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OVERLOOKING UNCOMMON BUILDINGS

Fearn and others v Board of Trustees of the Tate Gallery

Mark **Ortega***

This Note describes the key doctrinal developments in the *Fearn* decision and criticises two of these developments: the use-design distinction, and the privileging of the "common and ordinary" uses of land over "abnormal" uses of land. This Note argues that the use-design distinction is artificial and therefore the United Kingdom Supreme Court's effective insulation of architectural design choices from "reasonableness" review may give rise to unbalanced and unfair results as it did in *Fearn* itself. This Note also considers the implications of privileging "common and ordinary" uses and, in particular, how a dispute between two "abnormal" uses might play out under this new regime; it considers that *Fearn* should have been viewed as a clash between two competing "abnormal" uses, and that a broad-based "give and take" principle should have applied to balance two competing, but fundamentally different, "abnormal" uses.

I. Introduction

The tort of private nuisance protects a claimant's land, and the use or enjoyment of this land,[1] against a defendant's substantial and unreasonable interference.[2] These substantial and unreasonable interferences with the "use" or "enjoyment" of land must be framed as affecting the land itself – nuisance does not protect persons or goods or activities taking place on land; rather, it protects the "amenity value" of the land.[3]

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* LLM (Environmental Law) (Pace University, Elisabeth Haub School of Law); LLB (National University of Singapore); Advocate and Solicitor, Singapore; Teaching Assistant, Faculty of Law, National University of Singapore (NUS). I would like to thank Justin Tan for encouraging me to write this Note, and for always being available to discuss and exchange ideas with great generosity and openness. I would also like to sincerely thank the anonymous reviewer who helped greatly improve my analysis on the "common and ordinary" prioritisation issue by alerting me to the likely influence of Alan Beever's *The Law of Private Nuisance* (2013) and the debates surrounding them, as well as the Torts teaching team members at NUS who also debated these issues with much enthusiasm. All of these helped inform and shape this Note.

1 See, generally, Christian Witting, *Street on Torts*, 16th ed (Oxford: Oxford University Press, 2021) at 424 (describing interests protected by private nuisance and elements of private nuisance) [Witting, *Street on Torts*].

2 *Ibid.*

3 See, *eg*, *Fearn and others v Board of Trustees of the Tate Gallery* [2023] UKSC 4; [2023] 2 WLR 339 at [11] [*Fearn*].

Are some uses of land more protected than others? Yes – as the decision in *Fearn and others v Board of Trustees of the Tate Gallery* ("*Fearn*")[4] now makes clear. In *Fearn*, the United Kingdom Supreme Court prioritised "general",[5] "ordinary",[6] and "common"[7] uses of land over "particular",[8] "uncommon",[9] "special",[10] "unusual",[11] "exceptional",[12] and "abnormal"[13] uses of land,[14] having regard to the nature of the locality of the alleged interference.[15] The Supreme Court also effectively prioritised the freedom to build on one's own land, by analysing architectural design choices not as decisions amounting to the "use" of land but, arguably, as inhering in the land itself.[16] This effectively insulates building design choices from a "reasonableness" analysis.[17]

Yet on the other side of the looking glass, there are now no uses of a defendant's land which are categorically excluded from the scope of nuisance – the Supreme Court in *Fearn* has made it clear that actionable nuisance "can be caused by any means"[18] and "the categories of nuisance are not closed".[19] This open-ended approach to what can constitute a nuisance is tempered by the classic requirements that the interference must be "unreasonable"[20] and "substantial",[21] although the concept of the "reasonable user" is now strongly associated with the concept of the "common and ordinary" user of land.[22] Therefore, on the facts of *Fearn*, even the act of looking into a neighbour's property (by invitees to a defendant's land), if done frequently enough, can cross the *de minimis* threshold of substantiality and amount to an actionable nuisance – as it did in *Fearn*.[23]

This Note will critically analyse the *Fearn* decision along three themes: (1) the open-ended, non-categorical approach towards finding actionable nuisance, (2) the prioritisation of "ordinary" uses of land over "abnormal" uses of land and the grounding of this priority in the concept of "reasonableness", and (3) the effective privileging of the right to build on one's own land, and the court's effective insulation of building design decisions from the "reasonableness" analysis. Part II will summarise the facts and key aspects of the majority and minority opinions in *Fearn*.

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4 *Ibid*.
5 *Ibid* at [24].
6 *Ibid* at [24], [35].
7 *Ibid* at [35].
8 *Ibid* at [24].
9 *Ibid.*
10 *Ibid* at [35].
11 *Ibid.*
12 *Ibid* at [50].
13 *Ibid* at [88].
14 *Ibid* at [24], [35], [50].
15 *Ibid* at [38]–[41].
16 *Ibid* at [36], [37], [65]–[75]. Further discussion of this point will be found at Part II.B, and Part III.C below.
17 Further discussion of this point will be found at Part III.C below.
18 *Fearn*, *supra* note 3, at 345.
19 *Ibid* at [12].
20 *Ibid* at [18]–[21].
21 *Ibid* at [22], [23].
22 *Ibid* at [29]–[33].
23 *Ibid* especially at [48]–[52].

Part III will discuss the abovementioned themes (1) to (3), and provides a critical analysis. Part IV concludes.

II. The Decision in *Fearn*

A. Facts and Procedural History

The *Fearn* decision involved a dispute between (1) the Tate's Board of Trustees (the defendant) who owned and operated the Tate Modern art gallery, which included a public viewing gallery on its Blavatnik Building extension;[24] and (2) the original long leasehold owners (the claimants) of four flats in the neighbouring Neo Bankside residential development, which featured floor-to-ceiling glass walls.[25]

The Tate Modern is open to the public for free.[26] Thousands of guests visit daily the viewing gallery which offers panoramic views of London.[27] A section of the viewing gallery also allows visitors to look directly into the residences of Neo Bankside.[28] Visitors frequently look in, wave, take photographs and videos of the Neo Bankside residents, and even occasionally use binoculars.[29] These photographs and videos are often posted on social media.[30]

The viewing gallery was originally open to the public from 10.00am to 6.00pm from Sundays to Thursdays, and 10.00am to 10.00pm on Fridays and Saturdays.[31] In response to residents' complaints, the Tate changed the viewing gallery opening times to 10.00am to 5.30pm on Sundays to Thursdays, and closed the South and West sections of the viewing gallery (which face the Neo Bankside residences) earlier, at 7.00pm, on Fridays and Saturdays.[32] The Tate also put up signs and engaged security personnel who were instructed to stop the public from taking photos and videos of the Neo Bankside residents, but the trial judge, Mann J, found these efforts to have been largely ineffectual.[33]

Mann J found that a very significant number of visitors showed an interest in what took place within the claimants' flats, and that the extent of the viewing and interest shown could, in principle, amount to actionable private nuisance.[34] However, Mann J also found that the Tate's use of the viewing gallery was reasonable, attaching weight to how the claimants chose to purchase properties with glass walls and the availability of remedial measures like lowering their blinds and installing net curtains.[35]

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24 *Ibid* at [1], [136].
25 *Ibid* at [2], [139], [140].
26 *Ibid* at [1], [141].
27 *Ibid.* At the time the claim was commenced, approximately 5.5 million people visited Tate Modern each year, the great majority of whom visited the viewing gallery, which could hold a maximum of 300 persons at any time.
28 *Ibid* at [2], [3].
29 *Ibid* at [5], [144].
30 *Ibid.*
31 *Ibid* at [3].
32 *Ibid.*
33 *Ibid* at [49], [142].
34 *Ibid* at [5].
35 *Ibid.*

On appeal, the Court of Appeal disagreed with the reasoning of the trial judge on both of these conclusions, but arrived at the same outcome.[36] The Court of Appeal reasoned that, if the "general principles of private nuisance"[37] were applied to this case, the claim should have succeeded.[38] But the claim failed because the Court of Appeal considered that "overlooking" cannot amount to an actionable nuisance.[39]

Accordingly, on appeal to the Supreme Court, two key issues arose. First, whether "overlooking" could, in principle, amount to an actionable nuisance. (This will be called the "**Scope of Nuisance Issue**".) Second, what significance the court should attach, if any, to the fact that claimants willingly purchased flats with floor-to-ceiling glass walls and could take remedial measures which essentially amounted to covering these glass walls; in particular, how should these features be weighed against the Tate's use of its own building as a public viewing gallery in assessing the "reasonableness" of the Tate's use? (This will be called the "**Reasonableness Issue**".)[40]

The following Sections B and C summarise the key features of the majority and minority opinions, framed in terms of how they approached the Scope of Nuisance Issue and the Reasonableness Issue. A closer critical analysis, focused on the three themes mentioned in Part I above, will follow in Part III below.

B. The Majority Decision

Lord Leggatt delivered the majority opinion, with which Lord Reed and Lord Lloyd-Jones agreed. On the Scope of Nuisance Issue, the majority stated that there is "no conceptual or a priori limit to what can constitute a nuisance"[41] and, therefore, the "categories of nuisance are not closed".[42] This open-ended scope of nuisance is, however, circumscribed by the classic requirements that an actionable nuisance must be "substantial" and "unreasonable";[43] minor[44] and fleeting[45] annoyances cannot generally amount to actionable nuisance. Following from these general propositions, the majority disagreed with the Court of Appeal's conclusion that "mere overlooking" can never amount to a private nuisance.[46] In arriving at this conclusion, the majority distinguished the *act* of overlooking (which was present in *Fearn*) from the *architectural feature* of overlooking (in the sense of "your balcony

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[36] *Ibid* at [6]. See also *Fearn v Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104; [2020] 2 WLR 1081 [*Fearn (CA)*].

[37] *Fearn (CA)*, *supra* note 36 at [102].

[38] *Ibid* at [96]–[102].

[39] *Ibid* at [30]–[85].

[40] The framing of the two central issues on appeal in this way was partly inspired by the pithy framing employed by Lord Sales in *Fearn*, *supra* note 3 at [134], [135], and the framing employed by Lord Leggatt (tracking the main components of the lower courts' reasoning) in *Fearn*, *supra* note 3 at [5]–[7].

[41] *Fearn*, *supra* note 3, at [12].

[42] *Ibid*.

[43] *Ibid* at [18]–[23].

[44] *Ibid* at [22].

[45] See, *eg*, *Cunard v Antifyre Ltd* [1933] 1 KB 551. Talbot J stated (at 557): "nuisances, at least in the vast majority of cases, are interferences for a substantial length of time".

[46] *Fearn*, *supra* note 3 at [89]–[105].

overlooks my garden").[47] This distinction has a strong thematic resonance with a central feature of the majority's reasoning under the Reasonableness Issue, wherein architectural design features were distinguished from how the land is "used", which will be discussed (and criticised) further below.[48]

On the Reasonableness Issue, the majority first opined that the term "unreasonable" has "no explanatory power".[49] In particular, the majority agreed with the Court of Appeal's statement that private nuisance liability "does not turn on some overriding and free-ranging assessment by the court of the respective reasonableness of each party in light of all the facts and circumstances".[50] The majority emphasised that private nuisance liability is governed by principles which run through the cases and which were settled since the 19th century.[51] On these points, the majority appears to have been influenced by the ideas in Allan Beever's *The Law of Private Nuisance*,[52] which was cited twice in the majority's opinion[53] (and also debated in the minority's opinion),[54] specifically for the point that "unreasonableness" cannot explain private nuisance cases.[55] These ideas will be discussed more at Part III.B below. From these premises, the main principle the majority emphasised was that private nuisance prioritised the "general and ordinary use of land" over the "more particular and uncommon uses" of land.[56] Therefore, the term "reasonable user" should mean a person who uses her land in a "common and ordinary" manner, and not be a shorthand for an open-ended balancing between competing uses of land.[57] The majority justified this reading by reasoning that this was simply a return to what the law always has been. In particular, the majority considered that the 19th-century case of *Bamford v Turnley*[58] which gave rise to Bramwell B's classic and often cited formulation (cited here below) contained an underlying assumption that both the claimants and the defendants were using their land in an "ordinary" manner:

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47 *Ibid* at [90]–[91].

48 At Part III.C below.

49 *Fearn*, *supra* note 3 at [18].

50 *Ibid* at [20].

51 *Ibid*. Notably, Lord Leggatt stated: "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." Thus the majority was not opposed to using the term "unreasonable", but seemed to caution against its use. One might also observe that "undue" has a similar degree of open-endedness to "unreasonable". This particular statement was considered as a statement of general principle of private nuisance in the subsequent UK Supreme Court case of *Jalla v Shell International Trading and Shipping Co Ltd* [2023] UKSC 16; [2023] 2 WLR 1085 at [18(iii)], where Lord Burrows stated: "At a general level, what is involved is the balancing of the conflicting rights of landowners. This has sometimes been expressed by saying that the interference with the use and enjoyment of the land must be 'unlawful' or 'undue' or, although Lord Leggatt advised caution in using this term, 'unreasonable'."

52 Allan Beever, *The Law of Private Nuisance* (Oxford: Hart Publishing, 2013) [Beever, *Private Nuisance*].

53 *Fearn*, *supra* note 3 at [18], [31].

54 *Ibid* at [244]–[245].

55 *Fearn*, *supra* note 3 at [18], citing Beever, *Private Nuisance, supra* note 52 at 10: "['Unreasonableness'] is presented as an explanation of the operation of the law [of private nuisance], but it does not, cannot, explain anything."

56 *Fearn*, *supra* note 3 at [24].

57 *Ibid* at [29]–[33].

58 (1862) 112 ER 27 (Ex Ct) [*Bamford v Turnley*].

> [T]he 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.[59]

Therefore, the majority reasoned, the "give and take" principle only applied to govern two competing "ordinary" uses of land.[60]

The other nuisance principles the majority emphasised were: (1) the freedom to build on one's own land,[61] (2) the locality principle,[62] (3) coming to the nuisance is no defence,[63] (4) planning permission is no defence,[64] and (5) the public benefit of the defendant's use is no defence.[65] Of these five principles, principles (2) to (5) appeared to be largely uncontroversial in light of the case law prior to *Fearn*. Principle (1), however, largely based on *Hunter v Canary Wharf* ("*Hunter*"),[66] was arguably extended in *Fearn*, and critical to the majority's analysis on the Reasonableness Issue.[67]

The majority applied all the above principles to the facts as follows. First, because "inviting members of the public to look out from a viewing gallery is manifestly a very particular and exceptional use of land",[68] the Tate "cannot rely on the principle of give and take".[69] Second, regarding the claimants' increased sensitivity due to the floor-to-ceiling glass wall design of their flats, the majority decided that a claimant's particular sensitivity arising from the design and construction of its building should not be a factor which the court considers in deciding whether private nuisance liability should attach.[70] In so doing, *Robinson v Kilvert*[71] was effectively distinguished.[72] *Robinson v Kilvert* featured the claimant's "exceptionally delicate trade"[73] involving the storage of paper, which was damaged by heat from the neighbouring defendant's steam piping. The case stands for the proposition that, where a claimant's use of land made it particularly sensitive to interferences (where an ordinary user would not otherwise have been affected), an action in private nuisance cannot be maintained.[74] It appears that the

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59 *Ibid* at 33.
60 *Ibid* at [34], [35].
61 *Ibid* at [36], [37].
62 *Ibid* at [38]–[41].
63 *Ibid* at [42]–[46].
64 *Ibid* at [109], [110].
65 *Ibid* at [47], [114]–[126].
66 [1997] AC 655 (HL) [*Hunter*].
67 Further discussion of this point will be found at Part III.C below.
68 *Fearn*, *supra* note 3 at [24].
69 *Ibid.*
70 *Ibid* at [61]–[71].
71 (1889) 41 Ch D 88 [*Robinson v Kilvert*].
72 *Fearn*, *supra* note 3 at [65]–[68].
73 *Robinson v Kilvert*, *supra* note 71 at 97.
74 See, *eg*, *Fearn*, *supra* note 3 at [25]. *Cf McKinnon Industries v William Wallace Walker* [1951] 3 DLR 577 (PC) (defendant is liable for consequential property damage, including from sensitive use, if defendant's interference unreasonably affects the ordinary use of claimant's land).

main logic underpinning the *Fearn* majority's reasoning centred around how the architectural design features which increase sensitivity attach to the land itself and thus become part of the land.[75] By this logic of attachment to land, the design features which increase a claimant's sensitivity are now effectively immune in a balancing analysis going towards reasonableness of "use" of that "land". In particular, the majority contrasted the law's treatment of the subjective sensitivity of occupants (which are not protected) against the subjective sensitivity of the land itself (which is protected) in the following passage:

> [T]he injury [in private nuisance] [goes], 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.[76]
> [emphasis added]

In arriving at this conclusion, the majority emphasised the "basic right" of the owner of land in common law to build on her own land in any way she chooses, and that this right to build "applies equally to claimants and defendants".[77] The majority then cited how this principle was applied in *Hunter* and extended it to defendants, stating "[b]y the same token [as in *Hunter*], 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".[78]

It was these two lines of analysis, combined with the (largely uncontroversial) application of principles (2) to (5) listed above, that led the majority to hold that the Tate Board's use of its building as a viewing gallery was an "abnormal" use of its land amounting to a substantial and unreasonable interference with the claimants' ordinary use of their flats – *as designed*. Therefore, the Tate Board was held liable in private nuisance with the further decision on remedies remitted to the High Court.[79] In applying principle (2) (the locality principle), the majority agreed with the trial judge's finding that even in *that* specific locality in London (which is frequented partly for cultural purposes and attracts tourists), the Tate's particular use of its building as a viewing gallery was not "expected".[80] The majority relied also upon principles (3) to (5), namely, that coming to the nuisance, planning

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75 *Fearn*, *supra* note 3 at [66]–[69].
76 *Ibid* at [68].
77 *Ibid* at [69].
78 *Ibid.*
79 *Ibid* at [133].
80 *Ibid* at [74].

permissions, and public benefit all provided no defence, in deciding against the defendant.[81]

C. The Minority Decision

Lord Sales issued the dissenting minority opinion, with which Lord Kitchin agreed. On the Scope of Nuisance Issue, the minority aligned with the majority in holding that private nuisance has a "wide ambit"[82] and that the use of a viewing gallery in a way which "encourages an unusually intrusive degree of visual overlooking"[83] can amount to a private nuisance.

On the Reasonableness Issue, the minority's main dissent centred on criticising the majority's privileging of the "common and ordinary" uses of land. The minority considered that the principle of "reasonable reciprocity and compromise",[84] or "give and take",[85] applied to balance the respective competing uses of land.[86] The minority opined that the majority's privileging of the common and ordinary use of land would "seriously distort the tort"[87] of private nuisance by preventing the court from considering the way claimants have chosen to use their own land, including (where relevant) how they chose to design their building.[88] Nor was the court allowed to consider the availability of reasonable measures by which the nuisance may be mitigated by the "ordinary" user of land.[89] This would cause one party, purely by reason of its "abnormal" use of land, to bear all the cost and effort, while the other party, protected by its "common and ordinary" use status, would not have to incur any such costs.[90]

The minority raised serious public policy concerns about privileging the "common and ordinary" uses of land over "abnormal" uses of land. First, such an approach may discourage new and innovative uses of land.[91] Second, in densely populated urban settings, lines of sight can operate over considerable distances.[92] This makes it all the more necessary for a general principle of reciprocity, or "give and take", to govern neighbourly relations.[93]

III. Discussion and Analysis

This Part will focus on three key themes in critically analysing the reasoning in *Fearn*.

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81 *Ibid* at [42]–[47], [119], [110], [114]–[126].
82 *Ibid* at the heading above [170].
83 *Ibid* at [179].
84 *Ibid* at [162].
85 *Ibid.*
86 *Ibid* at [158]–[169].
87 *Ibid* at [227].
88 *Ibid* at [227], [228].
89 *Ibid* at [214], [227].
90 *Ibid* at [228], [231].
91 *Ibid* at [230], [231].
92 *Ibid* at [212].
93 *Ibid.*

A. "The Categories of Nuisance Are Not Closed"

The majority and minority opinions were united in deciding that "the categories of nuisance are not closed",[94] adapting that famous line from *Donoghue v Stevenson*[95] (suitably modified) which presaged a significant shift of the tort of negligence from a categorical approach to a general, open-ended category of negligence.[96] One might wonder: will *Fearn* be the *Donoghue* of private nuisance?

Perhaps not. Prior to *Fearn*, there was no strict "positive" categorical approach towards what forms of interference could amount to actionable nuisance. Certainly, the classic "emanations"[97] of pollutants (air and water), noise, and vibrations qualify. The majority in *Fearn* called this "physical invasions"[98] and highlighted prior cases involving actionable nuisance without such "physical invasions". These include obstructing access to land,[99] obstructing an acquired right to light,[100] or air flow,[101] or preventing connection to a public sewer.[102] Indeed, the Court of Appeal decision had already yielded the observation that:

> The difficulty, however, with any rigid categorisation [towards categories of private nuisance] is that it may not easily accommodate possible examples of nuisance in new social conditions or may undermine a proper analysis of factual situations which have aspects of more than one category but do not fall squarely within any one category…[103]

This quote indicates that even the Court of Appeal did not view nuisance as being shaped by a "positive" categorical list. However, it should also be noted that Lord Goff in *Hunter* did consider that actionable nuisances would usually arise from "emanations" and that actionable nuisances arising from activities without "emanations" (such as the sight of sex workers and their clients entering and leaving neighbouring premises)[104] must be "relatively rare".[105] This may suggest that the law recognises only narrow, incremental exceptions to the general requirement for "emanations".

What was perhaps present prior to *Fearn* was a "negative" categorical list. The Court of Appeal, in surveying several prior authorities, including *Victoria Park*

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94 *Ibid* at [12].

95 [1932] AC 562 at 619 (HL), per Lord Macmillian: "The categories of negligence are never closed."

96 See, *eg*, Witting, *Street on Torts, supra* note 1 at 31–33.

97 See, *eg*, *Fearn, supra* note 3 at [94]. See also *Hunter*, *supra* note 66 at 685 (Lord Goff states that interferences which may amount to private nuisance will "generally arise from something emanating from the defendant's land", and that "[s]uch an emanation may take many forms – noise, dirt, fumes, a noxious smell, vibrations, and suchlike").

98 *Fearn*, *supra* note 3 at [13].

99 *Ibid* at [13], citing, *eg*, *Guppys (Bridgport) Ltd v Brookling* (1983) 14 HLR 1 (CA).

100 *Fearn, supra* note 3 at [13], citing, *eg*, *Jolly v Kine* [1907] AC 1 (HL).

101 *Fearn, supra* note 3 at [13], citing, *eg*, *Bass v Gregory* (1890) 25 QBD 481.

102 *Fearn, supra* note 3 at [13], citing, *eg*, *Barratt Homes Ltd v Dŵr Cymru Cyfyngedig (Welsh Water) (No 2)* [2013] 1 WLR 3486 (CA).

103 *Fearn (CA), supra* note 36 at [33].

104 *Thompson-Schwab v Costaki* [1956] 1 WLR 335 (CA).

105 *Hunter*, *supra* note 66 at 685G–686A.

Racing and Recreation Grounds Co Ltd v Taylor,[106] thought of "mere overlooking" as falling within one such "negative" category. This categorical exclusion was overruled by the majority in *Fearn*, basing their decision on a review of prior precedents, focusing on the action of "overlooking", and the generic rule that "the categories of nuisance are not closed".[107] Yet another persistent category of cases that can *never* amount to an actionable nuisance can be found in *Hunter* itself, namely, interference caused by the mere presence without more of a building.[108] In *Hunter*, the House of Lords left open the possibility that interference with television signals could, in principle, amount to an actionable nuisance, especially when watching television eventually becomes a common and ordinary use of residential land.[109] Thus while *Hunter* applied no restriction on the type or kind of *thing* (including a right or interest) interfered with,[110] it placed a restriction on the *cause* or *mechanism* of interference – where substantial and unreasonable interference is caused by the mere presence without more of a building on the defendant's land, that is not actionable. Accordingly, despite the *Fearn* majority's declaration that the "categories of nuisance are not closed",[111] there is at least one category that is closed – interference caused by the mere presence without more of a building. This is another instance where the right to build, once exercised, appears to inhere in the very land itself, and is thus immune from the requirement of "reasonableness", or "give and take" reciprocal balancing.

B. Prioritising the "Common and Ordinary" Use of Land

The *Fearn* majority prioritised the "common and ordinary" uses of land over "abnormal" or "unusual" uses of land.[112] The upshot of this is that, where one party's use is regarded as abnormal and another party's use is regarded as ordinary, the party who uses her land in an abnormal way will bear the cost of the interference. Thus a defendant using her land abnormally will face an injunction or damages without any expectation of self-help measures from the claimant – this was the outcome in *Fearn*.[113] Conversely, a claimant who uses his land abnormally, particularly in a way which increases his sensitivity to interferences, should expect no relief from interference by a defendant who uses his land in an ordinary way, as in *Robinson v Kilvert.*[114] Where both parties use their land in common and ordinary ways, the principle of reciprocity, of "give and take", applies, as it did in *Southwark London*

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[106] [1937] HCA 45; (1937) 58 CLR 479 (building a watchtower to view races on neighbouring land and broadcasting those races do not amount to a private nuisance).

[107] *Fearn*, *supra* note 3 at [12]–[17], [89]–[104]. See Part II.B above, for more on this.

[108] *Hunter*, *supra* note 66 at 685G, per Lord Goff: "… in the absence of an easement, more is required than the mere presence of a neighbouring building to give rise to an actionable private nuisance."

[109] *Hunter*, *supra* note 66 at 684E–685A.

[110] Assuming, of course, that the interference of said "thing" can be properly framed as affecting the claimant's use or enjoyment of her land.

[111] *Fearn*, *supra* note 3 at [12].

[112] *Ibid* at [24].

[113] *Ibid* at [48]–[52], [130]–[133].

[114] *Robinson v Kilvert*, *supra* note 71.

Borough Council v Mills, Baxter v Camden London Borough Council.[115] The *Fearn* majority's ruling, however, leaves open the question of how disputes between two parties, both using their land in an "abnormal" way, would be decided.

The *Fearn* minority opinion criticised this prioritisation of the "common and ordinary" use, raising the policy concern that it would discourage and stifle innovative uses of land. Leaving aside the *doctrinal* concerns for now, this Note considers that the minority's *policy* concern may perhaps be mitigated on two fronts. First, innovative building design is insulated by the privileging of the right to build.[116] Second, to some extent, the locality principle[117] may further mitigate the effect of this rule. Local neighbourhoods may evolve through new and innovative uses of land. This evolution may, in the main, be stifled or encouraged by planning permissions. Regardless of the causes of the evolution of neighbourhoods, broad changes in land use across specific neighbourhoods may change the nature of localities and thus the interests, rights, and expectations which begin to inhere and "harden" via the locality principle. In this context, the "common and ordinary" priority rule might promote the maintenance of a reasonable stability to land use, ensuring that, while localities can evolve (and private rights and expectations evolve with them), that transition is not too rapid or too extreme as to frustrate the reasonable expectations of private land-owners. Thus, from a policy perspective, the "common and ordinary" use priority, tempered by the locality principle, may help balance innovation with the stability of private rights, acting as a further layer of private law safeguards atop the planning permission regime. However, one could also imagine a situation in which a group of conservative private land owners might be encouraged to make pre-emptive litigation strikes against emerging land use trends (such as viewing galleries, rooftop bars, and roof garden parties[118]), to prevent these from catching on and coalescing into the "character of the neighbourhood".[119] Taking all these into consideration, from a *policy* perspective, this Note does not take as strong a view as the *Fearn* minority does on whether a prioritisation of the "common and ordinary" use of land is likely to stifle novel or innovative uses of land. This is because: (a) innovative land uses will already, in practice, be primarily managed via planning permissions, and (b) what is considered "common and ordinary" within a given locality can evolve as the locality evolves. This brings us to the trickier *doctrinal* problem of how the new "common and ordinary" rule is to be applied.

As mentioned above, the *Fearn* majority's opinion appears to have been influenced by Beever's *The Law of Private Nuisance*.[120] In *Private Nuisance*, Beever argues that the concept of the defendant's "unreasonableness" cannot explain the outcomes of private nuisance cases,[121] and calls for a theory of private nuisance

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[115] [2001] 1 AC 1 (HL) (no claim in private nuisance for noises from neighbours' activities of everyday living passing through thinly-insulated walls).

[116] Discussed further at Section C below.

[117] *Fearn, supra* note 3 at [38] ("what is a 'common and ordinary use of land' is to be judged having regard to the character of the locality").

[118] Since roof gardens *per se* are a design feature of the building, while roof garden *parties* are a "use" of the building.

[119] *Eg*, *Fearn, supra* note 3 at [200], [220].

[120] Beever, *Private Nuisance, supra* note 52.

[121] *Ibid* at 9–11, 21–27.

which explains nuisance cases in terms of the prioritisation of more "fundamental rights" in (effectively, "fundamental uses" of) land.[122] One may observe how Beever's concept of "fundamental rights" maps directly unto what the *Fearn* majority now calls, conceptually, the "common and ordinary" uses of land, as a replacement for the concept of "unreasonableness".[123] Indeed, in his extensive criticism of Beever's *Private Nuisance*, Dan Priel (correctly) observes how Beever uses the concepts of "fundamental rights" (in land) and "fundamental uses" (of land) interchangeably,[124] and how Beever's various "concrete examples"[125] wherein he tries to explain the outcome of nuisance cases in terms of "fundamental rights" all concern the prioritisation of one "more fundamental"[126] type of land use over another "less fundamental"[127] type of land use. Yet it is not difficult to imagine many scenarios, involving novel or innovative uses of land in which it will be difficult and artificial to categorise one type of use as more "fundamental" than another. One striking example Priel raises is how, in *Christie v Davey* ("*Christie*"),[128] it is not obvious why the claimants' playing of music was somehow "more fundamental" than the defendant's banging on the wall to disrupt the claimants' music playing;[129] the outcome in *Christie* is better described in terms of the defendant's "unreasonableness". A similar difficulty and artificiality is likely to play out in determining whose land use is more "common and ordinary" within a given locality. Indeed, we do not need to imagine – we can simply look at the reasoning and outcome in *Fearn* itself.

The *Fearn* majority perhaps started from the uncontroversial position that using one's home for day-to-day residential living is a "common and ordinary" use of land. By contrast, using one's property as a public viewing gallery is less "common and ordinary". So, *prima facie,* the claimants win. But what about the fact that the claimants bought and live in residences with floor-to-ceiling glass walls, and have available, practical self-help measures (like installing net curtains)? This point is excluded from the discussion, since we cannot talk about features of the land itself

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[122] See discussion below on how these two concepts are equated*, eg*, at *infra* note 123.

[123] However, it should be noted that Beever rejected "the ordinary usages of mankind" as an "index by which property rights are to be prioritised": Beever, *Private Nuisance, supra* note 52 at 16–17. See also David Tan, "The Law of Private Nuisance by Allan Beever" [2014] Sing JLS 1 at 2: "[Beever] rejects 'ordinary usages of mankind' as an index for reasonableness (at p. 17) but does not explain what his preferred 'fundamental use' might entail."

[124] Dan Priel, "Land Use Priorities and the Law of Nuisance" (2015) 39(1) Melbourne UL Rev 346 at 365 [Priel]: "Though Beever's official view is that '[t]he law of nuisance … prioritise[s] property rights … by insisting that the exercise of more fundamental rights trumps the exercise of less fundamental rights', his concrete examples all talk about the prioritisation of land uses. At times Beever slides within a single sentence from one formulation to the other: 'The law of nuisance prioritises property rights so that more fundamental uses of land trump less fundamental uses'", citing Beever, *Private Nuisance, supra* note 52 at 105, 125.

[125] *Ibid.*

[126] Beever, *Private Nuisance, supra* note 52 at 25–27*, eg*, "being able to live on one's land – and in particular being able to sleep at night on it – is more fundamental than running an oil depot", discussing *Halsey v Esso Petroleum* [1961] 1 WLR 683 (QBD).

[127] Beever, *Private Nuisance, supra* note 52 at 26–27, *eg*, "Operating machinery is less fundamental than being able to occupy and use a room for activities such as reading, talking and the like", discussing *Sturges v Bridgman* (1879) 11 Ch D 852 (CA).

[128] [1893] 1 Ch 316.

[129] Priel, *supra* note 124 at 366–368.

(a point which will be criticised further in Section C below). This illustrates how a decision-making approach centred around what is or is not "common and ordinary", and what real-world factors – categorically – can or cannot go towards such a categorisation, leads to an all-or-nothing decision-making process which may turn on artificial, arbitrary factors like the use-design distinction discussed below. Therefore, the "common and ordinary" use prioritisation rule, like Beever's "fundamental" right/use conception, to echo Priel's criticism, is likely to "suffer from serious problems that make it difficult to implement in addressing the kind of real-world problems that nuisance law is meant to solve".[130] Perhaps, in implementing this approach, the courts may shift towards classifying some land uses as "more ordinary" or "less ordinary" than others via a more nuanced multi-factorial balancing of factors, such as locality, frequency and duration of nuisance, availability of self-help remedies, and so on. If so, it would be difficult to distinguish such an approach from one based on the pre-*Fearn* orthodoxy centred around the defendant's "unreasonableness".

C. Privileging and Extending the Right to Build (In Any Way)

The *Fearn* majority's approach extends the principle in *Hunter* and applies it to protect claimants' right to build on their own land.[131] Strictly speaking, the claimants in *Fearn* did not build on their own land, but purchased flats within an uncommonly-designed building. Therefore, the right to build also effectively includes a right to *purchase* and *use* a building of any design, and not to have the enjoyment of any unusual design features held against you.

Yet the distinction between "use" and "design" by the *Fearn* claimants strikes this author as deeply artificial. When someone buys a home with floor-to-ceiling glass walls, she buys that home (at least partly) to enjoy the views it offers. Indeed, considering the costs and hassle of litigation, it is likely that the *Fearn* claimants' real objection towards not installing blinds or net curtains is the desire to preserve their stunning views. Simply put, the claimant residents of Neo Bankside flats probably want to look out of their glass houses, but not have their neighbours' guests look in.

The ability to look out and enjoy glorious views is a function of, and closely intertwined with, the floor-to-ceiling glass wall design of a building. Looking out and enjoying the view is a "use". Seen this way, the *Fearn* litigation is a dispute over which of two neighbours gets to enjoy their beautiful views, and how reasonable it is when one of those neighbours invites thousands of invitees daily to enjoy these views. It is a "use" versus "use" scenario which seems to call for a broad balancing of the competing land uses, and for mutual compromises.

If we accept the premise that both the Tate Board and the Neo Bankside residents are both using their properties in uncommon ways, what might be an appropriate test or approach to resolving the claimants' private nuisance claim? In Section B above, it was observed that the *Fearn* majority opinion did not specify how an "abnormal

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[130] *Ibid* at 346, abstract.

[131] *Ibid* at [66]–[69]. Also discussed at Part II.B above.

use" versus "abnormal use" scenario would be resolved. The principle of "give and take" may be of limited application here because how can, for example, a Neo Bankside resident say "I only expect Tate Modern to behave as how I myself would behave"[132] when none of these residents would likely ever use their homes as a public viewing gallery? This illustrates how "abnormal use" versus "abnormal use" scenarios would tend to involve the proverbial "apples and oranges" type of comparisons that make reciprocal comparisons and reciprocal compromises difficult.

But perhaps at least one view of the principle of "give and take" is wider than this sort of narrow, reciprocal, similar-use balancing. This wider view would involve a broad-based, multi-factorial balancing considering a wide range of factors to determine how to resolve cases involving competing *different* uses of land. In determining whether a defendant's conduct is what "objectively a normal person would find to be reasonable to put up with"[133] (particularly in an "abnormal use" versus "abnormal use" case), a court should balance a range of factors including the defendant's motive, relative fault, locality, practicality of preventing or avoiding the interference, the kind of land user involved, and the social utility of the defendant's land use.[134]

Returning to the artificiality of the design-use distinction, the *Fearn* majority also appears to have overlooked the "more is required"[135] qualification in *Hunter*. This qualification in *Hunter* appears to suggest that some kind of "use" of the building itself may, in principle, contribute towards causing actionable interference. Possibly this could refer to some kind of radio-signal emitting activity taking place in the building in *Hunter* which may cause interference to the television signals. By analogy, in *Fearn*, the claimant residents are not merely going about their daily lives; they are doing it while enjoying the stunning views their floor-to-ceiling glass windows afford them. This should have counted as something "more" than the mere presence of the building; this should have been regarded as "use".

Thus the majority in *Fearn* appears to have built upon, extended, and entrenched a key value within the tort of private nuisance – the ability to build on one's own land in whatever way one chooses. By extending this right, in an almost absolute way, from defendants to claimants, the *Fearn* majority now allows this right to be

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[132] This understanding and application of the "give and take" principle arises from the statement by Bramwell B in *Bamford v Turnley, supra* note 58 at 33, that:

> "There is an obvious necessity for [the 'give and take, live and let live' principle]. 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" [emphasis added].

This statement seems to suggest the "give and take" principle applied to excuse a defendant's uses of land that the claimant himself would likely perform at some other point in time.

[133] *Lawrence v Fen Tigers Ltd* [2014] UKSC 13; [2014] AC 822 at [179], citing with approval Tony Weir, *An Introduction to Tort Law*, 2d ed (Oxford: Oxford University Press) at 160.

[134] See, *eg*, Witting, *Street on Torts, supra* note 1 at 441–448 for a pre-*Fearn* (but post-*Fearn (CA)*) discussion on the various factors which affect what is considered "unreasonable" use by the defendant. See also *Fearn, supra* note 3 at [240], where Lord Sales (in dissent) argued that "the whole law of nuisance is shot through with the need for assessments of reasonableness which take account of the interests on both sides."

[135] *Hunter, supra* note 66 at 685G, per Lord Goff: "… in the absence of an easement, more is required than the mere presence of a neighbouring building to give rise to an actionable private nuisance."

used as a "sword" in addition to being used as a "shield".[136] This is likely to make future private nuisance cases turn on the design-use distinction which, as the outcome in *Fearn* demonstrates, can be artificial.

We may also question the policy logic of privileging the right to build as a near absolute value. Building on one's own land is just one of many ways land can be used.[137] If the tort of private nuisance seeks to protect the amenity value of the land itself, and has long recognised that a land owner's ability to use her land affects the amenity value of the land itself,[138] then there is no good reason in principle or policy why construction and design decisions should be categorically privileged over other uses of land.

IV. Conclusion

In conclusion, the following are key doctrinal developments brought about by *Fearn* in the tort of private nuisance, at least as it applies in the United Kingdom:

(a) It is now clear that there are no conceptual or *a priori* restrictions on what may qualify as a private nuisance. In particular, the *act* of "overlooking" (as distinct from "overlooking" architectural features), if done frequently enough, can cross the "substantiality" threshold to amount to an actionable private nuisance.[139]

(b) In determining whether a defendant's use of land is "unreasonable", "common and ordinary" uses of land will be prioritised over "unusual" or "abnormal" uses of land. The locality of the alleged interference affects what is considered "common and ordinary". The "give and take" principle, or the principle of reciprocity, only clearly applies to cases where both the claimants and defendants are using their land in "common and ordinary" ways. A *wider* "give and take" principle, involving broad-based balancing of multiple factors in assessing the reasonableness of the defendant's use of his land, *vis-à-vis* the claimant's competing "use" and "enjoyment" of his land, may still apply where both the claimants and defendants are using their land in an "abnormal" manner.[140]

(c) Architectural design features of buildings are considered as parts of the land itself. Therefore, such design features are not subject to a broad "reasonableness" (or "reasonable user") analysis, since such design features are not a "use" of the land itself (even if they do facilitate special uses, like enjoying a nice view).[141]

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[136] To borrow a well-known expression from the law of promissory estoppel, see*, eg*, *Combe v Combe* [1951] 2 KB 215 at 224 (CA).

[137] This point was also made by Lord Sales (in dissent), in *Fearn, supra* note 3 at [250]: "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."

[138] See, *eg*, *Fearn*, *supra* note 3 at [11].

[139] Discussed at Part II.B and Part III.A above.

[140] Discussed at Part II.B and Part III.B above.

[141] Discussed at Part II.B and Part III.C above.

This Note's strongest criticism pertains to point (c) – the "use" versus "design" distinction, which it argues is artificial so that there is no strong reason in principle or policy to uphold it. *Fearn* should have been decided as a case of two competing abnormal uses and, therefore, a broad-based balancing of multiple factors should have taken place. The *Fearn* majority could have found that, in principle, frequent "overlooking" by the Tate's guests into the Neo Bankside flats did *prima facie* amount to an actionable private nuisance, but held that the remedies should reflect a broad approach of compromise between two neighbouring properties whose residents simply want to enjoy the stunning views their properties afford (or allow their visitors to enjoy). The particular, unusual, and abnormal sensitivity of the Neo Bankside glass flats, and the availability of self-help measures, should have been taken into account in this balancing. In this regard, the practical difficulties in implementing point (b) – the prioritising of "common and ordinary" uses of land – which this Note also criticises, have further ensured that the abnormal building sensitivity and availability of self-help measures could not be taken into account, and the broad-based, multi-factorial balancing which has been the heart of pre-*Fearn* private nuisance law is now thrown into uncertainty.

Certainly, while the courts have not yet reached a determination on remedies, the *Fearn* majority's holding – namely, that the claimants' particular sensitivity and availability of self-help measures should not be considered – is likely to influence how such factors may be considered and balanced in assessing damages or the scope of any injunction. The Supreme Court's holding is also likely to affect any settlement negotiations prior to hearings on remedies. In this author's view, this would be an unfortunate outcome of the combination of privileging the right to build (including the right to purchase and live in unusually designed buildings) and the prioritisation of the "common and ordinary" uses of land.

If any common law courts are considering whether to adopt the principles and holdings in *Fearn*, the doctrinal and policy implications discussed in this Note may be considered. These are of particular importance to jurisdictions with high-density urban settings, like Singapore and Hong Kong, where lines of sight (and thus, private nuisance liability) can theoretically stretch for great distances, and where private nuisance can operate alongside applicable planning permission regimes and affect private rights and liabilities beyond such regimes.