear case of nuisance”.

He added that the gallery was “liable to the claimants under the law of nuisance” and he sent the case back to the High Court for a decision on a remedy for the residents.

Leggatt said the lower courts had found that the living areas of the flats, which have floor-to-ceiling windows, were under “constant observation from the Tate’s viewing gallery for much of the day, every day of the week”.

He continued: “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.”

The dispute centred on blocks of high-end flats in the Neo Bankside building, which was built next to the Tate in 2012 along the Thames on London’s South Bank.

The flats are roughly the same height above ground as the gallery’s visitor viewing platform, which opened in 2016, and have walls constructed mainly of glass. Residents have told a series of court hearings that on the south side of the viewing platform, visitors can see directly into their flats.

At the time of the first trial the viewing platform was open every day of the week and was visited by up to 600,000 people each year.

The original trial judge accepted that some of the gallery’s visitors peered into the private residences, with some taking photographs and even waving.

It also emerged during the High Court claim that occasionally gallery visitors on the viewing platform used binoculars to peer into the flats opposite and that many photographs of the residents had been posted online.

Residents asked the court for an injunction that would require Tate bosses to prevent visitors from viewing their flats from the platform, or alternatively, an award of damages.

Their claim was based on the common law concept of nuisance, but it was dismissed in the High Court in 2019 and then by appeal judges the year after.

But the residents did not give up and their lawyers took their claim to the UK’s most senior judges.

The case went to the Supreme Court and the court's president, Lord Reed, joined the majority ruling with Lord Lloyd-Jones. Lords Sales and Kitchin gave a minority judgment.

Tate Modern is one of Britain's most popular visitor attractions and the most visited modern art gallery in the world. It opened the viewing platform as part of its £260 million Blavatnik Building extension.

The observation deck, which has free entry, offers visitors 360-degree views from the tenth floor of the building. In September 2016 Sir Nicholas Serota, as Tate director, suggested that the residents install blinds or net curtains.

Natasha Rees, a partner at Forsters and the lead lawyer for the residents, said that they were "pleased and relieved that nearly six years after they began their claim the Supreme Court has now found in their favour".

She added that the residents "now look forward to working with the Tate as valued neighbours to find a practical solution which protects all of their interests".

Legal experts said the ruling was a landmark from the Supreme Court. "This is a judgment which moves the goal posts in the law of nuisance," said Dellah Gilbert, the chairwoman of the Property Litigation Association.

He added that the case had "clearly been perplexing the Supreme Court, given that it has taken a really rather remarkable 15 months and the residents only won by a slim majority".

The Daily Telegraph

Neighbours win Tate Modern privacy court battle over viewing platform

Supreme Court rules residents have suffered a 'nuisance' after hundreds of thousands of visitors were able to gaze into their luxury flats

By Craig Simpson

1 February 2023 • 10:45am

Residents living in the luxury flats have won their case in the Supreme Court, which ruled they are entitled to a remedy for the 'nuisance' caused by the viewing platform at the Tate Modern

Residents living in the luxury flats have won their case in the Supreme Court, which ruled they are entitled to a remedy for the 'nuisance' caused by the viewing platform at the Tate Modern CREDIT: Alicia Canter

Neighbours of the Tate Modern have won a legal battle over the gallery's viewing platform, which allows visitors to gaze into their luxury flats.

Residents of four flats, which boast walls almost entirely made of glass, complained in 2016 that a new viewing platform opened at the Tate overlooked their homes and allowed people to see inside.

Four flat owners sought to stop this or gain compensation by taking a case to court. This was ultimately dismissed by judges and residents were advised to use blinds or "net curtains" to stop tourists seeing into their homes.

However, on Wednesday the Supreme Court judged that residents of the luxury flats have in fact suffered a "nuisance" as a result of the viewing platform, which allows the gallery's thousands of visitors to intrude into their privacy.

The court's majority judgment stated: "The claimants' flats are under near constant observation by visitors to the viewing platform.

"There are hundreds of thousands of spectators each year and many take photographs and post them on social media. The ordinary person would consider this level of intrusion to be a substantial interference with the ordinary use and enjoyment of their home."

The judgment stated that there is no defence of this nuisance as "a common and ordinary use of the Tate's land", even "in the context of operating an art museum in a built-up area of south London".

The Supreme Court judgment added that "Tate is therefore liable to the claimants in nuisance", a matter of common law covering issues such neighbours playing music too loud, adding that it would be for the High Court to decide what form a "remedy" would take.

Like 'living in a zoo'

Natasha Rees, senior lead lawyer advising the residents on behalf of law firm Forsters, said: "Our clients are both pleased and relieved that nearly six years after they began their claim, the Supreme Court has now found in their favour.

"Lord Leggatt, giving the majority judgment, recognised how oppressive it can be to live under constant observation from the Tate's viewing gallery for much of the day, every day of the week … much like being on display in a zoo."

"Our clients now look forward to working with the Tate as valued neighbours to find a practical solution which protects all of their interests."

The Tate has been contacted for comment

Daily Mail

Owners of £2m luxury flats overlooked by Tate Modern win Supreme Court privacy battle over art gallery's viewing platform to stop 'hundreds of thousands' of visitors gawping through their windows 'like being on display in a zoo'

Residents of flats overlooked by the Tate Modern have won their privacy battle

The owners said 'hundreds of thousands' of people could look into their homes

By ALASTAIR LOCKHART

Owners of four luxury flats overlooked by the Tate Modern have won their Supreme Court privacy battle over the gallery's viewing platform after a judge ruled living in the homes was 'like being on display in a zoo'.

Residents of the multi-million pound Neo Bankside flats on London's South Bank launched a legal bid to close down the viewing platform in the art gallery which allows 'hundreds of thousands' of museum visitors to look inside their homes.

They first applied for an injunction in 2017 requiring the Tate to cordon off parts of the platform or to erect screening to block the views of their homes to stop what they said was a 'relentless' invasion of their privacy.

The owners lost the last stage of their fight at the Court of Appeal in February in 2022 when a judge agreed with a previous High Court decision which suggested the owners could simply 'lower their solar blinds' or 'install privacy film (or) net curtains'.

The viewing platform seems to give a perfect view of Neo Bankside apartments (pictured)

A photograph taken from the viewing platform in 2016 shows how visitors can see into the apartments at Neo Bankside (Pictured: a reporter)

Evening Standard

Supreme Court to rule on Tate Modern flats privacy battle

The owners of four flats in the Neo Bankside development on London's South Bank took legal action against the gallery's board of trustees

Residents of flats overlooked by the Tate Modern in London are due to find out whether they have won their Supreme Court privacy bid.

The owners of four flats in the Neo Bankside development on the capital's South Bank took legal action against the gallery's board of trustees in a bid to stop "hundreds of thousands of visitors" looking into their homes from the Tate's viewing platform.

They applied for an injunction requiring the gallery to prevent members of the public observing their flats by "cordoning off" parts of the platform or "erecting screening", to stop what they said was a "relentless" invasion of their privacy.

But after losing their case in the High Court and Court of Appeal, the residents took their case to the Supreme Court.

Following a hearing in December 2021, justices at the UK's highest court are due to give their decision on Wednesday.

How this leading esports host keeps her work at her fingertips

Tom Weekes KC, for the flat residents, previously argued that the Court of Appeal "misinterpreted" the law.

He said that under the court's ruling, the Tate would be allowed to hold barbecues on the platform and "use the viewing gallery as a rubbish storage area emitting a terrible smell".

"It could open its viewing gallery 24 hours a day and it could provide every visitor to the viewing gallery with a pair of binoculars."

One of the flat owners previously said his family are "more or less constantly watched" from the viewing gallery and feel like they are in a zoo.

However, Guy Fetherstonhaugh KC, for the Tate, argued there "is no general right not to be overlooked in English law" and that the Court of Appeal's ruling was correct.

Mr Fetherstonhaugh later added that the residents still have rights, and that if photographs are taken from the gallery "with the deliberate intention of garnering private information for publication", they may be able to claim for misuse of private information.

The Supreme Court justices were asked to decide whether the Court of Appeal reached the wrong decision regarding the law on private nuisance.

They will also rule whether the court was wrong to conclude that public viewing from the gallery did not amount to a breach of the residents' rights to respect for their private and family lives.

The judgment by Lord Reed, Lord Lloyd-Jones, Lord Kitchin, Lord Sales and Lord Leggatt is due to be handed down at 9.45am.

BBC NEWS

Flat owners win viewing platform privacy case

By Ollie Pritchard-Jones & PA Media

1 February 2023, 10:10 GMT

Updated 1 hour ago

The flats which are overlooked by the gallery

The Supreme Court ruling is the latest development in the long-running dispute

The owners of four luxury flats overlooked by the Tate Modern in London have won a privacy bid over the use of the gallery's viewing platform.

The Neo Bankside residents took legal action over the "hundreds of thousands of visitors" looking into their homes.

In February 2020, the Court of Appeal dismissed their claim, saying they should "lower their solar blinds".

But the Supreme Court overturned the decision on Wednesday following a hearing in December 2021.

Tate Modern privacy row residents dealt legal blow

The five residents had applied for an injunction requiring the gallery to prevent members of the public observing their flats by "cordoning off" parts of the platform or "erecting screening".

The Supreme Court heard the residents' flats are approximately 112ft (34m) away from the Tate Modern.

Other flats in the four-block development are on sale for between £750,000 and £2.5m, according to current listings on Rightmove.

The residents, who had bought their flats in 2013 and 2014, lost their case at the High Court and Court of Appeal so took it to the UK's highest court.

The flat owners said they had no privacy when their blinds were open

Passing his judgement, Lord Leggatt said the viewing gallery, which is currently closed, left the residents feeling like they were "being on display in a zoo".

He added it was "not difficult to imagine how oppressive living in such circumstances would feel for any ordinary person".

FT
FINANCIAL TIMES

The court drew a distinction between the impact of the Tate's viewing deck and an hypothetical block of flats that could have been built on the same site, which would be classed as "normal" usage.

"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," said Lord Leggatt.

The flats on the 18th and 19th floors of the building are at around the same height as the viewing gallery

But if the occupants of the new flats were "showing as much consideration for their neighbours as they could reasonably expect" they could not have complained.

"It would be required by the rule of give and take, live and let live," he added.

Nevertheless, the court ruled that creating the viewing platform was not a "normal" use of the museum's land and therefore there was a right to complain.

"Inviting members of the public to look out from a viewing gallery is manifestly a very particular and exceptional use of land," the judge said.

This momentous win for the owners of the multimillion-pound glass-box flats has already triggered a huge debate among London's construction lawyers as to where it will lead.

While the facts of the dispute relate to modern architecture, the law partly dates back to the 14th Century.

The Supreme Court notes that back in 1341, John Le Leche, a London fishmonger, unlawfully erected a "watch-tower" from which he could peep on his neighbours.

That ancient case shows that peering into someone's home can cause a legally intolerable nuisance, even in a densely populated city.

The key question, as Lord Leggatt explains in this case, is what is ordinary and normal use of the Tate's land.

And the majority of the court said the Tate viewing deck had created a "very particular and exceptional situation" that crossed the line because of its impact.

So rather like the 14th Century fishmonger's long-forgotten watch tower, the constant viewing of the flats was not a necessary or ordinary use of the Tate's land - and therefore must, somehow, stop.

The platform opened in 2016 and provides a panorama of London as well as a direct view into the glass-fronted flats.

The flat owners said it created a "relentless" invasion of their privacy and applied for an injunction the following year.

The court case has been running ever since with the Supreme Court ruling by a margin of three-to-two in the flat owners' favour.

The case will now be returned to the High Court to determine a solution for the flat owners.

Natasha Rees, a partner at Forsters LLP who represented the residents, said her clients were "pleased and relieved" with the ruling.

She added they would work with the Tate to "find a practical solution which protects all of their interests".

A Tate spokesperson said as the case has been referred back to the High Court it "cannot comment further".

sky news

Luxury flat owners win privacy case over Tate Modern viewing platform

Owners of four luxury flats overlooked by the Tate Modern's public viewing platform have won their long-running privacy case at the Supreme Court.

Neo Bankside residents said "hundreds of thousands" of visitors to the world-famous London gallery were looking into their homes in a "relentless" invasion of privacy.

They wanted the gallery to cordon off parts of the platform or put up screens.

The High Court and Court of Appeal sided with the gallery, but the residents took the case to the Supreme Court and on Wednesday it ruled 3-2 in their favour.

It said a viewing gallery was not a normal use of the gallery's land and that it was a legal "nuisance" to the flat owners who couldn't properly enjoy their property.

The properties have floor-to-ceiling windows and the Supreme Court's Lord Leggatt likened it to "being on display in a zoo".

"Inviting members of the public to look out from a viewing gallery is manifestly a very particular and exceptional use of land," he said.

"It cannot even be said to be a necessary or ordinary incident of operating an art museum."

Shortly after the platform opened in 2016, the gallery's former boss suggested owners simply put up blinds or curtains and claimed people buying flats were aware the platform was due to open.

But Lord Leggatt said residents "cannot be obliged to live behind net curtains or with their blinds drawn all day" to protect themselves from prying eyes.

He also said the Court of Appeal had made legal errors when dismissing a bid for injunction and damages.

Flats in the block - situated next to the Thames on the South Bank - go for a premium price, with a three-bed currently on the market for £3.4m.

Nearly six years after the claim began, it will now go back to the High Court to find a solution for the flat owners.

"Our clients now look forward to working with the Tate as valued neighbours to find a practical solution which protects all of their interests," said solicitor Natasha Rees from law firm Forsters.

Bloomberg

Tate Modern's Nosy Art Fans Can No longer Snoop on Neighbours,

The owners of four apartments overlooking the River Thames, which feature floor-to-ceiling windows, have been locked in a legal battle with the gallery's board of trustees after arguing their privacy is being violated from the gallery's adjacent viewing platform. Supreme Court judges ruled on Wednesday that the Tate Modern is responsible to the residents for the nuisance and sent the case back to a lower court to decide on a remedy. "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," Judge George Leggatt said in the written judgment.

The Blavatnik Building, an extension to the Tate Modern, has a viewing gallery allowing a a 360-degree panoramic view of central London, and was built around the same time as the flats. It hosts hundreds of thousands of people each year and as many as 300 visitors can access it at the same time, with the homeowners arguing some used binoculars to look inside the flats.

"Residents can throw away their net curtains after all," said James Souter, a lawyer at Charles Russell Speechlys, who's not involved in the case.

"Today's judgment is a landmark moment extending the law of nuisance to protect against visual intrusion. "A spokesperson for the Tate Modern said the case continues and declined to comment further. "Our clients now look forward to working with the Tate as valued neighbours to find a practical solution which protects all of their interests," said Natasha Rees, a lawyer at Forsters LLP, which represents the residents.

REUTERS

London's Tate gallery loses privacy case to luxury flat owners

By Sam Tobin

LONDON (Reuters) -Residents of a luxury London block, who are trying to stop visitors peering into their glass-walled apartments from the neighbouring Tate Modern art gallery, won their privacy case at the United Kingdom's Supreme Court on Wednesday.

The owners of four flats in the nearby Neo Bankside development took the Tate, one of Britain's top tourist attractions, to court after the gallery opened an extension in 2016 featuring a panoramic platform on its top floor, which gives visitors clear views of the inside of some flats.

They applied to London's High Court for an injunction requiring the Tate to stop visitors from viewing their flats, which one owner said left them "more or less constantly watched".

In 2019, their case was dismissed by a High Court judge, who suggested they could lower their blinds or install net curtains, and they lost an appeal the following year.

But, on Wednesday, the Supreme Court overturned those decisions by a 3-2 majority and sent the case back to the High Court to determine whether an injunction should be granted, or if the claimants should receive any damages from the Tate.

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In the court's written ruling, Judge George Leggatt said: "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."

He added that the flats were "under constant observation" from the platform, which attracts hundreds of thousands of visitors each year, some of whom take photographs and 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," the judge said.

The flat owners' lawyer, Natasha Rees, said in a statement that her clients were pleased and relieved, adding that they looked forward to working with the gallery to find a practical solution which protected all their interests.

A Tate spokesperson said: "We thank the Supreme Court for their careful consideration of this matter."

Prior to the COVID-19 pandemic, the gallery attracted more than six million visitors a year, and vies with the British Museum to be the country's most popular attraction, according to figures from the Association of Leading Visitor Attractions.

THE LAWYER

Supreme Court rules in favour of residents over battle with Tate Modern

By James Browning 1 February 2023

The long-running legal battle between Tate Modern and residents of nearby luxury apartments has been settled, albeit with a split judgment, today at the Supreme Court.

The residents, represented by Forsters, have unsuccessfully pursued a nuisance-related claim to protect their rights to privacy against the art gallery for years, with the High Court and Court of Appeal siding with the Tate. But a majority judgment handed down today in the Supreme Court has finally ruled in the residents' favour.

The dispute's origins lie in the development of the £260m Blavatnik extension of the world-famous gallery, which opened in 2016. Part funded by the Tate's largest ever donation, the 10th floor viewing level, which offers panoramic views of London, raised objections from nearby residents who have since pursued privacy and nuisance-based litigation against the Tate.

Today's judgment upholds the Court of Appeal's finding that the residents' were not unduly sensitive. Floor-to-ceiling glass windows do not represent a choice to expose themselves to potential visual intrusion, as well as rejecting the notion that residents should reasonably be expected to insulate themselves from potential intrusion, by, for example, installing blinds or curtains.

However, the Supreme Court has departed from the Court of Appeal, which found for Herbert Smith's client the Tate, in that a claim of nuisance could not be found because the viewing platform allowed for visual entry into the residences homes.

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In the decisive opinion of three members of the Supreme Court, the viewing platform went further than allowing for visual entry. The viewing platform "actively invites" perusal of the appellants dwellings from "30-odd metres away", "for the best part of the day, every day of the week". Commenting on the outcome, James Souter, partner at Charles Russell Speechlys, remarked that the "residents can throw away their net curtains after all".

That said, two members of the Supreme Court ultimately disagreed, and would have upheld the Tate's ability to continue to operate the viewing platform. Dismissing the Court of Appeal's notion, upheld by three justices today, that the residents should take measures to insulate themselves from potential intrusion, the dissenting judgment found that the installation of blinds or curtains were not unreasonable requests to place on residents, and that their nuisance case was without merit.

Greg Simms, legal director in Addleshaw Goddard's real estate disputes team, said "this is a surprising outcome".

He added: "The fact that the court has determined that overlooking can be considered a nuisance is likely to worry developers … however, developers can take some comfort from the test that the court applied. The Supreme Court confirmed that the test was whether the land was being used for a common and ordinary use. The Tate's viewing gallery failed this test, but I think it's is highly likely that 'ordinary' residential and commercial developments would not."

Forsters, who acted for the successful residents, added: "Our clients now look forward to working with the Tate as valued neighbours to find a practical solution, which protects all of their interests."

LAW.COM

Forsters Defeats HSF in Tate Modern Supreme Court Dispute

The decision comes after the UK High Court and Court of Appeals originally sided with the gallery. February 01, 2023 at 10:21 AM 3 minute read Litigation Habiba Cullen-Jafar Reporter A Forsters team, representing owners of four luxury flats, has won a long-standing case at the Supreme Court against the Tate Modern. After a six-year battle, the Supreme Court finally ended the matter by finding in favour of the residents from the Neo Bankside development, who deplored the intrusive nature of the Tate's public viewing gallery.

Acting for the appellants, Forsters, headed by senior partner and residential property litigation expert, Natasha Rees, instructed barristers Tom Weekes KC and Richard Moules from Landmark Chambers as well as Jacob Dean from 5RB. Commenting on her victory, Rees said: "Our clients are both pleased and relieved that nearly six years after they began their claim the Supreme Court has now found in their favour. Our clients now look forward to working with the Tate as valued neighbours to find a practical solution which protects all of their interests."

The victory comes after both the High Court and Court of Appeal had originally sided with the gallery, represented by Anglo-Australian firm, Herbert Smith Freehills. The HSF team was led by its head of real estate dispute resolution, Matthew Bonye, and had instructed barristers Guy Fetherstonhaugh KC and Elizabeth Fitzgerald of Falcon Chambers, and Aileen McColgan KC of 11KBW for the case. The viewing gallery, first opened in 2016 as part of an extension known as the Blavatnik Building, offers "striking" panoramic views across London, according to the judgment and attracts up to 600,000 visitors a year.

However, the appellants from the adjacent Neo Bankside development whose flats are situated around the same height as the viewing platform and have walls constructed mainly of glass, complained that visitors to the art gallery could see straight into their living space. In evidence given at

the High Court back in 2019, the claimants stated that they had seen visitors taking photographs, and on one occasion using binoculars to look into their flats.

One resident claimed he “felt constantly watched” while another said the situation made her feel “sick to her stomach”. The case, which was decided on by justices Lord Reed, Lord LloydJones, Lord Kitchin, Lord Sales and Lord Leggatt, found in favour by a majority of three to two. Lord Leggatt, who gave the leading Judgment, with which Lord Reed and Lord Lloyd-Jones agreed, decided that the Tate’s use of the viewing gallery does give rise to liability to the residents under common law nuisance and that the case should be remitted to the High Court to determine the appropriate remedy.

LAW360® UK

Tate Extension A Nuisance To Homeowners, Top Court Rules

By **Ronan Barnard** · Listen to article

Law360, London (February 1, 2023, 10:22 AM GMT) -- Residents of luxury London apartments next to the Tate Modern Museum won their battle over the viewing platform that lets visitors look into their homes after a narrow majority of the U.K.'s Supreme Court ruled Wednesday the extension was a nuisance.

The Supreme Court ruled in a 3-2 majority that the Tate Modern's viewing gallery, pictured hereon the top story of the Blavatnik Building, was a "straightforward case of nuisance" for nearby homeowners. (iStock.com/Sebastien Mercier)

The Supreme Court ruled in a 3-2 majority that the Tate Modern's viewing gallery was a "straightforward case of nuisance" for the homeowners, sending the case back to the High Court to decide whether to grant the owners an injunction or financial damages.

The five owners have flats near the gallery in London's central South Bank area. The extension to the Tate, known as the Blavatnik Building, was erected around the same time as their homes were being built. The 10-story tower has a 360-degree viewing platform open for the public to view the city

The judgment comes more than a year after the case was heard at the U.K.'s highest court, where the apartment residents **urged the justices** to overturn the Court of Appeal's 2020 ruling that the visitors' "visual intrusion" did not support a cause of action for private nuisance.

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FINANCIAL TIMES

Justice George Leggatt, joined by Justices Robert Reed and David Lloyd-Jones agreeing, said that the Court of Appeal and the High Court judges had incorrectly assessed the severity of the gallery's "visual intrusion" into the flats.

"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," Justice Leggatt wrote for the majority.

Justice Leggatt said that the Court of Appeal wrongly decided that the platform just allowed visitors to overlook the apartments, despite the owners complaining that the platform draws an estimated 600,000 visitors per year with its views, including the owners' apartments.

"[It] is like arguing that, because ordinary household noise caused by neighbors does not constitute a nuisance, inviting a brass band to practise all day every day in my back garden cannot be an actionable nuisance," the justice added.

Justice Philip Sales, with Justice David Kitchin agreeing, said in the dissenting opinion that while the gallery encouraged an "unusually intrusive degree of visual overlooking," the dispute should be resolved by a compromise between the gallery and the apartment owners.

"There is no reason why the whole burden of minimization or avoidance of such friction should fall upon the defendant." Justice Sales said in the dissent. "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."

The justice said that the case should be analyzed with a "test of reasonableness" applying the character of the local area, rather than using a test of whether the gallery's use of its own land was "common and ordinary."

The lawsuit, brought by long leasehold owners of four apartments, claims visitors to the viewing area frequently look into their apartments and take photographs, sometimes even using binoculars to spy into their lives. Pictures taken of their apartments are posted on social media, the museum neighbors said.

They sued the museum in 2017, seeking an injunction requiring its board of trustees to prevent visitors looking into their apartments or award them damages for common law "private nuisance."

High Court Judge Anthony Mann dismissed the claim in February 2019 after finding there was "no actionable nuisance," that the Tate's use of the viewing gallery was reasonable, and the residents were responsible for the intrusion partly because they bought properties with glass walls.

The judge also said the owners could take "remedial steps" to prevent intrusion into their privacy, such as installing privacy film on their windows or lowering their blinds.

Supreme Court Justices Robert Reed, David Lloyd-Jones, David Kitchin, Philip Sales and George Leggatt sat on the panel for the appeal.

"Our clients are both pleased and relieved that nearly six years after they began their claim the Supreme Court has now found in their favor," Natasha Rees, leading solicitor for the owners, said Wednesday. "Our clients now look forward to working with the Tate as valued neighbors to find a practical solution which protects all of their interests."

A Tate spokesperson thanked the Supreme Court for considering the case and declined to comment further. A spokesperson for the gallery's counsel, Herbert Smith Freehills LLP, declined to comment on the judgment.

The appellants are represented by Tom Weekes KC and Richard Moules of Landmark Chambers, and Jacob Dean of 5RB, instructed by Forsters LLP.

The Board of Trustees of the Tate Gallery is represented by Guy Fetherstonhaugh KC and Elizabeth Fitzgerald of Falcon Chambers, and Aileen McColgan KC of 11KBW, instructed by Herbert Smith Freehills LLP.

The case is Fearn and others v. The Board of Trustees of the Tate Gallery, case number 2020/0056, in the Supreme Court of the United Kingdom.

--Editing by Joe Millis.

Update: This story has been updated with comment from the appellants' counsel. The Tate and its counsel declined to comment.

Building

Supreme Court backs Neo Bankside residents in Tate Modern 'snooping' row

By Jim Dunton1 February 2023

Ruling overturns earlier decisions on nuisance caused by Herzog & de Meuron-designed viewing gallery

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FINANCIAL TIMES

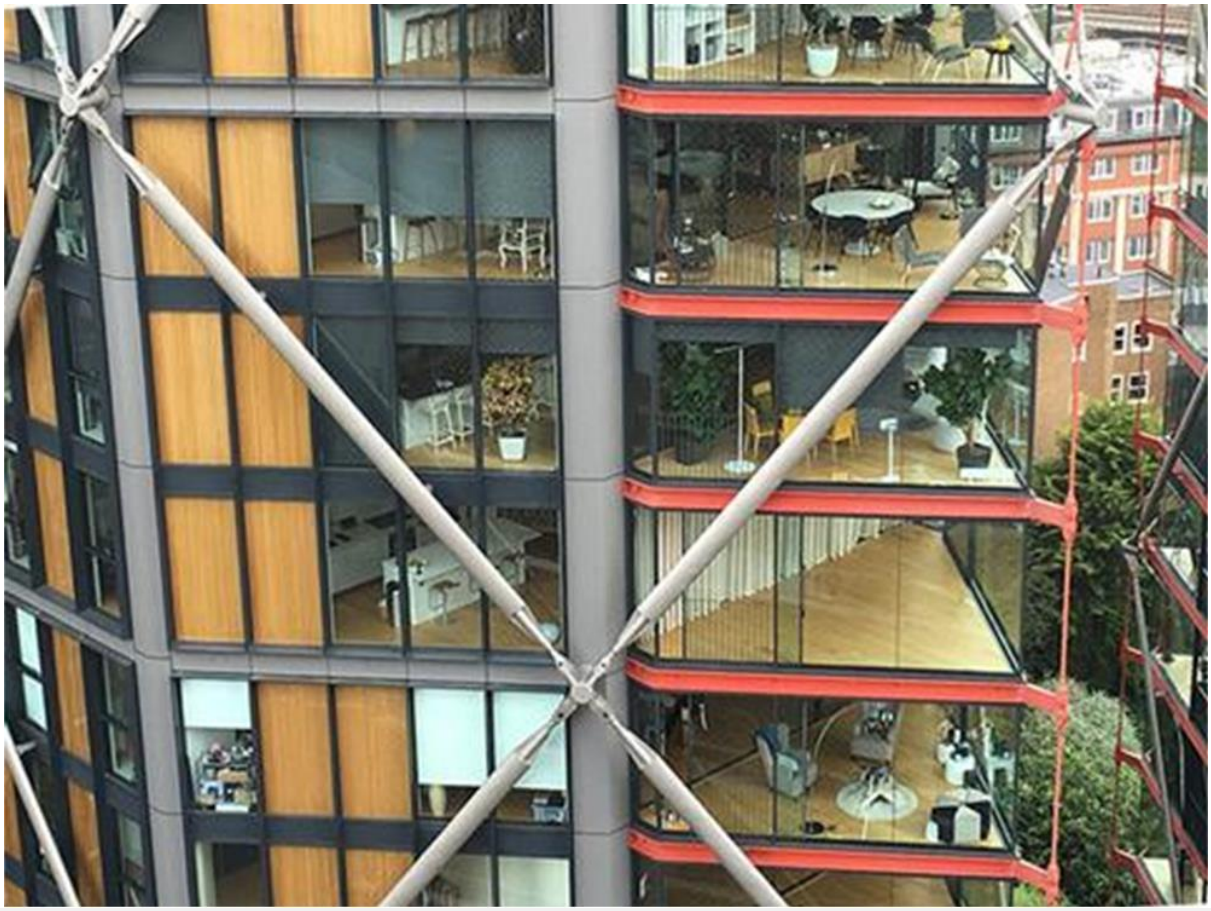
Residents of RSHP's Neo Bankside flats in Southwark have triumphed in their legal challenge over visitors to the Tate Modern gallery's Herzog & de Meuron-designed extension "snooping" into their high-end homes.

In a ruling handed down today, the Supreme Court said a 2019 High Court decision in the case was wrong and that the Court of Appeal had also been wrong to uphold it the following year.

Residents of the Neo Bankside flats – which cost from £2m-£19m – had complained that visitors to the 10th floor viewing platform of Tate Modern's Blavatnik Building extension, previously known as Switch House, looked into their homes with binoculars and took pictures of them.

Neo Bankside was completed by Carillion in 2012, four years before the Tate Modern extension, built by Mace, opened to the public.

Visitor numbers to the viewing gallery are in the region of 500,000-600,000 a year. Residents said they wanted the Tate Board of Trustees to either close off part of the viewing area, or screen it to give greater privacy for their homes, which have floor-to-ceiling windows with views of the River Thames.



View from Tate Modern Switch House into Neo Bankside

In its 2020 decision, the Court of Appeal said there was no precedent for overlooking by neighbours to constitute a "nuisance".

Overturning the previous decisions, the Supreme Court said that inviting members of the public to admire the view from a viewing platform was not a "common and ordinary" use of the Tate's land, even in the context of operating an art museum in a built-up area of south London.

It said the Tate was liable to the claimants for the nuisance caused, and sent the case back to the High Court for the remedy to be decided.

Natasha Rees, senior partner at law firm Forsters, is the lead lawyer advising the Neo Bankside claimants.

She said the residents were “both pleased and relieved” that the Supreme Court had found in their favour, six years after their claim began.

“Lord Leggatt, giving the majority judgment, recognised how oppressive it can be to live ‘under constant observation from the Tate’s viewing gallery for much of the day, every day of the week… much like being on display in a zoo’,” she said.

“Our clients now look forward to working with the Tate as valued neighbours to find a practical solution which protects all of their interests.”

A spokesperson for Tate Modern thanked the Supreme Court for its “careful consideration” of the matter but declined to comment further as the case has been referred back to the High Court and is ongoing.

Source: Elizabeth Hopkirk

Neo Bankside flats overlooked by the Tate Modern viewing deck on the 10th floor of the Switch House

Radius

Apartment owners win long-running Tate Modern case

James Lumley
01/02/2023

The residents of an exclusive apartment block on London's South Bank have won their long-running legal dispute with Tate Modern over a viewing gallery that allows visitors to look directly into their homes.

A five-judge panel found, by a majority of three to two, that the platform constituted a "nuisance".

Until today the residents have had no success in the courts, having lost in both the High Court and the Court of Appeal. Even so, in both courts they lost for different reasons, highlighting the complicated nature of the legal points at stake.

The viewing platform, part of an extension to Tate Modern named the Blavatnik Building, has been open to the public since June 2016. The walkway on the 10th floor offers panoramic views of London, but also allows people to stare into the adjacent Neo Bankside flats.

Giving judgment today, Supreme Court judge Lord Leggatt said this case is a "straightforward case of nuisance".

"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," Leggatt said.

James Souter, a partner at Charles Russell Speechlys, said the ruling was "a landmark moment extending the law of nuisance to protect against visual intrusion".

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FINANCIAL TIMES

Souter said: "We've waited over three years for this decision and, having lost at the High Court and Court of Appeal, against all odds the flat owners have won the right to safeguard against an invasion of privacy in their homes. The Supreme Court decision was split 3-2 in favour of the flat owners, showing how finely balanced the case was even to the very end.

"Looking ahead, it will be interesting to see whether this case triggers more property owners to make similar claims where they feel they are being overlooked. However, the Supreme Court has made it clear that the circumstances where the new law will be applied will be rare, but did highlight issues around CCTV and sharing of images from camera phones on social media."

The residents say that, from a significant part of the viewing platform, there is "little to view apart from Neo Bankside", which means that visitors inevitably have their eyes drawn to their homes.

They argue the deck is a "nuisance" as it enables visitors to the gallery to look directly into their multimillion-pound apartments, turning their homes into a "public exhibit".

The main ruling, written by Lord Leggatt, found that "the Tate's use of the viewing gallery gives rise to liability to the claimants under the common law of nuisance".

"The claimants' flats are under constant observation from the Tate's viewing gallery for much of the day, every day of the week," he said. "The number of spectators is in the hundreds of thousands each year… spectators frequently take photographs of the interiors and sometmes post them on social media.

"It is not difficult to to imagine how oppressive living in such circumstances would feel for an ordinary person – much like being on display in a zoo."

The High Court judge who ruled in an earlier hearing found that, as the South Bank is in the inner city, residents "can expect to live quite cheek by jowl with neighbours" and advised the residents to put up net curtains.

Today's ruling disagreed.

"Inviting members of the public to look out from a viewing gallery is manifestly a very particular and exceptional use of land," Leggatt said. "It cannot even be said to be a necessary or ordinary incident of operating an art museum."

As for the blinds: "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," Leggatt said.

"In circumstances where the claimants are doing no more than occupying and using their flats in the 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," he said.

The Court of Appeal found against the claimants saying that "mere overlooking" cannot give rise to liability for nuisance.

The Supreme Court found that this is not a case of "mere overlooking," and the judges at the Court of Appeal had made an "error" in their reasoning.

"The claimants have made it expressly clear from the trial that they do not object to the fact that they are overlooked by the Blavatnik Building," Leggatt said.

"What they complain about is the particular use made by the Tate of the top floor. They complain that the Tate permits and actively invites members of the public to visit and look out from that location in every direction, including the claimants' flats, only 30-odd meters away.

"To argue that this use of the defendants' land cannot be a nuisance because 'overlooking'... 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 practice all day every day in by back garden cannot be an actionable nuisance... the conclusion simply does not follow from the premise."

The Supreme Court found that, while the Tate is liable for nuisance, it was unable to decide what the remedy should be as the issue has not been properly addressed in the hearings.

Leggatt said the residents and the gallery should should try and reach their own agreement. If they can't, the case must go back to the High Court for a decision.

Natasha Rees, senior partner at Forsters LLP, acted for the flat owners. She said: "Our clients are both pleased and relieved that nearly six years after they began their claim the Supreme Court has now found in their favour.

"Lord Leggatt, giving the majority judgment, recognised how oppressive it can be to live under constant observation from the Tate's viewing gallery for much of the day, every day of the week... much like being on display in a zoo. Our clients now look forward to working with the Tate as valued neighbours to find a practical solution which protects all of their interests."

The legal dispute has been ongoing since at least 2018, and the Supreme Court has taken more than a year to produce its judgment. Even so, the residents have not been recently disturbed by the viewing deck. It was closed during the Covid pandemic, and has yet to reopen.

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Supreme Court Backs Residents Against Tate Modern in Landmark Privacy Ruling

Six-Year Battle Ends in Milestone Decision With Wide-Ranging Implication For Developers and the Laws on Visual Nuisance

The Tate Modern. (CoStar)

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FINANCIAL TIMES

By Paul Norman
CoStar News
1 February 2023 | 11:19

The Supreme Court has ruled that the Tate Modern is infringing on the privacy of nearby flats due to its viewing gallery which directly looks into their homes, in a landmark decision.

The judgment is being seen already as a milestone for development as it extends the law of nuisance to protect against visual intrusion.

The Tate Modern, a public art gallery in London's South Bank, opened a new extension in 2016 called the Blavatnik Building. The building is 10 storeys high and, on its top floor, has a viewing platform which offers panoramic views of London.

The claimants own flats in a block neighbouring the Tate that are at around the same height above ground as the viewing platform and have walls constructed mainly of glass. On the south side of the viewing platform, visitors can see directly into the claimants' flats. At the time of the trial the viewing platform was open every day of the week and was visited by an estimated 500,000-600,000 people each year.

The trial judge found that a very significant number of visitors display an interest in the interiors of the claimants' flats.

They noted: "Some look, some peer, some photograph, some wave. Occasionally binoculars are used. Many photographs have been posted online."

The claimants sought an injunction requiring the Tate to prevent its visitors from viewing their flats from the platform, or alternatively, an award of damages. Their claim is based on the common law of nuisance. The claims had been dismissed by the High Court and, for different reasons, by the Court of Appeal before the appeal was made to the Supreme Court.

The Supreme Court has now, by a majority of 3 to 2, allowed the appeal.

Lord Leggatt, who gave the leading judgment, decided that the Tate's use of the viewing gallery does give rise to liability to the residents under common law nuisance and that the case should be now sent to the High Court to determine the appropriate remedy. The Judgment, which runs to 168 pages, re-asserts the principles of the law of nuisance.

Forsters lead partner, Natasha Rees, advising the clients, said in a statement: "Our clients are both pleased and relieved that nearly six years after they began their claim the Supreme Court has now found in their favour. Lord Leggatt, giving the majority judgment, recognised how oppressive it can be to live 'under constant observation from the Tate's viewing gallery for much of the day, every day of the week…much like being on display in a zoo'. Our clients now look forward to working with the Tate as valued neighbours to find a practical solution which protects all of their interests."

James Souter, Partner, Charles Russell Speechlys, said residents can now "throw away their curtains after all".

"We've waited over three years for this decision and, having lost at the High Court and Court of Appeal, against all odds the flat owners have won the right to safeguard against an invasion of privacy in their homes. The Supreme Court decision was split 3-2 in favour of the flat owners showing how finely balanced the case was even to the very end.

"Looking ahead, it will be interesting to see whether this case triggers more property owners to make similar claims where they feel they are being overlooked. However, the Supreme Court has made it

clear that the circumstances where the new law will be applied will be rare but did highlight issues around CCTV and sharing of images from camera phones on social media."

REACT news

Tate Modern viewing platform invades flat owners' privacy, supreme court rules

1 Feb 2023 | by James Riding

Neo Bankside residents living in "oppressive" circumstances akin to a zoo

What Flat owners opposite Tate Modern face constant intrusion on privacy, supreme court finds

Why Neo Bankside residents are photographed and viewed with binoculars, Lord Leggatt said

What next Remedy will be determined by High Court

The owners of four flats opposite the Tate Modern viewing platform face a "constant visual intrusion" on their privacy, the supreme court has ruled.

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Residents of Native Land's Neo Bankside development took legal action in 2017 over the "hundreds of thousands of visitors" looking into their homes from the gallery 34 metres away. Five residents had applied for an injunction requiring the Tate Modern to cordon off parts of the platform or erect screening.

Their claim was dismissed by the court of appeal in February 2020, who said they should "lower their solar blinds". However, the supreme court has overturned that decision following a hearing in December 2021.

In his judgement, Lord Leggatt said: "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."

He said that a significant number of visitors displayed an interest in the interior of the flats, including photographing them and using binoculars to view them.

The decision had been anticipated as a landmark judgment that could open the floodgates to thousands of neighbour disputes around privacy.

However, Leggatt explained that the Tate viewing gallery was "a very particular and exceptional use of land" and his judgement did not mean that residents could complain of nuisance because neighbours could see inside their buildings.

The high court will now decide on a remedy, which may involve an injunction or damages paid to the owners.

The judgement said a significant number of Tate visitors were photographing the interior of the flats

"A surprising outcome"

Natasha Rees, a partner at Forsters who represented the residents, said her clients were "pleased and relieved" with the ruling. "Our clients now look forward to working with the Tate as valued neighbours to find a practical solution which protects all of their interests," she added.

Greg Simms, legal director in Addleshaw Goddard's real estate disputes team, said: "This is a surprising outcome. The fact that the court has determined that overlooking can be considered a nuisance is likely to worry developers, many of whom are already facing a multitude of other pressures. This could become yet another barrier to developers building in populated areas." However, he added that it was "difficult to imagine that this result will be widely replicated."

Claire Lamkin, partner in the real estate team at Kingsley Napley, said "the likelihood of all nuisance cases succeeding in future remains slim" but added that the judgement "will no doubt precipitate a wave of copycat cases" where people feel a development near them is highly intrusive. "Builders, architects, developers, town planners and policy makers will need to check their plans carefully from now on to minimise the risk of future similar litigation," she said.

"It won't be long before this issue is back in the courts"

James Souter, a partner at Charles Russell Speechlys, called the judgement "a landmark moment extending the law of nuisance to protect against visual intrusion." He pointed out that the supreme court was split 3-2 in favour of the flat owners, showing "how finely balanced the case was even to the very end."

Looking ahead, he added, "it will be interesting to see whether this case triggers more property owners to make similar claims where they feel they are being overlooked."

Jessica Dick, associate at Cripps, said: "Today's decision is likely to make developers, especially those working in cities like London, think more carefully about adding features like balconies and roof gardens on non-residential buildings, like office blocks, in case they overlook nearby residents."

Mark Reading, vice chair of the Property Litigation Association, said: "The concept of abnormal use is one where the battleground for future cases is sure to lie." He asked if someone might have a claim over a neighbour's CCTV camera pointed directly into their property. "It seems unlikely that it will be very long before this issue is again before the courts," he added.

AJ Architects' Journal

NEO Bankside residents win Tate Modern overlooking battle

1 FEBRUARY 2023 • BY RICHARD WAITE

Residents of the RSHP-designed NEO Bankside have won their long-running legal action over Tate Modern visitors peering into their flats

The Supreme Court overruled earlier judgments and held that overlooking from the museum's 2016 Herzog & de Meuron-designed extension was a 'straightforward case of nuisance'.

The original nuisance action was launched in 2017 by residents in the glass-fronted, ten-year-old block, who claimed their human rights were being breached due to 'near-constant surveillance' from visitors to the gallery on the south bank of the Thames in central London.

The intrusion by gallery visitors peering into their homes and posting photographs and films on social media was, they said, 'unreasonably interfering with the claimants' enjoyment of their flats, so as to be a nuisance'.

However, at the initial High Court hearing in 2019 Justice Mann refused to grant an injunction to close the viewing gallery – just 34m away from the homes. Although he accepted the argument that overlooking theoretically could fall within the scope of existing legal protections against intrusion into the home, he ruled that the residents had 'created their own sensitivity' by purchasing flats with floor-to-ceiling windows.

'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,' his judgment said.

That decision was reaffirmed a year later by three Court of Appeal judges, who refused to overturn the High Court ruling 'but for different reasons'. This appeal judgement seemed to go even further by saying that 'mere overlooking' did not fall within the tort of nuisance and suggested the residents 'lower their solar blinds'.

Terence Etherton, the Master of the Rolls, who was sitting with Lord Justice Lewison and Lady Justice Rose, said that any ruling against Tate could have 'opened the floodgates' to claims in every single case where planning permission is granted with a balcony overlooking.

In its original claim, the residents of the 2015 RIBA Stirling Prize-shortlisted building said Tate Modern could easily have stopped 'this invasion of the claimants' privacy and home life [...] at little or no cost'.

The residents also said that the intense degree of visual scrutiny did 'not provide a safe or satisfactory home environment for young children'. They took the Court of Appeal judgement to the Supreme Court in April 2021.

Now, after a six-year battle, five Supreme Court judges have narrowly ruled 3:2 in favour of the flat owners and that the viewing gallery did give rise to liability to the residents under common law nuisance. The case will now be passed back to the High Court to determine the appropriate remedy.

In his majority judgment, Lord Leggatt rejected the Court of Appeal's ruling that visual intrusion could not constitute a nuisance, saying it was not supported by precedent and, indeed, the relevant legal authorities supported the opposite conclusion.

He concluding by saying that he suspected the rejection of the claim by the courts was based on a 'reluctance to decide that the property 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'.

Natasha Rees, lead partner at law firm Forsters, who was advising the residents, said: 'Our clients are both pleased and relieved that nearly six years after they began their claim the Supreme Court has now found in their favour.

'Lord Leggatt, giving the majority judgment, recognised how oppressive it can be to live "under constant observation from the Tate's viewing gallery for much of the day, every day of the week ... much like being on display in a zoo".'

Rees added: 'Our clients now look forward to working with the Tate as valued neighbours to find a practical solution which protects all of their interests.'

A spokesperson for Tate said: 'We thank the Supreme Court for their careful consideration of this matter. The Supreme Court has referred the case back to the High Court and as the case is ongoing we cannot comment further.'

Comments

James Souter, partner, Charles Russell Speechlys

Residents can throw away their net curtains after all. Today's judgment is a landmark moment extending the law of nuisance to protect against visual intrusion.

We've waited over three years for this decision and, having lost at the High Court and Court of Appeal, against all odds the flat owners have won the right to safeguard against an invasion of privacy in their homes. The Supreme Court decision was split 3:2 in favour of the flat owners, showing how finely balanced the case was even to the very end.

Residents can throw away their net curtains after all

Looking ahead, it will be interesting to see whether this case triggers more property owners to make similar claims where they feel they are being overlooked. However, the Supreme Court has made it clear that the circumstances where the new law will be applied will be rare, but did highlight issues around CCTV and sharing of images from camera phones on social media.

Adam Gross, partner, Fladgate

The key issue for developers on live and future projects, and building owners seeking to maximise on the profitability of the space in their building, is that visual intrusion can be a nuisance where the use of property is not common and ordinary.

And it is not a defence in those circumstances to say the neighbours should simply erect blinds or curtains to protect their privacy, or that the flats went up after.

Martin Thomas, real estate partner, Gowling WLG

This decision will have an important impact for buildings which have public spaces such as viewing galleries which are not directly connected to the use of the property. A London Eye-esque building is OK, but art galleries, museums or restaurants with ancillary viewing platforms will need to re-consider their position.

The Supreme Court has ruled that members of the public overlooking and peering into neighbouring glass-walled flats is an actionable nuisance. This is likely to have a big impact on landowners who own properties with public spaces such as a viewing platform which is not obviously connected with the ordinary or typical use of the building and could cause substantial impact on the enjoyment of neighbouring premises. No ruling has yet been made on a remedy and whether Tate will need to close part of all of its viewing platform or if it will be required to pay damages to the neighbours.

The Supreme Court (by a majority) held that the Tate caused a nuisance by operating a viewing gallery at Tate Modern which enabled visitors to engage in viewing into neighbouring flats. This ruling makes clear that visual intrusion can be a nuisance. The fact that the neighbours should have known interference would have been possible when purchasing flats with floor to ceiling glass walls was not a defence to the nuisance.

dezeen

Tate Modern loses privacy feud with Neo Bankside residents over viewing platform

Lizzie Crook | 4 hours ago | 5 comments

Residents of the luxury Neo Bankside flats live as though they are "on display in a zoo" because of the Tate Modern's Herzog & de Meuron-designed extension, the supreme court has ruled.

A majority judgment by the supreme court has determined that the viewing gallery at the Tate's Switch House building invades the privacy of residents and prevents them from enjoying their homes in the RSHP-designed tower, located on the south bank of the Thames.

The ruling overturns both the high court in 2019 and the court of appeal's dismissal in 2022 of Neo Bankside residents' claims that the extension invades their privacy.

"Constant observation and photography"

These dismissals led the case to be taken up by the supreme court, which is the UK's highest court, which has today ruled in the residents' favour.

These dismissals led the case to be taken up by the supreme court, which is the UK's highest court, which has today ruled in the residents' favour.

According to supreme court judge Lord Leggatt, it is a "straightforward case of nuisance" due to "constant observation and photography" of the luxury flats by visitors to the museum.

"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," he continued.

"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," he added.

Residents of Neo Bankside (above) have won their privacy battle with the Tate

An extension to the Tate Modern gallery, Herzog & de Meuron's Switch House opened in 2016, four years after Neo Bankside completed in 2012.

Its outdoor public viewing balcony runs along the exterior of the extension's tenth floor, designed to provide visitors with a view over London, but also overlooks the flats.

The privacy battle, which began in 2017, involves five owners of four apartments in the Neo Bankside development, which is just 34 metres away from the viewpoint.

High court to determine solution

Today's win for the residents will require Tate Modern to respond, but the judgement does not specify a remedy. The case will now be returned to the high court to determine a solution, which could involve payment of damages or an injunction.

The dispute began in 2016 when claimants accused visitors to the Tate Modern of spying, before applying for an injunction requiring the gallery to cordon off parts of the platform or erect privacy screening.

Judges in the high court ruled against the flat owners, stating that residents should take their own measures to protect their privacy, leading it to be taken to the supreme court.

Read:
Neo Bankside residents lose battle to stop Tate Modern visitors looking into their flats

Tate Modern's former galleries director Nicholas Serota, who oversaw the Tate Modern's launch in 2000 and its subsequent £260 million extension, agreed with the previous judgements.

At the time, Serota said privacy could "be enhanced if those people decided that they might put up a blind or a net curtain or whatever, as is common in many places," reported the Guardian.

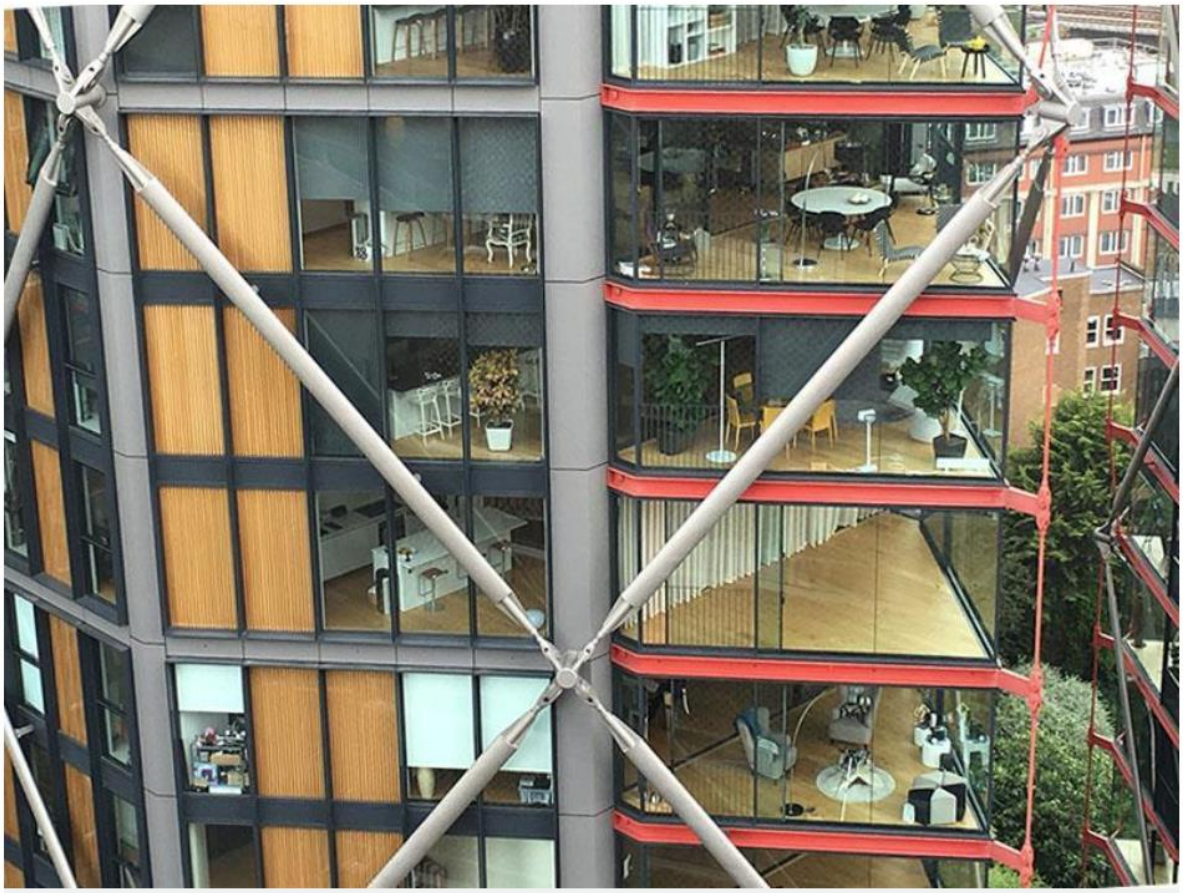
Commenting on the previous cases, Leggatt suggested in the judgement that this dismissal could have been due to "a reluctance to decide that the private rights of a few wealthy property owners should prevent the general public from enjoying an unrestricted view of London and a major national museum from providing public access to such a view".

In 2018, artist Max Siedentopf installed binoculars at the Tate Modern in response to the dispute, which allowed visitors to the art gallery to look directly into the Neo Bankside development.

Building Design.

Supreme Court backs Neo Bankside residents in Tate Modern challenge

By Jim Dunton | 1 February 2023



Residents of RSHP's Neo Bankside flats in Southwark have triumphed in their legal challenge over visitors to the Tate Modern gallery's Herzog & de Meuron-designed extension "snooping" into their high-end homes.

In a ruling handed down today, the Supreme Court said a 2019 High Court decision in the case was wrong and that the Court of Appeal had been wrong to uphold it the following year.

Residents of the Neo Bankside flats – which cost from £2m-£19m - had complained that visitors to the 10th floor viewing platform of Tate Modern's Blavatnik Building extension, previously known as Switch House, looked into their homes with binoculars and took pictures of them.

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FINANCIAL TIMES

Neo Bankside completed in 2012, four years before the Tate Modern extension opened to the public.

Visitor numbers to the viewing gallery are in the region of 500,000-600,000 a year. Residents said they wanted the Tate Board of Trustees to either close off part of the viewing area, or screen it to give greater privacy for their homes, which have floor-to-ceiling windows with views of the River Thames.

Source: Elizabeth Hopkirk

Neo Bankside flats overlooked by the Tate Modern viewing deck on the 10th floor of the Switch House

In its 2020 decision, the Court of Appeal said there was no precedent for overlooking by neighbours to constitute a "nuisance".

Overturning the previous decisions, the Supreme Court said that inviting members of the public to admire the view from a viewing platform was not a "common and ordinary" use of the Tate's land, even in the context of operating an art museum in a built-up area of south London.

It said the Tate was liable to the claimants for the nuisance caused, and sent the case back to the High Court for the remedy to be decided.

Natasha Rees, senior partner at law firm Forsters, is the lead lawyer advising the Neo Bankside claimants.

She said the residents were "both pleased and relieved" that the Supreme Court had found in their favour, six years after their claim began.

Source: Edmund Sumner
Neo Bankside by Rogers Stirk Harbour and Partners

"Lord Leggatt, giving the majority judgment, recognised how oppressive it can be to live 'under constant observation from the Tate's viewing gallery for much of the day, every day of the week... much like being on display in a zoo'," she said.

"Our clients now look forward to working with the Tate as valued neighbours to find a practical solution which protects all of their interests."

A spokesperson for Tate Modern thanked the Supreme Court for its "careful consideration" of the matter, but declined to comment further as the case has been referred back to the High Court and is ongoing.

PLANNING

Supreme Court rules that Tate's 'abnormal' viewing gallery a nuisance to overlooked residents

1 February 2023 by Court reporter and Toby Porter

The Supreme Court has ruled in a landmark case that residents of flats peered into by hundreds of thousands of visitors to a viewing platform at London's Tate Modern gallery suffered a legal "nuisance".

Tate Modern extension with, to the left, Neo Bankside. Image: Richard Chivers/View Pictures/Universal Images Group via Getty Images

Tate Modern's 10-storey high extension, called the Blavatnik Building, opened in 2016 and included a public viewing platform which at the time allowed an estimated 500-600,000 visitors a year to enjoy panamoric views over London.

The extension was, however, greeted with dismay by residents of a neighbouring, heavily-glazed, block of flats. Tate Modern visitors took to peering into their homes, some of them waving and even using binoculars. Many intrusive photographs had appeared on social media.

A number of flat owners in 2017 launched a ground-breaking common law nuisance claim against the Tate's board of trustees, seeking either damages or an injunction requiring them to prevent visitors from looking into their homes.

The residents' claim was, however, rejected by the High Court in early 2019 on the basis that the flat owners had exposed themselves to visual intrusion into their properties by choosing to live in flats with glass walls.

Their challenge to that decision also fell on fallow ground when the Court of Appeal ruled that "mere overlooking" cannot give rise to liability for nuisance.

Reversing that outcome by a majority today (1 February), the Supreme Court emphasised that ordinary people would consider that the near-constant observation of them going about their lives would amount to a substantial interference with the ordinary use and enjoyment of their homes.

Inviting many thousands of visitors to admire the view from the viewing platform was not a "common or ordinary" use of Tate Modern's land, even in the context of operating a world-renowned art gallery in a heavily built-up part of South London.

Given that the viewing gallery was an "abnormal and unexpected" use of the land, it was no answer for Tate Modern to argue that the residents would not have suffered a nuisance if their homes had been differently designed or constructed.

Arguments that it would be reasonable to expect the residents to protect themselves by putting up blinds or net curtains wrongly placed the responsibility on the victim to avoid the consequences of Tate Modern's abnormal use of its land.

The court accepted that flat owners cannot generally complain of nuisance merely because their properties are overlooked by another building, or because people on the top floor can see inside their homes.

However, the residents complaint was that members of the public are actively invited to look out from the viewing platform - from which they can, and do, peer into their flats - and that Tate Modern allowed this to continue, without interruption, for most of the day every day of the week.

There was no reason why constant visual intrusion of such a kind could not give rise to liability for nuisance. It was no defence for Tate Modern to assert that it was using its land reasonably in a way that was beneficial to the public.

On the facts of the case, the court concluded that the board of trustees is liable for the nuisance caused to residents. The case was remitted to the High Court for consideration of what remedy they should be granted.

Forsters lead partner, Natasha Rees, who was advising the residents of the block, Neo Bankside, said: "Our clients are both pleased and relieved that nearly six years after they began their claim the Supreme Court has now found in their favour. Lord Leggatt, giving the majority judgment, recognised how oppressive it can be to live “under constant observation from the Tate’s viewing gallery for much of the day, every day of the week... much like being on display in a zoo.” Our clients now look forward to working with the Tate as valued neighbours to find a practical solution which protects all of their interests."

Lisa Barge, partner and head of real estate dispute resolution at law firm Eversheds Sutherland: “The question of what remedy will be imposed is not yet decided. It remains to be seen whether the flat owners will receive an injunction which prevents use of the viewing platform at all, or imposes a number of mitigation criteria. It is also possible that the flat owners receive financial compensation instead.”

Adam Gross, Partner at law firm Fladgate said: "By a 3-2 majority, the Supreme Court held in the case of Fearn v Tate Trustees that operating a viewing gallery at Tate Modern was liable in nuisance to neighbouring flat owners.

"The key issue for developers on live and future projects, and building owners seeking to maximise on the profitability of the space in their building, is that visual intrusion can be a nuisance where the use of property is not common and ordinary. And it is not a defence in those circumstances to say the neighbours should simply erect blinds or curtains to protect their privacy, or that the flats went up after."

Fearn & Ors v Board of Trustees of the Tate Gallery. Case Number: [2023] UKSC 4

Law report: Visual intrusion from Tate Modern viewing gallery a nuisance

Monday February 06 2023, 12.01am, The Times

Supreme Court

Published February 6, 2023

Fearn and others v Board of Trustees of the Tate Gallery Before Lord Reed, Lord Lloyd-Jones, Lord Kitchin, Lord Sales and Lord Leggatt

[2023] UKSC

Judgment February 1, 2023

The Tate Modern art gallery was liable in nuisance to the owners of nearby flats, whose walls were made of glass, because the viewing and photography which took place from its tenth floor viewing gallery caused a substantial interference with the ordinary use and enjoyment of those flats.

The Supreme Court so held in allowing an appeal by the claimants, Giles Fearn, Gerald Kraftman, Ian McFadyen, Helen McFadyen and Lindsay Urquhart, leaseholders and occupiers of flats in Neo Bankside, London SE1, against the upholding by the Court of Appeal (Sir Terence Etherton, Master of the Rolls, Lord Justice Lewison and Lady Justice Rose) (The Times April 17, 2020; [2020] Ch 621) of the dismissal by Mr Justice Mann (The Times March 7, 2019; [2019] Ch 369) of their claim in nuisance against the defendant, the Board of Trustees of the Tate Gallery, in relation to its use of an exterior viewing gallery walkway around the tenth floor of an extension to the Tate Modern gallery.

Tom Weekes KC, **Jacob Dean** and **Richard Moules** for the claimants; **Guy Fetherstonhaugh KC**, **Aileen McColgan KC** and **Elizabeth Fitzgerald for** the defendant.

Lord Leggatt, with whom Lord Reed and Lord Lloyd-Jones agreed, said that the trial judge had held that intrusive viewing from a neighbouring property could in principle give rise to a claim for nuisance.

But he concluded that the intrusion experienced by the claimants did not amount to a nuisance because, in essence, the Tate's use of the viewing gallery was reasonable and the claimants were responsible for their own misfortune: first, because they had bought properties with glass walls and, second, because they could take remedial measures to protect their own privacy such as lowering their blinds or installing net curtains.

The Court of Appeal dismissed the claimants' appeal on the ground that "overlooking", no matter how oppressive, could not in law count as a nuisance.

In his lordship's opinion, on the facts found by the judge, the present case was a straightforward case of nuisance.

His Lordship suspected that what lay behind the rejection of the claim by the courts below was 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 that was a relevant consideration, however, its relevance was to the question of remedy and whether it was appropriate to prohibit the defendant's activity by granting an injunction: it could not justify permitting the defendant to infringe the claimants' rights without compensation.

To make good those conclusions, it was necessary to recall the relevant core principles of the common law of private nuisance.

The subject matter of private nuisance was wrongful interference with the claimant's enjoyment of rights over land. Because the interest protected was the use and enjoyment of land, only a person with a legal interest in the land could sue.

Generally, the required interest was a right to exclusive possession of the land. That requirement was satisfied by the claimants, who were the leasehold owners of their flats. The harm from which the law protected a claimant was diminution in the utility and amenity value of the land.

There was no conceptual or a priori limit to what could constitute a nuisance. Anything short of direct trespass on the claimant's land which materially interfered with the claimant's enjoyment of rights in land was capable of being a nuisance. The present case was concerned with the interference caused by people constantly looking in. It was 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.

The law of private nuisance was concerned with maintaining a balance between the conflicting rights of neighbouring landowners. Not every interference with a person's use and enjoyment of their land could be actionable as a nuisance. The first question which the court had to ask was whether the defendant's use of land had caused a "substantial" interference with the "ordinary" use of the claimant's land.

The interference with the use of the claimant's land had to exceed a minimum level of seriousness to justify the law's intervention. The test was objective. What amounted to a material or substantial interference was not judged by what the claimant found annoying or inconvenient but by the standards of an ordinary or average person in the claimant's position.

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

An occupier could not complain if the use interfered with was not an ordinary use and, even where the defendant's activity substantially interfered with the ordinary use and enjoyment of the claimant's land, it would not give rise to liability if the activity was itself no more than an ordinary use of the defendant's own land.

What was a "common and ordinary use of land" was to be judged having regard to the character of the locality.

Finally, it was not a defence to a claim for nuisance that the activity carried on by the defendant was of public benefit.

The application of those legal principles to the facts found by the judge was entirely straightforward.

The judge found that the living areas of the claimants' flats were under constant observation from the Tate's viewing gallery for much of the day, every day of the week; that the number of spectators was in the hundreds of thousands each year; and that spectators frequently took photographs of the interiors of the flats and sometimes posted them on social media.

It was 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 was beyond doubt that the viewing and photography which took place from the Tate's building caused a substantial interference with the ordinary use and enjoyment of the claimants' properties.

The judge characterised the locality in which the Tate Modern and the flats were situated as "a part of urban south London used for a mixture of residential, cultural, tourist and commercial purposes" and he noted that an occupier in that environment "can expect rather less privacy than perhaps a rural occupier might".

But he made no finding that there was any other viewing platform in that part of London; nor that operating a public viewing gallery was 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. It could not even be said to be a necessary or ordinary incident of operating an art museum.

The concepts of invasion of privacy and damage to interests in property were not mutually exclusive. However, the (sole) issue in the present case was whether the viewing and photography to which the claimants were subjected on a daily basis violated their rights to the use and enjoyment of their flats. No new privacy laws were needed to deal with that complaint. The general principles of the common law of nuisance were perfectly adequate to do so.

For the same reason, there was no need or justification for invoking human rights law when the common law had already developed tried and tested principles which determined when liability arose for the type of legal wrong of which the claimants complained. Accordingly, the Tate was liable to the claimants in nuisance. If the parties could not reach agreement, a remedy hearing would be required before a judge of the Chancery Division.

The matters on which the judge might choose to hear argument could include: (i) whether there was 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 might propose were sufficient to avoid an injunction or damages; (iii) the scope of any injunction; and (iv) questions of quantification of any award of damages.

Lord Sales, with whom Lord Kitchin agreed, gave a dissenting judgment saying that, although intense visual intrusion into someone's domestic property was capable of amounting to a nuisance, the judge had been entitled to make the assessment he did and there were no good grounds on which an appellate court could interfere with that assessment.

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