THE TORT OF NUISANCE: FROM THE OUTSIDE LOOKING IN

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It is central to the exclusion paradigm of property law that visual intrusions, however unpleasant, cannot amount to actionable wrongs. This proposition is best captured by Lord Camden CJ's famous dictum that, 'the eye cannot by the laws of England be guilty of a trespass'. This settled understanding has been upended by the recent decision of the Supreme Court of the United Kingdom in Fearn v Board of Trustees of the Tate Gallery *('*Fearn*'), in which the Court unanimously held that acts of visual intrusion can amount to a nuisance, and a majority found that nuisance had been established on the facts. This article argues that the decision in* Fearn *sets an undesirable precedent that should not be followed in other common law jurisdictions.*

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I Introduction

In recent years, 'exclusion' has replaced the 'bundle of rights' as the dominant theory of property.[1] As its leading proponents stress, the value of the right to exclude is purely instrumental.[2] Its purpose is not to encourage people to live like hermits,[3] but to facilitate anonymous interactions over scarce resources at low cost. It does this by delineating the owner's sphere of exclusive authority solely in terms of physical interactions with the relevant 'thing'. It is thus fundamental to the exclusion paradigm that overlooking and other forms of 'visual intrusion' cannot amount to wrongs to property. This point was well understood by both practitioners and theoreticians,[4] and is perhaps best captured by Lord Camden CJ's famous dictum that 'the eye cannot by the laws of England be guilty of a trespass'.[5]

This understanding of the basic architecture of property law has been challenged by the recent decision of the Supreme Court of the United Kingdom ('UK') in *Fearn v Board of Trustees of the Tate Gallery* ('*Fearn*'), in which a majority of the Court held that overlooking by visitors to the Tate Modern's viewing gallery amounted to a nuisance against five long leaseholders who live in a neighbouring block of flats.[6] Whilst the behaviour of a minority of the Tate Modern's licensees was certainly to be deplored, the Court's decision to extend the ambit of nuisance to visual intrusions is wrong and should not be followed in other common law jurisdictions.

The argument made below is not that acts of voyeurism are intrinsically worthy of legal protection, but that permitting visual intrusions is a price worth paying for the systemic benefit of cheaply delineating the sphere of an owner's exclusive authority. By driving a coach and horses through the exclusion paradigm, the Supreme Court has doubtless protected, or perhaps even increased,

[1] See generally Katrina M Wyman, 'The New Essentialism in Property' (2017) 9(2) *Journal of Legal Analysis* 183. Adherents to the exclusion model are sometimes referred to as property 'new essentialists': at 184. See also Michael JR Crawford, *An Expressive Theory of Possession* (Hart Publishing, 2020) 22–3.

[2] As Penner has written, '[n]o one has any interest in merely excluding others from things, for any reasons or no reason at all. The interest that underpins the right to property is the interest we have in purposefully dealing with things': JE Penner, *The Idea of Property in Law* (Clarendon Press, 1997) 70–1.

[3] Lior Jacob Strahilevitz, 'Information Asymmetries and the Rights To Exclude' (2006) 104(8) *Michigan Law Review* 1835, 1841.

[4] See also Jeevan Hariharan, 'The View from the Top: Visual Intrusion as Nuisance in *Fearn v Tate Gallery*' (2024) 87(3) *Modern Law Review* 697, 697–8.

[5] *Entick v Carrington* (1765) 19 St Tr 1030, 1066 ('*Entick*').

[6] [2024] AC 1, 47 [133] (Lord Leggatt JSC, Lord Reed PSC and Lord Lloyd-Jones JSC agreeing) ('*Fearn*').

the value of the claimants' flats. However, this boon to the claimants has come at the expense of both the Tate Modern and, more significantly, prospective certainty about the ambit of an owner's rights. The true legacy of the decision in *Fearn* will thus not merely be an enlarged conception of an owner's rights in land, but a reduction in the likelihood that future disputes between neighbours will be resolved without recourse to the courts. Whilst this is a future to which English law appears to have committed itself, it is one that courts in other common law jurisdictions would do well to avoid.

II The Cost of Delineating Rights

A *The Exclusion Thesis and the Ambit of an Owner's Authority*

In 'The Problem of Social Cost', Ronald Coase famously demonstrated that 'Pigouvian taxes' are not required to solve externality problems.[7] If property rights are fully delineated and transaction costs are sufficiently low, parties affected by 'spillovers' will bargain their way to the Pareto optimal distribution of rights.[8] Put in its strongest 'invariance' form, the 'Coase Theorem' says that, in a world of zero transaction costs, the default distribution of rights need not be allocatively efficient because parties will bargain their way to the efficient distribution.[9]

Coase did not, of course, believe the Coase Theorem,[10] and the bulk of his seminal article is devoted to explaining how and why positive transaction costs shape legal institutions. Whilst Coase was acutely aware of the problem of transaction costs, he was less alive to another source of friction; the costs of delineating, publicising and processing the rights in whose shadow people must bargain.[11] As Thomas Merrill and Henry Smith have observed, Coase was typical of legal economists in implicitly subscribing to a version of the 'bundle of

[7] RH Coase, 'The Problem of Social Cost' (1960) 3 (October) *Journal of Law and Economics* 1, 28–34. Pigouvian taxes are an impost on the party creating the spillover equal to the difference between the private and social cost of the activity: at 41.

[8] For a helpful discussion, see Bruce Yandle, 'Property Rights or Externalities?' in Terry L Anderson and Fred S McChesney (eds), *Property Rights: Cooperation, Conflict, & Law* (Princeton University Press, 2003) 259, 265–76.

[9] See generally Francesco Parisi, *The Language of Law and Economics: A Dictionary* (Cambridge University Press, 2013) 47–8.

[10] See Coase (n 7) 15. On this point, see generally Deirdre McCloskey, 'The So-Called Coase Theorem' (1998) 24(3) *Eastern Economic Journal* 367.

[11] For the same observation, see Robert C Ellickson, *Order without Law: How Neighbors Settle Disputes* (Harvard University Press, 1991) 281; Thomas W Merrill and Henry E Smith, 'Making Coasean Property More Coasean' (2011) 54 (4) *Journal of Law and Economics* S77, S94.

rights' theory of property, according to which the institution of property is merely an aggregation of state-sanctioned in personam use rights attaching to particular resources.[12] Merrill and Smith explain that

> [t]he implicit conception of property that underlies these assumptions is that of an authoritatively established collection of use rights with respect to a resource. Each situation has its own unique list of use rights, with different use rights assigned to different individuals. 'Property' is the list that is currently recognized by law… or by established practice or convention …[13]

The flaw in the bundle of rights conception of property is its failure to appreciate that delineating rights on a use-by-use basis is prohibitively expensive, particularly in cases where the impugned conduct affects more than two people. To again borrow from Smith:

> At the hypothetical extreme, the law would implement a list of use rights holding between all potential pairwise combinations of persons with respect to any (at least heretofore) conceivable activity that has any impact on anyone. The costs of this approach would be prohibitive, but it is the vision lurking behind the economic approach to tort, and especially nuisance, law.[14]

In a world of both positive transaction *and* information costs, the law must employ a delineation mechanism that resolves the maximum number of resource conflicts using the minimum number of informational variables.[15] It achieves this through the proxy of exclusion, which acts as a '*shortcut* over direct delineation of this more "complete" set of legal relations'.[16] The exclusion paradigm forbids everyone but the person designated as 'owner' from physically interfering with the collection of resource attributes that together constitute the legal 'thing'. The virtue of the exclusion proxy is that it obeys the rule

[12] Thomas W Merrill and Henry E Smith, 'What Happened to Property in Law and Economics?' (2001) 111(2) *Yale Law Journal* 357, 359–60, 366. See also Merrill and Smith, 'Making Coasean Property More Coasean' (n 11) S80.

[13] Merrill and Smith, 'What Happened to Property in Law and Economics?' (n 12) 397–8.

[14] Henry E Smith, 'Exclusion and Property Rules in the Law of Nuisance' (2004) 90(4) *Virginia Law Review* 965, 972.

[15] Given his focus on institutional constraints, it is odd that Coase never noticed this. As Merrill and Smith note, the form that property rights take matters precisely because we do not live in a frictionless universe: Merrill and Smith, 'Making Coasean Property More Coasean' (n 11) S94–S95.

[16] Henry E Smith, 'Property as the Law of Things' (2011) 125(7) *Harvard Law Review* 1691, 1704 (emphasis in original).

of the excluded middle.[17] Because any given use either involves physical interference or it does not, one simple informational variable can delineate use rights in an infinite number of possible interactions.[18]

In the case of land, the law implements the exclusion strategy by forbidding physical incursions into a three-dimensional column of space bounded in the horizontal plane by the fence lines.[19] Uses that require one to be inside the column are the sole preserve of the owner, whilst those that do not remain open to everyone. As the owner of a house, I alone may paint a mural on the door or plant a Japanese maple in the front yard. On the other hand, any member of the public may sketch the maple or photograph the mural, so long as they do so from the public footpath.[20] Contrary to the use-by-use characterisation of property, this allocation of rights does not arise because I detached the 'sketching' and 'photographing' sticks from the bundle of rights that together constitute my freehold and assigned them to particular passers-by. Instead, it reflects the fact that planting trees and painting murals are uses that are captured by the proxy of exclusion,[21] whereas sketching or photographing them from the public footpath are not.

B *The Place of Nuisance in the Exclusion Model*

Although the exclusion model and its emphasis on boundary crossing is most obviously associated with the tort of trespass, it is also largely consistent with paradigm cases of nuisance. As Lord Goff has observed:

> [F]or 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 an emanation may take many forms — noise, dirt, fumes, a noxious smell, vibrations, and suchlike.[22]

[17] The law of the 'excluded middle' says that some proposition X or its negation must be true. There is no 'in between'. More formally, this is written as $X \vee \neg X$, for every X.

[18] See also Merrill and Smith, 'What Happened to Property in Law and Economics?' (n 12) 389.

[19] Although the *ad coelum* rule is often maligned, it remains an important part of land law: *Bocardo SA v Star Energy UK Onshore Ltd* [2011] 1 AC 380, 395–6 [19]–[20], 398 [26] (Lord Hope DPSC). See also Crawford (n 1) 34. On the application of the exclusion theory to chattels, see Simon Douglas, *Liability for Wrongful Interferences with Chattels* (Hart Publishing, 2011) 24, 65–7.

[20] See, eg, *Bathurst City Council v Saban* (1985) 2 NSWLR 704, 706 (Young J).

[21] To borrow Harris' words, these are but two uses in an owner's 'open-ended set of use-privileges': JW Harris, *Property and Justice* (Clarendon Press, 1996) 26.

[22] *Hunter v Canary Wharf Ltd* [1997] AC 655, 685 ('*Hunter*').

Whilst noise and other vibrations are energy-bearing waves that stimulate adjacent particles rather than moving them through space,[23] one can readily conceive of archetypal examples of nuisance as instances of boundary crossing.[24] To take a particularly stark example, whilst the Millers sued the neighbouring cricket club in negligence and nuisance rather than trespass,[25] it is difficult to think of a clearer example of gross boundary crossing than hitting a cricket ball into someone's backyard.

That such 'emanations' are considered acts of 'nuisance' rather than 'trespass' is largely explained by an historical quirk of common law pleading, according to which the action was determined by the location of the impugned conduct. If it originated on the plaintiff's land, the appropriate action was trespass; if not, then the claim was to be brought in nuisance.[26] Consequently, fumes and vibrations emanating from neighbouring properties were captured by nuisance, whereas acts of bodily boundary crossing were actionable as trespasses.[27] Whilst nuisance plausibly extends to 'aesthetic' blights such as prostitution in residential neighbourhoods as well as a miscellany of other cases,[28]

[23] See also Richard A Epstein, 'Nuisance Law: Corrective Justice and Its Utilitarian Constraints' (1979) 8(1) *Journal of Legal Studies* 49, 56 ('Nuisance Law').

[24] As Epstein has remarked,

> [t]he term 'invasion' is not used as a disguised synonym for the legal conclusion that the defendant's activities are of the sort to which tortious liability should attach, where liability is at bottom imposed for other, possibly economic, reasons. Instead, the term 'invasion' is *a description of a natural state of affairs which in itself serves as a justification for imposing legal responsibility*.

Ibid 53 (emphasis in original). See also Simon Douglas, 'The Content of a Freehold: A "Right to Use" Land?' in Nicholas Hopkins (ed), *Modern Studies in Property Law* (Hart Publishing, 2013) vol 7, 359, 368–9.

[25] *Miller v Jackson* [1977] QB 966, 979 (Lord Denning MR).

[26] FH Newark, 'The Boundaries of Nuisance' (1949) 65 (October) *Law Quarterly Review* 480, 481–2; PH Winfield, 'Nuisance as a Tort' (1931) 4(2) *Cambridge Law Journal* 189, 201–2.

[27] If the trespass ultimately led to an ouster, the appropriate action was *novel disseisin*: Newark (n 26) 481; Winfield (n 26) 190.

[28] See (inevitably) *Thompson-Schwab v Costaki* [1956] 1 WLR 335, 339 (Lord Evershed MR, Romer LJ agreeing at 341, Parker LJ agreeing at 342) ('*Costaki*'). Whilst it is often cited by proponents of a broad theory of nuisance, *Costaki* (n 28) is only an appeal against the grant of an interlocutory injunction by the trial judge: at 337–8. It is thus extremely weak authority for the proposition that aesthetic blights constitute actionable nuisances. On the grab bag of claims that fall under the rubric of 'nuisance', see generally Christopher Essert, 'Nuisance and the Normative Boundaries of Ownership' (2016) 52(1) *Tulsa Law Review* 85, 96–7; Donal Nolan, '"A Tort against Land": Private Nuisance as a Property Tort' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012) 459, 464, 467.

instances in which non-invasive conduct amounts to a nuisance 'must', as Lord Goff observed, 'be relatively rare'.[29]

C *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor*

Although it long predates the information cost revolution in property theory, the role of exclusion in delineating an owner's rights[30] to use land was strikingly captured by the 1937 decision of the High Court of Australia in *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* ('*Victoria Park Racing*'), in which the owner of a racecourse sought to enjoin the defendants from broadcasting the results of horse races that they observed from a tower erected on neighbouring land.[31] By a majority of 3:2, the High Court refused the injunction, holding that the defendant's conduct did not amount to an actionable nuisance.[32] The majority position was captured by Latham CJ's pithy statement:

> The court has not been referred to any authority in English law which supports the general contention that if a person chooses to organize an entertainment or to do anything else which other persons are able to see he has a right to obtain from a court an order that they shall not describe to anybody what they see.[33]

The defendants did not prevail over the plaintiff because their conduct was deemed to be meritorious or otherwise worthy of protection. To the contrary, they were unabashed free riders whose behaviour was described by McTiernan J as 'impudent'.[34] The defendants prevailed for the simple reason that their conduct did not amount to a physical invasion of the plaintiff's land and was therefore not wrongful. The outcome in *Victoria Park Racing* is thus nothing more than an application of Lord Camden CJ's famous dictum that 'the eye cannot

[29] *Hunter* (n 22) 686. There have been attempts to sever the connection between nuisance and boundary crossing. Ellickson, for instance, has argued that liability in nuisance should depend upon whether some change in use is regarded as 'unneighborly according to contemporary community standards': Robert C Ellickson, 'Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls' (1973) 40(4) *University of Chicago Law Review* 681, 732. The difficulty of establishing those standards is, of course, the flaw in Ellickson's model.

[30] Strictly speaking, these are not (claim) 'rights' but 'liberties': see, eg, Simon Douglas and Ben McFarlane, 'Defining Property Rights' in James Penner and Henry E Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press, 2013) 219, 220–1. On Hohfeldian 'liberties' or 'privileges' more generally, see Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) *Yale Law Journal* 16, 32–44.

[31] (1937) 58 CLR 479, 492 (Latham CJ) ('*Victoria Park Racing*').

[32] Ibid 494, 498 (Latham CJ), 506–7, 511 (Dixon J), 527 (McTiernan J). For the dissenting judgments, see at 504–5 (Rich J), 522 (Evatt J).

[33] Ibid 496.

[34] Ibid 526.

by the laws of England be guilty of a trespass',[35] where trespass means a generic 'wrong'.[36]

III *Fearn v Board of Trustees of the Tate Gallery*

A *The Facts*

This settled understanding of the law has been upended by UK Supreme Court's recent decision in *Fearn*. The five claimants hold 999-year leases over expensive flats in the Neo Bankside development, a collection of residential towers abutting the Tate Modern in Southwark, London.[37] The most striking feature of these otherwise bland prisms is the transparent glass of the exterior walls. Whilst this ensures the residents' enviable views out, it also guarantees outsiders unobstructed views in.[38] The claimants have been made painfully aware of this fact by the decision of their nearest neighbour, the Tate Modern, to use the top floor of its Blavatnik Building as a public viewing gallery.[39] The viewing gallery affords its 500,000–600,000 annual visitors uninterrupted views both over London and into the interior of the claimants' flats.[40] Evidently, many visitors find the view into the flats more diverting than that over south London. The trial judge found that some visitors used smartphones to take photos of the claimants' flats which they then posted online,[41] whilst others even peered in with the aid of binoculars.[42] The claimants, who unsurprisingly object to this behaviour, sued the trustees of the Tate Gallery arguing that it amounted to an actionable nuisance.[43]

Although the claimants naturally emphasised the most egregious visual intrusions, the essence of their claim is a right not to be overlooked by those in the viewing gallery. If Lord Camden CJ's dictum is indeed a foundational design feature of property law, then resolution of the dispute should have been simple. The claimants ought to have failed on the ground that neither the

[35] *Entick* (n 5) 1066.

[36] See also Kevin Gray, 'Property in Thin Air' (1991) 50(2) *Cambridge Law Journal* 252, 259–61.

[37] *Fearn* (n 6) 10–11 [1]–[2], 12 [10] (Lord Leggatt JSC).

[38] Ibid 48 [137] (Lord Sales JSC).

[39] Ibid 10–11 [1]–[2] (Lord Leggatt JSC).

[40] Ibid.

[41] *Fearn v Board of Trustees of the Tate Gallery* [2019] Ch 369, 392–3 [81]–[84] (Mann J) ('*Fearn (Trial)*').

[42] Ibid 395 [88].

[43] *Fearn* (n 6) 11 [4] (Lord Leggatt JSC).

defendant nor its licensees committed a wrong known to English law. Indeed, this is precisely the basis on which the claimants' appeal was dismissed by a unanimous Court of Appeal, which held that

> despite the hundreds of years in which there has been a remedy for causing nuisance to an adjoining owner's land and the prevalence of overlooking in all cities and towns, 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. There have, however, been cases in which judges have decided and expressed the view that no such cause of action exists.[44]

Despite this emphatic statement, the claimants not only prevailed on appeal in the UK Supreme Court by a majority of 3:2, all five members agreed that visual intrusions or 'overlooking' can, in principle, amount to a nuisance at law.[45]

B *The Court's Reasoning*

What separated the majority from the minority in *Fearn* was thus not a difference of opinion about the ambit of nuisance, but the correct interpretation of the 'reasonable user' principle that lies at its heart. In an oft-cited passage, Lord Goff explained that strict liability in nuisance

> 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:' … 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.[46]

Although Lord Goff faithfully reproduced the key passage from *Bamford v Turnley* ('*Bamford*'), his gloss on Bramwell B's famous dictum contains more

[44] *Fearn v Board of Trustees of the Tate Gallery* [2020] Ch 621, 639 [53] (Sir Terence Etherton MR, Lewison and Rose LJJ).

[45] *Fearn* (n 6) 39 [104], 47 [133] (Lord Leggatt JSC, Lord Reed PSC and Lord Lloyd-Jones JSC agreeing), 60 [179] (Lord Sales JSC, Lord Kitchin JSC agreeing). This proposition was accepted without qualification in *Jalla v Shell International Trading and Shipping Co Ltd* [2023] 2 WLR 1085, 1090 [3] (Lord Burrows JSC, Lord Reed PSC, Lords Briggs, Kitchin and Sales JJSC agreeing).

[46] *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, 299 (Lord Templeman agreeing at 290, Lord Jauncey agreeing at 309, Lord Lowry agreeing at 309, Lord Woolf agreeing at 310), quoting *Bamford v Turnley* (1862) 3 B & S 66; 122 ER 27, 33 ('*Bamford*').

than a little creative licence. Whilst Bramwell B noted, en passant, that acts necessary for ordinary use ought to be 'conveniently done'[47] nowhere, contra Lord Goff, did he conflate the concepts of 'ordinary' and 'reasonable' use. What, then, is the proper relationship between these two concepts?

According to Lord Leggatt JSC, with whom Lord Reed PSC and Lord Lloyd-Jones JSC agreed, the principle of 'reasonable user' is coextensive with that of 'ordinary use'. His Lordship explained that

> [t]his 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 … 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.[48]

Because the claimant must prove that an unusual or atypical use of the defendant's land resulted in a '*substantial* interference with the *ordinary* use of the claimant's land',[49] liability in nuisance can only arise when the defendant's unusual use of his land substantially interferes with the claimant's ordinary use of her land. Lord Leggatt JSC's view of liability in nuisance can be summarised in the following table:[50]

[47] *Bamford* (n 46) 33.

[48] *Fearn* (n 6) 20 [35].

[49] Ibid 15 [21] (emphasis in original).

[50] McBride also summarises Lord Leggatt JSC's reasoning in a two-by-two table: Nicholas McBride, '"A Straightforward Case of Nuisance": A Note on Fearn v Tate Gallery [2023] UKSC 4' (Research Paper No 14/2023, Faculty of Law, University of Cambridge, April 2023) 11. However, he places a question mark in the southeast quadrant on the basis that Lord Leggatt JSC's reasoning does not extend to clashing uses that are atypical. This, however, is not correct. Because Lord Leggatt JSC's test explicitly requires a substantial interference with an *ordinary* use, it must follow that the conflict between two atypical uses cannot amount to a nuisance.

		Plaintiff's use: **Typical**	Plaintiff's use: **Atypical**
Defendant's use	**Typical**	No nuisance	No nuisance
	Atypical	Nuisance	No nuisance

Lord Sales JSC, with whom Lord Kitchin JSC agreed, criticised the majority's interpretation of the 'reasonable user' requirement, describing it as 'mechanistic'[51] and arguing that it elevated one factor in the give and take enquiry 'to unjustified prominence'.[52] His Lordship instead urged a 'more open-textured objective reasonableness standard, which is fact-sensitive in its application across the whole range of possible cases'.[53]

This difference of opinion was not merely semantic. According to the majority, the substantial interference with the claimants' ordinary use and enjoyment of their flats amounted to a nuisance because operating a public viewing gallery could not be said to be 'necessary for the common and ordinary use and occupation of the Tate's land'.[54] Lord Leggatt JSC explained that

> [i]nviting 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.[55]

By contrast, Lord Sales JSC argued that the question of 'reasonable user' could not be resolved by simply asking whether the impugned use was ordinary or

[51] *Fearn* (n 6) 77 [241].

[52] Ibid 79 [245].

[53] Ibid 78 [242].

[54] Ibid 25 [50] (Lord Leggatt JSC, Lord Reed PSC and Lord Lloyd-Jones JSC agreeing).

[55] Ibid.

atypical.[56] Moreover, that the claimants' use is common or ordinary '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'.[57] According to his Lordship, the reasonable user enquiry requires, amongst other things, consideration of the degree to which the claimants could have mitigated the conduct of which they complain.[58] Thus, when applying the principle of 'give and take' as between neighbours, Lord Sales JSC could not ignore the unusual design of the claimants' flats nor their refusal to install curtains or take any other self-help measures which, his Lordship argued, could reasonably be expected of people who live in the densely populated centre of a large city.[59]

Whilst Lord Leggatt JSC regarded this insistence on self-help measures as victim blaming,[60] Lord Sales JSC pointed to the absurdity of making the defendant liable in nuisance only because the peculiar design of the Neo Bankside towers attracted the gaze of those without.[61] His Lordship concluded that, when assessed against the normal design of a residential tower in the area,

> the Tate's operation of the viewing gallery did not involve a nuisance. The owners of the flats in Neo Bankside could not turn the operation of the viewing gallery into a nuisance by reason of the development of their own property according to a design which was out of line with the norm for the area.[62]

C *Unanswered Questions*

Before discussing the broader implications of the decision in *Fearn*, it is important to note two questions left unanswered by Lord Leggatt JSC's majority judgment. The first, and most obvious, is that of remedy. Although his Lordship devoted several paragraphs to discussion of the principles that determine whether the victim of a nuisance should be entitled to specific relief or damages in lieu,[63] the unenviable task of determining the appropriate remedy was, in the

[56] Ibid 73 [226].

[57] Ibid 77 [241].

[58] Ibid 73 [226].

[59] Ibid 85 [271].

[60] Ibid 33 [83] (Lord Leggatt JSC, Lord Reed PSC and Lord Lloyd-Jones JSC agreeing).

[61] Ibid 76 [237]–[238], 85 [272] (Lord Sales JSC, Lord Kitchin JSC agreeing).

[62] Ibid 87 [278].

[63] Ibid 45–7 [126]–[133] (Lord Leggatt JSC, Lord Reed PSC and Lord Lloyd-Jones JSC agreeing).

absence of argument on the question, remitted to a judge of the Chancery Division of the High Court of England and Wales.[64]

The second, and related, question concerns identification of the precise conduct that amounted to a nuisance. As was to be expected, the claimants highlighted the most egregious acts of overlooking, particularly the visitors' use of camera phones.[65] Lord Leggatt JSC fixed upon this part of the claimants' case, remarking of it that, '[i]t 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'.[66] This emphasis on the licensees' conduct suggests that the Tate Modern's liability is attributable to the conduct of its licensees. However, in his summation, Lord Leggatt JSC stressed that, '[i]nviting members of the public to look out from a viewing gallery is manifestly a very particular and exceptional use of land'.[67] This, by contrast, suggests that the tortious conduct was not the behaviour of the visitors, but the mere decision of the defendants to use the top floor of the Blavatnik Building as a public viewing gallery.

One might remark of this distinction: who cares? The existence of the viewing gallery was a necessary condition for the visitors' objectionable behaviour, and it is well established that a freeholder may be liable in nuisance for the conduct of her licensees.[68] Whilst this is true, specifying the precise conduct remains important because it bears heavily on the issue of remedy.[69] If the mere operation of the viewing gallery is wrongful per se, then the question of remedy is simple: the claimants ought to be entitled to an order enjoining the trustees from using their land for that purpose.[70] If, on the other hand, the wrongful conduct is confined to the more egregious conduct of a minority of visitors, then the question becomes far more difficult. As is discussed in greater detail below, this is because any order for specific relief must enjoin the wrongful

[64] Ibid 47 [132]–[133].

[65] See, eg, *Fearn (Trial)* (n 41) 390 [71]–[85] (Mann J).

[66] *Fearn* (n 6) 24 [48] (Lord Leggatt JSC, Lord Reed PSC and Lord Lloyd-Jones JSC agreeing).

[67] Ibid 25 [50].

[68] See, eg, *Cocking v Eacott* [2016] QB 1080, in which the Court of Appeal of England and Wales unanimously held that the owner of a house was liable for the nuisance created by her daughter, who was a mere licensee: at 1082–3 [1]–[2], 1088–9 [28] (Vos LJ, McFarlane LJ agreeing at 1089 [33]), 1090 [35] (Arden LJ). See also *Jalla* (n 45) 1089 [2] (Lord Burrows JSC, Lord Reed PSC, Lords Briggs, Kitchin and Sales JJSC agreeing).

[69] It is also relevant to defining the precise ratio decidendi to emerge from the decision. I am grateful to Timothy Pilkington for this point.

[70] The UK Supreme Court has, however, made clear that the decision to grant or deny an injunction is the classic example of judicial discretion and cannot be fettered by a presumption in favour of specific relief in nuisance cases: *Lawrence v Fen Tigers Ltd* [2014] AC 822, 855–6 [120]–[122] (Lord Neuberger PSC, Lord Mance JSC agreeing at 865 [167]), 864 [161] (Lord Sumption JSC), 866 [170] (Lord Clarke JSC), 882 [239] (Lord Carnwath JSC) ('*Lawrence*').

behaviour without also capturing the many uses of the viewing gallery that are not, ex hypothesi, wrongful.[71] That Lord Leggatt JSC equivocated on this question is unfortunate, not least for the Chancery judge who, absent a settlement, must thread this remedial needle.[72]

IV Crossing the Rubicon

A *Analysis of Existing Authorities*

Whilst the UK Supreme Court either failed or declined to answer these questions, it was emphatic in its conclusion about the ambit of the tort of nuisance. Not only did both Lord Leggatt JSC and Lord Sales JSC hold that visual intrusions could amount to a nuisance, each also argued that this is a matter of settled principle.[73] Indeed, Lord Leggatt JSC remarked that the proven facts in *Fearn* disclose a 'straightforward case of nuisance'.[74] This will come as a surprise to many, not least the Court of Appeal which, as noted above, unanimously dismissed the claimants' appeal on the grounds that established authorities dictate precisely the opposite conclusion.[75]

As a matter of doctrine, the UK Supreme Court's conclusion on the question of ambit relies upon what could charitably be described as a tendentious reading of the existing authorities. Take first, Lord Leggatt JSC's discussion of the 'pivotal'[76] Australian authority, *Victoria Park Racing*. According to his Lordship, *Victoria Park Racing*

[71] See below Part IV(C).

[72] It appears that the parties have settled since the time of writing, with the Tate Modern undertaking not to operate the viewing gallery in a way that causes nuisance to the claimants: Natasha Rees and Sarah Heatley, 'Fearn and Others v The Board of Trustees of the Tate Gallery', *Forsters* (News, 18 October 2023) <https://www.forsters.co.uk/news/news/fearn-and-others-v-board-of-trustees-of-tate-gallery>, archived at <https://perma.cc/Y93W-PNPZ>. The practical effect of the settlement appears to be the permanent closure of the southern walkway: see Ed Cunningham, 'The Tate Modern Has Reopened Its Majestic Tenth-Floor Viewing Gallery', *TimeOut* (News, 6 September 2023) <https://www.timeout.com/london/news/the-tate-modern-has-reopened-its-majestic-tenth-floor-viewing-gallery-090623>, archived at <https://perma.cc/EJ8L-ZHZX>. Importantly, the general significance of this remedial point is not confined to *Fearn* (n 6), as it is likely to arise in any future case concerning nuisance by visual intrusion.

[73] *Fearn* (n 6) 39 [104], 47 [133] (Lord Leggatt JSC, Lord Reed PSC and Lord Lloyd-Jones JSC agreeing), 59 [175], 60 [179] (Lord Sales JSC, Lord Kitchin JSC agreeing).

[74] Ibid 12 [7] (Lord Leggatt JSC, Lord Reed PSC and Lord Lloyd-Jones JSC agreeing).

[75] See above n 44 and accompanying text.

[76] Gray (n 36) 264, discussing *Victoria Park Racing* (n 31).

> 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 … '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.[77]

Lord Leggatt JSC's summation of the case correctly identifies that the valuable resource in dispute in *Victoria Park Racing* was not the spectacle of horses galloping around a track, but *information* about the order in which they finished. The unauthorised dissemination of this information was injurious to the plaintiff because it allowed punters, who would otherwise have purchased tickets and attended the track in person, to instead bet with illegal off-course bookmakers from the comfort of their local pub.[78]

Nevertheless, to confine the significance of *Victoria Park Racing* to commercial disputes is to conflate the distinction between legal means and private ends.[79] Information about the result of a horserace is no less a product of the track on which it is run than a potato is a product of the soil in which it is grown. Each is a latent resource attribute of land realised through the investment decisions and efforts of the owner. In a world of positive transaction costs, the question of whether to invest in potatoes or horse racing will depend, at least in part, on which activity enjoys legal protection from free riders. The effect of the decision in *Victoria Park Racing* is simply to make clear that information about activities taking place on privately owned land is, unlike a potato, not a *legally* protected resource attribute of the land. Thus, if the owner of a racecourse wishes to capture the value of her investment in horse racing, she cannot, unlike the farmer, rely on the law to assist her.[80] The majority in *Victoria*

[77] *Fearn* (n 6) 38 [99] (Lord Leggatt JSC, Lord Reed PSC and Lord Lloyd-Jones JSC agreeing), quoting *Victoria Park Racing* (n 31) 508.

[78] *Victoria Park Racing* (n 31) 500 (Rich J). See also Gray (n 36) 265.

[79] On this distinction between legal means and private ends, see generally Henry E Smith, 'Mind the Gap: The Indirect Relation between Ends and Means in American Property Law' (2009) 94(4) *Cornell Law Review* 959. Lord Leggatt JSC's reasoning on this point has, however, been accepted by some commentators: see, eg, McBride (n 50) 13.

[80] Moreover, if the law's refusal to exclude free riders makes an owner's preferred use of its land uneconomic then, *contra* Lord Leggatt JSC, it is impossible to say that free riders, such as the defendants in *Victoria Park Racing* (n 31), have merely interfered with the profitable conduct

Park Racing could not have been clearer on this point. Chief Justice Latham held:

> I am unable to see that any right of the plaintiff has been violated or any wrong done to him. Any person is entitled to look over the plaintiff's fences and to see what goes on in the plaintiff's land. If the plaintiff desires to prevent this, the plaintiff can erect a higher fence. … In my opinion, the law cannot by an injunction in effect erect fences which the plaintiff is not prepared to provide. The defendant does no wrong to the plaintiff by looking at what takes place on the plaintiff's land. Further, he does no wrong to the plaintiff by describing to other persons, to as wide an audience as he can obtain, what takes place on the plaintiff's ground. The court has not been referred to any principle of law which prevents any man from describing anything which he sees anywhere if he does not make defamatory statements, infringe the law as to offensive language, &c, break a contract, or wrongfully reveal confidential information.[81]

To the same effect, Dixon J remarked that

> [i]f one, who could not see the spectacle, took upon himself to broadcast a fictitious account of the races he might conceivably render himself liable in a form of action in which his falsehood played a part, but he would commit no nuisance. It is the obtaining a view of the premises which is the foundation of the allegation. *But English law is, rightly or wrongly, clear that the natural rights of an occupier do not include freedom from the view and inspection of neighbouring occupiers or of other persons who enable themselves to overlook the premises. An occupier of land is at liberty to exclude his neighbour's view by any physical means he can adopt. But while it is no wrongful act on his part to block the prospect from adjacent land, it is no wrongful act on the part of any person on such land to avail himself of what prospect exists or can be obtained.*[82]

Given these clear statements of principle, it is impossible to concur with Lord Leggatt JSC's conclusion that *Victoria Park Racing* 'provides no support at all for the proposition that watching from a neighbouring property, however

of the owner's business but not its enjoyment of its land. Lord Leggatt JSC's discussion of *Victoria Park Racing* (n 31) proceeds on an unwarranted distinction between personal and commercial uses of land.

[81] *Victoria Park Racing* (n 31) 494.

[82] Ibid 507 (emphasis added). For his Honour's part, McTiernan J concluded that, '[i]n my opinion there are no legal principles which the court can apply to protect the plaintiff against the acts of the defendants of which it complains': at 527.

persistent and intrusive, can never amount to a nuisance'.[83] To the contrary, this is precisely the proposition that the majority judgments support.

Lord Sales JSC's attempt to reshape *Victoria Park Racing* fares little better. For a start, his Lordship misinterpreted Latham CJ's remarks about fences as support for the proposition that the reciprocity principle in nuisance requires a claimant to demonstrate that she has taken reasonable steps to either avoid or mitigate the severity of the impugned conduct.[84] Contrary to Lord Sales JSC's view, Latham CJ's acerbic remarks had nothing to do with liability in nuisance. Chief Justice Latham's purpose was simply to make clear that the plaintiff in *Victoria Park Racing* must rely on self-help measures because the defendants' conduct was not wrongful and thus would not be restrained by the Court.

Lord Sales JSC's principal attack on the authority of *Victoria Park Racing* concerned the extent to which the majority relied on *Tapling v Jones*,[85] an authority which, his Lordship stressed, concerned prescriptive easements to light and not the ambit of nuisance.[86] Jones, the plaintiff, owned a building with two 'antient windows', entitling him to an uninterrupted flow of air and light through apertures corresponding to their dimensions.[87] During renovations, he both enlarged the antient windows and added new ones.[88] Tapling, his neighbour and the defendant, then built a warehouse that blocked the flow of air and light to both Jones' new and ancient windows.[89] Although Jones subsequently bricked-up the new windows and reduced the enlarged windows to their original size, Tapling refused to demolish his warehouse.[90] Following *Renshaw v Bean* ('*Renshaw*'),[91] Tapling argued that Jones' act of opening new windows was both wrongful and resulted in the extinguishment of the rights attaching to his antient windows.[92]

[83] *Fearn* (n 6) 38 [99] (Lord Leggatt JSC, Lord Reed PSC and Lord Lloyd-Jones JSC agreeing).

[84] See ibid 64 [194] (Lord Sales JSC, Lord Kitchin JSC agreeing), citing *Victoria Park Racing* (n 31) 494.

[85] *Fearn* (n 6) 61 [183]–[184] (Lord Sales JSC, Lord Kitchin JSC agreeing), discussing *Tapling v Jones* (1865) 20 CB NS 164; 141 ER 1067 ('*Tapling*'). *Tapling* (n 85) is cited by the majority judgments in *Victoria Park Racing* (n 31) 496 (Latham CJ), 508 (Dixon J), 523 (McTiernan J).

[86] *Fearn* (n 6) 63 [190]–[192] (Lord Sales JSC, Lord Kitchin JSC agreeing), discussing *Tapling* (n 85) 1073 (Lord Westbury LC), 1075–6 (Lord Cranworth), 1078–80 (Lord Chelmsford).

[87] *Tapling* (n 85) 1068 (headnote).

[88] Ibid 1069.

[89] Ibid.

[90] Ibid 1074.

[91] (1852) 18 QB 112; 118 ER 42 ('*Renshaw*').

[92] *Tapling* (n 85) 1074 (Lord Cranworth).

The House of Lords unanimously rejected Tapling's argument, in the process overruling *Renshaw* and its central heresy that one who opens new windows commits a wrong against his neighbours.[93] Lord Chancellor Lord Westbury stated that, 'the opening of the new windows is in law an innocent act; and no innocent act can destroy the existing right of the one party, or give any enlarged right to the other, viz the adjoining proprietor'.[94] Lord Cranworth likewise observed:

> Every man may open any number of windows looking over his neighbour's land; and, on the other hand, the neighbour may, by building on his own land: within twenty years after the opening of the windows, obstruct the light which would otherwise reach them.[95]

To the same effect, Lord Chelmsford held that

> [i]t is not correct to say that the plaintiff, by putting new windows into his house, or altering the dimensions of the old ones, 'exceeded the limits of his right;' because, the owner of a house has a right at all times (apart, of course, from any agreement to the contrary), to open as many windows in his own house as he pleases. *By the exercise of this right, he may materially interfere with the comfort and enjoyment of his neighbour: but of this species of injury the law takes no cognizance;* it leaves every one to his self-defence against an annoyance of this description; and 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.[96]

It is true that none of their Lordships' speeches were directed to the ambit of nuisance. Nevertheless, as Dixon J clearly appreciated in *Victoria Park Racing*, the import of these statements of principle cannot be confined to prescriptive easements.[97] If A has a right to overlook B's land, then it cannot be that A's

[93] See *Renshaw* (n 91) 48–9 (Lord Campbell CJ).

[94] *Tapling* (n 85) 1074.

[95] Ibid 1075.

[96] Ibid 1078 (emphasis added).

[97] Justice Dixon wrote that,

> [w]hen this principle is applied to the plaintiff's case it means … that the essential element upon which it depends is lacking. So far as freedom from view or inspection is a natural or acquired physical characteristic of the site, giving it value for the purpose of the business or pursuit which the plaintiff conducts, it is a characteristic which is not a legally protected interest.

Victoria Park Racing (n 31) 508.

conduct also amounts to a nuisance or any other wrong.[98] Whether the dispute concerns the acquisition, breach or extinguishment of rights, this is a simple contradiction.

B *From Exclusion to Governance*

Although tortured and ultimately unconvincing, the doctrinal reasonings of Lord Leggatt JSC and Lord Sales JSC are the least significant aspect of the decision in *Fearn*. Given their Lordships' obvious determination to recognise nuisance by visual intrusion, it is surprising that they did not dispense with the doctrinal contortions and simply declare that, as members of a final appellate court, they were exercising their power to make new law. The issue of substance is not whether the common law always recognised the possibility of nuisance by overlooking, but the normative question of whether it should do so now.

The case for the affirmative is simply that many visual intrusions are clearly externalities. If, as Lord Leggatt JSC noted, the basic justification for private property in land is the internalisation of externalities,[99] then there is no good reason for restricting the ambit of nuisance to the traditional categories of physical invasion such as smoke, fumes or noise. Indeed, doing so would seem to be an invitation to the inefficient use of land.

The flaw in this argument is its assumption that all activities with external effects are inefficient.[100] A 'spillover' will only create an externality *problem* if its costs exceed its benefits. Acts with external effects are more likely to be inefficient than those whose effects are completely internalised because its 'doer' will give no weight to the costs that her conduct imposes on others. So long as the benefits exceed her private costs, the conduct will be privately worthwhile even if it is socially wasteful. Nevertheless, it is possible that the private benefits of imperfectly internalised conduct will exceed the sum of its private and social costs, making it efficient despite the uncompensated costs it imposes on others. In any case, the excess of costs over benefits is not, of itself, a compelling reason for the law to intervene and rearrange the default rules provided by the exclusion model. Whether problems of inconsistent use should be resolved by the

[98] Rendered in more accurate Hohfeldian terms, if A has a liberty against B to φ, it cannot be that A simultaneously owes B a duty not to φ. '[P]rivileges' and 'duties' are, in Hohfeld's language, '[j]ural [o]pposites': see Hohfeld (n 30) 30.

[99] *Fearn* (n 6) 45 [125] (Lord Leggatt JSC, Lord Reed PSC and Lord Lloyd-Jones JSC agreeing). For the classic discussion, see generally Harold Demsetz, 'Toward a Theory of Property Rights' (1967) 57(2) *American Economic Review* 347.

[100] For a discussion of this assumption, see Jules L Coleman, *Markets, Morals and the Law* (Cambridge University Press, 1988) 76–7.

'on-off' *rule* of physical interference instantiated by trespass or the fact-intensive *standard* of 'reasonable' use instantiated by nuisance depends upon whether the benefits of switching to the latter mode of determining liability outweigh its costs.[101]

Consistently with the argument made above,[102] Smith has argued that nuisance, like trespass, 'rests on a foundation of exclusion'.[103] What distinguishes the two torts is not whether the impugned conduct involves an act of boundary crossing, but the degree of decision-making authority that each tort delegates to the owner of the land affected by the defendant's conduct.[104] The transition from trespass to nuisance involves moving from a system that places an open-ended set of uses under the owner's sole authority to a more accurate but costly process in which courts resolve disputes by determining rules for proper use that are peculiar to the land in question.[105] As Merrill and Smith have observed separately, moving from a highly decentralised to a more centralised system of dispute resolution becomes justified when transaction costs prevent parties from bargaining around inefficient default rules.[106] More particularly, we would expect to see the transition from 'exclusion' to 'governance' where complementary uses are possible, but coordination between the affected parties is thwarted by high transaction costs, holdouts and other forms of strategic behaviour made possible by the exclusion regime under conditions of bilateral monopoly.

An important question is thus whether the parties in *Fearn* were beset by high transaction costs or mired in strategic bargaining. The answer is: 'not obviously'. What is striking about the background facts is that the Tate Modern's

[101] On the distinction between 'rules' and 'standards' see, eg, Frederick Schauer, *Thinking like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press, 2009) ch 10.

[102] See above Part II(B).

[103] Smith, 'Exclusion and Property Rules in the Law of Nuisance' (n 14) 1024.

[104] See ibid 992–3.

[105] Henry E Smith, 'Exclusion versus Governance: Two Strategies for Delineating Property Rights' (2002) 31(2) *Journal of Legal Studies* S453, S455. The flexibility of nuisance is apparent at both the liability stage, where the court is concerned with questions of 'ordinary' or 'reasonable' use, and at the remedies stage where, in contrast to actions in trespass, courts are more willing to substitute damages for specific relief. For the classic formulation, see *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, 322–3 (AL Smith LJ). More recently, see the comments in *Lawrence* (n 70) 851–7 [100]–[127] (Lord Neuberger PSC, Lord Mance JSC agreeing at 865 [167]), 863–4 [159]–[161] (Lord Sumption JSC), 866 [171] (Lord Clarke JSC), 882 [239] (Lord Carnwath JSC). The comparative remedial strictness of trespass is demonstrated by the cases on ephemeral and apparently harmless interferences with airspace: see, eg, *Bendal Pty Ltd v Mirvac Project Pty Ltd* (1991) 23 NSWLR 464, 468–70 (Bryson J).

[106] Thomas W Merrill, 'Trespass, Nuisance, and the Costs of Determining Property Rights' (1985) 14(1) *Journal of Legal Studies* 13, 25–6 ('Costs of Determining Property Rights'); Smith, 'Exclusion and Property Rules in the Law of Nuisance' (n 14) 972.

viewing gallery and the Neo Bankside flats were developed contemporaneously.[107] Prior to the construction and the sale of the flats, the nascent dispute thus involved only two parties: the developer and the board of trustees. All other things being equal, transaction costs should have been relatively low. Lord Leggatt JSC observed of this fact that

> [a]lthough 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.[108]

A different view of this fact is that the absence of a bargain between the developer and the trustees is evidence that neither party wished to rearrange the default rules provided by the exclusion model. Whilst the claimants' disappointment at their lack of privacy might form the basis for a claim against the developer,[109] it is not, of itself, a reason to impose a novel form of tortious liability on their immediate neighbour.

Even if this conjecture is incorrect and transaction costs were high, it does not follow that the default rule of 'look but don't touch' was inefficient. As noted above, Lord Sales JSC argued that the principle of 'give and take' required the claimants to take some steps to protect their privacy.[110] Their refusal to do so precluded a finding of nuisance. Another way of expressing his Lordship's position is to say that the claimants are, in Calabresian terms, the 'cheapest cost-avoiders'.[111] The intuition here is that a small investment by the claimants in sheer curtains or privacy film would solve the problem of voyeurism, thus allowing the Tate Modern to continue to operate its viewing gallery without making the claimants feel like zoological exhibits in their own homes. Consistently with Lord Sales JSC's conclusion, this interpretation of the cheapest cost-avoider principle simply requires the Court to affirm the default rule that acts of visual intrusion do not constitute wrongs.

Whether the claimants are the cheapest cost-avoiders is, of course, an empirical question that depends on the available window furnishing technology. If, for instance, the only blinds capable of shielding the claimants from the

[107] *Fearn* (n 6) 71 [221] (Lord Sales JSC, Lord Kitchin JSC agreeing).

[108] Ibid 25 [51] (Lord Leggatt JSC, Lord Reed PSC and Lord Lloyd-Jones JSC agreeing).

[109] Or it might not. This would depend on what representations, if any, were made by the developers to the claimants prior to the purchase of the flats.

[110] *Fearn* (n 6) 70 [216] (Lord Sales JSC, Lord Kitchin JSC agreeing).

[111] The seminal discussion of this concept can be found in Guido Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970).

voyeurs' gaze would also ruin the view from their flats, then Lord Sales JSC's reasoning becomes less compelling. It certainly failed to persuade Lord Leggatt JSC and the other members of the majority, for whom the facts in *Fearn* warranted a departure from the default rule of physical exclusion. Put in its best light, the majority position is that declaring acts of visual intrusion to be actionable wrongs creates the optimal compromise between competing uses because it preserves the viewing gallery for its intended use as a window to central London whilst allowing the claimants to inhabit their flats in relative privacy.

C *Remedies and Redistribution*

Whether the majority's position is an improvement over the status quo prescribed by simple trespass depends upon whether the benefits of judicially specifying rules for proper use between the parties exceed the costs of doing so. The concrete problem here is the cost of enforcing the remedy required to give effect to the new distribution of rights. The claimants' preference is, doubtless, for injunctive relief over damages. The problem is that an injunction designed to give effect to this compromise will either be grossly overinclusive or prohibitively expensive and require ongoing judicial supervision.[112] An order that the southern walkway of the viewing gallery be closed would create minimal compliance and enforcement costs but would also restrain a huge number of innocuous uses of the viewing gallery that do not amount to a nuisance. On the other hand, an order that the defendants employ additional security guards to prevent the use of binoculars and camera phones would be sufficiently targeted. However, not only would such an order require regular judicial intervention to address the claimants' (inevitable) complaints about the diligence of the guards,[113] the cost of complying with it in perpetuity would greatly exceed the quantum of the claimants' loss.

What, then, about an order for damages in lieu of injunctive relief? If we assume that the Tate Modern is being made liable for the most egregious behaviour of its licensees, then the quantum of damages must equal the diminution in the value of the claimants' flats attributable to those particular acts of visual intrusion rather than overlooking generally. Whilst this is certainly a complication, it is not an insuperable one. The real objection to an award of damages is that it is a costly exercise in redistribution for redistribution's sake.

[112] On judicial supervision and other bars to specific relief, see *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, 12–16 (Lord Hoffmann).

[113] Indeed, it was established at trial that the Tate Modern already instructs its security guards to 'stop people taking photographs of the flats and occupants', but to almost no effect: *Fearn (Trial)* (n 41) 390 [69] (Mann J).

To say that specific relief is prohibitively expensive is simply to say that the costs of judicially reorganising the default rules of real property exceed the benefits. If one is concerned with efficiency as a goal, then the correct conclusion is not to grant the claimants the second-best remedy but to relieve the defendants of liability by reaffirming the basic rule that visual intrusions do not amount to actionable wrongs.

If this is correct, then why grant the claimants damages? In *Bamford*, Bramwell B famously remarked that

> [t]he public consists of all the individuals of it, and a thing is only for the public benefit when it is productive of good to those individuals on the balance of loss and gain to all. So that if all the loss and all the gain were borne and received by one individual, he on the whole would be a gainer. *But whenever this is the case, — whenever a thing is for the public benefit, properly understood, — the loss to the individuals of the public who lose will bear compensation out of the gains of those who gain.*[114]

According to Lord Leggatt JSC, these remarks are both an endorsement of what is now called 'methodological individualism' in cost-benefit analysis and,[115] more significantly, authority for the existence of an obligation binding those who have benefited from some change to the status quo to compensate those who have lost by it. His Lordship explained that

> 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. … *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.*[116]

Whilst efficiency simply requires that the sum of the benefits from a change to the status quo exceed the losses, Lord Leggatt JSC's argument is that the law must also attend to the distribution of the surplus amongst the affected

[114] *Bamford* (n 47) 33 (emphasis added), quoted in *Fearn* (n 6) 44–5 [124] (Lord Leggatt JSC, Lord Reed PSC and Lord Lloyd-Jones JSC agreeing).

[115] Richard A Epstein, 'For a Bramwell Revival' (1994) 38(3) *American Journal of Legal History* 246, 277.

[116] *Fearn* (n 6) 45 [125] (Lord Leggatt JSC, Lord Reed PSC and Lord Lloyd-Jones JSC agreeing) (emphasis added).

parties.[117] Consistently with Pareto's criterion of efficiency,[118] his Lordship's position appears to be that one should not be permitted to be made better off by making someone else worse off. Applied to *Fearn*, this principle requires the Tate Modern to compensate the claimants for the costs that its viewing gallery imposes upon them.

Although this may be an attractive ethical principle, the notion that someone has a right to compensation *because* someone has caused her harm is plainly wrong. A claimant only has an entitlement to compensation if she can show that the defendant's conduct caused her loss *and* amounted to a breach of her antecedent rights. Thus, and contrary to Lord Leggatt JSC's apparent argument, the law is replete with examples of *damnum absque injuria*. To take an obvious example, A is not liable for causing B pure economic loss, even if A's conduct were not only intentional but malicious.[119] To return to land law, A may ruin B's television reception either by stealing his antenna or by building a large structure on neighbouring land that obstructs the signal to it.[120] Whilst in each case A has reduced the amenity of B's home, it is only in the former that A's conduct amounts to a breach of B's rights, thus entitling B to compensation.[121] Contrary to Lord Leggatt JSC's position, many, if not most, land uses with unwanted external effects do not trigger an obligation to compensate because they do not constitute the breach of any (legal) duty owed to those harmed by them.[122]

Quite apart from this, it is not clear that judicial redistribution is even desirable. As noted above, some change in the status quo will be efficient if the

[117] The efficiency-based argument for mandating compensation is that compelling the 'taker' to compensate those whom she makes worse off discourages forced transfers whose benefits to the taker are less than the aggregate costs to others. In the literature on compulsory acquisition, this is often discussed under the rubric of 'fiscal illusion', see Thomas W Merrill and Henry E Smith, *Property: Principles and Policies* (Foundation Press, 3rd ed, 2017) 1236.

[118] See generally Matthew D Adler and Eric A Posner, 'Rethinking Cost-Benefit Analysis' (1999) 109(2) *Yale Law Journal* 165, 188–91. 'Pareto' improvements are those departures from the status quo that make one party better off without making anyone else worse off: at 188–90. 'Pareto efficiency' thus differs from the 'Kaldor-Hicks', or 'potential Pareto', measure of efficiency because the latter simply requires that the winner's surplus be sufficiently large that he could, but need not, compensate the loser and still be better off: at 191. Pareto efficiency can thus also be seen as a weak criterion of morality, whereas Kaldor-Hicks is not obviously a criterion of morality at all.

[119] See *OBG Ltd v Allan* [2008] 1 AC 1, 53 [142] (Lord Nicholls); *Bradford Corporation v Pickles* [1895] AC 587, 594 (Lord Halsbury LC).

[120] The latter are precisely the facts in *Hunter* (n 22) 662–3 (Pill LJ).

[121] See ibid (n 22) 686 (Lord Goff).

[122] To reiterate the point made above in Part II(A), this requires proof of an act of physical interference or boundary crossing: see Crawford (n 1) 33.

gain to A exceeds the harm to B. If redistribution were costless, then A could be compelled to compensate B and would still, by definition, be better off. The problem is, of course, that redistribution is never costless.[123] The attempt by B to seek compensation from A is, like any form of redistribution, an example of rent-seeking because the object of the exercise is to procure a pure transfer of wealth from the former to the latter.[124] Whilst it may appear to be a zero-sum activity, rent-seeking is always negative-sum because the *net* value of the transfer is its gross value less the opportunity cost of the resources required to procure it. So, even in the unlikely event that A's surplus exceeds the sum of B's loss *and* the cost of compensating her so that A is still better off, the effect of the redistribution must be to reduce the size of the 'pie'.

Fearn is a paragon example of this problem. Because the quantum of any damages ultimately paid to the claimants will likely exceed the costs they incurred in obtaining them, their decision to sue is rational. However, the price of achieving this redistribution is the sum of the cost to the claimants of bringing the action, to the defendants of resisting it and to the court of adjudicating it,[125] which must be many multiples of the value of the transfer itself. Whilst the amount of waste a society is prepared to tolerate in pursuit of its preferred distribution of wealth is a question of social values, this should at least demonstrate that Lord Leggatt JSC's Paretian tendencies are not as unambiguously desirable as they first appear.

D *The Costs of Prospective Uncertainty*

This is not, however, the only cost of the decision in *Fearn*. As discussed above, the virtue of the exclusion model is that, at some cost to precision, it delineates the owner's sphere of exclusive authority at very low cost. Like transaction costs, 'entitlement-determination costs' are a source of friction between those affected by un-internalised land uses.[126] Reducing entitlement-determination costs thus maximises the chances that allocative inefficiencies will be corrected

[123] For a discussion of this point, see Epstein, 'Nuisance Law' (n 23) 78–9. Epstein also stresses that permitting low-level irritations under the 'live and let live' rule of nuisance works as a form of implicit compensation because the victim one day is likely to be the perpetrator the next: see especially at 82–4. On the concept of 'settlement costs', see Frank I Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law' (1967) 80(6) *Harvard Law Review* 1165, 1214–15.

[124] On the concept of rent-seeking, see generally Gordon Tullock, 'Rent Seeking as a Negative-Sum Game' in James M Buchanan, Robert D Tollison and Gordon Tullock (eds), *Toward a Theory of the Rent-Seeking Society* (Texas A&M University Press, 1980) 16.

[125] Or at least the costs of adjudication that are not borne by the claimant.

[126] Merrill, 'Costs of Determining Property Rights' (n 106) 23.

by private bargains.[127] As Merrill explains, '[t]he combination of low transaction costs and low entitlement-determination costs will maximize the extent to which conflicts between competing uses of land can be resolved by market transactions'.[128]

By recognising such a significant exception to the exclusion paradigm, the decision in *Fearn* will create prospective uncertainty about the ambit of an owner's rights, thereby increasing entitlement-determination costs and reducing the number of land use disputes that are resolved by Coasean bargains.[129] Lord Leggatt JSC, who appeared to be cognisant of this problem, was at pains to stress that the rule of 'live and let live' will prevent a flood of litigation by jaded residents of high-rise flats who do not like being visible to their near-neighbours.[130] However, in considering the law of nuisance, Lord Leggatt JSC neglected the law of unintended consequences. Lawyers are paid to be inventive, and the genie of 'nuisance by overlooking', having once been released into the UK, cannot now be put back in the bottle.[131]

Whilst expanding the ambit of nuisance to include visual intrusion will doubtless increase the incidence of litigation between neighbours, the precise magnitude of the increase will depend in part on which version of the 'give and take' principle is ultimately adopted by English law. In this respect, Lord Leggatt JSC's focus on 'ordinary' use is more desirable than Lord Sales JSC's emphasis on 'reasonable' use.[132] Whereas Lord Sales JSC's approach is almost impossible for the parties to apply *ex ante*, Lord Leggatt JSC's emphasis on ordinary use at least has some empirically verifiable grounding in the locality principle.[133] Assuming that ordinary uses in Belgrave Square differ markedly from those in Bermondsey,[134] his Lordship's approach provides a modicum of guidance to those involved in land use disputes. Moreover, as his Lordship was keen to stress, it also avoids the embarrassment of resolving such disputes by an

[127] Ibid 24–5.

[128] Ibid 14.

[129] As Merrill points out, ambiguity about the underlying legal rules would only be unproblematic where the parties share the same estimate of who holds the relevant rights and have the same preference for risk: ibid 24.

[130] *Fearn* (n 6) 27–8 [62]–[63] (Lord Leggatt JSC, Lord Reed PSC and Lord Lloyd-Jones JSC agreeing).

[131] For a similar observation, see James Lee, 'Different Views of Nuisance' (2023) 139 (October) *Law Quarterly Review* 535, 541.

[132] Other commentators have taken precisely the opposite view, see, eg, Hariharan (n 4) 709.

[133] See *Fearn* (n 6) 21 [38] (Lord Leggatt JSC, Lord Reed PSC and Lord Lloyd-Jones JSC agreeing).

[134] *Sturges v Bridgman* (1879) 11 Ch D 852, 865 (Thesiger LJ for the Court).

approach to nuisance that is little more than an appeal to the judge's personal view of the propriety of the defendant's conduct.[135]

V Conclusion

Whilst the conduct of a minority of the visitors to the Tate Modern's viewing gallery was undoubtedly obnoxious and distressing to the claimants, the question for the UK Supreme Court was whether it also amounted to an actionable nuisance.[136] The answer to this question should not depend upon one's instinctive reaction to the licensees' more outré behaviour, but instead on whether the benefits of departing from the exclusion model and its central 'look but don't touch' norm exceed the costs.

Decision-makers, including courts, should minimise the sum of the costs of decisions and the costs of errors.[137] Even without a decision on remedies, the litigation in *Fearn* has, at enormous cost, produced only a dubious improvement over the status quo prescribed by the exclusion paradigm. Whilst the claimants' expenditure will likely prove to be a prudent investment in their valuable assets, the sum of the costs incurred by all parties will overwhelm any benefit to the claimants, making the enterprise socially wasteful. Even more significant is the effect of the decision on future disputes. The Court's unanimous recognition of nuisance by overlooking will generate prospective uncertainty about the rights of neighbours, the effect of which will be to minimise the chance that disputes arising from un-internalised conduct will be resolved by cooperative bargains between the affected parties and without the need for litigation.

The decision in *Fearn* will doubtless be received by some judges in other common law jurisdictions as a welcome invitation to update the law of nuisance to take account of camera phones, social media and other baleful realities of modern life. However, for the reasons discussed above, it is an invitation that they would be well-advised to decline.

[135] *Fearn* (n 6) 15 [20] (Lord Leggatt JSC, Lord Reed PSC and Lord Lloyd-Jones JSC agreeing).

[136] As Lee (n 131) notes, '[e]stablishing that certain conduct is a problem and is to be discouraged differs from establishing that it ought to fall within *nuisance*': at 537 (emphasis in original).

[137] Cass R Sunstein and Edna Ullmann-Margalit, 'Second-Order Decisions' in Cass R Sunstein (ed), *Behavioural Law and Economics* (Cambridge University Press, 2000) 187, 190.