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CALIFORNIA LAWYERS ASSOCIATION
THE HONOURABLE SOCIETY OF THE INNER TEMPLE
TRANSATLANTIC DEMONSTRATION MOOT, 22 APRIL 2026

In the Mid-Atlantic Court of Appeal

Justices Coulson, Dias, Silver and Solner

On appeal from the High Court of Justice

Mrs Justice Over-Look

Between:

HOMEOWNERS FOR PRIVACY (H4P)

Appellants

and

ROOMS WITH A VIEW INC

Respondent

MOOT BUNDLE

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CASE SUMMARY

A New York developer, someone with political ambitions, trading as Rooms With a View Inc, acquires a large plot of land in Mayfair and has secured planning permission to build a multi-storey building consisting of very high-end apartments with floor to ceiling windows and balconies which he hopes to sell on long leases at elevated prices. In granting permission, the planning authority case officer specifically endorsed the “powerful addition of this scheme to the local high-level urban environment”. The immediate local area is predominantly residential.

That is not how the scheme has struck a group of 30 neighbouring homeowners, calling themselves ‘Homeowners for Privacy’ (“H4P”), all of whose properties (in an adjacent and similarly plush tower block) would be overlooked by the proposed development, and in particular its enclosed glazed balconies and fenestration. H4P issued proceedings at the High Court in London seeking an injunction to stop the construction proceeding.

At first instance, Mrs Justice Over-Look held as follows:

1. That the Tate Modern case is indistinguishable, in that the new building would overlook the neighbours, thus a strong *prima facie* case in common law nuisance was made out. However:
2. That an injunction would not issue because the neighbours can be adequately compensated in damages.

Both parties were dissatisfied with the decision and immediately sought permission to appeal to the Court of Appeal. A single Lord Justice determined the two applications on the papers and directed as follows:

1. That H4P be granted permission to appeal on the ground that Mrs Justice Over-Look was wrong not to grant the injunctive relief sought; and

2. That Rooms With a View Inc be granted permission to cross-appeal on the ground that Mrs Justice Over-Look should have summarily dismissed the common law claim in nuisance as unarguable on because the facts were materially different from those in the Tate Modern case.

CASE MANAGEMENT DIRECTIONS

The matter has been set down for a full hearing before four justices on Wednesday 22 April 2026 at Inner Temple. The following directions have been made.

1. The appeal and the cross-appeal are to be heard together.
2. The appeal will be heard first, with oral argument proceeding as follows:
 - i. Leading counsel for H4P (12 mins)
 - ii. Leading counsel for Rooms With a View Inc (15 mins)
 - iii. Reply from Leading counsel for H4P (3 mins)
3. The cross-appeal will follow immediately, and oral argument proceeding as follows:
 - i. Junior counsel for Rooms With a View Inc (12 mins)
 - ii. Junior counsel for H4P (15 mins)
 - iii. Reply from junior counsel for Rooms With a View Inc (3 mins)
4. Judgment will be pronounced upon the conclusion of oral argument, with no retirement.
5. On or before 28 February 2026, the parties are to agree the content of a paginated bundle of authorities, limited to a maximum of four cases per issue per party.
6. On or before 28 February 2026, the parties are to exchange bullet point outline submissions, referencing the bundle of authorities, limited to one page per party.

BENCH

The appeal will be heard by:

Rt Hon Lord Justice Peter Coulson
Mrs Justice Julia Dias
Judge Richard Silver
Judge Bonnie Goldstein

REPRESENTATION

Mr Guy Fetherstonhaugh KC and Ms Elizabeth Fitzgerald act for Homeowners for Privacy (H4P)

Mr Eric Anderson and Ms Ashlee Gustafson act for Rooms With a View Inc

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SUMMARY OF ARGUMENT FOR H4P

A. The appeal: the Judge was wrong not to grant the injunctive relief sought

1. Having found that there was likely to be an actionable and enduring nuisance to the Appellant's land were the Respondent's building to be allowed to proceed, the Judge should have decided that the primary remedy was the grant of an injunction restraining the nuisance, in the absence of any special features (per Lord Neuberger PSC in in Lawrence v Fen Tigers [2014] AC 822). This is because it is wrong in principle for the Respondent to use the Court to buy off an important property right, allowing the nuisance to continue in return for money compensation to the Appellant.

2. There were no special features in this case: compare Cooper v Ludgate House Ltd [2026] EWHC 484 (Ch), where the claimants did not act with despatch, and the defendant's building had been erected, fitted out and occupied by the time of the hearing, such that it would have been an enormous waste of resources to order its destruction.

3. The calculation of damages in lieu of an injunction is a complex and approximate business, and damages are a wholly unsuitable proxy remedy in this case.

B. The Cross-Appeal: the Judge was right to hold that the Tate Modern case is indistinguishable, in that the new building will overlook the neighbours, establishing a strong prima facie case in common law nuisance.

4. Tate established that the primary control device in the tort of nuisance is whether a use of land from which an alleged nuisance flows is an ordinary and common use.

5. It is neither ordinary nor common to allow land to be fitted with glazed balconies and floor to ceiling fenestration for the obvious purpose of permitting viewing, when the object of the view will surely include the Appellant's private property.

6. This is not speculative: it is obvious, and to await the actual commission of the nuisance will weaken the Appellant's case for an injunction.

Skeleton Argument: Rooms With a View Inc (Respondent/Cross-Appellant)

I. The Denial of a Permanent Injunction was a Proper Exercise of Judicial Discretion

- A. Discretionary Remedy:** Injunctions are extraordinary, discretionary remedies issued sparingly and only upon a clear showing that legal remedies are inadequate. The trial court's decision should not be disturbed on appeal absent a showing of a clear abuse of discretion.
- B. Adequate Remedy at Law:** If the appellants were to prove a nuisance exists upon completion, they have an adequate remedy at law (i.e. monetary damages) which serves as a sufficient substitute for an injunction.
- C. Balance of Equities:** Courts must balance the interests of both parties and the public at large. Precluding construction would cause immense, irreparable hardship to RWAV, while the public would be harmed by the loss of high-end housing and potential local economic benefits.

II. The Nuisance Claim is Premature and Speculative (Cross-Appeal)

- A. Requirement of Imminence:** A permanent injunction requires proof of imminent, irreparable injury. Anticipatory nuisance claims cannot be based on conjecture regarding future events.
- B. "Nuisance in Fact" vs. "Nuisance Per Se":** In the absence of a nuisance *per se*, courts will not enjoin a lawful business anticipatory to its operation. Claims must wait until the nuisance is actualized.
- C. Distinguishing *Fearn*:** Unlike the extreme surveillance-like intrusion in *Fearn*, the appellants' concerns here are generic. Overlooking is inherent in high-level urban environments, and appellants failed to provide strong evidence of actual injury.

Summary of Authorities

Case	Legal Principle Supported
<i>1717 Bissonnet, LLC v. Loughhead</i>	Balance of hardships favors developers; injunctions are inappropriate where homeowners have an adequate remedy in damages.

Case	Legal Principle Supported
<i>Fearn v. Board of Trustees of the Tate Gallery</i> [2023] UKSC 4	While establishing the possibility of nuisance by overlooking, it remains a high bar for "surveillance-like" intrusion not applicable to standard residential developments.
<i>Mendez v. Rancho Valencia Resort</i> 3 Cal.App.5th 248, 207 Cal.Rptr.3d 532 (Cal. App. 2016)	Confirms that trial court decisions regarding injunctions are held to a "sound discretion" standard and are rarely disturbed.
<i>Simpson v Kollasch</i> , 749 N.W.2d 671 (2008)	This standard is akin to our "clear and convincing evidence" standard. See King v. King , 291 N.W.2d 22, 24. However, the experts conceded they could not be certain a nuisance will necessarily result if General Development is allowed to develop and operate Sow 1 Court examined a variety of factors (Health, water, odor, property values) raised by the neighbors' experts raised legitimate concerns regarding the operation of the hog slaughter plant it did not rise to the necessary their testimony cast doubt on whether Sow 1 would cause a nuisance.
<i>Wallace v Andersonville Docks, Inc.</i> , 489 S.W.2d 532 (1972)	Courts will not grant an injunction merely to relieve fears or apprehensions of possible future injury; there must be a showing of actual or reasonably certain harm. Speculative harm is insufficient for injunctive relief. Courts require probable or imminent harm, not mere apprehension.
<i>Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.</i> , 114 So.2d 357 (Fla. Dist. Ct. App. 1959)	A landowner has no legal right to the free flow of light and air across adjoining land absent an easement. Courts often deny injunctions for view obstruction unless a property right (easement, covenant, or statute) exists

A

The Law Reports

Appeal Cases

B

Supreme Court

C

Fearn and others *v* Board of Trustees of the Tate Gallery

[2023] UKSC 4

2021 Dec 7, 8;

2023 Feb 1

Lord Reed PSC, Lord Lloyd-Jones,

Lord Kitchin, Lord Sales, Lord Leggatt JJSC

D

Nuisance — Cause of action — Visual intrusion — Art gallery’s public viewing platform allowing visitors to view interiors of neighbouring flats with glass walls — Public frequently taking photographs of interiors of flats and sometimes posting them on social media — Whether gallery liable in private nuisance — Whether intrusive viewing from neighbouring property capable of amounting to nuisance

E

The claimants owned flats in a development that was adjacent to an art gallery run by the defendant. The living areas of the flats, whose walls were constructed mainly of glass, were overlooked by an extension to the gallery, which contained a public viewing gallery offering panoramic views of London. The claimants brought a claim against the defendant in nuisance, contending that the defendant’s use of the viewing gallery unreasonably interfered with their enjoyment of their flats. The judge found that the living areas of the claimants’ flats were under constant observation from the viewing gallery for much of the day, that the number of visitors was in the hundreds of thousands each year and that the visitors frequently took photographs of the interiors of the flats and sometimes posted them on social media. However, despite holding that intrusive viewing from a neighbouring property could, in principle, give rise to a claim for nuisance, the judge concluded that the defendant was not liable in nuisance because its use of the viewing gallery was reasonable, in particular considering that the claimants’ flats were especially sensitive to visual intrusion and that the claimants could have taken remedial steps to protect their own privacy. The Court of Appeal dismissed the claimants’ appeal, holding that “mere overlooking” from one property to another was not capable of giving rise to a cause of action in nuisance.

G

On the claimants’ further appeal—

H

Held, allowing the appeal (Lord Kitchin and Lord Sales JJSC dissenting), that anything which materially interfered with the ordinary use and enjoyment of neighbouring land by a person with a legal interest in that land was capable of being a nuisance; that, to amount to a nuisance, the interference had to be substantial, judged not by what the claimant found annoying or inconvenient but by the standards of an ordinary person in the claimant’s position; that, further, a claimant could not complain if the activity objected to was no more than an ordinary use of the defendant’s land, which was to be judged having regard to the character of the locality; that, on the other hand, it was not a defence to an action for nuisance that

the defendant was only making reasonable use of its own land, nor that the activity carried on by the defendant was of public benefit, nor that the design or construction of the claimant's property made it abnormally sensitive to that activity, nor that the claimant could have taken remedial measures to avoid the adverse consequence of the defendant's activity; that although mere overlooking of a neighbouring property would not amount to a nuisance, visual intrusion, which was very different, could do so in appropriate circumstances; that, in the present case, the judge had applied the wrong legal test by asking whether the defendant, in operating the viewing gallery as it did, was making an unreasonable use of its land and had erred in having regard to the sensitivity of the claimants' flats and their failure to take remedial measures, and the Court of Appeal had erred in supposing that the claimants' claim was about overlooking; that, applying the correct principles to the facts found by the judge, (i) the viewing and photography which took place from the defendant's building caused a substantial interference with the ordinary use and enjoyment of the claimants' properties and (ii) operating a public viewing gallery as the defendant did was not an ordinary use of the defendant's land; that, therefore, the defendant was liable in nuisance to the claimants; and that, accordingly, the case would be remitted to the High Court to determine the appropriate remedy (post, paras 7, 9–12, 16–17, 20–27, 31, 34–35, 38, 47–50, 52, 65, 72, 88, 133).

Bamford v Turnley (1862) 3 B & S 66, *Sturges v Bridgman* (1879) 11 Ch D 852, CA, *Eastern and South African Telegraph Co Ltd v Cape Town Tramways Co Ltd* [1902] AC 381, PC, *Hunter v Canary Wharf Ltd* [1997] AC 655, HL(E), *Southwark London Borough Council v Tanner* [2001] 1 AC 1, HL(E) and *Lawrence v Fen Tigers Ltd* [2014] AC 822, SC(E) applied.

Cambridge Water Co v Eastern Counties Leather plc [1994] 2 AC 264, HL(E) considered.

Dicta of Buxton LJ in *Network Rail Infrastructure Ltd v Morris (trading as Soundstar Studio)* [2004] Env LR 41, paras 32, 35–36, CA disapproved.

Per Lord Reed PSC, Lord Lloyd-Jones and Lord Leggatt JJSC. (i) The possibility should not be ruled out that there could be extreme cases where the design or construction of a building is so unusual and far from anything that could actually be expected that it might give rise to a claim or defence to a claim in nuisance (post, para 76).

(ii) No new privacy laws are needed to deal with the claimants' complaint and there is no need or justification for invoking human rights law when the common law has already developed tried and tested principles which determine when liability arises for this type of legal wrong (post, paras 112–113).

(iii) In deciding whether one party's use of land has infringed another's rights, the public utility of the conflicting uses is not relevant. The public interest may sometimes justify awarding damages rather than granting an injunction to restrain the defendant's harmful activity, but it cannot justify denying the victim any remedy at all (post, paras 114, 119–122).

Per Lord Kitchin and Lord Sales JJSC (dissenting). Intense visual intrusion into someone's domestic property is capable of amounting to a nuisance. However, the factors to which the judge referred and to which he gave particular weight were relevant and he was entitled to make the assessment he did. There were no good grounds on which an appellate court could interfere with that assessment (post, paras 179, 279).

Decision of the Court of Appeal [2020] EWCA Civ 104; [2020] Ch 621; [2020] 2 WLR 1081; [2021] 1 All ER 60 reversed.

The following cases are referred to in the judgments:

Andreae v Selfridge & Co Ltd [1938] Ch 1; [1937] 3 All ER 255, CA
Attorney General v Cole & Son [1901] 1 Ch 205
Attorney General v Doughty (1752) 2 Ves Sen 453
Ball v Ray (1873) LR 8 Ch App 467, CA
Bamford v Turnley (1862) 3 B & S 66

- A *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525
Barr v Biffa Waste Services Ltd [2011] EWHC 1003 (TCC); [2011] 4 All ER 1065; [2012] EWCA Civ 312; [2013] QB 455; [2012] 3 WLR 795; [2012] PTSR 1527; [2012] 3 All ER 380, CA
Barratt Homes Ltd v Dŵr Cymru Cyfyngedig (No 2) [2013] EWCA Civ 233; [2013] 1 WLR 3486, CA
Barrow v Bankside Agency Ltd [1996] 1 WLR 257; [1996] 1 All ER 981, CA
- B *Bass v Gregory* (1890) 25 QBD 481
Bernstein of Leigh (Baron) v Skyviews & General Ltd [1978] QB 479; [1977] 3 WLR 136; [1977] 2 All ER 902
Biogen Inc v Medeva plc [1997] RPC 1, HL(E)
Bone v Seale [1975] 1 WLR 797; [1975] 1 All ER 787, CA
Brand v Hammersmith and City Railway Co (1867) LR 2 QB 223
Bridlington Relay Ltd v Yorkshire Electricity Board [1965] Ch 436; [1965] 2 WLR 349; [1965] 1 All ER 264
- C *Broder v Saillard* (1876) 2 Ch D 692
Brooker v Police [2007] NZSC 30; [2007] 3 NZLR 91
Cambridge Water Co v Eastern Counties Leather plc [1994] 2 AC 264; [1994] 2 WLR 53; [1994] 1 All ER 53, HL(E)
Chandler v Thompson (1811) 3 Camp 80
Cremidas v Fenton (1916) 111 NE 855
Crumph v Lambert (1867) LR 3 Eq 409
- D *Dalton v Henry Angus & Co* (1881) 6 App Cas 740, HL(E)
Delaware Mansions Ltd v Westminster City Council [2001] UKHL 55; [2002] 1 AC 321; [2001] 3 WLR 1007; [2001] 4 All ER 737, HL(E)
Donoghue v Stevenson [1932] AC 562, HL(Sc)
Eastern and South African Telegraph Co Ltd v Cape Town Tramways Co Ltd [1902] AC 381, PC
Fleming v Hislop (1886) 11 App Cas 686, HL(Sc)
- E *Foley v Harris* (1982) 286 SE 2d 186
Grayan Building Services Ltd, In re [1995] Ch 241; [1995] 3 WLR 1, CA
Guppys (Bridport) Ltd v Brookling (1983) 14 HLR 1, CA
Henderson v Henderson (1843) 3 Hare 100
Hirose Electrical UK Ltd v Peak Ingredients Ltd [2011] JPL 429; [2011] EWCA Civ 987; [2011] Env LR 34, CA
Hoare and Co v McAlpine [1923] 1 Ch 167
- F *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836; [2000] 2 WLR 1396; [2000] 2 All ER 705, CA
Hubbard v Pitt [1976] QB 142; [1975] 3 WLR 201; [1975] ICR 308; [1975] 3 All ER 1, CA
Hunter v Canary Wharf Ltd [1997] AC 655; [1997] 2 WLR 684; [1997] 2 All ER 426, HL(E)
Jolly v Kine [1907] AC 1, HL(E)
- G *Lawrence v Fen Tigers Ltd* [2014] UKSC 13; [2014] AC 822; [2014] 2 WLR 433; [2014] PTSR 384; [2014] 2 All ER 622, SC(E)
Laws v Florinplace Ltd [1981] 1 All ER 659
Lyons (J) & Sons v Wilkins [1899] 1 Ch 255, CA
Martin v Lavigne 2011 BCCA 104; 17 BCLR (5th) 132
Miller v Jackson [1977] QB 966; [1977] 3 WLR 20; [1977] 3 All ER 338, CA
Morris v Beardmore [1981] AC 446; [1980] 3 WLR 283; [1980] 2 All ER 753, HL(E)
- H *Network Rail Infrastructure Ltd (formerly Railtrack plc) v Morris (trading as Soundstar Studio)* [2004] EWCA Civ 172; [2004] Env LR 41, CA
Raciti v Hughes (1995) 7 BPR 14837
Read v J Lyons & Co Ltd [1947] AC 156; [1946] 2 All ER 471, HL(E)
Reinhardt v Mentasti (1889) 42 Ch D 685
Robinson v Kilvert (1889) 41 Ch D 88, CA

- Rylands v Fletcher* (1868) LR 3 HL 330, HL(E) A
Sainsbury's Supermarkets Ltd v Visa Europe Services LLC [2020] UKSC 24; [2020] Bus LR 1196; [2020] 4 All ER 807; [2021] 1 All ER (Comm) 283, SC(E)
St Helen's Smelting Co v Tipping (1865) 11 HL Cas 642, HL(E)
Sampson v Hodson-Pressinger [1981] 3 All ER 710, CA
Sedleigh-Denfield v O'Callaghan [1940] AC 880; [1940] 3 All ER 349, HL(E)
Semayne's Case (1604) 5 Co Rep 91a
Shelburne Inc v Crossan Corp'n (1923) 95 NJ Eq 188 B
Shelfer v City of London Electric Lighting Co [1895] 1 Ch 287, CA
Southwark London Borough Council v Tanner [2001] 1 AC 1; [1999] 3 WLR 939; [1999] 4 All ER 449, HL(E)
Sturges v Bridgman (1879) 11 Ch D 852, CA
Suzuki v Munroe 2009 BCSC 1403; 87 RPR (4th) 68
Tapling v Jones (1865) 20 CBNS 166; 11 HL Cas 290, HL(E)
Thompson-Schwab v Costaki [1956] 1 WLR 335; [1956] 1 All ER 652, CA C
Turner v Spooner (1861) 30 LJ (Ch) 801
Victoria Park Racing and Recreation Grounds Co Ltd v Taylor (1937) 58 CLR 479
Walter v Selfe (1851) 4 De G & Sm 315
Wasserman v Hall 2009 BCSC 1318; 87 RPR (4th) 184
Webster v Lord Advocate 1985 SC 173, Ct of Sess
Williams v Network Rail Infrastructure Ltd [2018] EWCA Civ 1514; [2019] QB 601; [2018] 3 WLR 1105, CA D

The following additional cases were cited in argument:

- Beaumont Business Centres Ltd v Floral Properties Ltd* [2020] EWHC 550 (Ch); [2020] EGLR 20
D v East Berkshire Community Health NHS Trust [2005] UKHL 23; [2005] 2 AC 373; [2005] 2 WLR 993; [2005] 2 All ER 443, HL(E)
Gómez v Spain (Application No 4143/02) (2004) 41 EHRR 40, ECtHR E
Hatton v United Kingdom (Application No 36022/97) (2003) 37 EHRR 28, ECtHR (GC)
JR38, In re [2015] UKSC 42; [2016] AC 1131; [2015] 3 WLR 155; [2015] 4 All ER 90, SC(NI)
Khorasandjian v Bush [1993] QB 727; [1993] 3 WLR 476; [1993] 3 All ER 669, CA
McKennitt v Ash [2006] EWCA Civ 1714; [2008] QB 73; [2007] 3 WLR 194, CA
Manchester City Council v Pinnock [2010] UKSC 45; [2011] 2 AC 104; [2010] 3 WLR 1441; [2011] PTSR 61; [2011] 1 All ER 285, SC(E) F
Murray v Express Newspapers plc [2008] EWCA Civ 446; [2009] Ch 481; [2008] 3 WLR 1360, CA
Wainwright v Home Office [2003] UKHL 53; [2004] 2 AC 406; [2003] 3 WLR 1137; [2003] 4 All ER 969, HL(E)

APPEAL from the Court of Appeal

By a claim form issued on 22 February 2017 the claimants, Giles Duncan Fearn, Gerald Kraftman, Ian McFadyen, Helen Claire McFadyen and Lindsay Urquhart, leaseholders and occupiers of flats in a development known as Neo Bankside, 50 Holland St, London SE1 9FU, brought claims in nuisance and under section 6 of the Human Rights Act 1998 for breach of their rights under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, relating to use by the defendant, the Board of Trustees of the Tate Gallery, of an exterior viewing gallery on the tenth floor of an extension to the Tate Modern gallery. In particular the claimants sought an injunction requiring the defendant to cordon off an identified area of the viewing gallery or to erect screening in order to prevent

A members of the public, or any other licensees, from observing their flats. By a judgment dated 12 February 2019 Mann J dismissed the claim [2019] EWHC 246 (Ch); [2019] Ch 369.

B By an appellant's notice filed on 4 March 2019 and with permission granted by the Court of Appeal (Rose LJ) the claimants appealed. By a judgment dated 12 February 2020 the Court of Appeal (Sir Terence Etherton MR, Lewison and Rose LJ) [2020] EWCA Civ 104; [2020] Ch 621 dismissed the appeal.

C With permission granted by the Supreme Court (Lord Lloyd-Jones, Lord Kitchin and Lord Leggatt JSC) on 4 November 2020 the claimants appealed. The issues for the Supreme Court, as set out in the parties' agreed statement of facts and issues, were: (1) did the common law cause of action for private nuisance provide a remedy in respect of the ways in which the viewing gallery was said to interfere with the use and enjoyment of the claimants' flats; (2) did public viewing from the viewing gallery constitute an unjustified interference with the claimants' rights under article 8 of the Human Rights Convention to respect for their private lives and their homes; (3) to give effect to rights conferred by article 8, should nuisance, in an appropriate case, be extended to such things as watching/observation/viewing/photographing/overlooking (and, more generally, other types of privacy invasion); (4) was the Court of Appeal right to say that Mann J's approach, in finding that the "remedial steps" which the claimants could have taken was relevant to the actionability of an interference with privacy, was contrary to principle; and (5) did any common law sensitivity principle applicable in cases of amenity nuisance apply where the "undue sensitivity" arose not from the claimants as individuals or from the activity undertaken in the property, but from the property itself, and, if so, was Mann J correct to hold that the claimants' claim should be dismissed on the ground that they occupied sensitive properties in sensitive ways.

E The facts are stated in the judgment of Lord Leggatt JSC, post, paras 1–6.

F *Tom Weekes KC, Jacob Dean and Richard Moules* (instructed by *Forsters LLP*) for the claimants.

G Since the 19th century, whether an activity is a nuisance turns on the application of the following three principles. First, malicious interference with a neighbour's enjoyment of land is automatically a nuisance. Secondly, "those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action": see *Bamford v Turnley* (1862) 3 B & S 66, 83.

H This is the key control mechanism for nuisance, the rule of give and take, of live and let live. "Necessary" does not mean that the land would be incapable of occupation without the act being done at all; its meaning is coloured by association with "the common and ordinary use and occupation of land and houses". It includes noise from a piano or children in a nursery (*Ball v Ray* (1873) LR 8 Ch App 467, 471), the sounds of everyday activities at a flat (*Southwark London Borough Council v Tanner* [2001] 1 AC 1, 21) and the right to build, alter or repair buildings (*Bamford v Turnley*, p 83 and *Hunter v Canary Wharf Ltd* [1997] AC 655, 720). Whether a building is used in a "common" or "ordinary" way is not dictated by the purpose for which it was designed to be used: see *Bamford v Turnley* and *Ball v Ray*, pp 469–470. "Conveniently done" means done with proper consideration

for the interests of neighbouring occupiers or in a way which shows as much consideration for the neighbours as can reasonably be expected: see *Southwark*, pp 16, 21. Thirdly, in all other cases, whether a landowner's activity is a nuisance turns simply on whether, having regard to the locality, the activity harms the amenity of his/her neighbour's land to a sufficient extent: see *Walter v Selfe* (1851) 4 De G & Sm 315, 322 and *J Lyons & Sons v Wilkins* [1899] 1 Ch 255, 271.

The Court of Appeal in the present case was wrong to hold that, as an exception to those basic and settled principles, there is a principle that, for the purpose of ascertaining whether an activity is a nuisance, any harm to the amenity of the claimant's land caused by visual intrusion must be disregarded. First, such a principle would be anomalous. The nature of the activity, and the way in which the activity harms the claimant, are immaterial. It would be surprising if, whilst tort protects against invasions of privacy generally, nuisance offered no protection whatsoever against invasions of privacy caused by visual intrusion. Secondly, there is virtually no support in the authorities for the Court of Appeal's supposed principle. No domestic case has recognised such a principle. The judgments most heavily relied upon by the Court of Appeal—the “right to light cases” (*Chandler v Thompson* (1811) 3 Camp 80, 82, *Turner v Spooner* (1861) 30 LJ (Ch) 801, 803 and *Tapling v Jones* (1865) 20 CBNS 166, 191) and the judgments of Latham CJ and Dixon J in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479—appear to have been based on the false proposition that the law does not protect privacy. Thirdly, on the contrary, the authorities strongly suggest that the principle does not exist and that an activity creating a visual intrusion can be a nuisance or, at least, contribute to something being a nuisance: see *Baron Bernstein of Leigh v Skyviews & General Ltd* [1978] QB 479, 489, *Victoria Park Racing and Raciti v Hughes* (1995) 7 BPR 14837. Fourthly, the supposed exclusionary principle would result in unjust outcomes. Defendants harming their neighbours by grossly unneighbourly conduct would be provided with a defence. Fifthly, in circumstances in which it is the will of Parliament (as expressed through the Human Rights Act 1998) that the courts should increase the domestic law's protection of rights under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms by developing the principles of nuisance, the courts should refuse to recognise an anomalous defence to a nuisance claim that a defendant has invaded privacy in a particular way. [Reference was made to *Gómez v Spain* (2004) 41 EHRH 40.]

The “right to light” cases are not authority for the principle that an activity causing visual intrusion is incapable of being a nuisance. They are simply authority for the proposition that creating a window overlooking neighbouring land is not a nuisance. Both the building work necessary to create a window, and the “ordinary” use of any room(s) accommodated by the window, are protected by the rule of give and take, live and let live: see Winfield, “Privacy” (1931) 47 LQR 23, 26–28. The rationale for excluding liability for harm to the amenity of land caused by buildings which interfere with light, air flow and prospect does not apply to activities such as operating a viewing gallery which causes or encourages the public to engage in viewing into neighbouring homes. The Court of Appeal's misunderstanding of these cases seems to have led to an unjustified fear that, unless the supposed

A exclusionary principle applied, the floodgates would open to undesirable or unmeritorious claims. The Canadian cases, in which filming neighbouring homes with CCTV has been held to be a nuisance whilst the “staring neighbour” claim failed, demonstrate how the absence of the supposed exclusionary principle does not result in any floodgates issue: see *Suzuki v Munroe* 2009 BCSC 1403, *Wasserman v Hall* 2009 BCSC 1318 and *Martin v Lavigne* (2011) 17 BCLR (5th) 132.

B The Court of Appeal was, however, correct to hold that Mann J’s reasons for dismissing the claims were mistaken. Mann J’s conclusion that there was a principle that a claimant cannot complain about harm to the amenity of his property caused by an activity to the extent that the harm arises from a feature of his property that he has, in some sense, chosen would produce obviously unjust outcomes. By buying flats with big windows, the claimants
C did not assume the risk of the harm that the flat would suffer from being subject to near-constant observation from a viewing gallery over and above the amenity harm that would be caused if the windows were smaller. The principle is inconsistent with the fact that it is no defence to a nuisance claim that the claimant has “come to the nuisance”: see *Laurence v Fen Tigers Ltd* [2014] AC 822, para 52. Mann J was also wrong to suggest that the
D defendant might have a defence on the ground that the claimants’ building is an “especially sensitive building”. First, the rationale for the principle about sensitive claimants or uses does not apply to buildings: see *Williams v Network Rail Infrastructure Ltd* [2019] QB 601, para 43. Secondly, as a result, it has been held or assumed on many occasions that the sensitivity principle does not apply to buildings: see *Sturges v Bridgman* (1879) 11 Ch D 852, *Hoare and Co v McAlpine* [1923] 1 Ch 167, 176 and *Southwark*
E [2001] 1 AC 1. Thirdly, Mann J’s reason for saying that, in relation to visual intrusion, the claimants’ building is an “especially sensitive building” is flawed; it is based on only one aspect, namely, its big windows. Having regard to the fact that it is situated a long way from other buildings, it is not especially sensitive to visual intrusion. Finally, a claimant is not required himself to remedy a defendant’s wrong by foregoing the right to enjoy his
F property to the full: see *Miller v Jackson* [1977] QB 966 and *Webster v Lord Advocate* 1985 SC 173, 181.

Guy Fetherstonhaugh KC, Aileen McColgan KC and Elizabeth Fitzgerald (instructed by *Herbert Smith Freehills LLP*) for the defendant.

Nuisance is a property tort: see *Hunter v Canary Wharf Ltd* [1997] AC 655, 723 (overruling in part *Khorasandjian v Bush* [1993] QB 727) and
G *Williams v Network Rail Infrastructure Ltd* [2019] QB 601, para 48. It involves an interference with a right or an amenity in land which the law recognises as a facet of the right of ownership or right to exclusive possession. The common law does not recognise any right of a landowner not to be overlooked and the law of nuisance does not protect against invasions of privacy created by overlooking. Nuisance is not directly concerned with harm to persons on the land, but rather with damage to the land: see Newark,
H “The Boundaries of Nuisance” (1949) 65 LQR 480, 481–482. It is not concerned to protect (other than indirectly) against privacy invasions, which are concerned with people (irrespective of their title to the land) rather than property interests. Thus in general only persons with exclusive possession have standing to sue: see *Hunter*, pp 688, 691–692. [Reference was also

made to Gearty, “The Place of Private Nuisance in a Modern Law of Torts” [1989] CLJ 214, 242.] A

Little is gained from focusing on the historical origins of nuisance, since it is difficult to derive any clear principle from the cases to which the claimants refer. There was, and still is, an inevitable conflict in a crowded city between (i) the desire for privacy and not to be overlooked by neighbouring properties and (ii) the need for houses to have windows for light and air: see Loengard, “Common Law and Custom: Windows, Light, and Privacy in Late Medieval England” (2012). Ultimately the practicalities of protecting rights to privacy, which left a neighbour without light, meant that the right to privacy became less important, “eventually vanishing entirely”: Loengard, p 298. It cannot be shown that the protection of privacy, particularly in the sense in which that concept is understood today, was part of the common law tort of nuisance. The Court of Appeal was right to note, at para 53, that there has been no reported case in this country in which a claimant has been successful in a nuisance claim for overlooking by a neighbour, but that there have been cases in which judges have decided and expressed the view that no such cause of action exists. B C

The law of nuisance does not regard privacy as a protected facet of land ownership: see *Chandler v Thompson* (1811) 3 Camp 80, *Turner v Spooner* (1861) 30 LJ (Ch) 801, 803 and *Tapling v Jones* (1865) 20 CBNS 166. Neither has English law traditionally recognised a right not to be overlooked, either as an incident of land or as an easement that could be acquired by prescription: see *Dalton v Henry Angus & Co* (1881) 6 App Cas 740, 764. Something more than mere watching/overlooking is required: see *Hubbard v Pitt* [1976] QB 142, 175, 177. The law does not provide a remedy for every annoyance to a neighbour: there is no natural right to a view from a property, and such a right cannot be acquired as an easement: see *Dalton*, p 824. Just as the view out cannot be guaranteed or protected (save by introducing the protection of contract), neither can the absence of the view in. The law does not protect from prying eyes. The interference alleged by the claimants cannot properly be regarded as damage to a property interest. Interference with the use and utility of land is a broad concept, but nevertheless one which has its limits. The tort does not intrinsically protect against conduct which diminishes the market value of property: see *Williams* [2019] QB 601, paras 46–51. The fact that a privacy violation happens in a person’s home ought not to be the feature that makes the harm a potential nuisance. To seek to use the tort of nuisance to protect the amenity of the occupiers of the land, and not the land itself, is contrary to the fundamental tenet of the cause of action in nuisance. The courts have so far refused to formulate a general principle of “invasion of privacy”: see *Wainwright v Home Office* [2004] 2 AC 406, paras 18–19. In finding that an interference with privacy is not actionable in private nuisance, the Court of Appeal confirmed the general understanding of the position prior to the decision of Mann J: see Professor Nolan, “Nuisance and Privacy” (2021) 137 LQR 1. English law should not be changed so as to create such a right, because existing controls suffice: see *Hunter* [1997] AC 655, 710. In general terms, the law deals with overlooking through planning rather than by private law. A deliberate attempt to snoop and record neighbours’ actions on video tape is now likely to breach data protection legislation; while a deliberate course H

- A of surveillance over a period of time would be likely to breach the Protection from Harassment Act 1997. If there is an arguable case for changing the law, the implications and uncertainties are such that it should be left to Parliament. [Reference was made to *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525 and *Manchester City Council v Pinnock* [2011] 2 AC 104.]
- B The claimants' assertion that privacy is an aspect of the amenity of land protected by nuisance is not supported by any of the cases they cite. The claimants also refer to the law in Canada to support the proposition that the law of nuisance does not refuse to protect against invasions of privacy caused by overlooking but, in five Canadian provinces, legislation has been enacted making it a tort, actionable without proof of damage, for a person wilfully and without a claim of right to violate the privacy of another. In
- C *Wasserman v Hall* 2009 BCSC 1318 a statutory tort was found to have been committed; the question of whether there was nuisance was only briefly addressed. The decision in *Suzuki v Munroe* 2009 BCSC 1403 would have been accommodated in this jurisdiction under the existing laws relating to privacy, without needing any manipulation of the tort of nuisance. In
- D *Martin v Lavigne* (2011) 17 BCLR (5th) 132 the claim in nuisance, based on "staring", was held to be a trivial complaint and an appeal was dismissed. The jurisprudence in Australia to which the claimants refer is still less compelling. The decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 is to precisely the same effect as the English jurisprudence: overlooking does not engage the law of nuisance. In
- E *Raciti v Hughes* (1995) 7 BPR 14837 the same result could have been reached without resorting to the law of nuisance.
- F The claimants' submission that nuisance turns on the application of only three principles undermines the more general concept of reasonableness, which permeates the law of private nuisance. The "reasonable user test" has developed to establish whether an interference surmounts the threshold necessary to give rise to an action in nuisance: see *Barr v Biffa Waste Services Ltd* [2013] QB 455, para 72 and *Lawrence v Fen Tigers Ltd* [2014] AC 822,
- G para 179. It is the interference with the claimant that must be unreasonable, rather than the conduct of the defendant. However, the state of mind of the defendant might be relevant to the question of the social utility of the defendant's behaviour in causing an interference, which is relevant when addressing the question of the sensitivity of the claimant to a putative nuisance. Actions which might otherwise be justified on grounds of reciprocity will therefore not be regarded as "reasonable" if they are done
- H maliciously. More broadly, the law of private nuisance is concerned to preserve a balance between the conflicting interests of neighbouring landowners: see *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 903 and *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, 299. An interference will be unreasonable if it creates discomfort in excess of that which an ordinary person could reasonably be expected to put up with: see *Barr v Biffa Waste Services Ltd* [2013] QB 455, para 74. [Reference was also made to *Beaumont Business Centres Ltd v Floral Properties Ltd* [2020] EGLR 20.]

In any event, the decision of the Court of Appeal should be upheld on additional grounds, namely that a claim in nuisance could not be sustained

in this case by reason of the facts found by Mann J: i.e. that the claimants occupy particularly sensitive property in a sensitive way and invite the overlooking by failing to take the obvious, inexpensive, reasonable and non-intrusive measures to protect their privacy which are available to them. Further, there has been no finding that the defendant's use of its land is other than a necessary and common and ordinary use, or that such use is not reasonable having regard to the claimants' interests.

McColgan KC following.

The English law of nuisance should not be changed to accommodate the human right to privacy. The question whether public viewing from the viewing gallery infringes the claimants' rights under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms requires a fact-sensitive evaluation such as that carried out by Mann J, who concluded that there had been no such breach. Mann J clearly directed himself in accordance with the dicta in *In re JR38* [2016] AC 1131 that the question whether there was such an expectation was objective and had to be approached broadly. Section 6 of the Human Rights Act 1998 imposes an obligation on the courts to develop the common law consistently with the Convention. But it does not create the obligation to treat a Convention right as a property right, or to distort the boundaries of a tort. The change which the claimants seek to impose on the tort of nuisance cannot be described as incremental; rather it would require a conceptual decoupling of the tort of private nuisance from its fundamental concern with remedying wrongs to real property rights and would, further, give rise to the practical problems identified by the Court of Appeal at paras 92–94 of their judgment. It is clear from *Hatton v United Kingdom* (2003) 37 EHRR 28 that the ability of the claimants to avoid, ameliorate or remove the impact of the alleged interference is key to whether there has been a breach of article 8. The claimants are, further, wrong to suggest that this position is inconsistent with *Murray v Express Newspapers plc* [2009] Ch 481: see para 38 of the Court of Appeal's judgment in *Murray*. [Reference was also made to *McKennitt v Ash* [2008] QB 73 and *D v East Berkshire Community Health NHS Trust* [2005] 2 AC 373.]

Weekes KC replied.

The court took time for consideration.

1 February 2023. The following judgments were handed down.

LORD LEGGATT JSC (with whom **LORD REED PSC** and **LORD LLOYD-JONES JSC** agreed)

A. Introduction

1 On the top floor of the Blavatnik Building, which is part of the Tate Modern art museum on Bankside in London, there is a public viewing gallery. It is a popular visitor attraction. From the viewing gallery visitors can enjoy 360-degree panoramic views of London. When the claim was brought, about 5½ million people were visiting the Tate Modern each year and, of them, several hundred thousand (between 500,000 and 600,000 on one estimate) visited the viewing gallery, with a limit of 300 people at any

A one time. Entry to the museum and the viewing gallery is free but the top floor of the Blavatnik Building is also available to hire for external events. Such events are very important financially to the Tate Modern because they bring in significant income.

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

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

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

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

6 On appeal, the Court of Appeal (Sir Terence Etherton MR, Lewison and Rose LJ) found that the judge’s reasoning involved material errors of

law and that, if the principles of common law nuisance are correctly applied to the facts of this case, the claim should succeed. Nevertheless, they dismissed the appeal. They did so on the ground that “overlooking”, no matter how oppressive, cannot in law count as a nuisance. By way of cold comfort to the claimants, they explained that “even in modern times the law does not always provide a remedy for every annoyance to a neighbour, however considerable that annoyance may be”: [2020] Ch 621, para 79.

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

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

B. Core principles of private nuisance

(1) The scope of private nuisance

9 In his classic article “The Boundaries of Nuisance” (1949) 65 LQR 480, 489 Professor Francis Newark described private nuisance as a “tort to land”—by which he meant that its subject matter is wrongful interference with the claimant’s enjoyment of rights over land. He declared his willingness “in the spirit of the old reformers” to nail the following thesis to the doors of the Law Courts and defend it against all comers: “The term ‘nuisance’ is properly applied only to such actionable user of land as interferes with the enjoyment by the plaintiff of rights in land.” As generally in the law of property, the legal concept of land includes here not only the earth itself but also buildings and other things which are physically attached to it and rights, for example easements, which attach in law to the land.

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

11 It follows from the nature of the tort of private nuisance that the harm from which the law protects a claimant is diminution in the utility and amenity value of the claimant’s land, and not personal discomfort to the

A persons who are occupying it: see e.g. *Hunter*, p 696B–D (Lord Lloyd), pp 705G–707C (Lord Hoffmann), pp 724F–725A (Lord Hope); *Williams v Network Rail Infrastructure Ltd* [2019] QB 601, para 43. As Professor Newark put it in his article, at pp 488–489:

B “the interest of the plaintiff which is invaded is not the interest of bodily security but the interest of liberty to exercise rights over land in the amplest manner. A sulphurous chimney in a residential area is not a nuisance because it makes householders cough and splutter but because it prevents them taking their ease in their gardens.”

(2) *Nuisance can be caused by any means*

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

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

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

have long been engaged in the application of certain basic legal concepts to a never-ending variety of circumstances . . .” A

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

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

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

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

(3) “Unreasonable” interference

18 At a general level, the law of private nuisance is concerned with maintaining a balance between the conflicting rights of neighbouring landowners—“between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with”: *Sedleigh-Denfield v O’Callaghan* [1940] AC 880, 903 (Lord Wright). It is evident that, if such a balance is to be maintained, not every interference H

A with a person's use and enjoyment of their land can be actionable as a nuisance. It is sometimes said, as if it were a governing principle, that to give rise to liability the interference must be "unreasonable". However, the term "unreasonable" in this statement has no explanatory power: see in particular Allan Beever, *The Law of Private Nuisance* (2013), p 10 ("It is presented as an explanation of the operation of the law, but it does not, cannot, explain anything"). The requirement that the interference must be "unreasonable" is just another way of saying that—as it is also put—the interference must be "unlawful" (see eg *Winfield and Jolowicz on Tort*, 20th ed (2020), para 15-010, and the cases there cited); or that to give rise to liability an activity must "unduly" interfere with a person's use or enjoyment of land (see eg *Clerk & Lindsell on Torts*, 23rd ed (2020), para 19-01; *Lawrence v Fen Tigers Ltd* [2014] AC 822, para 3, per Lord Neuberger of Abbotsbury PSC).

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

D 20 In their judgment in this case the Court of Appeal rightly emphasised that liability for private nuisance "does not turn on some overriding and free-ranging assessment by the court of the respective reasonableness of each party in the light of all the facts and circumstances", and that the requirements of the common law as to what a claimant must prove, and what will constitute a good defence, "themselves represent in the round the law's assessment of what is and is not unreasonable conduct sufficient to give rise to a legal remedy": [2020] Ch 621, para 38. Provided this is understood, no harm is done in using the language of "reasonableness". The risk of this form of expression, however, is that it might be mistaken for an actual test for determining liability, albeit one that is entirely open-ended and lacking in content. On occasion the best the law can do is to ask an impartial judge to decide what he or she intuitively feels is reasonable or right between the parties in all the circumstances of the case. But the common law aspires to be more principled than this. As I will describe, there are principles, settled since the 19th century, which run through the cases and govern whether interference with the use and enjoyment of land is "unlawful" or "undue" or (if the term is to be used) "unreasonable". These principles are not formulae or mechanical rules. They involve judgment in their application. But they provide clear standards rooted in values of reciprocity and equal justice.

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

H (4) *The interference must be substantial*

22 Courts have adopted varying phraseology to express the point that the interference with the use of the claimant's land must exceed a minimum level of seriousness to justify the law's intervention. The terms "real", "substantial", "material" and "significant" have all been used. Put the other

way round, the courts will not entertain claims for minor annoyances. As Lord Wensleydale said in *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642, 653–654: “the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected.”

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

(5) *The ordinary use of land*

24 Fundamental to the common law of private nuisance is the priority accorded to the general and ordinary use of land over more particular and uncommon uses. In *Fleming v Hislop* (1886) 11 App Cas 686, 691, the Earl of Selborne encapsulated this well when he defined a nuisance as “what causes material discomfort and annoyance *for the ordinary purposes of life* to a man's house or to his property” (emphasis added). In the earlier case of *Ball v Ray* (1873) LR 8 Ch App 467, 470, the same judge, when Lord Chancellor, had expressed the converse proposition that:

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

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

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

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

25 One aspect of this core principle is that an occupier cannot complain if the use interfered with is not an ordinary use. In *Robinson v Kilvert* (1889) 41 ChD 88 the claimant rented a warehouse in which he stored a particularly delicate and sensitive type of paper. Heat rising from the defendant's cellar underneath the warehouse floor damaged the paper

A although it would not have affected ordinary paper and was not sufficient to interfere with “the ordinary use of property for the purposes of residence or business” (p 94). The Court of Appeal held that the defendant was not liable in nuisance. Cotton LJ, at p 94, rejected the notion that something can be a nuisance “because it does harm to some particular trade in the adjoining property, although it would not prejudicially affect any ordinary trade carried on there, and does not interfere with the ordinary enjoyment of life”.
B As Lord Robertson said, giving the judgment of the Privy Council in *Eastern and South African Telegraph Co Ltd v Cape Town Tramways Co Ltd* [1902] AC 381, 393: “A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure.”

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

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

F “There must be, then, some principle on which such cases must be excepted. It seems to me that that principle may be deduced from the character of these cases, and is this, viz, that *those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action.*” (Emphasis added.)

Bramwell B justified this principle in the following way:

G “There is an obvious necessity for such a principle as I have mentioned. It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbour’s land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live.”

H 28 Subsequent cases have shown that this justification is not limited, as Bramwell B suggested, to situations where the reciprocal nuisances “are of a comparatively trifling character”. The rule of “give and take, live and let live” applies wherever a nuisance results from the ordinary use of land. In *Southwark London Borough Council v Tanner* [2001] 1 AC 1 adjoining flats

had been built without sound insulation, with the result that, as described by Lord Hoffmann at p 7: A

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

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

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

“Reasonable user”

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

“although liability for nuisance has generally been regarded as strict, . . . [it] has been kept under control by the principle of reasonable user—the principle of give and take as between neighbouring occupiers of land, under which ‘those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action’: see *Bamford v Turnley* (1862) 3 B & S 66, 83, per Bramwell B. The effect is that, if the user is reasonable, the defendant will not be liable for consequent harm to his neighbour’s enjoyment of his land; but if the user is not reasonable, the defendant will be liable, even though he may have exercised reasonable care and skill to avoid it.” E
F

It can be seen that in this passage Lord Goff was expressly endorsing the principle formulated by Bramwell B in *Bamford v Turnley* and was using the phrase “reasonable user” as a shorthand for this principle, under which “those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action”. Unfortunately, this point has sometimes been overlooked and these remarks treated as if Lord Goff had been suggesting that the applicable test is one of the “reasonableness” of the defendant’s use of land in a general, undefined sense. The misunderstanding is ironic, as the very issue decided in *Bamford v Turnley* was that it is not a defence to liability that the defendant’s use of his land is reasonable. G
H

30 The complaint in *Bamford v Turnley* 3 B & S 66 was that “the brick-kilns of the defendant, by immitting corrupted air upon the plaintiff’s

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

31 The point that it is no answer to a claim for nuisance to say that the defendant is using its land reasonably has been reiterated in many later cases: see e.g. *Broder v Saillard* 2 ChD 692, 701; *Reinhardt v Mentasti* (1889) 42 ChD 685, 690; *Attorney General v Cole & Son* [1901] 1 Ch 205; *Southwark London Borough Council v Tanner* [2001] 1 AC 1, 20; *Barr v Biffa Waste Services Ltd* [2013] QB 455, paras 60–72; and see also Allan Beever, *The Law of Private Nuisance*, pp 9–13. In *Southwark* Lord Millett (with whom Lord Slynn, Lord Steyn and Lord Clyde agreed) addressed directly Lord Goff’s description in *Cambridge Water* of Bramwell B’s principle as “the principle of reasonable user”, saying, at p 20: “The use of the word ‘reasonable’ in this context is apt to be misunderstood. It is no answer to an action for nuisance to say that the defendant is only making reasonable use of his land.” Lord Millett went on to reiterate that the principle which limits the liability of a landowner who causes a sensible interference with his neighbour’s enjoyment of his property is that stated by Bramwell B in *Bamford v Turnley*, and that where the two conditions of that test are satisfied, no action will lie against the landowner “for that substantial interference with the use and enjoyment of his neighbour’s land that would otherwise have been an actionable nuisance” (p 21).

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

“Reasonable user has been equated to the principle of ‘give and take’ . . . Although that principle was originally said *not* to arise in cases where the use was ‘not unnatural nor unusual but not the common and ordinary use of land’ (see *Bamford v Turnley*), the modern law of nuisance focuses on whether, in all the circumstances, the user is reasonable, and ‘give and take’ will usually be an element of that

assessment, regardless of whether the use of the land could be said to be common or not . . .”

33 In allowing the claimants’ appeal, the Court of Appeal firmly rejected this view of the law, describing it as “unsupported by authority, and misconceived”: see [2013] QB 455, paras 60–72. Carnwath LJ (with whom the other members of the court agreed) discussed the concept of “reasonable user” at some length, observing (at para 46) that the phrase “reasonable user” is “at most a different way of describing old principles, not an excuse for re-inventing them”. He pointed out that in *Cambridge Water* Lord Goff was not seeking to redefine the ordinary law of nuisance but rather was citing the well-established principles formulated by Bramwell B in *Bamford v Turnley* (para 65) and was using the phrase “reasonable user” “as no more than a shorthand for the traditional common law tests” (para 71). He referred to Lord Millett’s comments in *Southwark* on Lord Goff’s use of the expression and noted that Lord Millett’s own summary of Bramwell B’s principles did not use a test of reasonableness. Carnwath LJ reiterated that “reasonable user” “should be judged by the well settled tests” formulated by Bramwell B (para 72). That is an important reminder, which I would endorse.

Reciprocity

34 The underlying justification for those “well settled tests” was spelt out by Lord Millett in *Southwark* [2001] 1 AC 1, when he explained (at p 20) that: “The governing principle is good neighbourliness, and this involves reciprocity. A landowner must show the same consideration for his neighbour as he would expect his neighbour to show for him.” This explanation gets to the nub of the rule of “give and take, live and let live” stated by Bramwell B in *Bamford v Turnley*. It is a principle of equal justice, a form of the golden rule that you should “do as you would be done by”. Put negatively, people cannot fairly demand of others behaviour which they would not at the same time allow others to demand of them. See further Ernest J Weinrib, *The Idea of Private Law* (2012), pp 190–194; C Essert, “Nuisance and the Normative Boundaries of Ownership” 52 *Tulsa L Rev* 85, 103–106.

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

The freedom to build

36 I have mentioned already that in *Hunter v Canary Wharf Ltd* [1997] AC 655 the House of Lords confirmed that only a person with an interest in the affected land may sue for nuisance. A second issue raised on that appeal

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

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

(6) The locality principle

- 38 It is also well settled that what is a "common and ordinary use of land" is to be judged having regard to the character of the locality. In *Sturges*
- F *v Bridgman* (1879) 11 Ch D 852, 865, Thesiger LJ giving the judgment of the Court of Appeal expressed this in a famous statement that "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey". In saying this, he was not, as is sometimes mistakenly supposed, suggesting that inhabitants of an upmarket neighbourhood are entitled to greater legal protection than those of a poorer neighbourhood—an approach which
- G would be entirely contrary to equal justice. The facts were that Dr Sturges, a physician living in Wimpole Street in London, built a consulting room at the end of his back garden. On the other side of the party wall from the new consulting room was the kitchen of the defendant, Mr Bridgman, who carried on business as a confectioner. Mr Bridgman had in his kitchen two large mortars set in brickwork built up against the party wall and worked by
- H two large pestles held upright by horizontal bearers attached to the wall. Dr Sturges complained that, when the pestles and mortars were used, noise and vibrations caused serious disturbance.

39 At the trial Sir George Jessel MR found the evidence of nuisance clear and "all one way" (p 855). The principal defence was that the defendant had acquired a prescriptive right to continue using the pestles and

mortars as a result of having done so without interruption for more than 20 years. The judge and the Court of Appeal rejected this argument. The principle on which such a right can be acquired is that the other party has acquiesced in a wrong for the prescribed period of time. In this case no such acquiescence could be inferred as the use of the pestles and mortars only became a nuisance and thus an actionable wrong when the consulting room was built.

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

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

41 The fact that the claim in *Sturges v Bridgman* succeeded reflects the fact that in 1873, when Dr Sturges built his consulting room, it could not be said that the locality was one devoted to manufacture, as Wimpole Street was primarily residential, with professionals, including many members of the medical profession like Dr Sturges, conducting business from their homes: see AWB Simpson, “The Story of *Sturges v Bridgman*: The Resolution of Land Use Disputes between Neighbors” in G Korngold and A Morriss (eds), *Property Stories* (2004), p 9.

(7) *Coming to a nuisance is no defence*

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

A those reasons shed further light on the principles which underpin the law of nuisance. The rationale for the approach taken by the common law can be seen by comparing the alternatives.

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

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

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

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

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

46 The general rule that coming to a nuisance is not a defence was confirmed by the Supreme Court in *Lawrence v Fen Tigers Ltd* [2014] AC 822. There is discussion (obiter) in the judgments of Lord Neuberger PSC and Lord Carnwath JSC in that case of the possibility that a use of the defendant's land which pre-dates a change in use of the claimant's land may nevertheless support a defence by contributing to the character of the locality. The points discussed may in future need to be revisited but do not arise for decision on this appeal.

(8) *The public interest*

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

C. Applying the law in this case

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

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

50 The judge characterised the locality in which the Tate Modern and the Neo Bankside flats are situated as “a part of urban south London used for a mixture of residential, cultural, tourist and commercial purposes”. He noted that an occupier in that environment “can expect rather less privacy than perhaps a rural occupier might” and that “Anyone who lives in an inner

A city can expect to live quite cheek by jowl with neighbours”: para 190. But he made no finding that there is any other viewing platform in that part of London; nor that operating a public viewing gallery is necessary for the common and ordinary use and occupation of the Tate’s land. The Tate did not make, and could not credibly have made, any such allegation. Inviting members of the public to look out from a viewing gallery is manifestly a very particular and exceptional use of land. It cannot even be said to be a necessary or ordinary incident of operating an art museum. Hence, the Tate cannot rely on the principle of give and take and argue that it seeks no more toleration from its neighbours for its activities than they would expect the Tate to show for them.

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

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

F D. The judge’s reasons

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

G (1) “Reasonable use” of the Tate’s land

54 First, the judge applied the wrong legal test by framing the question he had to decide as “whether the Tate Modern, in operating the viewing gallery as it does, is making an unreasonable use of its land”. The judge thought that this required an overall assessment bearing in mind the nature of the Tate’s use of its land, the character of the locality and “bearing in mind that the victim is expected to have to put up with some give and take appropriate to modern society and the locale”: [2019] Ch 369, para 180. The judge thus made the same mistake, or cluster of mistakes, as the trial judge in *Barr v Biffa Waste Services Ltd* [2011] 4 All ER 1065 (see paras 32–33 above), a case that unfortunately does not appear to have been cited to him. He thought that an overall assessment was required of what—in an undefined

sense—is “reasonable” in all the circumstances. He treated the rule of give and take as if it were an element of such an assessment of “reasonableness” rather than a principle of reciprocity and equal justice. And he asked himself whether the nature of the Tate’s use of its land is “reasonable”, instead of asking whether it is a common and ordinary use.

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

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

(2) “Sensitive” buildings

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

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

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

A The “winter gardens”

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

Relevance of the glassed design

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

D Sensitivity to the ordinary use of neighbouring land

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

G 63 Suppose, for example, that on the site of the Blavatnik Building another block of flats of similar height had been erected. In such circumstances the fact that the occupants of these new flats could see straight into the claimants’ living accommodation might have caused the claimants annoyance. But if the occupants of the new flats were doing no more than making normal use of their own homes and showing as much consideration for their neighbours as they could reasonably expect their neighbours to show for them, the claimants could not have complained of nuisance. Such a situation would be analogous to the facts of *Southwark* [2001] 1 AC 1, where the claimants had to put up with noise incidental to the ordinary use and occupation of neighbouring flats despite the considerable annoyance resulting from the fact that the flats had been built without adequate sound

insulation. In the same way, in accordance with the principle of reciprocity, each flat owner in my example would have to put up with being visible to her neighbour just as her neighbour would have to put up with being visible to her. It would be required by the rule of give and take, live and let live.

64 *Hirose Electrical UK Ltd v Peak Ingredients Ltd* [2011] JPL 429, on which counsel for the Tate relied, further illustrates this point. The parties in that case occupied adjacent premises on a light industrial estate. The claimant complained of food smells entering its offices (owing to the porous nature of the party wall) from the food additive manufacturing unit next door. The deputy judge found that, having regard to the nature of the locality, the degree of interference was insufficient to amount to a nuisance. This was sufficient reason in itself to dismiss the claim. But relevantly for present purposes the judge also found that the defendant was making an ordinary use of its industrial premises and was not conducting its operations in an unreasonable manner. Hence, by analogy with the *Southwark* case, the defendant was in any case not liable. The Court of Appeal affirmed these findings: [2011] Env LR 34. This is another example, therefore, of a case where the rule of give and take applied.

Sensitivity to abnormal use

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

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

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

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

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

C 69 This reflects the basic right of a person at common law, discussed earlier, to occupy and build on their land as they choose. The right applies equally to claimants and defendants. I have referred to the general rule, affirmed by the House of Lords in *Hunter v Canary Wharf Ltd* [1997] AC 655, that interference with the use of land caused by the presence or construction or design of a building on the defendant’s land is not actionable as a nuisance (see para 35 above). By the same token, it is not a defence for a defendant to argue that the interference was caused by the presence or construction or design of the claimant’s building. So in *Sturges v Bridgman* 11 Ch D 852, for example, the fact that no nuisance arose until Dr Sturges’ consulting room was erected did not afford a defence to the claim. Nor did it afford a defence that, as Mr Bridgman argued, if Dr Sturges had built his consulting room with a separate wall and not directly against the party wall, he would not have experienced any noise or vibration (see p 854). The same point could be made about countless other cases of nuisance. It is not a defence that the defendant’s activity would not have caused a nuisance if the claimant’s building had been differently constructed or designed.

F 70 Counsel for the Tate sought to draw support from *Southwark* [2001] 1 AC 1 and *Hirose* [2011] JPL 429, mentioned above. Adopting the view expressed by the authors of *Winfield and Jolowicz on Tort*, 20th ed, para 15-031, counsel submitted that the best explanation for the decision in *Southwark* is that the claim failed because the claimants’ flats were abnormally sensitive to noise. Similarly, they submitted that the decision in *Hirose* should be explained on the ground that the physical attributes of the party wall made the claimant’s property abnormally sensitive to the odours generated in the adjoining unit. These cases were thus said to support a principle that it may be a defence that the claimant is occupying an abnormally sensitive property.

H 71 However, this explanation does not reflect what the House of Lords actually decided in *Southwark*. For very good reason, the House of Lords did not decide that the claim failed because the claimants only had themselves to blame for renting flats with inadequate sound insulation in circumstances where they would not have suffered a nuisance if they had

occupied “normal” flats. There is no hint of such unsatisfactory reasoning in the judgments. Nor was *Hirose* decided on the ground that no claim lay because the party wall was porous and the claimant would not have been subjected to the smell if it had occupied a “normally” built unit. In each case the “sensitive” nature of the physical make-up of the building did not itself provide a defence. It was simply part of the factual setting in which the claim arose and had to be decided, neutral in itself. The reason why the defendant had a good defence in each case was because of the principle that “those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action”. That principle applies equally whatever the construction or design of the claimant’s (or the defendant’s) property and does not depend on whether either property is adjudged to be abnormally sensitive.

Conclusion on the relevance of sensitivity in design and construction

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

73 For that reason in *Southwark* to the extent that noise from their neighbours’ normal daily activities caused the claimants annoyance and disturbance which they would not have suffered in differently built flats, no claim lay. The same was true in *Hirose* in so far as the ordinary use made of industrial premises by the defendant would not have caused annoyance if better protection had been afforded by the party wall. Likewise, where the living areas of flats in the Neo Bankside development can be seen from the Blavatnik Building, the normal use of that building would not give rise to a claim. In so far as this results in the occupants of flats being exposed to visual intrusion to which they would not have been exposed in a differently designed building, this is again something they have to put up with in accordance with the general principles of common law nuisance.

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

75 Inviting several hundred thousand visitors a year to look out at the view from your building cannot by any stretch of the imagination be

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

Extreme cases of abnormal construction

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

- D 77 *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525 may be an example of such a case. That was the case where (in the middle of the day during the summer months when the sun was at its brightest) glass roofing panels on the defendant's building deflected the sun's rays in such a way as to cast a dazzling glare through the windows of properties across the street. As Lord Lloyd noted in *Hunter* [1997] AC 655, 700A–C, it is not easy to reconcile the finding of nuisance in the *Bank of New Zealand* case with the decision of the House of Lords in *Hunter* that the interference with television
- E reception caused by the size of the defendant's building and its stainless steel cladding was not actionable. Lord Goff suggested that the *Bank of New Zealand* case might be explained on the basis that the design of the defendant's building had the effect of deflecting the sunlight at such an angle and in such a manner as to cause "a high intensity dazzle", such that the nuisance was caused not by the mere presence of the building but by something emanating from the defendant's land: see pp 685G–686C.
- F However, this distinction is unconvincing since, as Lord Lloyd pointed out, even if the light rays are regarded as having emanated from the defendant's land, a nuisance need not be caused by something emanating from the defendant's land and may arise from a mere state of affairs (see para 13 above). Assuming the *Bank of New Zealand* case was correctly decided, it may therefore need to be explained on the basis that the interference caused
- G by the design of the defendant's building was so unusual and unforeseeable as to be beyond anything that could actually be expected. Certainly, as Lord Lloyd said at p 700C, that case would seem to "go to the limit of the law of nuisance".

- H 78 So far as I am aware there is no English or Commonwealth authority in which it has ever been decided, conversely, that the design of the claimant's building was so unusual and unforeseeable as to preclude a claim in nuisance. However, the authors of *Winfield and Jolowicz on Tort*, 20th ed, para 15-031, refer to *Cremidas v Fenton* (1916) 111 NE 855 (Mass), an American case where the plaintiff complained of vibrations to his house caused by the operation of machinery from a factory adjoining his premises. The claim failed. It was found as a fact that the age and

unsubstantial construction of the plaintiff's house were such that "it would shake or jar . . . even by a person walking across the floor" and that this condition was unavoidable unless all operation of the machinery was suspended. In the light of these findings, the Massachusetts Supreme Judicial Court felt unable to say that, as a matter of law, the decision to dismiss the claim was wrong. Again, the facts of this case seem to me indicative of the kind of extreme circumstances in which the abnormal construction of a building might possibly be relevant.

79 It is unnecessary to reach any concluded view on this question, however, since if there can be cases in which extreme abnormality of the physical attributes of a building may give rise to a claim or to a defence, the present case is on any view not one of them. There is no basis for regarding the glass walls of the claimants' flats as unusual, either in the context of modern high-rise blocks of flats generally or in the particular locality. Still less is there any basis for suggesting that the glassed design is so aberrant as arguably to put the flats in the category of highly abnormal buildings of which, if it exists, the buildings in the *Bank of New Zealand* case and *Cremidas v Fenton* may be examples. The overall architectural design of the Neo Bankside blocks of flats, which have exo-skeletons of steel as well as floor to ceiling windows alternating with some wooden fascias, is striking. But that is not to say that floor to ceiling windows without vertical or horizontal breaks of the kind that it incorporates are unusual, let alone off the scale of anything that could actually be expected. In this action the Tate has never made any such allegation. Nor (so far as the judgment indicates) was there any evidence at the trial to that effect. Both parties adduced evidence from planning experts but the experts did not suggest that what they described in their joint report as the "fully glazed facades" of the Neo Bankside buildings are abnormal or unusual. And the judge made no such finding.

80 There was in these circumstances no factual foundation for the approach adopted by the judge of asking whether the use of the Tate's viewing gallery would have amounted to a nuisance if the claimants had lived in a hypothetical alternative building designed with "significant vertical and perhaps horizontal breaks to interrupt the inward view" (para 202). The judge's "imaginary building" was not based on any evidence or information about the type or extent of glass panelling which is normal or represents the outer limit of anything that could be expected in the neighbourhood. There was therefore no basis or yardstick for comparing the Neo Bankside flats with "flats designed with more wall and less window" (para 201). To say, as the judge did, that a "differently built, but perfectly acceptable, property . . . would not have had the same degree of exposure" (para 211) is nothing to the point. There is no justification for regarding the windows of the claimants' properties as departing from some relevant norm, built as they are.

(3) *The possibility of protective measures*

81 As part of his "overall assessment" of reasonableness, the judge also thought it would be reasonable for the claimants to take protective measures to avoid being seen from the viewing gallery. He identified three measures as meriting consideration: [2019] Ch 369, para 214. The claimants' flats are

A fitted with solar blinds which they could lower during the day—albeit with the loss of their clear view of the outside world and of a certain amount of light. Secondly, they could install privacy film, which reflects the external light outwards—although it does not work when it is dark outside and seeking to install it might have planning implications. The third potential measure would be to install net curtains, which would have the same effect and drawbacks as lowering the blinds. Perhaps because of the uncertainty about the planning implications of privacy film, counsel for the Tate on this appeal emphasised the first and third of these possibilities and submitted that it would have been comparatively simple for the claimants to screen the views of the interiors of their flats by using their blinds or installing net curtains.

C 82 The judge acknowledged that it is not usually a defence to a nuisance claim to say that the claimant could take remedial steps to avoid the adverse consequences of the defendant's acts. For example, he noted that "The victim of excessive dust would not be expected to put up additional sealing of doors and windows" and that "the victim of excessive noise would not be expected to buy earplugs": para 215. However, the judge thought that "this is an unusual case" and that "privacy is a bit different" in that it has become acceptable to expect those who want to enhance their privacy to protect their own interests. He saw this as part of the give and take expected of neighbouring property owners and concluded, at para 215: "Looking at the overall balance which has to be achieved, the availability and reasonableness of such measures is another reason why I consider there to be no nuisance in this case."

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

H 84 I cannot agree with the judge that "privacy is a bit different". In any context it is reasonable to expect those who want more protection from outside interference than the law provides to protect their own interests. For instance, a homeowner may be kept awake or find it impossible to concentrate as a result of noise arising from a normal use of a neighbouring property. If so, then their only recourse is self-protection, for example by using ear plugs. Similarly, someone who cannot stand the smell of their neighbour's cooking at mealtimes had better close their windows. Visual intrusion is just the same. If the interior of a person's home can be seen from

the windows of houses across the street and the occupants wish to avoid being seen, it is for them to draw their blinds or take other measures of the kind suggested by the judge. But in all these cases the person whose activity causes the interference is using their property in a common and ordinary way. What is not acceptable is to place the burden on the claimant to mitigate the impact of a special use of the defendant's property. To do so is inconsistent with the principle of reciprocity that underpins the law of nuisance.

85 In the *Bank of New Zealand* case [1984] 1 NZLR 525 the judge made this point clearly. One of the arguments made by the defendant was that the claimants could almost entirely alleviate the dazzling glare caused by sunlight reflected off the defendant's building by installing and then drawing when necessary darker curtains or blinds. Hardie Boys J rejected that argument (at p 534) on the ground that:

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

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

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

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

87 In *Webster v Lord Advocate* 1985 SC 173 noise made in erecting metal stands between June and August for the annual Edinburgh Military Tattoo caused a nuisance to the owner of a flat overlooking the esplanade at Edinburgh Castle. It was suggested that the flat owner could substantially reduce any annoyance or discomfort from noise by keeping her windows closed. In rejecting this argument, Lord Stott said, at p 181:

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

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

E. The Court of Appeal's reasons: "mere overlooking"

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

- D "There being no finding by the judge that the viewing gallery is 'necessary' for the common and ordinary use and occupation of the Tate within Bramwell B's statement in *Bamford* 3 B & S 66 quoted above, once it is established that the use of the viewing balcony has caused material damage to the amenity value of the claimants' flats and that the use of the flats is ordinary and reasonable, having regard to the locality, there would be a liability in nuisance *if (contrary to our decision) the cause of action extended to overlooking*. There would be no question in those circumstances of any particular sensitivity of the flats, nor of any need on the part of the claimants to take what the judge described (in para 214) as 'remedial steps'. . ." (Emphasis added.)

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

(1) The meaning of "overlooking"

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

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

(2) The complaint in this case

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

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

(3) The arguments concerning “overlooking”

94 I do not understand the Court of Appeal’s judgment to suggest that there is any conceptual reason why visual intrusion cannot be an actionable

- A nuisance. The judgment recognises that different categories of nuisance are merely examples and that no rigid categorisation of relevant factual situations is possible: see [2020] Ch 621, paras 32–33. Nor did the Court of Appeal adopt the theory that nuisance can only result from physical emanations from the defendant’s land or physical invasions of the claimant’s land—a theory which, for the reasons given at para 13 above, is not sustainable. Rather, their suggestion is that “overlooking” is one of a small number of specific types of interference with the use and enjoyment of land which are excluded from the scope of the law of private nuisance as a matter of legal precedent and policy.

(4) Precedent

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

- D 96 The “weight of judicial authority” relied on by the Court of Appeal to show that “mere overlooking” cannot be an actionable nuisance is in fact very light. It consists principally of obiter dicta in three 19th century cases concerned with obstruction of an acquired right to receive light through a defined aperture. In each case the claimant sought an injunction to require the defendant to remove the obstruction and the defendant opposed the claim by arguing that the claimant had installed new windows and, in those circumstances, could not rely on the previously acquired right to light. In each case the court held that, in so far as the new windows occupied existing apertures through which there was a right to light, the defendant’s obstruction of them was unlawful. It was in this context that remarks were made that the installation of new windows could not itself be the subject of complaint because “opening” (ie installing) a window overlooking a neighbour’s land does not give rise to a claim in nuisance.

- F 97 Thus, in *Chandler v Thompson* (1811) 3 Camp 80, 82, Le Blanc J is reported as saying that, “although an action for opening a window to disturb the plaintiff’s privacy was to be read of in the books, he had never known such an action maintained” and that “he had heard it laid down by Lord Eyre CJ that such an action did not lie, and that the only remedy was to build on the adjoining land, opposite to the offensive window”. There are further dicta to similar effect in *Turner v Spooner* (1861) 30 LJ (Ch) 801, 803, and in *Tapling v Jones* (1865) 20 CBNS 166, a decision of the House of Lords. For example, in *Tapling v Jones*, at p 179, Lord Westbury LC said that “invasion of privacy, by opening windows” is “not treated by the law as a wrong for which any remedy is given”; and Lord Chelmsford said, at pp 191–192, that “the owner of a house has a right at all times . . . to open as many windows in his own house as he pleases” and that “the only remedy in the power of the adjoining owner is to build on his own land, and so to shut out the offensive windows”.

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

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

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

101 To similar effect, in *Suzuki v Munroe* 2009 BCSC 1403 a court in British Columbia held that positioning a surveillance camera so that it continuously observed the entrance areas to the claimants’ neighbouring property was an intolerable interference with the use and enjoyment of the claimants’ property and constituted a private nuisance. The court cited several other Canadian cases in which video surveillance of a neighbouring property was held to amount to a private nuisance. One of those cases, *Wasserman v Hall* 2009 BCSC 1318, was also cited by counsel for the claimants in their argument on this appeal.

102 The Court of Appeal sought to distinguish such cases, saying that watching and spying of the kind that occurred in *Raciti* “is quite different from just overlooking and what takes place on the Tate’s viewing gallery”

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

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

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

(5) Policy arguments

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

Difficulty in drawing the line

- 106 The first policy reason given was that, unlike in the case of noise, dirt, smells and so on, in the case of viewing it would be difficult to apply the objective test at common law for deciding whether there has been a material

interference with the amenity value of the affected land. The Court of Appeal said, at para 81: A

“While the viewing of the claimants’ land by thousands of people from the Tate’s viewing gallery may be thought to be a clear case of nuisance at one end of the spectrum, overlooking on a much smaller scale may be just as objectively annoying to owners and occupiers of overlooked properties.” B

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

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

108 In any event I do not accept the premise of the argument. Applying the objective test, it seems self-evident that an ordinary or average person would not find “overlooking on a much smaller scale” just as annoying as the viewing of the claimants’ flats from the Tate’s viewing gallery by thousands of people every day (of whom a significant number take photographs). Nor do I accept that intrusive viewing is intrinsically more subjective or harder to judge than other forms of nuisance. For example, people vary significantly in their sensitivity to noise, not only as to volume but as to different types of sound. There are smells which some people find seriously unpleasant and others do not. That is not to mention the cases of nuisance involving offensive sights. In none of these types of case is there a scientific test which a judge can apply, or more specific legal guidance which an appellate court can give, to identify where the line should be drawn. In each case the court just has to make a judgment about whether the nature and degree of interference exceeds what an ordinary person would regard as acceptable. I think that in practice courts seek to make allowance for variations in normal human reactions by building a margin into their assessment and requiring quite a high level of interference before finding an interference with the ordinary use of property to be sufficiently serious to amount to a nuisance. But of course there will be some finely balanced cases in which different judges applying the same test to the same facts may reach different conclusions. The possibility of such disagreement is inherent in the task of judging. There is nothing peculiar about assessing whether visual intrusion amounts to a nuisance which puts such cases beyond the pale. D
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Reliance on planning law

109 The second matter of policy raised by the Court of Appeal was a suggestion that planning laws and regulations would be a better medium for controlling “inappropriate overlooking” than the common law of nuisance (para 83). This seems to me to overlook (if I may use the term) the fact that, while both may sometimes be relevant, planning laws and the common law of nuisance have different functions. Unlike the common law of nuisance, the planning system does not have as its object preventing or compensating H

A violations of private rights in the use of land. Its purpose is to control the development of land in the public interest. The objectives which a planning authority may take into account in formulating policy and in deciding whether to grant permission for building on land or for a material change of use are open-ended and include a broad range of environmental, social and economic considerations. While a planning authority is likely to consider the potential effect of a new building or use of land on the amenity value of neighbouring properties, there is no obligation to give this factor any particular weight in the assessment. Quite apart from this, as Lord Neuberger PSC observed in *Lawrence v Fen Tigers Ltd* [2014] AC 822, para 95:

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

D 110 For such reasons, the Supreme Court made it clear in *Lawrence* that planning laws are not a substitute or alternative for the protection provided by the common law of nuisance. As Carnwath LJ said in *Biffa Waste* [2013] QB 455, para 46(ii), in a passage quoted with approval by Lord Neuberger PSC in *Lawrence*, at para 92: “Short of express or implied statutory authority to commit a nuisance . . . there is no basis, in principle or authority, for using such a statutory scheme to cut down private law rights.” The practical as well as legal irrelevance of planning permission in this case is apparent from the judge’s finding that no consideration was given to overlooking in the planning process for the Tate extension: [2019] Ch 369, paras 58–63.

Invasion of privacy

F 111 Finally, the Court of Appeal suggested that “what is really the issue in cases of overlooking in general, and the present case in particular, is invasion of privacy rather than (as is the case with the tort of nuisance) damage to interests in property”: [2020] Ch 621, para 84. They pointed out that there are already other laws which bear on privacy, including the law relating to confidentiality, misuse of private information, data protection, harassment and stalking. They expressed the view that this is an area which is better left to the legislature to decide whether any further laws are needed rather than for the courts to extend the law of private nuisance (para 85).

H 112 This again assumes that applying the common law of nuisance to the activity complained of in this case would require an extension of the law, rather than simply the application of well settled tests. As discussed above, I consider this to be a wrong assumption. A further point is that “privacy” is a very broad term which encompasses an assortment of more specific concepts and human interests. As the list given by the Court of Appeal indicates, various legally distinct wrongs are all capable of being described as “invasions of privacy”. The watching and photography that takes place from the Tate’s viewing gallery can be said to fall under that broad description. Contrary to what is said by the Court of Appeal, however, the

claimants' complaint is indeed one of damage to interests in property. The concepts of invasion of privacy and damage to interests in property are not mutually exclusive. An important aspect of the amenity value of real property is the freedom to conduct your life in your own home without being constantly watched and photographed by strangers. Damage to that interest might in some cases also give rise to other causes of action, for example harassment, though they do not here. The (sole) issue in this case is whether the viewing and photography to which the claimants are subjected on a daily basis violates the claimants' rights to the use and enjoyment of their flats. No new privacy laws are needed to deal with this complaint. The general principles of the common law of nuisance are perfectly adequate to do so.

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

F. The public interest

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

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

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

116 It is difficult to give this test a coherent meaning unless it is understood as a way of asking whether the defendant's land use is of public benefit. So far as I can see, this was how the judge approached the question (at paras 196–199). He thought it necessary to evaluate "the importance of the southern view" from the viewing gallery (para 196), which I take to be a judgment about the benefit of making a full 360-degree view accessible to the public. Earlier in the judgment he described such a panoramic view of

A London as “rather splendid” and said that “members of the public will find it very attractive” (para 5).

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

C 118 The Court of Appeal evidently shared the judge’s view that any decision about whether to restrict the use of the viewing gallery should take account of the public interest. They considered that “there are complex issues about reconciling the different interests—public and private—in a unique part of London, with unique attractions, which draw millions of visitors every year” (para 83). But they saw this task as outside the competence of the common law of nuisance. Hence their proposal that such issues should be left to planning laws or, if these are not adequate for the task, to Parliament to formulate any further laws that are perceived to be necessary: see paras 84–85.

E 119 The Court of Appeal’s discussion was directed at “overlooking”. But the difficulties that concerned the Court of Appeal about reconciling the different public and private interests in a use of land which materially interferes with the ordinary use of neighbouring land can occur in relation to almost any form of nuisance. In *Lawrence* [2014] AC 822, for example, the interference consisted of noise from motor sports carried on at the defendant’s stadium and adjoining track. The question whether to restrict those activities potentially affected the interests of many people who derived enjoyment or economic benefit from taking part in or watching the various motor sports. Industrial activities which cause atmospheric pollution to neighbouring land may have substantial economic importance including for those employed in the undertaking. These are classic cases falling within the scope of the law of nuisance. The difficulties of reconciling the different public and private interests involved in such cases have not been treated as a reason for the courts to abstain from granting any remedy for violations of private rights in respect of land use, and instead to leave such matters to the planning system or the legislature. And rightly so. The result of such abstinence would in practice simply be to leave the rights of individuals without any effective protection. That was what the Court of Appeal did here.

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

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

121 I said I would come back to the principle that a defendant cannot avoid liability for nuisance by arguing that its activity is of public benefit.

The reason is simply that private nuisance is a violation of real property rights (see paras 10–11 above). The very nature of property rights requires that, as a general principle, they be respected by all others unless relinquished voluntarily. The fact that it would be of general benefit to the community to use your land for a particular purpose—say, as a short-cut or as a place for taking exercise—is not a reason to allow such use without your consent. The same applies to nuisance. It is not a justification for carrying on an activity which substantially interferes with the ordinary use of your land that the community as a whole will benefit from the interference. In *Sturges v Bridgman* 11 Ch D 852, for example, no one thought it relevant to examine the public utility of Mr Bridgman’s use of his land for making confectionery or to seek to compare this with the public utility of Dr Sturges’ use of his consulting room. (Although the economist Ronald Coase was understood by some to have proposed such an approach in a famous essay, it is entirely inconsistent with the common law: see RH Coase, “The Problem of Social Cost” (1960) 3 JL & Econ 1; and David Campbell & Matthias Klaes, “What Did Ronald Coase Know about the Law of Tort?” (2016) 39 Melb U L Rev 793.) The point of the law of private nuisance is to protect equality of rights between neighbouring occupiers to the use and enjoyment of their own land when those rights conflict. In deciding whether one party’s use has infringed the other’s rights, the public utility of the conflicting uses is not relevant.

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

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

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

“Now, in the first place, that law to my mind is a bad one which, for the public benefit, inflicts loss on an individual without compensation. But further, with great respect, I think this consideration misapplied in this and in many other cases. The public consists of all the individuals of it, and a thing is only for the public benefit when it is productive of good to those individuals on the balance of loss and gain to all. So that if all the loss and all the gain were borne and received by one individual, he on the whole would be a gainer. But whenever this is the case,—whenever a

- A thing is for the public benefit, properly understood,—the loss to the individuals of the public who lose will bear compensation out of the gains of those who gain. It is for the public benefit there should be railways, but it would not be unless the gain of having the railway was sufficient to compensate the loss occasioned by the use of the land required for its site; and accordingly no one thinks it would be right to take an individual's land without compensation to make a railway."

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

- 125 The key insight in this passage is that the public is not some abstract entity with interests of its own which need to be balanced against the interests of private individuals. Rather, in Bramwell B's pithy phrase, the public "consists of all the individuals of it". Hence, to say that something is for the public benefit means only that, in the overall balance of loss and gain, the benefits to the individuals who gain outweigh the loss to those who lose. So when land is used to carry on an activity—whether it be operating a railway, manufacturing bricks, operating a viewing gallery or anything else—which benefits many people but damages the amenity value of neighbouring land, the relevant question to ask is on which individuals should the loss fall. Should it be borne by the individuals on whom the loss is inflicted or by those who gain from the activity? Once the problem is seen in this way, the answer is obvious. Bramwell B was ahead of his time in perceiving what is now a commonplace of economics that it is in the interests of economic efficiency that the external costs of an activity should be internalised. But his more fundamental point is a point about justice. It is most unjust to allow those who benefit from a use of land which inflicts loss on a neighbour to do so without either stopping the activity or compensating the loss.

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

Damages in lieu of an injunction

- 127 For a long time the English courts generally took a very restrictive approach to this question. Historically, only the Court of Chancery had the power to grant an injunction, whereas only the common law courts could award damages. Although Lord Cairns' Act (the Chancery Amendment Act 1858 (21 & 22 Vict c 27)) gave the Court of Chancery the power to award damages in lieu of an injunction, which all courts acquired following the Judicature Act 1873 (36 & 37 Vict c 66), some judges were reluctant to exercise it. A highly influential case was the decision of the Court of Appeal in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, where the plaintiff complained of noise and vibrations caused by the running of turbines used by the defendant company to generate electricity, an activity of obvious benefit to the community. The trial judge found that the interference amounted to a nuisance but awarded damages in lieu of an

injunction. The Court of Appeal reversed that decision. Lindley LJ said, at pp 315–316, that:

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

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

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

129 The topic was reviewed by the Supreme Court in *Lawrence* [2014] AC 822. All the members of the court agreed that, in the words of Lord Carnwath JSC at para 239, “the opportunity should be taken to signal a move away from the strict criteria derived from *Shelfer*”. Different opinions were expressed, however, about how far this move should go. Lord Sumption JSC saw “much to be said for the view that damages are ordinarily an adequate remedy for nuisance and that an injunction should not usually be granted in a case where it is likely that conflicting interests are engaged other than the parties’ interests” (para 161). This drew a protest from Lord Mance JSC, who emphasised that “the right to enjoy one’s home without disturbance is one which I would believe that many, indeed most, people value for reasons largely if not entirely independent of money” (para 168). The majority agreed with Lord Neuberger PSC, for whom the court’s power to award damages in lieu of an injunction “involves a classic exercise of discretion, which should not, as a matter of principle, be fettered” (para 120). Lord Neuberger PSC recognised that nevertheless “it is appropriate to give as much guidance as possible so as to ensure that, while the discretion is not fettered, its manner of exercise is as predictable as possible” (para 121). But I think it fair to say that—perhaps because of the divergent opinions of the Justices—there is little in the way of such guidance to be gleaned from his judgment. Lord Neuberger PSC ended his discussion of this issue by acknowledging that “we are at risk of introducing a degree of uncertainty into the law” but said that “in so far as there can be clearer or more precise principles, they will have to be worked out in the way familiar to the common law, namely on a case by case basis” (para 132).

A *G. Remedy*

130 As I have concluded that on the facts found in this case the Tate is liable in nuisance, the question arises of what remedy the court should grant. Desirable as it is, however, for there to be a final resolution of these proceedings, I am driven to the view that the question is not one which this court can decide. It was not raised as an issue in the appeal and we have not
B heard any argument on the subject of remedies. Moreover, the question was left unresolved at the trial because of the judge's conclusion on liability and, for the same reason, did not arise in the Court of Appeal.

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

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

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

LORD SALES JSC (dissenting) (with whom **LORD KITCHIN JSC** agreed)

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

H 135 The trial judge, Mann J, answered the first question in the affirmative, but answered the second question “no”. The Court of Appeal (Sir Terence Etherton MR, Lewison and Rose LJ) answered the first question in the negative, so the second question did not arise. But, in case they were wrong on the first question, they also expressed the view that the

judge had erred in his approach to and conclusion on the second. The claimants appeal to this court. In order to succeed on the appeal they have to win on both points. In relation to the second question a further, more mundane issue arises regarding the interpretation of what Mann J said about the facts of the case.

Factual background

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

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

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

139 The claimants are the original long leasehold owners of four flats in Block C of Neo Bankside (since the judgment of the Court of Appeal, the first appellant, Mr Fearn, has sold the long lease of his flat and the fifth appellant, Ms Urquhart, has let hers and no longer lives there). The design, planning process and construction of Neo Bankside took place between 2006 and September 2012. The claimants’ flats are directly opposite the Blavatnik Building, which includes the viewing gallery. The viewing gallery runs around all four sides of the top floor, Level 10, and allows visitors to Tate Modern to enjoy a 360-degree panoramic view of central London.

140 The flats which are the subject of the claim are 1301, 1801, 1901, and 2101. The first two digits indicate the floor on which the flat is situated. The floor plans of the flats in Block C vary but each flat involved in this action comprises two parts: a general living space and a triangular end-piece known as a “winter garden”. The winter gardens have floor-to-ceiling single-glazed windows, which are separated from the flat by double-glazed glass doors. They have the same heated flooring as the rest of the accommodation but are separated from the rest of the accommodation by a lip and the double-glazed doors. Although the winter gardens were initially conceived by the developers as a type of indoor balcony, in the case of all the claimants’ flats the winter garden has been adapted to become part of the general living accommodation. The other sides of the flats which enclose the living space of the accommodation, including the kitchen, dining and sitting areas, are made up of floor-to-ceiling clear glass panels but equipped

A with wooden fascias which prevent a whole view of the interior of the dining and sitting areas, albeit they do not provide much screening. The remainder of the flats, comprising bedrooms and the like, do not have floor-to-ceiling glass, but instead have more conventional window type apertures, and the action is not concerned with these parts.

B 141 Tate Modern is free and open to the public. The process of development of the Blavatnik Building took place between 2006 and 2016, including its design, the obtaining of planning permission and its construction. The viewing gallery is a particular feature. It provides a striking view of London to the north, west, and east, with a less interesting view to the south. Neo Bankside is located on the south side. The viewing gallery has been open to the public since the Blavatnik Building was completed in 2016. Access to it is free to visitors to Tate Modern. The viewing gallery attracts hundreds of thousands of people a year (with one estimate at 500,000–600,000), with a maximum of 300 visitors at one time. Visitors spend 15 minutes on average in the viewing gallery.

D 142 Originally, the viewing gallery was open when the art gallery was open: 10 a.m. to 6 p.m. Sunday to Thursday and 10 a.m. to 10 p.m. on Friday and Saturday. However, in response to complaints from flat owners, from April 2018 the Tate shortened the opening times for the viewing gallery. It was closed to the public at 5.30 p.m. on Sunday to Thursday, and on Friday and Saturday the south and west sides (from which the flats at Neo Bankside can be viewed) were closed from 7 p.m. The Tate also posted notices on the south side asking visitors to respect the privacy of Tate Modern's neighbours and instructed security guards to stop people taking photographs of the flats and their occupants, but the judge found that these latter measures were not likely to achieve much. There is a monthly event called Tate Lates, which takes place on the last Friday of each month, and for which the whole viewing gallery remains open until 10 p.m. The viewing gallery also hosts internal events and external commercial events which are important for Tate Modern to bring in income. In its first 17 months 52 external events were hosted there.

G 143 Block C is the block of Neo Bankside which is closest to the Blavatnik Building. The winter gardens of Block C are roughly parallel to it. The distance between the viewing gallery and the 18th floor flat in Block C is just over 34 metres. Absent a barrier, visitors to the viewing gallery can see straight into the living accommodation of the claimants' flats. The most extensive view is of the interior of flats 1801 and 1901, with less for flat 2101, and less again for flat 1301. The flats have been fitted with solar blinds which, when kept down, obscure the view of the interior of the flat from the outside during the day. In the evening, however, when the lights are on, shadows of occupants may be visible to onlookers. The solar blinds also obscure the views of the outside and deprive the occupants of the use of the windows on one side of their flat.

H 144 Visitors in the viewing gallery frequently look into the claimants' flats and take photographs, and less frequently view the claimants and their flats with binoculars. Photographs of the flats are posted on social media by visitors. On the platform Instagram there were 124 posts in the period between June 2016 and April 2018. It has been estimated that those posts

reached an audience of 38,600. Mann J found that there was a significant number of people using the viewing gallery who demonstrated a visual interest in the interiors of the flats, including by looking, peering in, taking photographs and waving to the occupants. He accepted that their numbers and the level of interest were such that a homeowner would reasonably regard this as intrusive so far as the use of the south side of the viewing gallery was concerned (by contrast, the western side of the viewing gallery is at an oblique angle to the flats, offering only a limited view into them).

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

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

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

148 The designs for the Blavatnik Building always included a viewing gallery in some form, although its precise extent varied through successive iterations of the design. Planning policy for the South Bank encourages the construction of viewing galleries in buildings of significant height. However, there is no planning document which indicates that overlooking by the viewing gallery in the direction of Block C was considered by the local planning authority at any stage. It is not likely that the planning authority considered the extent of overlooking. Further, while the Neo Bankside developer was aware of the plans for a viewing gallery, it did not foresee the level of intrusion which resulted. In broad terms, the design and construction of the Blavatnik Building with the viewing gallery in its final form took place in parallel with the design and construction of Neo Bankside, without the effects of the one on the other so far as visual intrusion was concerned being fully appreciated or addressed.

A *The proceedings below*

149 The claim form was issued on 22 February 2017 claiming an injunction requiring the Tate to prevent members of the public or any other licensees from observing the claimants' flats from the whole of the southern walkway of the viewing gallery, fronting directly onto the flats, and also the southern half of the western walkway. The claimants maintained that the

- B Tate's use of those parts of the viewing gallery unreasonably interfered with the claimants' enjoyment of their flats so as to be a nuisance. They also alleged that the Tate was a public authority for the purposes of section 6 of the Human Rights Act 1998 ("the HRA") and that its use of the viewing gallery infringed their rights under article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR") (right to respect for private and family life and the home).

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

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

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

153 The Court of Appeal dismissed the claimants' appeal on the nuisance issue, but for different reasons. In their opinion, contrary to the judge's view, the tort of nuisance could not provide a remedy for "mere overlooking". The weight of authority was contrary to the idea that mere overlooking can give rise to a cause of action in nuisance and there were policy reasons against extending it to cover such a case. Unlike in relation to such annoyances as noise, dirt, fumes, noxious smells and vibrations (all of which may give rise to a cause of action in nuisance), it would be difficult to apply an objective test to determine whether there had been a material interference with the amenity value of the affected land; there were other ways of protecting owners of land from overlooking, in particular through planning controls; and the real point at issue is invasion of privacy rather than damage to an interest in property (which is the focus of the law of nuisance), and there are already other laws which deal with invasions of privacy and, in so far as these might require supplementation, that is a matter for the legislature rather than something to be addressed by the extension of the common law tort of nuisance. There was no infringement of article 8 rights which might support the extension of the tort and the judge had been wrong to rely on article 8 in support of his conclusions. Since, on the court's view, there was no scope for application of the tort, there was no basis on which the Tate could be expected or required to give undertakings as to its use of the viewing gallery, so the undertaking given to Mann J to limit the opening hours of the viewing gallery was discharged.

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

The appeal to this court

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

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

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

- A 157 Much of the law relating to the basic ground rules in respect of the tort of private nuisance is common ground. Mann J and the Court of Appeal approached it in the same way. Private nuisance is a tort concerned with real property and the violation of rights pertaining to real property. It involves either an interference with the legal rights of an owner or a person with exclusive possession of land, including an interest in land such as an easement or a profit à prendre, or interference with the amenity of the land,
- B ie the right to use and enjoy it, which is an inherent facet of a right of exclusive possession: *Hunter v Canary Wharf Ltd* [1997] AC 655 (“*Hunter*”), pp 687G–688E (Lord Goff of Chieveley, citing FH Newark, “The Boundaries of Nuisance” (1949) 65 LQR 480, 482: it is a tort “directed against the plaintiff’s enjoyment of rights over land”), p 696B (Lord Lloyd of Berwick), pp 702G–H, 706B and 707C (Lord Hoffmann) and pp 723D–F and
- C 724D (Lord Hope of Craighead: the tort is concerned with cases where the claimant has a right to the land and there is “an unlawful interference with his use or enjoyment of the land or of his right over or in connection with it”).

The principle of reasonableness between neighbours

- D 158 The unifying principle underlying the tort is reasonableness between neighbours: *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 (“*Cambridge Water*”), 299 per Lord Goff, with whom the other members of the Appellate Committee agreed:

- E “although liability for nuisance has generally been regarded as strict, at least in the case of a defendant who has been responsible for the creation of a nuisance, even so that liability has been kept under control by the principle of reasonable user—the principle of give and take as between neighbouring occupiers of land, under which ‘those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action’ [citing the judgment of Bramwell B in *Bamford v Turnley* (1862) 3 B & S 66, 83: see below]. The effect is that, if the user is reasonable, the
- F defendant will not be liable for consequent harm to his neighbour’s enjoyment of his land . . .”

An issue on this appeal is the relationship between the general principle of reasonable user stated by Lord Goff and questions relating to “the common and ordinary use and occupation of land”, in Bramwell B’s language.

- G 159 Reasonable user, as the controlling principle identified by Lord Goff, is an objective matter. In *Lawrence v Fen Tigers Ltd* [2014] AC 822 (“*Lawrence*”) Lord Neuberger PSC (giving the leading judgment, with which the other members of the court expressed broad agreement) endorsed the principle of reasonable user set out by Lord Goff in *Cambridge Water*: paras 5 and 55. At para 179, Lord Carnwath JSC referred to Lord Goff’s principle of reasonable user and quoted with approval, as he had done in his
- H previous judgment in the Court of Appeal in *Barr v Biffa Waste Services Ltd* [2013] QB 455 (“*Biffa Waste*”), at para 72, the following passage from Tony Weir, *An Introduction to Tort Law*, 2nd ed (2006), p 160:

“Reasonableness is a relevant consideration here, but the question is neither what is reasonable in the eyes of the defendant or even the

claimant (for one cannot by being unduly sensitive, constrain one's neighbour's freedoms), but what objectively a normal person would find it reasonable to have to put up with."

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

160 The centrality in the law of nuisance of reasonableness between neighbours emerges from consideration of the classic cases in the 19th century, which repay close reading even today: *Bamford v Turnley* 3 B & S 66 and *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642 ("*St Helen's Smelting Co*"). In those cases the courts identified the principles of law which balanced the desirability of productive development of land against protection for neighbouring landowners with regard to the use of their own land.

161 In *Bamford v Turnley* the claimant alleged that the defendant was liable for nuisance for burning bricks on the defendant's land with a view to using them to construct a house on the land, which resulted in a bad smell affecting the amenity associated with occupation of the plaintiff's land. The jury found for the defendant. On appeal, the lawfulness of the direction to the jury was in issue, by which they had been told to find for the defendant if they thought that the place where the bricks were burned was a proper and convenient spot and the burning of them was, under the circumstances, a reasonable use by the defendant of his own land. By a majority (Pollock CB dissenting), the Exchequer Chamber held that this was a misdirection. The principal judgment for the majority was that of Erle CJ, Wilde B and Williams and Keating JJ. They held that it was not a defence merely to say that the defendant's use of his own land had been reasonable. As counsel for the claimant put it (p 67), the only question was "whether there is a real substantial injury to the [claimant], he being supposed to be of ordinary character and nerves, and with reference to the state of the neighbourhood", which was residential rather than industrial.

162 Bramwell B gave a concurring judgment which has become a classic statement of the law in this area. It has been cited and approved many times: eg in *Cambridge Water*, at p 299, and *Southwark London Borough Council v Tanner* [2001] 1 AC 1 ("*Southwark*"), pp 15–16 and 20. Bramwell B observed (p 82), "The defendant has done that which, if done wantonly or maliciously, would be actionable as being a nuisance to the [claimant's] habitation by causing a sensible diminution of the comfortable enjoyment of it". The fact that the defendant's use of his own land was reasonable, taken by itself, was not a defence. His justification for his action ("that the nuisance is not to the health of the inhabitants of the [claimant's] house, that it is of a temporary character, and is necessary for the beneficial use of his, the defendant's, land, and that the public good requires he should be entitled to do what he claims to do", ie to make productive use of his own land by building a house on it: p 82)

A was no answer. Bramwell B identified the relevant principle as follows (pp 83–84):

“those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action. This principle . . . would not comprehend the present [case], where what has been done was not the
 B using of land in a common and ordinary way, but in an exceptional manner—not unnatural nor unusual, but not the common and ordinary use of land. There is an obvious necessity for such a principle as I have mentioned. It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary
 C use of his neighbour’s land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live.”

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

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

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

G and he referred to “The compromises that belong to social life”. (Cf *Sturges v Bridgman* (1879) 11 Ch D 852, 865, per Thesiger LJ, emphasising the importance of the norms of behaviour in the particular locality: “what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey”; quoted in *Lawrence* [2014] AC 822, para 4, per Lord Neuberger PSC.)

H 164 The difference between Pollock CB and the majority was narrow. It concerned the interpretation of the direction given by the trial judge. Pollock CB observed (pp 80–81):

“If the act complained of be done in a convenient manner, so as to give no unnecessary annoyance, and be a reasonable exercise of some apparent right, or a reasonable use of the land, house or property of the party under all the circumstances, *in which I include the degree of*

inconvenience it will produce, then I think no action can be sustained, if the jury find that it was reasonable” (emphasis added). A

That is how, in his view, the direction to the jury and its finding should have been interpreted. The difference between Pollock CB and the majority depended on whether one interpreted the direction as referring to reasonable use of the defendant’s land, looked at solely from his point of view (which all agreed was incorrect), or to reasonable use of the defendant’s land, taking account of the interests of both the claimant and the defendant. In this way, in my view, Pollock CB, like Bramwell B, also emphasised that the underlying principle was one of overall reasonableness, involving reciprocity and compromise, taking account of the competing interests of both landowners. This view has persisted since then. In a note in (1937) 53 LQR 3, Professor Goodhart said that the governing principle is one of reasonableness in which “what is reasonable depends both upon [the defendant’s] circumstances and on those of his neighbour”. I will return to this when I deal with the second issue, below. B C

165 In view of the submissions made by Mr Weekes, it is important to emphasise this difference between the principle of reasonable user as set out by Lord Goff in *Cambridge Water* and explained by Lord Neuberger PSC in *Lawrence* and the distinct idea of reasonable use which the defendant sought to invoke in *Bamford v Turnley*, which was disapproved by the court in that case. As Lord Millett was careful to explain in *Southwark* [2001] 1 AC 1, 20, in discussing complaints of nuisance in relation to noisy activities in adjoining flats: D

“The use of the word ‘reasonable’ in this context is apt to be misunderstood. It is no answer to an action for nuisance to say that the defendant is only making reasonable use of his land . . . What is reasonable from the point of view of one party may be completely unreasonable from the point of view of the other. It is not enough for a landowner to act reasonably in his own interest. He must also be considerate of the interest of his neighbour. The governing principle is good neighbourliness, and this involves reciprocity. A landowner must show the same consideration for his neighbour as he would expect his neighbour to show for him.” E F

Carnwath LJ (as he then was) likewise emphasised the importance of this distinction between these different concepts of reasonableness in *Biffa Waste* [2013] QB 455, at paras 60–72. At para 69 he cited the passage from Lord Millett’s speech in *Southwark* and at para 72 he said that the matter was set out “simply and accurately by Tony Weir” in the statement quoted above (para 159). Liability turns on the issue of reasonableness as between the two parties located in a particular locality, not on the reasonableness of the defendant’s use in the abstract. G

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

A many situations. It was the straightforward answer to the claim in nuisance in *Southwark*. As Lord Hoffmann said, p 15, “I do not think that the normal use of a residential flat can possibly be a nuisance to the neighbours. If it were, we would have the absurd position that each, behaving normally and reasonably, was a nuisance to the other”; and see pp 20–21 per Lord Millett.

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

168 The second of the classic 19th century authorities is *St Helen’s Smelting Co* 11 HL Cas 642. In that case the owner of an estate in Lancashire complained that his hedges, trees and shrubs were being damaged by pollution from the defendant’s copper-smelting works over a mile away. The defendant pointed out that the area was full of factories and chemical works and that if the claimant was entitled to complain, industry E would be brought to a halt. Lord Westbury LC said (pp 650–651):

“My Lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal F discomfort. With regard to the latter, namely, the personal inconvenience and interference with one’s enjoyment, one’s quiet, one’s personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is G necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because H to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords,

that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property.”

169 In *Hunter* [1997] AC 655 Lord Hoffmann analysed this passage at pp 705–707. As he pointed out, Lord Westbury LC was not seeking to suggest that there were two torts of nuisance, one relating to material injury to property and the other concerned with causing “sensible personal discomfort” such as that arising from excessive noise or smells. There is one tort, concerned in both types of case with injury to land. In the latter case, the injury to the land is because “its utility has been diminished by the existence of the nuisance”. Referring to *Bone v Seale* [1975] 1 WLR 797, which concerned a nuisance arising from smells from a pig farm, Lord Hoffmann observed “the value of the right to occupy a house which smells of pigs must be less than the value of the occupation of an equivalent house which does not”; in the case of a transitory nuisance, “the owner or occupier is entitled to compensation for the diminution in the amenity value of the property during the period for which the nuisance persisted”; as he said, “the injury to the amenity of the land consists in the fact that the persons upon it are liable to suffer inconvenience, annoyance or illness” (p 706).

The wide ambit of private nuisance

170 As regards the first issue in this appeal, the formulations adopted in the case law from *Bamford v Turnley* 3 B & S 66 onwards to explain the ambit of the tort are relevant. Bramwell B referred to “a nuisance to the [claimant’s] habitation by causing a sensible diminution of the comfortable enjoyment of it”. According to that formulation, there is no reason to say that visual intrusion which, at a certain level of intensity, may indeed cause a sensible diminution of the comfortable enjoyment of one’s home should fall outside the scope of the tort. Similarly, Pollock CB took the tort to be concerned with, among others, things which “[lessen] the comfort . . . of a neighbour”, and again there is no good reason to think that this would not cover visual intrusion. Lord Westbury LC in *St Helen’s Smelting Co* referred to matters producing “sensible personal discomfort”, and the same point applies.

171 In *Hunter* [1997] AC 655 Lord Goff approved (p 688B) a statement by Professor Newark that nuisance protects against the invasion of the claimant’s “liberty to exercise rights over land in the amplest manner”. Lord Lloyd referred (p 696B) to “interference with land or the enjoyment of land”. The formulation employed by Lord Neuberger PSC in *Lawrence* [2014] AC 822, at para 3, refers to action (or sometimes a failure to act) “which causes an interference with the claimant’s reasonable enjoyment of his land, or . . . which unduly interferes with the claimant’s enjoyment of his land”.

172 A range of authorities provide further support for the wide ambit of the tort. Mr Weekes placed particular reliance on *J Lyons & Sons v Wilkins* [1899] 1 Ch 255. That case concerned the picketing (or, as it was called, watching and besetting) by union members of premises used by the claimants for the production of leather goods, in the course of a strike, with a view to dissuading workers from going in and persuading the claimants to change

- A their mode of business. No violence, intimidation or threats were used. The claimants applied for and obtained injunctive relief at first instance and this was upheld on appeal. The case turned on the construction of a statutory provision which made it an offence to watch or beset the house or other place where a person resided or worked with a view to compelling him, “wrongfully and without legal authority”, to do or abstain from doing something. Lindley MR held (pp 267–268) that what had been done fell within the scope of the provision because to watch or beset a man’s house without some reasonable justification is a nuisance at common law, since “Such conduct seriously interferes with the ordinary comfort of human existence and ordinary enjoyment of the house beset”. In support of this view he cited *Bamford v Turnley*; *Walter v Selfe* (1851) 4 De G & Sm 315, concerning smoke and smells, in which Knight-Bruce V-C found a nuisance because the defendant’s activities would “diminish seriously and materially the ordinary comfort of existence to the occupier [of the claimant’s dwelling house]” (p 323); *Crump v Lambert* (1867) LR 3 Eq 409, concerning smoke, smells and noise, in which Lord Romilly MR (pp 413–414) took the principle established by *St Helen’s Smelting Co* to be “whether the annoyance is such as materially to interfere with the ordinary comfort of human existence”; and *Broder v Saillard* (1876) 2 Ch D 692, a noise case, in which Jessel MR stated the principle (p 701) to be that “a man is entitled to the comfortable enjoyment of his dwelling house”.

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

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

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

- 176 A person of ordinary sensitivity would regard the extreme degree of visual intrusion experienced by the claimants in this case as a serious interference with their ability to enjoy their property as a domestic habitation. Anyone would be likely to regard living their lives within their own home under the gaze of a multitude of strangers as having a highly inhibiting and unpleasant effect. An important aspect of the enjoyment of the rights of property in one’s own home is that one can live there with a reasonable degree of privacy and without intrusion by others, hence the well-known saying that a person’s home is their castle. Over the years there have been a number of judicial statements which acknowledge this

dimension of the enjoyment of a residential property. The judge cited *Semayne's Case* (1604) 5 Co Rep 91a, 91b; *Morris v Beardmore* [1981] AC 446, 465; and the (dissenting) judgment of Thomas J in *Brooker v Police* [2007] 3 NZLR 91, paras 256–258. It would be odd to single out this aspect of enjoyment of the rights of property in one's own home as not deserving protection under the tort, when other aspects of such enjoyment which are protected (such as not to be subjected to unreasonable noise, smells, dust or vibrations) might often be less disturbing as interferences with that enjoyment.

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

178 In *Hunter* [1997] AC 655 Lord Goff said (p 685G–H), “for an action in private nuisance to lie in respect of interference with the plaintiff's enjoyment of his land, it will generally arise from something emanating from the defendant's land”, such as “noise, dirt, fumes, a noxious smell [or] vibrations”. Mr Fetherstonhaugh KC for the Tate submits that such a formulation is not apt to cover the visual intrusion into the claimants' flats which occurs in this case. However, it is clear that Lord Goff was not laying down a requirement that there be emanations as an inflexible rule of law. He pointed out that sometimes an activity on a neighbour's land may be so offensive to neighbours as to constitute a nuisance without the element of invasion by emanation, citing *Thompson-Schwab* and *Bank of New Zealand v Greenwood*.

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

Authority on visual intrusion as a nuisance

180 In an article entitled “Privacy” (1931) 47 LQR 23, Professor Winfield debated the possibility that English law might recognise infringement of privacy as a tort in its own right and speculated that the tort of nuisance might cover the case of a person staring into the room of a dwelling house. He referred (p 27) to a case in 1904 “in which a family in Balham, by placing in their garden an arrangement of large mirrors, were enabled to observe all that passed in the study and operating-room of a neighbouring dentist, who sought in vain for legal protection against ‘the annoyance and indignity’ to which he was thus subjected”. Professor Winfield expressed the view that a claim in nuisance should have been

A available, because such conduct “seriously interferes with the ordinary comfort of human existence and the ordinary enjoyment of the house [so beset]”. It is, I think, significant that this was the view of one of the leading authorities on the law of tort. Professor Winfield referred to *Lyons & Sons v Wilkins* as authority which supported his view, as indeed I think it does.

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

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

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

F 184 McTiernan J also referred to *Tapling v Jones*, noting that the claimant implicitly accepted that the defendants were entitled to build on their land as they pleased and then view out from the platform, but adopted an intermediate position. He emphasised that the claimant only sought relief to restrain broadcasting of commentary on the races rather than removal of the platform. However, as he observed (pp 523–524), it had not been shown “that the broadcasting interferes with the use and enjoyment of the land or the conduct of the race meetings or the comfort or enjoyment of any of the [claimant’s] patrons”; it was conceivable that it might in a suitable case be an adjunct to the actionable nuisance of watching and besetting premises discussed in *Lyons & Sons v Wilkins*, as the list of actions which might constitute nuisance was not closed, but it could not be an actionable nuisance “at least unless it causes substantial interference with the use and enjoyment of the premises”. This approach allows for the possibility, in principle, that visual intrusion could constitute a nuisance if it causes substantial interference with the use and enjoyment of the claimant’s land.

This was not a case concerned with visual intrusion into a residential property. For the reasons set out above, such intrusion may be capable of causing substantial interference with the use and enjoyment of such property.

185 In *Raciti v Hughes* (1995) 7 BPR 14837 the defendants installed on their property some floodlights and surveillance cameras set up in such a way as to illuminate the claimant's backyard and record on videotape what happened there. The first instance court in New South Wales held that, by analogy with watching and besetting cases like *Lyons & Sons v Wilkins*, the deliberate attempt to snoop on the privacy of a neighbour and record their actions on videotape was an actionable nuisance.

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

187 In *Martin v Lavigne* (2011) 17 BCLR (5th) 132 the Court of Appeal for British Columbia implicitly accepted that visual intrusion into a residential property might amount to a nuisance, but dismissed an appeal against the finding of the trial judge that the intrusion complained of (namely that the defendant had regularly stared into the claimants' flat, which had floor-to-ceiling windows looking out onto a public footpath where the defendant would walk) was not sufficiently substantial or serious to be actionable. In relation to his submissions on the second issue in this appeal, Mr Fetherstonhaugh called attention to the comment by Smith J, giving the leading judgment, that if the claimants were home when this occurred, "one must wonder why they did not simply turn away . . . or close their window coverings, or simply ignore him" (para 29).

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

A Cases on the opening of windows

189 The Court of Appeal considered that cases on the opening of windows, including in particular *Tapling v Jones* 20 CBNS 166, supported their conclusion that the law of nuisance cannot, in principle, extend to protection against visual intrusion or being overlooked from another property. In my view, however, they do not have that effect.

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

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

E “That is not treated by the law as a wrong for which any remedy is given. If A is the owner of beautiful gardens and pleasure-grounds, and B is the owner of an adjoining piece of land, B may build on it a manufactory with a hundred windows overlooking the pleasure-grounds, and A has neither more nor less than the right which he previously had, of erecting on his land a building of such height and extent as will shut out the windows of the newly-erected manufactory [i.e to prevent B from acquiring an easement of light by prescription] . . .”

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

G 192 In my view, this observation and those of Lord Cranworth and Lord Chelmsford were not at all directed to the operation of the law of nuisance. Lord Westbury LC’s statement was aimed at clearing the ground for a discussion of the law of prescription in relation to easements of light. Kindersley V-C made a similar remark in *Turner v Spooner* (1861) 30 LJ (Ch) 801, another opening windows case. Referring to the question of privacy, he said (p 803) that

H “no doubt the owner of a house would prefer that a neighbour should not have the right of looking into his windows or yard, but neither this court nor a court of law will interfere on the mere ground of invasion of privacy; and a party has a right even to open new windows, although he is thereby enabled to overlook his neighbour’s premises, and so interfering, perhaps with his comfort.”

But again he was not seeking to make any statement about the operation of the law of nuisance. The same is true of another similar statement in an

opening windows case on which Mr Fetherstonhaugh sought to rely: *Chandler v Thompson* (1811) 3 Camp 80, 81–82.

193 However, I think the emphasis given by Lord Westbury LC and the other Law Lords in *Tapling v Jones* to the possibility of self-help by the person who does not wish to be overlooked has some relevance to the discussion of the second issue, below. That possibility made it acceptable that the law should not prevent a landowner (B) from building what he liked on his own land. A rough balance between the interests of a landowner to make use of his own land and of a neighbour to enjoy his land was therefore achieved in this way. The same comment applies in relation to the discussion of *Tapling v Jones* by the majority in *Victoria Park Racing* 58 CLR 479, in the context of the law of nuisance.

194 In my view, once it is recognised that the law of nuisance operates in a more nuanced way in relation to visual intrusion than was discussed in *Tapling v Jones*, and it is accepted that this may afford a neighbour the opportunity of going to law to seek relief to prevent the landowner from using his land as he wishes, the question whether there are adequate means of self-help available to the neighbour becomes of still greater importance. If there are reasonable and adequate means of self-help, the use of the law of nuisance to prevent development of the landowner's land becomes more difficult to justify. As Latham CJ put it in *Victoria Park Racing*, p 494, "the law cannot by an injunction in effect erect fences which the plaintiff is not prepared to provide". It seems to me that the principle of reasonable reciprocity and compromise which the law has adopted as the mechanism to balance the competing interests of neighbouring landowners has to take account of reasonable measures of self-protection which may be available.

Historical, legal and policy considerations

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

196 With reference to the opening windows cases, the Court of Appeal said that the absence at common law of a right to light, short of an easement acquired by prescription, or to air flow and prospect (i.e. a view), is "mirrored by the absence of a right to prevent looking into a residence" (para 75). The reasons given for the former position, and in particular for a general rule that no right to a prospect could be acquired by prescription, in terms of a concern that such a right would constrain building in towns and cities (see *Attorney General v Doughty* (1752) 2 Ves Sen 453, 453–454; *Dalton v Henry Angus & Co* (1881) 6 App Cas 740, 824; *Hunter* [1997] AC 655, 699f per Lord Lloyd), also applied to limit the ambit of the law of nuisance in relation to visual intrusion from neighbours. They said (para 78), "It is logical that the same policy consideration underlies . . . the absence of any successful claim for overlooking, despite the very long history of a cause of action for nuisance" and also the opening windows cases; cheek-by-jowl living in cities meant that overlooking was commonplace and indeed inevitable through the period when the great cities were being constructed.

197 However, whilst some degree of being overlooked from neighbouring properties is indeed a normal feature of life (and not just in

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

B 198 The principle of “give and take” provides the appropriate way to balance the competing interests which arise in relation to visual intrusion, just as it does for other forms of intrusion such as by sound, smell or vibration. By contrast, where an easement exists it is an absolute property right, which is not subject to such a principle. This means that acquisition of a right to a prospect as an easement would be far more damaging in relation to, and indeed destructive of, rights to build on land and a far greater threat to the development of towns and cities than the law of nuisance ever could be. In my view, the equation by the Court of Appeal of the policy arguments against recognition of these very different sorts of rights cannot be sustained.

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

D 200 The Court of Appeal said (para 81) that “Unlike such annoyances as noise, dirt, fumes, noxious smells and vibrations emanating from neighbouring land, it would be difficult, in the case of overlooking, to apply the objective test in nuisance for determining whether there has been a material interference with the amenity value of the affected land”; and “It is difficult to envisage any clear legal guidance as to where the line would be drawn between what is legal and what is not, depending on the number of people and frequency of overlooking”. However, the absence of clear legal guidance of the kind referred to by the Court of Appeal is a general feature of the law of nuisance, as much in relation to noise, smells and the like as in relation to visual intrusion. In none of these areas does the law lay down a clear bright-line rule, but instead applies a standard of reasonableness according to the principle of “give and take”, having regard to the character of the neighbourhood and other relevant features of the particular case.

E That is why the courts have emphasised since Victorian times that the question whether an actionable nuisance has occurred is one for the jury or the judge as the trier of fact. There is no significant difference in the question posed in a visual intrusion case, according to the principle of “give and take”, and in the manner in which it has to be addressed by a court, than in

relation to the other forms of intrusion destructive of the amenity of property referred to by the Court of Appeal.

201 At para 81 the Court of Appeal also pointed out that overlooking is frequently a ground of objection to planning applications and noted that “any recognition that the cause of action in nuisance includes overlooking raises the prospect of claims in nuisance when such a planning objection has been rejected”. However, other forms of activity which can give rise to claims in nuisance, such as the generation of noise, smoke or smells, are also matters which may be addressed in objections to planning applications, so this does not give rise to any point of distinction. More fundamentally, as this court pointed out in *Lawrence* [2014] AC 822, paras 77–95 per Lord Neuberger PSC, the planning regime is concerned with issues of the public interest, not with resolving questions of individual rights. So it is not surprising, and is not a matter of particular concern, that a cause of action in nuisance may be found to exist in a case where an objection to the grant of planning permission founded on similar matters has been rejected. A grant of planning permission pursuant to the administrative processes under the planning regime cannot remove private rights which neighbouring landowners may have. See also *Hunter*, p 710D, per Lord Hoffmann and *Lawrence*, paras 156 (Lord Sumption JSC), 165 (Lord Mance JSC) and 193 (Lord Carnwath JSC).

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

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

204 Finally, at para 84 the Court of Appeal considered that what is really at issue in this case is invasion of privacy rather than damage to interests in property, which is the province of the law of nuisance. Invasion

- A of privacy is the subject of legislation and involves questions which should be left to the legislature. However, the claimants have been careful to put their case in a way which is based on an allegation of damage to their property rights in respect of their flats. The question is whether they have made out that case. In my opinion, there is no good reason to rule out such a claim as a matter of principle.
- B 205 If the Court of Appeal were correct in their view that visual intrusion is incapable of providing the basis of a claim in nuisance, the Tate would be entitled to cease to apply the restrictions and safeguards it has put in place up to now to protect the claimants' amenity in their flats to some degree. But those are matters of good neighbourliness for which in the circumstances of this case, in my view, there should be scope for provision to be made. Again, the conclusion is that it is the principle of reasonable "give and take" which provides the better mechanism to reconcile the competing property interests in issue, rather than ruling that there can in principle be no claim in private nuisance in a case such as this.
- C

Article 8 of the ECHR

- D 206 No part of the reasoning above depends in any way upon article 8 of the ECHR and the HRA. In my view, the basic concepts of the English law of nuisance are already adapted to cover the circumstances of the present case and reference to article 8 is unnecessary and unhelpful. The claimants do not need to rely upon article 8 to make good their case on the first issue in this appeal.
- E 207 Mr Weekes referred to article 8 as the foundation for an alternative submission in case the claimants were unsuccessful on their primary submission on the first issue. Mann J said (para 170) that if there were any doubt that the tort of nuisance is capable, as a matter of principle, of protecting privacy in the home he would have considered it had been removed by article 8. However, it is clear from his analysis overall that he reached his decision regarding the potential for a claim in nuisance based on visual intrusion and his decision regarding the fair balance to be struck
- F between the parties' property rights according to the "give and take" principle without relying on article 8 or an analysis of the operation of the rights under article 8.
- G 208 The Court of Appeal (paras 86–95) made some well-directed criticisms of the judge's reference to article 8. In my respectful opinion, the judge did not analyse the position regarding the application of article 8 in a case concerning a clash of property rights between two sets of private persons with the care which would have been required had the case really turned on this. It is by no means clear that article 8 imposes a positive obligation on a state to intervene in some way in a dispute between private parties of the kind which arises in this case. Nor is it clear whether article 8 requires the state to extend or qualify the property rights of one or other of the parties as a departure from whatever balance the state's own law has itself struck between the competing interests, once one takes account of the usual margin of appreciation allowed to a state in striking a balance between competing interests and rights of private persons, particularly when they are covered by Convention rights such as article 1 of the First Protocol to the ECHR (right to protection of property). It is also by no means clear that the
- H

Tate (as opposed to the individuals who make use of the viewing platform and actually look into the claimants' flats) is properly to be regarded as the relevant party which engages in intrusion into the home or the privacy of the claimants for the purposes of analysis under article 8. But it is not necessary to lengthen this judgment by exploring any of these issues.

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

Introduction

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

210 In several of the Victorian cases, the principle applied was expressed in the Latin maxim "sic utere tuo ut alienum non laedas" (use your own property in such a way as not to injure another's property), which sought to capture the same idea as the expression "give and take". The maxim was criticised by Lord Wright in *Sedleigh-Denfield v O'Callaghan* ("*Sedleigh-Denfield*") [1940] AC 880, 903, as lacking in precision. As he pointed out, "An occupier may make in many ways a use of his land which causes damage to the neighbouring landowners and yet be free from liability". However, both formulas provide a useful reminder that the aim of the tort of nuisance is that the freedom of neighbouring landowners regarding the use of their property should be maximised in a symmetrical way, so far as possible. An occupier is not confined to using their property in a way which matches the ways in which neighbours use theirs. Rather, as Lord Wright put it, "A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with".

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

A regard to the rights and interests of both neighbours, so that a fair balance is maintained between them, judged in the context of the character of the particular neighbourhood where they are located.

212 The application of the “give and take” principle as a way of modulating and reconciling the property rights of neighbouring landowners is particularly important where the issue is visual intrusion or overlooking.

B Many types of nuisance, such as those to do with smell, vibration and noise, naturally tend to occur over relatively short distances. But lines of sight may be open across considerable distances, and where a landowner can look out from their property then others can look in. Particularly in an urban environment, a degree of overlooking and visual intrusion is inevitable.

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

D 214 In striking the appropriate balance between the competing property interests, I can see no good reason why one should leave out of account reasonable self-help measures which might be available to the person complaining about visual intrusion. The “ordinary usages of mankind” living in a city include employing a degree of self-help to protect oneself against visual intrusion by neighbours, by using curtains, blinds and the like. Further, in the opening windows cases the courts were careful to explain that the potential for a property owner to acquire rights to light as an easement by prescription was balanced by the ability of a neighbour to protect themselves by building on their own property. The judges in the majority in *Victoria Park Racing* 58 CLR 479 also emphasised the measures available to the claimants to engage in self-help to protect their interests. Latham CJ made the telling observation (para 194 above) to the effect that they should not rely upon the court to supply by injunction what they could have achieved by reasonable measures of self-help for themselves. In *Martin v Lavigne* (2011) 17 BCLR (5th) 132 Smith J made a similar point in the context of another claim framed in nuisance (para 187 above).

E 215 Standing back from the authorities and looking at the matter generally, a degree of toleration of some annoyance is expected as an aspect of good neighbourliness, with the object of allowing other landowners to enjoy their own rights of enjoyment of their property to the fullest extent reasonably possible. As Lord Millett said in *Southwark* [2001] 1 AC 1, 20, “A landowner must show the same consideration for his neighbour as he would expect his neighbour to show for him”. In my view, this includes being willing to live with what may be a new and unusual use of a neighbour’s land, if it is in accordance with the objective principle of reasonable use, in order to accommodate the same interest in free development of land which both landowners have. Since that is so, if the claimant is able to take measures reasonably available to them and consistent with the ordinary habits of life which a reasonable person could be expected to adopt, which would allow for accommodation of reasonable use of land by a neighbour, that is in my

view a relevant factor which can and should be taken into account. But in deciding whether possible self-help measures should be brought into account in deciding whether an actionable nuisance exists, a great deal will depend on the nature of the nuisance alleged. Potential exposure to visual intrusion is an inevitable feature of urban living and it is usual for people to use screening measures of one sort or another to protect themselves to some degree.

216 The purpose of the “give and take” principle is to allow the court to determine the point at which a reasonable reconciliation between the property rights of different landowners can be achieved, and the opportunities for one or other to take action themselves to help achieve that are relevant. In that regard I do not consider that there is any difference in principle between self-help measures which are reasonably available to the claimants in this case and the possibility for action on the part of the Tate to reduce the impact of the viewing platform on the claimants’ properties by closing it at certain times, putting up notices and so forth. In each case some action may be required by the party which is in a position to take it so as to reduce the friction created by their desire to enjoy the amenity of their own property and to exercise their right to use their land as they wish. A court can impose an appropriate standard of behaviour on a defendant by requiring an undertaking to be given or issuing an injunction. Conversely, it can in effect require an appropriate standard of behaviour from a claimant by refusing to grant relief in circumstances where it thinks that relevant self-help measures are available, in the light of which it would be unreasonable to prevent the defendant from using its land in the manner complained of. This is simply an effect of the basic point made in para 209 above.

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

218 In *Broder v Saillard* 2 Ch D 692 (above) the defendant constructed stables against the wall of a neighbouring residential property. The noise from the stables kept the neighbours awake at night. Jessel MR accepted that the defendant’s use of his property was reasonable from his own point of view but held that a nuisance was made out because, given the residential nature of the neighbourhood, he had chosen to locate the stables in a position which was not proper for the keeping of horses (p 701). The defendant’s action, albeit reasonable as judged from his perspective, had not taken sufficiently into account the interest of the neighbours in being able to enjoy their own property in a way which was in keeping with the uses of land in that area. So, in the present case, the construction and use of the flats as the claimants wish, without having to resort to screening measures, can readily be seen to be reasonable as judged from their perspective. The Court of Appeal emphasised this point. But the flats were constructed to an open design which was unusual for the area and in my view the judge was entitled to take this into account in applying the different reasonableness test implicit in the “give and take” principle when assessing whether the use of their land

A meant that the law should give a remedy to prevent the Tate from using its land as it wished. The Tate's operation of the viewing gallery was reasonable as judged from its own perspective and was also reasonable as judged by the standards to be expected in the area where both properties were located.

B 219 The fact that a claimant has "come to the nuisance"—i.e. has moved into a property knowing that a neighbour carries on a particular activity which might create annoyance—is no defence because, as Lord Neuberger PSC observed in *Lawrence* [2014] AC 822 (para 52), "nuisance is a property-based tort, so that the right to allege a nuisance should, as it were, run with the land". This feature of the tort explains why the "give and take" principle is an objective one to be applied in the light of the nature of the neighbourhood in which the relevant properties are located.

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

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

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

"But no case has been cited where the doing something not in itself noxious has been held a nuisance, unless it interferes with the ordinary

enjoyment of life, or the ordinary use of property for the purposes of residence or business. It would, in my opinion, be wrong to say that the doing something not in itself noxious is a nuisance because it does harm to some particular trade in the adjoining property, although it would not prejudicially affect any ordinary trade carried on there, and does not interfere with the ordinary enjoyment of life.”

223 Mann J observed (para 205):

“There is a clear analogy here. The developers in building the flats, and the claimants as successors in title who chose to buy the flats, have created or submitted themselves to a sensitivity to privacy which is greater than would [be] the case of a less glassed design. It would be wrong to allow this self-induced incentive to gaze, and to infringe privacy, and self-induced exposure to the outside world, to create a liability in nuisance. Other architectural designs would have reduced the invasion of privacy to levels which should be tolerated; that is the appropriate measure in my view. If the claimants have a design which raises the privacy invasion then they have created their own sensitivity and will have to tolerate what the design has created. I remind myself that the first designs for these flats did have some privacy protection built in.”

The judge made the same point about the use to which the claimants had put the winter gardens: paras 208–211. They had been designed as a form of glazed balcony but had been converted by the claimants for use as an ordinary living area. As the judge observed, one does not expect so much privacy on a balcony. In converting the winter gardens to internal living areas the owners of the flats had “created their own additional sensitivity to the inward gaze” (para 210).

224 Before leaving this discussion of the authorities, I should comment on a further submission made by Mr Weekes. He says that the appropriate way for the rights and interests of the claimants and the Tate to be balanced against each other is by a finding that the Tate has committed the tort of nuisance, leaving the balance to be struck in a more tailored way by adjustment at the remedies stage. Although the law in this area does allow for a degree of fine-tuning of the balance at the remedies stage, I do not consider that this justifies the approach urged by Mr Weekes. As explained above, the right of action in nuisance is an aspect of the right of property in land in the context of a particular neighbourhood. That is why “coming to a nuisance” is not a defence; nor is it generally a defence that the defendant has taken the utmost care in carrying on their activity (see *Hunter* [1997] AC 655, 696F per Lord Lloyd, citing *Read v J Lyons & Co Ltd* [1947] AC 156, 183). It is appropriate that such rights should be determined according to a reasonably clear objective standard, as provided by the “give and take” principle. The tort depends on what, in the circumstances of the particular area, is to be regarded as the protectible interest of the claimant regarding their reasonable use of their land. This is primarily a matter of objective right affecting the property itself, to be governed by application of the “give and take” principle, not a matter of remedy and the application of a discretion regarding adjustment between the particular claimant and the particular defendant.

A Alternative approaches

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

226 The difference between these approaches is important for the outcome of this appeal. Since the Tate's use of its land is causing a significant interference with the claimants' enjoyment of theirs, having regard to the manner in which they wish to use it, and the use by the Tate is not common and ordinary, it is said that the claimants' complaint in nuisance is made out. In my respectful opinion, however, the principle of reasonable user explained by Tony Weir and endorsed in *Lawrence* [2014] AC 822 cannot be reduced to a simple question whether the defendant's use is common and ordinary. Instead, in an unusual case like the present, it requires a broader consideration of the circumstances of the case, including whether the claimants' own use of their land is common and ordinary for the locale, whether by their use they have made themselves particularly vulnerable to the type of intrusion of which they now complain and whether there are measures of self-help available to them of a comparatively modest and normal kind which would reduce that intrusion to an acceptable degree in the context of the locale. There are sound reasons why it is appropriate to adopt an approach based on an objective standard of reasonableness in the context of the particular locale.

227 First, I consider that elevating the question of whether the defendant has acted in accordance with the existing common and ordinary use of land in a locality into, in effect, the be all and end all of the test for nuisance (provided there is a significant impact), as Mr Weekes urged, would seriously distort the tort. Such an exclusive focus places excessive weight on one side of what is an inextricably two-sided relationship. It means that if a defendant's use of its land is outside such user a claimant only has to show that the defendant's use has a significant unwelcome impact on the

claimant's use of its own land in order for its claim to succeed. The court is disabled from looking at the way in which the claimant has chosen to use its own land and whether the possible adoption of reasonable measures by the claimant might represent the best way to minimise and resolve the friction between the two competing uses. In a situation like the present where the respective use of its land by each of a claimant and a defendant falls outside existing standards of common and ordinary use of land in the locale, I can see no principled justification why unusual use of land by the defendant should necessarily have to give way to unusual use of land by the claimant without any attempt to balance the competing interests.

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

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

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

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

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

F 233 Where the defendant's use of its land is common and ordinary by the standards of the locale, and its activities have been carried on in an appropriate manner with due regard for the interests of neighbours, the conclusion is that such use is objectively reasonable and there is no actionable nuisance: see e.g. *Hirose Electrical UK Ltd v Peak Ingredients Ltd* (2011) 4 JPL 429 and the use of neighbouring flats in the *Southwark* case [2001] 1 AC 1. Bramwell B put it succinctly in *Bamford v Turnley* 3 B & S 66, 83, in his positive statement that "those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action". If those conditions are fulfilled, the answer is simple, that the defendant has made out a defence: see *Southwark*, p 21, per Lord Millett. That is to say, in such a case the defendant will have established that its activity was reasonable, according to the relevant objective standard.

H 234 However, it does not follow from this that *only* acts which constitute common and ordinary use of land in a particular locale avoid being actionable nuisances. In a vibrant and changing modern society I think the principle of reasonable reciprocity, or give and take, has to be wider than that. The fact that there are simple cases of the kind just referred to does not exhaust the requirement to find a suitable legal mechanism

capable of governing the full range of situations which may arise. In some cases the courts' reasoning does not depend upon whether the defendant has been using its land in a common or ordinary way. Other factors come into play as well.

235 In looking to see whether a nuisance has been committed, courts often examine whether the claimant's use of its land, as interfered with by the defendant's activity, is common and ordinary according to the standards of the locale. If it is, that may be a highly relevant factor indicating that the defendant will be required to moderate its actions to respect that use according to the principle of reasonable reciprocity. This is the explanation for *Hoare and Co v McAlpine* [1923] 1 Ch 167, *Webster v Lord Advocate* 1985 SC 173, *Miller v Jackson* [1977] QB 966 and the authorities discussed in paras 172–174 above. The fact that the courts examine issues of this kind indicates that a broader test of objective reasonableness is being applied than simple examination of whether the defendant's use of its land is common and ordinary. The cases in which unusual sensitivity of the claimant's activities is treated as important, such as *Robinson v Kilvert* 41 Ch D 88, demonstrate the same point.

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

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

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

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

240 Fifth, the whole law of nuisance is shot through with the need for assessments of reasonableness which take account of the interests on both sides. An objective test of reasonable reciprocity and compromise is clear

- A and workable. Even where there is common and ordinary use in broad terms by both claimant and defendant, the give and take principle requires such assessments of reasonableness to be made, since (in Bramwell B's words in *Bamford v Turnley* 3 B & S 66) the defendant will commit no nuisance only if the offending use is "conveniently done", i.e. reasonably and with proper regard to the interests of the other party. Lord Hoffmann made this point in
- B *Southwark* [2001] 1 AC 1, 16, in discussing *Sampson v Hodson-Pressinger* [1981] 3 All ER 710 (in which use of a terrace over the plaintiff's roof was held to be a nuisance because of noise): "in my opinion this decision can be justified only on the basis that having regard to the construction of the premises, walking on the roof over the plaintiff's flat was not a use of the flat above which showed reasonable consideration for the occupant of the flat beneath. It was not, in Bramwell B's phrase, 'conveniently done'; suitable
- C soundproofing was required; conversely, if there had been normal and ordinary user "in a way which shows as much consideration for the neighbours as can reasonably be expected", there would not have been an actionable nuisance. See also para 200 above. Reasonableness is not a concept without explanatory power in this context. I do not think that there is anything inappropriate about applying an equivalent test of objective
- D reasonableness, by extension, in the circumstances of the present case.

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

242 Conversely, I think it would be inappropriate to limit the right of a claimant to sue in nuisance to cases where its use of its own land is common and ordinary. It has an equal and opposite right to use its property in new

ways, and unreasonable interference by a defendant with that right would constitute a nuisance. What might have been a reasonable use of land by the defendant in the context of the original ordinary use of the claimant's land might cease to be reasonable (or "convenient"), according to an objective standard, when the claimant seeks to adopt a new use. Also, it is possible that the interference by a defendant landowner might be so intrusive, according to an objective standard of reasonableness appropriate for the locale, that a nuisance could be established even if the use interfered with is not an ordinary use. These considerations all point in favour of the appropriateness of a more open-textured objective reasonableness standard, which is fact-sensitive in its application across the whole range of possible cases. As I have observed at para 205, it is because the Tate's use of its land is capable of giving rise to liability in nuisance and is part of the reason that friction has arisen that conditions as to its use can be imposed, and that is so even though the claimants' use of their land is not common or ordinary in this locale.

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

244 As Lord Carnwath JSC noted in *Lawrence* [2014] AC 822 (para 179) there has been some academic criticism of the criterion of reasonableness as not having explanatory force (see Allan Beever, *The Law of Private Nuisance* (2013), pp 9 et seq); but nonetheless in his judgment in *Biffa Waste* [2013] QB 455 (para 72) and again in *Lawrence* (para 179) he affirmed Tony Weir's summation of the objective reasonableness test (para 159 above). In *Lawrence*, at para 5, in a part of his judgment with which all the other justices concurred and which is central to his analysis, Lord Neuberger PSC agreed with Lord Carnwath JSC's judgment at para 179 and affirmed that reasonableness is to be assessed objectively. So that particular criticism has been rejected.

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

A and 404; and Tony Weir (para 159 above) and Professor Goodhart (para 164 above). Accordingly, I think that the alternative approach does not affirm established principle, but instead would constitute a major change in the law, by elevating one factor (whether the defendant's use of its land is common and ordinary) to unjustified prominence.

B 246 Lord Leggatt JSC and I interpret Lord Goff's speech in *Cambridge Water* [1994] 2 AC 264 (para 158 above) in different ways. As I understand his judgment, Lord Leggatt JSC interprets Lord Goff's use of the term "reasonable user" as a shorthand for "common and ordinary use". In my opinion, however, Lord Goff was endorsing an objective reasonableness test informed by the basic principle of give and take, according to which (as one example) if a defendant's use of its land is common and ordinary and is carried on in a "convenient" (ie reasonable) manner, that will satisfy the test. I find it difficult to see why Lord Goff would describe the principle as one of "reasonable user" if he intended that to have no wider conceptual role to play beyond examination of whether the defendant's use of its land was common and ordinary.

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

G 248 Similarly, Lord Wright's influential formulation in *Sedleigh-Denfield* [1940] AC 880 (para 211 above), often cited, is based on the concept of reasonableness between neighbours. The defendants in that case were held liable in nuisance for flooding of a neighbour's land arising from the blocking of a narrow drainage culvert on the defendants' land by leaves and debris. The culvert had been laid by a stranger who was a trespasser, but the defendants were aware of its existence. There was no suggestion that the claimant's use of his land, as interfered with by the flooding, was other than ordinary. H The House of Lords did not ask whether the defendants' use of their land was common or ordinary. Lord Atkin, for example, analysed the case in terms of the knowledge of the defendant of the culvert and "the reasonable expectation that it might be obstructed and of the result of such obstruction" (p 896). Lord Wright applied the principle of reasonableness

which he had articulated. Lord Porter likewise said that the occupier of land “is liable for a nuisance existing on his property to the extent that he can reasonably abate it” (p 919) and held that the defendants “ought . . . as reasonable persons to have recognized the probability, or at least the possibility of a flood occurring” (p 920).

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

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

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

252 For these reasons, it is my view that an approach based on the principle of reasonable reciprocity and compromise and application of a standard of objective reasonableness informed by the character of the relevant locality is preferable to one based simply on whether the defendant’s use of its land is “common and ordinary”.

The approach of an appellate court

253 In *Lawrence* [2014] AC 822 Lord Neuberger PSC said (para 59) that “The assessment of the character of the locality for the purpose of assessing whether a defendant’s activities constitute a nuisance is a classic issue of fact and judgment for the judge trying the case”. See also *Lawrence*, para 190, per Lord Carnwath JSC: in cases concerning whether a change in the intensity or character of an activity constitute a nuisance, it is “a matter for the judge, as an issue of fact and degree, to establish the limits of the acceptable”. As noted above, the question whether a nuisance is established in a particular case in the light of the assessment of the character of the

A locality has also always been treated as a matter for the jury or the judge as the trier of fact. An appellate court will be slow to second-guess their assessment unless there is a misdirection regarding the test to be applied.

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

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

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

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

Mann J’s decision

256 Having decided that in principle the law of nuisance can apply in cases of invasion of privacy by visual intrusion in relation to a residential property, Mann J turned to consider whether the claimants had established an actionable nuisance on the facts of this case. At para 130(iv) he directed himself by reference to Lord Neuberger PSC’s judgment in *Lawrence* [2014] AC 822, paras 3–5. At para 180 Mann J again explained that he based his

judgment on the law as outlined by Lord Neuberger PSC in *Lawrence* and asked whether

“the Tate . . . , in operating the viewing gallery as it does, is making an unreasonable use of its land, bearing in mind the nature of that use, the locality in which it takes place, and bearing in mind that the victim is expected to have to put up with some give and take appropriate to modern society and the locale.”

257 Mann J found that the history of the grant of planning permission for the Blavatnik Building to the Tate provided no helpful guidance. He characterised the locality as an inner city urban environment with a significant amount of tourist activity, in which anyone would expect to live cheek by jowl with neighbours; and he noted that the claimants acknowledged this to the extent that they did not object to the fact that they were overlooked from the windows of the Blavatnik Building: para 190. He found that the Tate was making reasonable use of its land; the operation of a viewing gallery was not an inherently objectionable activity in the neighbourhood: para 196.

258 Having made a site visit, Mann J was well placed to make findings as to the nature of the locale: para 87. At para 130 he cited *Sturges v Bridgman* 11 ChD 852 and *Sedleigh-Denfield* [1940] AC 880 and was well aware that the assessment of nuisance needed to be made taking into account the characteristics of the area (see also para 180). In characterising the locality as he did, Mann J established what the reasonable standard of privacy was for the particular locale. This provides the necessary context for the discussion at paras 200–206 of whether hypothetical flats “designed with more wall and less window” would have had cause for complaint.

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

260 His assessment was that the claimants’ use of their land, by adoption of the open design of the flats, is unusual by the standards of the locality. He stated that in using their properties as dwellings the claimants are “At one level . . . using their properties in accordance with the characteristics of the neighbourhood” (para 200), thereby indicating that at another level they are not. He expanded on this at para 201 by referring to the specific complaint of the claimants, “that their everyday life in the flats is on view because of the nature of the view . . . [ie] the complete (or largely complete) view that one has of the living accommodation from the viewing gallery”; and by pointing out that this “arises (obviously) because of the complete glass walls of the living accommodation”. He therefore explained that he would consider whether the claimants would have had a complaint if they had lived in flats designed “with more wall and less window”, since if so they would still have a complaint in nuisance irrespective of the particular design they had adopted (ie there would have been undue interference with their property rights according to the objective reasonableness test appropriate for the particular

A locality). If, on the other hand, they would not have a complaint in nuisance in such circumstances, then he would have to consider whether they would nonetheless have a cause of action, arising out of the glass construction.

B 261 That Mann J considered the claimants' flats to be atypical for residential use in the locale is apparent from his description of them as "particularly sensitive" due to an "increased exposure to the outside world": paras 206 and 211. Though not of itself unreasonable, Mann J considered that the atypical design of the flats in the context of the standards of privacy reasonably to be expected in that locale was a relevant factor in determining the overall reasonableness as between the parties, according to an objective assessment. In my view, that analysis cannot be faulted.

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

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

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

Criticisms by the Court of Appeal

H 265 The Court of Appeal criticised Mann J's judgment on this issue on two grounds: (i) he was wrong to draw the analogy with sensitive users of property as illustrated by *Robinson v Kilvert* 41 ChD 88 (above); the claimants had no undue sensitivity as individuals and their activity in using their flats (i.e. without employing screening) was "ordinary and reasonable" and did not fall foul of the objective reasonable user test for nuisance; there

was no finding that the viewing gallery is “necessary” for the common and ordinary use and occupation of the Tate within Bramwell B’s statement in *Bamford v Turnley* 3 B & S 66 set out above; and (citing *Miller v Jackson* [1977] QB 966) there could be no question of any need on the part of the claimants to take any self-help steps to prevent the visual intrusion which was happening: paras 98–99; and (ii) there was no suggestion that the claimants are using their flats otherwise than in a perfectly normal fashion as homes, and the judge’s approach to balance their interests against those of the Tate was contrary to the general principles of private nuisance: paras 100–102.

Assessment

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

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

268 In my view, this submission cannot be sustained. It is clear that the judge addressed the relevant question, which was the application of the “give and take” principle, and that he considered the reasonableness of the Tate’s use of its property in the wider sense explained by (in particular) Lord Goff in *Cambridge Water* [1994] 2 AC 264 and Lord Neuberger PSC in *Lawrence* [2014] AC 822, taking into account the interests of the claimants as well as the Tate and having regard to the nature of the neighbourhood in seeking to identify a reasonable balance between them.

269 I also consider, with respect, that the criticisms of Mann J’s judgment by the Court of Appeal are wrong. In essence the Court of Appeal asked whether the claimants’ use of their own property, judged without reference to the interests of the Tate as a neighbouring landowner, could be said to be reasonable. Having concluded that it was reasonable according to this standard, they thought that the judge fell into error by treating the claimants’ interests and rights as regards the use of their property as falling to be qualified by reference to the use to which the Tate wished, reasonably, to put its own property. But in my view that is to misapply the “give and take” principle and, in effect, repeats the error of the trial judge in *Bamford v Turnley* from the opposite direction. It gives excessive weight to the reasonableness of use by one of the landowners whose interests conflict, in this case the claimants, assessed without reference to the reasonable interests of the other landowner regarding the use of their own property. Proper application of the “give and take” principle means that the reasonable interests on both sides regarding the free use of their respective properties have to be taken into account.

270 In my judgment, the first reason given by the Court of Appeal gives insufficient weight to the reasonable interest of the Tate in making use of its own property as it wishes in a particular way, by operating the viewing gallery, which the judge found to be reasonable when assessed by reference to the nature of the locality. The Court of Appeal said that this use was not “necessary” (quoting Bramwell B) for the common and ordinary use of the Tate’s property. In framing the balance between competing rights and

- A interests in this way I consider that the Court of Appeal inappropriately treated the language used by Bramwell B like the text of a statute and lost sight of the underlying principle which he was seeking to lay down. In consequence, they distorted the “give and take” principle by setting the interest of the claimants to use their property in a way which was reasonable (judged from their own perspective) against a requirement that the Tate’s use of its property
- B had to satisfy a higher standard of being “necessary”. There is no good reason in principle why the test should be weighted against one of the competing property owners in this way. The Tate’s use of its property to create a viewing platform may not have been conventional, but in my opinion the Court of Appeal’s approach fails to acknowledge that the “give and take” principle is directed to reconciling the competing freedoms of property owners to use their property as they see fit, as was emphasised in *Hunter* [1997] AC 655.
- C 271 In my view, the judge’s approach to the application of the “give and take” test was correct. Property owners in this part of London have to expect to be overlooked to a significant degree and the risk of people being able to look through their windows from neighbouring properties is an inevitable part of community life in the area. It is normal to expect people to use curtains, blinds and other screening measures to limit the annoyance which
- D that might cause. As the judge rightly observed, the nature of the nuisance alleged (visual intrusion) is significant. He found that the Tate’s viewing gallery would not have constituted a nuisance if Neo Bankside had been built and the winter gardens had been used in a way which did not involve heightened sensitivity to that form of intrusion and which did not invite “the consequence of an increased exposure to the outside world”, beyond that to be expected by the “appropriate measure” for the area: paras 205–206 and
- E 208–211.
- 272 However, the owners of the land at Neo Bankside chose to develop it by building striking buildings of architectural distinction likely to attract attention and the gaze of strangers. The particular design emphasised an open aspect for the inhabitants looking out and necessarily thereby created a particular degree of openness to people looking in. The building was
- F constructed so as to involve a heightened degree of sensitivity to the ordinary feature of being overlooked in this particular urban environment and by their use of the winter gardens the claimants increased their exposure to visual intrusion still further. The owners of the flats at Neo Bankside could not acquire any right vis-à-vis neighbouring landowners to maintain their aspect looking out, since that would interfere to an unacceptable degree with
- G the rights of neighbouring landowners to develop their own land for use as they wished. Nor in my view could they acquire any right against being overlooked and subjected to visual intrusion which would be seriously burdensome in terms of preventing neighbouring landowners developing their own land for use as they wished, to a degree beyond that which would be regarded as reasonable for the area.
- H 273 In assessing what was a reasonable balance to strike between the competing interests and property rights of the claimants and the Tate in the context of the particular neighbourhood and in light of the nature of the particular nuisance alleged (i.e. by visual intrusion), I consider that the judge was entitled in the circumstances to have regard to the availability of self-help measures which it was not unreasonable to expect them to take.

274 *Miller v Jackson* [1977] QB 966 (above) does not rule this out as a matter of principle. It was a very different case, involving dangerous invasion of the claimants' property by flying cricket balls struck from the neighbouring cricket ground. They broke windows and tiles on the roof and created the risk of personal injury to the claimants, particularly when using their garden. As Lord Neuberger PSC emphasised in *Lawrence* [2014] AC 822, para 54, the case was concerned with nuisance through physical encroachment on property and potential physical damage to the claimants and their property, rather than by an assault on the senses. There was no difficulty in that case in finding that a physical encroachment of that kind clearly did interfere with the ordinary amenity attaching to the property, and the issue was whether this conclusion was affected by the fact that the claimants refused offers by the defendants to provide certain protective measures. The claimants claimed injunctive relief to compel the defendants to stop playing cricket on the ground until they had erected a barrier of sufficient height to prevent the encroachment by cricket balls. The defendants said that the claimants should have accepted alternative protective measures, for which the defendants offered to pay, by fitting unbreakable glass or shutters and by fixing a net over the garden to stop the balls landing there. The majority in the Court of Appeal (Geoffrey Lane and Cumming-Bruce LJ) held that a nuisance was made out. Geoffrey Lane LJ said (p 985) that there was no obligation on the claimants to protect themselves in their own home from the activities of the defendants; in any event it would have been unreasonable to expect them to live behind shutters and stay out of their garden; and the net idea was impracticable, in that it would have required the construction of supports in the garden and it was not reasonable to expect the claimants to consent to that. Cumming-Bruce LJ agreed with these points. These observations were directed to the particular circumstances of that case and do not suggest that the availability of self-help measures is irrelevant in every case. The position in *Miller v Jackson* is consistent with the test set out in para 215 above.

275 By contrast, in this case the prior and more difficult question is whether overlooking, which does not normally constitute a nuisance, is occurring in circumstances sufficiently unusual to make it an actionable form of annoyance. As Mann J emphasised (para 215), application of the "give and take" principle in relation to visual intrusion should take account of the distinct nature of the annoyance involved. The case law which addresses this kind of nuisance most directly refers to the relevance of self-help measures which it is reasonable to expect the claimant to make use of: *Victoria Park Racing* 58 CLR 479 and *Martin v Lavigne* (2011) 17 BCLR (5th) 132.

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

277 In his submissions, Mr Weekes emphasised that the use to which the claimants wish to put their flats, to live in them without the need for any kind of screening against visual intrusion from the outside, is reasonable. So it is, looking at it solely from their point of view. But in my judgment, though that is of course a relevant factor, it cannot be a sufficient basis for the grant of an injunction to prevent the Tate using its property as it wishes reasonably to do, any more than the reasonable use by the defendant of his

A own property in *Bamford v Turnley* 3 B & S 66 was a sufficient ground for refusing the grant of an injunction, which would have had the effect of requiring the claimant to put up with the detrimental impact on his property arising from such use.

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

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

Conclusion

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

Remedy and disposal

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

H 282 The application of the principle of finality in the context of this case, when it is remitted, will need to be considered. In *Lawrence* [2014] AC 822, Lord Neuberger PSC said (para 149) that "a defendant who wishes to argue that the court should award damages rather than an injunction should make it clear that he wishes to do so well in advance of the hearing, not least

because the claimant may wish to adduce documentary or oral evidence on that issue which she would not otherwise consider relevant”. This statement implies that the principle of finality should apply in a nuisance claim, including in relation to a decision to award damages in place of an injunction. There seems to be good reason to expect the same approach from a claimant, if they wish to argue for damages as a fall-back option if injunctive relief is refused, so that the court can address all issues with finality at the trial.

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

Appeal allowed.

JILL SUTHERLAND, Barrister

Supreme Court

A

Lawrence and another v Fen Tigers Ltd and others

[2014] UKSC 13

2013 Nov 12, 13, 14;
2014 Feb 26Lord Neuberger of Abbotsbury PSC, Lord Mance,
Lord Clarke of Stone-cum-Ebony,
Lord Sumption, Lord Carnwath JJSC

B

Nuisance — Private — Noise — Claimants bringing action for nuisance in respect of noise caused by motor sports at stadium and adjoining track — Defendants having carried out activities at stadium for over 20 years and stadium and track having planning permission for use for motor sports — Whether open to defendants to claim prescriptive right to commit what otherwise would be noise nuisance — Whether open to defendants to claim that claimants had come to nuisance — Factors relevant to whether activities constituting nuisance — Whether existence of planning permission determinant factor — Appropriate remedy in event of finding of nuisance — Factors relevant in deciding whether injunction or damages appropriate remedy

C

In 1975 the fourth defendant, pursuant to planning permission, constructed a stadium which was used for various motor sports, including speedway racing and stock car racing. In 1992 he obtained temporary planning permission to use agricultural land to the rear of the stadium as a motocross track for one year and constructed a track. The permission was renewed on a number of occasions until permanent permission was granted in 2002. The permissions placed limits on the frequency and times of activities at the stadium and track but did not place any conditions on the level of noise emitted during those activities. In 2006 the claimants bought a house which was situated close to the stadium and the track. Following their complaints about the noise generated by motor sports at the stadium and the track, the local authority served abatement notices under the Environmental Protection Act 1990 on the second defendant, who organised events at the stadium, and the third defendant, who had been granted a lease of the land on which the track was situated. Works were carried out to reduce the noise and the local authority took no further action. The claimants, who alleged that the noise generated by the activities remained unacceptable, issued proceedings in nuisance against the second to fourth defendants, among others. The judge held that the planning permissions for the uses of the stadium and the track did not change the character of the area so as to affect his assessment of what noise levels and frequency would constitute a nuisance and that, on all the evidence before him, the operation of activities at the stadium and track both before and after the abatement works constituted a noise nuisance to the claimants. The judge also rejected a defence claim that they had acquired a right to create what would otherwise have been a nuisance by noise, as a result of the activities taking place at the stadium for more than 20 years, holding that no such right could be acquired as a matter of law. The Court of Appeal allowed an appeal by the second and third defendants, holding that, although a planning authority could not by the grant of planning permission authorise the commission of a nuisance, if a grant of permission followed by its implementation had the effect of changing the character of a locality then the question whether particular activities in that locality constituted a nuisance was to be decided against the background of its changed character; and that, following the implementation of the permissions in respect of the stadium and track, the noise of motor sports emanating from them were an established part of the character of the locality and so the nuisance claim fell to be dismissed.

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On appeal by the claimants—

- A *Held*, (1) that it was possible for the owner of land to acquire by prescription an easement to carry on an activity which resulted in noise which would otherwise cause an actionable nuisance, provided that such noise nuisance had been emitted for 20 years, albeit not necessarily continuously; that a finding by the judge of an easement by prescription would provide a defence to the nuisance claim; but that it was no defence that the claimant had acquired the affected property after the nuisance had started, although it would be open to the defendant to claim that the complaint could only have arisen because of some post-acquisition change of use of that property by the claimant (post, paras 33–34, 37, 41, 51, 58, 142–143, 154, 162, 169, 178).

Miller v Jackson [1977] QB 966, CA and *Kennaway v Thompson* [1981] QB 88, CA considered.

- (2) That in determining whether a particular activity caused a nuisance by noise, the court had to assess the level of noise which, objectively, a normal person would find it reasonable to have to put up with given the established pattern of uses, or character, of the locality in which the activity concerned was carried out; that for the purposes of that assessment, the defendant could rely on his own activity on his land in so far as it could be shown that it was a lawful part of the established pattern of uses of the area; that any implementation of a planning permission for the defendant's activity could be relevant to an evaluation of the established pattern of uses in the locality; that the terms and conditions of such permission could also be relevant to an evaluation of the acceptability of the complained-of noise; that, however, the defendant could not rely on a planning permission permitting the very noise which was alleged to constitute a nuisance as making that noise an established part of the character of the locality; and that the fact of planning permission was not a major determinant of liability, even (Lord Carnwath JSC dissenting) where the grant related to a major, strategic development (post, paras 3–5, 58, 60, 65–66, 74, 82, 91, 94, 96, 154–156, 162, 165–166, 169, 178–180, 187, 218, 222–224).

- Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1993] QB 343, *Wheeler v JJ Saunders Ltd* [1996] Ch 19, CA, *Watson v Croft Promosport Ltd* [2009] 3 All ER 249, CA and *Barr v Biffa Waste Services Ltd* [2013] QB 455, CA considered.

- (3) That, where a claimant had established that the defendant's activities constituted a nuisance, prima facie the remedy, in addition to damages for past nuisance, was an injunction to restrain the defendant from committing such nuisance in the future, the precise form of any injunction depending on the facts of the particular case; that the court had power, however, to award damages instead of an injunction and, in considering whether to do so, was free to take account of the existence, and terms and conditions, of any planning permission for the land in question, as well as other matters of public interest such as the effect of any injunction on the viability of the defendant's business and on the public's enjoyment of the activities carried on by that business; that, by contrast, the court could also take account of the effect on persons other than the claimant who would remain badly affected by the nuisance if an injunction were not granted; but that in all cases it was for the court to weigh up all competing factors in the exercise of its unfettered discretion (post, paras 101, 119–120, 123–126, 154, 161, 162, 166, 167, 170–171, 239, 245–247).

Shelfer v City of London Electric Lighting Co [1895] 1 Ch 287, CA, *Regan v Paul Properties DPF No 1 Ltd* [2007] Ch 135, CA and *Watson v Croft Promosport Ltd* [2009] 3 All ER 249, CA considered.

- (4) Allowing the appeal, that the noise from the defendants' activities had not caused a nuisance to the claimants' land for sufficient period so as to establish a right by prescription; that the defendants could not rely on any defence that the claimants had come to the nuisance; that the Court of Appeal had been wrong to treat the existence of planning permission for the defendants' activities as determinative of the character of the locality and ought not to have overturned the judge's finding that the complained-of noise amounted to a nuisance; and that, accordingly, the judge's

order for injunctive relief would be restored, albeit that the inclusion in that order of liberty to apply would allow the defendants to seek to have the order discharged and damages awarded in lieu (post, paras 134, 136, 139, 145, 147–148, 151, 153, 154, 162, 169, 174, 233–237, 249).

Quaere. (i) In what circumstances it might be appropriate to award damages as a remedy for nuisance, rather than an injunction (post, paras 127–132, 157–161, 167–168, 171–172, 239–247).

(ii) Whether, where the court decides to award damages for nuisance, those damages should not always be limited to the value of the consequent reduction in the value of the claimant's property but might also include the value of the benefit to the defendant of not suffering an injunction (post, paras 128, 172–173, 248).

Decision of the Court of Appeal [2012] EWCA Civ 26; [2012] 1 WLR 2127; [2012] PTSR 1505; [2012] 3 All ER 168 reversed.

The following cases are referred to in the judgments:

Allen v Gulf Oil Refining Ltd [1980] QB 156; [1979] 3 WLR 523; [1979] 3 All ER 1008, CA; [1981] AC 1001; [1981] 2 WLR 188; [1981] 1 All ER 353, HL(E)

Andreae v Selfridge & Co Ltd [1938] Ch 1; [1937] 3 All ER 255, CA

Bamford v Turnley (1862) 3 B & S 66

Bank of New Zealand v Greenwood [1984] 1 NZLR 525

Barr v Biffa Waste Services Ltd [2012] EWCA Civ 312; [2013] QB 455; [2012] 3 WLR 795; [2012] PTSR 1527; [2012] 3 All ER 380, CA

Baxendale v McMurray (1867) LR 2 Ch App 790

Bellew v Cement Ltd [1948] IR 61

Bliss v Hall (1838) 4 Bing NC 183

Boomer v Atlantic Cement Co (1970) 26 NY 2d 219

Bottom v Ontario Leaf Tobacco Co [1935] 2 DLR 699

Cambridge Water Co v Eastern Counties Leather plc [1994] 2 AC 264; [1994] 2 WLR 53; [1994] 1 All ER 53, HL(E)

Canada Paper Co v Brown (1922) 63 SCR 243

Carr v Foster (1842) 3 QB 581

Colls v Home and Colonial Stores Ltd [1904] AC 179, HL(E)

Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1996] Ch 286; [1996] 3 WLR 27; [1996] 3 All ER 934, CA; [1998] AC 1; [1997] 2 WLR 898; [1997] 3 All ER 297, HL(E)

Crumph v Lambert (1867) LR 3 Eq 409

Dennis v Ministry of Defence [2003] EWHC 793 (QB); [2003] Env LR 741

Farley v Skinner [2001] UKHL 49; [2002] 2 AC 732; [2001] 3 WLR 899; [2001] 4 All ER 801, HL(E)

Fishenden v Higgs & Hill Ltd (1935) 153 LT 128, Crossman J and CA

Fleming v Hislop (1886) 11 App Cas 686, HL(Sc)

Forsyth-Grant v Allen [2008] EWCA Civ 505; [2008] Env LR 877, CA

Gillingham Borough Council v Medway (Chatham) Dock Co Ltd [1993] QB 343; [1992] 3 WLR 449; [1992] 3 All ER 923

Halsey v Esso Petroleum Co Ltd [1961] 1 WLR 683; [1961] 2 All ER 145

Hirose Electrical UK Ltd v Peak Ingredients Ltd [2011] EWCA Civ 987; [2011] Env LR 680, CA

Hunter v Canary Wharf Ltd [1997] AC 655; [1997] 2 WLR 684; [1997] 2 All ER 426, HL(E)

Jaggard v Sawyer [1995] 1 WLR 269; [1995] 2 All ER 189, CA

Kennaway v Thompson [1981] QB 88; [1980] 3 WLR 361; [1980] 3 All ER 329, CA

Kine v Jolly [1905] 1 Ch 480, CA

Leeds v Shakerley (1599) Cro Eliz 751

London, Brighton and South Coast Railway Co v Truman (1885) 11 App Cas 45, HL(E)

Lyttelton Times Co Ltd v Warners Ltd [1907] AC 476, PC

- A *McAdams Homes Ltd v Robinson* [2004] EWCA Civ 214; [2004] 3 EGLR 93, CA
Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening) [2010] UKSC 45; [2011] 2 AC 104; [2010] 3 WLR 1441; [2011] PTSR 61; [2011] 1 All ER 285, SC(E)
Manchester Corp'n v Farnworth [1930] AC 171, HL(E)
Miller v Jackson [1977] QB 966; [1977] 3 WLR 20; [1977] 3 All ER 338, CA
Munro v Southern Dairies [1955] VLR 332
- B *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634, HL(E)
R v Cross (1826) 2 C & P 483
R (Lewis) v Redcar and Cleveland Borough Council (No 2) [2010] UKSC 11; [2010] 2 AC 1; [2010] 2 WLR 653; [2010] 2 All ER 613; [2010] LGR 295, SC(E)
Regan v Paul Properties DPF No 1 Ltd [2006] EWCA Civ 1319; [2007] Ch 135; [2006] 3 WLR 1131; [2007] 4 All ER 48, CA
Rushmer v Polsue & Alfieri Ltd [1906] 1 Ch 234, CA; [1907] AC 121, HL(E)
- C *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344; [1995] 3 WLR 118; [1995] 3 All ER 268, HL(E)
Rylands v Fletcher (1868) LR 3 HL 330, HL(E)
St Helen's Smelting Co v Tipping (1865) 11 HL Cas 642, HL(E)
Sedleigh-Denfield v O'Callaghan [1940] AC 880; [1940] 3 All ER 349, HL(E)
Shelfer v City of London Electric Lighting Co [1895] 1 Ch 287, CA
Slack v Leeds Industrial Co-operative Society Ltd [1924] 2 Ch 475, CA
- D *Sturges v Bridgman* (1879) 11 Ch D 852, CA
Transco plc v Stockport Metropolitan Borough Council [2003] UKHL 61; [2004] 2 AC 1; [2003] 3 WLR 1467; [2004] 1 All ER 589, HL(E)
Watson v Croft Promosport Ltd [2008] EWHC 759 (QB); [2008] 3 All ER 1171; [2009] EWCA Civ 15; [2009] 3 All ER 249, CA
Wheeler v JJ Saunders Ltd [1996] Ch 19; [1995] 3 WLR 466; [1995] 2 All ER 697, CA
- E *White v Taylor (No 2)* [1969] 1 Ch 160; [1968] 2 WLR 1402; [1968] 1 All ER 1015

The following additional cases were cited in argument:

- Blewman v Wilkinson* [1979] 2 NZLR 208
Christie v Davey [1893] 1 Ch 316
Crossley & Sons Ltd v Lightowler (1867) LR 2 Ch App 478
Leakey v National Trust for Places of Historic Interest or Natural Beauty [1980] QB 485; [1980] 2 WLR 65; [1980] 1 All ER 17, CA
- F *Maxwell v Equitable Building and Investment Co of Wellington Ltd* (1903) 23 NZLR 592
R (Richardson) v North Yorkshire County Council [2003] EWCA Civ 1860; [2004] 1 WLR 1920; [2004] 2 All ER 31, CA

APPEAL from the Court of Appeal

- G By a claim form issued in the Queen's Bench Division on 19 October 2009 the claimants, Katherine Lawrence and Raymond Shields, claimed against the defendants, (1) Fen Tigers Ltd (a company which ran a speedway team at Mildenhall Stadium, Mildenhall, Suffolk, but which was subsequently dissolved after the proceedings were issued), (2) David Mitchell Coventry (the owner of the stadium), (3) Moto-Land UK Ltd (the operator of an adjoining motocross track), (4) Terence Raymond Waters and (5) Anthony
- H Walter Morley (the joint owners of the motocross track), and (6) James Edward Waters (a former owner of the stadium), an injunction to restrain the defendants whether by themselves or by their employees, or agents or otherwise howsoever from causing or permitting nuisance, discomfort, annoyance and disturbance to the claimants and their property by way of

causing or permitting unreasonable noise to come from their motor sport activities and music at the stadium and adjoining motocross track, and damages including aggravated and exemplary damages. On 4 March 2011 Judge Richard Seymour QC, sitting as a judge of the Queen's Bench Division [2011] EWHC 360 (QB); reported in part [2011] 4 All ER 1314 (i) granted an injunction against the second and third defendants limiting the sports activities in the track and stadium, (ii) awarded damages in nuisance against the second, third and sixth defendants in the sum of, respectively, £10,325, £10,425 and £100 (that latter sum on the basis that the sixth defendant had only been responsible for the nuisance between 28 January and 4 April 2008) and (iii) dismissed the claim against the fourth and fifth defendants and the claim for aggravated or exemplary damages.

The second and third defendants appealed, and the claimants cross-appealed against the judge's dismissal of their claim against the fourth defendant and most of their claim against the sixth defendant, and the judge's refusal to extend the injunction to the fourth and sixth defendants. On 27 February 2012, the Court of Appeal [2012] 1 WLR 2127 (Mummery, Jackson and Lewison LJ) allowed the appeal and dismissed the cross-appeal.

On 26 July 2012 the Supreme Court (Lord Phillips of Worth Matravers PSC, Lord Mance and Lord Dyson JJSC) granted an application by the claimants for permission to appeal, the respondents to the appeal being named as the second, third, fourth and sixth defendants. Following the grant of permission the second and third defendants filed an acknowledgement indicating that they intended to ask the Supreme Court to uphold the decision of the Court of Appeal for the reasons it had given and on the following additional grounds, which raised the following issues: (1) the relevance of the public benefits of the activities, and the judgment of the local planning authority as to their acceptability, to the court's nuisance assessment; (2) the existence in principle, and the applicability on the facts of the case, of a defence of "coming to the nuisance"; (3) whether the stadium benefited from a prescriptive right to transmit noise over the claimants' property; (4) whether an injunction was an appropriate remedy; (5) the recoverability of a 100% success fee and an after the event insurance premium (as a matter of principle). By letter dated 3 July 2013 the fourth and sixth defendants stated that they did not intend to appear or to be represented at the hearing before the Supreme Court.

The issues for the court, as stated in the parties' statement of facts and issues, were as follows. (1) (As formulated by the second and third defendants) whether, and to what extent, the judgment of a planning authority as to the value of an activity and the acceptability of its effects, was material to a nuisance assessment, or (as formulated by the claimants) (i) whether, and if so in what circumstances, the exercise of planning rights materially changed the character of the area for the purpose of a nuisance assessment; in particular, whether the exercise of planning rights would materially change the character of the area for this purpose if and only if the change was "strategic"; (ii) whether, even if the exercise of planning rights materially changed the character of the area, it followed that such exercise could no longer amount to a nuisance, or whether it remained for the court to make its own assessment of the conduct relied on as amounting to a nuisance; and (iii) whether, if the exercise of planning rights made no

- A material change to the character of the area, the existence of those rights and the judgment of a planning authority as to the value of an activity and the acceptability of its effects were none the less relevant for the purposes of the courts' nuisance assessment. (2) Whether an allegedly tortious activity might make a relevant contribution to the character of the area. (3) Whether the Court of Appeal had erred in law in concluding that the exercise of planning rights had materially changed the character of the area.
- B (4) Whether the Court of Appeal had erred in law in concluding that, albeit in exercise of those planning rights, the conduct relied on did not amount to a nuisance. (5) Whether the Court of Appeal had erred in principle in not remitting the case to the trial judge to redetermine whether, in the light of its conclusions about the character of the area, there was nevertheless still (or had been prior to the defendants' remedial works) a nuisance by reason of
- C certain alleged breaches of planning control for which damages and/or an injunction should be awarded. (6) Whether "coming to a nuisance" was capable of being a defence to a nuisance claim. (7) Whether a right to transmit noise over another's land was capable of being an easement and, if so, whether the trial judge had erred in principle either (i) in his conclusions on the evidence, or (ii) alternatively, in concluding that a temporary
- D cessation of user during the relevant 20-year period was fatal to the prescription defence. (8) Whether, as the defendants sought to argue, the value of the activity might justify an award of damages instead of an injunction even in cases where the court concluded that the activity caused a non-minor nuisance. The claimants considered that as that issue had not been in dispute below, it could not be raised now. (9) Whether, were the appeal successful, the uplift in the claimants' conditional fee agreement
- E coupled with the after the event insurance premium should not be recoverable because such recovery would (i) conflict with article 9(4) of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters, and (ii) be a disproportionate interference with defendants' rights under article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and article 1 of the First Protocol thereto.
- F The facts are stated in the judgment of Lord Neuberger of Abbotsbury PSC.

Stephen Hockman QC and William Upton (instructed by Richard Buxton Environmental and Public Law, Cambridge) for the claimants.

- G It was for the judge to balance the relevant factors in determining whether a nuisance had been caused. He was entitled to form a view that the planning permissions did not change the character of the area so as to affect the judgment of what noise levels and frequency would constitute a nuisance.

- H The Court of Appeal was wrong to hold that a tortious activity could make a relevant contribution to the character of the area. It is only in situations where the neighbourhood has been changed by the implementation of a strategic permission (see *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1993] QB 343) that the question of nuisance will thereafter fall to be decided by reference to a neighbourhood with that development or use and not as it was previously. Otherwise, the character of the neighbourhood relevant to the assessment of whether an activity is a nuisance is the character before the nuisance began.

The Court of Appeal was also wrong to hold that the exercise of planning permission materially changed the character of the area. The fact that a breach of planning permission is indicative of a nuisance does not mean that compliance with the permission is indicative of the lack of nuisance. [Reference was made to *Barr v Biffa Waste Services Ltd* [2013] QB 455, paras 36, 46, 76; *Allen v Gulf Oil Refining Ltd* [1980] QB 156, 174; [1981] AC 1001; *Wheeler v JJ Saunders Ltd* [1996] Ch 19, 35–36, *Watson v Croft Promosport Ltd* [2009] 3 All ER 249, paras 35, 44 and Tromans “Planning and environmental law—uneasy bedfellows?” (2012) JP Env L 2012 13 Supp OP73, para 24.] It is only where the court finds that the defendant has caused a nuisance to the claimant that the exercise of planning rights and the judgment of a planning authority as to the value of an activity and the acceptability of its effects are relevant to the scope of the appropriate remedy which the court may grant, and its detailed provisions.

The concept of “coming to a nuisance” is not capable of providing a defence to a nuisance claim. [Reference was made to *Fleming v Hislop* (1886) 11 App Cas 686, 696–697 and Newark, “The Boundaries of Nuisance” (1949) 65 LQR 480, 488–489.]

Upton following.

A right to commit a noise nuisance will only arise by prescription in the rarest case, where the noise is at a consistent level, direction and duration over the 20-year period. The owner of the servient tenement must be made aware that the dominant owner is asserting such a right. The inherent variability and transience of the noise in the present case were insufficient to create that right: see *Clerk & Lindsell on Torts*, 20th ed (2010), para 20-85. [Reference was also made to *Dennis v Ministry of Defence* [2003] Env LR 741, paras 50–54.] In any event the judge correctly concluded that the defendants’ argument on prescription failed on the facts.

Robert McCracken QC and *Sebastian Kokelaar* (instructed by *Pooley Bendall & Watson Solicitors, Isleham*) for the second and third defendants.

Private nuisance is the unacceptable impact on a property by the unreasonable user of neighbouring land: see *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, 299. A distinction is to be drawn between activities which cause physical damage to property (see *St Helen’s Smelting Co v Tipping* (1865) 11 HL Cas 642) and cases involving interference with amenity.

Planning permissions are material, albeit not determinative, in two ways. First, the exercise of planning permissions changes the character of the area so that the lawful activities authorised by them now form part of it. Secondly, the permissions give an indication of what the elected representatives of the local community, assisted by professional planning officers, considered to be reasonable and appropriate to the character of the area. Where a planning officer makes a recommendation which is followed by those representatives, it is a reasonable inference that they do so for the reasons advanced by the officer: see *R (Richardson) v North Yorkshire County Council* [2004] 1 WLR 1920, para 35.

It is wrong to restrict the relevance of planning rights to those conferred pursuant to a “strategic” permission and to ignore the effect of a whole series of permissions implemented over a long period of time. Planning authorities are well placed to assess the current character of an area and to determine

- A what is an acceptable level of change: see *Hunter v Canary Wharf Ltd* [1997] AC 655, 721, 722 and *Hirose Electrical UK Ltd v Peak Ingredients Ltd* [2011] Env LR 680, para 41.

The value and benefit of an activity to a local community is relevant to a court's assessment of the reasonableness of the activity and the acceptability of its impact on neighbours: see *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, 323. The absence of any perceived value in an activity has a correlative effect: see *Christie v Davey* [1893] 1 Ch 316, 326–327.

- B Activities which are the subject of nuisance proceedings can form part of the character of an area for the purpose of assessing whether there is a nuisance. A reasonable person would expect to have to live with the established activities of an area which the planning authority had approved, and which enjoyed widespread support amongst local residents, and regard them as part of the background character which forms the standard.

- C There is no good reason why a right to transmit noise over another's land should not be recognised as an easement capable of being acquired by prescription. Whether there is an easement is to be decided between the owner of the property from which the noise emanates and each neighbouring property owner. It is not necessary to determine exactly what noise level (in decibels) has been created over the whole period of prescription. Nor is it necessary for the court to be satisfied that the right claimed was enjoyed in each year of the prescription period. The question is whether the right has been substantially enjoyed for a period of 20 years rather than just casually or occasionally. [Reference was made to *Crossley & Sons Ltd v Lightowler* (1867) LR 2 Ch App 478; *Baxendale v McMurray* (1867) LR 2 Ch App 790 and *Carr v Foster* (1842) 3 QB 581.]

- D The defence of coming to the nuisance can be justified where a claimant chose to move into an area in which there was an existing source of potential annoyance, provided that the court is satisfied that the claimant knew, or ought to have known, about the activities or conditions said to give rise to the nuisance. The claimants chose to move to a locality in which motorsports had been carried on for more than 25 years. [Reference was made to *Leeds v Shakerley* (1599) Cro Eliz 751; *Miller v Jackson* [1977] QB 966; *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485; *Blewman v Wilkinson* [1979] 2 NZLR 208; *Maxwell v Equitable Building and Investment Co of Wellington Ltd* (1903) 23 NZLR 592 and *Blackstone, Commentaries on the Laws of England*, 1st ed (1765–1769), vol II, ch 26, pp 402–403.]

- E The judge could not properly have been asked to exercise his discretion to award the claimants damages in lieu of an injunction, given the restrictive approach to the exercise of the discretion laid down by the Court of Appeal in *Regan v Paul Properties DPF No 1 Ltd* [2007] Ch 135 (based on *Shelfer's* case [1895] 1 Ch 287) and applied by it *Watson v Croft Promosport Ltd* [2009] 3 All ER 249. Public interest issues can be a relevant, and in some cases a decisive, factor for the court exercising its discretion to award damages, particularly where the tortious activities are carried on pursuant to regulatory consent issued after consideration of the competing public and private interests. If the appeal is allowed, damages would be the appropriate remedy given the economic and social benefits brought to the local area by the stadium and the track, which would be lost if the injunctive relief were restored.

Hockman QC in reply.

The issue whether an award of damages should be made instead of an injunction cannot be raised now. It was agreed that, if the court concluded that the level of interference was more than minor, an injunction was the only appropriate remedy. The courts should not sanction a defendant's ability to buy out his neighbour's lawful claim. The value of a tortious activity has not in the past justified, and should not now justify, an award of damages instead of an injunction in anything other than exceptional public interest cases.

The court took time for consideration.

26 February 2014. The following judgments were handed down.

LORD NEUBERGER OF ABBOTSBURY PSC

The issues raised by this appeal

1 This appeal raises a number of points in connection with the law of private nuisance, a common law tort. While the law also recognises public nuisance, a common law offence, this appeal is only concerned with private nuisance, so all references hereafter to nuisance are to private nuisance. It should also be mentioned at the outset that the type of nuisance alleged in this case is nuisance in the sense of personal discomfort, in particular nuisance by noise, as opposed to actual injury to the claimant's property (such as discharge of noxious material or removal of support).

2 As Lord Goff of Chieveley explained in *Hunter v Canary Wharf Ltd* [1997] AC 655, 688, "[the] term 'nuisance' is properly applied only to such actionable user of land as interferes with the enjoyment by the plaintiff of rights in land", quoting from Newark, "The Boundaries of Nuisance" (1949) 65 LQR 480. See also per Lord Hoffmann at pp 705–707, where he explained that this principle may serve to limit the extent to which a nuisance claim could be based on activities which offended the senses of occupiers of property as opposed to physically detrimental to the property.

3 A nuisance can be defined, albeit in general terms, as an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant's reasonable enjoyment of his land, or to use a slightly different formulation, which unduly interferes with the claimant's enjoyment of his land. As Lord Wright said in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 903, "a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society".

4 In *Sturges v Bridgman* (1879) 11 Ch D 852, 865, Thesiger LJ, giving the judgment of the Court of Appeal, famously observed that whether something is a nuisance "is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances", and "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey". Accordingly, whether a particular activity causes a nuisance often depends on an assessment of the locality in which the activity concerned is carried out.

A 5 As Lord Goff said in *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, 299, liability for nuisance is

B “kept under control by the principle of reasonable user—the principle of give and take as between neighbouring occupiers of land, under which ‘those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action’: see *Bamford v Turnley* (1862) 3 B & S 66, 83, per Bramwell B.”

I agree with Lord Carnwath JSC in para 179 below that reasonableness in this context is to be assessed objectively.

C 6 The issues raised on this appeal are as follows: the extent, if any, to which it is open to a defendant to contend that he has established a prescriptive right to commit what would otherwise be a nuisance by means of noise; the extent, if any, to which a defendant to a nuisance claim can rely on the fact that the claimant “came to the nuisance”; the extent, if any, to which it is open to a defendant to a nuisance claim to invoke the actual use of his premises, complained of by the claimant, when assessing the character of the locality; the extent, if any, to which the grant of planning permission for a particular use can affect the question of whether that use is a nuisance or any other use in the locality can be taken into account when considering the character of the locality; the approach to be adopted by a court when deciding whether to grant an injunction to restrain a nuisance being committed, or whether to award damages instead, and the relevance of planning permission to that issue.

E *A summary of the substantive facts*

F 7 In February 1975, planning permission was granted to Terence Waters for the construction of a stadium (“the stadium”) some three miles west of Mildenhall Suffolk, on agricultural land which he owned. The planning permission permitted the stadium to be used for “speedway racing and associated facilities” for a period of ten years. Speedway racing involves racing speedway motorcycles over several laps of a circuit.

G 8 The stadium was constructed during the ensuing year, and thereafter it was used for the permitted purpose by a company called Fen Tigers Ltd, Terence Waters’s licensee or lessee of the stadium. The planning permission was renewed on a permanent basis in 1985, although it was made personal to Mr Waters. Stock car and banger racing started at the stadium in 1984. Such uses were not permitted under the planning permission, but after ten years of such use, it was contended that they had become immune from planning control enforcement, pursuant to section 191 of the Town and Country Planning Act 1990, as substituted by section 10(1) of the Planning and Compensation Act 1991, and Mr Waters applied for a certificate of lawfulness of existing use or development (a “CLEUD”), pursuant to section 191, in early 1995. In July 1997, a CLEUD was issued by the planning authority confirming that, for a period of ten years, there had been 20 stock car and banger racing events (at specified hours of the day) at the stadium each year, so that such a use had become lawful in planning terms.

H 9 To the rear of the stadium is a motocross track (“the track”), an undulating track on which this particular type of motorbike racing and

practice takes place. The track was constructed and used pursuant to a personal planning permission for motocross events, which was granted in May 1992 for a year, and renewed from time to time thereafter, always subject to conditions which sought to control the frequency of events, and the amount of sound which was emitted during such events. Eventually, in 2002, a permanent personal planning permission was granted for this use, subject to similar conditions, including one which limited the use of the track to a limited number of days within prescribed hours, and another which imposed a maximum noise level of LAeq 85 dB over any hour at the boundary of the track.

10 In August 2005, the stadium was acquired from Mr Waters by his son, James Walters, and he leased it a month later to Carl Harris, who entered into an arrangement whereby the business at the stadium was operated by David Coventry. David Coventry and his brother later took on the lease and then acquired the stadium in April 2008. They have owned and operated it since then. Fen Tigers Ltd itself continued to promote speedway racing at the stadium until it went into liquidation in July 2010. Terence Waters is also one of the three joint owners of the track, and, in September 2003, he and his co-owners granted a lease of the track for ten years to Moto-Land UK Ltd (“M-LUK”), who since then have operated the activities on the track.

11 The trial judge, Judge Richard Seymour QC (sitting as a judge of the High Court), found that, between 1975 and 2009, the stadium had been used for speedway racing between 16 and 35 times per year, save that for six years (1990, 1991, 1993, 1994, 1997 and 2000) it was not used at all for speedway. As for stock car racing, the judge found that it had occurred at the stadium between 16 and 27 times a year between 1985 and 2009, save that there was no stock car racing in 1991 or 1992. The judge also found that the track had been “used for motocross to the full extent permitted” by the relevant planning permission: para 76. As he also mentioned, in 1995 this activity had resulted in the service of noise abatement notices, under section 80 of the Environmental Protection Act 1990, which were then the subject of inconclusive proceedings.

12 Across open fields, about 560 metres from the stadium and about 860 metres from the track, is a bungalow called “Fenland”, which was built in the 1950s. It stands in about 0.35 hectares of garden, and is otherwise surrounded by agricultural land. The nearest residential property to Fenland appears to be about half a mile away, and the small village of West Row is about 1.5 miles to the south east of Fenland (and about one mile to the south east of the stadium).

13 In January 2006, Katherine Lawrence and Raymond Shields (“the appellants”) purchased and moved into Fenland; their vendors were a Mr and Mrs Relton, who had owned and lived in Fenland since 1984. By April 2006, the appellants had become concerned about the noise coming from the motocross events on the track. They complained about this to the local council in and after April 2006, and they also wrote to Mr Coventry and M-LUK, and to Terence and James Waters, threatening proceedings. The complaints to the council eventually resulted in the service of further noise abatement notices, required the carrying out of works to mitigate the noise emanation (“the attenuation works”). These notices were served during December 2007 on Mr Coventry, his brother, M-LUK and Fen Tigers

A Ltd, and stated that the activities at the stadium and on the track each constituted a statutory nuisance. The attenuation works were carried out, albeit later than they should have been, by January 2009.

B 14 Meanwhile, the appellants had also been pursuing their contention that both the stadium and the track were being used in such a way as to constitute a nuisance. As discussions did not produce what they considered to be an acceptable outcome, the appellants issued proceedings against Mr Coventry, M-LUK and Terence and James Waters (“the respondents”) in the High Court for an injunction to restrain the nuisance in early 2008. In those proceedings, the appellants contended that the activities at the stadium and on the track constituted a nuisance individually, or in the alternative cumulatively. They maintained this contention following the completion of the attenuation works. The respondents filed a joint defence in December 2009 denying nuisance.

C 15 In April 2010, Fenland suffered a serious fire, which caused extensive damage and rendered it uninhabitable. Since then, no one has lived there, as it has yet to be rebuilt. Meanwhile, the proceedings came on before Judge Seymour on 26 January, and he heard them over 11 days.

D *The judgments below*

E 16 The judge gave his decision on 4 March 2011, and his judgment runs to 325 paragraphs and over 110 pages [2011] EWHC 360 (QB) (reported in part [2011] 4 All ER 1314). It is unnecessary to attempt to explain it in any detail for the purposes of this appeal. There are some parts which are difficult to follow, and there are one or two findings which he should have made, but did not make (in particular whether the appellants knew of the planning permissions when they purchased Fenland).

F 17 Particularly where there has been a relatively long and expensive hearing, it is important that the judge (i) clearly identifies for his own benefit as well as that of the parties, all the issues of fact and expert opinion that are in issue, and (ii) resolves in clear terms all such issues which are relevant on his view of the law, and, at least often, those issues which would be relevant if his view of the law turns out to be wrong. Otherwise, there is a real risk of a complete or partial rehearing being ordered, which would be very unfair on the parties, and would bring the administration of law into disrepute.

G 18 Reverting to Judge Seymour QC’s judgment, he began by summarising the relatively uncontroversial history, and then turned to the “nature of the locality”. He described the immediate locality which was generally rural, but included some houses and a small village, West End, and also a US Air Force base at RAF Mildenhall, which, at its nearest point, is about a mile to the east of the stadium, the track and Fenland, and is also about a mile to the north of West Row. The judge described the terms of the various planning permissions, and then turned to the question whether the planning permissions for the uses of the stadium and the track should have any bearing on the issue of whether those uses constituted a nuisance. He concluded in para 66 that they should not, because of the personal nature of the permissions, and the fact that they limited the permitted uses to a maximum number of days a year and to specified hours of the day.

H 19 Judge Seymour QC next discussed the extent to which the stadium and the track had been used over the years. He then set out (at paras 96–206) the oral and documentary evidence which he had read and

heard in relation to the level of noise emanating from the stadium and the track. This evidence consisted of (i) letters, mostly of support, sent to the planning authorities in connection with the applications for, and renewals of, the planning permissions for the use of the stadium and the track for the activities described above, (ii) the advices given in connection with those applications and permissions by planning officers to planning committees, (iii) the planning permissions themselves, (iv) letters sent to the local authority between 1992 and 2010, complaining of the noise, (v) records kept, and letters sent, by the local environmental health officers, (vi) the oral evidence of the appellants, four other residents in the locality on behalf of the appellants, and Mrs Relton and at least five other residents for the respondents, (vii) one expert acoustic witness for each side, (viii) reports on noise levels from various public bodies including the World Health Organisation, the Department of the Environment, the National Physical Laboratory, and the Institute of Sound and Vibration Research.

20 When considering the expert evidence, the judge, at para 158, raised the question

“whether it was appropriate, in assessing whether the noise generated by the activities [of the defendant] was capable of causing a . . . nuisance, to take into account as one of the noise characteristics of the locality the noise generated by those very activities.”

As Jackson LJ said in the Court of Appeal [2012] 1 WLR 2127, para 72, the judge does not appear to have answered that question expressly, but he appears to have held that the answer was “no”.

21 The judge said that, when the stadium was being used for speedway, stock car, and banger racing from 1984, and also when the track was being used for motocross from 1992, the noise was “sometimes . . . sufficiently intrusive to generate complaints, and sometimes not”. Accordingly, he concluded that “it was possible so to organise activities at the stadium or at the track as not to produce intrusive noise affecting those residing nearby”: para 95.

22 The judge also concluded, at para 207, that “the operation of activities at the stadium both before and after the [attenuation] works constituted a nuisance, by reason of the noise generated, to [the appellants]”, and he immediately went on to make the same finding about “the activities at the track”.

23 The judge then considered and rejected the respondents’ contention that they had acquired a right to create what would otherwise have been a nuisance by noise, as a result of the use of the stadium for speedway, stock car, and banger racing for more than 20 years. First, he held that no such right could be acquired as a matter of law; secondly, he held that, even if that was wrong, the interruption in use, especially in respect of stock car and banger racing in 1991 and 1992, would have been fatal to a prescriptive claim.

24 Finally, having concluded that the appellants had established a claim in nuisance, the judge turned to the question of remedies. He stated, at paras 243–245, that he was minded to grant an injunction to restrain the respondents from carrying on activities at the stadium or at the track which emitted more than a specified level of noise, which he had in mind to fix at specific levels which he identified. He explained at para 243 that he had

A arrived at those levels by reference to the quantum of noise emitted from various motor racing circuits across the United Kingdom, a topic on which he had heard evidence from one of the expert witnesses, and also stated that there should be a lower level of noise permitted during the evening and at night. He recorded, at para 244, that the respondents did not challenge the notion that he should grant an injunction if he concluded that their activities had caused “continuing nuisance”. At para 245, he provisionally indicated
B the decibel limits he had in mind, and added that, as Fenland was unoccupied, it may be appropriate to suspend any injunction. The judge then dealt with damages for past nuisance.

25 After he had handed down his judgment, a further hearing took place before the judge, pursuant to which he made an order which was a little more generous to the respondents than he had provisionally suggested,
C in that the injunction he granted permitted them to emit somewhat higher noise levels on up to 12 weekends each year. He gave the respondents time to reorganise their affairs by providing that the injunction would only take effect on 1 January 2012, or (if later) when Fenland was ready for residential occupation (which has not yet happened). The terms of the order also gave either party permission to apply to vary the terms of the injunction, but not earlier than 1 October 2011.

D 26 The respondents appealed against the decision. The Court of Appeal reversed Judge Seymour QC’s decision, holding that the appellants had failed to establish that the respondents’ activities at the stadium and the track constituted a nuisance [2012] 1 WLR 2127. Jackson LJ, who gave the main judgment, with which Mummery and Lewison LJ agreed, held that the judge had gone wrong in holding that the actual use of the stadium and
E the track over a number of years, with planning permission, or a CLEUD, could not be taken into account when the assessing the character of the locality for the purpose of determining whether an activity is a nuisance: paras 74 and 76. In those circumstances, it was unnecessary for the Court of Appeal to consider any other issue, although Lewison LJ expressed a provisional view that, contrary to the judge’s conclusion, it is possible to obtain by prescription a right to commit what would otherwise be a
F nuisance: paras 88–91.

27 The appellants now appeal to the Supreme Court. As indicated at the start of this judgment, the appeal raises a number of points relating to the law of nuisance, and it is convenient to consider them in principle before applying them to the facts and arguments in this appeal.

G *Acquiring a right to commit what would otherwise be a nuisance by noise*

28 There is no doubt that a defendant can have a right to carry on an activity which would otherwise be a nuisance. For instance, in common law, a claimant may have bindingly agreed to the activity being carried on and to the consequent nuisance, or a claimant may somehow be estopped from objecting to the activity on the ground that it constitutes a nuisance; and,
H under a statute, certain activities in certain circumstances may be accorded immunity from a claim in nuisance: see, for example, section 76 of the Civil Aviation Act 1982 and section 158 of the Planning Act 2008.

29 It is well established that an easement (that is, a right in favour of the so-called “dominant” land over the so-called “servient” land, such as a right of way, a right to light, a right of support, or a right of drainage) can be

acquired by prescription as well as by express grant. Prescription is a form of deemed grant and arises as a result of long use.

30 Prescription was initially introduced and developed by the judges. It has been complicated by the facts that (i) as originally developed, it was subject to some rather technical, and impractical, rules (and in particular a requirement of at least an inference of enjoyment since 1189), (ii) the courts have developed another prescriptive principle, that of lost modern grant (which is not subject to so much technicality), (iii) it has been the subject of a large number of judicial decisions, many of which are hard to understand or reconcile, (iv) Parliament enacted the ill-drafted Prescription Act in 1832 (2 & 3 Will 4, c 71), so that (v) there are now two types of common law prescription, together with statutory prescription.

31 The essential feature of prescription for present purposes is that, in order to establish a right by prescription, a person must show at least 20 years uninterrupted enjoyment as of right, that is *nec vi, nec clam, nec precario* (“not by force, nor stealth, nor with the licence of the owner”), as Lord Walker of Gestingthorpe JSC put it in *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70, para 20, of that which he now claims to be entitled to enjoy by right.

32 An issue in the present appeal is whether the right to commit a nuisance by noise can be acquired by prescription. For this purpose, I do not think that it strictly matters whether the right to make a noise which would otherwise be a nuisance can be an easement or not. As Lord Sumner said in *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634, 649, a right in favour of a property owner over neighbouring land (in that case, to spread coal dust emanating from the property owner’s land over adjoining land) may be too indeterminate to be an easement, but it can still be the subject of a perfectly valid grant. Accordingly, it seems to me that there is no inherent reason why a right to spread coal dust, or to make a noise which would otherwise be a nuisance, should not be established by prescription.

33 Having said that, I am of the view that the right to carry on an activity which results in noise, or the right to emit a noise, which would otherwise cause an actionable nuisance, is capable of being an easement. The fact that the noise from an activity may be heard in a large number of different properties can fairly be said to render it an unusual easement, but, as Mr Robert McCracken QC for the respondents said, whether or not there is an easement is to be decided between the owner of the property from which the noise emanates and each neighbouring property owner. Equally, as Lewison LJ said [2012] 1 WLR 2127, para 88, the fact that a right is only exercisable at specified times does not prevent it from being an easement. As he also pointed out, at para 89, one can characterise a right to emit noise in relatively conventional terms in the context of easements, namely as “the right to transmit sound waves over” the servient land. Lord Parker of Waddington clearly assumed that the right to emit noise could be an easement in *Pwllbach* [1915] AC 634, 646, referring to *Lyttelton Times Co Ltd v Warners Ltd* [1907] AC 476. Furthermore, where there is an express grant, it should normally be reasonably easy to identify the level of permitted noise, the periods when it may be emitted, and the activities which may produce the noise.

34 Subject to questions of notice and registration, the benefit and burden of an easement run with the land, and, therefore, if a right to emit

- A noise which would otherwise be a nuisance is an easement, it would bind successors of the grantor, whereas it is a little hard to see how that would be so if the right were not an easement. Given the property-based nature of nuisance, and given the undesirable practical consequences if the benefit and burden of the right to emit a noise would not run with the relevant land, it appears to me that both principle and policy favour the conclusion that a right to create what would otherwise be a nuisance by noise to land can be an easement.

- 35 Greater difficulties arise when one comes to consider whether, and if so how, a right to commit a nuisance has been obtained by prescription. It has been suggested that it is not possible to obtain by prescription a right to commit what would otherwise be a nuisance by noise, vibration, smoke or smell: see the discussion in *Clerk & Lindsell on Torts*, 20th ed (2010), para 20-85.

- 36 As that discussion suggests, there appear to be three possible problems with the notion that such a right could be obtained by prescription. The first is that the 20 years can only run when the noise amounts to a nuisance. As Thesiger LJ giving the judgment of the Court of Appeal, agreeing with Jessel MR, put it in *Sturges* 11 Ch D 852, 863-864, “[consent] or acquiescence of the owner of the servient tenement lies at the root of prescription, and . . . an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence”. So, during such time as the noise is at such a level that it does not amount to a nuisance, time will not run: while it is not a nuisance there can be no question of the claimant being able to stop it. Secondly, there could obviously be difficulties in identifying the extent of the easement obtained by prescription: even if the level of noise can be shown to have amounted to a nuisance for more than 20 years, it will often have varied in intensity and frequency (in the sense of both timing and pitch). Thirdly, there could also be a connected problem of deciding how much, if any, more noise could be emitted pursuant to the acquired right than had been emitted during the 20 years.

- 37 In my view, these problems should not stand in the way of a continuing nuisance by noise being able to give rise to a prescriptive right to transmit sound waves over servient land. The first two problems are, at least largely, practical in nature, and could often present the owner of the alleged dominant land with difficulties in making out his case, but that is not a good reason for holding that he should not be entitled to do so on appropriate facts. Further, the extent of the two problems is mitigated by the fact that, to justify a prescriptive right, the 20 years use does not have to be continuous: see *Carr v Foster* (1842) 3 QB 581, 586-588, per Lord Denman CJ, Patteson and Williams JJ. It is worth noting that Patteson J was prepared to accept that an interruption of even seven years might not destroy the claim to have acquired a right by prescription over 20 years.

- 38 As for the third problem, it is not dissimilar from the question of the extent of some other easements obtained by prescription, such as a right of way or a right to discharge polluted water. The precise extent of a right to transmit sound waves obtained by prescription must be highly fact-sensitive, and may often depend not only on the amount and frequency of the noise emitted, but also on other factors including the character of the neighbourhood and the give and take referred to by Lord Goff in *Cambridge Water* [1994] 2 AC 264, 299.

39 Given the potential effect on the enjoyment of the servient land of an increase in the level or frequency of noise, it seems to me that the dominant owner cannot, or at least could only very rarely, be accorded the degree of latitude available to someone with a right of way or a right of drainage obtained by prescription, as discussed in *McAdams Homes Ltd v Robinson* [2004] 3 EGLR 93, paras 24–47, 79–84. The position is closer to a case where a right to pollute the servient owner’s watercourse is obtained by prescription. Thus, in *Baxendale v McMurray* (1867) LR 2 Ch App 790, 795 Lord Cairns LJ indicated that, albeit in a case where a change of materials had been involved in the business of the dominant owner, the servient owner had cause for complaint if he could show “a greater amount of pollution and injury arising from the use of this new material” in order to establish a breach of his rights.

40 So far as previous cases on noise and the like are concerned, as Lewison LJ said below, at para 91, Tindal CJ clearly assumed that a right to emit “noxious vapours and smells” could be acquired by prescription in *Bliss v Hall* (1838) 4 Bing NC 183, 186, and in *Sturges v Bridgman* 11 Ch D 852, 863–865 it was also clearly assumed by the Court of Appeal that a right to emit noise and vibration which would otherwise be a nuisance can be acquired by prescription. So, too, in *Crump v Lambert* (1867) LR 3 Eq 409, 413 Lord Romilly MR said that “the right of . . . sending smoke or noise” over a neighbour’s land could be obtained if the neighbour “has not resisted for a period of 20 years”. Finally in this connection, I note that in another well known nuisance case, *St Helen’s Smelting Co v Tipping* (1865) 11 HL Cas 642, 652, Lord Westbury LC referred to “cases where any prescriptive right has been acquired by a lengthened user of the place”.

41 In these circumstances, I conclude that, in the light of the relevant principles, practical considerations and judicial dicta, it is possible to obtain by prescription a right to commit what would otherwise be a nuisance by noise, or, to put it another way, to transmit sound waves over neighbouring land.

42 Before leaving this topic, I should mention that, in the Court of Appeal, Lewison LJ at para 91 raised the possibility that all that the owner of the dominant land needed to establish in order to show a prescriptive right was that the sound waves (at a certain volume) have been passing over the servient land for a period of over 20 years irrespective of whether they constituted a nuisance during any part of that period. So far as practicalities are concerned, this approach would have the advantage of avoiding the first of the three problems identified in para 36 above, but the other two problems would remain.

43 However, this approach was not adopted by the respondents on this appeal, and I am inclined to think that they were right. The approach was considered and rejected both by Jessel MR and the Court of Appeal in *Sturges* 11 Ch D 852, as explained in para 36 above, on the ground that time does not run for the purposes of prescription unless the activities of the owner (or occupier) of the putative dominant land can be objected to by the owner of the putative servient land. The notion that an easement can only be acquired by prescription if the activity concerned is carried on “as of right” for 20 years, i.e. *nec vi, nec clam, nec precario*, would seem to carry with it the assumption that it would not assist the putative dominant owner if the

- A activity was carried on “of right” for 20 years, as no question of force, stealth or permission could apply.

44 Lord Walker JSC’s observations in *R (Lewis) v Redcar and Cleveland Borough Council* (No 2) [2010] 2 AC 70, para 30 give some support for this view. He approved as a “general proposition” that if a right is to be obtained by prescription, the persons claiming that right

- B “must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him.”

- 45 It is true that this would not apply to a right to receive light, but the right to light is an “anomalous” easement, as Lord Hoffmann pointed out in *Hunter v Canary Wharf Ltd* [1997] AC 655, 709. In a passage which supports the view expressed in the preceding two paragraphs, he said that:

“In the normal case of prescription, the dominant owner will have been doing something for the period of prescription (such as using a footpath) which the servient owner could have stopped. But one cannot stop a neighbour from erecting a building with windows.”

- D 46 In any event, the right to emit noise (or smoke or smells) over neighbouring land must be a positive easement, as opposed to a negative easement such as the right to receive light, support, air or water: see *Gale on Easements*, 19th ed (2012), para 1-01 and footnote 3. (It is suggested in the text that the right to emit noise etc represent a third category of easement, because they merely involve actions on the dominant land, but, as the footnote states, the easement is not to carry on the activity on the dominant land but to emit noise over or into the servient land, which is a positive easement.) In every case that I can conceive, the acquisition of a positive easement can only arise from the owner or occupier of the putative dominant land doing something which would be a wrong against the owner or occupier of the putative servient land—normally trespassing: see the list of positive easements in *Gale*, para 1-74.

F

“Coming to the nuisance”

- 47 For some time now, it has been generally accepted that it is not a defence to a claim in nuisance to show that the claimant acquired, or started to occupy, her property after the nuisance had started—ie that it is no defence that the claimant has come to the nuisance. This proposition was clearly stated in *Bliss v King* [1883] 13 QBD 183, 186, per Tindal CJ. Coming to the nuisance appears to have been assumed not to be a defence in *Sturges v Bridgman* [1899] 11 ChD 852. And in *London, Brighton and South Coast Railway Co v Gomm* (1885) 11 App Cas 45, 52 Lord Halsbury LC described the idea that it was a defence to nuisance as an “old notion . . . long since exploded” and he also said that “whether the man went to the nuisance or the nuisance came to the man, the rights are the same” in *Fleming v Hislop* (1886) 11 App Cas 686, 697.

H

48 More recently, in *Miller v Jackson* [1977] QB 966, 986–987, the majority of the Court of Appeal held that the principle was well established. However, Lord Denning MR, in the minority, considered that the proper approach was for the court to “balance the right of the cricket club to

continue playing cricket on their cricket ground”, as they had done for 70 years, “as against the right of the householder”, whom he described as “a newcomer” who had built “a house on the edge of the cricket ground which four years ago was a field where cattle grazed”: see pp 976, 981. He held that there was no nuisance given that the cricket club had “spent money, labour and love in the making of [the pitch]: and they have the right to play upon it as they have done for 70 years”, and answered with a resounding no his own rhetorical (in both senses of the word) question whether this was “all to be rendered useless to them by the thoughtless and selfish act of an estate developer in building right up to the edge of it?”: see p 978.

49 Geoffrey Lane LJ (with whom Cumming-Bruce LJ agreed) accepted, albeit with some regret, that it was not for the Court of Appeal “to alter a rule which has stood for so long”, namely, at p 987:

“that it is no answer to a claim in nuisance for the defendant to show that the plaintiff brought the trouble on his own head by building or coming to live in a house so close to the defendant’s premises that he would inevitably be affected by the defendant’s activities, where no one had been affected previously.”

Accordingly, he concluded that the claim in nuisance was made out.

50 The respondents suggest that there is authority prior to the decision in *Bliss* 4 Bing NC 183 which supports the contention that the law was somewhat different in earlier times. *Leeds v Shakerley* (1599) Cro Eliz 751 was cited as an authority for the proposition that coming to the nuisance was a defence, but it may well be explained on the ground that the wrong complained of was the single act of diverting a watercourse, as opposed to the continuing loss of the watercourse. In his *Commentaries on the Laws of England*, 1st ed (1765–1769), vol II, ch 26, p 403, Sir William Blackstone, after explaining that a defendant can be liable in nuisance for setting up a tannery near my home, continues “but if he is first in possession of the air and I fix my habitation near him, the nuisance is of my own seeking, and must continue”. And in the criminal, public nuisance, case of *R v Cross* (1826) 2 C & P 483, 484, Abbott CJ said that a defendant whose trade was said to be a nuisance to a householder or a user of a road

“would be entitled to continue his trade [if] his trade [had been] legal before the erection of the houses in the one case, and the making of the road in the other.”

51 In my view, the law is clear, at least in a case such as the present, where the claimant in nuisance uses her property for essentially the same purpose as that for which it has been used by her predecessors since before the alleged nuisance started: in such a case, the defence of coming to the nuisance must fail. For over 180 years it has been assumed and authoritatively stated to be the law that it is no defence for a defendant to a nuisance claim to argue that the claimant came to the nuisance. With the dubious 16th century exception of the *Leeds* case Cro Eliz 751, there is no authority the other way, as the observations of Blackstone and Abbott CJ were concerned with cases where the defendant’s activities had originally not been a nuisance, and had only become an arguable nuisance as a result of a change of use (due to construction works) on the claimant’s property.

A 52 Furthermore, the notion that coming to the nuisance is no defence is consistent with the fact that nuisance is a property-based tort, so that the right to allege a nuisance should, as it were, run with the land. It would also seem odd if a defendant was no longer liable for nuisance owing to the fact that the identity of his neighbour had changed, even though the use of his neighbour's property remained unchanged. Quite apart from this, the concerns expressed by Lord Denning MR in *Miller* [1977] QB 966 would not apply where a purchasing claimant has simply continued with the use of the property which had been started before the defendant's alleged nuisance-causing activities started.

B
C 53 There is much more room for argument that a claimant who builds on, or changes the use of, her property, after the defendant has started the activity alleged to cause a nuisance by noise, or any other emission offensive to the senses, should not have the same rights to complain about that activity as she would have had if her building work or change of use had occurred before the defendant's activity had started. That raises a rather different point from the issue of coming to the nuisance, namely whether an alteration in the claimant's property after the activity in question has started can give rise to a claim in nuisance if the activity would not have been a nuisance had the alteration not occurred.

D 54 The observations I have quoted from Blackstone and Abbot CJ were in the context of cases where the defendant's activity only becomes a potential nuisance after a change of use or building work on the claimant's property, and they therefore provide some support for the defendant in such a case. However, in both *Sturges* and *Miller*, it appears clear that the defendant's activities predated the plaintiff's construction work, and it was only as a result of that work and the subsequent use of the new building that the activities became a nuisance. However, *Miller* was not concerned with damage to the senses, but with physical encroachment on, and potential physical damage to, the plaintiffs and their property (through cricket balls). In *Sturges*, the only issue raised by the unsuccessful defendant was prescription, the nuisance at least arguably involved more than offence to the senses, and the plaintiff's construction work merely involved an extension to an existing building: see *Sturges* 11 ChD 852, 852-854, 860-861.

E
F 55 It is unnecessary to decide this point on this appeal, but it may well be that it could and should normally be resolved by treating any pre-existing activity on the defendant's land, which was originally not a nuisance to the claimant's land, as part of the character of the neighbourhood—at least if it was otherwise lawful. After all, until the claimant built on her land or changed its use, the activity in question will, ex hypothesi, not have been a nuisance. This is consistent with the notion that nuisance claims should be considered by reference to what Lord Goff referred to as the “give and take as between neighbouring occupiers of land” quoted in para 5 above (and some indirect support for such a view may be found in *Sturges*, at pp 865-866).

G
H 56 On this basis, where a claimant builds on, or changes the use of, her land, I would suggest that it may well be wrong to hold that a defendant's pre-existing activity gives rise to a nuisance provided that (i) it can only be said to be a nuisance because it affects the senses of those on the claimant's land, (ii) it was not a nuisance before the building or change of use of the

claimant's land, (iii) it is and has been, a reasonable and otherwise lawful use of the defendant's land, (iv) it is carried out in a reasonable way, and (v) it causes no greater nuisance than when the claimant first carried out the building or changed the use. (This is not intended to imply that in any case where one or more of these requirements is not satisfied, a claim in nuisance would be bound to succeed.)

57 It would appear that the Court of Appeal adopted this approach in *Kennaway v Thompson* [1981] QB 88. In that case, Lawton LJ seems to have assumed that the noise made by the defendant's motorboats on the neighbouring lake should not be treated as a nuisance in so far as it was at the same level as when the plaintiff built her house nearby, and was a reasonable use reasonably carried out. However, a subsequent and substantial increase in the level of noise (due to larger boats and increased proximity to the plaintiff's house) and in the frequency of activity did constitute a nuisance.

58 Accordingly, it appears clear to me that it is no defence for a defendant who is sued in nuisance to contend that the claimant came to the nuisance, although it may well be a defence, at least in some circumstances, for a defendant to contend that, as it is only because the claimant has changed the use of, or built on, her land that the defendant's pre-existing activity is claimed to have become a nuisance, the claim should fail.

Reliance on the defendant's own activities in defending a nuisance claim

59 The assessment of the character of the locality for the purpose of assessing whether a defendant's activities constitute a nuisance is a classic issue of fact and judgment for the judge trying the case. Sometimes, it may be difficult to identify the precise extent of the locality for the purpose of the assessment, or the precise words to describe the character of the locality, but any attempt to give general guidance on such issues risks being unhelpful or worse.

60 However, such questions can give rise to points of principle on which an appellate court can give guidance. Thus, the concept of "the character" of the locality may be too monolithic in some cases, and a better description may often be something like "the established pattern of uses" in the locality.

61 In this case, the ground on which the Court of Appeal overturned the judge's decision was that he had wrongly failed to take into account the respondents' activities at the stadium and the track when considering the character of the locality. The appellants contend that the judge was right to disregard those activities.

62 The issue therefore is whether, and if so to what extent, the use to which the defendant actually puts his property can or should be relied on when assessing the character of the locality for the purpose of assessing whether the claimant has made out her case that those activities constitute a nuisance.

63 It seems clear that the character of the locality must be assessed by reference to the position as it is as a matter of fact, save to the extent that any departure from reality, or artificial assumption, should be made as a matter of logic or legal requirement (the presumption of reality). Accordingly, in a nuisance claim, I accept that one starts, as it were, with the proposition that

- A the defendant's activities are to be taken into account when assessing the character of the locality.

64 This approach accords with what was said by Lord Westbury in *St Helen's Smelting* 11 HL Cas 642, 650, namely:

- B "anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop."
- C

- D 65 Where I part company with the Court of Appeal is on the issue of whether one ignores the fact that those activities may constitute a nuisance to the claimant. In my view, to the extent that those activities are a nuisance to the claimant, they should be left out of account when assessing the character of the locality, or, to put it another way, they should be notionally stripped out of the locality when assessing its character. Thus, in the present case, where the judge concluded that the activities at the stadium and the track were actually carried on in such a way as to constitute a nuisance, E although they could be carried on so as not to cause a nuisance, the character of the locality should be assessed on the basis that (i) it includes the stadium and the track, and (ii) they could be used for speedway, stockcar, and banger racing and for motocross respectively, but (iii) only to an extent which would not cause a nuisance.

- F 66 In so far as the respondents' activities at the stadium and the track cause no nuisance, they are lawful. There is therefore no reason to disregard them when assessing the character of the neighbourhood. Indeed, it would be unrealistic, and indeed unfair on the respondents, if those activities were disregarded. However, in so far as the activities are unlawful, in particular in so far as they constitute a nuisance to the appellants, it would seem to me to be illogical, as well as unfair to the appellants, to take those activities into account. It would involve the respondents invoking their own wrong against G the appellants in order to justify their continuing to commit that very wrong against the appellants.

- H 67 The Court of Appeal appears to have accepted at para 75 of Jackson LJ's judgment that, if the respondents had used the stadium or the track in breach of planning conditions, a claim in nuisance may well have been made out. But the reason for that must be that a use in breach of planning law is unlawful and should therefore not be taken into account when assessing the character of the locality (unless, perhaps, it was shown that planning permission was likely to be forthcoming). It appears to me that the same conclusion should, as a matter of logic, indeed perhaps a fortiori, apply to a use which constitutes the very nuisance of which the appellants are complaining.

68 The respondents rely on the fact that the activities carried on at the stadium and the track had been going on for many years before the judge made his assessment of the character of the neighbourhood. As Jackson LJ put it [2012] 1 WLR 2127, paras 69, 72, these activities were “an established feature, indeed a dominant feature, of the locality” and “one of the noise characteristics of the locality” by the time that the appellants brought their claim. However, in so far as those activities were being carried on unlawfully, for instance because they give rise to a nuisance to the claimants making the nuisance claim, they should not be taken into account when assessing the character of the locality, whether they have been going on for a few days or many years.

69 Of course, once the nuisance has been going on for 20 years, the position may be different, as the respondents may well have obtained a right to cause what would otherwise be a nuisance. I should perhaps add that if a defendant’s actual activities have been held to be a nuisance by the court, but the court has then decided to refuse an injunction and award damages instead, then, whether or not the activities can be described as “lawful”, it would in my view be proper to take them into account as part of the character of the locality: they have effectively been sanctioned by the court.

70 I do not consider that this conclusion is inconsistent with the reasoning of the Court of Appeal in *Rushmer v Polsue & Alfieri Ltd* [1906] 1 Ch 234; affirmed [1907] AC 121. In my view, the brief opinion of Lord Loreburn LC [1907] AC 121, 122–123 encapsulates the effect of the judgments of Stirling and Cozens-Hardy LJ in the Court of Appeal, namely that (i) whether an activity gives rise to a nuisance may depend on the character of the particular locality, (ii) the trial judge rightly directed himself as to the law, and (iii) there was no reason to think that he had not applied his own directions to the facts of the case (and I think that the rather discursive judgment of Vaughan Williams LJ is to much the same effect). The only relevant point for present purposes which I can discern from the reasoning of the Court of Appeal is that an activity can be a nuisance even if it conforms to the character of the locality—a point made by all three members of the court, perhaps most clearly by Cozens-Hardy LJ [1906] 1 Ch 234, 250–251. But that is entirely consistent with the above analysis.

71 It must be acknowledged, however, that there appears to be an element of circularity in the notion that, when assessing the character of the locality, one has to ignore the defendant’s activities if, or to the extent that, they constitute a nuisance, given that the point one is ultimately seeking to decide is whether the defendant’s activities amount to a nuisance. However, it seems to me that there should be no real problem in this connection. In many cases, it is fairly clear whether or not a defendant’s activities constitute a nuisance once one has established the facts, and nice questions as to the precise identification of the locality or its character do not have to be addressed. In those cases where the precise character of the locality is of importance, the point should not cause much difficulty either. In this case, for example, the question for the judge was the extent to which the noise levels from the stadium and the track were or would be acceptable in what was a sparsely populated area, with a couple of small villages and a military airfield between a mile and two miles away, and he answered it by taking the noise levels at other well established racing circuits elsewhere in the country.

A 72 However, in some cases, there will be an element of circularity. In such cases, the court may have to go through an iterative process when considering what noise levels are acceptable when assessing the character of the locality and assessing what constitutes a nuisance. None the less, the circularity involved in my conclusion does give cause for concern.

B 73 The concern is, however, allayed once one considers the two other possible approaches. Either one ignores the activity in question altogether when assessing the character of the locality. That may often be the simplest and fairest way of dealing with the issue but, at least in some cases, it could be unfair on a defendant in a nuisance case. Or one adopts a solution which is both even more circular than the one which I prefer, and surprising in its consequences, namely the approach taken by the Court of Appeal. If the activity which causes the alleged nuisance is taken into account, without
C modification, as part of the character of the locality, it would mean that there could rarely be a successful claim for nuisance, as I see it. If the matters complained of by the claimant are part of the character of the locality, then it is hard to see how they could be unacceptable by a standard which is to be assessed by reference to that very character. Furthermore, to the extent that the defendant's activities constitute a nuisance, it seems wrong that he should be able to have them taken account when assessing the character of
D the locality: he would be relying on his own wrong against the claimant.

74 Accordingly, I conclude that a defendant, faced with a contention that his 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—and to avoid any misunderstanding, if the activities couldn't be carried out without creating a
E nuisance, then they would have to be entirely discounted when assessing the character of the neighbourhood.

75 Similarly, any other activity in the neighbourhood can properly be taken into account when assessing the character of the neighbourhood, to the extent that it does not give rise to an actionable nuisance or is otherwise unlawful. There will, no doubt, frequently be many uses which may not have obtained a specific sanction (through being agreed to by the claimant,
F through a prescriptive right or through the court refusing an injunction), but which are unobjectionable as a matter of law, and may therefore properly be taken into account.

76 In addition, as Lord Carnwath JSC says at para 185 below, the fact that it is not open to a neighbouring claimant to object to the defendant's activities simply because they emit noise does not mean that the defendant is
G free to carry on those activities in any way he wishes. The claimant is entitled to expect the defendant to take all reasonable steps to ensure that the noise is kept to a reasonable minimum, consistent with what was said by Bramwell B in *Bamford v Turnley* (1862) 3 B & S 66: see para 5 above. This is consistent with the approach taken by the court in relation to the noise temporarily caused by building works: see, e.g, *Andreae v Selfridge & Co Ltd* [1938] Ch 1, 7.

H *The effect of planning permission on an allegation of nuisance*

77 The interrelationship of planning permission and nuisance has been considered in a number of cases, and has been discussed in a number of articles and books. The grant of planning permission for a particular use is

potentially relevant to a nuisance claim in two ways. First, the grant, or terms and conditions, of a planning permission may permit the very noise (or other disturbance) which is alleged by the claimant to constitute a nuisance. In such a case, the question is the extent, if any, to which the planning permission can be relied on as a defence to the nuisance claim. Secondly, the grant, or terms and conditions, of a planning permission may permit the defendant's property or another property in the locality to be used for a certain purpose, so that the question is how far that planning permission can be relied on by the defendant as changing the character of the locality.

78 As explained in para 18 above, the judge effectively bypassed these issues by concluding that the grant of planning permission should not be taken into account when assessing whether the respondents' activities at the stadium or the track constituted a nuisance, for two reasons. The first reason was that the permissions in question were personal, and the second was that they only permitted those activities at certain times. I find the first reason largely unconvincing and the second reason baffling.

79 The fact that a planning permission for a particular use is personal does not alter the fact that it removes the bar which would otherwise exist on that use, and that the use is acceptable in planning terms at least if carried on by, or on behalf of, the very person who is carrying it on. However, there is something in the point that, by granting a permission which was both permanent and personal, the planning authority was, as it were, hedging its bets—a view supported by the fact that the question whether to grant planning permission was controversial. None the less, the fact remains that the use in question did have planning permission.

80 I fail to understand why the restriction as to number of days and the time limitations contained in an otherwise relevant planning permission should invalidate its relevance to the issue of nuisance. Apart from the inherent illogicality of the judge's conclusion, such restrictions and limitations were no doubt imposed, at least in part, in the interests of those in the neighbourhood of the stadium and track. Accordingly, I agree with the Court of Appeal that the judge's reasons for refusing to take into account the fact that planning permissions had been granted for the activities carried on by the respondents are unsupportable.

81 However, that leaves open the question as to what weight, if any, should be given to the fact that planning permission has been granted for the very activities which a claimant contends give rise to a nuisance by noise. More particularly, what weight, if any, should be given to the fact that there is a planning permission for a use which will inevitably give rise to the noise which is said to constitute a nuisance, and/or which contains terms or conditions which specifically allow the emission of the noise which is said by a claimant to constitute a nuisance?

82 The implementation of a planning permission can give rise to a change in the character of the locality, but, subject to one possible point, it is no different from any other building work or change of use which does not require planning permission. Thus, if the implementation of a planning permission results in the creation of a nuisance to a claimant, then, subject to one possible point, it cannot be said that the implementation has led to a change in the character of the locality—save, as explained above, (i) to the extent that the implementation could have been effected in a way which would not have created a nuisance, or (ii) if the defendant can show a

A prescriptive right to create the nuisance, or (iii) the court has decided to award the claimant damages rather than an injunction in respect of the nuisance.

83 I have described the conclusions in the preceding paragraph as being “subject to one possible point”. That point is the extent, if any, to which a defendant, in seeking to rebut a claim in nuisance, can rely on the fact that the grant, or terms and conditions, of a planning permission permit the very noise (or other disturbance) which is alleged by the claimant to constitute the nuisance (or which is relied on by the defendant as forming part of the character of the locality).

84 In the Court of Appeal, Jackson LJ discussed the cases in which the relationship between planning decisions and claims in nuisance had been considered. In *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1993] QB 343, 359 Buckley J accepted that “planning permission is not a licence to commit nuisance”, but he went on to say that “a planning authority can, through its development plans and decisions, alter the character of a neighbourhood”. As Jackson LJ explained [2012] 1 WLR 2117, para 57, even though the implementation of the planning permission in *Gillingham* resulted in “noise, vibration, dust and fumes [which] caused serious disturbance local residents . . . Buckley J dismissed the claim for public nuisance”. In the following paragraph of his judgment, having described that as a “[harsh] . . . outcome”, Jackson LJ said it was none the less a correct outcome, as the planning authority “had made a decision in the public interest and the consequences had to be accepted”.

85 Jackson LJ seems to have concluded that the same reasoning applied in *Hirose Electrical UK Ltd v Peak Ingredients Ltd* [2011] Env LR 680: see para 62. However, he also accepted in para 59 that it was not open to a defendant in a nuisance claim to be able to rely on a planning permission for “a change of use of a very small piece of land”, which was the basis of the decision of the Court of Appeal in *Wheeler v JJ Saunders Ltd* [1996] Ch 19. In that case, Staughton LJ suggested that only “a strategic planning decision affected by considerations of public interest” would assist a defendant in a nuisance claim, and Peter Gibson LJ, while plainly dubious about the reasoning in *Gillingham*, suggested that it could only apply in relation to a “major development”: see pp 30, 35. Further, as I read the analysis of Jackson LJ at para 66, he also thought that that reason justified the decision of the Court of Appeal in *Watson v Croft Promosport Ltd* [2009] 3 All ER 249.

86 It seems to me that the effect of Jackson LJ’s analysis is that, where the planning permission is granted for a use of the defendant’s property which inevitably results in, or specifically permits, what would otherwise be a nuisance to the claimant, that use is to be treated as part of the character of the locality, if the permission relates to a large area, but not if it relates to a small area. Further, as is apparent from the contrasting outcomes in *Gillingham* and *Hirose*, as against *Wheeler* and *Watson*, where the planning permission for the nuisance-making activity is “strategic” in nature or relates to a “major development”, it would defeat the claim for nuisance, whereas where it is for a small area, it would have no effect on the nuisance claim. As mentioned in para 73 above, that is scarcely surprising, as once one accepts that the noise complained of forms part of the character of the locality for

the purpose of considering what constitutes a nuisance, it is hard to see how that very noise could be held to be a nuisance. A

87 In my judgment, the conclusion reached by the Court of Appeal on this issue is unsatisfactory, both in principle and in practice, although it is only fair to add that they may understandably have considered that their hands were tied by the decisions mentioned in paras 84–86 above. Logically, the fact that the alleged nuisance arising from the defendant’s property is permitted by the planning authority should be a decisive factor, a relevant factor, or an irrelevant factor when assessing whether it is a nuisance. B
Which of those three possibilities applies should not depend on whether the permission relates to a large or small area of land. Furthermore, while Jackson LJ was at pains to emphasise that the grant of planning permission would not defeat a nuisance claim, it seems to me that that was precisely the effect of a planning permission for a large area, according to the reasoning of Buckley J in *Gillingham*, of the Court of Appeal in *Watson*, and of Jackson LJ in this case. C

88 It also would be somewhat paradoxical if the greater the likely disagreeable impact of a change of use permitted by the planning authorities, the harder it would be for a claimant to establish a claim in nuisance. Yet that seems to be the effect of Jackson LJ’s analysis, as the greater the area covered by the planning permission (i) the more likely it is to provide a defence to a claim in nuisance, and (ii) the more intrusive any noise or other intrusion is likely to be. Quite apart from this, it is hard to know what is meant by a large area. D

89 The grant of planning permission for a particular development does not mean that that development is lawful. All it means is that a bar to the use imposed by planning law, in the public interest, has been removed. E
Logically, it might be argued, the grant of planning permission for a particular activity in 1985 or 2002 should have no more bearing on a claim that that activity causes a nuisance than the fact that the same activity could have occurred in the 19th century without any permission would have had on a nuisance claim in those days.

90 Quite apart from this, it seems wrong in principle that, through the grant of a planning permission, a planning authority should be able to deprive a property owner of a right to object to what would otherwise be a nuisance, without providing her with compensation, when there is no provision in the planning legislation which suggests such a possibility. F
This point is reinforced when one turns to sections 152 and 158 of the Planning Act 2008: section 158 expressly excludes claims in nuisance by neighbours as a result of the use of a property consequent on a ministerial order permitting that use, and section 152 provides for appropriate compensation where a neighbour would, but for section 158, have had a claim in nuisance. G
It is also to be noted that section 76 of the Civil Aviation Act 1982 expressly excludes an action for nuisance owing to aircraft, but section 1 of the Land Compensation Act 1973 provides for compensation for neighbours (including in respect of nuisance by noise attributable to aircraft) when land is developed as an “aerodrome”. H

91 As for practical considerations, I am not impressed by the suggested difference between “a strategic planning decision affected by considerations of public interest” (or a planning decision relating to a “major development”) and other planning decisions. No doubt all planning

- A applications take into account the public interest, and the difference between a “strategic” planning permission (or a planning permission for a “major development”), and other planning permissions seems to me to be a recipe for uncertainty.

92 In my view, therefore, Carnwath LJ was right when he said in *Barr v Biffa Waste Services Ltd* [2013] QB 455, para 46(ii), that:

- B “The common law of nuisance has co-existed with statutory controls, albeit less sophisticated, since the 19th century. There is no principle that the common law should ‘march with’ a statutory scheme covering similar subject matter. Short of express or implied statutory authority to commit a nuisance . . . there is no basis, in principle or authority, for using such a statutory scheme to cut down private law rights.”

- C 93 Peter Gibson LJ expressed much the same view in *Wheeler* [1996] Ch 19, 35, where he suggested that:

“The court should be slow to acquiesce in the extinction of private rights without compensation as a result of administrative decisions which cannot be appealed and are difficult to challenge”.

- D In an observation that also relates to the final topic raised on this appeal, he added that, where

“a major development altering the character of a neighbourhood with wide consequential effects such as required a balancing of competing public and private interests before permission was granted”,

he could

- E “well see that in such a case the public interest must be allowed to prevail and that it would be inappropriate to grant an injunction (though whether that should preclude any award of damages in lieu is a question which may need further consideration).”

- F 94 Accordingly, I consider that the mere fact that the activity which is said to give rise to the nuisance has the benefit of a planning permission is normally of no assistance to the defendant in a claim brought by a neighbour who contends that the activity cause a nuisance to her land in the form of noise or other loss of amenity.

- G 95 A planning authority has to consider the effect of a proposed development on occupiers of neighbouring land, but that is merely one of the factors which has to be taken into account. The planning authority can be expected to balance various competing interests, which will often be multifarious in nature, as best it can in the overall public interest, bearing in mind relevant planning guidelines. Some of those factors, such as many political and economic considerations which properly may play a part in the thinking of the members of a planning authority, would play no part in the assessment of whether a particular activity constitutes a nuisance—unless the law of nuisance is to be changed fairly radically. Quite apart from this,
- H when granting planning permission for a change of use, a planning authority would be entitled to assume that a neighbour whose private rights might be infringed by that use could enforce those rights in a nuisance action; it could not be expected to take on itself the role of deciding a neighbour’s common law rights.

96 However, there will be occasions when the terms of a planning permission could be of some relevance in a nuisance case. Thus, the fact that the planning authority takes the view that noisy activity is acceptable after 8.30 a.m, or if it is limited to a certain decibel level, in a particular locality, may be of real value, at least as a starting point as Lord Carnwath JSC says in para 218 below, in a case where the claimant is contending that the activity gives rise to a nuisance if it starts before 9.30 a.m, or is at or below the permitted decibel level. While the decision whether the activity causes a nuisance to the claimant is not for the planning authority but for the court, the existence and terms of the permission are not irrelevant as a matter of law, but in many cases they will be of little, or even no, evidential value, and in other cases rather more.

97 The evidence before the planning authority when it was deciding to grant planning permission may also be before the court when deciding a nuisance claim. This evidence will often consist of letters or other submissions from neighbours (sometimes including the claimant), expert assessments, and advice from planning officers. The weight to be given to this sort of evidence obviously depends very much on the facts of the particular case, but, in a nuisance case with live witnesses, it will be likely to be of significantly less value if the people who produced the documents are not available to be cross-examined.

98 It should be added that I am very dubious about the notion that it would always be safe to assume that the reasons given by planning officers for recommending that planning permission be granted were the actual reasons which the planning authority had in mind when granting planning permission. While the planning officers' reasons would normally feature large in the minds of members of the planning committee, it would be little short of naïve to assume that even the majority of those members who were in favour of granting permission agreed with all those reasons, or had no other reasons. Where a planning authority is defending a public law attack on the grant of a planning permission, and the only positive evidence of its reasons for the grant of the permission are those contained in the planning officer's advice, and the authority has adduced no evidence to suggest that it had not accepted those reasons (and there is no other evidence to suggest otherwise), I can see some ground for making the assumption. However, where the issue arises in private law proceedings in which the planning authority is not a party and the planning permission itself is not under attack, and in which there is normally oral evidence, I do not think it would be necessarily correct to make such an assumption. Whether it would be right to make the assumption in a particular case would depend on the evidence, including the contemporary documentation and possibly expert evidence, as well as on the arguments.

99 It is right to add that I should not be taken as necessarily suggesting that the actual decision that there was no liability in nuisance in *Gillingham* [1993] QB 343 was wrong, although much of Buckley J's reasoning, despite the fact that it was approved in the dissenting judgment of Lord Cooke of Thorndon in *Hunter v Canary Wharf Ltd* [1997] AC 655, 722, cannot stand. As Lord Carnwath JSC points out in para 203 below, the alternative basis for the decision in *Gillingham*, which was based on discretion, was probably right.

A *The award of damages instead of an injunction*

100 As explained in paras 24–25 above, in addition to awarding the appellants damages for the nuisance by noise which they had suffered in the past, the judge granted them an injunction limiting the levels of noise which could be emitted from the stadium and the track, and he also gave liberty to apply. He was not invited to award the appellants damages instead of an injunction. On this appeal, however, the respondents contend that, if the judge was right in concluding that their activities at the stadium and the track constituted a nuisance, then this was a case where he ought to have awarded damages instead of an injunction.

101 Where a claimant has established that the defendant's activities constitute a nuisance, *prima facie* the remedy to which she is entitled (in addition to damages for past nuisance) is an injunction to restrain the defendant from committing such nuisance in the future; of course, the precise form of any injunction will depend very much on the facts of the particular case. However, ever since Lord Cairns' Act (the Chancery Amendment Act 1858 (21 & 22 Vict c 27)), the court has had power to award damages instead of an injunction in any case, including a case of nuisance: see now section 50 of the Senior Courts Act 1981. Where the court decides to refuse the claimant an injunction to restrain a nuisance, and instead awards her damages, such damages are conventionally based on the reduction in the value of the claimant's property as a result of the continuation of the nuisance. Subject to what I say in paras 128–131 below, this is clearly the appropriate basis for assessing damages, given that nuisance is a property-related tort and what constitutes a nuisance is judged by the standard of the ordinary reasonable person.

102 The question which arises is what, if any, principles govern the exercise of the court's jurisdiction to award damages instead of an injunction. The case which is probably most frequently cited on the question is *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, but there has been a substantial number of cases in which judges have considered the issue, some before, and many others since. For present purposes, it is necessary to consider *Shelfer* and some of the subsequent cases, which were more fully reviewed by Mummery LJ in *Regan v Paul Properties DPF No 1 Ltd* [2007] Ch 135, paras 35–59.

103 In *Shelfer* the Court of Appeal upheld the trial judge's decision to grant an injunction to restrain noise and vibration. Lindley LJ said, at pp 315–316:

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

104 A L Smith LJ said, at pp 322–323, in a frequently cited passage:

“a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the court to sanction his doing so by purchasing his neighbour’s rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be. In such cases the well known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff’s legal right has been invaded, and he is *prima facie* entitled to an injunction. There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution . . . In my opinion, it may be stated as a good working rule that— (1) If the injury to the plaintiff’s legal rights is small, (2) And is one which is capable of being estimated in money, (3) And is one which can be adequately compensated by a small money payment, (4) And the case is one in which it would be oppressive to the defendant to grant an injunction:—then damages in substitution for an injunction may be given.”

105 Significant obiter observations were subsequently made on the question in *Colls v Home & Colonial Store Ltd* [1904] AC 179, where the House of Lords reversed the courts below who had concluded that the defendant had infringed the plaintiff’s right to light (and had awarded an injunction). Lord Macnaghten said, at p 192, that he had “some difficulty in following out [the] rule” that “an injunction ought to be granted when substantial damages would be given at law”. He added, at p 193, that “if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit”, then he was “disposed to think that the court ought to incline to damages rather than to an injunction”. Lord Lindley (as he had by then become), at pp 212–213, after reviewing some of the previous cases on the topic, including *Shelfer*, described “the result of the foregoing review of the authorities” as “not altogether satisfactory”, and adding that “there is the uncertainty as to whether the proper remedy is an injunction or damages”, but that “the good sense of judges and juries may be relied on for adequately protecting rights to light on the one hand and freedom from unnecessary burdens on the other”.

106 In *Kine v Jolly* [1905] 1 Ch 480, the Court of Appeal discharged an injunction restraining an interference to a right to light. At p 504, Cozens-Hardy LJ said he thought that “the tendency of the speeches in the House of Lords in . . . *Colls*” was to go “a little further than was done in *Shelfer*”, and indicated that “as a general rule the court ought to be less free in granting mandatory injunctions than it was in years gone by”. Vaughan Williams LJ appears to have thought that the two cases involved different approaches, but concluded that each approach yielded the conclusion that there should be no injunction. Romer LJ, dissenting on the issue of liability, did not need to decide the point, and did not indicate which he preferred.

107 In the subsequent decision of *Slack v Leeds Industrial Co-operative Society Ltd* [1924] 2 Ch 475, which was also concerned with an interference with the plaintiff’s right to light, all three members of the Court of Appeal (Sir Ernest Pollock MR, Warrington and Sargant LJJ) considered that nothing in *Colls* served to undermine the “good working rule” of

A A L Smith LJ in *Shelfer*, although they discharged a quia timet injunction and ordered an inquiry as to damages.

B 108 In *Fishenden v Higgs & Hill Ltd* (1935) 153 LT 128, another rights of light case, the Court of Appeal adopted a rather different approach, when allowing an appeal against Crossman J's refusal to award damages instead of an injunction. Lord Hanworth MR (as Sir Ernest Pollock had become) observed that his judgment in *Slack* should not be read as saying that A L Smith LJ's four tests "by themselves were now prescribed as the guiding tests for the court". Indeed, he observed at p 139 that "we ought to incline against an injunction if possible".

C 109 Romer LJ said, at p 141, that A L Smith LJ's four tests "were not intended to be a fetter on the exercise of the court's discretion", and suggested that, while it was true that an injunction should be refused if those tests were satisfied, "it by no means [followed]" that an injunction should be granted if they were not. In deciding to overturn the injunction, Romer LJ was strongly influenced by the fact that the defendants had "acted fairly [and] in a neighbourly spirit" as well as by the conduct of the plaintiff. At p 144, Maugham LJ said that "the working rule laid down by A L Smith LJ" was not "a universal or even a sound rule in all cases of injury to light", and said he preferred the approach of Lord Lindley in *Shelfer* and *Colls*.

D 110 In more recent times, the Court of Appeal seems to have assumed that the approach of Lindley and A L Smith LJ in *Shelfer* represents the law, and indeed that the four tests suggested by A L Smith LJ are normally to be applied, so that, unless all four tests are satisfied, there was no jurisdiction to refuse an injunction. That seems to have been the approach of Geoffrey Lane LJ in *Miller* [1977] QB 966 (discussed in paras 48–49 above), and of E Lawton LJ in *Kennaway* [1981] QB 88 (discussed in para 57 above).

F 111 *Jaggard v Sawyer* [1995] 1 WLR 269 was a case where the Court of Appeal upheld the trial judge's decision to award damages instead of an injunction restraining the defendant trespassing on the plaintiff's land. In so doing, the judge effectively gave the defendant a right of way to his house over the plaintiff's land, against the plaintiff's will, in return for a capital payment from the defendant to the plaintiff: see pp 286–287.

F 112 At pp 282–283, Sir Thomas Bingham MR (with whom Kennedy LJ agreed), specifically tested the trial judge's decision to award damages by reference to A L Smith LJ's four tests, and emphasised that "the test is one of oppression, and the court should not slide into application of a general balance of convenience test". He held that the judge had rightly concluded that the four tests were satisfied.

G 113 Millett LJ said, at p 287, that "A L Smith LJ's checklist has stood the test of time", but emphasised that "it is only a working rule and does not purport to be an exhaustive statement of the circumstances in which damages may be awarded instead of an injunction". As he immediately went on to emphasise on the next page, the decision whether or not to award damages instead of an injunction is a discretion. Accordingly, he said, the cases where judges have awarded or refused to award damages can be no more than "illustrations of circumstances in which particular judges have exercised their discretion". He also suggested that "The outcome of any particular case usually turns on the question: would it in all the circumstances be oppressive to the defendant to grant the injunction to which the plaintiff is prima facie entitled?" He then went on to refer to the

significance of the defendant's state of mind, including openness, good faith, and understanding. A

114 Some seven years ago, in *Regan* [2007] Ch 135, the Court of Appeal rejected the trial judge's view that, where the defendant's building interfered with the claimant's right to light, the onus was on the claimant to show that damages were not an adequate remedy. In his judgment, Mummery LJ then effectively decided that an injunction should be granted on the basis that three of A L Smith LJ's tests were not satisfied: see paras 70–73. B

115 In *Watson* [2009] 3 All ER 249, the Court of Appeal reversed the trial judge's decision to award damages instead of an injunction in a case where the nuisance was very similar in nature and cause to that alleged in this case. At para 44, Sir Andrew Morritt C described "the appropriate test" as having been "clearly established by the decision of the Court of Appeal in *Shelfer*", namely "that damages in lieu of an injunction should only be awarded under 'very exceptional circumstances'". He also said that *Shelfer* "established that the circumstance that the wrongdoer is in some sense a public benefactor is not a sufficient reason for refusing an injunction", although he accepted, at para 51, that "the effect on the public" could properly be taken into account in a case "where the damage to the claimant is minimal". C

116 It seems to me that there are two problems about the current state of the authorities on this question of the proper approach for a court to adopt on the question whether to award damages instead of an injunction. D

117 The first is what at best might be described as a tension, and at worst as an inconsistency, between two sets of judicial dicta since *Shelfer* [1895] 1 Ch 475. Observations in *Slack*, *Miller*, *Kennaway*, *Regan*, and *Watson* appear to support the notion that A L Smith LJ's approach in *Shelfer* is generally to be adopted and that it requires an exceptional case before damages should be awarded in lieu of an injunction, whereas the approach adopted in *Colls*, *Kine*, and *Fishenden* seems to support a more open-minded approach, taking into account the conduct of the parties. In *Jaggard*, the Court of Appeal did not need to address the question, as even on the stricter approach it upheld the trial judge's award of damages in lieu, although Millett LJ seems to have tried to reconcile the two approaches. E

118 The second problem is the unsatisfactory way in which it seems that the public interest is to be taken into account when considering the issue whether to grant an injunction or award damages. The notion that it can be relevant where the damages are minimal, but not otherwise, as stated in *Watson*, seems very strange. Either the public interest is capable of being relevant to the issue or it is not. As part of this second problem, there is a question as to the extent to which it is relevant that the activity giving rise to the nuisance has the benefit of a planning permission. F

119 So far as the first problem is concerned, the approach to be adopted by a judge when being asked to award damages instead of an injunction should, in my view, be much more flexible than that suggested in the recent cases of *Regan* [2007] Ch 135 and *Watson* [2009] 3 All ER 249. It seems to me that (i) an almost mechanical application of A L Smith LJ's four tests, and (ii) an approach which involves damages being awarded only in "very exceptional circumstances", are each simply wrong in principle, and give rise to a serious risk of going wrong in practice. (Quite apart from this, exceptionality may be a questionable guide in any event: see *Manchester* H

- A *City Council v Pinnock (Secretary of State for Communities and Local Government intervening)* [2011] 2 AC 104, para 51.)

B 120 The court's power to award damages in lieu of an injunction involves a classic exercise of discretion, which should not, as a matter of principle, be fettered, particularly in the very constrained way in which the Court of Appeal has suggested in *Regan and Watson*. And, as a matter of practical fairness, each case is likely to be so fact-sensitive that any firm guidance is likely to do more harm than good. On this aspect, I would adopt the observation of Millett LJ in *Jaggard* [1995] 1 WLR 269, 288 where he said:

C "Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion, in some cases by granting an injunction, and in others by awarding damages instead. Since they are all cases on the exercise of a discretion, none of them is a binding authority on how the discretion should be exercised. The most that any of them can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. But it does not follow that it would be wrong to exercise it differently."

D 121 Having approved that statement, it is only right to acknowledge that this does not prevent the courts from laying down rules as to what factors can, and cannot, be taken into account by a judge when deciding whether to exercise his discretion to award damages in lieu. Indeed, it is appropriate to give as much guidance as possible so as to ensure that, while the discretion is not fettered, its manner of exercise is as predictable as possible. I would accept that the *prima facie* position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not. And, subject to one possible point, I would cautiously (in the light of the fact that each case turns on its facts) approve the observations of Lord Macnaghten in *Colls* [1904] AC 179, 193, where he said:

F "In some cases, of course, an injunction is necessary—if, for instance, the injury cannot fairly be compensated by money—if the defendant has acted in a high-handed manner—if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others. But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money."

H 122 The one possible doubt that I have about this observation relates to the suggestion in the antepenultimate sentence that the court "ought to incline to damages" in the event he describes. If, as I suspect, Lord Macnaghten was simply suggesting that, if there was no prejudice to a claimant other than the bare fact of an interference with her rights, and there was no other ground for granting an injunction, I agree with him. However,

it is right to emphasise that, when a judge is called on to decide whether to award damages in lieu of an injunction, I do not think that there should be any inclination either way (subject to the legal burden discussed above): the outcome should depend on all the evidence and arguments. Further, the sentence should not be taken as suggesting that there could not be any other relevant factors: clearly there could be. (It is true that *Colls*, like a number of the cases on the issue of damages in lieu, was concerned with rights of light, but I do not see such cases as involving special rules when it comes to this issue. *Shelfer* itself was not a right to light case; nor were *Jaggard* and *Watson*. However, in many cases involving nuisance by noise, there may be more wide ranging issues and more possible forms of relief than in cases concerned with infringements of a right to light.)

123 Where does that leave A L Smith LJ's four tests? While the application of any such series of tests cannot be mechanical, I would adopt a modified version of the view expressed by Romer LJ in *Fishenden* 153 LT 128, 141. First, the application of the four tests must not be such as "to be a fetter on the exercise of the court's discretion". Secondly, it would, in the absence of additional relevant circumstances pointing the other way, normally be right to refuse an injunction if those four tests were satisfied. Thirdly, the fact that those tests are not all satisfied does not mean that an injunction should be granted.

124 As for the second problem, that of public interest, I find it hard to see how there could be any circumstances in which it arose and could not, as a matter of law, be a relevant factor. Of course, it is very easy to think of circumstances in which it might arise but did not begin to justify the court refusing, or, as the case may be, deciding, to award an injunction if it was otherwise minded to do so. But that is not the point. The fact that a defendant's business may have to shut down if an injunction is granted should, it seems to me, obviously be a relevant fact, and it is hard to see why relevance should not extend to the fact that a number of the defendant's employees would lose their livelihood, although in many cases that may well not be sufficient to justify the refusal of an injunction. Equally, I do not see why the court should not be entitled to have regard to the fact that many other neighbours in addition to the claimant are badly affected by the nuisance as a factor in favour of granting an injunction.

125 It is also right to mention planning permission in this context. In some cases, the grant of planning permission for a particular activity (whether carried on at the claimant's, or the defendant's, premises) may provide strong support for the contention that the activity is of benefit to the public, which would be relevant to the question of whether or not to grant an injunction. Accordingly, the existence of a planning permission which expressly or inherently authorises carrying on an activity in such a way as to cause a nuisance by noise or the like, can be a factor in favour of refusing an injunction and compensating the claimant in damages. This factor would have real force in cases where it was clear that the planning authority had been reasonably and fairly influenced by the public benefit of the activity, and where the activity cannot be carried out without causing the nuisance complained of. However, even in such cases, the court would have to weigh up all the competing factors.

126 In some such cases, the court may well be impressed by a defendant's argument that an injunction would involve a loss to the public

A or a waste of resources on account of what may be a single claimant, or that the financial implications of an injunction for the defendant would be disproportionate to the damage done to the claimant if she was left to her claim in damages. In many such cases, particularly where an injunction would in practice stop the defendant from pursuing the activities, an injunction may well not be the appropriate remedy.

B 127 Since writing this, I have read with interest Lord Sumption JSC's suggestions as to how the law on the topic of damages instead of an injunction in nuisance cases might develop. At any rate on the face of it, I can see much merit in the proposals which he proffers. However, it would be inappropriate to go further than I have gone at this stage, in the light of the arguments which were raised on this appeal. There may well be objections, qualifications, and alternatives which could be made in relation to Lord Sumption JSC's suggested approach, and they should be considered before the law on this topic is developed further. In that connection, I see real force in what Lord Mance JSC says in para 168.

C
D 128 A final point which it is right to mention on this issue is the measure of damages, where a judge decides to award damages instead of an injunction. It seems to me at least arguable that, where a claimant has a prima facie right to an injunction to restrain a nuisance, and the court decides to award damages instead, those damages should not always be limited to the value of the consequent reduction in the value of the claimant's property. While double counting must be avoided, the damages might well, at least where it was appropriate, also include the loss of the claimant's ability to enforce her rights, which may often be assessed by reference to the benefit to the defendant of not suffering an injunction.

E 129 Support for such an approach may be found in the reasoning in *Jaggard* [1995] 1 WLR 269, which suggests that this is a proper approach to damages where an injunction is refused to restrain a trespass, and damages were awarded instead. Bingham MR said, at pp 281–282, when explaining and approving an earlier case where a judge had assessed damages for breach of a restrictive building covenant, which he then applied to the claim in *Jaggard*:

G “The defendants had committed a breach of covenant, the effects of which continued. The judge was not willing to order the defendants to undo the continuing effects of that breach. He had therefore to assess the damages necessary to compensate the plaintiffs for this continuing invasion of their right. He paid attention to the profits earned by the defendants, as it seems to me, not in order to strip the defendants of their unjust gains, but because of the obvious relationship between the profits earned by the defendants and the sum which the defendants would reasonably have been willing to pay to secure release from the covenant.”

H 130 To the same effect, Millett LJ said in *Jaggard*, at p 292:

“In my view there is no reason why compensatory damages for future trespasses and continuing breaches of covenant should not reflect the value of the rights which she has lost, or why such damages should not be measured by the amount which she could reasonably have expected to receive for their release.”

131 However, there are factors which support the contention that damages in a nuisance case should never, or only rarely, be assessed by reference to the benefit to the defendant in no injunction being granted, as pointed out by Lord Carnwath JSC in para 248 below. For that reason, as well as because we have not heard argument on the issue, it would be inappropriate for us to seek to decide on this appeal whether, and if so in what circumstances, damages could be recoverable on this basis in a nuisance claim.

132 There are differences between the various members of the court on this final issue. Most, probably all, of these differences are ones of emphasis and detail rather than of principle, but I none the less accept that we are at risk of introducing a degree of uncertainty into the law. The nature of the issue, whether to award damages in lieu of an injunction, is such that a degree of uncertainty is inevitable, but that does not alter the fact that it should be kept to a reasonable minimum. Given that we are changing the practice of the courts, it is inevitable that, in so far as there can be clearer or more precise principles, they will have to be worked out in the way familiar to the common law, namely on a case by case basis.

The resolution of this appeal

133 Having dealt with the points of principle raised on this appeal, I can now turn to the application of those principles to the facts of this appeal.

134 First, there is no question of the respondents being able to rely on the fact that the appellants came to the nuisance, or any other similar argument. The appellants used their property, Fenland, as a residence, which was the same purpose to which it had been put ever since before the activities currently carried on at the stadium and the track had started.

135 Secondly, there is the relevance of the planning situation in relation to the appellants' nuisance claim. As already explained (paras 77–79 above) the judge was wrong to hold that (i) the planning permission granted in 1985 and the CLEUD issued in 1997 in relation to the use of the stadium, and (ii) the planning permission granted in 2002 for the use of the track, were irrelevant for the purposes of the appellants' nuisance claim on the ground that the planning permissions were personal and they and the CLEUD were for discontinuous periods. Accordingly, the two permissions and the CLEUD were, at least in principle, evidence which could have been taken into account.

136 However, I do not consider that the judge's failure to take them into account can fairly be said to undermine his conclusion that the respondents' activities at the stadium and the track constituted a nuisance. The CLEUD was of no relevance, other than as evidence which supported the argument that the activities to which it related had been going on for ten years before it had been applied for. The planning permissions showed that the planning authority considered that at least most of the uses of which the appellants complained were acceptable in planning terms, and turned their minds to some extent to noise pollution by limiting the frequency and the times of the activities.

137 Further, the judge's failure to give any weight to the planning permissions or the CLEUD on the issue of nuisance does not call into question his ultimate conclusion on that issue in favour of the appellants. It was not the appellants' case, nor was it the judge's conclusion, that the

A current use of the stadium and the track was by any means necessarily inappropriate: the concern was over the level of noise, which was not a matter specifically covered by the planning permissions or the CLEUD (save the 2002 permission for the motocross activities on the track). This is best illustrated by the judge's concern to make an order which enabled the business at the stadium and the track to continue.

B 138 Quite apart from this, as already explained, the fact that a particular use has been granted planning permission is not normally a matter of much weight, and there was no reason to think that this was an exceptional case. On the contrary. The evidence showed that it was not an easy decision whether to grant the planning permissions, as was demonstrated by the initial temporary permissions, and the cautious nature of the planning officers' recommendation. Further, the background documents to the planning permissions (including letters of support and opposition, and the planning officers' reports) were available to the judge, and he took them into account, and there was a wealth of other evidence available to the judge at the trial, and that evidence was subject to cross-examination, and he took it all into account.

D 139 As I have already explained, the Court of Appeal took the view that the 1985 and 2002 planning permissions, given that they had been implemented, were highly relevant to, indeed effectively determinative of, the appellants' claim in nuisance. For the reasons which I have given in paras 80–98 above, that was wrong (although understandable in the light of earlier decisions of the Court of Appeal), and, as I have just explained, although the judge also went wrong on the issue of the relevance of the permissions, I do not think that his error justified interfering with his conclusion.

F 140 The third question is whether the judge went wrong in holding that the respondents had failed to establish a right by prescription to create what would otherwise be a nuisance of noise at the stadium. On that topic, I consider that the judge was right for the wrong reason. I do not consider that he was entitled to hold that the interruption for two years prevented the respondents obtaining the right to create what would otherwise be a nuisance of noise if they had otherwise satisfied the requirements for establishing such a right. If a person regularly causes a nuisance by noise through holding motocross events more than 20 times a year for a period of 20 years, save that during two years of that period, there are no such events, I consider that the requirements of a prescriptive right would be satisfied (subject, of course, to there being any of the normal defences).

G 141 In that connection, I have already referred in para 37 above to the judgments in *Carr v Foster* 3 QB 581. Mere non-use, or inactivity, for two out of 20 years, at least in the absence of other evidence, would be insufficient to justify a court concluding that an action which has been carried out for the other 18 years fairly consistently and to a significant extent in each of those years failed to justify the conclusion that a prescriptive right had been established. It is a question of degree, and that is shown by contrasting the facts of the present case and of *Carr* with those of *White v Taylor (No 2)* [1969] 1 Ch 160, where non-use for two periods, each more than five years, did defeat a prescription claim.

H 142 The essential question in a prescription case has been said to be whether the nature and degree of the activity of the putative dominant

owner over the period of 20 years, taken as a whole, should make a reasonable person in the position of the putative servient owner aware that a continuous right to enjoyment is being asserted and ought to be challenged if it is intended to be resisted: see *Gale*, para 4-54, and per Lord Walker JSC in *Lewis* [2010] 2 AC 70, para 30. This somewhat circular and hypothetical test appears to involve questions of degree and judgment. However, one must take as a starting point the somewhat arbitrary, but at least clear, proposition that, where the use or activity in question has been carried on as of right for 20 years or more, then, absent special facts, the dominant owner gets a right to carry on the use or activity. Accordingly, the answer to my mind on the facts of this case is plain: assuming that the activities at the stadium and the track had caused a nuisance over a period of at least 20 years, the putative servient owner should have appreciated what was being claimed. Given the consistent and substantial activities at the stadium for all but two of those 20 or more years the two years' interruption should not be capable of being a problem for the respondents' prescriptive claim.

143 However, the reason why, in my view, the respondents fail to establish a prescriptive right to create what would otherwise be a nuisance in this case, is that, even allowing for the fact that gaps such as that discussed in the preceding two paragraphs would not be fatal to their claim, they did not show that their activities during a period of 20 years amounted to a nuisance. As explained in paras 35-37 above, in order to justify the establishment of a right to create a noise by prescription, it is not enough to show that the activity which now creates the noise has been carried on for 20 years. It is not even enough to show that the activity has created a noise for 20 years. What has to be established is that the activity has (or a combination of activities have) created a nuisance over 20 years. Otherwise, it could not be said that the putative servient owner had the opportunity to object to the nuisance, or could be said notionally to have agreed to it.

144 As acknowledged in paras 35-39 above, this requirement will often present evidential problems for a person seeking to establish by prescription a right to commit what would otherwise be a nuisance. Of course, the strictness of this requirement is mitigated by the fact that the nuisance does not need to have occurred anything like every day during the 20 years, as just explained.

145 In the present case, it seems to me that, on the findings made by the judge, and the evidence as explained by him, fell well short of establishing that the activities had caused a nuisance to Fenland for a continuous period of 20 years (even allowing for periods of no nuisance as in *Carr* 3 QBD 581) at any time between the commencement of the use of the stadium in 1976 and the date on which these proceedings were issued in 2008.

146 Mr Relton (the appellants' predecessor in title) apparently first formally complained of noise to the council in 1992 (only 16 years before the proceedings were brought), and this resulted in the abatement notices referred to in para 11 above. At least as recorded in the judgment, no witness appears to have suggested, through either first hand or hearsay evidence, either expressly or inferentially, that there was nuisance by noise to Fenland much before 1994. The appellants' witnesses seem to have come to the area after 1990, and (with the exception of Mrs Relton) the respondents' witnesses seem to have been in a similar position, and Mrs Relton denied

- A that there was a significant noise problem (and indeed described her husband as over-sensitive to noise).

147 There is also an argument that the judge did not properly approach the question whether the respondents caused a nuisance by noise on the right basis, as he decided that Fenland was to be treated as being in a purely agricultural environment, rather than in an environment which included the stadium and the track used for activities which did not create a nuisance (as explained in para 65 above). There are passages in his judgment which suggest that he may have approached the issue on this basis. However, it is clear that he did not do so, as, in para 243 of his decision, he fixed the acceptable level of noise from the stadium and track by reference to the levels of noise emitted from land used for similar activities: see para 24 above.

- B
- C 148 The consequence of these conclusions is that, subject to a final point, the injunction granted by the judge should be restored (together with all the other terms, including the permission to apply).

- 149 The final point is whether the judge should have awarded damages rather than an injunction. Given that he was not asked to do so, it is scarcely surprising that he did not address this issue. Further, it is not an issue which an appellate court should determine when the trial judge was not asked to do so, save in the most exceptional circumstances. The decision whether to award damages instead of an injunction can be dependent on a number of issues, including the behaviour and attitude of the parties. It is therefore a matter on which the trial judge is particularly well positioned to assess in a case such as this, where there was substantial oral evidence. Further, a defendant who wishes to argue that the court should award damages rather than an injunction should make it clear that he wishes to do so well in advance of the hearing, not least because the claimant may wish to adduce documentary or oral evidence on that issue which she would not otherwise consider relevant. The appellants were not afforded such an opportunity in this case.
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- E

- 150 However, as Lord Clarke of Stone-cum-Ebony JSC said in argument, it would be wrong to be very critical of the respondents for not raising the point at or before the trial as the decisions in *Regan* [2007] Ch 135 and *Watson* [2009] 3 All ER 249 would have precluded the trial judge from awarding damages in lieu of an injunction, although it is right to add that the respondents should ideally have reserved their position on the point.
- F

- 151 In my judgment, the fairest way to deal with the point that the judge should have awarded damages instead of an injunction is to refuse the respondents permission to raise it, but to hold that they should be free to raise the argument that the injunction granted by the judge should be discharged, and damages awarded instead under the provision in the judge's order giving the parties permission to apply.
- G

- 152 I should emphasise that, if such an application were made by the respondents, I am not in any way seeking to fetter the judge's discretion when deciding whether to award damages instead, or seeking to suggest how that discretion might be exercised. No doubt the judge will carefully consider the effect of, and give such appropriate weight as he sees fit to, all the circumstances, including the evidence and arguments which he has already received, and any fresh evidence and argument which he sees fit to receive, in the light of the points made in paras 119–130 above.
- H

Conclusion

153 As the first, second and fifth issues set out in para 6 above were raised by the respondents, and the third and fourth issues were raised by the appellants, the effect of this decision is that the appeal is allowed, and the order of Judge Seymour QC is restored.

LORD SUMPTION JSC

154 I agree that this appeal should be allowed for the reasons given by Lord Neuberger of Abbotsbury PSC.

155 It is, I think, worth pointing out that the question what impact the grant of planning permission should have on liability in tort for private nuisance and the question what remedies should be available for a nuisance are closely related. They both raise a broader issue of legal policy of some importance, namely how is one to reconcile public and private law in the domain of land use where they occupy much the same space?

156 I agree with Lord Neuberger PSC that the existence of planning permission for a given use is of very limited relevance to the question whether that use constitutes a private nuisance. It may at best provide some evidence of the reasonableness of the particular use of land in question. But planning authorities are concerned with the public interest in development and land use, as that interest is defined in the planning legislation and any relevant development plans and policies. Planning powers do not exist to enforce or override private rights in respect of land use, whether arising from restrictive covenants, contracts, or the law of tort. Likewise, the question whether a neighbouring landowner has a right of action in nuisance in respect of some use of land has to be decided by the courts regardless of any public interest engaged.

157 What saves, or could save the law from anomaly and incoherence is the court's discretion as to remedies. An injunction is a remedy with significant side-effects beyond the parties and the issues in the proceedings. Most uses of land said to be objectionable cannot be restrained by injunction simply as between the owner of that land and his neighbour. If the use of a site for (say) motocross is restrained by injunction, that prevents the activity as between the defendant and the whole world. Yet it may be a use which is in the interest of very many other people who derive enjoyment or economic benefits from it of precisely the kind with which the planning system is concerned. An injunction prohibiting the activity entirely will operate in practice in exactly the same way as a refusal of planning permission, but without regard to the factors which a planning authority would be bound to take into account. The obvious solution to this problem is to allow the activity to continue but to compensate the claimant financially for the loss of amenity and the diminished value of his property. In a case where planning permission has actually been granted for the use in question, there are particularly strong reasons for adopting this solution. It is what the law normally provides for when a public interest conflicts with a proprietary right.

158 The main question, as it seems to me, is not whether the judge in deciding on the appropriate remedy should take account of the public interest or, more generally, of interests which are not before the court. He will usually lack the information to do so effectively, and is in danger of stepping outside his main function of deciding the issue between the parties.

A The main question is whether the current principles of law governing the availability of injunctions are consistent with the public interest reflected in the successive and increasingly elaborate legislative schemes of development control which have existed in England since 1947.

B 159 The ordinary principle is that the court does not grant an injunction in a case where there is an adequate legal remedy. In particular, it does not do so where damages would be an adequate remedy. Where an injunction is granted, it is usually because the injury to the claimant is “irreparable”, in the sense that money cannot atone for it. However, this principle has never been consistently followed in cases of nuisance. The leading case is *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 which created a strong presumption in favour of an injunction, to be displaced only in the four narrowly defined categories identified by A L Smith LJ, at pp 322–323. The exceptions applied only to cases where the injury to the claimant was small and the grant of an injunction would be oppressive. In *Colls v Home and Colonial Stores Ltd* [1904] AC 179, 192 Lord Macnaghten wondered why an injunction should be granted “when substantial damages would be given at law”, and there were subsequent attempts to widen the discretion. But the courts have not taken the hint. In *Regan v Paul Properties DPF No 1 Ltd* [2007] Ch 135 and *Watson v Croft Promosport Ltd* [2009] 3 All ER 249, the Court of Appeal have reverted to substantially the same position as the Court of Appeal in *Shelfer* more than a century before.

D 160 The courts might have defended the special treatment of nuisance by pointing to the traditional attitude of equity to land as being unique, an approach which is exemplified in its willingness to grant specific performance of contracts for the sale of land. From this, it might have been concluded that paying the claimant enough to buy a comparable property elsewhere where there was no nuisance was not equivalent to letting him use his existing land free of the nuisance. In fact the *Shelfer* principle was based mainly on the court’s objection to sanctioning a wrong by allowing the defendant to pay for the right to go on doing it. This seems an unduly moralistic approach to disputes, and if taken at face value would justify the grant of an injunction in all cases, which is plainly not the law. In his dissenting judgment in the Court of Appeal in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1996] Ch 286, 304 (subsequently upheld in the House of Lords [1998] AC 1), Millett LJ said:

G “The competing arguments in the present case, and the difference in the views of the members of this court, reflect a controversy which has persisted since the dispute between Sir Edward Coke and Lord Ellesmere LC. Sir Edward Coke resented the existence of an equitable jurisdiction which deprived the defendant of what he regarded as a fundamental freedom to elect whether to carry out his promise or to pay damages for the breach. Modern economic theory supports Sir Edward Coke; an award of damages reflects normal commercial expectations and ensures a more efficient allocation of scarce economic resources. The defendant will break his contract only if it pays him to do so after taking the payment of damages into account; the plaintiff will be fully compensated in damages; and both parties will be free to allocate their resources elsewhere. Against this there is the repugnance felt by those who share the view of Fuller CJ in *Union Pacific Railway Co v Chicago, Rock Island*

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and Pacific Railway Co (1896) 163 US 564, 600 that it is an intolerable travesty of justice that a party should be allowed to break his contract at pleasure by electing to pay damages for the breach. English law has adopted a pragmatic approach in resolving this dispute . . . The leading principle is usually said to be that equitable relief is not available where damages are an adequate remedy. In my view, it would be more accurate to say that equitable relief will be granted where it is appropriate and not otherwise; and that where damages are an adequate remedy it is inappropriate to grant equitable relief.”

161 In my view, the decision in *Shelfer* [1895] 1 Ch 287 is out of date, and it is unfortunate that it has been followed so recently and so slavishly. It was devised for a time in which England was much less crowded, when comparatively few people owned property, when conservation was only beginning to be a public issue, and when there was no general system of statutory development control. The whole jurisprudence in this area will need one day to be reviewed in this court. There is much to be said for the view that damages are ordinarily an adequate remedy for nuisance and that an injunction should not usually be granted in a case where it is likely that conflicting interests are engaged other than the parties’ interests. In particular, it may well be that an injunction should as a matter of principle not be granted in a case where a use of land to which objection is taken requires and has received planning permission. However, at this stage, in the absence of argument on these points, I can do no more than identify them as calling for consideration in a case in which they arise.

LORD MANCE JSC

162 I agree that the appeal should be allowed for the reasons given by Lord Neuberger of Abbotsbury PSC.

163 In addition to their reasons for allowing this appeal, the judgments prepared by Lord Neuberger PSC, Lord Sumption and Lord Carnwath JSC address a number of wider issues which were argued before us. For the most part, I also agree with the way in which Lord Neuberger PSC addresses these issues in his judgment.

164 It is common ground that a change in the intensity of a previous activity may, just as much as the introduction of a new activity, give rise to a nuisance. The fact that the nuisance is already being committed cannot make it part of the character of the locality: see Lord Neuberger PSC’s judgment, paras 65 to 76. But Lord Neuberger PSC (paras 72 and 74) and Lord Carnwath JSC (para 187) suggest, as I see it, that such a change or the introduction of a new activity may in some circumstances and to some degree be compatible with the existing character of the locality, and to that extent not involve the creation of a nuisance. With or without planning permission, the character of an area may be susceptible over time to gradual change and development. Each step in the process may be said by itself to fit with the existing character and be largely imperceptible, though, ultimately, the difference resulting from the totality of all the steps may be considerable. In the meantime, those occupying property, living or working, in the area, will have had time to adapt. That is a quite different process from one brought about by an activity increased in intensity or introduced for the first time and bringing about a radical change over a relatively short period. In

A the latter case and to the extent that the increased or new activity goes beyond anything which would fit with the existing character of the locality, an aggrieved occupier can have cause for complaint about a resulting nuisance, unless and until the increased or new activity is allowed to continue as a nuisance either for 20 years without proceedings being issued or by a court by refusal of an injunction.

B 165 With regard to the significance of planning permission, I agree with what Lord Neuberger PSC says in paras 77–97, 99. The reasoning in *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1993] QB 343 suggests that a development plan or a “strategic” planning decision adopted in the public interest can of itself bring about a corresponding major alteration in the character of a neighbourhood without any need to compensate for any private nuisance thereby caused. I regard that as
C unsustainable in principle and fairness. If the increase in an existing activity or the introduction of a new activity constitutes a nuisance in relation to the previously existing character of the locality, I see no basis for treating differently a decision to permit such an increase or new activity taken in the public interest by a development or planning authority. The general public interest may have led to a particular private interest being overlooked or
D overridden. If it is to be acceptable to permit this, then it should at least be permitted on a basis that affords compensation.

166 That is not to suggest that the grant, terms and conditions of a planning permission may not have some relevance in some nuisance cases, as Lord Neuberger PSC indicates in his paras 96–97 and also (in relation to remedy) in para 118. As to the reliance which might be placed on planning
E officers’ reports, on which Lord Neuberger PSC touches in para 98, it seems to me that it must all depend on the nature of the decision and of the debate before the planning committee and so on all the circumstances (as I understand Lord Neuberger PSC also to say in the last sentence of para 98), and I prefer myself to say no more without rather more information about these in a specific case.

167 With regard to remedy, I am broadly in agreement with Lord
F Neuberger PSC. However, I would adopt the qualifications made by Lord Carnwath JSC in paras 246 and 247. I do not think that a grant of planning permission can give rise to any presumption that there should be no injunction, and, while I would, in a case where it was relevant, like to hear argument on this, I am not at present persuaded that cases on the right to light involve the same considerations as those arising, or are therefore necessarily helpful, where the question is the appropriate remedy in respect
G of a nuisance of the present different nature.

168 I would only add in relation to remedy that the right to enjoy one’s home without disturbance is one which I would believe that many, indeed most, people value for reasons largely if not entirely independent of money. With reference to Lord Sumption JSC’s concluding paragraph (para 161 above), I would not therefore presently be persuaded by a view that
H “damages are ordinarily an adequate remedy for nuisance” and that “an injunction should not usually be granted in a case where it is likely that conflicting interests are engaged other than the parties’ interests”—a suggested example of the latter being given as a case where a use of land has received planning permission. I would see this as putting the significance of planning permission and public benefit too high, in the context of the

remedy to be afforded for a private nuisance. As already indicated, I agree with Lord Neuberger PSC's nuanced approach. A

LORD CLARKE OF STONE-CUM-EBONY JSC

169 I agree with the conclusions and reasoning of Lord Neuberger of Abbotsbury PSC subject to one or two points. First, I agree that the fact that planning permission has been granted is capable of being relevant to an action in nuisance in a number of respects but, as Lord Carnwath JSC has shown, the facts of such cases are so varied that it is difficult to lay down hard and fast rules. As so often, all depends on the circumstances. However, I agree with Lord Neuberger PSC, Lord Sumption and Lord Carnwath JJSC that the existence of planning permission for the activity complained of may well be of particular relevance to the remedy to be granted. B

170 Secondly, I agree with Lord Neuberger PSC at para 120 that the court's power to award damages in lieu of an injunction involves a classic exercise of discretion which should not as a matter of principle be fettered. In these circumstances, in the absence of submissions on the point, I would wish to reserve the question on whom the burden of proof should be placed on the question how that discretion should be exercised. C

171 Thirdly, as I see it, the most important aspect of this case relates to the correct approach to remedies. In particular I agree with the views of Millett LJ in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1996] Ch 286, 305, which was a dissenting judgment but was subsequently upheld by the House of Lords [1986] AC 1. He concluded that the general principle is or should be that equitable relief will be granted where it is appropriate and not otherwise and that, where damages are an adequate remedy, it is inappropriate to grant equitable relief. Lord Sumption JSC set out Millett LJ's views at his para 160, as I read it, with approval. I entirely agree with Lord Sumption, at para 161, that the decision in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 is out of date and that it is unfortunate that it has been followed so recently and so slavishly. Indeed, I would so hold now in this appeal, although (in the absence of submissions) I would not now lay down precise principles which should be followed in the future. They must be developed on a case by case basis and in each case all will depend on the circumstances. I agree with Millett LJ's general approach. D E F

172 Fourthly, I would leave open the question how damages should be assessed. The traditional approach had been to assess the loss of value of the property caused by the nuisance. There may also be scope for an award of general damages: see, e.g, in the context of noise, *Farley v Skinner* [2002] 2 AC 732. Although the claim was in contract, Lord Steyn, who gave the leading speech, would have reached the same conclusion if the claim had been in nuisance: see para 30. It may however be that, in the light of the views expressed by Lord Hoffmann in *Hunter v Canary Wharf Ltd* [1997] AC 655, 706, such damages could only be awarded in nuisance as loss of the amenity value of the land. This could be in the form of general damages if it is not possible to prove a specific loss of value, rather as in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, which is referred to by Lord Hoffmann at p 706E. G H

173 Finally, I would leave open the question whether it may in some circumstances be appropriate to award what have been called gain-based

- A damages in lieu of an injunction. I appreciate the possible problems identified by Lord Neuberger PSC and Lord Carnwath JSC but it does seem to me that, where a claimant is seeking an injunction to restrain the noise which has been held to amount to a nuisance, it is at least arguable that there is no reason in principle why a court considering whether or not to award damages in lieu of an injunction should not be able to award damages on a more generous basis than the diminution in value caused by the nuisance,
- B including, for example, an award which represented a reasonable price for a licence to commit the nuisance. So, for example, as Lord Neuberger PSC notes at para 111, in *Jaggard v Sawyer* [1995] 1 WLR 269, the Court of Appeal awarded damages for trespass in lieu of an injunction which in effect gave the defendant a right of way over the plaintiff's land in return for a capital sum. If that can be done in trespass I do not at present see why it should not in principle be done in nuisance in a case like this, where a similar
- C payment would give the respondents the right to commit what would otherwise be a nuisance by noise. Moreover, as Lord Neuberger PSC observes at para 128, there may be scope for assessing the claimant's loss by reference to the benefit to the defendant of not suffering an injunction. However, these are all matters for the future and I recognise that before reaching final conclusions it would be necessary to consider the relevant
- D authorities and to receive appropriate submissions.

- 174 I agree with Lord Neuberger PSC's proposals as to the resolution of the appeal. In particular, as to the future, I agree with his paras 148–151, especially 150 and 151. Thus, while I naturally hope that issues of remedy can now be resolved by agreement, some of the questions raised by Lord Neuberger PSC and the other judgments in this appeal may fall for decision
- E in this very case.

LORD CARNWATH JSC

Basic principles

- 175 The present appeal raises important issues relating to an area of the law which has received little attention at the highest level, that is “nuisance by interference with enjoyment” (as distinct from “nuisance by encroachment or damage”: see *Clerk & Lindsell on Torts*, 20th ed (2010), paras 20-07 and 20-09). Although many of the relevant principles are treated by the textbooks as long settled, the authorities are generally in the Court of Appeal and below. Particular aspects of the law of nuisance, notably the rule in *Rylands v Fletcher* (1868) LR 3 HL 330, have received
- F recent attention in the House of Lords (*Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 and *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1), and some of the speeches have commented on more general principles. But for authoritative statements at the highest level on this area of the law one has to go back almost 150 years, to the landmark case of *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642, long before the advent of modern planning control.
- G
- H 176 Ben Pontin in his valuable recent book *Nuisance Law and Environmental Protection* (2013) shows how since the middle of the 19th century common law nuisance has played an important complementary role to regulatory controls, on the one hand stimulating industry to find better technical solutions to environmental problems, and, on the other,

stimulating the legislature to fill gaps in the regulatory system. He sees the present appeal as an important opportunity for the Supreme Court to review the proper role of this part of the law of nuisance in the modern world: p 184.

177 Lord Neuberger of Abbotsbury PSC has highlighted five particular issues raised by the appeal, in summary: (i) prescriptive right; (ii) “coming to the nuisance”; (iii) the defendant’s activity as part of the “character of the area”; (iv) relevance of planning permission; (v) remedies.

178 On the first two issues I agree respectfully with Lord Neuberger PSC and have nothing to add. On the others, although I agree with his overall conclusions, I prefer to explain my reasoning in my own words.

“Reasonable user”

179 It is important at the outset to identify the test to be applied in determining what amounts to a nuisance. In his introduction (para 5), Lord Neuberger PSC quotes without comment a passage in *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, 299 in which Lord Goff of Chieveley referred to the controlling principle of “reasonable user—the principle of give and take . . .” As I explained in *Barr v Biffa Waste Services Ltd* [2013] QB 455, paras 60–72, Lord Goff was not seeking to lay down a general rule, and the concept is not without its problems. The criterion of “reasonableness” has also been strongly criticised by some academics. (See for example, *Allan Beever, The Law of Private Nuisance* (2013), p 9 et seq: “it is presented as an explanation of the operation of the law, but it does not, cannot, explain anything.”) In *Barr v Biffa Waste Services Ltd*, para 72 I referred to Tony Weir’s qualification of the reasonableness test:

“Reasonableness is a relevant consideration here, but the question is neither what is reasonable in the eyes of the defendant or even the claimant (for one cannot by being unduly sensitive, constrain one’s neighbour’s freedoms), but what objectively a normal person would find it reasonable to have to put up with.” (*Weir, An Introduction to Tort Law*, 2nd ed (2006), p 160.)

“The character of the locality”

180 Another important question is the context in which the reasonableness test is to be applied. Traditionally the acceptability of the defendant’s activity is to be judged by reference to “the character of the locality”, a concept which dates back at least to *Sturges v Bridgman* (1879) 11 ChD 852. At that time the mix of uses in an area would have been the result largely of unrestrained market forces, and the degree of regulatory control was very limited. Although the same principle has survived into the modern law, it is unrealistic to leave out of account the many factors which influence the character of an area in the modern world, including the impact of planning control. In *Hunter v Canary Wharf Ltd* [1997] AC 655 Lord Cooke of Thorndon (dissenting on this part of the case) highlighted these changes, at p 711:

“the lineaments of the law of nuisance were established before the age of television and radio, motor transport and aviation, town and country planning, a ‘crowded island’, and a heightened public consciousness of

- A the need to protect the environment. All these are now among the factors falling to be taken into account in evolving the law . . .”

Lord Hoffmann, in the majority, also commented on the significance of the introduction of modern planning control, which he saw as an argument against further extending the law of nuisance, at p 710:

- B “In a case such as this, where the development is likely to have an impact upon many people over a large area, the planning system is, I think, a far more appropriate form of control, from the point of view of both the developer and the public, than enlarging the right to bring actions for nuisance at common law.”

- C 181 Against that background, in areas where conflicts may arise, the character of any locality may not conform to a single homogeneous identity, but rather may consist of a varied pattern of uses all of which need to coexist in a modern society. Due account also needs to be taken of the process by which the pattern of uses has developed. The impact of general planning control since 1948, which includes development plan allocations as well as decisions on individual planning applications, will have played a major part in ensuring, as Lord Hoffmann said, an appropriate balance between
D developers and the public.

- E 182 However planning control is only part of the story. The pattern of uses will include, not only uses approved under modern planning permissions, but also other lawful uses—lawful either because they began before 1948, or because they have become established in law since then (such as stock car racing in this case). Potentially unneighbourly uses, even if not subject to specific planning permission, are likely to have been subject to other regulatory controls to ensure their acceptability within their particular environment. Other activities may have been encouraged to relocate, with or without threats of discontinuance orders, or financial incentives.

- F 183 After more than 60 years of modern planning and environmental controls, it is not unreasonable to start from the presumption that the established pattern of uses generally represents society’s view of the appropriate balance of uses in a particular area, taking account both of the social needs of the area and of the maintenance of an acceptable environment for its occupants. The common law of nuisance is there to provide a residual control to ensure that new or intensified activities do not need lead to conditions which, within that pattern, go beyond what a normal
G person should be expected to put up with.

- H 184 This analysis seems to me consistent with that of Lord Westbury LC in the *St Helen’s* case in the different circumstances of the Victorian world. In the passage quoted by Lord Neuberger PSC at para 64, Lord Westbury LC spoke of the need for a person living in a town to subject himself to consequence of trade operations in his locality which are “necessary for trade and commerce . . . and for the benefit of the inhabitants of the town and of the public at large”: 11 HL Cas 642, 650. There is no reason why, in a modern context, the same analysis should not apply to activities other than trade which contribute to the ordinary life of a modern community, and which need to be accommodated within the urban fabric.

185 An example mentioned in argument was a major football stadium. Significant disturbance on match days may be regarded as a necessary price for an activity regarded as socially important, provided it is subject to proper controls by the public authorities, including the police, to ensure that the disturbance is contained as far as reasonably practicable. In those circumstances, if someone buys a house next to such a stadium, he should not be able to sue for nuisance, even though the noise may be highly disturbing to ordinary home life on those days. This is not because he came to the nuisance, nor (necessarily) because it has continued for 20 years. Rather it is because it is part of the established pattern of uses in the area, and society attaches importance to having places for professional football within urban areas. He can however sue if there is something about the organisation, or lack of it, which takes the disturbance beyond what is acceptable under the reasonableness test.

186 Nor is there any reason why this approach should be confined to urban areas. As the present case illustrates, similar patterns of potentially conflicting uses may arise in the country as much as in the town.

Relevance of the defendant's activity

187 The above analysis seems to me to provide the answer to Lord Neuberger PSC's third issue, concerning the relevance of the actual use complained of by the claimant. An existing activity can in my view clearly be taken into account if it is part of the established pattern of use. That is clear from many of the reported cases which proceed on the basis that the defendant's activity contributes to the character of the locality against which the new or intensified use is to be considered.

188 So in *Rushmer v Polsue & Alfieri Ltd* [1906] 1 Ch 234 (approved by the House of Lords [1907] AC 121) the Court of Appeal specifically rejected an argument that because the defendant's activities conformed to the character of the area, there could not be a nuisance when a new more intrusive element was introduced. Similarly, in *Halsey v Esso Petroleum* [1961] 1 WLR 683, 692 Veale J started from the position of the

"ordinary man . . . who may well like peace and quiet, will not complain, for instance, of the noise of traffic if he chooses to live on a main street in an urban centre, nor of the reasonable noises of industry, if he chooses to live alongside a factory."

Thus the defendant's activities, at their previous level, were accepted as part of the established pattern of uses in the area, also reflected in the development plan zoning (p 688), and thus as the starting point for consideration of the alleged nuisance.

189 In *Kennaway v Thompson* [1981] QB 88 it was common ground that the plaintiff could not complain of noise of motor boats at the levels accepted by her as tolerable when she built her house: p 94B. The terms of the injunction were designed to protect the defendant's activities at that level, with a limited number of days for noisier boats: pp 94F–95A. Similarly in *Watson v Croft Promosport Ltd* [2009] 3 All ER 249 the injunction, even as modified by the Court of Appeal, did not stop the defendant's activity altogether, but sought to define the level of acceptable use, by limiting numbers of days and defining noise limits: paras 53–54.

- A 190 In none of these cases did the court find it necessary to undertake an “iterative process” as proposed by Lord Neuberger PSC: para 72. The judges proceeded on the basis that a change in the intensity or character of an existing activity may result in a nuisance, no less than the introduction of a new activity. It was a matter for the judge, as an issue of fact and degree, to establish the limits of the acceptable, and if appropriate to make an order by reference to the limits so defined.

B

Planning control

The problem

- 191 The most difficult problem raised by the present appeal, in my view, is the fourth of Lord Neuberger PSC’s issues, that is the relevance of the planning history of the defendant’s activity.

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- 192 Modern planning legislation dates from the coming into force in 1948 of the Town and Country Planning Act 1947. More limited regulatory controls of activities on land had existed since around the mid-19th century, but until the 1947 Act there was no attempt to provide a comprehensive system for the allocation of land use and development. Decisions made by local planning authorities and planning inspectors reflect, or should reflect, an attempt by the authorities consciously to balance the likely benefits of a proposed development against any potential adverse consequences. That process often involves consideration of the interests of neighbouring property owners, including the impact of noise. Thus, national planning advice encourages planning authorities to restrict new development which could give rise to significant adverse impacts from noise; but emphasises that planning is concerned with the acceptability of the use in principle, rather than control of processes or emissions which are subject to other regulatory controls: National Planning Policy Framework (2012), paras 122–123.

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- 193 The law of private nuisance, of far greater antiquity than modern planning legislation, also fulfils the function of protecting the interests of property owners. There is, however, a fundamental difference between planning law and the law of nuisance. The former exists to protect and promote the public interest, whereas the latter protects the rights of particular individuals. Planning decisions may require individuals to bear burdens for the benefit of others, the local community or the public as a whole. But, as the law stands, it is generally no defence to a claim of nuisance that the activity in question is of benefit to the public.

F

- 194 Thus planning controls and the law of nuisance may pull in opposite directions. A development executed in accordance with planning permission may nevertheless cause a substantial interference with the enjoyment of neighbouring properties. Should a property owner be able in effect to undermine the planning process by bringing a claim of nuisance against the developer and securing not only damages but also an injunction prohibiting the activity in question, regardless of its public significance?

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- 195 This is not a problem which arises if the project is authorised by statute. In the 19th century, long before modern planning control, railways were built under private Acts which not only conferred the necessary powers to acquire or interfere with private property interests, but also conferred effective immunity from actions for nuisance. The same principle has provided protection for more modern activities, such as oil refineries. But, as

H

Lord Wilberforce explained in *Allen v Gulf Oil Refining Ltd* [1981] AC 1001, 1011F, 1013F, the defence applies only where Parliament has “by express direction or by necessary implication” authorised the activity in question and the alleged nuisance is the inevitable consequence of that activity.

196 The Planning Act 2008 has adopted the same solution for nationally significant infrastructure projects, such as airports and power stations. The Act is designed to provide a more efficient method for securing planning and other approvals necessary for such projects, within the context of a policy framework approved by Parliament. Section 158 of the 2008 Act provides statutory immunity from liability for private or public nuisance for activities authorised by an order granting development consent under the Act, subject to any contrary provision contained in the order. By section 152 compensation is payable to any person whose land is injuriously affected by the carrying out of the works (within the relatively narrow limits defined by section 10 of the Compulsory Purchase Act 1965 and Part I of the Land Compensation Act 1973: section 152(5)(7)). There is no equivalent statutory protection for other forms of development authorised under ordinary planning procedures, whether by the local planning authority or the Secretary of State following a public inquiry.

197 In *Barr v Biffa Waste Services Ltd* [2013] QB 455, para 46, a case relating to waste disposal under an environmental licence, in a passage quoted by Lord Neuberger PSC at para 91, I pointed out that the common law of nuisance had co-existed with statutory controls since the 19th century without the latter being treated as a reason for cutting down private law rights. However, the context is important. I was speaking about environmental regulation rather than planning control, which was not in issue.

198 Further, while my statement was an accurate reflection of the historical position, it is open to the criticism that as a blueprint for the future development of the law it was unduly simplistic. In a perceptive article on the decisions of the Court of Appeal in the present case and in *Barr v Biffa Waste Services Ltd*, Maria Lee concludes:

“It is not realistic to look for a single, across the board response to the complicated relationship between tort and regulation, or even just nuisance and planning permission . . . Courts are not generally in a position to assess the substantive quality of regulation.” (“Nuisance and Regulation in the Court of Appeal” [2013] JPL 277, 284.)

She suggests that an examination of the process followed by the regulation could help the court to determine how much authority the external assessment of the public interest should have, but that no single process issue could be decisive: p 284.

Gillingham Borough Council v Medway (Chatham) Dock Co Ltd and subsequent cases

199 The issue has attracted particular attention over the last 20 years, since the judgment of Buckley J in the *Gillingham* case (*Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1993] QB 343). That has been considered by the Court of Appeal in two cases before the present judgment (*Wheeler v JJ Saunders Ltd* [1996] Ch 19 and *Watson v Croft Promosport*

A *Ltd* [2009] 3 All ER 249) and once in the House of Lords (*Hunter v Canary Wharf Ltd* [1997] AC 655).

B 200 The facts of the *Gillingham* case were unusual. The council as local planning authority had granted planning permission to the defendant to develop part of the historic Chatham Royal Naval Dockyard as a commercial port. It had been clear to both the council and local residents at the time that the port would be operated on a 24-hour basis, and that the only access to the port for vehicles would be via two residential roads. In spite of strong objections by local residents the council decided that the promised economic benefits outweighed the inevitable disturbance of local residents.

C 201 Several years later, the priorities of the council changed and they brought an action in public nuisance seeking to restrain the use of the residential roads by heavy goods vehicles at night. Modifying the planning permission to achieve the same effect would have involved the payment of compensation. The judge rejected the claim. Although he accepted that the principle of statutory immunity had no direct application, he attached weight to the fact that Parliament had delegated to the local planning authority the task of balancing the likely pros and cons of a proposed development, under a procedure which enabled local residents to object. He said, at p 359:

E “It has been said, no doubt correctly, that planning permission is not a licence to commit nuisance and that a planning authority has no jurisdiction to authorise nuisance. However, a planning authority can, through its development plans and decisions, alter the character of a neighbourhood. That may have the effect of rendering innocent activities which prior to the change would have been an actionable nuisance . . .”

F 202 The grant of planning permission for the dock had authorised a change to the character of the neighbourhood, against which the reasonableness of the use was to be judged. The dock company was not operating the port other than as a normal commercial undertaking, and it could not operate a commercial port without disturbing nearby residents. It would not, he thought, be realistic to attempt to limit the amount of trade at the port:

G “It would be a task for which a court would be ill-equipped, involving as it would the need to consider the interests of the locality as a whole and the plaintiff’s and county council’s plans in respect of it. In some cases even the national interest would have to be considered. These are matters to be decided by the planning authority and, if necessary, the minister and should be subject only to judicial review.” (See pp 360–361.)

H 203 There was an alternative public law challenge based on the unreasonableness of the council’s action in bringing public nuisance proceedings in respect of a project which it had itself authorised on public interest grounds, and where there was available the alternative of modification of the permission or discontinuance accompanied by compensation: see pp 350–351. The judge found it unnecessary to consider how those arguments would have been resolved in judicial review proceedings. However, he indicated that, even if he had held otherwise on liability, he would have refused an injunction as matter of discretion, having

regard to the history and the damage to the dock undertaking, leaving it to the authority to resolve the “planning problem” using its statutory powers: p 364A–C. A

204 That judgment was considered by the Court of Appeal, some three years later, in *Wheeler v JJ Saunders Ltd* [1996] Ch 19. Again the facts were unusual. Dr Wheeler was a veterinary surgeon specialising in pigs. He had earlier been involved in the management of a pig farm operated by the defendant company close to his home. But the relationship broke down and the business was subsequently conducted without his involvement. In 1988 and 1989, the company obtained planning permission to construct two new buildings to house their pigs (some 800 in total), one of which was only 11 metres from a holiday cottage owned by Dr Wheeler and his wife. Government guidelines recommended a normal separation distance of at least 100 metres from the nearest dwelling house. B C

205 Dr Wheeler and his wife succeeded in their action for damages and an injunction restraining the use of the new pig sheds, notwithstanding that they had been erected and used in accordance with planning permission. Staughton LJ noted that the company had given the council the misleading impression that the planning applications were merely to continue an activity which had been tolerated in the past, and that nothing much would change as regards the number of pigs on the farm or the conditions in which they were to be kept. Also, the local planning authority had failed to consult the council’s environmental health department. Peter Gibson LJ described the grant as “incomprehensible”: p 36. D

206 It was held that the reasoning in *Gillingham* had no application to the facts of this case. The planning permission had not changed the character of the neighbourhood, which remained a pig farm but with an intensified use of part of it. In the words of Staughton LJ, the planning permission was not “a strategic planning decision affected by considerations of public interest”: p 30. Peter Gibson LJ said, at p 35: E

“Prior to the *Gillingham* case the general assumption appears to have been that private rights to claim in nuisance were unaffected by the permissive grant of planning permission, the developer going ahead with the development at his own risk if his activities were to cause a nuisance. The *Gillingham* case, if rightly decided, calls that assumption into question, at any rate in cases, like *Gillingham* itself, of a major development altering the character of a neighbourhood with wide consequential effects such as required a balancing of competing public and private interests before permission was granted. I can well see that in such a case the public interest must be allowed to prevail and that it would be inappropriate to grant an injunction (though whether that should preclude any award of damages in lieu is a question which may need further consideration). But I am not prepared to accept that the principle applied in the *Gillingham* case must be taken to apply to every planning decision. The court should be slow to acquiesce in the extinction of private rights without compensation as a result of administrative decisions which cannot be appealed and are difficult to challenge.” F G H

207 In the meantime, the *Gillingham* case had been considered by the House of Lords in *Hunter v Canary Wharf Ltd* [1997] AC 655. The case

- A involved a claim for nuisance, brought by local residents in relation to interference with television signals due to the construction of a tower as part of the Canary Wharf development. The development had been carried out under planning permission granted under a special procedure by the London Docklands Development Corpn. There was no appeal from the Court of Appeal's decision that the grant of planning permission could not itself provide immunity from liability for nuisance.
- B In the House of Lords, Lord Cooke of Thorndon, who alone thought that there could be liability in principle, endorsed the *Gillingham* judgment as directly relevant to the circumstances of Canary Wharf. He contrasted *Wheeler* [1996] Ch 19 in which there had been "an injudicious grant of planning consent, procured apparently by the supply of inaccurate and incomplete information": p 722. By contrast, the Canary Wharf Tower had been built in an enterprise zone in
- C an urban development area and authorised under the special procedure designed to encourage regeneration:

- "The Canary Wharf project in general, and the tower at One Canada Square in particular, were obviously of a scale totally transforming the environment . . . In these circumstances, to adopt the words of Staughton LJ in *Wheeler v JJ Saunders Ltd*, at p 30, the tower falls fairly within the scope of 'a strategic planning decision affected by considerations of public interest.'" (See p 722.)
- D

208 Of the *Gillingham* case itself he said, at p 722:

- "the judge held that, although a planning consent could not authorise a nuisance, it could change the character of the neighbourhood by which the standard of reasonable user fell to be judged. This principle appears to me to be sound and to apply to the present case as far at least as television reception is concerned. Although it did interfere with television reception the Canary Wharf Tower must, I think, be accepted as a reasonable development in all the circumstances."
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- 209 More recently, the issue arose again, in circumstances much closer to those of the present case, in *Watson v Croft Promosport Ltd* [2009] 3 All ER 249. A World War II aerodrome had been turned into a motor racing circuit, pursuant to planning permission granted in 1963 after a public inquiry. Although there were no planning restrictions on the levels of activities, its use was relatively limited until 1994 (there were no more than ten meetings a year between 1982 and 1994), and appears to have caused little disturbance to local residents. In that year, after the circuit had
- F
- G changed ownership, an application was made for more extensive use, involving 37 race days, 24 exclusive test days and 120 days when the track would be used for other purposes. Permission was granted by the local authority in July 1995.

- 210 In 1998, following a period of disputes with local residents, and an adjourned planning inquiry, the owner made a further application for planning permission on the basis that he was prepared to enter into an enforceable planning obligation under section 106 of the Town and Country Planning Act 1990 to set limits to the amount of noise from racing on the circuit. The proposed agreement contained a detailed set of measurement criteria by which noise from the circuit would be assessed and monitored, and prescribed the racing activities which could be undertaken, and when
- H

quiet and rest days were to be held. The activities were divided into N₁ to N₅ activities, according to the noise levels which were generated.

211 Permission was granted by the inspector on this basis. He accepted that “the development plan policies weigh heavily against the project” and that the noise had at times “been of such character, duration and intensity and tone as to seriously harm the amenity to which residents reasonably feel they are entitled”; but that had to be weighed against the existing planning permission which allowed uncontrolled use of the circuit. Bearing in mind “the very wide planning use rights which the site now enjoys”, he considered that the agreement would strengthen significantly the ability of the local planning authority to control noise at the circuit.

212 Local residents brought an action claiming that, even within the constraints set by the agreement, the activities constituted a nuisance. Simon J [2008] 3 All ER 1171 noted that their objections were not to the car and motor bicycle racing fixtures, amounting to about 20 (N₁ and N₂) events each year (over approximately 45–50 days), but to the noise from other activities, in particular vehicle testing days and track days (when members of the public drive vehicles at speed all day) at noise levels which reach N₂–N₄ levels. He held that the character of the locality had been “essentially rural”, and that the circuit “could be, and was, run in a way that was consistent with its essentially rural nature”: para 55. He declined to accept the 1998 planning permission as an indication (in Lord Hoffmann’s terms) of the appropriate balance between developer and public, since the limits had in effect been dictated by the owners: paras 55–56. He held that there was an actionable nuisance.

213 The claimants had argued that the N₁–N₄ noise from the circuit should be confined to 20 days, as representing the “the threshold of the nuisance”, and that 40 days would be acceptable only on the payment of compensation for the difference between 20–40 days. This, they submitted, would accommodate “the core” activities of the circuit. The judge regarded the proposed threshold as too low. Striking “a proper balance between the respective legitimate interests of the parties, in the light of the past and present circumstances” (para 66), he held that the threshold should be set at 40 N₁–N₄ days.

214 However he declined to grant an injunction, awarding damages instead (based on the diminution in value of the claimant’s properties). He took account of the delay in bringing the proceedings, and the claimant’s willingness to accept damages for at least part of the nuisance. He also took account of his perception of the social value of the activity, and the limited number of sites on which it could take place: paras 87–88.

215 The finding of nuisance was upheld by the Court of Appeal. The court accepted that the implementation (not the mere grant) of planning permission might so alter the character of a neighbourhood as to render innocent an activity which would otherwise have been a nuisance: paras 32–33. Whether it did so was a question of fact and degree. In this case the planning permissions had not changed the character of the local neighbourhood, which remained essentially rural, nor could they be regarded as “strategic”: para 34.

216 Further, the Court of Appeal held that the judge had been wrong to refuse an injunction. Applying the principles established in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, the circumstances of the case

A were held not to be sufficiently exceptional to justify the refusal of an injunction. The court accepted that, in a marginal case where the damage to the claimant is minimal, the social value of the activity in question could be taken into account consistently with *Shelfer*. However, the existence of a public benefit could not alone negate the requirement of exceptional circumstances or oppression of the defendant: para 51.

B *Relevance of planning history*

217 I have reviewed these cases in some detail, because they illustrate the wide variety of circumstances in which planning decisions may be made, and the danger of laying down any general propositions about their relevance to the application of the reasonableness test in any particular case.

C 218 They suggest that a planning permission may be relevant in two distinct ways: (i) It may provide evidence of the relative importance, in so far as it is relevant, of the permitted activity as part of the pattern of uses in the area; (ii) Where a relevant planning permission (or a related section 106 agreement) includes a detailed, and carefully considered, framework of conditions governing the acceptable limits of a noise use, they may provide a useful starting point or benchmark for the court's consideration of the same issues.

D 219 Before considering those alternatives, I should note my respectful disagreement with Lord Neuberger PSC's reservations (para 98) about the potential utility of planning officer's reports as evidence of the reasoning of the planning authority itself. Judged by my own experience in practice and on the bench over some 40 years, I have found that a planning officer's report, at least in cases where the officer's recommendation is followed, is likely to be a very good indication of the council's consideration of the matter, particularly on such issues as public interest and the effect on the local environment. The fact that not all the members will have shared the same views on all the issues does not detract from the utility of the report as an indication of the general thrust of the council's thinking. That is illustrated by some of the planning reports in this case (as Lord Neuberger PSC implicitly recognises, when relying on the "cautious" nature of the planning officer's recommendations: para 138). In any event, in so far as the focus is on the evidence before the planning authority (to which Lord Neuberger PSC refers in para 138), rather than the decision itself, the planning officer's report is likely to offer the most comprehensive summary of the relevant material.

G (i) *Relative importance*

H 220 The first alternative begs the question whether the relative importance of an activity to the public is relevant at all. In *Miller v Jackson* [1977] QB 966, the Court of Appeal held by a majority that public benefit was not relevant to liability, but (by a different majority) that it may be relevant to remedies. In *Kennaway v Thompson* [1981] QB 88 the court declined to follow the latter view, holding that public benefit was not relevant at either stage.

221 *Clerk & Lindsell*, para 20-107 notes the position as apparently established by those cases, but adds that since a finding of nuisance "necessarily involves the balancing of competing interests", public interest,

while not itself a defence, should be “a factor in assessing reasonableness of user”. The only case cited, *Dennis v Ministry of Defence* [2003] Env LR 741 (noise from military aircraft), does not directly support the proposition, since Buckley J held there to be a nuisance, but awarded damages in lieu of a declaration or injunction because of the public interest in the activity: paras 48, 80.

222 In agreement with Peter Gibson LJ in *Wheeler* [1996] Ch 19, 35, I think there should be a strong presumption against allowing private rights to be overridden by administrative decisions without compensation. The public interest comes into play in the limited sense accepted by Lord Westbury in *St Helen's Smelting Co v Tipping* 11 HL Cas 642, 650, as discussed above, that is in evaluating the pattern of uses “necessary . . . for the benefit of the inhabitants of the town and of the public at large”, against which the acceptability of the defendant's activity is to be judged. Otherwise its relevance generally in my view should be in the context of remedies rather than liability.

223 I would accept however that in exceptional cases a planning permission may be the result of a considered policy decision by the competent authority leading to a fundamental change in the pattern of uses, which cannot sensibly be ignored in assessing the character of the area against which the acceptability of the defendant's activity is to be judged. I read Staughton LJ's use of the word “strategic” as equivalent to Peter Gibson LJ's reference to “a major development altering the character of a neighbourhood with wide consequential effects such as required a balancing of competing public and private interests before permission was granted”. For this reason, in my view (differing respectfully from Lord Neuberger PSC on this point) the reasoning of the judge in *Gillingham* can be supported. Similarly, the Canary Wharf development was understandably regarded by Lord Cooke as strategic in the same sense. But those projects were exceptional both in scale and the nature of the planning judgments which led to their approval. By contrast, in neither *Wheeler v JJ Saunders Ltd* nor *Watson v Croft Promosport Ltd* did the relevant permissions result in a significant change in the pattern of uses in the area, let alone one which could be regarded as strategic; and for the reasons noted above neither decision could be regarded as reflecting a considered assessment by the authorities concerned of the appropriate balance between public and private interests.

(ii) *Benchmark*

224 Apart from such strategic cases, a planning permission may also be of some practical utility in a different way. As many of the cases show, a major problem when dealing with nuisance by noise is to establish any objective and verifiable criteria by which to judge either the existence of a nuisance or the limits of any injunction. In some cases there may have been a single planning permission which established, by condition or by a linked section 106 agreement, a framework of noise levels and time limits, which can be taken as representing the authority's view, with the benefit of its expert advisers, of the acceptable limits. Lord Neuberger PSC makes a similar point in para 96.

225 *Watson v Croft Promosport Ltd* [2009] 3 All ER 249 offers one example of such a framework, in the form of a unilateral undertaking incorporating a relatively sophisticated set of noise criteria. As has been

A seen, that did not purport to be an assessment of what was seen by the planning inspector as objectively reasonable, but rather an attempt to control the uncontrolled. However, some of the noise criteria found in the agreement were used by the judge in setting the threshold of the acceptable, and by the Court of Appeal in framing the limits of their injunction.

B 226 Where the evidence shows that a set of conditions has been carefully designed to represent the authority's view of a fair balance, there may be much to be said for the parties and their experts adopting that as a starting point for their own consideration. It is not binding on the judge, of course, but it may help to bring some order to the debate. However, if the defendant seeks to rely on compliance with such criteria as evidence of the reasonableness of his operation, I would put the onus on him to show compliance: see by analogy *Manchester Corp'n v Farnworth* [1930] AC 171, relating to the onus on the defendant to prove reasonable diligence under a private Act. By contrast, evidence of failure to comply with such conditions, while not determinative, may reinforce the case for a finding of nuisance under the reasonableness test.

D 227 The present case is illustrative of the opposite case, where the conditions of the planning permissions, such as they were, were of little help to the judge. It is perhaps unfortunate that the authority did not at some stage attempt to secure an overall agreement relating to the operation of activities on the combined sites. The permission for the stadium contained no noise-limits, other than some limits on days and hours of use. Three breach of condition notices served by the planning authority between 2007 and 2009 related to apparently isolated breaches of those limits. The established use certificate contained some limitation of hours, but it is unclear how if at all they could be enforced. In relation to the noise limit of 85dB LAeq over one hour at the boundary of the site, set by the 1997 permission for the motocross site, the most recent evidence we were shown of compliance was in a planning report of December 2001.

F 228 With the help of its own expert advice, the council did attempt in 2008 to impose some overall control by use of their statutory nuisance powers [2011] EWHC 360 (QB) at [115]–[117]. That may be an uncertain guide in the context of the common law, given the statutory defence of “best practicable means”. (Thus, as Lord Neuberger PSC says at para 11, the 1995 noise abatement proceedings had been “inconclusive”, not because of their result which was in favour of the owners, but because it was not possible to say whether the justices held that there was no nuisance, or merely that the owners were using best practicable means.) In any event, although the authority's expert's report was available, he was not called as a witness, his approach was strongly criticised by the claimant's expert, and the judge was unimpressed by the council officer's evidence that the abatement works had solved the problem: para 207.

G 229 In those circumstances, the judge was entitled to regard the conditions in the planning permissions and the terms of the abatement notices as of very little assistance in establishing the appropriate noise limits of the defendant's activity.

The judgment of the Court of Appeal

H 230 Against that background, I turn to the reasoning of Jackson LJ in the present case. Dealing with what he called “the planning permission

issue”, he reviewed the sequence of cases since *Gillingham* [1992] 3 All ER 923 and summarised their effect in the following propositions, at para 65: A

“(i) A planning authority by the grant of planning permission cannot authorise the commission of a nuisance. (ii) Nevertheless the grant of planning permission followed by the implementation of such permission may change the character of a locality. (iii) It is a question of fact in every case whether the grant of planning permission followed by steps to implement such permission do have the effect of changing the character of the locality. (iv) If the character of a locality is changed as a consequence of planning permission having been granted and implemented, then: (a) the question whether particular activities in that locality constitute a nuisance must be decided against the background of its changed character; (b) one consequence may be that otherwise offensive activities in that locality cease to constitute a nuisance.” B C

231 He held that the appeal should be allowed. I should quote the relevant passage in full, at paras 71–75:

“71. The judge, at para 158, identified the following question as an important issue in the case: ‘whether it was appropriate, in assessing whether the noise generated by the activities at the stadium and at the track was capable of causing a reasonable person annoyance to a degree amounting to a nuisance, to take into account as one of the noise characteristics of the locality the noise generated by those very activities.’ D

“72. The judge did not immediately state his answer to that question. It is clear, however, from the later passages, as Mr Peter Harrison for the claimants concedes, that the judge’s answer to that question is ‘no’. In my view, that is the wrong answer. Throughout the period when the claimants were living at Fenland the noise generated from time to time by motor sports was ‘one of the noise characteristics of the locality’. E

“73. The judge, at para 203, stated his conclusion as follows: ‘What was clear from Mr Sharps’s measurements, and was borne out by the recordings of measurements annexed to the second report of Mr Stigwood, was that noise from the activities at the stadium and at the track, after the completion of the works undertaken in 2008–2009, was intermittently much louder, typically by 10 dB, than the ambient noise level leaving out of account those activities. It is, in my judgment, those dramatic increases in loudness which really constitute the nuisance in the present case, in other words the contrast between the loud levels and the noise levels prevailing when there was nothing going on at the stadium or at the track.’ F G

“74. In my view that conclusion is flawed. The noise of motor sports emanating from the track and the stadium are an established part of the character of the locality. They cannot be left out of account when considering whether the matters of which the claimants complain constitute a nuisance.

“75. I quite accept that if the second and third defendants had ignored the breach of condition notices and had conducted their business at noise levels above those permitted by the planning permissions, the claimants might have been able to make out a case in nuisance. It appears, however, that this was not the case. Abatement works were carried out in 2008 to H

A the satisfaction of Forest Heath District Council. No breach of condition notices have been served since then, apart from one which did not relate to noise level.”

232 It will be apparent from my discussion of the *Gillingham* case [1993] QB 343 that I regard that case as of no relevance to the present. It has not been argued that the change resulting from the various permissions was
B “strategic”, and the Court of Appeal rightly did not so find. That, however, did not detract from the relevance of the permitted or established uses as part of the established pattern of uses in the area. The Court of Appeal were right to regard them as matters to be taken into account in judging the acceptability of the current use.

233 However, like Lord Neuberger PSC, and in respectful disagreement
C with the Court of Appeal, I do not consider that the judge’s essential reasoning is open to challenge on this basis. Admittedly, as Lord Neuberger PSC has pointed out (paras 77–79), the judge’s reasons for discounting the particular permissions (his para 66) seem unconvincing. However, he was entitled in my view on the facts of this case to approach the matter on the basis (his para 67) that it was more relevant to look, not so much at the permissions as such, as at their practical effects on the locality.
D This led to his conclusion (para 95) that the activities at the stadium and track were part of the character of the area, but only intermittently, and even then not necessarily involving a noise amounting to a nuisance. I find that conclusion hard to criticise.

234 Furthermore, para 158, on which the Court of Appeal relied, seems to me to have been taken by them out of context (albeit apparently with the acquiescence of counsel then appearing for the claimants). As I read it, the
E second part of para 158 was not raising an issue of law as to the relevance of the defendant’s existing activities. The judge had already made clear his view on that issue in dealing with the character of the area: see above.

235 Rather para 158, though perhaps not very clearly expressed, was his introduction to the discussion of the respective expert views on the appropriate methods of assessment of noise. It would serve no purpose in
F this judgment to review the noise evidence in any detail, particularly as the judge’s task was complicated by the failure of the experts to agree a common methodology. However, it is clear that there was a significant difference of approach. The defendants’ expert favoured comparison with what he called “fixed benchmark values”, which he saw as appropriate for a situation where “the noise from the stadium and motocross track are part of the
G background noise level of the area”: see especially judgment paras 164, 188. By contrast, the claimants’ expert favoured comparison with the background noise levels in the absence of the relevant noise source, noting differences on occasion of at least 10 dBA over those levels. The judge preferred the latter approach, because it was those “dramatic” differences which constituted the real nuisance: paras 203, 243.

236 The judge’s treatment of the noise evidence cannot in my view be
H equated (as the Court of Appeal seemed to think) with “leaving out of account” the noise from the existing activities. It simply reflected his reasonable assessment, preferring on this point the expert evidence for the claimant, that the impact of the extreme events which were the real cause of the nuisance was not mitigated by the more acceptable noise levels

experienced on other days or at other times. This was not a conclusion of law, but one of factual judgment properly based on the evidence before him.

237 Finally, while I agree with Jackson LJ as to the potential relevance of evidence of a substantial failure to comply with planning conditions, there was nothing in the evidence in this case which should have led to any assumption in that respect in favour of the defendants. Regardless of any specific enforcement action by the authority, it was for the defendants, if they wished to rely on any planning conditions, to prove not only compliance with them but also their significance to the judge's assessment of nuisance. On the facts of this case, as I have said, the judge was entitled to give very little weight to that factor.

Remedies

238 On the way the case has been argued in the lower courts, the final issue addressed by Lord Neuberger PSC does not strictly arise. As the judge recorded, it was accepted that if a nuisance was established an injunction should follow, the only issue being its terms. The defendants have sought to open the issue in this court for the first time, on the basis that in the lower courts having regard to the authorities such an argument would have been doomed to failure. However, the result is that we have no relevant findings, either as to how the judge would have exercised his discretion if he been able to do so, or as to how he would have assessed future damages, had he decided on that course. In those circumstances, we should approach the issue with caution, conscious that anything we say can be no more than guidance.

239 With that caveat, I agree with Lord Neuberger PSC and the rest of the court that the opportunity should be taken to signal a move away from the strict criteria derived from *Shelfer* [1895] 1 Ch 287. This is particularly relevant to cases where an injunction would have serious consequences for third parties, such as employees of the defendant's business, or, in this case, members of the public using or enjoying the stadium. In that respect, in my view, the Court of Appeal in *Watson* [2009] 3 All ER 249 was wrong to hold that the judge had no power to make the order he did, and to limit public interest considerations to cases where the damage to the claimant is "minimal".

240 As has been seen, Peter Gibson LJ in *Wheeler* [1996] Ch 19 saw more flexible remedial principles as a possible answer to the public interest aspect of cases such as *Gillingham* [1993] QB 343, rather than creating an exception to the law of nuisance. Commenting on the restrictive view taken by the Court of Appeal in *Watson*, Maria Lee has said:

"The fact that something should go ahead in the public interest does not tell us where the costs should lie; we need not assume that injured parties should bear the burden associated with broader social benefits . . . The continued strength of private nuisance in a regulatory state probably depends on a more flexible approach to remedies." ("Tort Law and Regulation: Planning and Nuisance" (2011) 8 JPL 986, 989-990.)

I agree.

241 The practice of other common law countries has varied. For example, the Australian courts have generally followed the *Shelfer* principles: see e.g. *Munro v Southern Dairies* [1955] VLR 332. So also in

A New Zealand: see *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525, where Hardie Boys J said, at p 535: “To the extent that this is an appeal to set the public interest ahead of the private interests of the plaintiffs, then I regret that authority requires me to close my ears to it.” So also in Ireland, in the leading case of *Bellew v Cement Ltd* [1948] IR 61, the majority adopted a strict *Shelfer* approach. Maguire CJ said, at p 64:

B “... I am of the opinion that the court is not entitled to take the public convenience into consideration when dealing with the rights of private parties. This matter is a dispute between private parties, and I think that the court should be concerned, only, to see that the rights of the parties are safeguarded.”

C 242 In Canada by contrast the Supreme Court has allowed a more flexible approach. Thus in *Canada Paper Co v Brown* (1922) 63 SCR 243 the court adopted *Shelfer* principles, but Duff J added, at para 252:

D “An injunction will not be granted where, having regard to all the circumstances, to grant it would be unjust; and the disparity between the advantage to the plaintiff to be gained by the granting of that remedy and the inconvenience and disadvantage which the defendant and others would suffer in consequence thereof may be a sufficient ground for refusing it.”

Similarly, in *Bottom v Ontario Leaf Tobacco Co* [1935] 2 DLR 699, in refusing an injunction to close a factory, the court gave weight to the fact that closure would cause unemployment which would be disastrous to a small community. Riddell JA said, at para 3: “The public good can never be absent from the mind of the court when dealing with a matter of discretion.”

E 243 A more flexible approach has also been adopted in the United States. A leading case is *Boomer v Atlantic Cement Co* (1970) 26 NY 2d 219, in the New York Court of Appeal. The case has been described as “a staple of the [US] law school curriculum and a constant preoccupation of [US] legal scholars”: D A Farber, “The Story of Boomer—Pollution and the Common Law” (2005) 32 Ecology LQ 113. A nuisance had been caused to local residents by the operation of a cement factory but the court refused to grant an injunction requiring the closure of the plant, taking account of the facts that it had cost \$45m to construct and employed more than 300 local people. As Justice Bergan said, at p 223, the total damage to the plaintiffs’ properties was “relatively small in comparison with the value of defendant’s operation and with the consequences of the injunction which plaintiffs seek”. The court accordingly permitted the defendant company to continue operating the factory on payment of damages in lieu of an injunction, to be assessed by the lower court.

F 244 Further support for a more flexible approach can be found in a number of academic writings, most recently by Mark Wilde in “Nuisance Law and Damages in Lieu of an Injunction: Challenging the Orthodoxy of the Shelfer Criteria” (in *Tort Law: Challenging Orthodoxy* ed Stephen Pitel and others (2013), ch 12, p 355).

H 245 While therefore I agree generally with the observations of Lord Neuberger PSC and Lord Sumption JSC on this aspect, I have three particular reservations.

246 First, I would not regard the grant of planning permission for a particular use as in itself giving rise to a presumption against the grant of an injunction. As I have said, the circumstances in which permissions may be granted differ so much as to make it unwise to lay down any general propositions. I would accept however that the nature of, and background to, a relevant planning permission may be an important factor in the court's assessment.

247 Secondly, I would be cautious of too direct a comparison with cases relating to rights of light, particularly where (as in *Kine v Jolly* [1905] 1 Ch 480) the court was asked to make a mandatory injunction to demolish a house built in good faith: see also Wilde, p 372, citing Sargant LJ in *Slack v Leeds Industrial Co-operative Society* [1924] 2 Ch 475, 496. Cases such as the present are not concerned with such drastic alternatives. The judge is not asked to bring the defendant's activity to an end altogether, but to set reasonable limits for its continuation. In so doing he should take into account not only the claimant's environment but also the viability of the defendant's business. In some cases it may be appropriate to combine an injunction with an award of damages (as happened at first instance in *Watson v Croft Promosport Ltd*). I also agree with Lord Mance JSC that special importance should attach to the right to enjoy one's home without disturbance, independently of financial considerations.

248 Thirdly, without much fuller argument than we have heard, I would be reluctant to open up the possibility of assessment of damages on the basis of a share of the benefit to the defendants. The issues are complex on any view (for a detailed academic discussion of the recent authorities, see Craig Rotherham, "Gain-based Relief in Tort after *Attorney General v Blake*" (2010) 126 LQR 102). *Jaggard v Sawyer* [1995] 1 WLR 269, to which Lord Neuberger PSC refers, gives Court of Appeal support for an award on that basis for trespass or breach of a restrictive covenant, but the same approach has not hitherto been extended to interference with rights of light: see *Forsyth-Grant v Allen* [2008] Env LR 877. In cases relating to clearly defined interference with a specific property right, it is not difficult to envisage a hypothetical negotiation to establish an appropriate "price". The same approach cannot in my view be readily transferred to claims for nuisance such as the present relating to interference with the enjoyment of land, where the injury is less specific, and the appropriate price much less easy to assess, particularly in a case where the nuisance affects a large number of people. Further, such an approach seems to represent a radical departure from the normal basis regarded by Parliament as fair and appropriate in relation to injurious affection arising from activities carried out under statutory authority.

Conclusion

249 For all these reasons, I agree with the disposal of the appeal proposed by Lord Neuberger PSC.

Appeal allowed.

COLIN BERESFORD, Barrister

A

Chancery Division

Cooper v Ludgate House Ltd**Powell and another v Ludgate House Ltd**

B

[2025] EWHC 1724 (Ch)

2025 March 17–21, 24, 25;
April 9, 10;
July 8

Fancourt J

C

Nuisance — Right of light — Interference with — Claimant leaseholders alleging defendant's building causing nuisance by interfering with claimants' rights of light — Whether actionable nuisance — Whether sufficient light remaining to claimants' properties for ordinary purposes — Whether additional light enjoyed by claimants to be left out of account for such purposes if claimants unable to protect such light — Whether damages to be awarded in lieu of injunction — Whether proper measure of damages negotiating damages or damages based on diminution in value of claimants' properties

D

The claimants, who were the leaseholders of flats in a residential building, brought claims in nuisance by which they sought injunctions requiring the defendant property developer to demolish part of an office building which the defendant had built not far from the claimants' flats, on the ground that the defendant's building caused a nuisance by interfering with the claimants' rights of light. In order to succeed on their claims the claimants needed to show that the light which remained to each of their flats was insufficient for their ordinary purposes and that, consequently, the use and enjoyment of each flat had been adversely affected. The defendant contended that, when assessing whether sufficient light remained to a flat for ordinary purposes, it would be necessary to take into account light which each flat enjoyed as the result of the demolition of a third building on a site which lay in between the defendant's building and the claimants' building, because the claimants had a right to that light. In particular, the defendant argued that it did not matter that the claimants would be unable to protect that light because of a local authority resolution under section 203 of the Housing and Planning Act 2016 which prevented them from enforcing the right in the event that a new building was constructed on that site.

E

F

On the claim—

G

Held, allowing the claim, (1) that, when determining whether the light which remained to a dominant tenement was insufficient for the ordinary purposes of the dominant owner, light which the dominant tenement actually enjoyed would not be taken into account if the dominant owner had no effective means of protecting that light, regardless of when the light might be obstructed and regardless of whether the dominant owner had a right to the light; that, therefore, where a dominant owner had a right to light but was unable to protect it because of a local authority resolution under section 203 of the Housing and Planning Act 2016 which permitted the carrying out of building works that interfered with the dominant owner's right to the light, the light would be left out of account when assessing whether the light which remained to the dominant tenement was insufficient for ordinary purposes; that it followed that the light which the claimants currently enjoyed as a result of the demolition of the third building should be left out of account when determining whether the defendant's building caused an actionable nuisance; that, leaving that light out of account, it was apparent that the light which remained to the claimants' flats would be insufficient for ordinary purposes and that, as a result, the defendant's building would have a substantial adverse effect on the ordinary use and enjoyment of those flats; and that, accordingly, the defendant was liable in nuisance (post, paras 89–111, 243–244).

H

Colls v Home and Colonial Stores Ltd [1904] AC 179, HL(E) and *Smith v Evangelization Society (Incorporated) Trust* [1933] Ch 515, CA applied. A

(2) That an injunction requiring the defendant to cut back its building to prevent an actionable interference with the claimants' light would be refused and the claimants would be awarded damages in lieu of an injunction, because (i) enforcement of such an injunction would be problematic given that none of the tenants of the defendant's building had been joined to the present claims, (ii) an injunction was likely to be futile, in that there was a good prospect that planning permission would be obtained to rebuild the defendant's building with the protection of a section 203 resolution, (iii) the harm caused by an injunction to the legitimate interests of the defendant, the tenants of the defendant's building and the public would be disproportionate to the harm caused to the claimants by the interference with their light, (iv) there was a public benefit in retaining the defendant's building, (v) the defendant's ultimate owner was entitled to assert that an injunction would be oppressive, (vi) the claimants had accepted that they did not want to see the defendant's building demolished and (vii) damages were an adequate remedy (post, paras 282–309). B C

Lawrence v Fen Tigers Ltd [2014] AC 822, SC(E) applied.

Shelfer v City of London Electric Lighting Co [1895] 1 Ch 287, CA considered.

(3) That since the claimant's claim was to enforce an easement in circumstances where damages were to be awarded in lieu of an injunction, it was for the court to judge what method of quantification of those damages would give a fair equivalent for what had been lost by refusing equitable relief; that, applying that approach to the facts, the appropriate basis on which to award damages was to award the claimants negotiating damages, which would be a good proxy for measuring the enjoyment value of the light which the claimants would lose, rather than damages measured by reference to the diminution in the value of the claimants' flats, which would not; and that, considering in the round what one could reasonably expect the parties to have negotiated and agreed in a hypothetical negotiation given the context, the nature of the rights being sold and the impact on each party of not having those rights, the claimant in the first claim would be awarded damages of £350,000 and the claimants in the second claim would be awarded damages of £500,000 (post, paras 320–322, 344–348, 369–384). D E

One Step (Support) Ltd v Morris-Garner [2019] AC 649, SC(E) applied.

The following cases are referred to in the judgment:

Amec Developments Ltd v Jury's Hotel Management (UK) Ltd (2000) 82 P & CR 22 Back v Stacey (1826) 2 C & P 265 F

Beaumont Business Centres Ltd v Florala Properties Ltd [2020] EWHC 550 (Ch)

Carr-Saunders v Dick McNeil Associates Ltd [1986] 1 WLR 922; [1986] 2 All ER 888

Colls v Home and Colonial Stores Ltd [1904] AC 179, HL(E)

Davis v Marrable [1913] 2 Ch 421

Deakins v Hookings [1994] 1 EGLR 190

Dyers' Co v King (1870) LR 9 Eq 438 G

Fearn v Board of Trustees of the Tate Gallery [2023] UKSC 4; [2024] AC 1; [2023] 2 WLR 339; [2023] 2 All ER 1, SC(E)

Kine v Jolly [1905] 1 Ch 480, CA

Lawrence v Fen Tigers Ltd [2014] UKSC 13; [2014] AC 822; [2014] 2 WLR 433; [2014] PTSR 384; [2014] 2 All ER 622, SC(E)

Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd [2006] EWCA Civ 430; [2006] 2 EGLR 29, CA H

One Step (Support) Ltd v Morris-Garner [2018] UKSC 20; [2019] AC 649; [2018] 2 WLR 1353; [2018] 3 All ER 659, SC(E)

Ough v King [1967] 1 WLR 1547; [1967] 3 All ER 859, CA

Regan v Paul Properties DPF No 1 Ltd [2006] EWCA Civ 1391; [2007] Ch 135; [2006] 3 WLR 1131; [2007] 4 All ER 48, CA

- A *Sheffield Masonic Hall Co Ltd v Sheffield Corp'n* [1932] 2 Ch 17
Shelfer v City of London Electric Lighting Co [1895] 1 Ch 287, CA
Smith v Evangelization Society (Incorporated) Trust [1933] Ch 515, CA
Stokes v Cambridge Corp'n (1961) 13 P & CR 77
Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd (No 2) [2007] EWHC 212 (Ch); [2007] 1 WLR 2167
Thorpe v Brumfitt (1873) LR 8 Ch App 650
- B *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798; [1974] 2 All ER 321

The following additional cases were cited in argument or referred to in the skeleton arguments:

- Ankersen v Connolly* [1907] 1 Ch 678, CA
Birmingham, Dudley & District Banking Co v Ross (1888) 38 Ch D 295, CA
- C *Dent v Auction Mart Co* (1866) LR 2 Eq 238
Fishenden v Higgs & Hill Ltd (1935) 153 LT 128, CA
Ford-Camber Ltd v Deanminster Ltd [2007] EWCA Civ 458, CA
Forsyth-Grant v Allen [2008] EWCA Civ 505; [2008] Env LR 41, CA
Gafford v Graham (1998) 77 P & CR 73, CA
Goldberg v Waite (1930) 143 LT 273
HKRUK II (CHC) Ltd v Heaney [2010] EWHC 2245 (Ch); [2010] 3 EGLR 15
- D *Hales' Case* (1569) Queen's Bench
Holliday v Breckland District Council [2012] UKUT 193 (LC); [2012] 3 EGLR 95, UT
Hortons Estate Ltd v James Beattie Ltd [1927] 1 Ch 75
Hunter v Canary Wharf [1997] AC 655; [1997] 2 WLR 684; [1997] 2 All ER 426, HL(E)
Kettel v Bloomfold Ltd [2012] EWHC 1422 (Ch); [2012] L & TR 30
Lambton v Mellish [1894] 3 Ch 163
- E *Metropolitan Housing Trust Ltd v RMC FH Co Ltd* [2017] EWHC 2609; [2018] Ch 195; [2018] 2 WLR 432
Midtown Ltd v City of London Real Property Co Ltd [2005] EWHC 33 (Ch); [2005] 1 EGLR 65
Morris v Redland Bricks Ltd [1970] AC 652; [1969] 2 WLR 1437; [1969] 2 All ER 576, HL(E)
Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd [2009] UKPC 45; [2011] 1 WLR 2370, PC
- F *Scott v Pape* (1886) 31 Ch D 554, CA
Sturges v Bridgman (1879) 11 Ch D 852, CA
Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd [2006] EWHC 3589 (Ch); [2007] 1 WLR 2148
United Utilities Water Ltd v Manchester Ship Canal Co Ltd [2024] UKSC 22; [2025] AC 761; [2024] 3 WLR 356; [2024] 4 All ER 825, SC(E)
- G *W H Bailey & Son Ltd v Holborn and Frascati Ltd* [1914] 1 Ch 598
Willers v Joyce (No 2) [2016] UKSC 44; [2018] AC 843; [2016] 3 WLR 534; [2017] 2 All ER 383, SC(E)
Wrotham Park Settled Estates v Hertsmere Borough Council [1993] 2 EGLR 15, CA

CLAIMS

- H By two claim forms dated 21 July 2022 and 27 June 2023 respectively the claimants, Kevin Cooper, Stephen Powell and Jennifer Powell, leaseholders of flats in a building known as Bankside Lofts, at 65 Hopton Street, London, sought injunctions against the defendant property developer, Ludgate House Ltd, requiring it to demolish substantial parts of its office building "Arbor", recently constructed opposite the claimants' building at the junction of Southwark Street and Blackfriars Road, London, in order to restrain its

interference with the right to light benefitting the claimants’ respective flats. In the alternative, the claimants sought damages in lieu of injunctive relief, assessed on a negotiating damages basis, or alternatively damages for diminution in value of their flats caused by the nuisance.

The facts are stated in the judgment, post, paras 1–28.

Tim Calland and *Timothy Foot* (instructed by *Estate Legal Ltd*) for the claimants.

John McGhee KC and *Kester Lees KC* (instructed by *Pinsent Masons LLP, Leeds*) for the defendant.

The court took time for consideration.

8 July 2025. FANCOURT J handed down the following judgment.

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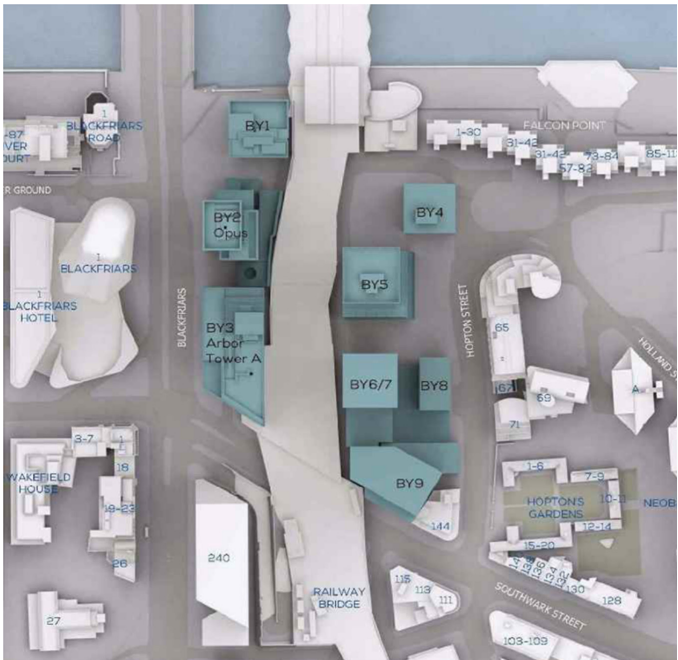
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I. Introduction

1 This is a claim by the owners of two leasehold flats in a building known as Bankside Lofts, at 65 Hopton Street, London SE1, for an injunction requiring Ludgate House Ltd (“the Defendant”) to demolish substantial parts of a new office building called “Arbor”, built recently at the junction of Southwark Street and Blackfriars Road, in London SE1. The Claimants allege that Arbor causes a nuisance by interfering with the rights of light that it is now admitted that they enjoy, appurtenant to their flats. In the alternative, the Claimants claim damages in lieu of injunctive relief, assessed on a negotiating damages basis, or alternatively damages for diminution in value of their flats caused by the nuisance.

2 Bankside Lofts, which was built by the Manhattan Loft Company between 1996 and 1998, stands on the east side of Hopton Street, which runs north from Southwark Street towards the River Thames and then curves round the end of Bankside Lofts towards the Tate Modern Museum on Bankside. The façade of Bankside Lofts faces west, towards a large development site created by the demolition of a building called Sampson House, which formerly stood on the west side of Hopton Street for most of its length (“the Sampson House site”). The Sampson House site adjoins on its west side the busy railway lines running south from Blackfriars Railway Station.

3 On the other side of the railway lines is another part of the development site, of a similar size, created in part by the demolition of Ludgate House on Blackfriars Road (“the Ludgate House site”). The two parts of the development site (which are linked by the arches and other land lying beneath the railway lines) are together known as Bankside Yards, and are being developed by Native Land. A plan of the development site is below:



4 The buildings to be built are marked on the plan as “BY1” to “BY9”, between Blackfriars Road and Hopton Street. Bankside Lofts is the building

A shown to the east of Hopton Street, and the Claimants' flats in that building sit just to the north of the number "65" marked on the plan.

5 Planning permission for Bankside Yards was first granted to the previous owners, Carlyle Group, in 2014, and there have been further permissions granted and non-material amendments made since then. There are planned to be eight large buildings in total, but it is expected that it may be 15 years before the development as a whole is completed, if indeed it is.

B 6 It is on the southern part of the Ludgate House site, next to Blackfriars Road, that Arbor has been built. The massing was completed in November 2021 and practical completion was in December 2022. It stands 19 storeys high. Next to it, a second tower, known as "Opus", intended for residential use, is in course of construction. It will be 48 storeys high when it is topped out later this year and is scheduled for completion in 2027. At present, the remaining parts of both sites are undeveloped, save in part at basement level.

C 7 Each half of the development site is owned by a different special purpose vehicle: the Ludgate House site by the Defendant (which I refer to as "the Defendant" or "LHL"), and the Sampson House site by Sampson House Ltd ("SHL"). LHL and SHL are each wholly owned by a company called Bankside Yards (Jersey) Ltd ("BY Jersey"). Native Land is a minority shareholder of BY Jersey and is the appointed development manager for Bankside Yards. I refer to Native Land hereafter as "the developer", though BY Jersey is the beneficial owner of the development site.

D 8 Mr Cooper's flat, which he bought in about March 2021, is flat 705, on the seventh floor of Bankside Lofts. It comprises three bedrooms, two bathrooms (one ensuite) and a large living/kitchen/dining room ("LKD"). The LKD is very much a feature of the flat, as it is relatively large and has a triple aspect, facing east, south and west, and enjoys a large, mainly south-facing terrace. It is common ground that this room enjoys and will continue to enjoy particularly good light.

E 9 Two of the bedrooms in flat 705, including the principal bedroom, face west only. It is the principal bedroom that it is claimed will suffer an actionable reduction in its light.

F 10 Mr and Mrs Powell's flat, which they bought in 2001, is flat 605, on the sixth floor of Bankside Lofts. It comprises two bedrooms, two bathrooms (one ensuite) and an LKD. All the rooms (except for an internal bathroom) face west. Flat 605 is smaller than flat 705, and, although it has a smaller terrace outside its LKD, it is not as strikingly well-lit as the equivalent room in flat 705, partly because it has no southerly aspect, and partly because the floor to ceiling height is rather low by modern standards (and not what one would expect in this kind of development). It is claimed that the LKD and the principal bedroom in flat 605 will suffer an actionable loss of light.

G 11 It is an oddity of this case that, although Arbor deprives the Claimants of some light, neither flat currently suffers from insufficient light in any of its rooms. That is because Sampson House, which originally stood two–three storeys higher than Bankside Lofts and was in place for much of the period of 20 years during which the rights of light were acquired, was demolished in 2019, and nothing currently stands in its place. The light enjoyed by the flats was thereby temporarily substantially improved by additional light, to which the Claimants have acquired no right; though that

improvement may prove temporary, and is now being reduced as a result of the construction of Opus. A

12 The greatest impact on the light currently enjoyed in flats 605 and 705 will be felt if the new buildings planned for the Sampson House site are built, in future years. The developer has planning permission for towers of 32 and 30 storeys on the part of the Sampson House site nearest to Bankside Lofts (buildings BY5 and BY6).

13 As a result of a resolution made by the Council of the London Borough of Southwark (“the Council”) on 18 January 2022 pursuant to section 203 of the Housing and Planning Act 2016 (“the section 203 resolution”), and following transfers of title to the two parts of the development site thereafter (to the Council and back again to LHL and SHL), Native Land became entitled to build the remainder of the development (excluding Arbor) notwithstanding the admitted interference that that will cause with adjoining owners’ rights to light. The Claimants will not be able to rely on their rights of light to prevent that development taking place. Under section 204 of the 2016 Act, the affected owners, including the Claimants, will be able to claim compensation, on a diminution in value basis only, for the loss of their light caused by the construction of the protected development. I will refer to that protected development hereafter as “the 203 development”, as the parties did, but it is important to remember that it excludes Arbor. B C D

14 Although the Claimants’ rights of light over the 203 development have not been abrogated, their ability to enforce them to protect the access and use of light to their flats has been removed in relation to any development carried out on the 203 development site pursuant to the planning permission, or any variant of it (and probably any replacement permission for a Bankside Yards scheme too). Prior to May 2022, when the transfers of title were completed, the Claimants would have been entitled to assert their rights against Opus, or BY5 and BY6, even if they had not objected to the construction of Arbor; but as from that time, they are only able to seek to enforce their rights against Arbor. E

15 There is a lively dispute about the appropriate basis for assessing the impact that Arbor has had (or will be seen in due course to have had) in these circumstances. The issue has never previously had to be addressed in a case where section 203 or its statutory predecessor, section 237 of the Town and Country Planning Act 1990, has been invoked, or (as far as is known) in other cases where works that contribute to an obstruction of light were authorised by an Act of Parliament and so immune from restraint for that reason. F G

16 The Claimants’ primary case is that the light that will be lost in due course when the 203 development is built must be left out of account in assessing whether the erection of Arbor is an actionable nuisance. That is because the effect of the section 203 resolution is that the Claimants can no longer protect the light passing over the 203 development site, even though they have rights of light; and accordingly that light should be ignored in the same way that light to which an objector has no right is ignored for this purpose. The appropriate comparison (the Claimants say), when assessing whether Arbor causes a nuisance, is between the amount of protectable light coming into the flats before Arbor was built (the “Before” assessment) and the volume of protectable light after Arbor is built (the “After” assessment). H

A Since the light that would be blocked by the 203 development cannot be protected, it is to be left out of account in both assessments. This scenario was referred to by the parties as “CS1”. For the purposes of calculation, it assumes that the other towers on the 203 development site have been built, but only as a means of eliminating from the assessment the light that they will block.

B 17 The Claimants also have a secondary case, which involves an attempt to equalise the burden of the Claimants’ rights of light across the different parts of the Sampson House site and the Ludgate House site (scenario “CS2”), so that no one part of the site can be built up beyond a level that allows each other part to be built to the same level without causing a nuisance to the Claimants. There is a dispute, first, about whether this is a correct approach in principle; second, if it is, whether the principle should be
C applied on the facts of this case; and third, if it should, whether the Claimants and their expert light surveyor have gone about it in the right way.

18 The Defendant’s case, on the other hand, is that light coming over the 203 development site at present should be taken into account, because it is there and because the section 203 resolution does nothing to deprive the Claimants of their rights of light: it just changes the remedy to which they will be entitled if and when the remaining parts of the 203 development cause a
D reduction in their light. The Defendant contends that the appropriate comparison is therefore between—as the “Before” assessment—the volume of light that was enjoyed when Sampson House and Ludgate House existed (since the Claimants cannot have acquired rights in relation to light passing over those parts of the airspace on the two sites) and—as the “After”
E assessment—the volume of that light that remains with Arbor additionally in place (scenario “DS1”).

19 Unsurprisingly, these three different comparisons produce significantly different results. On scenario DS1, Mr and Mrs Powell eventually accepted that they could not establish an actionable loss of light. Whether the reduction in light caused to Mr Cooper on scenario DS1 is
F actionable is disputed on the expert evidence.

20 It can therefore be seen that a very important question is whether, in view of the section 203 resolution, the Claimants should be treated as having effectively lost the long term benefit of light from the 203 development site, or whether they should be treated as still able to enjoy it, on the basis that they will be compensated for its loss separately in future. It is the first time that this issue has arisen in a case, as far as is known.

21 Apart from the debate about the appropriate scenario to use as the basis of Before and After comparison, there is an equally lively dispute about the appropriate way to measure the loss of light, in each of the scenarios contended for, for the purpose of determining whether there has been an actionable interference. The traditional method in rights of light cases is the Waldram method, named after the chartered surveyor who created it, Percy
G Waldram. This remains the standard method of assessment, used by the whole of the industry. It uses visibility—at working plane level in a room—of
H a small proportion of the sky as a proxy for identifying the proportion of the room that is well lit, with a proportion below 50% indicating that the room as a whole is poorly lit. The Claimants rely exclusively on that method, as their expert light surveyor contends that alternative methods are not appropriate

or reliable as a means of assessing whether there has been an actionable loss of light. A

22 The Defendant contends that the Waldram methodology is outmoded and liable to produce incorrect results, and does so in these cases. They rely instead—ultimately exclusively—on a different approach to measuring levels of illuminance in a room, called the Radiance methods, after the proprietary software that is used. This is based on various sunlight and daylight assessments and determines whether, in average conditions of external brightness, at least half the room will be lit to a minimum standard of illuminance. These methods, which are based on a British Standard that is in turn based on a European Standard, are regularly used in a planning context, as an aid both to design of buildings and achievement of minimum standards. Guidance issued by the British Research Establishment explains these methods further and also includes different assessments that can be used to indicate whether the construction of a new building is likely to cause a significant impact on the use of existing property, again for planning purposes. These methods were not designed or calibrated to measure whether the light remaining after an obstruction is sufficient for the ordinary purposes of occupiers of the property affected. They have only once previously been used to attempt to answer the specific questions arising in a rights of light context: in a recent case called *Beaumont Business Centres Ltd v Floral Properties Ltd* [2020] EWHC 550 (Ch). B C D

23 Again, the various methodologies produce some different results (though not entirely different), which in this case enable the Claimants to assert that there is a substantial interference with their lights and the Defendant to deny that the remaining light is insufficient or that any reduction in light is noticeable or substantial. E

24 If the Claimants establish a nuisance but injunctive relief is refused, for one or more of a number of reasons advanced by LHL, they seek negotiating damages. LHL denies that negotiating damages are appropriate in any right of light case, and say that the Claimants should only be compensated by an award that reflects the diminution in value of their flats caused by any actionable interference by Arbor. F

25 If the Claimants are entitled to negotiating damages, it is common ground that the hypothetical negotiation should be assumed to have taken place in August 2019, just before the start of the works to build Arbor above ground level.

26 One important component of the assessment may be the reduction in value of the Arbor site attributable to the inability of LHL to build above a certain level—i.e a scaled back version of Arbor could have been designed and built without infringing the rights of light, but that would have made the development and so the land less valuable. G

27 On that basis, the parties' development valuation expert witnesses have addressed the question of how much more the site of Arbor was worth, in August 2019, if Arbor could be built in full, rather than a reduced version of it or a different non-infringing building. That difference in value is not, of course, the measure of the negotiating damages: it is one component in the hypothetical negotiations between the Claimants and LHL for a payment to allow Arbor to proceed. As will become clear, there are also other significant factors that each side relied on. H

A 28 Finally, the parties have adduced expert evidence on the value of the flats, for the purposes of assessing diminution in value (as at the date of trial) in the event that it is decided that only diminution in value damages are to be awarded.

29 The case raises many difficult and important questions, which I have attempted to answer as fully as is necessary to decide the cases.

B *II. The issues*

30 The parties have helpfully agreed the issues and sub-issues that I need to address. They are the following:

(i) Has the construction of Arbor caused an actionable interference with the Claimants' rights of light? Relevant to that are the following questions:

C (a) Is CS₁, CS₂ or DS₁ the correct basis of comparison, as a matter of law?

(b) How should light be measured for the purpose of informing the court's assessment of whether an interference has occurred?

D (c) Whether any impact on the Claimants' light is such as to constitute an actionable nuisance, and in particular whether: (i) the Claimants are left with sufficient light for the ordinary use and enjoyment of the flats; (ii) the impact on the Claimants' light is noticeable; and (iii) it results in a substantial adverse effect on the use and enjoyment of the flats. The Claimants do not accept that sub-issues (ii) and (iii) are legally relevant as separate tests from sub-issue (i), if the Waldram method of assessment is used.

E (ii) If there is an actionable interference caused by the erection of Arbor, should the court in the exercise of its discretion grant an injunction? In particular:

(a) Would an injunction be an unjustified waste of resources and/or cause oppressive losses to LHL and/or the tenants of the development and neighbouring owners?

F (b) Would LHL be able to secure planning permission and then rebuild Arbor with the protection of section 203 if it had to demolish it, and should the court refuse an injunction on that basis?

(c) Should the court refuse an injunction on the basis of the public benefit from the Bankside Yards development?

(d) Have the Claimants unreasonably delayed in bringing their claims?

(e) Are the Claimants only interested in securing a monetary payment for the release of their rights?

G (f) Are the Claimants really concerned with protecting the view from their flats against the 203 development rather than their light?

(g) Is the reduction in the Claimants' light a minor one, so as not to be noticeable or so as not to cause a substantial interference with the enjoyment of their flats or not such as to cause a significant loss in value?

(iii) If an injunction is refused, should damages be awarded in lieu of an injunction?

H (iv) If so, what damages should be awarded?

(a) What measure of damages ought to be awarded: diminution in value or negotiating damages?

(b) If negotiating damages, should these be calculated by reference to enhanced "book value" of the rights or a percentage of the uplift (if any) of development value?

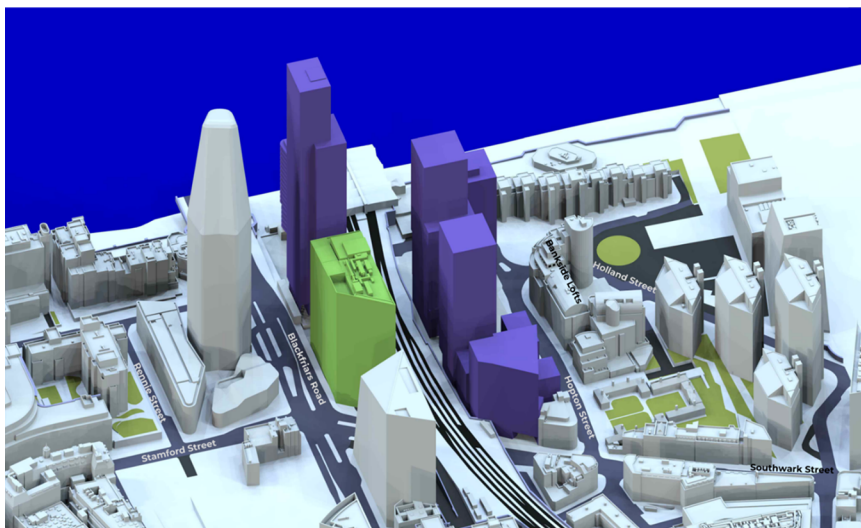
(c) If the latter, what (if any) apportionment ought to be undertaken as between neighbouring owners who share in the same cutback?

(d) On either measure, what is the correct quantum of damages?

III. *Bankside Yards*

31 Bankside Yards was originally assembled by Carlyle Group, who then obtained planning permission in 2014 for its development for mixed residential, office, hotel and retail uses.

32 The land was acquired by BY Jersey in 2015. A public consultation was carried out on its behalf between October 2017 and April 2018, following which an application for a revised planning permission was made in 2018. This was finally granted on 22 December 2020 and currently exists for 8 buildings above ground level, including Arbor and Opus. The location and scale of Arbor and the proposed other buildings to be built on Bankside Yards is shown on the image below. (Existing buildings are grey; Arbor is the green building; Opus is the indigo coloured building between Arbor and the river.) To date, nothing has been built above ground level on the Sampson House site.



33 The evidence from Mr Locke was that the next stages of the development will need to be funded (at least in part) by the proceeds of sale of the flats in Opus, so the next stage will not begin until after practical completion of Opus. Thereafter, the further buildings will be built in sequence, with the result that the last may not be completed within 15 years from today.

34 Opus (BY2) is close to being topped out. It is already having and will continue to have an impact on the light enjoyed by flats 605 and 705, though whether it and Arbor in combination will be an actionable infringement (triggering the Claimants' rights to claim compensation under section 204) was not established. It will, however, be buildings BY5 and BY6, much closer to the façade of Bankside Lofts, that cause the greatest impact on the flats' light.

A are that Mr Ingram excluded from his Waldram assessment the built-in wardrobe space and an area of space behind and in front of the door to the bedroom, which he considered not to be “habitable space”.

250 I prefer Mr Absolon’s opinion on both these points. The built-in wardrobe is not the only reasonable way of making use of that part of the room, as I have already described; it is therefore potentially “habitable” space. The area behind the door is also “habitable”, and the fact that there are plug sockets in that area is an indication that it was intended to be used, as Mr Ingram eventually accepted. The area of the room in front of the door and next to the bathroom door will obviously be a circulation route, but the Waldram method does not generally exclude such areas from habitable rooms that are measured, and Mr Ingram did not do so in his assessed room area for the bedroom in flat 605, where there is, equally, an area in front of the door that would necessarily have to be kept clear for circulation. Mr Ingram’s approach was neither persuasive nor consistent. It was not consistent with what Ms Hannon, one of the team of surveyors who actually worked on the assessment of possible infringement for Native Land, did when she carried out her measurements and assessments.

251 That leaves me with different results based on the Waldram and Radiance methods. How it was that the bedroom “passed” the MDI assessment so comprehensively and the MDF assessment reasonably comfortably and yet failed the Waldram assessment to a non-marginal degree is unclear. That was not explored in cross-examination. The shift in the Waldram contour line shows that it is a significant area in the middle of the room on one side where the “good” light is lost, which is confirmed in particular in the false colour image for the MDI assessment, suggesting that loss of sunlight may be a contributing factor, if not the whole explanation.

252 I therefore have to consider whether the margin of insufficiency, on the Waldram method, is thrown into sufficient doubt by the Radiance results that I should not accept Mr Absolon’s conclusion that the light is insufficient. There was no attempt to explain the divergent results in this scenario, beyond Mr Ingram’s assertion that Waldram does not tell the truth. I accept that the Radiance results do have some value, particularly in a case where the margins are closer than on the CS1 scenario.

253 On balance, I consider that there probably is insufficiency of light, but that the impact of that on use of the room may not be as marked as it is on the CS1 analysis. In view of the extremely well-lit, feature LKD in flat 705 and the fact that the two other bedrooms are unaffected, I conclude that, even though the light may just be insufficient in the principal bedroom, there will be no substantial adverse effect on use and enjoyment of the flat overall, and so no nuisance.

VII. If there is an actionable interference caused by the erection of Arbor, should the court in the exercise of its discretion grant an injunction?

254 As indicated at para 30(ii) above, there is a significant number of different factors at play in deciding the answer to this question. I will address each of them in the course of explaining my findings and my reasoning.

255 The starting point is that the natural remedy where a nuisance is continuing is an injunction to restrain it; to reflect that, the legal burden rests

on the defendant to show why an injunction should not be granted: see *Fen Tigers* [2014] AC 822 at paras 101, 121. A

256 I will return to the question of whether that case marks a new approach to the grant or withholding of injunctive relief in a case of nuisance, as the Defendant submits, or whether the approach of AL Smith LJ in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 (“*Shelfer*”) should still be applied, as the Claimants submit, and if so whether that assists in determining this case. B

257 The first consideration, however, is the nature of the injunction that the Claimants seek. The pleaded claim was for “an injunction restraining the Defendant from retaining Tower A in such a manner as to commit a nuisance by interfering with the access of light to [his/their] windows”. The oddly prohibitory language for an injunction that in substance seeks removal of an obstruction to light was, however, explained in the Claimants’ skeleton argument. The Claimants say that they do not object to Arbor remaining in place, as built, if cut backs are made in the other buildings intended to be built on Bankside Yards, so that the Claimants will retain sufficient light. C

258 It emerged that the Claimants accept that they should only be granted an injunction that would not become enforceable for a period of time, so that the Defendant can consider how else varied plans for other buildings might avoid the need for demolition, if they so wish, and can then apply for the injunction to be discharged on the basis of undertakings. The Defendant in evidence made clear, however, that it has no intention of doing that, so it is unnecessary to consider that further, because it will not eventuate. D

259 Another difficulty emerged in the course of the openings, which is that Arbor is now approximately two-thirds occupied by commercial tenants, but none is joined to these claims. The Claimants said that that was deliberate, because they recognised the tenants were likely to be affected but wanted to avoid the considerable additional costs from joining numerous additional defendants. They accept that the consequence is that an injunction could not be immediately effective in any event, without giving the tenants the opportunity to apply to have it set aside or varied. E F

260 I accept that a decision not to join the tenants was made in good faith, for the reason given, rather than because the Claimants had no real intention of pursuing an injunction but only claimed one for the purpose of extracting a large ransom payment from the Defendant, as it alleged. The non-joinder of the tenants (or a representative of them) does however have the consequence that an injunction, if granted, would have to be stayed—possibly until after the tenants’ rights against the Claimants had been tried. G

261 That is not on its own a reason to refuse an injunction, if it is otherwise the appropriate remedy to grant. But the possibility of further proceedings lasting a considerable time, and the risk of the injunction ultimately not being effective, is a factor in considering whether an alternative remedy is more appropriate, in all the circumstances. H

Test for grant or refusal of an injunction

262 The leading authority is now the *Fen Tigers* case [2014] AC 822: it is a decision of the Supreme Court, recently made, and it reviews

A comprehensively the previous decisions, including *Shelfer*. In *Fen Tigers*, the principal issue was the extent to which a planning permission for a noisy use can be taken to have changed the character of the local area, and whether it precludes an allegation of nuisance. A secondary question was whether an injunction should be granted to stop the permitted use. The judge had found a nuisance and granted an injunction, but the Court of Appeal reversed him.

B 263 The headnote gives a concise summary of the court's approach to relief:

C “where a claimant had established that the defendant's activities constituted a nuisance, prima facie the remedy, in addition to damages for past nuisance, was an injunction to restrain the defendant from committing such nuisance in the future, the precise form of any injunction depending on the facts of the particular case; that the court had power, however, to award damages instead of an injunction and, in considering whether to do so, was free to take account of the existence, and terms and conditions, of any planning permission for the land in question, as well as other matters of public interest, such as the effect of any injunction on the viability of the defendant's business and on the public's enjoyment of the activities carried on by that business; that, by contrast, the court could also take account of the effect on persons other than the claimant who would remain badly affected by the nuisance if an injunction were not granted; but that in all cases it was for the court to weigh up all competing factors in the exercise of its unfettered discretion.”

E 264 The leading judgment was given by Lord Neuburger. The Defendant submits that the following propositions, as they apply to this type of claim, emerge from the President's judgment (with paragraph references given):

(i) The court should adopt a flexible approach to whether or not to grant or refuse injunctive relief. It is not only in an exceptional case that injunctive relief should be refused (paras 117, 119);

F (ii) Subject only to the legal burden of proof remaining with the defendant, there should be no inclination either way whether or not to award injunctive relief, which should depend on all the evidence and arguments (paras 121, 122);

(iii) A relevant factor is if there is a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit (paras 121 and 122);

G (iv) The court should be careful not to allow an action for an injunction to be used as a means of extorting money (para 121);

(v) The public interest is a relevant factor (para 124);

(vi) The existence of planning permission can be a factor and has real force where the planning authority has been influenced by the public benefit (para 125);

H (vii) The fact that the grant of an injunction would involve a loss to the public or a waste of resource is a factor (para 126);

(viii) It is a factor if the financial implications of an injunction for the defendant would be disproportionate to the damage done to the claimant if it was left to a claim in damages (para 126).

I accept that this is an accurate distillation of the main principles established (in this regard), though proposition (iii) is clearer if the second

“if” is read as “was” (though I accept that “if” appears in the quotation from *Colls* in para 121). A

265 In the course of his judgment, the President referred to *Shelfer* and explained that it was not to be treated mechanically, as the basis for deciding whether an injunction should be granted or refused, or as establishing that damages should only be awarded in a nuisance claim instead of an injunction in an exceptional case. The principles in *Shelfer* are: B

“it may be stated as a good working rule that—

“(1) if the injury to the plaintiff’s legal rights is small,

“(2) and is one which is capable of being estimated in money,

“(3) and is one which can be adequately compensated by a small money payment,

“(4) and the case is one in which it would be oppressive to the defendant to grant an injunction:—then damages in substitution for an injunction may be given.” C

266 Cases such as *Regan v Paul Properties DPF No 1 Ltd* [2007] Ch 135, which applied the *Shelfer* principles mechanically, and as if the corollary was that if the rule was not satisfied an injunction should be granted, were “wrong in principle, and give rise to a serious risk of going wrong in practice”. The right approach was that the principles were not a fetter on the court’s discretion, but that, absent other countervailing material factors, it would normally be right to refuse an injunction where the rule applied, but there was no corollary for granting an injunction where it did not apply. Lord Neuberger, Lord Sumption and Lord Clarke of Stone-cum-Ebony JJSC all agreed that slavish application of *Shelfer* was wrong and out of date. D E

267 I therefore agree with the Defendant that *Fen Tigers* is to be taken as establishing a new approach, in which the court has a broad discretion whether to grant an injunction or award damages for nuisance, taking account of all relevant factors, but with the legal burden of persuasion to award damages lying on a defendant. F

The arguments

268 The Claimants say that an injunction is the right remedy to grant because the Defendant has deliberately proceeded with its development in the face of the Claimants’ rights, knowing that there was probably an infringement, and taking the chance that it would be able to buy off the Claimants and all those in an equivalent position. In fact, all but the Claimants have settled their potential claims for a monetary payment, and the Defendant relies on those settlements as a precedent to establish that modest damages are the appropriate remedy for infringement. G

269 However, the Claimants are people who say that they have a particular and strong attraction to the benefits of natural light directly from the sky, and are unwilling to see that light taken away from them, as a fait accompli. The position was, I am sure, exacerbated by Native Land’s advertising the new development as having “exceptional levels of natural light” that promote productivity and wellbeing, which Mr Cooper pointed out amounted to Native Land helping itself to his light and offering a modest payment while intending to sell it to others for a high price. H

A 270 I also accept that Mr Cooper was incensed by the way that the Council acceded to LHL's and SHL's section 203 application. He considered it to be an affront to local democracy, on the basis that the Council had not gone through the proper processes. These required it to be satisfied that Native Land had conducted appropriate negotiations with those claiming rights of light, and that those negotiations had failed.

B Mr Cooper is critical that Native Land did not get beyond offering various multiples of book value and did not engage in assessing damages on a negotiating basis.

C 271 The section 203 resolution was of great significance. It changed the dynamic of the discussions that had taken place, and it altered the legal position for the future. From May 2022, by which time Arbor had been fully built, the Claimants could no longer seek to restrain the 203 development later to protect their light; their only remedy was against Arbor. Until the section 203 resolution in January 2022 (or, strictly, May 2022 when the transfer, leaseback and re-transfers were completed), the Claimants had rights that they could enforce against the rest of the development, to protect their light. There was therefore no reason for the Claimants to seek an injunction in respect of Arbor before January 2022. But after May 2022 they could only object to Arbor.

D 272 The second thing that changed as a result of the section 203 resolution was that the only remedy that the Claimants could obtain for the significant loss of light that would ensue from the 203 development was compensation assessed on a diminution in value basis.

E 273 There is no doubt in my mind that the Claimants were evaluating their options throughout—the Powells from as early as 2018, when they received GIA's letter, and the Claimant from the time that he bought flat 705, in 2021. It cannot, however, be said that there was substantial delay by any of the Claimants that should disentitle them to injunctive relief, for two reasons. First, until May 2022, there was no occasion for them to proceed with a claim for injunctive relief, as their light could be protected, when necessary, by restraining later development. Second, Mr Locke, an executive director of Native Land, who gave evidence openly and frankly,

F made it clear that even if any of the Claimants had threatened an injunction well before the proceedings were issued, it would have made no difference to what Native Land did in proceeding to build Arbor. The Defendant was therefore not prejudiced in any way by any delay in issuing proceedings, nor did the Claimants gain an advantage from delay. Laches is not established.

G 274 I similarly reject the argument that Mr Cooper and Mr and Mrs Powell were only interested in turning the opportunity to object to Arbor to financial account, and so should be limited to a remedy in damages for that reason. Having heard Mr Cooper and Mr Powell cross-examined at some length about their motives, I am satisfied that, although they were aware that they might be left with monetary compensation only, that was not the purpose of their claims. I accept that they genuinely wanted to protect the light that their flats enjoyed, as they said.

H 275 In Mr Cooper's case, he bought flat 705 knowing of the proposed development. As a professional in the sphere of funding property developments, Mr Cooper knew how things worked, and he had come across rights of light previously. He backed himself to have the ability to deal with the threat of the development if and when it happened. He realised

that it might not be for some years, if at all. He loved the light in the flat and bought it for that reason, and for personal convenience for his main residence in Surrey and his place of work, near Ludgate Circus. If Mr Cooper had bought the flat as a financial opportunity to hold Native Land to ransom, he would have obtained specific advice about the existence and enforceability of rights of light appurtenant to the flat before completing the purchase of it. He did not do so. He was, however, sufficiently aware of what might happen to obtain some initial advice after he had purchased. I find that he wanted to put himself in the best position to deal with the threat if and when it happened, and that he believed he could do so.

276 Mr Powell had been at flat 605 for much longer, though it is only one of four homes that he and his wife have. The flat is in the nature of a pied-a-terre and convenient for use when visiting London. He and his wife were strongly attracted to the good light that the flat enjoyed (though, in 2001 when the Powells purchased, Sampson House was standing, so the light was not as outstanding as when Mr Cooper bought in 2021). Mr Powell realised from an early stage in the preparation of the development that his light would be affected and that there was a possibility of compensation.

277 He took advice, and he understood that seeking to restrain the development was an option but that this was a very expensive and arduous process. He was persuaded by Delva Patman Redler (“DPR”) to allow them to negotiate on his behalf, to see what settlement could be obtained. I accept Mr Powell’s evidence that he did not do this because he wanted to settle for a modest amount of monetary compensation for loss of light. Although he tended to suggest that this negotiation was DPR on a frolic of their own, I consider that he was sufficiently interested to know how much Native Land was prepared to pay to buy his rights. He did consider settling for money but ultimately was not willing to do so at the sum that DPR had been able to negotiate. He had been careful to establish that all negotiations were on a without prejudice basis.

278 In about April 2022 there was confusion about Mr Powell’s dealings with DPR and a firm of solicitors (Mishcon de Reya) that he had instructed to give some limited advice. A deed of settlement had been prepared by Native Land’s solicitors and sent to Mishcon de Reya—Mr Powell said that this was a mistake—to give effect to settlement at the sum that DPR had negotiated. I find that the mistake was caused by Mr Powell being unclear with DPR and Mishcon de Reya about what he wanted, partly because he was not wholly clear himself at that time and partly because he did not want to be led by solicitors. In the event, no settlement was achieved. It was the section 203 resolution that caused Mr Powell to focus on seeking an injunction in relation to Arbor. At that stage, he took advice from Waldrams rather than DPR and sought legal advice from Estate Legal instead of Mishcon de Reya in about May 2022.

279 By 2023, Mr Powell was set on seeking an injunction to protect his light. The only chance of doing so was to seek cut backs of Arbor. Mr Powell eventually understood that it was possible to get an injunction on this basis, and that this was the only way in practice that his light could be preserved once the 203 development began. That does not mean that Mr Powell was unaware of the ability of the court to award negotiating damages instead of granting such an injunction. I find that he did know that,

A but I accept that his primary interest was in seeking to preserve good light in flat 605. It is material that his living space, not just his bedroom, was at threat of having poor light.

280 I do not therefore consider that an injunction should be refused on the basis that the Claimants are really only interested in money.

B 281 The Defendant also pleaded and pursued the allegation that the Claimants were seeking injunctive relief not to protect their light but to protect the views from their flats over the River Thames. The Claimants do have some view of the Thames (directly north, from the balconies, which view will largely remain) and west, towards the Houses of Parliament, which is only a partial view and which will be lost once the 203 development is built. These are not panoramic waterfront views that would in themselves provide a motive for seeking relief. In any event, it is not Arbor that obstructs the views. Suffice to say that, although one can understand that the Claimants would like to preserve some limited view of the Thames, if possible, I do not find that such views were their main motivation. I accept that this was to protect the good light that their flats enjoyed.

Balancing oppression to the Defendant and harm to the Claimants

D 282 The real problem for the Claimants in seeking an order for injunctive relief is that demolition of Arbor, in whole or in part, will lead to one of two consequences. One possibility is that planning permission will be sought and granted for a new building, as large as Arbor or possibly even larger, but this time protected by the section 203 resolution. If that were to happen, an order to demolish Arbor would be futile, and a huge waste of scarce resources, as well as causing unnecessary disruption and harm to the local area. The other possibility is that Arbor will be demolished, in whole or in part, and not replaced, in which case there will be a waste of a high quality, valuable resource, in the form of a modern, net zero office building that brings considerable public and economic benefits to the area.

E 283 The Claimants' suggestion that an injunction should only take effect if Native Land does not re-design the 203 development recognises the strength of this argument. The partial demolition of Arbor that would be required, on the basis of the identified cut backs, might require demolition to 10th floor level, so that it is possible that up to half the building would be lost. Demolishing only half the building would be a more complex exercise in engineering terms, and therefore more expensive than entire demolition. Mr Locke considered that demolition could cost £15m to £20m, and re-building of the whole would cost around £225m.

G 284 There are strong arguments, in modern times, why over £200m of development costs should not be wasted. There would also be substantial harm done by a further, complex demolition contract and considerable environmental damage as a result. Apart from the financial interest of the developer, to which an order for demolition could be said to be oppressive in comparison with the degree of harm done to the Claimants, there is a significant public interest that needs to be taken into account.

H 285 The Claimants however did not agree that Native Land would be able to obtain planning permission to rebuild Arbor, if it had been demolished. They do not dispute that, if that happened, a rebuilt Arbor would be protected by the section 203 resolution and so they would not

be able to restrain it. They say that, on the assumption that the court had ordered demolition (in whole or in part) in order to protect their rights, the planning committee of the Council would not consider that granting permission to re-build Arbor was appropriate.

286 The Claimants' case on this point was based on the opinion of David Churchill MRTPI, an expert town planner, who gave evidence to that effect. He considered that, despite the development plan for the area supporting tall buildings on Bankside Yards, the elected members of the Council on the planning committee would be concerned about making a decision contrary to the court's decision, because of local political ramifications. This was so even though private rights were not relevant to the planning merits. The members would also be aware that the "missing" offices from Arbor (which was part of the originally consented uses mix) could be made up somewhere else on the development, though he did not identify where.

287 Mr Churchill considered that the members of the committee would not be willing to grant permission for a scheme that resulted in a higher degree of harm (sc to the Claimants' rights of light) than an alternative scheme would have. He felt that the committee would scrutinise more fully the sunlight/daylight assessments in the Environmental Statement ("ES") that would have to be submitted in support of a new planning application, though he recognised that the development as a whole had been considered to produce only a "minor adverse" impact to Bankside Lofts previously, and that a revised planning permission was granted for the Sampson House site in 2020 even though the ES identified major adverse impacts to 45 out of 280 windows in Bankside Lofts. Ultimately, he considered that the planning committee would consider that exceptional circumstances justified the refusal of planning permission notwithstanding that the application was consistent with planning policy and that other material considerations supported it.

288 Luke Emmerton MRTPI, who gave evidence as an expert planner on behalf of the Defendant, did not agree with Mr Churchill. He emphasised that a new Arbor building, or a different building of a similar height, would be consistent with the relevant policies in the development plan and all material planning considerations, and would be seen as an important component part of the larger Bankside Yards development. He said that the planning application would have to be addressed by the planning officers and considered by the planning committee according to its planning merits, without regard to alternatives that were not before them; and that a decision of the court to give effect to the private rights of the Claimants would be irrelevant to the public law merits of the proposal.

289 Since Arbor was considered acceptable before, in public law terms, Mr Emmerton said that it was difficult to see why it would not be seen as acceptable again. It was in any event impossible to see where ten large storeys of office accommodation could be provided elsewhere at Bankside Yards, as the whole site had been optimised in terms of its potential for development. It was not possible to do without the office space, as the 2014 planning permission required 45,000m² of office space, and there were planning policies against losing office space in the Southwark area which would be applicable.

A 290 I have no hesitation in preferring the opinion of Mr Emmerton, for the following reasons:

(i) Mr Churchill seemed to me to have placed too much reliance on possible political considerations (which were not established by any other evidence) in suggesting that the committee would be reluctant to grant planning permission because of the impact on the Claimants' rights following the grant of an injunction.

B (ii) The planning committee's responsibility is not to further any order made by the court enforcing private rights but to consider any planning application on its planning merits. I do not therefore consider that Mr Churchill is right to say that the injunction, if granted, would have fundamentally changed the narrative, as he put it. He accepted that the grant of an injunction was not a material consideration.

C (iii) The relevant planning policies strongly support the grant of planning permission for a tall building for office use in that location, which was considered to be an essential component of the mixed use scheme. Mr Churchill was unable to explain persuasively how the missing offices could be accommodated elsewhere on the development, when the Council's officers had previously considered that they could not be when they considered the viability of the proposed development of Arbor.

D (iv) Private rights are irrelevant to the planning merits, and though impact on amenity is a relevant consideration, the Council had previously considered sunlight and daylight assessments and granted planning permission for the Sampson House site despite some major adverse impacts, whereas the impact of the whole development on Bankside Lofts was only minor adverse. Arbor in isolation can be expected to be less than that. Now that the amenity of only two residents is in issue, as the others have settled with the developer, the extent of the harm to amenity has decreased.

E (v) The grant of planning permission previously and the officers' report to Cabinet on the exercise of section 203 powers show that although substantial adverse impact of the development on private rights would result, the officers and Cabinet considered that these adverse impacts were significantly outweighed by the public benefit of the proposed development.

F Public benefit will be a strong material consideration in the hypothetical application for planning permission.

(vi) Mr Churchill did not persuade me that there was any plausible reason why, against that background, the planning committee would reach an opposite conclusion and refuse planning permission. The policy (P30) against loss of office space would be an additional material consideration favouring grant of planning permission. Mr Churchill accepted that the Council would have had to be satisfied that it would be provided somewhere else, but he had not considered where that might be. I prefer Mr Emmerton's opinion that Native Land could not have delivered it elsewhere on Bankside Yards.

G 291 Accordingly, it is probable that if Arbor were demolished, planning permission for a development as part of the Bankside Yards scheme, protected by the section 203 resolution, would be granted for it or something like it to be re-built. Mr Locke said that Native Land would look to replace the development value of Arbor, either by re-building it or by building something larger, to seek to recover the loss that it would have suffered. A building only ten storeys high was not considered viable. Native Land

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would compare the value of what was left with the cost and value of what it might be able to build. I accept that it is probable that the developer would have sought to build an equivalent sized or larger building, rather than accept a cut back version of Arbor remaining on the site.

292 This means that an injunction to demolish part of Arbor, if it could take effect as against the tenants, would be futile. It would result in an unjustified waste of valuable resources, as well as a source of harm caused by a further long period of demolition and construction, harm to the economic interests of the area, and harm to employees of the tenants and the building staff, and to the public.

293 If Arbor were demolished, or partly demolished, and not re-built, there would still be a significant waste of top quality office accommodation with strong sustainability credentials, contrary to local planning policies, with consequential environmental, economic and public harm.

294 Arguments of waste of money and harm—which to a greater or lesser extent can be made in any case in which a mandatory injunction to pull down a building is sought—are not an automatic defence to the grant of an injunction, regardless of the facts. They cannot be deployed by a developer as a trump card to excuse wrongful conduct that causes serious harm. A defendant who has cynically sought to steal a march, without being open about what it intended to build, or who has sought to evade the jurisdiction of the court, is unlikely to receive much sympathy from the court.

295 It is sometimes said that a defendant should not be sheltered by the court from their decision voluntarily to take on the risk of an injunction being granted. However I consider that this overstates the matter. Risk-taking is a necessary part of commercial life and should not be regarded as synonymous with recklessness. The authorities suggest instead that “acting in a high-handed manner”, “attempting to steal a march”, “acting with reckless disregard” or “acting wantonly and quite unreasonably” are the hallmarks of a case where the court might not be receptive to a disproportionate harm argument. In any event, as *Fen Tigers* establishes, what is required is a balancing of all relevant considerations, with no presumption either way.

296 I do not find that Native Land did seek to steal a march on persons such as the Claimants, or otherwise acted wrongly in starting to build Arbor when it did, though I do find that the Defendant’s description of the “neighbourly manner” and “extensive consultation” that Native Land engaged in is rather overstated in its closing submissions. Native Land had a commercial strategy, on which Mr Ingram advised from an early stage, which was calculated to enable it to avoid the assertion of rights of light, and to buy off those who might have adverse rights at an early stage. Failure to buy off all potential objectors would not prevent the start of development above ground, which, as Mr Locke confirmed, would proceed anyway, on the basis of other imperatives. It is right to bear in mind, as Mr Locke said, that rights of light was only one aspect of the timing and sequencing of the development that he had to consider: there were many complex site issues, for example, that had to be brought into line at the same time. He said that rights of light were not at the forefront of Native Land’s thinking. I accept that evidence.

A 297 Nevertheless, in furtherance of its rights of light strategy, and with the benefit of the best advice, Native Land would have identified the best time at which to send initial letters to identified local residents who might have adverse rights, seeking access in order to conduct a survey, and then (with the benefit of the survey results and a Waldram analysis) make offers (at so many times the estimated book value of the weighted area that had lost
B “good” light) in the hope of obtaining a quick settlement. The initial letters were sent out by GIA in November 2017, but offers of settlement not until November 2019, shortly after the start of construction of Arbor above ground. This was not accidental. Once started, there was no way in which construction would be stopped, short of a court injunction. Residents who were made offers therefore had very little opportunity to take advice and react before the concrete cores were built. The timing was meant to give
C Native Land the best chance of reaching settlements before later buildings were built. Mr Locke said that the strategy was to conclude negotiations within 12–24 months after the offers were sent.

298 The strategy that Native Land applied is not deserving of especial criticism for three reasons. First, there had been consultation with the local residents and others from 2017. Second, there was nothing unusual or
D overtly exploitative in what Native Land did. In the interests of carrying out an expensive and valuable development, it needed to put itself in the best position that it could to counteract any attempt to stall the development, and to buy off adverse claims. That is what developers in cities have to do. Third, the construction of Arbor was not seen as being in itself an actionable interference with the rights of residents. Mr Locke confirmed that this was the case: “Arbor was not injuring anyone”; “As I knew that Arbor didn’t
E cause any injury, there was no risk”. Native Land’s view, even at a later stage when letters before claim were written, was that this was premature. Arbor was one only of eight large buildings intended for Bankside Yards. GIA was pursuing settlement on the developer’s behalf not in relation to Arbor but in relation to the whole Bankside Yards development.

299 Further, in relation to the only two residents who have pursued
F their rights in court, it was accepted, or in the case of Mr Cooper I have found, that there was no infringement by reason of the construction of Arbor alone. It was only as a result of the section 203 resolution, in January 2022, and the transfers and re-transfers in May 2022, that the Claimants (and other residents) lost their ability to protect the light that they continued to enjoy over the 203 development site, with the consequence that Arbor is a nuisance. Mr Locke said that it was only in April 2021 (following
G Mr Powell’s indication in April 2020 that he would not settle, MLC’s threat of injunctive relief in June 2020 and Mr Cooper’s letter before claim of January 2021) that use of section 203 was considered, and Native Land decided to open discussion within the Council about using its statutory powers. It decided to apply for a section 203 resolution in October 2021. The massing of Arbor was complete in September 2021. It was not
H suggested to Mr Locke that this sequence was planned from the outset; indeed it would make no sense to aim to proceed in that way, leaving Arbor out of section 203 protection.

300 This is therefore not a case in which it can be said that Native Land acted unfairly, exploitatively or covertly. The Defendant is entitled to

advance the points of futility, waste of resources, oppression and public harm as reasons for refusing injunctive relief. A

301 As to whether the damage caused by granting an injunction is disproportionate to the harm caused to the Claimants by the interference with their light, the harm caused to them is not trivial. It will (when the impact is suffered, which may not be for some years) cause most of the Powells' flat and one main room in Mr Cooper's flat to be insufficiently lit for the ordinary use of those rooms, without artificial lighting. While artificial lighting can make the rooms sufficiently lit for ordinary use, the quality of artificial light is not the same as natural light. I am satisfied that the difference in the light enjoyed in those rooms would be noticeably worse than the level of notionally reduced light that could not be objected to (i.e. the level at which the light is just sufficient, or compliant with the BS). B

302 The harm that the Claimants will suffer is not financial harm. The damage is principally to the use and enjoyment of the flats, not to their exchange value; though the reduced use and enjoyment value may have some impact on the market value. Mr Cooper and Mr Powell both stressed that they did not want money, they wanted their light, so that they could enjoy fully the advantages that their flats offered. Despite the loss of light, the flats remain useable, attractive and valuable, but less enjoyable in terms of their good light. Mr Cooper bought flat 705 in early 2021 knowing of the threat of an overbearing development that would reduce the light on the west side, so loss of light cannot (in his case) be considered as a major detraction from the advantages of occupying the flat. C D

303 I would therefore characterise the level of harm done as neither low nor higher end, but "substantial" in the case of the Powells, as their main living space and their main bedroom will be affected, and "moderate" in the case of Mr Cooper, whose main bedroom only will be affected. The impact will not make the flats unsuitable for use, just less attractive and enjoyable. E

304 In either case, the damage done by the grant of an injunction, both to the Defendant, the tenants and to the public interest, would be entirely disproportionate to the harm done to the Claimants, since—at one extreme, which is where the Claimants' cases ended up in closing submissions—the Claimants could be awarded sufficient damages to enable them to sell up and buy equivalent flats elsewhere in the locality, with good light, rights of light and some river views, at a total cost of (perhaps) £2m each, in comparison with the financial impact on the Defendant alone of nearly £2.50m if Arbor is demolished. F

305 The Claimants accept that the public interest should be taken into account when deciding whether to grant an injunction. The starting point is that planning permission was granted for Arbor, after considering sunlight and daylight issues and harm caused, as one part of a large mixed use development on a very large scale, which would be expected to bring considerable economic and other public benefits to this part of Southwark. In granting planning permission, the Council had to assess whether the harm to neighbours, in terms of noise and light impact and overlooking, among other issues, was outweighed by the benefits of the scheme. It reached the conclusion that it was significantly outweighed by those public benefits. G H

306 To remove the principal office component from the scheme would adversely alter the consented balance of uses in the scheme, and the shortfall in office space could not be made up elsewhere on Bankside Yards. The

- A development as a whole brings substantial benefits to the area, in terms of employment, improvement of the tone of the area and better public realm, connectivity beneath the railway lines, section 106 and CIL contributions. It is true that not all the benefits of the Bankside Yards development would be lost, but a substantial part of the employment benefits would be, and the delivery of the remainder of the development (other than Opus, presumably) would be delayed, by about two–three years, Mr Locke estimated. In those circumstances, weight should be given to the considerable benefits of the planning permission and the desirable mix of uses that there is intended to be at Bankside Yards.

- 307 There is also a substantial and obvious public interest in valuable resources not being wasted, particularly where what has been built is of such environmental merit, and in avoiding the harmful environmental consequences of demolition.

Summary of reasons for declining to grant an injunction

308 In short, an injunction requiring the Defendant to cut back Arbor to prevent an actionable interference with light will be refused in this case, in my discretion, because:

- D (i) The enforcement of an injunction is problematic to start with, as none of the tenants of Arbor have been joined—there would be at least a substantial delay before enforcement, and an injunction against the will of the tenants might be refused in any event;
- (ii) An injunction is likely to be futile, in that there is a good prospect that Native Land will apply for and obtain planning permission (either before or after the injunction takes effect) to re-build Arbor, or erect an equally large building in its place, which building would be protected by the section 203 resolution and similarly infringe the Claimants' rights of light;
- E (iii) The harm to the Defendant's legitimate interests, the tenant occupiers and the public in terms of the benefits of retaining Arbor would, if an injunction were granted, be disproportionate to the harm caused to the Claimants by the interference with their light;
- F (iv) The public benefit in retaining Arbor is a strong factor, as reflected in the terms of the grant of planning permission for the Bankside Yards development as a whole and the decision of the Council on the section 203 application, in both of which the adverse impact on all persons affected was considered to be strongly outweighed by the public benefits delivered;
- G (v) The developer, by its conduct, has not disentitled itself to assert that granting an injunction would be oppressive in the circumstances—in particular, it was entitled to take the view, until January 2022, that Arbor itself would not infringe the Claimants' rights;
- (vi) The Claimants themselves have accepted that they do not want to see Arbor demolished;
- (vii) All other persons in the position of the Claimants have settled with the developer for money, which supports the argument that damages are an adequate remedy;
- H (viii) Damages can be awarded to the Claimants that will be an adequate compensation for their loss.

309 The Claimants should be awarded damages in lieu of an injunction.

394 I prefer Mr Godfrey's approach to ascertaining the Before values and accept his valuations for both dates. However, I am not persuaded that there would be no impact at all on value of the diminution in good light from cut back Arbor Before scenario to Arbor as built After scenario. It transpired in cross-examination that, in considering the After scenarios, Mr Godfrey believed that even though the light was insufficient, to the extent shown in the Waldram results, a purchaser would not notice the insufficiency of the light. He considered that to be so even assuming that Mr Absolon's results were correct.

395 I am unable to accept that, and Mr Godfrey could not explain persuasively why that would be so. I find that a purchaser would notice that the natural light was poor in the rooms in question. I have found that the impact will be moderate (flat 705) and substantial (flat 605).

396 If there were two flats side by side, identical save as to the quality of the light, a hypothetical purchaser would certainly prefer the flat with the better light. Even without an opportunity directly to compare the Before and After light, a flat that has poor natural light in an LKD is very likely to attract fewer interested purchasers, and so will probably sell for a lower price than a flat with adequate lighting. A flat that has poor natural light in a bedroom may suffer the same fate, though a single bedroom is likely to be considered less significant, and therefore have a lesser impact on value. The difficulty in Mr Cooper's case is that although one of three bedrooms (the principal bedroom) will have poor light, the rest of his (larger) flat is unaffected, and the main attractive feature of the flat (the large LKD and terrace), which is likely to be the principal attraction to a purchaser, will continue to have unusually good light.

397 I accordingly find that the diminution in value for flat 605 would be £60,000, and for flat 705 £20,000.

Claim allowed.

VICTORIA WHEEN, Solicitor

500 S.W.3d 488

Court of Appeals of Texas, Houston (14th Dist.).

1717 BISSONNET, LLC, Appellant and Cross-Appellee
v.

Penelope LOUGHHEAD, Luong Nguyen, Lam Nguyen and Katherine Hoang, Jointly, Jamie Flatt, Donald Verplancken, Norman and Suannah Rund, Jointly, Achim and Diana Bell, Jointly, Jeanne Meis, Mary Van Dyke, Ralph and Leslie Miller, Jointly, Yin and Surong Zhang, Jointly, Martha Gariepy, Stephen Roberts, Suzanne Powell, Michelle Jennings and Michael Tetzlaff, Jointly, James and Allison Clifton, Jointly, Kimberly Bell, Richard and Mary Baraniuk, Jointly, Kenneth Reusser and Xanthi Couroucli, Jointly, and Earle Martin, Appellees and Cross-Appellants

NO. 14-14-00589-CV

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Opinion filed June 30, 2016

Synopsis

Background: Neighboring homeowners brought action against developer, seeking injunction precluding construction of multi-use high-rise building in their neighborhood or damages on ground that project would be permanent nuisance. The 157th District Court, Harris County, Randy Wilson, J., 2014 WL 8774060, entered judgment following jury verdict finding that project would be nuisance if built, awarding damages for lost market value, taxing costs against developer, and denying injunction. Developer appealed, and homeowners cross-appealed.

Holdings: The Court of Appeals, John Donovan, J., held that:

[1] purported homeowners had justiciable interest in their alleged properties, and thus had standing to bring action;

[2] nuisance was merely prospective and thus did not support award of lost-market-value damages;

[3] neighboring homeowners were not entitled to permanent injunction preventing construction of building;

[4] balance of hardships favored denial of permanent injunction;

[5] city's approval of project and harm to community supported denial of permanent injunction;

[6] homeowners had adequate remedy at law in absence of permanent injunction; and

[7] unclean hands of few homeowners favored denial of permanent injunction.

Affirmed in part, reversed and rendered in part.

Procedural Posture(s): On Appeal.

West Headnotes (25)

[1] **Nuisance** 🔑 **Persons entitled to sue**

There was some evidence that purported homeowners had justiciable interest in their alleged properties, and thus purported homeowners had standing to bring action to recover lost market value as nuisance damages against developer of proposed high-rise building, though developer asserted purported homeowners did not testify and there was no evidence that they owned properties at time of trial; homeowners' expert on lost market value referred to all plaintiffs as owners of properties affected by the project when explaining the task he was assigned, developer did not object to that testimony, much less on ground that expert lacked knowledge regarding such ownership for all homeowners, and developer did not cite any evidence that purported homeowners did not own any homes at time of trial.

[More cases on this issue](#)

[2] **Action** 🔑 **Persons entitled to sue**

"Standing" addresses whether a party has a sufficient relationship with the lawsuit so as to have a justiciable interest in its outcome.

[3] **Nuisance** 🔑 **Diminution of rental or salable value**

Nuisance from proposed high-rise building was merely prospective or anticipated, and thus did not support award of lost-market-value damages to neighboring homeowners in action against developer for nuisance damages, even if those damages had already occurred because of developer's plan to build project; building had not yet been built, there was no cause of action for damages from a prospective nuisance, and loss in value caused by developer's actions was not recoverable without viable cause of action.

2 Cases that cite this headnote

- [4] **Trial** 🔑 Issues not supported by pleadings and evidence

Trial 🔑 Immaterial, inconclusive, and uncontroverted facts or issues

Trial court may disregard a jury finding only if there is no evidence to support the finding or if the issue is immaterial.

1 Case that cites this headnote

- [5] **Trial** 🔑 Immaterial, inconclusive, and uncontroverted facts or issues

A jury question is immaterial, and thus the jury's finding can be disregarded by the trial court, when it should not have been submitted or was properly submitted but has been rendered immaterial by other findings.

1 Case that cites this headnote

- [6] **Trial** 🔑 Immaterial, inconclusive, and uncontroverted facts or issues

A jury question is immaterial, and thus the jury's finding can be disregarded by the trial court, when its answer can be found elsewhere in the verdict or when its answer cannot alter the effect of the verdict.

- [7] **Trial** 🔑 Evidentiary and ultimate facts and conclusions of law in general

A jury question that calls for a finding beyond the province of the jury, such as a question of law,

may be deemed immaterial, and thus the jury's finding can be disregarded by the trial court.

- [8] **Appeal and Error** 🔑 De novo review

When a trial court's ruling on a motion to disregard is based on a legal issue, the Court of Appeals reviews the ruling de novo.

- [9] **Nuisance** 🔑 Grounds of action and conditions precedent

There is no cause of action for damages caused by a prospective nuisance.

4 Cases that cite this headnote

- [10] **Nuisance** 🔑 Nature and extent of injury or danger

A "nuisance" is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities.

- [11] **Nuisance** 🔑 Diminution of rental or salable value

If a nuisance is permanent, a landowner may recover the property's lost market value as a result of the nuisance.

2 Cases that cite this headnote

- [12] **Nuisance** 🔑 Grounds for Injunction

A court may exercise its equitable power to enjoin a prospective nuisance under certain circumstances.

4 Cases that cite this headnote

- [13] **Nuisance** 🔑 Costs

Developer of proposed high-rise building was entitled to recover its costs as only successful party, in action by neighboring homeowners seeking permanent injunction enjoining construction or lost market value of their properties as nuisance damages, where

developer was prevailing party on homeowners' claims. *Tex. R. Civ. P. 131*.

[More cases on this issue](#)

[14] Nuisance 🔑 [Grounds for Injunction](#)

Neighboring homeowners were not entitled to permanent injunction preventing developer from constructing multi-use high-rise building, in action asserting building would be nuisance; impact was limited to homes within 200 feet of project, enforcing injunction would lead to potentially endless litigation, injunction would cause considerable hardship to developer, including that developer's efforts could not moved to another location and recouped, that outweighed some hardship and disruption to homeowners, injunction would have chilling effect on other development in city, neighborhood was dense without project, homeowners could seek damages once nuisance existed, and a few of the homeowners demonstrated lack of clean hands by threatening developer.

[1 Case that cites this headnote](#)

[More cases on this issue](#)

[15] Injunction 🔑 [Grounds in general; multiple factors](#)

To obtain a permanent injunction, a party must ordinarily show: (1) a wrongful act, (2) imminent harm, (3) an irreparable injury, and (4) the absence of an adequate remedy at law.

[2 Cases that cite this headnote](#)

[16] Nuisance 🔑 [Grounds for Injunction](#)

When a jury has found a nuisance, the trial court should balance the equities in deciding whether to issue a permanent injunction, including considering the injury an injunction may cause the defendant or the public and injury that may be suffered by the plaintiffs if the injunction is denied.

[2 Cases that cite this headnote](#)

[17] Appeal and Error 🔑 [Granting or refusing](#)

Court of Appeals reviews the denial of a request for a permanent injunction for abuse of discretion.

[2 Cases that cite this headnote](#)

[18] Appeal and Error 🔑 [Some evidence](#)

Appeal and Error 🔑 [Conflicting or Disputed Evidence](#)

Trial court does not abuse its discretion when its decision is based on conflicting evidence and some evidence in the record reasonably supports the trial court's decision.

[1 Case that cites this headnote](#)

[19] Nuisance 🔑 [Grounds for Injunction](#)

Proving a project will be a nuisance does not entitle neighboring property owners to an injunction as a matter of right.

[20] Nuisance 🔑 [Grounds for Injunction](#)

Balance of hardships favored denial of permanent injunction to neighboring homeowners prohibiting developer from constructing proposed mixed use high-rise building as approved by city, in action alleging building would be nuisance; some hardship and disruption to homeowners was outweighed by considerable hardship to developer, including that developer had invested millions of dollars towards project that could not be moved to another location and recouped, in light of unique benefits of site to developer.

[More cases on this issue](#)

[21] Nuisance 🔑 [Grounds for Injunction](#)

City's approval of developer's project and harm to community supported denial of permanent injunction preventing developer from building multi-use high-rise, which homeowners asserted would be nuisance if built; city approved project in settlement agreement with developer and, in

doing so, extracted concessions from developer to help ameliorate many neighborhood concerns, developer's plans complied with agreed criteria and developer stated intent to comply agreement, city could take enforcement action if developer did not comply, injunction would have chilling effect on other development in city, and project would generate millions in tax revenues, provide housing for medical center and university, and would create 2,000 to 2,800 jobs.

[More cases on this issue](#)

[22] Nuisance 🔑 Adequacy of remedy at law

Neighboring homeowners had adequate remedy at law in absence of permanent injunction prohibiting developer from building multi-use high-rise building, which homeowners asserted would be nuisance if built, since homeowners could seek damages for lost market damages once nuisance existed.

[More cases on this issue](#)

[23] Injunction 🔑 Real property in general

Statute providing that a writ of injunction may be granted if irreparable injury is threatened, irrespective of any remedy at law, does not require injunctive relief if there is a threatened irreparable injury to real property, but rather merely permits an injunction in that situation even if there is an adequate remedy at law. *Tex. Civ. Prac. & Rem. Code Ann. § 65.011(5)*.

[1 Case that cites this headnote](#)

[24] Nuisance 🔑 Grounds for Injunction

Unclean hands of few neighboring homeowners favored denial of permanent injunction preventing developer from building mixed-use high-rise, in action alleging building would be nuisance, though most homeowners' conduct was proper; few homeowners threatened developer, injunction would benefit those homeowners who made threats, and efforts to stop project were collective among residents.

[More cases on this issue](#)

[25] Equity 🔑 He Who Comes into Equity Must Come with Clean Hands

Equity 🔑 He who seeks equity must do equity

A party seeking an equitable remedy must do equity and come to court with clean hands.

***491 On Appeal from the 157th District Court, Harris County, Texas, Trial Court Cause No. 2013-26155**

Attorneys and Law Firms

Jean C. Frizzell, for appellee.

H. Fred Cook, Ramon G. Viada III, for appellant.

Panel consists of Chief Justice *Frost* and Justices *Boyce* and *Donovan*.

OPINION

John Donovan, Justice

Appellant/Cross-Appellee, 1717 Bissonnet, LLC (hereinafter “Developer”), plans to build a multi-use high-rise building (“the project”) in Houston and has obtained city approval. Appellees/Cross-Appellants (hereinafter “Homeowners”) own homes in the neighborhood where the project will be located. Homeowners sued Developer, seeking an injunction precluding construction of the project, or alternatively damages, on the ground that the project will be a permanent nuisance. Pursuant to a jury's finding that the project will be a nuisance, if built, as to Homeowners, the trial court rendered judgment (1) awarding Homeowners one category of damages assessed by the jury—lost market value to their properties, (2) disregarding the jury's finding that Homeowners sustained another category of damages—loss of use and *492 enjoyment, (3) taxing all court costs against Developer except for certain costs taxed against other plaintiffs who did not prevail at trial, and (4) denying Homeowners' application for a permanent injunction.¹

Developer appeals the award of damages and costs to Homeowners and requests that we tax costs against Homeowners. Homeowners cross-appeal, challenging the

denial of their application for an injunction.² We reverse the portion of the judgment awarding damages to Homeowners and render judgment that Homeowners take nothing on their claim for damages without prejudice to their right to seek damages once a cause of action for an existing nuisance accrues. We also reverse the portion of the judgment taxing costs against Developer and render judgment taxing all costs against Homeowners except for those costs that the trial court taxed against the non-prevailing plaintiffs. We affirm the remainder of the judgment including the denial of the application for a permanent injunction.

I. BACKGROUND

A. Factual History

In 2006, Developer purchased a 1.6 acre lot at the corner of Bissonnet Street and Ashby Street in Houston.³ At the time, the property was occupied by a two-story apartment complex with 67 units. The property is located near Rice University, the Texas Medical Center, and the Museum District. The surrounding neighborhood consists of numerous homes, but there also are several small businesses, including restaurants, several four-to-six-story apartment buildings, and a six-story medical clinic.

In 2007, Developer devised plans to build a 23-story mixed-use building, which would include 226 apartments, a spa, retail, restaurant and office space, and a multi-level parking garage. Developer filed its plans with the City. Knowing the project would be a departure in scale from surrounding properties, Developer anticipated opposition from area residents and advised the neighborhood associations about the plans.

The opposition was vehement, with residents fearing negative effects on their established neighborhoods, including impacts on traffic, aesthetics, privacy, and market values of their homes. Residents mobilized into a group called “Stop Ashby Highrise,” erected signs in the area, sent numerous letters to Developer’s principals and city officials, and signed petitions, all imploring Developer not to build the project. The two Houston mayors who served consecutively during relevant times also opposed ⁴93 the project. The residents and Developer attempted, unsuccessfully, to negotiate a compromise with respect to the size and nature of the project. Otherwise, the parties have remained entrenched in their positions for years, with Developer determined to build and area residents determined to stop the project.

Meanwhile, Developer applied for city approval. The City initially approved Developer’s traffic-impact analysis but withdrew the approval shortly thereafter. Developer revised its application ten times with each one being rejected by the City. Ultimately, the City approved another revised application submitted under protest, which called for a reduction (from the original application) of the trip count—the number of automobile trips from the project during peak traffic hours. But, Developer believed the City wrongfully rejected its original application and unsuccessfully appealed through the City process.

Developer then sued the City in a separate suit. In March 2012, those parties settled that suit. The settlement agreement provided that the City will approve all building permits for the project if it satisfies the following requirements: (1) it will be a 21-story residential or mixed-use structure with 228 residential high-rise units, 10,075 square feet of restaurant space, and four townhomes—subject to modification of the intended uses if the other requirements of the settlement agreement are met and the project satisfies a certain maximum trip count (a figure below that originally proposed by Developer); (2) the project will contain a pedestrian plaza in front; (3) the project will have a limited number of, and uses for, driveways; (4) traffic mitigation measures will be implemented, including providing shuttle service and bicycles; (5) there will be a fence along certain property lines and a “green screen” on certain walls of the parking garage; (6) lighting will be hooded or directed away from adjacent residents; and (7) noise-mitigation measures will be implemented. The then-mayor announced the settlement, reiterating her belief “this [is] the wrong project in the wrong place,” but expressing that the City lacked a legal basis to stop the project and that the settlement at least gave the City some control over the scope.

The City’s final building permit issued in March 2013. Developer proceeded to advance its plans and razed the existing apartment complex but has not begun construction of the project.

B. Procedural History

According to the residents, they were unable to obtain detailed plans for the project during the permit process. One resident’s open records request with the City was denied. Developer refused to provide the plans until approval by the City out of concern that the plans might spawn litigation. In January 2013, one resident filed an action to obtain pre-suit discovery

about the plans. The trial court ordered Developer to produce certain information regarding construction. In May 2013, that resident plus six additional residents filed the present suit, alleging, inter alia, the project would constitute a nuisance and seeking damages and a permanent injunction precluding construction. That suit was transferred to the present trial court below, which was hearing the pre-suit action. After various amendments, forty-five plaintiffs, as owners of thirty homes, were parties by the time of trial.

At trial, the plaintiffs presented evidence, albeit contested by Developer, regarding various negative effects anticipated because of the project: increased traffic; shadows cast on some homes; increased lighting and noise; the ability of project residents to view into some plaintiffs' *494 yards; and an expert's opinion that the weight of the project will cause foundation and structural damage to some homes. The plaintiffs also presented an expert opinion that their properties already had sustained a loss in market value because of the proposed project; in other words, the market already had responded to the mere fact that Developer plans to build the project.

Only two questions were submitted in the jury charge. In Question No. 1, the jury was asked:

Is [Developer's] proposed Project abnormal and out of place in its surroundings such that it will constitute a private nuisance if built?

[Developer] creates a "private nuisance" if its Project substantially interferes with Plaintiffs' use and enjoyment of their land.

"Substantial interference" means that the Project must cause unreasonable discomfort or unreasonable annoyance to a person of ordinary sensibilities attempting to use and enjoy the person's land. It is more than a slight inconvenience or petty annoyance.

A nuisance, if it exists, is not excused by the fact that it arises from an operation that is in itself lawful or useful.

Answer "Yes" or "No" for each plaintiff.

The jury answered "yes" for the twenty homes owned by the twenty-nine Homeowners in this appeal and "no" for the other homes.

The jury was asked to answer Question No. 2 relative to Homeowners:

What sum of money, if paid now in cash, would fairly and reasonably compensate plaintiffs for their damages, if any, proximately caused by the nuisance?

Consider the elements of damages listed below and none other. Consider each element separately. ...

1. Loss of Market Value. Consider the difference in market value of each plaintiff's property caused by the nuisance. Market value means the amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but is under no necessity of selling.

2. Loss of Use and Enjoyment of the Property.

Answer separately, in dollars and cents for damages, if any.

For each of the twenty homes, the jury assessed various amounts for both loss of market value and loss of use and enjoyment. These damages totaled about \$1.6 million, with the lost-market-value portions totaling about \$1.2 million.

Developer filed a motion for entry of judgment, for judgment notwithstanding the verdict ("JNOV"), and to disregard the jury findings, requesting the trial court to (1) render judgment in Developer's favor as to the plaintiffs for which the jury did not find a nuisance, and (2) render a JNOV or disregard both of the jury's findings as to Homeowners, on numerous grounds. Homeowners also moved for entry of judgment, requesting the trial court to permanently enjoin the project in light of the jury's nuisance finding instead of awarding damages; but Homeowners reserved the right to recover damages should the injunction be denied. Both parties and amici curiae submitted additional filings relative to the injunction request.

Over two days during March and April 2014, the trial court held a hearing to determine the appropriate judgment to render. The trial court heard additional evidence and considered the evidence admitted at trial. Subsequently, the trial court signed an "Opinion and Order," in which it (1) granted Developer's motion for *495 judgment as to the plaintiffs for which the jury did not find a nuisance, (2) denied Developer's motion for JNOV, (3) denied Developer's motion to disregard the jury's findings on nuisance and lost-market-value damages as to Homeowners, (4) granted that motion as to loss-of-use-and-enjoyment damages on the ground such damages were not ripe until the project is built, and (5) denied Homeowners' application for a permanent injunction.

As discussed more below, the trial court set forth a detailed explanation for these rulings.

The trial court then signed a final judgment consistent with its previous order. Therefore, the trial court (1) ordered that the plaintiffs who did not prevail at trial take nothing, (2) ordered that Homeowners recover the lost-market-value damages assessed by the jury, plus post-judgment interest, without prejudice to their right to seek and recover loss-of-use-and-enjoyment damages when such damages become ripe for determination, (3) taxed all costs against Developer except for certain costs to be taxed against the non-prevailing plaintiffs, and (4) denied Homeowners' application for permanent injunction. Developer and Homeowners now appeal.

II. DEVELOPER'S ISSUES

Developer presents nine stated issues challenging the award of damages as to all or some Homeowners for alternative reasons, which may be summarized into several categories. First, Developer contends the trial court erred by refusing to disregard the jury's finding on lost-market-value damages as immaterial because there was no liability theory submitted that would support an award of such damages. Then, Developer argues that, even if such damages were recoverable, Homeowners failed to prove their lost market values were proximately caused by the alleged prospective nuisance rather than some other source. Developer also challenges, for multiple reasons, the finding that the project will be a nuisance as to some or all Homeowners.⁴ Finally, Developer argues that several Homeowners lacked standing to bring their claims for damages because there was no evidence they had any justiciable interest in their alleged properties at the time of trial. Additionally, in a tenth issue, Developer challenges the award of court costs to Homeowners and requests that we award costs to Developer.

We will first address the standing issue because lack of standing would deprive the trial court and our court of subject matter jurisdiction to address the merits of those Homeowners' damages claims. See *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex.2005). As discussed below, we conclude those Homeowners had standing, so we will include their claims in our discussion of the substantive issues.

As further discussed below, we agree the trial court erred by refusing to disregard the finding on lost-market-value

damages because there was no liability theory submitted to the jury that would support an award of such damages. Thus, we need not consider Developer's other issues challenging the damages award. We will assume, solely for purposes of discussion, that Homeowners properly pleaded and proved the project, if built, will constitute a nuisance as to all Homeowners and the proposed project had resulted, at the time *496 of trial, in lost market value to their properties. Even assuming such factors, we conclude Homeowners may not seek damages until a nuisance exists. Because of that determination, we also conclude that the trial court erred by taxing court costs against Developer and it is entitled to recover its costs.

A. Standing

[1] [2] Standing addresses whether a party has a sufficient relationship with the lawsuit so as to have a "justiciable interest" in its outcome. *Id.* at 848. Developer briefly asserts that Martha Gariepy and James and Allison Clifton lacked standing to bring a claim for damages because they did not testify and there is no other evidence they owned any properties in question at the time of trial. However, Homeowners' expert on lost market values referred to all plaintiffs as the owners of properties affected by the project when explaining the task the expert was assigned. Developer did not object to this testimony, much less on the ground that the expert lacked knowledge regarding such ownership for all plaintiffs. And, Developer does not cite any evidence that Gariepy and the Cliftons did not own any homes in question at the time of trial. Accordingly, assuming without deciding that a person must own a property to recover its lost market value as nuisance damages, we construe the expert's testimony as some evidence Gariepy and the Cliftons owned properties in question at the time of trial. See *La China v. Woodlands Operating Co.*, 417 S.W.3d 516, 520–21 (Tex.App.–Houston [14th Dist.] 2013, no pet.) Therefore, we overrule Developer's ninth issue and turn to the award of damages to all Homeowners.

B. No liability theory submitted to support the damages award

[3] As quoted above, the only jury question purporting to establish liability asked whether the project will constitute a nuisance "if built." In its Opinion and Order, the trial court remarked that it awarded the lost-market-value damages because Homeowners presented evidence they had already incurred such damages as a result of the planned project. Developer argues the trial court erred by refusing to disregard

the damages finding because a prospective, contingent nuisance is not a tort that can support an award of damages.

[4] [5] [6] [7] [8] A trial court may disregard a jury finding only if there is no evidence to support the finding or if the issue is immaterial. *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex.1994). A question is immaterial when it should not have been submitted or was properly submitted but has been rendered immaterial by other findings. *Id.* A jury question is immaterial when its answer can be found elsewhere in the verdict or when its answer cannot alter the effect of the verdict. See *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex.1995). A question that calls for a finding beyond the province of the jury, such as a question of law, may be deemed immaterial. See *Spencer*, 876 S.W.2d at 157. When a trial court's ruling on a motion to disregard is based on a legal issue, we review the ruling *de novo*. *Hall v. Hubco, Inc.*, 292 S.W.3d 22, 27–28 (Tex.App.–Houston [14th Dist.] 2006, pet. denied).

1. No cause of action for damages from a prospective nuisance

[9] We agree that the damages question should not have been submitted because there is no cause of action for damages caused by a prospective nuisance, which is a question of law. See *Cook v. Neely*, No. 04–14–00518, 2015 WL 4554286, at *2 (Tex.App.–San Antonio July 29, 2015, pet. denied) *497 (mem. op.).⁵

[10] [11] As the jury was essentially instructed in the present case, a “nuisance” is “a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities.” *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 269 (Tex.2004). If a nuisance is permanent, a landowner may recover the property's lost market value as a result of the nuisance. *Id.* at 276.

[12] A court may exercise its equitable power to **enjoin** a prospective nuisance under certain circumstances. See *Freedman v. Briarcroft Prop. Owners, Inc.*, 776 S.W.2d 212, 216 (Tex.App.–Houston [14th Dist.] 1989, writ denied). However, Homeowners do not cite, and we have not found, any Texas authority permitting **recovery of damages** in tort liability for a prospective nuisance. In the absence of any basis in the common law or any statute, as an intermediate court of appeals, we decline to create a new tort cause of action allowing the recovery of damages allegedly caused by

a prospective nuisance. See *Env'tl. Procedures, Inc. v. Guidry*, 282 S.W.3d 602, 628 (Tex.App.–Houston [14th Dist.] 2009, pet. denied).

The Supreme Court of Texas has spoken about tort liability for nuisance in terms of an existing condition that has interfered with a plaintiff's use or enjoyment of his property. For example, many years ago, the court recognized the general principle that “all damages that are the natural and necessary consequence of **a nuisance** may be recovered under a general allegation of damage.” *Comminge v. Stevenson*, 76 Tex. 642, 13 S.W. 556, 557 (1890) (emphasis added). Moreover, the court has stated with respect to the statute of limitations on a claim for nuisance damages, “[a] permanent nuisance claim accrues when the condition **first** ‘substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities.’ ” *Natural Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 153 (Tex.2012) (emphasis added) (quoting *Bates*, 147 S.W.3d at 269–70).

The trial court relied on the fact that Homeowners presented evidence their homes already had lost market value because of the plan to build the project. But, it is axiomatic there may be various circumstances that cause a home to lose market value that are not necessarily torts, including a nuisance. See *Bates*, 147 S.W.3d at 277 (“Property values are affected by many factors; a decrease in market value does not mean there is a nuisance, any more than an increase means there is not.”). The Supreme Court of Texas has rejected the reasoning that loss in market value alone permits recovery of damages when no cause of action authorizing such recovery has been established: “ ‘If there be no nuisance, there can be no recovery of damages for such annoyance as may exist, nor for diminution in the value of the property.’ ” *Bay Petroleum Corp. v. Crumpler*, 372 S.W.2d 318, 318–20 (Tex.1963) (quoting *Sherman Gas & Elec. Co. v. Belden*, 103 Tex. 59, 123 S.W. 119, 120 (1909) *498 and affirming take-nothing judgment where plaintiffs obtained finding that defendant's operation caused diminution in market value to plaintiff's property but no finding that operation was a nuisance); *Sherman Gas*, 123 S.W. at 119–21 (reversing award of damages to plaintiff for lost market value resulting from defendant's operation where jury charge did not properly inquire whether operation was a nuisance and remanding because trial court should have included such inquiry). We acknowledge there was no finding of a nuisance in any form in those cases whereas the jury in the present case found a prospective nuisance. Nevertheless, those cases stand for the

proposition that loss in market value caused by a defendant's actions is not recoverable without a viable cause of action. See *Bay Petroleum*, 372 S.W.2d at 318–20; *Sherman Gas*, 123 S.W. at 119–21. In fact, in those cases, the defendants' offending structures that caused the plaintiffs' properties to lose market value were already in operation; yet, the supreme court held that those damages were not recoverable without a nuisance finding. See *Bay Petroleum*, 372 S.W.2d at 318–20; *Sherman Gas*, 123 S.W. at 119–21.

Developer cites an old case from a court of appeals, which is nonetheless persuasive because the court rejected that lost-market-value damages are recoverable for an anticipated nuisance. In *Sanders v. Miller*, 52 Tex.Civ.App. 372, 113 S.W. 996, 996–97 (1908, no writ), the plaintiff was awarded lost market value to his property on a permanent-nuisance theory as a result of the defendant having built a swimming pool on his nearby property. The evidence showed that, at the time of trial, the pool was not yet filled with water and was merely “a dry tank.” See *id.* at 996. The plaintiff alleged that harmful consequences from the pool (primarily disease from mosquito infestation) were expected once the pool was filled with water although the pool had not yet interfered with the use and enjoyment of the plaintiff's property. *Id.* at 997. Thus, the plaintiff essentially alleged that “the mere presence of the pool, or excavation in the ground,” because it would eventually be filled with water, supported an action for damage even “before it attained an offensive condition.” See *id.*

The court of appeals stated that the fact the plaintiff suffered a diminution in market value did not create an action for damages because not every injury to another's property creates actionable liability; rather, for the injury to form the basis for an action, there must be “a substantial invasion of, or interference with, the legal rights of the owner.” *Id.* at 998. The court therefore held that the plaintiff did not have a cause of action because there was no such interference and thus no nuisance yet, although such interference was expected in the future: “The entire claim for damage is predicated upon a condition which it is expected will arise sometime in the future.” See *id.* at 999.⁶ Unlike in the present case, the form of the pool already had been built in *Sanders*; but significantly, the aspect which might constitute a nuisance in *Sanders*—presence of water and its adverse consequences—was merely anticipated and could not support an award of lost-market-value damages. See *id.* Likewise, in the present case, the nuisance is merely anticipated and thus will not support an

award of lost-market-value damages even if those damages have already occurred because of the plan to build the project.

2. Homeowners' arguments

*499 Despite the lack of authority supporting recovery of damages for a prospective nuisance, Homeowners proffer several reasons such damages are permitted in the present case, in addition to relying on the trial court's reasoning discussed above.

Homeowners maintain that Developer “led the trial court down the path it took.” In particular, Homeowners assert that Developer consistently urged in the trial court, when opposing Homeowners' application for permanent injunction, that Homeowners have an adequate remedy at law through recovery of damages. We disagree that Developer's position in the trial court was consistently contradictory to its appellate challenge to the damages award: on appeal, Developer argues there is no cause of action for damages **before** the project is built; in its post-trial filings, Developer argued injunctive relief is improper because Homeowners will have an adequate legal remedy via a claim for damages **after** the project is built. Since the verdict, Developer has consistently urged the trial court to disregard the finding on lost-market-value damages. Thus, Developer did not lead the trial court to award those damages.

Similarly, Homeowners argue that Developer's appellate argument that damages are not yet recoverable is contradictory to its position in the trial court that Homeowners unduly delayed in bringing suit. However, in the instance cited by Homeowners, Developer opposed Homeowners' request for a permanent injunction on, among other grounds, the fact that Homeowners waited years since the project was announced to file suit and until after Developer had begun razing the previous apartment complex. That argument is not contradictory to the position that there is no action for damages before the project is built.

Homeowners also emphasize that Developer unquestionably intends to build the project. Regardless of how absolute Developer's plan may be, again, there is no cause of action for planning to construct a project that will be a nuisance. And, no matter how absolute the plan may be, clearly the project is not a reality until built and the scope of the project could change after trial. Accordingly, any lost market value resulting merely from the plan to build the project still retains a speculative aspect because the market value could rebound if the plan were abandoned, for whatever reason. That fact demonstrates

the untenability of awarding damages resulting solely from one's plan to take some action in the future that may be wrongful under tort law or otherwise compensable. *See City of Houston v. Biggers*, 380 S.W.2d 700, 704 (Tex.Civ.App.—Houston 1964, writ ref'd n.r.e.) (holding that passage of city ordinance including owner's land in what was contemplated as a civic center did not constitute a taking authorizing compensable damages, even if ordinance interfered with marketability of property, because ordinance was purely legislative and could be changed at any time).

Finally, Homeowners contend that if damages are not recoverable before building commences and yet Homeowners wish to enjoin construction, they are placed in a difficult position: they must file suit pre-construction to request injunctive relief but risk that damages are unavailable at that point; or they must wait until the project is built to seek damages when it is too late to seek an injunction. However, we disagree that any practical consideration authorizes a cause of action when none exists. Moreover, Homeowners present no reason why they are precluded from seeking to enjoin the project before it is built and if unsuccessful, seeking damages once a nuisance exists.

***500** In summary, because Texas law does not recognize a cause of action for damages resulting from a prospective nuisance and that was the only liability theory submitted to the jury, the trial court erred by denying Developer's motion to disregard the damages finding. We sustain Developer's first and second issues.

C. Award of costs

[13] In its post-trial motion, Developer asked the trial court to award Developer its court costs against all plaintiffs. The trial court awarded Developer certain costs against the non-prevailing plaintiffs. But, the trial court awarded court costs to Homeowners as the prevailing plaintiffs. In its tenth and final issue, Developer challenges that order and requests that we render judgment awarding Developer all of its costs against Homeowners. Homeowners urge that we uphold the award of costs because they were prevailing parties as to the nuisance issue and on their request for lost-market-value damages. Developer is now the prevailing party on all of Homeowners' claims in light of our conclusion that the trial court erred by awarding any damages to Homeowners and, as set forth below, our upholding the trial court's denial of a permanent injunction. Homeowners do not assert that there is good cause to adjudge costs against Developer if Developer is the prevailing party. *See Tex. R. Civ. P. 141*. Therefore, Developer

is entitled to recover its costs as the only “successful party” to the suit. *See Tex. R. Civ. P. 131* (“The successful party to a suit shall recover of his adversary all costs incurred therein, except where otherwise provided.”). Accordingly, we sustain Developer's tenth issue.

III. HOMEOWNERS' CROSS-APPEAL

[14] In their cross-appeal, Homeowners present a single issue challenging the trial court's denial of Homeowners' request for a permanent injunction.

[15] [16] [17] [18] To obtain a permanent injunction, a party must ordinarily show (1) a wrongful act, (2) imminent harm, (3) an irreparable injury, and (4) the absence of an adequate remedy at law. *Triantaphyllis v. Gamble*, 93 S.W.3d 398, 401 (Tex.App.—Houston [14th Dist.] 2002, pet. denied). When a jury has found a nuisance, the trial court should balance the equities in deciding whether to issue a permanent injunction, including considering the injury an injunction may cause the defendant or the public and injury that may be suffered by the plaintiffs if the injunction is denied. *See Storey v. Cent. Hide & Rendering Co.*, 148 Tex. 509, 226 S.W.2d 615, 618–19 (Tex.1950); *see also Triantaphyllis*, 93 S.W.3d at 401–02. We review the denial of a request for a permanent injunction for abuse of discretion. *See Triantaphyllis*, 93 S.W.3d at 402. A trial court abuses its discretion if its acts arbitrarily and unreasonably, without reference to guiding rules or principles, or misapplies the law to the established facts of the case. *Id.* The trial court does not abuse its discretion when its decision is based on conflicting evidence and some evidence in the record reasonably supports the trial court's decision. *Id.*

In its Opinion and Order, the trial court detailed numerous factors that it considered when balancing the equities and denying the injunction. Homeowners assert that some of the factors are unsupported by any evidence or the trial court misapplied the law to the evidence, and Homeowners proffer reasons that equity required the injunction. We note the trial court did not file separate findings of fact and conclusions of law. However, some of the remarks in the opinion sound as findings of fact although the opinion is in discussion format. Thus, when applicable, we will treat remarks as findings of fact ***501** and apply the above-cited standard of review. *See In re C.A.B.*, 289 S.W.3d 874, 881 (Tex.App.—Houston [14th Dist.] 2009, no pet.) (recognizing appellate court may consider recitations in judgment as findings of fact when not

supplanted by separately filed findings). After evaluating the following factors outlined by the trial court, we conclude it did not abuse its discretion by refusing to enjoin the project.⁷

A. Finding of nuisance was localized

The trial court stated that generally only those plaintiffs immediately adjacent to the project prevailed at trial—those with homes within about 200 feet of the project. According to the trial court, although the exact reasoning of the jury cannot be known, the finding suggested the jury rejected the traffic and shadow concerns raised by the plaintiffs. On appeal, Homeowners do not challenge the trial court's assessment that the nuisance is localized or its reliance on that fact. Consequently, we defer to the trial court's decision that the limited impact of the project weighed against an injunction.

B. Difficulties in enforcing an injunction

The trial court cited the difficulties inherent in enforcing an injunction, including that such relief would lead to an endless series of lawsuits and contempt motions, reasoning as follows: (1) the nuisance finding applied only to the project as proposed at the time of trial and permitted by the City; (2) the trial court was not asked to enjoin a particular type of business (such as a racetrack or hide tanning facility) because Homeowners' primary opposition to the mostly residential building is based on its size; (3) Homeowners did not obtain a finding on what scale of project would be permissible and thus the trial court had no finding on which to base an injunction restricting the building to any certain size—it had an “all or nothing” proposition of enjoining the project as permitted or not; (4) therefore, if the project were enjoined, a new trial on the nuisance issue would be required if, and each time, the Developer modifies its plan—for example, by planning a 20-story building rather than the 21-story building or a 6-story building but one that occupies more space horizontally and has more units; and (5) alternatively, if the trial court were to enjoin the project, the Developer's building of projects other than the one enjoined would not constitute contempt, but that alternative might nonetheless result in numerous contempt motions.

[19] Homeowners contend the trial court, in effect, unfairly penalized Homeowners for failing to prove what alternative project would be acceptable (a burden they assign to Developer) and that Homeowners were entitled to an injunction by proving **this** project will be a nuisance. However, as set forth above, proving the project will be a nuisance did not entitle Homeowners to an injunction

“as a matter of right.” See *Storey*, 226 S.W.2d at 618–19; see also *Bates*, 147 S.W.3d at 286–87 (stating trial court may choose not to abate a permanent nuisance even if that is the only remedy requested); *Triantaphyllis*, 93 S.W.3d at 401–02. Further, we disagree that the trial court necessarily required Homeowners to prove what alternative *502 project would not be a nuisance in order to obtain an injunction; the trial court did not deny the application solely because Homeowners failed to prove what project would be acceptable. Instead, the trial court merely cited the difficulties inherent in issuing an injunction under the circumstances of the present case—where Homeowners' primary opposition to the project is size and Developer could modify to address that concern—as one of many equitable reasons that weighed against the relief.

We agree with the trial court that, if it enjoined the project, Homeowners would not be entitled to a contempt finding if Developer modified the project because such modified project will not have been enjoined. And, Homeowners would not automatically be entitled to further injunctive relief because there would be no finding that such project will be a nuisance. Accordingly, the record supports the trial court's reasoning that an injunction would potentially cause endless litigation. See *Bates*, 147 S.W.3d at 287 (recognizing, “Judges may hesitate to issue discretionary orders that require extensive oversight”).

Homeowners rely on *Pool v. River Bend Ranch, LLC*, 346 S.W.3d 853, 859–61 (Tex.App.–Tyler 2001, pet. denied), in which the court upheld an injunction precluding the defendants from operating a commercial all-terrain vehicle park that was a nuisance to a neighbor. The court rejected the defendant's suggestion that the injunction was overly broad by precluding all such commercial activity, rather than reducing the operation to certain levels, because there was no evidence regarding the number of vehicles that would make the operation permissible. See *id.* at 860. *Pool* is distinguishable from the present case because it involved the breadth of an injunction that was granted instead of the denial of an injunction. See *id.* at 859–61. *Pool* does not stand for the proposition that an injunction must be granted when a defendant fails to prove alternatives that would not be a nuisance.

Homeowners also cite *Freedman*, 776 S.W.2d at 217, in which the court upheld the jury's finding that a proposed parking lot would constitute a nuisance although the defendant proffered modifications to its proposal. *Freedman* is inapplicable

to the present case because the proposed modifications were considered relative to the fact finder's initial nuisance determination and not with respect to the trial court's decision on whether to enjoin the project. *See id.* The *Freedman* court did not address a trial court's concerns that if an injunction were issued, the defendant might modify its plans, resulting in more litigation. *See id.*

Finally, Homeowners cite another case as an alleged model of appropriate relief and assert the trial court erroneously rejected such model. In *Rowe v. Moore*, 756 S.W.2d 117, 118 (Tex.App.–Houston [1st Dist.] 1988, orig. proceeding [leave denied]), the trial court permanently enjoined a church from constructing a parking garage that a jury found would be a nuisance to adjacent residents. Subsequently, the church modified the design of the garage and its location within the church property. *See id.* In denying the residents' motion for contempt, the trial court ruled that the church would not be in contempt if it built a garage that met certain criteria consistent with the revised plan. *See id.* The court of appeals denied one resident's request for mandamus relief, holding the church was not in contempt because the injunction precluded only the previously-planned project, which was the subject of the nuisance litigation. *See id.* at 119–20. In addition to citing *Rowe*, Homeowners presented as evidence *503 in the present case the trial court's orders in *Rowe*, which showed the substance of the injunction and the revised criteria.

However, the fact that one trial court chose to issue an injunction even if it entailed later refining the relief and permitting the project under certain criteria does not mean the trial court was required to do so in the present case—particularly in light of other factors relied on by the trial court, such as the lengthy period that has already passed since inception of the project. Additionally, *Rowe* actually supports the trial court's concerns about future contempt motions and litigation because *Rowe* involved (1) an injunction followed by a motion for contempt when the defendant modified its project, and (2) a ruling that the modification was not in contempt of the injunction, thus raising the possibility of future litigation over whether the revised project will be a nuisance. *See id.* at 118–20. Accordingly, the cases cited by Homeowners do not negate the trial court's discretion to decide that an injunction will be difficult to enforce in light of the potential for protracted judicial involvement.

C. Harm to Developer

[20] Next, the trial court found that an injunction would cause “considerable” hardship to Developer, which

would outweigh the “some hardship and disruption” to Homeowners. Specifically, the trial court commented that (1) the Developer had expended money and energy in planning the project over a seven-year period and forfeited rental income by razing the previous complex once the City approved the project, (2) Homeowners delayed filing suit until six of those years had expired and until a year after the Developer's settlement agreement with the City approving the project, and (3) Developer could not recoup its losses even if it sold the property and its efforts “cannot simply be picked up and moved to a new location.”

On appeal, Homeowners do not challenge that before they filed suit, Developer invested millions toward the project and forfeited a rental-income stream to prepare for construction. But, Homeowners argue there is no evidence that Developer's efforts cannot be moved to another location and its losses thereby recouped. However, Developer proffered testimony that (1) it cannot move the plans and specs to another site, (2) at the present site, Developer expects to obtain the highest rent in the market (which translates to a higher property value), based on the average incomes of area residents and proximity to the Texas Medical Center, the Museum District, the Central Business District, the Galleria, Greenway Plaza, Rice University, Hermann Park, and the Houston Zoo, (3) Developer anticipates that because of this rental-income potential, effecting a sale two years after the project begins operating will yield Developer \$72 million, and (4) Developer believes it could not achieve that rental income elsewhere in the City because of the site's unique proximity to so many amenities.

Moreover, we conclude the trial court reasonably could have inferred that (1) a developer does not simply move plans for a 21-story multi-use building from one site to another, and Developer would expend considerable funds to study and effect a site change, (2) moving to another site would not recoup the rental income forfeited at the present site upon razing the previous complex, and (3) there is no guarantee of a site where the project would be appropriate or permitted. Thus, some evidence supports the trial court's findings with respect to this factor. *See Garland Grain Co. v. D–C Home Owners Improvement Ass'n.*, 393 S.W.2d 635, 641–43 (Tex.App.–Tyler 1965, writ ref'd n.r.e.) *504 (reversing injunction precluding operation of cattle feed lots found to be a nuisance because of odors and citing as a factor significant amounts defendant had spent on the operation).

Homeowners also argue that Developer had opportunities to exit without incurring losses. Homeowners cite a letter from Stop Ashby Highrise to Developer in February 2008, outlining two alternatives to the project. According to Homeowners, these options would have made Developer whole but it rejected them and “doubled-down” on the high rise concept, thereby making all subsequent investment at its own risk. However, one proposal was a general suggestion that the site be redeveloped as a townhome project, that if Developer were uninterested, it sell to an interested developer, and Stop Ashby Highrise would assist in identifying potential developers and financiers who could make Developer whole. The other was a general proposal to redevelop the property with fewer but larger units. These proposals were not definite offers to buy the property from Developer for at least the amount of its investments already incurred, much less offers that would give Developer the profits it anticipates after the project is built. Further, another five years expired after these proposals without Homeowners filing suit despite knowing Developer intended to proceed.⁸

In this regard, Homeowners contend the finding that they unnecessarily delayed filing suit was unsupported by the record. Homeowners emphasize they filed suit shortly after Developer received its city permit and Developer had previously withheld the construction plans, so Homeowners were unable to investigate potential impacts. But, Homeowners have been vehemently opposed to the project from the outset based on its size. Additionally, Homeowners waited to file suit until a year after Developer's settlement agreement with the City approving the project ultimately permitted while Developer proceeded to implement its plans. Homeowners stress that Developer took the risk of incurring financial losses because it continued advancing its plans while knowing area residents were opposed. But, we will defer to the trial court's characterizing the scenario as Homeowners opposing the project from the outset but not filing suit while Developer advanced its plans and expended considerable funds.

D. City approval of project and harm to community from an injunction

[21] We will consider together the trial court's next two grounds because they are overlapping and Homeowners present a similar challenge to both. The trial court focused on the fact that the City approved the project and, in doing so, extracted *505 concessions from Developer to help ameliorate many neighborhood concerns. The trial court

also considered potential harm to the community from an injunction in essentially two manners. See *Bates*, 147 S.W.3d at 287 (stating that in modern society, nuisances may have effects on the public, the economy, and the environment far beyond the neighborhood and a court balancing the equities must consider those effects before issuing an injunction); *Garland Grain Co.*, 393 S.W.2d at 641–43 (citing as another factor when reversing injunction precluding operation of cattle feed lot that operation served welfare of general public and was the only operation of its sort in particular area of the state).

First, the trial court reasoned that an injunction would have a “chilling” effect on other development in Houston because (1) considering the project was approved by the City, the trial court would become a “one man zoning board” in a city with no zoning, and (2) developers might “think twice” about proceeding with projects if after a lengthy permitting process, they also faced the possibility of an injunction and protracted litigation on that issue. The trial court's concerns were supported by the testimony of a representative of Developer's limited partner, who has years in the real-estate-development business; he opined an injunction would create de facto zoning and highly increase the risk associated with development because principals and investors make decisions based on the established regulatory framework of the locale including, in Houston, the lack of zoning.

Homeowners argue heavily that the trial court improperly relied on these factors because Developer misled the City and misrepresented facts at trial. Homeowners contend the trial evidence indicated Developer did not intend to comply with the settlement agreement in certain aspects or generally intended to deceive the City as follows: (1) Developer was considering including more than one restaurant, while making the City believe there would be only one and thus the trip count would be under a certain limit; (2) Developer was contemplating no green screen or one that technically complied with the settlement agreement by covering walls but would not block light from the parking garage—the primary purpose of the screen; and (3) Developer intended for its foundation design submitted to the City to appear credible and falsely lead the City to believe that design would be implemented. Thus, Homeowners suggest city approval of the project was immaterial and the only “chilling” effect of an injunction would be to deter developers from misleading the City.

The trial court did not specifically discuss the evidence cited by Homeowners. But after reciting that the settlement agreement called for certain design changes, the trial court remarked, “Defendant followed all of the rules required of the City.” This remark is somewhat general but indicated the trial court found that Developer’s plans comply with the agreed criteria. Regardless of how the trial evidence is characterized, a principal of Developer testified at the post-trial hearing that it has no intent to violate the settlement agreement “in any way.” We will defer to the trial court’s discretion to take Developer at its word. Alternatively, the trial court was free to decide that (1) complaints about violations of the settlement agreement are not ripe until they occur, and (2) the City can take enforcement action in the future if Developer commits a violation, rather than the trial court enjoining the project as presently permitted.

Additionally, Homeowners assert the record shows Developer attempted to conceal evidence in the following manner: (1) Developer did not initially conduct tests to *506 determine whether the project will physically damage adjacent homes; (2) when Developer finally performed the tests only days before trial, it misrepresented or concealed the results, causing further discovery during trial; and (3) the results comported with those obtained by Homeowners’ expert showing construction may physically damage some homes. However, the trial court could have concluded that any attempts to conceal evidence regarding potential damage were more relevant to the determination of whether the project will be a nuisance than to the injunction issue. When denying the injunction, the trial court presupposed the project might cause physical damage but decided, as discussed below, a future claim for such damages would be the appropriate remedy.

Finally, the trial court heard all of the evidence allegedly showing deception and that issue was fully vetted. The trial court was in the best position to evaluate the credibility of Developer’s representatives, including Developer’s assurance about compliance with the City criteria, and decide what weight to assign any evidence of deception. Thus, assuming without deciding that Developer was deceptive in certain areas, we must defer to the trial court’s decision that the reasons for denying injunctive relief outweighed such misconduct.⁹

As its second consideration under these factors, the trial court mentioned that the project will generate millions in tax revenues and provide housing for the Houston Medical Center, Rice University, and other urban destinations. That

assertion is supported by evidence reflecting the project will provide 232 residential units, generate property taxes of at least \$1.7 million, and, although not specifically cited by the trial court, create 2,000 to 2,800 jobs. Homeowners contend there was no evidence that the project will benefit the City at its present site more than it would at another site or that the currently planned size will provide more benefits than a smaller building. However, the trial court was free to rely on the evidence regarding the unique benefits at the present site and conclude those benefits would derive, in part, from the currently planned size, in terms of the amounts of jobs and residences created and taxes generated. The trial court had discretion to decide that those benefits outweigh the harm to Homeowners. See *Lee v. Bowles*, 397 S.W.2d 923, 927 (Tex.Civ.App.–San Antonio 1965, no writ) (upholding denial of application to permanently enjoin race track and citing, inter alia, trial court’s finding that track would provide economic and recreational benefits to the public).

E. Other projects nearby

The trial court asserted that “[m]id-rise buildings are sprouting up throughout the inner city,” and within two to three blocks of the project are several four-to-six-story residential buildings and a six-story medical office, thereby making the neighborhood dense without the project. On appeal, *507 Homeowners do not challenge the trial court’s reasoning, so we will defer to its reliance on this factor.

F. Privacy Concerns pre-dated the project

The trial court commented that Homeowners’ privacy concerns did not justify an injunction because (1) any person who lives next to a two-story home bears the likelihood a neighbor could peer into the person’s backyard, (2) residents of the previous complex could look into some Homeowners’ properties, and (3) the project raises fewer privacy concerns because it will be set back further from the property line than the previous complex and the apartments will not start until the fifth floor (above the parking garage) whereas the previous complex had second-story apartments. In fact, the trial court attached to its opinion photographs showing views from the former complex into some yards. Homeowners also do not challenge the trial court’s reliance on this factor, so again we defer to the trial court’s finding.

G. Adequate remedy at law

[22] The trial court opined that Homeowners have an adequate remedy at law through a claim for monetary

damages. We note that the trial court referenced both the lost-market-value damages it intended to award and a claim for any damages that might later become ripe. As discussed above, we reverse the award of lost-market-value damages incurred before a nuisance exists. However, the trial court's reasoning on this factor remains because Homeowners may seek damages once a nuisance exists.

[23] Homeowners do not dispute that they may assert such a future claim for damages. Rather, Homeowners argue that the trial court ignored authority indicating that a threatened harm to real property is irreparable as a matter of law and damages are not an adequate remedy. Homeowners cite [Texas Civil Practice and Remedies Code section 65.011](#), which sets forth the various grounds for an injunction and provides in pertinent part: “A writ of injunction may be granted if ... irreparable injury to real or personal property is threatened, irrespective of any remedy at law.” [Tex. Civ. Prac. & Rem. Code Ann. § 65.011\(5\)](#) (West 2008). Contrary to Homeowners' suggestion, the statute does not provide that a threatened injury to real property is always irreparable or that there is never an adequate remedy at law for an irreparable injury to real property. *See id.* Further, the statute uses the word “may” and does not require injunctive relief if there is a threatened irreparable injury to real property. *See id.* The statute merely permits an injunction in that situation even if there is an adequate remedy at law. *See id.*¹⁰

Homeowners also cite [Stein v. Killough](#), 53 S.W.3d 36, 43–44 (Tex.App.–San Antonio 2001, no pet.), in which the court affirmed a permanent injunction where the plaintiffs demonstrated the defendant's plans would cause an irreparable injury in terms of a loss in market value to the plaintiffs' property. However, that court did not state that a trial court must grant a permanent injunction in such a situation. *See id.* And, Homeowners' theory is contrary to authority requiring the trial court to balance the equities before enjoining a *508 nuisance that causes harm to real property. *See Storey*, 226 S.W.2d at 618–19; *see also Bates*, 147 S.W.3d at 286–87. Consequently, the trial court retained discretion to deny an injunction even in the face of a threatened injury to real property because, among other considerations, Homeowners have an adequate remedy at law through a future claim for damages.

H. Other factors

The trial court also identified two other factors “of lesser importance” but worthy of consideration.

1. Choice of some plaintiffs to buy homes in the neighborhood

The trial court stated that several Homeowners bought their homes during the controversy, which did not disqualify them from obtaining damages for a prospective nuisance but should be considered as to the injunction issue. Homeowners do not challenge the trial court's consideration of this factor. We see no reason it was precluded from considering that potential harm from the project has not deterred some persons from wanting to buy homes in the area.

2. “He who seeks equity must do equity.”

[24] [25] Finally, the trial court included the above-quoted language, referencing the principle that a party seeking an equitable remedy must do equity and come to court with clean hands. *See Truly v. Austin*, 744 S.W.2d 934, 938 (Tex.1988). The trial court acknowledged that although most of the Homeowners' conduct has been perfectly proper, many residents, including some Homeowners, aggressively fought the project. The trial court recited that some area residents made threats against Developer's principals and threatened to picket homes of investors, appear at businesses and homes of contractors and service providers who work on the project, confront tenants, and boycott and demonstrate against any restaurant that occupies the project.

We agree with Homeowners that vehemently opposing the project alone would not necessarily be improper. But, the trial court was free to properly characterize threats as beyond appropriate opposition efforts. Homeowners also assert the trial court erroneously penalized Homeowners for the behavior of anonymous protestors. However, the record demonstrates some Homeowners did sign a letter making some of the threats,¹¹ an injunction would benefit those Homeowners and non-party residents who made threats, and it is undisputed the efforts to stop the project were collective among area residents. Consequently, the trial court could consider the behavior of a few Homeowners as a minor ground, among the other grounds, for denying injunctive relief.

In summary, the trial court's denial of the application for injunction was not arbitrary or unreasonable, without reference to guiding rules or principles; instead, the trial court considered extensive evidence and briefing and detailed numerous reasons, supported by the evidence, for its ruling and did not misapply the law to the evidence. Thus, under our

standard of review, we must defer to the trial court's balancing of the equities and its conclusion that the factors outlined above outweighed Homeowners' arguments in favor of the *509 relief. Accordingly, we overrule Homeowners' sole cross-issue.

nothing on their claim for damages without prejudice to their right to seek damages once a claim for an existing nuisance accrues. We also reverse the portion of the judgment taxing costs against Developer and render judgment taxing all costs against Homeowners except for those that the trial court taxed against the non-prevailing plaintiffs. We affirm the remainder of the judgment.

IV. CONCLUSION

We reverse the portion of the judgment awarding damages to Homeowners and render judgment that Homeowners take

All Citations

500 S.W.3d 488

Footnotes

- 1 The trial court also rendered judgment that the non-prevailing plaintiffs take nothing. Those plaintiffs do not appeal the judgment, so all references to "Homeowners" in this opinion mean only those plaintiffs who prevailed at trial and are appellees/cross-appellants in our court.
- 2 Homeowners do not challenge the portion of the judgment disregarding the jury's finding on loss-of-use-and-enjoyment damages.
- 3 The property was originally purchased by Buckhead Investment Partners, Inc. Pursuant to a subsequent transaction, the property became owned by Developer—a limited liability company consisting of a managing-member entity of which Buckhead Investment Partners, Inc. is general partner and another entity which is a 90% limited partner. Kevin Kirton and Matthew Morgan, principals of Buckhead Investment Partners, Inc., remained as owners of the managing-member entity of Developer and thus managers of the project. For ease of reference, we will refer to "Developer" throughout the opinion as though it were the owner from inception of the project.
- 4 Relative to the nuisance finding, Developer contends (1) there was no evidence the project will constitute a nuisance as to any Homeowners, (2) a determination that it will constitute a nuisance amounts to imposing an inapplicable strict-liability theory, (3) Homeowners failed to plead two of the factors on which they relied when alleging the project will constitute a nuisance, and (4) there is no evidence to support a nuisance finding as to some Homeowners whose properties do not abut the project site.
- 5 In the jury question on damages, the instruction "Consider the difference in market value of each plaintiff's property caused by the nuisance" was worded as though the project already had been built and thus already constituted a nuisance. However, even Developer seems to acknowledge that the "nuisance" referenced in the damages question meant the prospective nuisance referenced in the first jury question because it is undisputed there was no nuisance yet. Accordingly, solely for purposes of addressing whether there was a liability theory supporting submission of the damages question, we will treat the "nuisance" referenced in that question as the prospective nuisance.
- 6 Alternatively, the court held that the plaintiff could not recover lost market value because any nuisance was abatable. See *Sanders*, 113 S.W. at 999–1000.
- 7 Developer presents cross-points for affirming the ruling for reasons other than those stated in the opinion: (1) the project will not constitute a nuisance; (2) the injunction application is moot because Developer made

design changes to the project after the jury's verdict; and (3) the proposed injunction is overbroad. We need not consider those contentions because the trial court did not abuse its discretion even if the project as planned at the time of the jury finding will constitute a nuisance.

- 8 In the factual-background section of their appellate brief, Homeowners reference a third-party's August 2013 written offer to purchase the property. Homeowners do not cite the letter in the argument portion of their brief relative to the trial court's finding that Developer would lose money if the project were enjoined. Instead, Homeowners reference the letter as an alleged example of Developer's deceptive conduct. Homeowners assert Developer denied at trial that it had received a purchase offer from anyone in the neighborhood that it recognized or believed was "real," but disclosed in post-verdict discovery the letter signed by someone in the neighborhood. Nonetheless, the offer was made years after inception of the project and only a few months before trial. Developer's representative testified the offer would not have made Developer whole on the money already invested and Developer was uninterested in selling the property because development would provide the maximum return. Accordingly, the trial court was free to find that the offer did not negate the trial court's consideration of the money Developer had already invested as relevant to the injunction issue.
- 9 Homeowners also assert that there will be no chilling effect on development because evidence proffered by Homeowners during the jury trial and excluded by the trial court demonstrated the project would not be permitted today—evidence that there is now a City buffering ordinance that requires a certain setback between a high-rise and neighboring residences. Homeowners assert this evidence, although excluded during the jury trial, was before the trial court relative to the injunction issue. Even if the trial court considered that evidence, it could have decided the evidence failed to negate that an injunction would have a chilling effect on development; specifically, the trial court could have concluded that an injunction still would set a precedent of uncertainty because area residents might seek to enjoin a permitted project for reasons unrelated to a setback.
- 10 The trial court acknowledged [section 65.011\(5\)](#) but also remarked that subsequent case law still requires that there be no adequate remedy at law in order to obtain an injunction. We need not decide whether a court may enjoin a prospective nuisance that will cause an irreparable injury to real property even if there is an adequate remedy at law because the statute does not require such relief.
- 11 For instance, participants to the letter threatened, "We will appear at your tenant's restaurant and demonstrate our opposition to their presence in our neighborhood. If your restaurant tenant has other locations, we will boycott and appear at those locations as well. We will appear at the locations of the owners, investors, and chef of your restaurant tenant and demonstrate our opposition to their presence in our neighborhood."

749 N.W.2d 671
Supreme Court of Iowa.

Barry C. SIMPSON and [Stacy Simpson](#), Husband and Wife, David Gerber and Kathy Gerber, Husband and Wife, Jeremy Walker and Kayla Walker, Husband and Wife, Jeff Weber and Tracy Weber, Husband and Wife, Leroy F. Weber and Audrey H. Weber, Husband and Wife, Ken Witham and Cindy L. Witham, Husband and Wife, Terry W. Warmbier and Carol Warmbier, Husband and Wife, Howard P. Swanson and H. Aileen Swanson, Husband and Wife, Eugene K. Lemkee and Sharon Lemkee, Husband and Wife, Duane Heinen and Sharon K. Heinen, Husband and Wife, Earl Loss and Juanita Loss, Husband and Wife, Thomas M. Altman and Marlene Altman, Husband and Wife, J.W. Gardner and Karen Gardner, Husband and Wife, Ronald Frankl and Pamela Frankl, Husband and Wife, Bob Casey and Trish Casey, Husband and Wife, Richard N. Kohlhaas and Richard G. Thompson, Appellants,

v.

Luke KOLLASCH, Charlie Kollasch, Kollasch Land and Livestock, Inc., General Development, L.L.C., a/k/a General Development Corp., Donald R. Tietz, John Mertz, Nicholas Berte, Dean Berte, Kevin Berte and Craig Berte, Appellees.

No. 05–1410.

|

March 28, 2008.

Synopsis

Background: Neighbors of two proposed hog confinement facilities filed an anticipatory nuisance claim against the developers of the confinement facilities and the owners of the land where manure from the operations was to be spread. The District Court, Kossuth County, [Patrick M. Carr](#), J., denied injunction, and appeal was taken.

[Holding:] The Supreme Court, Streit, J., held that neighbors did not meet their evidentiary burden of proof for an anticipated nuisance.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (7)

[1] Nuisance [Nuisances subject to abatement or injunction](#)

An injunction based on an anticipatory nuisance is an extraordinary remedy and requires proof a nuisance will necessarily result.

[2 Cases that cite this headnote](#)

[2] Appeal and Error [Judge as factfinder below](#)

Appellate courts give weight to the findings of fact made by the trial court, especially with respect to the credibility of witnesses, but are not bound by those findings.

[2 Cases that cite this headnote](#)

[3] Appeal and Error [Substantive questions and issues](#)

Issue with respect to a second confined animal feeding operation (CAFO) was moot, and as such, the district court appropriately limited its ruling to the first proposed CAFO in anticipatory nuisance action filed by neighbors, who opposed company's application for permits to construct CAFOs; company had no plans to construct a second feeding operation, and when or if it decided to develop that second operation, it had to obtain a new construction permit from the Department of Natural Resources (DNR), and courts had no way of predicting future circumstances if that were to occur.

[4] Nuisance [Care and precautions against annoyance or injury](#)

Nuisance [Defenses](#)

While compliance with regulations was not a defense to a nuisance claim, evidence of applicant's compliance with Department of Natural Resources' (DNR) standards and

regulations was relevant in nuisance action brought by neighbors, who opposed applicant's applications for permits to construct confined animal feeding operations (CAFO); compliance with standards designed to avoid nuisances might in fact be some evidence that a nuisance would not necessarily result from the operations. [I.C.A. Rule 5.401](#).

2 Cases that cite this headnote

[5] **Nuisance** 🔑 Nuisances subject to abatement or injunction

An anticipated nuisance is whatever threatens to fulfill the statutory definition of a nuisance, if it were to come to fruition. [I.C.A. § 657.1](#).

1 Case that cites this headnote

[6] **Nuisance** 🔑 Evidence

Neighbors, who opposed company's applications for permits to construct confined animal feeding operations (CAFO), did not meet their evidentiary burden of proof for an anticipated nuisance; none of the neighbors claimed present adverse effects from other CAFOs presently in vicinity, evidence concerning health issues was speculative due to distance the neighbors lived from site of proposed facility, neighbors failed to prove groundwater contamination would necessarily result from CAFO, and until CAFO was in operation, it could not be said that CAFO inevitably would produce odors which qualified as a nuisance, and there was conflicting evidence that property values would necessarily or certainly decline should the CAFO be built.

[7] **Nuisance** 🔑 Nature and extent of injury or danger

When determining whether a nuisance exists, the fact finder uses a “normal person standard” to determine whether a nuisance involving personal discomfort or annoyance is significant enough to constitute a nuisance.

Attorneys and Law Firms

*[672](#) [David J. Stein, Jr.](#) and David J. Stein, Sr. of Stein Law Office L.L.P., Milford, for appellants.

[Sean P. Moore](#) and [Michael R. Blaser](#) of Brown, Winnick, Graves, Gross, Baskerville & Schoenebaum, P.L.C., Des Moines, for appellees.

Opinion

STREIT, Justice.

No one wants to live near a hog confinement operation. Neighbors of two proposed hog confinement facilities filed an anticipatory nuisance claim against the developers of the confinement facilities and the owners of the land where manure from the operations was to be spread. While the neighbors raised legitimate concerns, our role in this case is not akin to a zoning board. An injunction based on an anticipatory nuisance is an extraordinary remedy and requires proof a nuisance will necessarily result from the developers' proposal. Because the neighbors have not met this high burden, we affirm the district court's denial of an injunction.

I. Facts and Prior Proceedings.

[1] In early 2003, General Development L.L.C.¹ filed two separate applications with the Iowa Department of Natural Resources (DNR) for permits to construct confined animal feeding operations (CAFOs) in Sherman Township, Kossuth County. General Development referred to the operations, which were to be located approximately two miles apart, as “Sow 1” *[673](#) and “Sow 2.”² The facilities were designed to store all manure in concrete pits under the buildings. According to a manure management plan for each facility, the manure would be spread once a year on nearby farmland.

In May 2003, General Development published notices in the *Algona Upper Des Moines* newspaper stating its intent to build the two CAFOs. A public meeting was held. The Kossuth County Board of Supervisors submitted a list of concerns to the DNR. In August 2003, the DNR issued permits for the construction of Sow 1 and Sow 2. In its “Notice of Issuance of Construction Permits” to the Board, the DNR addressed the concerns raised by the Board and rejected them.

Prior to the issuance of the permits, the plaintiffs, who are all neighbors of the proposed facilities (hereafter “neighbors”), filed this case alleging nuisance and anticipatory nuisance.

General Development filed counterclaims, which were eventually dismissed without prejudice. The district court granted partial summary judgment in favor of General Development and dismissed the neighbors' nuisance claim.

At the bench trial for the anticipatory nuisance claim, General Development presented evidence the permit for Sow 2 had expired. Luke Kollasch testified he had no current plans to build Sow 2 although he acknowledged he may later reapply for a permit for Sow 2. Luke testified his plans for Sow 1 were unchanged. Sow 1 would house 10,900 pigs (5400 sows, 2500 gilts, and 3000 suckling pigs). General Development would compost approximately 2500³ dead pigs a year and store and spread approximately five million gallons of manure. Several neighbors testified regarding their concerns about the proposed CAFOs. Both parties provided expert and lay testimony with respect to potential odors, water contamination, health effects, and reduction in property values. Additionally, several individuals testified concerning their negative experiences living near General Development's existing CAFOs. The district court found the neighbors failed to prove an anticipatory nuisance and dismissed their petition. On appeal, the neighbors allege the district court erred (1) by only considering the Sow 1 facility; (2) by considering DNR standards and regulations; and (3) by concluding Sow 1 would not necessarily constitute a nuisance. General Development claims the district court properly found the neighbors failed to meet their burden of proof. It notes the neighbors are free to bring a nuisance claim if their concerns are realized once Sow 1 is in operation.

II. Scope of Review.

[2] Cases tried in equity are reviewed de novo. Iowa R.App. P. 6.4. “[W]e give weight to the findings of fact made by the trial court in this case, especially with respect to the credibility of witnesses, but are not bound by those findings.” *Owens v. Brownlie*, 610 N.W.2d 860, 865 (Iowa 2000).

III. Merits.

[3] **A. Whether the District Court Erred by Only Considering the Sow 1 Facility.** The district court's ruling did not make any findings of fact or conclusions of law with respect to Sow 2, other than the permit had expired. The neighbors filed a motion requesting the court to enlarge and amend its ruling to address *674 Sow 2. The neighbors noted “nothing is preventing the Defendants from reapplying for and being granted the permit for Sow 2....” In its ruling on the motion to enlarge, the district court stated because “Sow

Two is not presently threatening the Plaintiffs,” “there is no anticipated nuisance to be enjoined with respect to Sow Two.” On appeal, the neighbors contend the district court erred by not considering Sow 2. We disagree.

It would be entirely speculative to rule on Sow 2. At this juncture, General Development has no plans to construct Sow 2. When or if it decides to develop that CAFO, General Development must obtain a new construction permit from the DNR. We have no way of predicting future circumstances if that were to occur. For example, General Development may submit a revised plan, the law with respect to CAFOs may change, or some of the neighbors may move in the meantime. Since General Development applied for its original permits, the Kossuth County Board of Supervisors adopted the “master matrix” which requires anyone seeking a permit today to comply with the master matrix statute. See *Iowa Code* § 459.305. This statute also allows the Board to file a formal appeal with the DNR regarding the issuance of any new permits. See *id.* § 459.304. Thus, the issue with respect to Sow 2 is moot and the district court appropriately limited its ruling to Sow 1. See *Rhiner v. State*, 703 N.W.2d 174, 176 (Iowa 2005) (“[C]ourts do not decide cases when the underlying controversy is moot.”).

[4] **B. Whether the District Court Erred by Considering DNR Standards and Regulations.** The district court allowed General Development to admit evidence of its compliance with DNR standards and regulations. The neighbors argue the district court should not have considered evidence of compliance because “‘a lawful business, properly conducted, may still constitute a nuisance if the business interferes with another's use of his own property.’” *Weinhold v. Wolff*, 555 N.W.2d 454, 461 (Iowa 1996) (quoting *Valasek v. Baer*, 401 N.W.2d 33, 35 (Iowa 1987)). While compliance with regulations is not a defense to a nuisance claim, we agree with the district court this evidence was relevant. See *Iowa R. Evid.* 5.401 (defining relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”). But see *Andrews v. Western Asphalt Paving Corp.*, 193 Iowa 1047, 1052, 188 N.W. 900, 902 (1922) (holding it was not error to refuse to permit defendants to show the plant, which caused the nuisance, was operated and constructed in a usual manner). As the district court stated, “compliance with standards designed to avoid nuisances might in fact be some evidence that a nuisance would not necessarily result from the operation.”

[5] C. Whether the District Court Erred by Holding the Neighbors Failed to Prove an Anticipatory Nuisance.

The neighbors claim the proposed CAFO, if brought into operation, will constitute a nuisance and should be enjoined in advance. A nuisance is “[w]hatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere unreasonably with the comfortable enjoyment of life or property.” [Iowa Code § 657.1](#); *see id.* § 657.2(1) (explaining nuisances include “[t]he erecting, continuing, or using any building or other place for the exercise of any trade, ... which, by occasioning noxious exhalations, unreasonably offensive smells, or other annoyances, becomes injurious and dangerous *675 to the health, comfort, or property of individuals or the public”). “An ‘anticipated’ nuisance would be whatever threatens to fulfill the statutory definition, if it were to come to fruition.” [Rutter v. Carroll's Foods of the Midwest, Inc.](#), 50 F.Supp.2d 876, 884 (N.D.Iowa 1999). We have previously said,

An anticipated nuisance will not be enjoined unless it clearly appears a nuisance will necessarily result from the act ... it is sought to enjoin. Relief will usually be denied until a nuisance has been committed where the thing sought to be enjoined may or may not become such, depending on its use or other circumstances.

[Livingston v. Davis](#), 243 Iowa 21, 31, 50 N.W.2d 592, 599 (1951) (citing [Amdor v. Cooney](#), 241 Iowa 777, 784, 43 N.W.2d 136, 141 (1950)). This standard is akin to our “clear and convincing evidence” standard. *See King v. King*, 291 N.W.2d 22, 24 (Iowa 1980) (“Clear and convincing evidence is a standard that lies somewhere between a preponderance of evidence and evidence beyond a reasonable doubt.”).

[6] In its ruling, the district court stated “[t]he evidence in the record convinces the Court that with careful and diligent operation, this facility need not necessarily constitute a nuisance even to the closest neighbors, the Caseys, at one mile away.” We agree. While the neighbors’ concerns are understandable, they have failed to meet their burden of proof for an anticipated nuisance.

The neighbors are all long-time residents of the area where Sow 1 is proposed to be located. Robert and Patricia Casey live one mile northwest of Sow 1. Ken and Cynthia Witham live about 1.1 mile north/northwest of Sow 1. Jeff Weber lives a little over two miles northwest of Sow 1. Except for the Caseys and Withams, none of the neighbors live within two miles of the proposed location for Sow 1. All of the neighbors who testified either in person or by deposition expressed concerns about health issues, water quality issues, odor issues, and a perception property values would decline. We address each of these issues in turn.

[7] 1. Health issues. Some of the neighbors testified they had health concerns if General Development was allowed to go forward with this facility. None of them claimed present adverse effects from other CAFOs presently in the vicinity. Some of the neighbors have existing health conditions they fear will worsen with the presence of Sow 1. Jeff Weber has had a [kidney transplant](#) and is required to take immunosuppressant drugs. He is concerned biologic agents from the proposed facility may cause him infection in light of his compromised immune system. Eugene Lemke lives three miles east/northeast of the proposed facility and suffers from [emphysema](#) and [asthma](#). Pam Klein has had a liver transplant and Marlene Altman suffers from a lung problem. However, when determining whether a nuisance exists, the fact finder uses a “normal person standard” to determine whether a nuisance involving personal discomfort or annoyance is significant enough to constitute a nuisance. [Weinhold](#), 555 N.W.2d at 459.

We agree with the district court the evidence concerning health issues is speculative due to the distance the neighbors live from the site of the proposed facility. Dr. Stephanie Seemuth, an osteopathic physician, testified on behalf of the neighbors. She testified Sow 1 will cause “negative health risk to people around it.” On cross-examination, Dr. Seemuth conceded these effects will not “necessarily result” from the location and operation of the proposed facility. The studies upon which she relied dealt with children living on farms with CAFOs and workers exposed *676 daily to the fumes and dusts of CAFOs. The neighbors presented no credible evidence a serious health threat is posed to normal individuals living one or more miles from a CAFO.

2. Water quality issues. The neighbors expressed concerns about the potential for groundwater contamination. The neighbors obtain their drinking water from wells, some of which are shallow. For example, the Caseys rely on a forty-

foot well. The site of Sow 1 is low and in wet years has standing water. Mel Berryhill, who was the operator of the Milford, Iowa, water plant for eighteen years, testified on behalf of the neighbors. He explained the water table in the vicinity is three to six feet underground and the proposed facility will be ten to eleven feet deep. He testified there is an alluvial aquifer in the area. According to Berryhill, there is a “high to moderate” potential for well and aquifer contamination. He noted there is an agricultural drainage well located a mile to a mile-and-a-half away from the proposed facility.

Dennis Johnson, an engineer from Windom, Minnesota, who often works for developers of hog confinement facilities, testified for General Development. According to Johnson, all of the concerns expressed by the neighbors have been addressed. The manure pit will be made of heavily reinforced concrete cement. The ground elevation has been raised so the top of the pit will be four-and-a-half feet above the 100-year flood level. The agricultural drainage well is scheduled to be closed. An intermittent stream near the proposed facility will be relocated. Tile will be installed around the footing of the concrete pits to artificially lower the ground water. Moreover, the DNR concluded the engineer had adequately addressed concerns about groundwater contamination. We agree with the district court the neighbors failed to prove groundwater contamination will necessarily result from Sow 1.

3. *Odor issues.* It is undisputed hog manure stinks. Dr. James Moore, a retired professor from Oregon State University with a Ph.D. in livestock waste systems, testified on behalf of the neighbors. He opined the neighbors will be “negatively influenced,” the use of their property will be “impacted,” and they will regard the proposed facility as a nuisance. He said a deep pit system is one of the most odor-producing systems that can be used to raise hogs because it stores the waste in pits for up to twelve months and gives the waste an opportunity to anaerobically break down. However, he conceded deep pit storage such as the one planned for Sow 1 is by far the most predominant type of manure storage used in Iowa and the upper Midwest. Dr. Moore noted fans will withdraw the gases generated by the manure and place them in the atmosphere, which can impact the neighbors. He acknowledged with “very attentive” operators, the process of “knifing” or “injecting” manure into the soil will “significantly” reduce odor. He also acknowledged tree lines have been shown to reduce odor.

In response, General Development called Dr. Dwaine Bundy. Dr. Bundy is retired from Iowa State University and currently

is a consultant for hog confinement operators. He testified management practices have a significant impact on odor, such as including additives in the deep pit, cleaning, and type of feed. He testified one advantage of the deep pit system is that less surface area of the manure is exposed, which causes a reduction in odor. Dr. Bundy stated he would not expect a nuisance to occur at a half to one mile away or more. He claimed spreading manure by injection can cause a thirty to ninety percent reduction in odor at the *677 time of application and no appreciable odor should remain after twenty-four hours. Eric Wiklund from the DNR testified most complaints about odor come from people living less than a mile from a CAFO.

We agree with the district court it is “debatable” whether the odors produced by Sow 1 will rise to the level of an actionable nuisance. Dr. Moore and Dr. Bundy agree the level of odor will depend on the type of manure management system (here a deep pit system), distance between the facility and the neighbors, direction of the prevailing winds, the method and means of handling manure, location of trees, and the skills of the operators applying the manure to the fields. Until the facility is in operation, we cannot say it inevitably will produce odors which qualify as a nuisance.

4. *Property value concerns.* Finally, the neighbors also expressed concerns their property values will decrease as a result of Sow 1. James Kesterson, an appraiser and realtor from Fort Dodge, Iowa, testified on behalf of the neighbors. He opined some properties in the vicinity would suffer a loss in value because people do not want to live near a hog confinement facility. Kesterson did not specify which properties would decrease in value nor did he quantify the expected loss in value. On cross-examination, he was asked, given the number of existing CAFOs already in the area, whether one more would cause a reduction in value. Kesterson said it would “depend.”

Two experts testified for General Development with respect to Sow 1's impact on property values. Dr. Bruce Babcock, an economics professor at Iowa State University, testified about a study he conducted on behalf of the Center for Agriculture and Rural Development. The study found a new CAFO within a quarter of a mile of a residence may reduce the value of the property by ten percent. The perceived loss in value falls steeply when the new facility is a half mile away and at one-and-a-half miles away, the impact is negligible. Fred Greder, an independent fee appraiser, also testified. He acknowledged a reduction in property values may occur, but it was not

probable. In his opinion, there are several factors bearing on whether a decline in the value of any particular property will occur: (1) the highest and best use of the property; (2) distance; (3) direction from unit to account for prevailing wind; (4) whether the CAFO is within view of the property in question; (5) the size of the CAFO; (6) whether manure is stored indoors or outdoors; (7) whether the property in question is modest or expensive; and (8) whether the pigs are locally owned or non-locally owned. The district court found all of the experts credible. We agree with the district court that we cannot conclude based on the conflicting evidence that property values will necessarily or certainly decline should the CAFO be built.

IV. Conclusion.

The neighbors' experts raised legitimate concerns regarding the operation of Sow 1. However, those experts conceded they could not be certain a nuisance will necessarily result if General Development is allowed to develop and operate

Sow 1. Moreover, while the neighbors' attorney argued the defense experts were biased toward the hog industry, the district court found those experts credible, at least to the extent their testimony cast doubt on whether Sow 1 would cause a nuisance.

In recent years, hog confinement operations have become more controversial as they grow in number and size. Our task here is a narrow one—we are asked to determine whether the neighbors have *678 proven an anticipatory nuisance. We agree with the district court they have not.

AFFIRMED.

All justices concur except [LARSON](#), J., who takes no part.

All Citations

749 N.W.2d 671

Footnotes

- 1 There are numerous defendants in this action: General Development L.L.C. a/k/a General Development Corp. and Kollasch Land and Livestock, Inc. are companies owned by Luke Kollasch and Charlie Kollasch. John Mertz owns the property where the proposed facilities are to be located. Donald R. Tietz, Kevin Berte, Dean Berte, Craig Berte, and Nicholas Berte entered into manure easement agreements with Kollasch Land and Livestock, Inc. which allow manure from the proposed facilities to be spread on their respective lands. Throughout our opinion, we will simply refer to the defendants as “General Development.”
- 2 These proposed facilities were identical in size.
- 3 Based on the record, it appears Sow 1 was expected to compost 260 sows and the rest would be gilts and preweaned pigs.

3 Cal.App.5th 248

Court of Appeal, Fourth District, Division 1, California.

Angel L. **MENDEZ** et al., Individually and
as Trustees, etc., Plaintiffs and Appellants,

v.

**RANCHO VALENCIA RESORT
PARTNERS, LLC**, Defendant and Respondent.

D067899

|

Filed 8/26/2016

Synopsis

Background: Property owners filed suit against neighboring **resort**, alleging that noise emanating from **resort** when it hosted outdoor events constituted a private nuisance, and seeking to enjoin **resort** from continuing to create noise that would travel onto owners' property. Following bench trial, the Superior Court, San Diego County, No. 37–2012–00053798–CU–PO–NC, [William S. Dato, J.](#), entered judgment in favor of **resort**. Owners appealed.

Holdings: The Court Of Appeal, [Aaron, J.](#), held that:

[1] **resort's** intermittent violation of **resort** services regulation of zoning ordinance did not constitute per se private nuisance entitling owners to injunction;

[2] “structure,” as used in noise ordinance provision, referred to contained enclosure, rather than anything constructed;

[3] any error in interpreting “structure” as a contained enclosure was harmless; and

[4] evidence support trial court's determination that noise was not disturbing, excessive, or offensive in violation of noise ordinance.

Affirmed.

Procedural Posture(s): On Appeal; Judgment.

West Headnotes (21)

[1] **Injunction** 🔑 Nature of remedy in general

Permanent injunction is a determination on the merits that plaintiff has prevailed on a cause of action against defendant and that equitable relief is appropriate.

[3 Cases that cite this headnote](#)

[2] **Appeal and Error** 🔑 Granting or refusing **Injunction** 🔑 Discretionary Nature of Remedy

Grant or denial of a permanent injunction rests within trial court's sound discretion and will not be disturbed on appeal absent a showing of a clear abuse of discretion.

[6 Cases that cite this headnote](#)

[] **Appeal and Error** 🔑 Injunctive Relief

To the extent trial court had to review evidence to resolve disputed factual issues and draw inferences from presented facts in exercising its discretion with respect to the granting or denying of a permanent injunction, Court of Appeal reviews such factual findings under a substantial evidence standard.

[4 Cases that cite this headnote](#)

[4] **Appeal and Error** 🔑 Injunctive Relief

On appeal from grant or denial of permanent injunction, Court of Appeal resolves all factual conflicts and questions of credibility in favor of prevailing party and indulges all reasonable inferences to support trial court's order.

[2 Cases that cite this headnote](#)

[5] **Appeal and Error** 🔑 Agreed or undisputed facts

Court of Appeal exercises independent judgment when addressing a pure question of law, such

as the interpretation and application of a statute where underlying facts are not in dispute.

[6] Nuisance 🔑 Nature and extent of injury or danger

Private nuisance cause of action requires plaintiff to prove an injury specifically referable to the use and enjoyment of his or her land. *Cal. Civ. Code* § 3481.

[8 Cases that cite this headnote](#)

[7] Nuisance 🔑 Special annoyance, injury, or danger to individuals

In order for a private person to maintain an action for a public nuisance, damage suffered by private party must be different in kind and not merely in degree from that suffered by other members of the public. *Cal. Civ. Code* § 3480.

[2 Cases that cite this headnote](#)

[More cases on this issue](#)

[8] Nuisance 🔑 Nature and elements of private nuisance in general

Nuisance 🔑 Nature and elements of public nuisance in general

Unlike “public nuisance,” which is an interference with the rights of the community at large, “private nuisance” is a civil wrong based on disturbance of rights in land. *Cal. Civ. Code* §§ 3480, 3481.

[2 Cases that cite this headnote](#)

[9] Nuisance 🔑 Nature and extent of injury or danger

To proceed on a private nuisance theory, plaintiff must prove an injury specifically referable to the use and enjoyment of his or her land; the injury, however, need not be different in kind from that suffered by the general public. *Cal. Civ. Code* § 3481.

[3 Cases that cite this headnote](#)

[10] Nuisance 🔑 Nature and extent of injury or danger

So long as the interference with the use and enjoyment of land is substantial and unreasonable, and as such would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to private nuisance. *Cal. Civ. Code* § 3481.

[15 Cases that cite this headnote](#)

[More cases on this issue](#)

[11] Nuisance 🔑 Nature and extent of injury or danger

Interference with the use and enjoyment of land need not directly damage the land or prevent its use to constitute private nuisance. *Cal. Civ. Code* § 3481.

[3 Cases that cite this headnote](#)

[12] Nuisance 🔑 Nature and elements of private nuisance in general

Elements of an action for private nuisance are: (1) plaintiff must prove an interference with his use and enjoyment of his property; (2) invasion of the plaintiff's interest in the use and enjoyment of the land must be substantial, that is, that it causes plaintiff to suffer substantial actual damage; (3) interference with the protected interest must not only be substantial, but it must also be unreasonable, that is, it must be of such a nature, duration, or amount as to constitute unreasonable interference with the use and enjoyment of the land. *Cal. Civ. Code* § 3481.

[29 Cases that cite this headnote](#)

[13] Nuisance 🔑 Nature and extent of injury or danger

With respect to substantial damage element of private nuisance claim, degree of harm is to be measured by the effect the invasion would have on persons of normal health and sensibilities living in the same community; if normal persons

in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him. *Cal. Civ. Code* § 3481.

[2 Cases that cite this headnote](#)

[More cases on this issue](#)

[14] Nuisance 🔑 Nature and extent of injury or danger

With respect to the unreasonableness element of private nuisance claim, primary test for determining whether the invasion is unreasonable is whether the gravity of harm outweighs the social utility of defendant's conduct, taking a number of factors into account. *Cal. Civ. Code* § 3481.

[1 Case that cites this headnote](#)

[15] Nuisance 🔑 Nature and extent of injury or danger

Standard for determining whether invasion is unreasonable, as element of private nuisance claim, is objective: question is not whether the particular plaintiff found the invasion unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable. *Cal. Civ. Code* § 3481.

[2 Cases that cite this headnote](#)

[16] Nuisance 🔑 Questions for jury

Elements of substantial damage and unreasonableness necessary to making out a claim of private nuisance are questions of fact that are determined by considering all of the circumstances of the case. *Cal. Civ. Code* § 3481.

[2 Cases that cite this headnote](#)

[17] Nuisance 🔑 Noise and pollution of atmosphere in general

Excessive and inappropriate noise may under certain circumstances constitute an interference

with the present enjoyment of land amounting to private nuisance. *Cal. Civ. Code* § 3481.

[4 Cases that cite this headnote](#)

[18] Nuisance 🔑 Noise and pollution of atmosphere in general

Nuisance 🔑 Grounds for Injunction

Resort's intermittent violation of **resort** services regulation of zoning ordinance, which addressed use of public address systems at **resort** facility, by **resort's** use of public address system that allowed words to be understood outside boundaries of **resort's** property did not constitute per se private nuisance that entitled neighboring property owners to an injunction prohibiting **resort** from continuing to create noise that would travel onto owners' property; zoning ordinance provision declaring that violation of ordinance was a public nuisance did not declare violation of ordinance to be a private nuisance, zoning ordinance did it provide private individuals with right to enforce ordinance through private equitable actions, and it was not court's responsibility to enjoin violation of ordinance because county had method of abating public nuisance if it so desired. *Cal. Civ. Code* §§ 3480, 3481.

[4 Cases that cite this headnote](#)

[19] Disorderly and Disruptive Conduct 🔑 Noise in general

"Structure," as used in noise ordinance provision stating that it was a prima facie violation of ordinance if a device used for the production or reproduction of sound was audible at a distance of 50 feet or more from the structure in which it was located, impliedly referred to a contained enclosure, rather than anything constructed, such that referenced device was required to be inside of the structure; provision was intended to prohibit the use of referenced device at such a significant volume inside a contained enclosure that sound nevertheless would escape enclosure and be heard 50 feet away from outer edge of enclosure.

[20] Appeal and Error 🔑 **Particular Cases**

Any error in interpreting “structure,” as used in noise ordinance provision stating that it was a prima facie violation of ordinance if a device used for the production or reproduction of sound was audible at a distance of 50 feet or more from the structure in which it was located, as impliedly referring to a contained enclosure, rather than anything constructed, was harmless in property owners' action against neighboring **resort**, alleging that noise emanating from **resort** when it hosted outdoor events constituted a private nuisance; provision created rebuttable presumption that operating a sound-producing device at a level audible at a distance of 50 feet or more from structure in which device was located constituted a violation of provision, and court rebutted presumption by concluding that **resort** did not operate sound system in a manner that would be disturbing to persons of normal sensitivity. Cal. Civ. Code § 3481.

[21] Nuisance 🔑 **Noise and pollution of atmosphere in general**

Evidence supported trial court's determination that noise emanating from **resort's** sound system during its hosted outdoor events was not disturbing, excessive, or offensive, and thus that **resort's** use of sound system did not amount to violation of noise ordinance entitling neighboring property owners to an injunction with respect to their claim that noise emanating from **resort** constituted a private nuisance; although some of owners' neighbors testified that they had at times been bothered by noise coming from **resort**, evidence indicated that one owner was not nearly as disturbed by the noise as other owner and that other owner was not a person of normal sensitivity. Cal. Civ. Code § 3481.

See 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 133 et seq.

****535** APPEAL from a judgment of the Superior Court of San Diego County, **William S. Dato**, Judge. Affirmed. (Super. Ct. No. 37–2012–00053798–CU–PO–NC)

Attorneys and Law Firms

Burkhardt & Larson, **Philip Burkhardt**, **Rancho** Santa Fe, and **Francisco Garcia, Jr.** for Plaintiffs and Appellants.

Cooley, **Steven M. Strauss** and **Dennis C. Crovella**, San Diego, for Defendant and Respondent.

AARON, J.

***253** I.

INTRODUCTION

Plaintiffs Angel L. and Linda **Mendez**¹ appeal a judgment in favor of defendant **Rancho Valencia Resort Partners, LLC**. At the conclusion of a bench trial, the trial court entered judgment in favor of defendant on plaintiffs' action for private nuisance.

The case arises from a dispute over the reasonableness of the level of noise generated during outdoor festivities held at the **Rancho Valencia Resort** (the **Resort**). Plaintiffs, who share a property line with the **Resort**, became frustrated with the noise emanating from the **Resort** when it hosted outdoor events on a lawn created for that purpose. Plaintiffs filed suit, alleging that the **Resort's** outdoor events constituted a private nuisance, and seeking to enjoin the **Resort** from continuing to create noise that would travel onto plaintiffs' property and disturb them there.

***254** The trial court appreciated the difficulties inherent in this situation, but after a trial on the merits, concluded that the **Resort's** outdoor events did not amount to a private nuisance. The trial court explained:

“The history of this case reflects the principle that where neighbor disputes are concerned, a judicial resolution is rarely the preferable solution. This is because a court decision can only articulate a rule that marks a line between what one party is responsible for, and what it is not responsible for. Such a black-and-white approach is ill-suited to the multi-faceted subtleties that attend a neighbor relationship, which often require an ongoing series of give-

and-take compromises on a variety of subjects. Once a legal rule is applied to the facts of a particular case, there is often little wiggle room left to smooth the frictions that inevitably arise between parties who continue to share a common property boundary.

“In this case, plaintiffs elected not to pursue other avenues for addressing the dispute. In particular, they abandoned their earlier attempts to obtain relief through available County administrative procedures. They likewise chose not to join other homeowners in the neighborhood, who continued to work informally with the **resort** owners despite not being completely satisfied with the progress. By filing this lawsuit and taking the matter to trial, plaintiffs effectively drew a line in the sand. But forced to choose, the Court concludes that the noise in this case is not so substantial and unreasonable ****536** as to fall on the side of the line that would require issuance of the injunction sought by plaintiffs.”

Despite plaintiffs' contentions that the trial court failed to properly address purported violations of various San Diego County ordinances, we conclude that plaintiffs have demonstrated no reversible error in the trial court's decision. We therefore affirm the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

The **Resort**, a five-star **resort** property in the **Rancho** Santa Fe area of San Diego County, first opened in 1989. The property occupies approximately 45 acres in an otherwise residential neighborhood, consisting of large homes on large lots. A central building on the property houses a guest reception area, restaurant, bar, ballroom and terrace balcony. To one side of this building is an area called the Croquet Lawn, which consists of an expanse of grass. This area can accommodate large outdoor events at the **Resort**, such as weddings.

***255** Plaintiffs own a 6,800 square foot residence located on a lot that borders the **Resort** property. Plaintiffs' home is approximately 600 feet from the Croquet Lawn. Plaintiffs were aware of the **Resort** and its location in reference to their home at the time they purchased the home in 2000. Within weeks of buying the home, plaintiffs became aware that the **Resort** held outdoor events on the Croquet Lawn.

Beginning in 2004, Linda began complaining to San Diego County (County) officials regarding noise coming from the **Resort** property. In a March 2004 e-mail, Linda complained that the **Resort** was “ ‘not authorized to have outdoor events with amplified music or voices, which could adversely affect the neighborhood.’ ” Linda cited **Resort** Services Regulation section 6403 (**Resort** Services section 6403), which is contained in the County zoning ordinance (Zoning Ordinance), in complaining that the **Resort** “ ‘can not [sic] use a “public address system at such a volume as to allow words to be understood outside the boundaries of the lot or parcel on which the activity is located.” ’ ”

The record does not contain information as to precisely how Linda's 2004 complaint was resolved. Linda testified that she never received a response from the County, but documentary evidence demonstrates that when Linda again complained in 2006, a code enforcement officer responded that Linda's complaint regarding the “ ‘same issues’ ” had been investigated in 2004. When Linda continued to press the issue, the code enforcement officer referred Linda to a 2004 e-mail that had been sent to Linda, which stated that the enforcement department had determined “ ‘that weddings and other outdoor events are an allowable accessory use to a **resort**.’ ”² In 2007, the County issued a formal administrative decision regarding Linda's complaint that the **Resort** was in violation of the zoning ordinance, concluding that “ ‘wedding ceremonies are a reasonable and expected accessory use in a **resort**’ ” and that the **Resort** was not in violation of the Major Use Permit issued to it in 1986.

The record indicates that Linda took no further action to appeal the County's administrative zoning decision. Linda also did not take any action with respect to the County's noise ordinance, despite her concern that events at the **Resort** were in violation of noise restrictions. Linda explained ****537** that she was not as troubled by the noise from the **Resort** at that time because the frequency of outdoor events at the **Resort** had diminished.

In May 2010, defendant purchased the **Resort** from its previous owners. Upon learning about a proposed renovation of the property, plaintiffs and ***256** other neighbors became concerned that there would be more frequent outdoor events at the **Resort**. In November 2011, there was a meeting attended by four sets of neighbors to the **Resort** and David Essakow, one of the **partners** who owned the **Resort**. Two of the four sets of neighbors were principally concerned

with events taking place on the Croquet Lawn. Essakow told the group that he could not make any commitments before speaking with the **Resort's** lawyers. The group agreed to meet again approximately 30 days later.

In January 2012, the **Resort** closed for renovations. During the eight-month renovation period, representatives of the **Resort** met with surrounding neighbors in several follow-up meetings. The **Resort's** representatives indicated to the neighbors that they intended to include noise mitigation measures as part of the renovations. Plaintiffs did not attend these meetings because they apparently disagreed with the approach that their neighbors were taking in addressing concerns about the **Resort**. Instead, plaintiffs filed this lawsuit on May 22, 2012, claiming that sound from events at the **Resort** amounted to a private nuisance.

The **Resort** reopened in September 2012. The renovations that had taken place at the property included a number of measures designed to mitigate the effect of noise from the Croquet Lawn events on neighboring property owners, including plaintiffs. The **Resort** hired a consulting company, URS Corporation (URS) to analyze sound at the **Resort** and come up with methods to attempt to address excess sound. For example, the **Resort** mandated that all outdoor events end at 10:00 p.m. It was determined that a stage area located on the Croquet Lawn would be positioned so that sounds would be directed away from plaintiffs' property. In addition, the **Resort** purchased a distributive sound system and a removable sound barrier to be installed behind the stage, which would be used during amplified events. Further, regulations at the **Resort** required that members of live bands use earpieces rather than utilize speakers directed back toward the band.

The **Resort** began hosting wedding receptions and other outdoor events on the Croquet Lawn when it reopened in September 2012. The **Resort** continued to adjust its noise mitigation efforts and add new ones as more events were held. For example, sometime after the renovations were completed, a subwoofer system was added to reduce the level of bass sounds.

In addition to taking these noise mitigation measures, the **Resort** implemented a sound monitoring system for all Croquet Lawn events. Sound decibel monitors were installed along the property line between the **Resort** and plaintiffs' property. For events in which amplified sound was being used, the **Resort** utilized the services of URS to monitor real

time sound level *257 readings. URS would communicate with an employee of a different company, Sound Image, which operated the **Resort's** sound system for events. Using this system, when URS would detect sound levels that exceeded noise levels permitted by the County's noise ordinance, a URS employee would direct a Sound Image employee to reduce the volume of the sound system.

After the **Resort** reopened, plaintiffs had sound monitors placed on a second story deck at their residence. Plaintiffs' sound monitors were thus positioned at a higher **538 level than the sound monitors utilized by the **Resort** at the property line. Plaintiffs sought a preliminary injunction to enjoin the **Resort** from "generating any noise whatsoever on [the **Resort's** property] in excess of the statutory limits imposed by San Diego County Code of Regulatory Ordinances Section 36.404." In support of their motion for a preliminary injunction, plaintiffs presented to the trial court evidence that the decibel readings from their sound monitors at times exceeded the noise levels permitted by the County's noise ordinance.³ Based on this evidence, in December 2012, the trial court issued a preliminary injunction prohibiting the **Resort** " 'from generating any noise whatsoever on defendants' property located at 5926 **Valencia** Circle, **Rancho Santa Fe**, California in excess of the statutory limits imposed by San Diego County Code of Regulatory Ordinances Section 36.404 and 36.414.' " ⁴

In response to the preliminary injunction, the **Resort** declined to book events on the Croquet Lawn until May 2013. In the meantime, the **Resort** continued to take measures intended to mitigate the noise effects from events that the **Resort** planned to hold on the Croquet Lawn. For example, after January 2013, the **Resort** tested its distributive sound system a number of times prior to holding events. In May 2013, the **Resort** again began holding events on the Croquet Lawn that involved some form of amplified sound. The majority of outdoor events held at the **Resort** are weddings, which often occur during the summer months. The total duration of these events averaged approximately eight hours per month.

Despite the hosting of outdoor events at the **Resort** after the preliminary injunction was in place, plaintiffs never filed a motion claiming that the **Resort** had violated the preliminary injunction.

*258 In their complaint against the **Resort**, plaintiffs asserted four causes of action: (1) private nuisance; (2) negligence; (3) intentional infliction of emotional distress;

and (4) negligent infliction of emotional distress. All of plaintiffs' claims arose from their contention that the noise generated from the **Resort's** outdoor events constituted a private nuisance.

The litigation between the parties progressed to a bench trial. At trial, plaintiffs focused on their nuisance claim. Plaintiffs sought a permanent injunction preventing the **Resort** from using any outdoor sound amplification system or mechanical music from drums, horns, or other instruments. In seeking an injunction for a private nuisance, plaintiffs relied, in part, on alleged violations of San Diego County ordinances, including regulations pertaining to **resorts**, specifically, found in the County's Zoning Ordinance, and regulations included in the County's noise ordinance, which is part of the County's Regulatory Ordinances.

The court heard testimony from 13 witnesses, including plaintiffs, certain of plaintiffs' neighbors, two experts for the plaintiffs, a URS consultant, and representatives ****539** of the **Resort**. The court also listened to clips edited from audio recordings of specific events, selected by plaintiffs' attorney. In addition, the trial judge personally visited both the **Resort**, as well as plaintiffs' home, during a wedding reception held on the Croquet Lawn, at which the **Resort** utilized its amplified sound system (the court's site visit). The judge listened to the sounds that could be heard from plaintiffs' balcony.⁵

The evidence demonstrated that in 2014, there was at least one event held every weekend in July and August, and at least 17 events held between January 2014 and September 12, 2014. There were more than 30 outdoor events held on the Croquet Lawn between the beginning of 2013 and fall of 2014, when the trial took place.

At trial, Linda testified that it was her belief that the **Resort** "is not allowed to host outdoor events" at all. Linda testified that she became upset whenever she could hear sound from an event at the **Resort**. She acknowledged, however, that outdoor events took place for, at most, approximately eight hours per month, and conceded that she did not always hear noise during the hours in which the events took place.

***259** Linda acknowledged that in 2014, she began taking notes of her perceptions of the noise emanating from the events at the **Resort**. The trial court had access to Linda's notes. Linda had taken notes about the event that was held on the night of the court's site visit. The trial court found a marked contrast between (a) Linda's subjective expressions

of what she experienced, as reflected in her notes, and (b) the objective sound measurements from that night and the court's own observations about the noise emanating from the event.

Linda testified that the event held during the court's site visit was "one of the quietest" that the **Resort** had hosted. She reflected on her notes from the evening, and testified that although the sound was fairly typical of other events between the 7:00 p.m. and 8:00 p.m. hours, at some point "things were turned down," and then she "could hardly hear the voices." However, the objective sound measurements, which were not in dispute, demonstrated that the event registered between 46 and 48 decibels on average per hour. These sound measurements were "typical of the sound levels for other Croquet Lawn events about which Linda **Mendez** complained."

Angel testified that he could not identify a single Croquet Lawn event that had caused him to initiate suit against the **Resort**. He acknowledged that his wife's stress about the noise contributed to his own stress, and conceded that he had testified at his deposition that at least with respect to one particular event, any stress he had suffered had resulted from the fact that Linda " 'was very upset and distraught and it upsets [the] harmony of the home.' " ****540** Angel also admitted that he was not claiming to have suffered emotional distress resulting from any specific event at the **Resort** during 2014. Linda acknowledged ****540** that Angel was not as bothered by the noise from the **Resort** as she was, and conceded that he had testified that only "a handful of events" had ever disturbed him.

After the bench trial, the court issued a 26–page statement of decision in which it concluded that an injunction pertaining to the events on the **Resort's** Croquet Lawn was not warranted. Specifically, the court found that "the outdoor events in question—typically wedding receptions and similar festivities—have not occasioned any systematic violation of applicable local regulations," and "[t]o the extent there have been any violations, they are not so substantial and unreasonable as to constitute a private nuisance that requires issuance of an injunction." The trial court gave considerable weight to the evidence that demonstrated that "at no time did Croquet Lawn events hosted by [the **Resort**] generate noise exceeding the statutory limit [in the County's ***260** noise ordinance]." ***260** The trial court therefore found in favor of the **Resort** on plaintiffs' private nuisance cause of action, and further determined that plaintiffs' "ancillary claims provide no independent basis for relief."

Plaintiffs filed a timely notice of appeal from the trial court's judgment.

III.

DISCUSSION

Plaintiffs contend that the trial court erred in two respects in declining to issue an injunction prohibiting the **Resort** from emitting noise from its property that is audible to plaintiffs on their property. Specifically, plaintiffs contend that the trial court (1) erroneously failed to enjoin the **Resort's** purported violations of **Resort** Services section 6403, which is part of the County's Zoning Ordinance, and (2) erroneously failed to enjoin the **Resort's** purported violations of the County's Noise Ordinance. They request that this court order the trial court to issue “a permanent injunction prohibiting the **Resort** from violating either the Zoning Ordinance or Noise Ordinance.”

We conclude that the trial court did not err in its determination of the issues raised in this action and therefore affirm the judgment entered in favor of the **Resort**.

A. Legal standards on review

[1] [2] The standards under which we review the trial court's judgment are well settled. “ ‘A permanent injunction is a determination on the merits that a plaintiff has prevailed on a cause of action ... against a defendant and that equitable relief is appropriate.’ [Citation.] The grant or denial of a permanent injunction rests within the trial court's sound discretion and will not be disturbed on appeal absent a showing of a clear abuse of discretion.” (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 390, 33 Cal.Rptr.3d 644 (*Horsford*); see also *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 912, 117 Cal.Rptr.2d 631 (*Shapiro*) [the decision to issue a permanent injunction will not be disturbed on appeal in the absence of a showing of clear abuse of discretion by the trial court].)

[3] [4] “ ‘[T]o the extent the trial court had to review the evidence to resolve disputed factual issues, and draw inferences from the presented facts [in *261 exercising its discretion with respect to the granting or **541 denying of a permanent injunction], [we] review such factual findings under a substantial evidence standard.’ [Citation.] We resolve all factual conflicts and questions of credibility in favor of

the prevailing party and indulge all reasonable inferences to support the trial court's order.” (*Horsford, supra*, 132 Cal.App.4th at p. 390, 33 Cal.Rptr.3d 644.)

[5] However, we exercise independent judgment when addressing a pure question of law, such as the interpretation and application of a statute where the underlying facts are not in dispute. (*Shapiro, supra*, 96 Cal.App.4th at p. 912, 117 Cal.Rptr.2d 631.)

Whether the **Resort's** activities have resulted in “any systematic violation” of the regulations in question is a mixed question of law and fact. To the extent that the trial court's determination that there were no such violations relies on factual findings, we review those findings for substantial evidence. To the extent that the court's determination in this regard is premised on the court's interpretation of the relevant regulations, we review such an interpretation de novo. Finally, with respect to the trial court's conclusion that no injunction is appropriate, we review that conclusion for an abuse of discretion.

B. Relevant law regarding private nuisances

Plaintiffs sought an injunction against the **Resort** based on their cause of action asserting that the **Resort's** outdoor events in which amplified sound is utilized constitute a private nuisance. The legal standards applicable to nuisance claims are therefore relevant to this appeal.

In 1872, the California Legislature codified a number of common law principles regarding the law of nuisance. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1104, 60 Cal.Rptr.2d 277, 929 P.2d 596.) For example, the Legislature defined a “nuisance” in *Civil Code* section 3479 as anything that is “injurious to health, ... or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway.”

A nuisance is considered a “public nuisance” when it “affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.” (*Civ. Code*, § 3480.) A “private nuisance” is defined to include any nuisance not covered by the definition of a public *262 nuisance (*Civ. Code*, § 3481), and also includes

some public nuisances. (47 Cal.Jur.3d (2010) Nuisances, § 27, p. 303 [a nuisance may be both public and private under certain circumstances].) “In other words, it is possible for a nuisance to be public and, from the perspective of individuals who suffer an interference with their use and enjoyment of land, to be private as well.” (*Adams v. MHC Colony Park L.P.* (2014) 224 Cal.App.4th 601, 610, 169 Cal.Rptr.3d 146 (*Adams*)).

[6] [7] “A private nuisance cause of action requires the plaintiff to prove an injury specifically referable to the use and enjoyment of his or her land.” (*Adams, supra*, 224 Cal.App.4th at p. 610, 169 Cal.Rptr.3d 146.) Pursuant to Civil Code section 3501, a plaintiff seeking to remedy a private nuisance is limited to a civil action or abatement.⁸

****542** [8] [9] “ ‘Unlike public nuisance, which is an interference with the rights of the community at large, private nuisance is a civil wrong based on disturbance of rights in land.... [T]o proceed on a private nuisance theory the plaintiff must prove an injury specifically referable to the use and enjoyment of his or her land. The injury, however, need not be different in kind from that suffered by the general public.’ ” (*Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 302, 84 Cal.Rptr.3d 75 (*Monks*)).

[10] [11] “ ‘Examples of interferences with the use and enjoyment of land actionable under a private nuisance theory are legion. “So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance.” ... An interference need not directly damage the land or prevent its use to constitute a nuisance; private plaintiffs have successfully maintained nuisance actions against airports for interferences caused by noise, smoke and vibrations from flights over their homes ... and against a sewage treatment plant for interference caused by noxious odors.’ ” (*Monks, supra*, 167 Cal.App.4th at p. 302, 84 Cal.Rptr.3d 75.)

[12] In *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938, 55 Cal.Rptr.2d 724, 920 P.2d 669 (*San Diego Gas & Electric Co.*), the Supreme Court outlined the elements of an action for private nuisance. First, the plaintiff must prove an interference with his use and enjoyment of his property. (*Ibid.*) Second, “the invasion of the plaintiff’s interest in the use and enjoyment of the land [must be] substantial, i.e., that it cause[s] the plaintiff to suffer ‘substantial actual damage.’ ” (*Ibid.*) Third, “[t]he

interference with ***263** the protected interest must not only be substantial, but it must also be unreasonable’ [citation], i.e., it must be ‘of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.’ ” (*Ibid.*, italics omitted.)

The requirements of *substantial damage* and *unreasonableness* are not inconsequential. These requirements stem from the law’s recognition that:

“ ‘Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of “give and take, live and let live,” and *therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person’s conduct has some detrimental effect on another.* Liability ... is imposed in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation.’ ” (****543** *San Diego Gas & Electric Co., supra*, 13 Cal.4th at pp. 937–938, 55 Cal.Rptr.2d 724, 920 P.2d 669, quoting *Rest.2d Torts*, § 822, com. g, p. 112, italics added.)

[13] [14] [15] Both elements are to be judged by an objective standard. Thus, with respect to the substantial damage element, the degree of harm is to be measured by the “effect ... the invasion [would] have on persons of normal health and sensibilities living in the same community.” (*San Diego Gas & Electric Co., supra*, 13 Cal.4th at p. 938, 55 Cal.Rptr.2d 724, 920 P.2d 669.) “ ‘If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him.’ ” (*Ibid.*) With respect to the unreasonableness element, “[t]he primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant’s conduct, taking a number of factors into account. [Citation.] Again the standard is objective: the question is not whether the particular plaintiff found the invasion unreasonable, but ‘whether reasonable persons generally, looking at

the whole situation impartially and objectively, would consider it unreasonable.’ [Citation.] ... ‘Fundamentally, the unreasonableness of intentional invasions is a problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case.’ ” (*Id.* at pp. 938–939, 55 Cal.Rptr.2d 724, 920 P.2d 669.)

[16] As is apparent from the above standards, the elements of substantial damage and unreasonableness necessary to making out a claim of private ***264** nuisance are questions of fact that are determined by considering all of the circumstances of the case. (*San Diego Gas & Electric Co.*, *supra*, 13 Cal.4th at pp. 938–939, 55 Cal.Rptr.2d 724, 920 P.2d 669.)

[17] It is clear that “[e]xcessive and inappropriate noise may under certain circumstances constitute an interference with the present enjoyment of land amounting to a nuisance.” (*Schild v. Rubin* (1991) 232 Cal.App.3d 755, 764, 283 Cal.Rptr. 533 fn. omitted, citing *Wilson v. Interlake Steel Co.* (1982) 32 Cal.3d 229, 232, 185 Cal.Rptr. 280, 649 P.2d 922 [permitting plaintiffs to move forward with nuisance action, but not trespass action, in case involving complaint regarding noise from steel fabricating plant]; *Morton v. Superior Court* (1954) 124 Cal.App.2d 577, 586, 269 P.2d 81 [injunction preventing quarry from operating was too broad to address nuisances from traffic, excessive noise and dust; trial court should have enjoined the objectionable practices and imposed conditions to correct them]; *Wilms v. Hand* (1951) 101 Cal.App.2d 811, 812, 815–816, 226 P.2d 728 [trial court did not abuse its discretion in issuing preliminary injunction to prevent dogs in dog hospital from “ ‘annoying and disturbing the peace and comfort’ ” of plaintiffs, owners of neighboring motel].) However, it is equally clear that “*not every activity* which is ‘offensive to the senses [and] interferes with the comfortable enjoyment of life’ (Civ. Code, § 3479) is a nuisance.” (*Schild*, *supra*, at p. 764, 283 Cal.Rptr. 533, italics added.)

C. Trial court did not err in failing to enjoin the purported “Violation of the Zoning Ordinance”

[18] Plaintiffs’ first contend that they are entitled to equitable relief because they are “affected by the **Resort’s** unlawful use of its property.” The purported “unlawful use of [the **Resort’s**] property” is the violation of **Resort** Services section 6403. **Resort** Services section 6403 is part of the County’s **Resort** Services Regulations, which are found in Part Six, “General ****544** Regulations,” of the San Diego County Zoning Ordinance. **Resort** Services section 6400 provides the title

and purpose of these specific provisions: “The provisions of Section 6400 through 6449, inclusive, shall be known as the **Resort** Service Regulations. The purpose of these provisions is to ensure that transient habitation uses providing **resort** services meet minimum standards of habitability and do not adversely impact surrounding property.”

Resort Services section 6403 contains a provision addressing the use of public address systems and lighting at a **resort** facility, providing in full:

“6403 IMPACT ON SURROUNDING PROPERTY.

***265** “a. Public Address Systems. Public address systems shall not be used by **resort** services at such a volume as to allow words to be understood outside the boundaries of the lot or parcel on which the activity is located.

“b. Outdoor Lighting. Outdoor lighting used by **resort** services uses shall be adjusted to reflect light away from roads and driveways and from adjoining property, except that a bona fide system of street lights may be used if it does not cause light to be reflected on adjoining property.”

The trial court made a finding that “the public address system used by the **Resort** on the Croquet Law operates at a volume that allows words to be understood outside the boundaries of the **Rancho Valencia** property.”⁹ Plaintiffs seize on this finding to assert that the trial court “improperly overlooked the clear violation of the Zoning Ordinance simply because ‘the evidence demonstrates that the **Resort** has complied with the County Noise Ordinance.’ ” Plaintiffs insist that the trial court failed to independently assess whether the violation of the County’s Zoning Ordinance, as opposed to the County’s Noise Ordinance, constituted a nuisance. In making this argument, plaintiffs suggest that any violation of the Zoning Ordinance constitutes a nuisance per se. Plaintiffs’ analysis is incorrect.

Plaintiffs rely on section 7703, subdivision (e) of the Zoning Ordinance to support their contention that the court’s finding of a violation of **Resort** Services section 6403 required the court to issue a permanent injunction prohibiting the **Resort** from using its amplified sound system on its property.¹⁰ Zoning Ordinance section 7703, subdivision (e) provides:

“Violation is A Public Nuisance. Any building or structure erected, constructed, altered or maintained and/or any use of property contrary to the provisions of these regulations shall be and the same is hereby declared to be unlawful

and a ****545** public nuisance, and any failure, refusal or neglect to obtain a permit as required by the terms of this ordinance shall be prima facie evidence of the fact that a nuisance has been committed in connection with the erection, construction, alteration or maintenance of any building or structure erected, ***266** constructed, altered or maintained or used contrary to the provisions of this ordinance. The public nuisance may be abated in accordance with the Uniform Public Nuisance Abatement Procedures contained in Chapter 2, Division 6, Title 1 (commencing with Section 16.201) of the San Diego County Code or County Counsel shall, upon order of the Board of Supervisors immediately commence necessary proceedings for the abatement, removal and/or enjoinder thereof in the manner provided by law.”

As is clear from this provision, Zoning Ordinance section 7703 does not declare any violation of the Zoning Ordinance to be a *private nuisance*, nor does it provide private individuals with a right to enforce provisions of the Zoning Ordinance through private equitable actions. Rather, Zoning Ordinance section 7703, subdivision (e) identifies the method by which a violation of the Zoning Ordinance is to be addressed—i.e., in accordance with the Uniform Public Nuisance Abatement Procedures contained in the San Diego County Code or by way of County Counsel commencing proceedings to abate or enjoin the nuisance “in the manner provided by law.” The provision does not authorize private persons to bring a private civil action to enforce the Zoning Ordinance.

Nevertheless, plaintiffs suggest that because the County has “clearly set the legislative policy here,” it is “the *court's* responsibility to enforce that policy” (italics added), presumably in plaintiff's private nuisance action, because, according to plaintiffs, “[t]he County does not have the authority to issue an injunction.” However, the County clearly has a method of abating a public nuisance if it should so desire, pursuant to its authority to engage in abatement procedures specified in the San Diego County Code. For example, Zoning Ordinance section 7703, subdivision (e) refers to the San Diego County Uniform Public Nuisance Abatement Procedures (the UPNAP), found in San Diego County Code of Regulatory Ordinances, Title 1, Division 6, Chapter 2. The UPNAP begins with the following introductory language:

“This chapter shall be known and cited as the ‘Public Nuisance Abatement Procedure.’ It is enacted pursuant to [Government Code Section 25845](#) and is intended to

establish an administrative procedure for the abatement of a public nuisance resulting from a violation of any statute, regulation or ordinance the County enforces.” (San Diego County Code of Reg. Ord., § 16.201.)

Pursuant to the UPNAP, a “County Abatement Officer” is the “County officer responsible for enforcement of the County ordinances being violated and who declares a violation to be a public nuisance.” (San Diego County Code of Reg. Ord., § 16.202(a).) The UPNAP also provides a detailed procedure for instituting and proceeding with an administrative abatement of ***267** a violation that is deemed to be a public nuisance. (See San Diego County Code of Reg. Ord., §§ 16.202.5–16.218.)

Further, as Zoning Ordinance section 7703 acknowledges, a county or municipality seeking to enforce the policies set forth in its ordinances clearly also has the authority *to seek an injunction itself* if it believes that the policies it has set are being violated and other methods of remediation have failed. (See, e.g., [County of Tulare v. Nunes](#) (2013) 215 Cal.App.4th 1188, 1193, 155 Cal.Rptr.3d 781 [county ****546** brought action for injunctive relief seeking to require defendants to discontinue nonconforming use of the property]; [County of Butte v. Bach](#) (1985) 172 Cal.App.3d 848, 854, 218 Cal.Rptr. 613 [county filed action to enjoin defendant from using house in violation of zoning ordinance].)

Thus, even assuming that a violation of **Resort** Services section 6403 constitutes a public nuisance pursuant to Zoning Ordinance section 7703, plaintiffs' suggestion that the court has a responsibility to enjoin any violation of a zoning ordinance raised in a private nuisance action because there is no other method to “enforce [the County's legislative] policy,” is baseless. The relevant ordinances do not leave a vacuum of remedies for the violation of the Zoning Ordinance, such that the only available remedy is for a trial court to enjoin such a violation of the Zoning Ordinance through a private nuisance action filed by private individuals.

Further, plaintiffs' contention that they are “*entitled* to ... equitable relief” as a result of the **Resort's** violation of **Resort** Services section 6403 fails to recognize the nature of the claim that plaintiffs brought against the **Resort**—i.e., a claim for private nuisance. While Zoning Ordinance section 7703 states that unlawful use of property constitutes a *public* nuisance, it does not declare that any violation of the Zoning Ordinance is a per se *private* nuisance entitling a private party to an injunction. Absent any such statement that would make a

violation of **Resort** Services section 6403 a private nuisance, a private party seeking to rely on a violation of the Zoning Ordinance as the basis for a private nuisance cause of action must still establish that the violation in question meets the elements of a private nuisance.

Plaintiffs' reliance on *Sapiro v. Frisbie* (1928) 93 Cal.App. 299, 270 P. 280 (*Sapiro*) for the proposition that they are entitled to a private cause of action based on a violation of a zoning ordinance, and are thereby entitled to an injunction to abate the zoning ordinance violation, is misplaced. In *Sapiro*, the court considered whether a private individual could obtain injunctive relief and damages against a funeral home that was operating without a permit in a residentially zoned district. (*Id.* at p. 301, 270 P. 280.) The *Sapiro* court *268 concluded that the plaintiffs could state such an action, *apart* from any claim that the funeral home constituted a nuisance:

“[W]e emphasize the proposition that the right of the plaintiff herein to claim and recover damages for any damage they may have sustained or may sustain as a result of the acts of the defendants in doing that which the ordinance prohibits, proceeds, *not from or upon the theory that the acts complained of constitute a common-law nuisance, but upon the theory that, the defendants having violated a right specially given to the plaintiffs by the law, and thus have caused damage to their real property, the latter are entitled to have redressed by way of compensatory relief the wrong so committed.*” (*Id.* at p. 311, 270 P. 280, italics added.)

We are not persuaded that a local ordinance's regulation of certain uses of property, together with the application of the maxim that all wrongs have a remedy, is a proper basis for a claim of an implied right of action in favor of private individuals in situations in which an ordinance, such as the one at issue here, specifically provides for enforcement by public officials. Indeed, more recent cases that have considered the question have determined that a zoning violation *cannot* be enjoined by a private individual in the absence of proof that the violation also constitutes a private nuisance, has caused the individual special damages of a kind different from the general **547 public, or that the ordinance was enacted to protect the particular welfare of a community of which the private individual is a member. (See, e.g., *Major v. Silna* (2005) 134 Cal.App.4th 1485, 1498, 36 Cal.Rptr.3d 875 [“citizens of a municipality ordinarily have limited standing to enjoin violations of a municipal ordinance, absent authorization in the ordinance itself,” and thus individuals must show specialized personal injury in

order to enjoin violation of ordinance]; *Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community* (1986) 178 Cal.App.3d 1147, 1152–1153, 224 Cal.Rptr. 380 [“The law allows a private individual to enjoin a zoning violation as a nuisance when the individual suffers a ‘special injury to himself in person or property of a character different in kind from that suffered by the general public’ ” or “the individual is a ‘member of the community for whose particular welfare the ordinance was enacted’ ”]; *Taliaferro v. Salyer* (1958) 162 Cal.App.2d 685, 691, 328 P.2d 799 [“[A] violation [of a local building code] would not necessarily give a private individual a cause of action therefor. In order to state a cause of action based upon a violation of the building code, plaintiff must show that he has suffered some exceptional damage other than that suffered by the public generally”]; *Stegner v. Bahr & Ledoyen, Inc.* (1954) 126 Cal.App.2d 220, 231, 272 P.2d 106 [“Failing to prove that the operation of the quarry constitutes a nuisance and failing to prove that the operation of the quarry results in legal injury to them, plaintiffs are in effect seeking, solely and simply, to enforce a penal law. No such remedy is available to them”]; *McIvor v. Mercer-Fraser Co.* (1946) 76 Cal.App.2d 247, 253, 172 P.2d 758 [“The record discloses evidence that appellants were guilty of willfully *269 creating and maintaining a dangerous and deleterious condition on their premises, thereby substantially impairing the use and enjoyment of respondents' adjoining premises”]; *Carter v. Chotiner* (1930) 210 Cal. 288, 291–292, 291 P. 577 [in action seeking to enjoin the operation of a cemetery where local ordinance required a permit that defendants did not possess, mere violation of ordinance was not a sufficient basis on which to grant the plaintiffs injunctive relief: “It is elementary that violation of a penal ordinance does not of itself create a private nuisance *per se*, and it is likewise eleme[n]tary that in the absence of special injury an injunction will not be granted on the application of a private individual merely to prevent violation of a penal statute”].)

After considering the enforcement provisions of the Zoning Ordinance, and considering other cases holding that a zoning violation cannot be enjoined by a private individual through a private nuisance action in the absence of proof that the violation constitutes a private nuisance, we reject the argument that *Sapiro* establishes that plaintiffs are necessarily entitled to an injunction on the basis of any demonstration of a violation of the Zoning Ordinance.¹¹

*270 **548 Thus, we conclude that even in the face of a finding of the existence of violations of **Resort** Services section 6403 on the part of the **Resort** by its use of a public

address system that allows words to be understood outside the boundaries of the **Resort's** property, plaintiffs still must demonstrate that the use of this public address system in this way constitutes an interference with plaintiffs' use and enjoyment of their land that is *substantial and unreasonable*. Again, both the substantiality and unreasonableness of the claimed interference are to be judged by objective standards—i.e., what effect would the invasion have on persons of normal health and sensibilities. (See *Monks*, *supra*, 167 Cal.App.4th at p. 303, 84 Cal.Rptr.3d 75.) In this regard, the trial court determined that the use of the public address system in a manner that permitted words to be heard on plaintiffs' property during certain outdoor events held on the Croquet Lawn was not so substantial and unreasonable, to a person of normal sensitivities, to amount to a private nuisance. Plaintiffs do not contend that this portion of the trial court's decision was erroneous; rather, their position on appeal is that the **Resort's** intermittent violation of **Resort** Services section 6403, as contained in the Zoning Ordinance, constitutes a per se private nuisance that *entitles* them to an injunction. For the reasons stated, the statutory framework does not support plaintiffs' position. We therefore reject plaintiffs' contention that the court is obligated, in this private nuisance action, to abate the alleged public nuisance stemming from the court's finding that the **Resort** has technically violated **Resort** Services section 6403.

*D. The trial court did not err in declining to “Enjoin the **Resort's** Violation of the Noise Ordinance”*

Plaintiffs also suggest that the trial court erred in declining to issue an injunction based on the court's analysis of the Noise Ordinance contained in Title 3, Division 6, Chapter 4 of the San Diego County Code of Regulatory Ordinances (Noise Ordinance).

****549** The trial court made a determination that even though the “noise from Croquet Lawn events is clearly audible to the **Mendezes** and other neighbors in the surrounding area,” the noise “*is not unreasonably disturbing* within the meaning of the County Noise Ordinance.” (Italics added.) In other words, the court found that the noises emanating from the **Resort's** property during outdoor events held on the Croquet Lawn do not constitute a violation of the Noise Ordinance. Plaintiffs argue that the trial court was wrong in concluding that the noise from the **Resort's** outdoor events does not violate the Noise Ordinance and contend that if the trial court had properly interpreted and applied Noise Ordinance section 36.414, it would have issued an injunction in their favor prohibiting the **Resort** from violating the Noise Ordinance.

***271** Plaintiffs make two arguments with respect to the trial court's application of Noise Ordinance section 36.414 (Section 36.414) to this case. Plaintiffs first assert that the trial court erred in its interpretation of Section 36.414, subdivision (c)(3). Section 36.414, subdivision (c)(3) provides that it is “a prima facie violation of section 36.414(c)(2)(A) if a device for the production or reproduction of sound that is being operated, used or played is plainly audible at a distance of 50 feet or more from the building, structure or vehicle in which it is located.” According to plaintiffs, the **Resort's** use of an amplification system on the Croquet Lawn necessarily constitutes a violation of the Noise Ordinance because the sound is audible at a distance more than 50 feet from either the stage, or the Croquet Lawn itself. They appear to contend that because the noise from the events on the Croquet Lawn comes from a device used to reproduce sound, and is audible more than 50 feet from where the device is housed, they are necessarily entitled to an injunction to abate this violation of the Noise Ordinance.

Plaintiffs next assert that the trial court “improperly refused to apply [the] general noise prohibition of Section 36.414(a).” According to plaintiffs, the trial court's focus on the **Resort's** compliance with the sound limits provided for in section 36.404 of the Noise Ordinance (Section 36.404)—i.e., the fact that the noise from the **Resort** remained under 50 decibels per hour on average—resulted in the court “eviscerat[ing] the General Noise Prohibitions of section 36.414.” Plaintiffs argue that the trial court inappropriately focused solely on the level of noise generated by the **Resort's** outdoor festivities held on the Croquet Lawn, and failed to give adequate consideration to the additional factors on the “list of 10 nonexclusive factors to be considered when determining whether noise from any source, mechanically produced or not, violates section 36.414.” According to plaintiffs, the trial court's finding that plaintiffs' neighbors who testified at trial “‘were disturbed by the noise from the events on the Croquet Lawn.’ ... mandates a ruling in favor of [plaintiffs]” because it demonstrates that the noise was “‘disturbing, excessive, or offensive’” in violation of Section 36.414, subdivision (c)(2) (A).

1. Relevant provisions of the Noise Ordinance

Because plaintiffs' argument is premised on various provisions of the Noise Ordinance, it is useful to set forth some of the relevant provisions of this portion of the County's Regulatory Ordinances.

Section 36.401 of the Noise Ordinance provides the basic policy behind the Noise Ordinance:

“Disturbing, excessive or offensive noise interferes with a person's right to enjoy life and property and is detrimental to ****550** the public health and safety. Every person is entitled to an environment free of annoying and harmful noise. The purpose of this chapter is to regulate noise in the ***272** unincorporated area of the County to promote the public health, comfort and convenience of the County's inhabitants and its visitors.”

Noise Ordinance section 36.402 provides definitions applicable to the chapter. This provision defines “ ‘[d]isturbing, excessive or offensive noise’ ” as “any sound or noise that” either “[e]ndangers the health or safety of any person” or “[c]auses discomfort or annoyance to a person of normal sensitivity.” (Noise Ordinance, § 36.402, subd. (g).) It defines “ ‘[p]lainly audible’ ” to mean “any sound that can be detected by a person using his or her unaided hearing faculties.” (*Id.* subd. (o).)

Section 36.404, titled “General Sound Level Limits,” (some capitalization and boldface omitted) contains a table that sets forth objective sound level measurements proscribed for various areas of the County. It provides in relevant part: “Except as provided in section 36.409 of this chapter, it shall be unlawful for any person to cause or allow the creation of any noise, which exceeds the one-hour average sound level limits in Table 36.404, when the one-hour average sound level is measured at the property line of the property on which the noise is produced or at any location on a property that is receiving the noise.” The parties agree that, pursuant to Section 36.404, the applicable one-hour average for the property at issue in this case is 50 decibels between the hours of 7:00 a.m. and 10:00 p.m. ¹²

Sections 36.405 through 36.413 of the Noise Ordinance provide for noise regulation of specific activities and/or locations. ¹³

Section 36.414 is titled “General Noise Prohibitions,” (some capitalization and boldface omitted) and appears to codify general nuisance standards. It provides, in relevant part:

“In addition to the general limitations on sound levels in section 36.404, the following additional prohibitions shall apply:

“(a) It shall be unlawful for a person to make, continue or cause to be made or continued a disturbing, excessive or offensive noise.

***273** “(b) The characteristics and conditions which should be considered in determining whether a violation of this section has been committed include, but are not limited to, the following:

“(1) The level of noise.

“(2) Whether the nature of the noise is usual or unusual.

“(3) Whether the origin of the noise is natural or unnatural.

“(4) The ambient noise level.

“(5) The proximity of the noise to a place where someone sleeps.

“(6) The nature and zoning of the area within which the noise emanates and where it is received.

****551** “(7) The time of day the noise occurs.

“(8) The duration of the noise.

“(9) Whether the noise is recurrent, intermittent or constant.

“(10) Whether the noise is produced by a commercial or noncommercial activity.

“(c) The following acts, among others, are declared to be disturbing, excessive and offensive noises that violate this chapter and are unlawful:

“[¶] ... [¶]

“(2) Using, operating, playing or allowing another person to use[,] operate or play, a radio, musical instrument, phonograph, television set or other device for the production or reproduction of sound:

“(A) That disturbs the peace, quiet and comfort of persons of normal sensitivity residing in the area.

“(B) That exceeds the levels in section 36.404 when measured at a distance of twenty-five feet from a device operating in a public right-of-way.

“(C) That exceeds the levels in section 36.404 when measured at a distance of twenty-five feet from a device for the production or reproduction of sound operated in a County park unless a permit has been obtained from the County Parks and Recreation Department specifying the time, location and other *274 conditions under which amplified sound may be allowed within a County park. A person using, operating or playing a device for the production or reproduction of sound in a County park, however, shall not exceed a level of 90 decibels when measured fifty feet from the source or exceed the levels in section 36.404 when measured at the park boundary. Subsection 36.414 (c)(2)(C) shall be enforced by the Parks and Recreation Department.

“(3) It shall be a prima facie violation of section 36.414(c)(2)(A) if a device for the production or reproduction of sound that is being operated, used or played is plainly audible at a distance of 50 feet or more from the building, structure or vehicle in which it is located.”

The Noise Ordinance also provides that the County sheriff is to have “primary responsibility for enforcing sections 36.405, 36.407, 36.411, 36.412, 36.413, 36.414 and 36.415.” (Noise Ord., § 36.418.) A “noise control officer shall have primary responsibility for enforcing all other sections of this chapter.” (*Ibid.*) The provision also clarifies that “a person authorized to enforce this chapter may arrest a person without a warrant if he or she has reasonable cause to believe that the person has committed a misdemeanor in his or her presence that violates this chapter.” (*Ibid.*)

In a section entitled “Additional Remedies,” (some capitalization and boldface omitted) the Noise Ordinance clarifies that “[t]he noise control officer may order a person to cease violating any section of this chapter that the noise control officer enforces. The noise control officer may, in addition to using any remedy provided in section 11.121 of this code, summarily abate a public nuisance caused by any act that violates this chapter if the noise control officer determines the[re] is an immediate threat to the health or safety of any person.” (Noise Ord., § 36.419.)

2. The trial court did not err in interpreting Section 36.414, subdivision (c)(3); however, even if this court

accepted plaintiffs' interpretation of the meaning of “structure,” a finding of a violation is not required

[19] Plaintiffs assert that the trial court erred in interpreting Section 36.414, **552 subdivision (c)(3), which states that “[i]t shall be a prima facie violation of section 36.414(c)(2) (A) if a device for the production or reproduction of sound that is being operated, used or played is plainly audible at a distance of 50 feet or more from the building, structure or vehicle in which it is located.”¹⁴ According to plaintiffs, the reference to the term “structure” in the ordinance should be interpreted to include either the stage or the Croquet *275 Lawn itself, such that the Resort's use of an amplification system on the Croquet Lawn would constitute a violation of the Noise Ordinance if sound from the amplification system is audible at a distance more than 50 feet from either the stage or the Croquet Lawn.

“In interpreting an ordinance or a voter initiative, we rely on the same rules of statutory construction applicable to statutes.” (*Woodland Park Management, LLC v. City of East Palo Alto Rent Stabilization Bd.* (2010) 181 Cal.App.4th 915, 919, 104 Cal.Rptr.3d 673.) “The primary duty of a court when interpreting a statute is to give effect to the intent of the Legislature, so as to effectuate the purpose of the law. [Citation.] To determine intent, courts turn first to the words themselves, giving them their ordinary and generally accepted meaning. [Citation.] If the language permits more than one reasonable interpretation, the court then looks to extrinsic aids, such as the object to be achieved and the evil to be remedied by the statute, the legislative history, public policy, and the statutory scheme of which the statute is a part.” (*Id.* at p. 920, 104 Cal.Rptr.3d 673.)

Plaintiffs assert that it was error for the trial court to conclude that the term “structure” in Section 36.414, subdivision (c)(3) impliedly refers to a “‘contained enclosure,’” such that the referenced device must be *inside* of the structure. Plaintiffs suggest that the trial court placed “undue emphasis on the word ‘in,’ and no emphasis on the stated purpose of the Ordinance,” and in doing so “effectively t[ook] the word ‘structure’ out of the ordinance.” Plaintiffs suggest that in interpreting this provision of the Noise Ordinance, we should borrow the definitions of “building” and “structure” from the County's Zoning Ordinance, which defines both terms. They point out that the definitions of these terms in the Zoning Ordinance do not require that either a building or a structure be enclosed. Section 1110 of the Zoning Ordinance defines a “building” as “[a]ny structure used or intended for supporting or sheltering any use or occupancy” and

defines a “structure” as “[t]hat which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner.” Plaintiffs argue that pursuant to the Zoning Ordinance definition of a “structure,” the stage used on the Croquet Lawn is a building or a structure, and the Croquet Lawn, which was constructed by the **Resort**, is a structure.¹⁵

***276 **553** The **Resort** counters that plaintiffs’ proffered construction of Section 36.414, subdivision (c)(3) is unreasonable, and points out that it ignores the words “in which it [the device] is located.” They contend that plaintiffs’ position that the word “in” must be interpreted to mean “on” when one considers the “purpose” of the Noise Ordinance, is incorrect. They further point out that if one were to apply plaintiffs’ interpretation, the provision’s inclusion of the word “building” would be rendered meaningless, since, pursuant to the definition of a “building” in the Zoning Ordinance, any building is also a “structure.” If these definitions were applied to the Noise Ordinance, the **Resort** contends, then there would be no need for the Noise Ordinance to include the word “building,” since any building would be necessarily included in the term “structure.” The **Resort** suggests that the trial court’s interpretation, which gives meaning to the word “in” and does not render the phrase “building” superfluous, is the more reasonable interpretation.

We conclude that the **Resort** offers the more reasonable interpretation of what Section 36.414, subdivision (c)(3) is attempting to address. A fundamental principle of statutory construction is that “interpretations which render any part of a statute superfluous are to be avoided.” (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1207, 48 Cal.Rptr.3d 108, 141 P.3d 225.) Despite plaintiffs’ contention that giving effect to the word “in” as it is ordinarily understood places “undue emphasis” on that word and somehow takes “the word ‘structure’ out of the ordinance,” it is possible to give effect to both the word “in” and the word “structure,” while also giving due regard to the underlying purpose of the Noise Ordinance, which is to “regulate noise in the unincorporated area of the County to promote the public health, comfort and convenience of the County’s inhabitants and its visitors.” (Noise Ord., § 36.401.)

Section 36.414, subdivision (c)(3) speaks specifically about the use of a “device” that produces or reproduces sound. This is a direct reference to the devices referred to in Section 36.414, subdivision (c)(2)(A), which include “a

radio, musical instrument, phonograph, television set or other device for the production or reproduction of sound.” Subdivision (c)(3) of Section 36.414 makes it a “prima facie violation” of subdivision (c)(2)(A) of the same section (i.e., a violation of the provision making it unlawful to use, operate, play, etc., one of the listed devices in a manner that “disturbs the peace, quiet and comfort of persons of normal sensitivity”) if the device being used, operated, played, etc., is “plainly audible at a distance of 50 feet or more from the building, structure or vehicle *in which* it [(the device)] is located.” (Italics added.)

Given the types of devices listed—i.e., radios, televisions, and musical instruments—as well as the list of the places “in which” such devices are ***277** considered located—i.e., buildings, structures, and vehicles, the more reasonable interpretation of this provision is that it is intended to prohibit the use of one of these devices at such a significant volume inside a contained enclosure that the sound nevertheless escapes the enclosure and can be heard 50 feet away from an outer edge of the enclosure. In giving the ordinance this interpretation, we give meaning to the County’s use of the phrase “in which it [the device] is located,” and we further acknowledge that the term “structure” in this provision (despite being defined in a very particular manner in Section 1110 of the Zoning Ordinance) is best understood as a general descriptor for a constructed enclosure that is otherwise not typically referred to as a “building,” such as a residence, other dwelling home, or possibly a temporary office or other constructed edifice. (See, e.g., Zoning Ord., § 6952, subd. (c)(2) [setbacks to be measured ****554** from “existing *residences or buildings* occupied by civic use types” (italics added)]; Zoning Ord., § 6156, subd. (b) [“One detached poolhouse, art or music studio, or recreation room is permitted, provided the *structure* meets main building setbacks” (italics added.)]; City of San Diego Mun. Code, Ch. 9 [Chapter is titled “Building, Housing and Sign Regulations,” suggesting that the term “building” need not necessarily refer to a residence or dwelling].)¹⁶

We acknowledge that this interpretation may not address potentially injurious noise-creating conduct by individuals who use sound producing or reproducing devices outside. However, in our view, through this ordinance, the County was specifically attempting to address situations in which individuals who are inside of homes, buildings, or vehicles using radios or other devices to produce sounds that escape the contained enclosure in which they are located. We conclude that the trial court did not err in interpreting

section 36.414, subdivision (c)(3) of the Noise Ordinance in addressing plaintiffs' complaint in this case.

[20] There is an additional problem with plaintiffs' position regarding the proper analysis of Noise Ordinance section 36.414. Plaintiffs assume that if their interpretation of the meaning of “structure” in Section 35.414, subdivision (c)(3) is given credit, then they have *necessarily* established the existence of a violation and would thus be entitled to enjoin the violation of the ***278** Noise Ordinance.¹⁷ We are not convinced that plaintiffs would have established the existence of a Noise Ordinance violation, even if we were to conclude that plaintiffs' interpretation of Section 36.414, subdivision (c)(3) is the more reasonable interpretation. This is because Section 36.414, subdivision (c)(3) states that it “shall be a *prima facie* violation” of a prior regulatory provision if a device used to produce or reproduce sound creates sound that is audible at a distance of 50 feet or more from “the building, structure or vehicle in which it is located.” (Italics added.) Although the parties apparently did not focus on this phrase in the trial court, the inclusion of the phrase “prima facie” must serve *some* purpose in the ordinance. (See *Clements v. T. R. Bechtel Co.* (1954) 43 Cal.2d 227, 233, 273 P.2d 5 [“[E]very word, phrase and provision employed in a statute is intended to have meaning and to perform a useful function”].)

The Oxford English Dictionary defines “prima facie” as meaning, as an adverb, ****555** “[a]t first sight; on the face of it; as it appears at first without investigation,” and, as an adjective, “[a]rising at first sight; based or founded on the first impression; (of evidence, etc.) acceptable unless contradicted.” (Oxford English Dict. Online (2016) <<http://www.oed.com/view/Entry/151264?redirectedFrom=prima+facie>> [as of Aug. 26, 2016].) Further, consistent with these definitions and as commonly used in the law, the use of the phrase “prima facie” often refers to the creation of a *presumption*, as opposed to a definitive determination. For example, “[a] statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption.” (Evid. Code, § 602; see also *In re Raymond G.* (1991) 230 Cal.App.3d 964, 972, 281 Cal.Rptr. 625 [“ ‘The words “prima facie” mean literally, “at first view,” and a prima facie case is one which is received or continues until the contrary is shown and can be overthrown only by rebutting evidence adduced on the other side’ ”].)

Giving the phrase “prima facie” in Section 36.414, subdivision (c)(3) its usual meaning, it is reasonable to construe Section 36.414, subdivision (c)(3) as creating a

rebuttable presumption that operating, using, or playing a sound producing or reproducing device at a level that “is plainly audible at a distance of 50 feet or more from the building, structure or vehicle in which it is located” constitutes a violation of Section 36.414, subdivision ***279** (c)(2)(A).¹⁸ This presumption can be rebutted by evidence demonstrating that the use of a sound producing or reproducing device at a volume that is plainly audible more than 50 feet from the source does not “disturb[] the peace, quiet and comfort of persons of normal sensitivity residing in the area.”

As we explain *post*, after considering all of the evidence, the trial court concluded that the noise emanating from the sound system utilized on the **Resort's** Croquet Lawn during its hosted outdoor events, when examined under the objective standard set forth in Section 36.414, subdivision (a), did *not* constitute the making or causing to be made a noise in a manner that would be disturbing to persons of normal sensitivity. Consequently, even if we were to assume that plaintiffs' proffered interpretation of the meaning of the term “structure” as used in Section 36.414, subdivision (c)(3) is the more reasonable interpretation, we would nevertheless conclude that any error on the trial court's part in interpreting Section 36.414, subdivision (c)(3) was harmless, given that, as we explain below, the trial court properly analyzed and applied Section 36.414, subdivision (a) of the “General Noise Prohibitions,” (some capitalization and boldface omitted) which makes it unlawful for someone to make a “disturbing, excessive or offensive noise” (i.e., which makes it unlawful to do *by any means* what Section 36.414, subdivision (c)(2) (A) makes it unlawful to do by use of a device for producing or reproducing sound).

3. *The trial court considered relevant factors identified in Section 36.414, subdivision (a); the trial court did not err in its application of this provision of the Noise Ordinance in assessing whether plaintiffs were entitled to an injunction with respect to their claim for private nuisance*

[21] Plaintiffs contend, in essence, that the trial court ignored the “general noise ****556** prohibitions” in Section 36.414, subdivision (a), and instead focused on whether the noise generated by the **Resort** during its outdoor functions met the 50-decibel-per-hour average noise measurements level set forth in Section 36.404. Plaintiffs argue that the trial court inappropriately focused on the level of noise generated by the **Resort's** outdoor festivities held on the Croquet Lawn,

even though “the *level* of noise is only one of a list of 10 nonexclusive factors to be considered when determining whether noise from any source, mechanically produced or not, violates [S]ection 36.414.”

As plaintiffs point out, the factors listed in subdivision (a) of Section 36.414 include (1) the level of noise; (2) whether the noise is usual or ***280** unusual; **(3)** whether the origin of the noise is natural or unnatural; (4) the level of ambient noise; (5) any proximity of the noise to a place where someone sleeps; (6) the nature and zoning of the area from which the noise emanates and where it is heard; (7) the time of day the noise occurs; (8) its duration; (9) whether the noise is recurrent, intermittent or constant; and (10) whether the noise is produced by a commercial or noncommercial activity. (§ 36.414, subd. (b).)

Despite plaintiffs' complaints about the trial court's lack of consideration of factors other than the level of the noise, the court explained that in a case such as this, in which the plaintiffs' “fundamental complaint is not about the nature of the noise or the time of day, but rather that the amplified sounds—voices and music—are simply too loud,” the other factors on the list in Section 36.414, subdivision (b), are not as relevant as evidence concerning the volume of the noise. Thus, because plaintiffs' complaint is, at its core, based on the *level* of noise generated by the **Resort**, the trial court appropriately placed due emphasis on that factor in assessing whether that noise violated the Noise Ordinance.

Further, it is clear from a review of the trial court's thorough statement of decision that the trial court did, in fact, consider, and mention, a great number of these other factors in reaching its determination that the noises generated from the Croquet Lawn—noises that “otherwise comply with the General Sound Level Limits of the County Noise Ordinance,” were not “ ‘disturbing, excessive or offensive’ within the meaning of section 36.414.” For example, the trial court considered the nature of the noise, noting that the sounds were comprised of “music, voices, applause, and laughter,” none of which is unusual or unexpected. The court also noted the evening events concluded at 10:00 p.m., so that “it cannot be said that these sounds extend beyond a reasonable hour.” The court took into consideration the fact that the noise from the Croquet Lawn events took place intermittently, on more than 30 occasions between early 2013 and the issuance of the court's statement of decision on February 2, 2015. Further, the court considered the effect of ambient noise on the level of noise in general in the area, including bird noise, sprinklers,

and aircraft. The court also noted that Linda experienced and took notes regarding the ambient noise, including traffic and vehicle noise, barking dogs, screeching coyotes, and even events occurring on other neighboring properties. The court considered all of these factors, in addition to its finding regarding the *level* of noise—i.e., that “at no time did Croquet Lawn events hosted by **Rancho Valencia** generate noise exceeding the statutory limit.”

It is thus clear that the trial court considered a variety of the factors outlined in Section 36.414, subdivision (b) in making its determination that ***281** the noise emanating from the **Resort's** property during events ****557** on the Croquet Lawn did not violate the objective standards set forth in either Section 36.414, subdivision (a) (which incorporates the objective standard included in the definition of a “ ‘[d]isturbing, excessive or offensive noise’ ” found in Noise Ordinance, § 36.402, subd. (g)) or Section 36.414, subdivision (c)(2)(A) (which itself includes an objective standard, in that the noise must “disturb[] the peace, quiet and comfort of persons of normal sensitivity”).

Secondarily, plaintiffs also suggest that because the trial court referred to plaintiffs' neighbors' testimony at trial as being that they “were disturbed by the noise from the events on the Croquet Lawn,” the court made a “finding” that “mandates a ruling in favor of [plaintiffs]” because it demonstrates that the noise was “ ‘disturbing, excessive or offensive’ ” in violation of Section 36.414, subdivision (c)(2)(A). However, the trial court did not make a finding that the noise from the Croquet Lawn had, in fact, disturbed the peace, quiet and comfort of the neighbors and that these neighbors are persons of normal sensitivity. Rather, the trial court's comments regarding plaintiffs' neighbors were made in noting that *in contrast to Linda*, who seemed quite disturbed by the noise from the **Resort**, the testifying neighbors, and even Linda's husband, Angel, were not nearly as disturbed by the noise as Linda was. Further, the court ultimately concluded that these individual's subjective expressions of their displeasure with the sounds from events held on the Croquet Lawn did not necessitate a finding that those sounds were *objectively unreasonable*. The trial court personally visited both the **Resort** and plaintiffs' property during one such event, and compared both the court's observations and the objective sound measurements from that event with Linda's notes from the evening and her subjective experience of the noise. In addition, the trial court listened to preselected recordings of events proffered by plaintiffs, and considered the objective sound measurements from a number of events other than

the event on the evening of the court's site visit. Based on all of this evidence, the court made a specific finding that Linda "is more sensitive than most," and that she "is not the 'person of normal sensitivity' described in section 36.414 of the County Noise Ordinance." The court also made a finding that even though the "noise from Croquet Lawn events is clearly audible to the **Mendezes** and other neighbors in the surrounding area," it is "not unreasonably disturbing within the meaning of the County Noise Ordinance."

The trial court's findings are entitled to deference, given that the court "review[ed] ... all the evidence including its first-hand observations during the September 27 event." Based on this evidence, the court could reasonably find that the sounds coming from the **Resort** a few evenings a month did not amount to a violation of Section 36.414, subdivision (a). The fact that some of plaintiffs' neighbors testified that they had at times been bothered by noise coming from outdoor events at the **Resort** did not require a ***282** different conclusion.¹⁹ As the trial court noted, "[t]his is one of those situations, so common in discussions of legal philosophy, where reasonable minds can differ. It is not unreasonable for someone ... to retire for the evening before 10:00 p.m. It is similarly not unreasonable for people ... to value their solitude and to prefer the sounds of nature to those associated with human

habitation.... Others find music and laughter, in moderation and at a reasonable hour, pleasant, or at least not disturbing."

****558** Given all of the evidence, the trial court reasonably determined that it "cannot conclude that noise levels from the **Resort** that otherwise comply with the General Sound Level Limits of the County Noise Ordinance are nonetheless 'disturbing, excessive or offensive' within the meaning of section 36.414."

IV.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent.

Benke, Acting P.J., and **Irion**, J., concurred.

All Citations

3 Cal.App.5th 248, 207 Cal.Rptr.3d 532, 16 Cal. Daily Op. Serv. 10,138, 2016 Daily Journal D.A.R. 9513

Footnotes

- 1 The **Mendezes** filed this action in their individual capacities, as well as in their capacities as trustees of the **Mendez** Family Trust dated November 1, 2002. For ease of reference and clarity, we will refer to each plaintiff by his or her first name when referring to them individually.
- 2 At the time, Linda did not indicate in response to the code enforcement officer that she had not received the previous email referred to by the code enforcement officer.
- 3 As we explain further in our discussion, the County's noise ordinance generally makes it unlawful for any person to cause or allow the creation of any noise that exceeds the one-hour average of 50 decibels per hour between the hours of 7:00 a.m. and 10:00 p.m. in the area in which the **Resort** and the **Mendez** residence are located.
- 4 In seeking the preliminary injunction, plaintiffs did not rely on **Resort** Services section 6403. In addition, plaintiffs did not argue that the **Resort** violated Noise Ordinance section 36.414(c)(3) on the ground that the device used for the production or reproduction of sound was located "in" a structure—i.e., that the Croquet Lawn itself or a stage on the Croquet Lawn constituted a "structure" for purposes of the ordinance.
- 5 Because the court was concerned that the noise generated from this event might have been intentionally dampened if the **Resort** was made aware of the court's site visit, the court ordered the parties and counsel

not to advise anyone about the court's site visit in advance. In addition, the court was able to compare sound measurements from the event on the night of the court's site visit with sound measurements from events on other dates; the sound measurements were comparable.

- 6 Angel also admitted that his ability to sleep was generally impacted by the fact that he and Linda were “ ‘up late talking about [the noise] instead of resting comfortably.’ ”
- 7 The court also determined that “if there was a technical violation [of the County's noise ordinance average sound limits], it would have been slight, infrequent, and would have occurred despite the good faith efforts of the **Resort** to assure compliance with the Noise Ordinance.”
- 8 “A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise.” (Civ. Code, § 3493.) The damage suffered by the private party must be different in kind and not merely in degree from that suffered by other members of the public. (*Institoris v. City of Los Angeles* (1989) 210 Cal.App.3d 10, 21, 258 Cal.Rptr. 418.)
- 9 The trial court noted that during the court's site visit, the court “could make out words from certain of the speeches at the reception.”
- 10 Plaintiffs assert that the trial court “swept away section 7703 in a footnote refusing to recognize the misuse of the public address system on the **Resort** property as a ‘use of property contrary to the provisions of these regulations’ and rejecting the propriety of a private lawsuit to abate a nuisance.” However, plaintiffs did not raise Zoning Ordinance section 7703 in their complaint, their motion for a preliminary injunction, or in their trial briefing. Rather, plaintiffs apparently raised the question of the effect of Zoning Ordinance section 7703 only in their objections to the court's proposed statement of decision. As a result, the trial court addressed plaintiffs' objection to the proposed statement of decision by way of a footnote in the final statement of decision. As we shall discuss, the trial court's analysis of the effect of Zoning Ordinance section 7703 in the court's footnote demonstrates no error.
- 11 Plaintiffs brought a claim for a private nuisance and sought to rely on a demonstration of a violation of **Resort** Services section 6603 in order to prove their claim for private nuisance. They did not bring an action seeking to enforce **Resort** Services section 6603. As a result, in order to prevail, they were required to establish the elements of a private nuisance at trial.

Although it might also be possible for a private individual to bring an action seeking an injunction to enforce a provision of a zoning ordinance if that individual can either demonstrate that he or she has suffered a special injury that is different in kind from that suffered by the general public, or that he or she “is a ‘member of the community for whose particular welfare the ordinance was enacted’ ” (*Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community*, *supra*, 178 Cal.App.3d at pp. 1152–1153, 224 Cal.Rptr. 380), plaintiffs did not bring such an action, nor did they attempt to demonstrate in the trial court that they either suffered any injury that is different *in kind*, and not different *in degree*, from that suffered by the general public as a result of the violation of **Resort** Services section 6603, or that they are members of a community for whom **Resort** Services section 6603 was enacted.

In their reply briefing and at oral argument, plaintiffs cited [Government Code section 25132](#) in support of their contention that they are entitled to bring a private civil action to enforce a county ordinance, and to suggest that the trial court should have granted them an injunction based on the court's finding of a violation of **Resort** Services section 6603, even absent any “unique interest in enforcing the law.” [Government Code section 25132, subdivision \(a\)](#) provides: “(a) violation of a county ordinance is a misdemeanor unless by ordinance it is made an infraction. The violation of a county ordinance may be prosecuted by county authorities in the name of the people of the State of California, or redressed by civil action.” However, even assuming that the

statute means what plaintiffs contend it means (i.e., that, like a private attorney general statute, it authorizes any private individual to file an action to enforce a county ordinance), the fact remains that plaintiffs did *not* bring an action to privately enforce a county ordinance. Instead, plaintiffs pled and attempted to prove a cause of action for private nuisance, based in part on asserted violations of various county ordinances, including **Resort** Services section 6603. The existence of a statutory provision that, according to plaintiffs, grants them the right to privately enforce a county ordinance does not eliminate the need for a plaintiff who seeks to privately enforce a county ordinance to plead and prove *that* cause of action, and thereby give the opposing party the opportunity to defend against that claim and the court the opportunity to address that claim.

12 Subdivision (d) of Section 36.404 provides for a slight deviation from this 50–decibel requirement in circumstances in which “the measured ambient noise level exceeds the applicable limit in Table 36.404.” In such an instance, “the allowable one-hour average sound level shall be the one-hour average ambient noise level, plus **three** decibels. The ambient noise level shall be measured when the alleged noise violation source is not operating.”

13 For example, titles of these sections include “Repairing, Rebuilding or Testing Motor Vehicles” (§ 36.405), “Refuse Vehicles & Parking Lot Sweepers” (§ 36.407), “Sound Level Limitations on Construction Equipment” (§ 36.409), “Signal Device for Food Trucks” (§ 36.412), and “Multiple Family Dwelling Units” (§ 36.413). (Some capitalization and boldface omitted.)

14 For ease of reference, we restate the language of Section 36.414, subdivision (c)(2)(A):

“(c) The following acts, among others, are declared to be disturbing, excessive and offensive noises that violate this chapter and are unlawful:

“[¶] ... [¶]

“(2) Using, operating, playing or allowing another person to use[,] operate or play, a radio, musical instrument, phonograph, television set or other device for the production or reproduction of sound:

“(A) That disturbs the peace, quiet and comfort of persons of normal sensitivity residing in the area.”

15 Notably, the definition of a “building” under the Zoning Ordinance makes reference to it being a “structure.”

16 The **Resort** also points out that the 50–foot restriction as applied to “structures” under the definition that plaintiffs proffer would be impractical and unreasonable. As the **Resort** points out, 50 feet is less than 18 yards. If the word “structure” is understood to be *anything* constructed, as plaintiffs’ suggest, then a sound producing/reproducing device used from a podium, or even a courtroom bench, would be subject to the 50–foot limitation. It seems patently unreasonable that the County intended to apply this limitation to devices used to produce or reproduce sound that could be heard beyond 50 feet from “any piece of work artificially built up or composed of parts joined together in some definite manner,” such as a stage, podium, or even a courtroom bench.

17 Plaintiffs only specify the nature of the error that they are asserting with respect to the court’s interpretation of Section 36.414, subdivision (c)(3) in the headings for their argument, in which they state: “The trial court erred by failing to enjoin ... the **Resort’s** Violation of the Noise Ordinance,” and “The trial court improperly refused to apply the 50 foot limitation of section 36.414(c)(3)” (Formatting omitted as to both quotations.) The plaintiffs do not otherwise express in this argument that they believe they are entitled to an injunction. We therefore glean from the headings that plaintiffs believe they are entitled to an injunction if this court determines that the trial court incorrectly interpreted Section 36.414, subdivision (c)(3).

- 18 Significantly, the ordinance does not state that “it shall be a violation” or that “it shall be a per se violation” to use or play a device at a volume that is plainly audible more than 50 feet away from where the device is located.
- 19 Indeed, none of plaintiffs' neighbors joined in plaintiffs' lawsuit, nor initiated a lawsuit themselves to enjoin events on the **Resort's** Croquet Lawn.

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489 S.W.2d 532

Court of Appeals of Tennessee, Eastern Section.

Ralph WALLACE et al., Appellees,

v.

ANDERSONVILLE DOCKS, INC., et al., Appellants.

Feb. 18, 1972.

I

Certiorari Denied by Supreme Court Aug. 7, 1972.

Synopsis

Declaratory action to restrain operation of proposed motorcycle 'scrambles course.' The Chancery Court, Union County, Walter R. Gray, Chancellor, granted injunction and defendants appealed. The Court of Appeals, Parrott, J., held that plaintiffs were not entitled to injunction for lack of sufficient evidence as to sound level of noise which would be produced.

Decree reversed and suit dismissed.

Procedural Posture(s): On Appeal.

West Headnotes (3)

[1] **Evidence** 🔑 **Qualities and properties of matter**

It is common knowledge that motorcycles generally emit considerable noise through their exhaust systems.

[2] **Nuisance** 🔑 **Grounds for Injunction**

Anticipatory nuisance will only be enjoined when injury is imminent and certain and only when it appears that proposed establishment is nuisance per se, i. e., nuisance at all times under any circumstances, regardless of location or surroundings, and if thing complained of is nuisance per accidens, i. e., nuisance in fact which by reason of circumstances, surroundings, or operations may cause injury but from which harm is uncertain or contingent, it will not be enjoined anticipatory to its going into operation.

6 Cases that cite this headnote

[3] **Nuisance** 🔑 **Evidence**

Plaintiffs were not entitled to injunction against proposed operation of motorcycle "scrambles course" for lack of sufficient evidence as to sound level of noise which would be produced.

3 Cases that cite this headnote

Attorneys and Law Firms

*533 Edward F. Hurd, Newport, Hal Clements, Jr., Knoxville, for appellants.

Asquith, Ailor & Jones, Knoxville, for appellees.

OPINION

PARROTT, Judge.

In this declaratory action, defendants have appealed from the chancellor's decree declaring the operation of their proposed motorcycle 'scrambles course' to be a nuisance and permanently enjoining the operation at the proposed location.

The several complainants are property owners in the Squirrel Hill Addition, a subdivision owned and developed by the defendants, Andersonville Docks, Inc. and Mr. and Mrs. Jim DuBose. The remaining defendant, Frankie Waddell, is a son-in-law of the DuBoses.

In the early part of 1970, defendant Waddell commenced construction of a motorcycle race track of scrambles course on vacant property leased from Andersonville Docks, Inc. The scrambles course is located adjacent to the Squirrel Hill Subdivision where the complainants live. The record does not go into detail as to the extent of the construction but does clearly show that no races have ever been held on the course. The proposed races were planned to be held on every other Sunday afternoon from late spring through early fall. The races would take some two to two and one-half hours not including time for trial runs.

Numerous witnesses, including many of the complainants, testified as to the noise emanating from the motorcycles. Since no races have been held on the track, no witness testified

as to the discernible noise in the particular locality of the complainants' homes.

Defendants called as their expert witness, Dr. David Lipscomb, a clinical audiologist and director of the University of Tennessee noise study laboratory. Dr. Lipscomb testified that sound dissipates as it travels. He explained that it was difficult to forecast what the sound level of a noise will be because you must take into consideration the contour of the land, trees, atmospheric conditions, etc. It was his opinion that from the center of the course to some 500 feet away the sound level of a motorcycle, under ideal conditions, would be somewhere near 60 decibels. He further stated that his speaking voice was somewhere between 70 and 75 decibels.

[1] In spite of Dr. Lipscomb's testimony, we believe common knowledge tells us that motorcycles do generally emit considerable *534 noise through their exhaust system. Nevertheless, in the instant case we find no competent credible evidence showing the sound level of noise to be produced when the scrambles track is in operation.

This Court, in [Caldwell v. Knox Concrete Products, Inc.](#), 54 [Tenn.App.](#) 393, 391 S.W.2d 5, held that generally noise is not a nuisance per se. In the Caldwell case the Court, speaking through Judge Cooper, had the following to say on the subject of noise being a nuisance:

'A nuisance has been defined as anything which annoys or disturbs the free use of one's property, or which renders its ordinary use or physical occupation uncomfortable. [Adams v. Hamilton Carhartt Overall Co.](#), 293 Ky. 443, 169 S.W.2d 294. In [City of Nashville v. Nevin](#), 12 [Tenn.App.](#) 336, it was said that a nuisance extends to everything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of property. See also [Williams v. Cross](#), 16 [Tenn.App.](#) 454, 459, 65 S.W.2d 198.

'What is a reasonable use of one's property and whether a particular use is an unreasonable invasion of another's use and enjoyment of his property cannot be determined by exact rules, but must necessarily depend upon the circumstances of each case, such as locality and the character of the surroundings, the nature, utility and social value of the use, the extent and nature of the harm involved, the nature, utility and social value of the use or enjoyment invaded, and the like. See [Clinic & Hospital v. McConnell](#), 241 [Mo.App.](#) 223, 236 S.W.2d 384, 23 A.L.R.2d 1278; [Restatement, Torts, Secs. 822, 831, pp. 214, 265.](#)

'Generally, noise is not a nuisance per se for it is recognized that no one is entitled to absolute quiet in the enjoyment of his property, but may only insist upon a degree of quietness consistent with the standard of comfort prevailing in the locality in which he dwells or has his business. [Collins v. Wayne Iron Works](#), 227 Pa. 326, 76 A. 24, 19 [Ann.Cas.](#) 991. See also [Hannum v. Gruber](#), 346 Pa. 417, 31 A.2d 99; 66 C.J.S. Nuisances s 22 a. However, noise may constitute a nuisance in fact even though it arises from the operation of a factory, industrial plant or other lawful business or occupation. [Phelps v. Winch](#), 309 Ill. 158, 140 N.E. 847, 28 A.L.R. 1169; [Warren Co. v. Dickson](#), 185 Ga. 481, 195 S.E. 568; [Magel v. Gruetli Benevolent Society of St. Louis](#), 203 [Mo.App.](#) 335, 218 S.W. 704; [Payne v. Johnson](#), 20 [Wash.2d](#) 24, 145 P.2d 552; 39 [Am.Jur.](#), Nuisance, Sec. 47, p. 330. The test in such cases is 'whether rights of property, of health or of comfort are so injuriously affected by the noise in question that the sufferer is subjected to a loss which goes beyond the reasonable limit imposed upon him by the condition of living, or of holding property, in a particular locality in fact devoted to uses which involve the emission of noise although ordinary care is taken to confine it within reasonable bounds; or in the vicinity of property of another owner who though creating a noise is acting with reasonable regard for the rights of those affected by it.' [Tortorella v. H. Traiser & Co.](#), 284 [Mass.](#) 497, 188 N.E. 254, 90 A.L.R. 1203. See also [City of Chicago v. Reuter Bros. Iron Works, Inc.](#), 398 Ill. 202, 208, 75 N.E.2d 355, 359, 173 A.L.R. 266.'

In [State v. Feezell](#), 218 [Tenn.](#) 17, 400 S.W.2d 716, nearby property owners filed a suit seeking to enjoin the operation of a proposed crematory. Our Supreme Court, in affirming the chancellor's sustaining a demurrer, said:

"A Mere possibility or Fear of Future injury from a structure, instrumentality, or business which is Not a nuisance Per se is not ground for injunction, and equity will not interfere where the apprehended injury is doubtful or speculative; reasonable probability, or even reasonable certainty, of injury, or *535 a showing that there will necessarily be a nuisance, is required.' 66 C.J.S. Nuisances s 113 (1950). (Emphasis supplied.)

'Another Tennessee case set forth the rule more generally: Injunctions will not issue 'merely to relieve the fears or apprehensions of an applicant.' [Nashville, C. & St. L.R. v. Railroad & Public Utilities Comm.](#), 161 [Tenn.](#) 592, 32 S.W.2d 1043 (1930). In [Central Drug Store v. Adams](#), 184 [Tenn.](#) 541, 201 S.W.2d 682 (1947), it was said that

“* * * (w)here a business is not a nuisance in and of itself, a court of equity will not anticipate that it will be operated injuriously to others and award an injunction to abate it.” 184 Tenn. at 549, 201 S.W.2d at 685.’

[2] The Feezell opinion makes it clear that anticipatory nuisance will only be enjoined when the injury is imminent and certain to occur. Injunctive relief will be granted only in those cases where it is shown that the proposed establishment is a nuisance per se. Thus, the thing complained of must be a nuisance at all times under any circumstances, regardless of location or surroundings. If the thing complained of is a nuisance per accidens, that is, a nuisance in fact which by reason of circumstances, surroundings or operations, may cause injury but the harm is uncertain or contingent, such nuisance will not be enjoined anticipatory to its going into operation.

[3] In this case we do not find sufficient evidence to hold the operation of the scrambles course to be a nuisance per se subject to immediate injunction. Under the proof we must hold the injunction has been prematurely issued.

It results the decree of the chancellor is reversed and complainants' suit dismissed with costs.

SANDERS, J., and LUKE M. McAMIS, Special Judge, concur.

All Citations

489 S.W.2d 532

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114 So.2d 357

District Court of Appeal of **Florida**,

Third District.

FONTAINEBLEAU HOTEL CORP., a **Florida corporation**,

and Charnofree **Corporation**, a **Florida corporation**, Appellants,

v.

FORTY-FIVE TWENTY-FIVE, INC., a **Florida corporation**, Appellee.

No. 59–450.

|

Aug. 27, **1959**.

|

Rehearing Denied Sept. 23, **1959**.

Synopsis

Action to enjoin owners from continuing with construction of fourteen-story addition to their **hotel** on a beach facing the Atlantic Ocean. The Circuit Court, Dade County, Robert H. Anderson, J., entered an order temporarily enjoining owners from continuing with the construction and they appealed. The District Court of Appeal held that where a structure serves a useful and beneficial purpose, it does not give rise to a cause of action, either for damages or for an injunction under the maxim sic utere tuo ut alienum non laedas, even though it causes injury to another by cutting off the light and air and interfering with the view that would otherwise be available over adjoining land in its natural state, regardless of the fact that the structure may have been erected partly for spite.

Reversed with directions.

West Headnotes (6)

[1] Constitutional Law 🔑 Relationship to police power or public welfare in general

The maxim sic utere tuo ut alienum non laedas, does not mean that one must never use his own property in such a way as to do any injury to his neighbor, but means only that one must use his property so as not to injure the lawful rights of another.

[2] Adjoining Landowners 🔑 Right to and Obstruction of Light, Air, or View

At common law, a landowner had no legal right, in the absence of an easement or uninterrupted use and enjoyment for a period of 20 years, to unobstructed light and air from the adjoining land.

[5 Cases that cite this headnote](#)

[3] Easements 🔑 Acquisition of rights as to light, air, and view

The English doctrine of “ancient lights” has been unanimously repudiated in the United States.

[4] Adjoining Landowners 🔑 Motive in erecting obstruction

Injunction 🔑 Encroachments by buildings, fences, and other structures

Where a structure serves a useful and beneficial purpose, it does not give rise to a cause of action, either for damages or for an injunction under the maxim *sic utere tuo ut alienum non laedas*, even though it causes injury to another by cutting off the light and air and interfering with the view that would otherwise be available over adjoining land in its natural state, regardless of the fact that the structure may have been erected partly for spite.

12 Cases that cite this headnote

[5] Zoning and Planning 🔑 Modification or amendment; rezoning

If public policy demands that a landowner in the Miami Beach area refrain from constructing buildings on his premises that will cast a shadow on the adjoining premises, an amendment of its comprehensive planning and zoning ordinance, applicable to the public as a whole, is the means by which such purpose should be achieved.

[6] Injunction 🔑 Other particular cases

Where construction of a 14-story addition was proceeding under a permit issued by the city pursuant to mandate of the District Court of Appeal in a previous action between owners of the addition and an adjoining landowner, and such mandate authorized completion of the addition according to plan showing a 76-foot setback from the ocean bulkhead line, and adjoining landowner's objection to the distance of the structure from the ocean was made for the first time in a suit to enjoin further work on the structure, and such suit was filed almost a year after the beginning of the construction of the addition, at a time when it was roughly eight stories in height, and represented an expenditure by owners of several million dollars, adjoining landowner stated no cause of action for equitable relief based on violation of setback requirement of an applicable city ordinance, even if there was in fact a violation of such ordinance.

Attorneys and Law Firms

*358 Sibley, Grusmark, Barkdull & King, Miami Beach, for appellants.

Anderson & Nadeau, Miami, for appellee.

Opinion

PER CURIAM.

This is an interlocutory appeal from an order temporarily enjoining the appellants from continuing with the construction of a fourteen-story addition to the **Fontainebleau Hotel**, owned and operated by the appellants. Appellee, plaintiff below, owns the Eden Roc **Hotel**, which was constructed in 1955, about a year after the **Fontainebleau**, and adjoins the **Fontainebleau** on the north. Both are luxury **hotels**, facing the Atlantic Ocean. The proposed addition to **Fontainebleau** is being constructed twenty feet from its north property line, 130 feet from the mean high water mark of the Atlantic Ocean, and 76 feet 8 inches from the ocean bulkhead line. The 14-story tower will extend 160 feet above grade in height and is 416 feet long from east to west. During the winter months, from around two o'clock in the afternoon for the remainder of the day, the shadow of the addition will extend over the cabana, swimming pool, and sunbathing areas of the Eden Roc, which are located in the southern portion of its property.

In this action, plaintiff-appellee sought to enjoin the defendants-appellants from proceeding with the construction of the addition to the **Fontainebleau** (it appears to have been roughly eight stories high at the time suit was filed), alleging that the construction would interfere with the light and air on the beach in front of the Eden Roc and cast a shadow of such size as to render the beach

wholly unfitted for the use and enjoyment of its guests, to the irreparable injury of the plaintiff; further, that the construction of such addition on the north side of defendants' property, rather than the south side, was actuated by malice and ill will on the part of the defendants' president toward the plaintiff's president; and that the construction was in violation of a building ordinance requiring a 100-foot setback from the ocean. It was also alleged that the construction would interfere with the easements of light and air enjoyed by plaintiff and its predecessors in title for more than twenty years and 'impliedly granted by virtue of the acts of the plaintiff's predecessors in title, as well as under the common law and the express recognition of such rights by virtue of Chapter 9837, Laws of **Florida** 1923 * * *.' Some attempt was also made to allege an easement by implication in favor of the plaintiff's property, as the dominant, and against the defendants' property, as the servient, tenement.

***359** The defendants' answer denied the material allegations of the complaint, pleaded laches and estopped by judgment.

The chancellor heard considerable testimony on the issues made by the complaint and the answer and, as noted, entered a temporary injunction restraining the defendants from continuing with the construction of the addition. His reason for so doing was stated by him, in a memorandum opinion, as follows:

'In granting the temporary injunction in this case the Court wishes to make several things very clear. The ruling is not based on any alleged presumptive title nor prescriptive right of the plaintiff to light and air nor is it based on any deed restrictions nor recorded plats in the title of the plaintiff nor of the defendant nor of any plat of record. It is not based on any zoning ordinance nor on any provision of the building code of the City of Miami Beach nor on the decision of any court, nisi prius or appellate. It is based solely on the proposition that no one has a right to use his property to the injury of another. In this case it is clear from the evidence that the proposed use by the **Fontainebleau** will materially damage the Eden Roc. There is evidence indicating that the construction of the proposed annex by the **Fontainebleau** is malicious or deliberate for the purpose of injuring the Eden Roc, but it is scarcely sufficient, standing alone, to afford a basis for equitable relief.'

[1] This is indeed a novel application of the maxim *sic utere tuo ut alienum non laedas*. This maxim does not mean that one must never use his own property in such a way as to do any injury to his neighbor. **Beckman v. Marshall**, **Fla.** 1956, 85 **So.2d** 552. It means only that one must use his property so as not to injure the lawful *rights* of another. **Cason v. Florida Power Co.**, 74 **Fla.** 1, 76 **So.** 535, **L.R.A.** 1918A, 1034. In **Reaver v. Martin Theatres**, **Fla.** 1951, 52 **So.2d** 682, 683, 25 **A.L.R.2d** 1451, under this maxim, it was stated that 'it is well settled that a property owner may put his own property to any reasonable and lawful use, so long as he does not thereby deprive the adjoining landowner of any right of enjoyment of his property *which is recognized and protected by law, and so long as his use is not such a one as the law will pronounce a nuisance*.' [Emphasis supplied.]

[2] [3] No American decision has been cited, and independent research has revealed none, in which it has been held that—in the absence of some contractual or statutory obligation—a landowner has a legal right to the free flow of light and air across the adjoining land of his neighbor. Even at common law, the landowner had no legal right, in the absence of an easement or uninterrupted use and enjoyment for a period of 20 years, to unobstructed light and air from the adjoining land. **Blumberg v. Weiss**, 1941, 129 **N.J.Eq.** 34, 17 **A.2d** 823; 1 **Am.Jur.**, *Adjoining Landowners*, § 51. And the English doctrine of 'ancient lights' has been unanimously repudiated in this country. 1 **Am.Jur.**, *Adjoining Landowners*, § 49, p. 533; **Lynch v. Hill**, 1939, 24 **Del.Ch.** 86, 6 **A.2d** 614, overruling **Clawson v. Primrose**, 4 **Del.Ch.** 643.

[4] There being, then, no legal right to the free flow of light and air from the adjoining land, it is universally held that where a structure serves a useful and beneficial purpose, it does not give rise to a cause of action, either for damages or for an injunction under the maxim *sic utere tuo ut alienum non laedas*, even though it causes injury to another by cutting off the light and air and interfering with the view that would otherwise be available over adjoining land in its natural state, regardless of the fact that the structure may have been erected partly for spite. See the cases collected in the annotation in 133 **A.L.R.** at pp. 701 et seq.; 1 **Am.Jur.**, *Adjoining Landowners*, § 54, p. 536; ***360 Taliaferro v. Salyer**, 1958, 162 **Cal.App.2d** 685, 328 **P.2d** 799; **Musumeci v. Leonardo**, 1950, 77 **R.I.** 255, 75 **A.2d** 175; **Harrison v. Langlinais**, **Tex.Civ.App.** 1958, 312 **S.W.2d** 286; **Granberry v. Jones**, 1949, 188 **Tenn.** 51, 216 **S.W.2d** 721; **Letts v. Kessler**, 1896, 54 **Ohio St.** 73, 42 **N.E.** 765; **Kulbitsky v. Zimnoch**, 1950, 196 **Md.** 504, 77 **A.2d** 14; **Southern Advertising Co. v. Sherman**, **Tenn.App.** 1957, 308 **S.W.2d** 491.

[5] We see no reason for departing from this universal rule. If, as contended on behalf of plaintiff, public policy demands that a landowner in the Miami Beach area refrain from constructing buildings on his premises that will cast a shadow on the adjoining premises, an amendment of its comprehensive planning and zoning ordinance, applicable to the public as a whole, is the means by which such purpose should be achieved. (No opinion is expressed here as to the validity of such an ordinance, if one should be enacted pursuant to the requirements of law. Cf. *City of Miami Beach v. State ex rel. Fontainebleau Hotel Corp.*, Fla.App.1959, 108 So.2d 614, 619; certiorari denied, Fla.1959, 111 So.2d 437.) But to change the universal rule—and the custom followed in this state since its inception—that adjoining landowners have an equal right under the law to build to the line of their respective tracts and to such a height as is desired by them (in the absence, of course, of building restrictions or regulations) amounts, in our opinion, to judicial legislation. As stated in *Musumeci v. Leonardo*, supra [77 R.I. 255, 75 A.2d 177], ‘So use your own as not to injure another’s property is, indeed, a sound and salutary principle for the promotion of justice, but it may not and should not be applied so as gratuitously to confer upon an adjacent property owner incorporeal rights incidental to his ownership of land which the law does not sanction.’

We have also considered whether the order here reviewed may be sustained upon any other reasoning, conformable to and consistent with the pleadings, regardless of the erroneous reasoning upon which the order was actually based. See *McGregor v. Provident Trust Co. of Philadelphia*, 119 Fla. 718, 162 So. 323. We have concluded that it cannot.

The record affirmatively shows that no statutory basis for the right sought to be enforced by plaintiff exists. The so-called Shadow Ordinance enacted by the City of Miami Beach at plaintiff’s behest was held invalid in *City of Miami Beach v. State ex rel. Fontainebleau Hotel Corp.*, supra. It also affirmatively appears that there is no possible basis for holding that plaintiff has an easement for light and air, either express or implied, across defendants’ property, nor any prescriptive right thereto—even if it be assumed, arguendo, that the common-law right of prescription as to ‘ancient lights’ is in effect in this state. And from what we have said heretofore in this opinion, it is perhaps superfluous to add that we have no desire to dissent from the unanimous holding in this country repudiating the English doctrine of ancient lights.

The only other possible basis—and, in fact, the only one insisted upon by plaintiff in its brief filed here, other than its reliance upon the law of private nuisance as expressed in the maxim *sic utere tuo ut alienum non laedas*—for the order here reviewed is the alleged violation by defendants of the setback line prescribed by ordinance. The plaintiff argues that the ordinance applicable to the Use District in which plaintiff’s and defendants’ properties are located, prescribing ‘a front yard having a depth of not less than one hundred (100) feet, measured from the ocean, * * *,’ should be and has been interpreted by the City’s zoning inspector as requiring a setback of 100 feet from an established ocean bulkhead line. As noted above, the addition to the *Fontainebleau* is set back only 76 feet 8 inches from the ocean bulkhead line, although it is 130 feet from the ocean measured from the mean high water mark.

*361 [6] While the chancellor did not decide the question of whether the setback ordinance had been violated, it is our view that, even if there was such a violation, the plaintiff would have no cause of action against the defendants based on such violation. The application of simple mathematics to the sun studies filed in evidence by plaintiff in support of its claim demonstrates conclusively that to move the existing structure back some 23 feet from the ocean would make no appreciable difference in the problem which is the subject of this controversy. Cf. *Taliaferro v. Salyer*, supra. The construction of the 14-story addition is proceeding under a permit issued by the city pursuant to the mandate of this court in *City of Miami Beach v. State ex rel. Fontainebleau Hotel Corp.*, supra, which permit authorizes completion of the 14-story addition according to a plan showing a 76-foot setback from the ocean bulkhead line. Moreover, the plaintiff’s objection to the distance of the structure from the ocean appears to have been made for the first time in the instant suit, which was filed almost a year after the beginning of the construction of the addition, at a time when it was roughly eight stories in height, representing the expenditure by defendants of several million dollars. In these circumstances, it is our view that the plaintiff has stated no cause of action for equitable relief based on the violation of the ordinance—assuming, arguendo, that there has been a violation.

Since it affirmatively appears that the plaintiff has not established a cause of action against the defendants by reason of the structure here in question, the order granting a temporary injunction should be and it is hereby reversed with directions to dismiss the complaint.

Reversed with directions.

HORTON, C. J., and CARROLL, CHAS., J., and CABOT, TED, Associate Judge concur.

All Citations

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