Current Issues in Nuisance and Trespass

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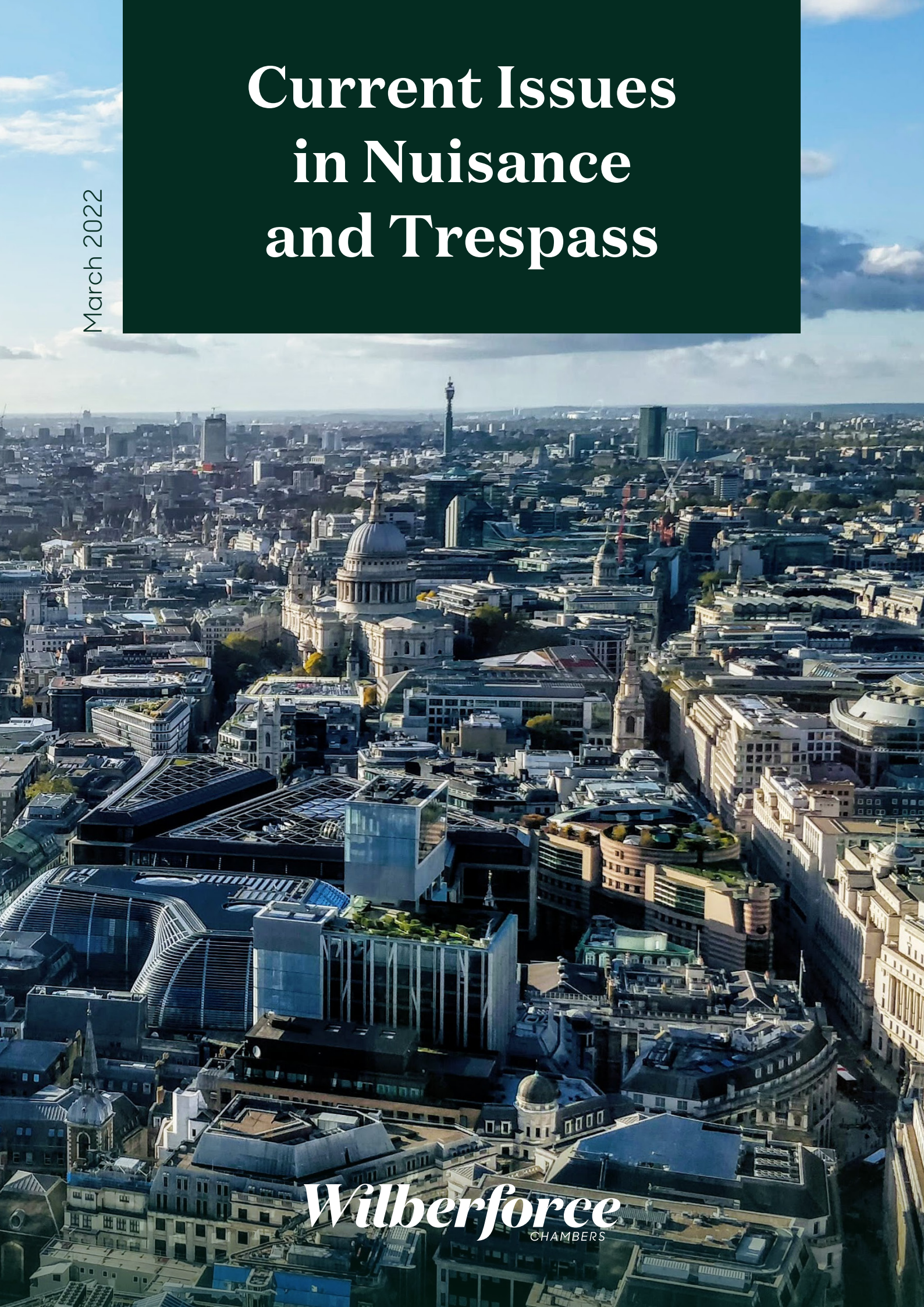

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Current Issues in Nuisance and Trespass

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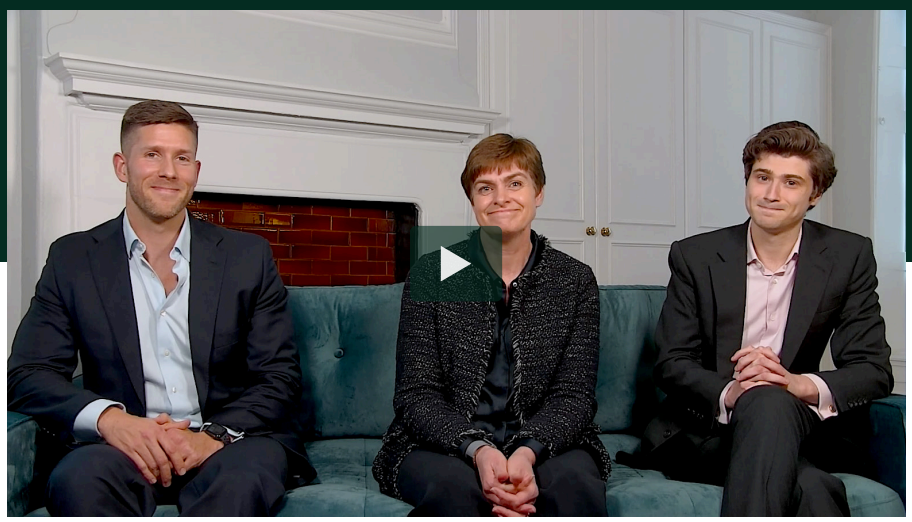

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The torts of trespass and nuisance have long historical roots in English and Welsh law, and still form part of the bedrock of property law in all common law jurisdictions. It is the right to sue for trespass, and thereby control the use of land and exclude others from it, which lies at the heart of our concept of ownership, while the law of nuisance protects an owner from undue interference with his or her enjoyment of their land. After all, any concept of property ownership which is powerless in the face of incursions or interference by third parties would not, in any recognisable or meaningful sense, be ownership at all.

Given the large number of cases in the older law reports about these causes of action, it might come as a surprise to the uninitiated that there is still anything left to say about them. But as this collection of essays shows, in these fields of law there is much that is uncertain, there is much to debate, and there is much that remains in flux. Indeed, the age of many of the cases, and the more recent proliferation of them, often obscures rather than clarifies the law.

As a growing proportion of the country live in densely populated urban areas, the law which governs our relationships with our neighbours remains more relevant than ever. The Courts continue to adapt it to suit contemporary issues, like the scourge of Japanese knotweed in *Network Rail Infrastructure Ltd v Williams* [2018] EWCA Civ 1514. They must also grapple with the relationship between the law of tort and modern planning controls, as in *Lawrence v*

Fen Tigers [2014] UKSC 13, or environmental legislation, as in *Pigot v Environment Agency* [2021] EWCA Civ 213. As this book goes to print, the Supreme Court has heard the appeal of the Court of Appeal's decision in *Fearn v Tate Gallery Board of Trustees* [2020] EWCA Civ 104, which considers the point at which the citizen ceases to be able to look to the law of nuisance for protection – in this context, to prevent overlooking from a neighbouring building – and judgment is awaited. Meanwhile, that court, in *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20, has attempted to rationalise an approach to negotiating damages, which have long held sway in the fields of nuisance and trespass. Finally, the Court of Appeal in *Barking and Dagenham v Persons Unknown* [2022] EWCA Civ 13 has provided guidance on the availability of interim injunctive relief against persons unknown in the context of a trespass claim.

Each chapter in this book explores an aspect of the law of trespass or nuisance, or the remedies available to those who can establish their claim, where the modern law may be said still to leave unanswered questions or where legal principles need conversion into practical advice. It is, very deliberately, not a comprehensive textbook which seeks to explain all aspects of the law.

Daniel Petrides seeks to find the boundaries of the modern law of nuisance, with particular reference to certain forms of interference which the law refuses to recognise as actionable, and the possible dilution of the remedies available to successful claimants following *Lawrence*. Benjamin Faulkner and Francesca Mitchell consider the thorny and controversial questions which arise around nuisance where property is subject to a tenancy. Jonathan Seitler QC gives advice on how the law of trespass and nuisance play out in the context of noisy and disruptive building work, surely among the most frequently encountered nuisances of the modern city. Julian Greenhill QC then explores the recent case of *Jalla v Shell International Trading & Shipping Co* [2021] EWCA Civ 63 and asks whether the distinction between continuing nuisances and one-off events, which can be so important to questions of limitation, is harder to draw in practice than the Court of Appeal was willing to admit. Lastly, we have three chapters concerned with remedies, with Jonathan Chew probing the law relating to negotiating damages for nuisance and trespass, Daniel Scott (building on a very well received article by Tom Roscoe from 2012) considering the relationship between possession and injunction claims, and Tiffany Scott QC considering injunctions against "persons unknown".

We here at Wilberforce Chambers hope that this book will give food for thought, elicit discussion and help steer clients towards the practical steps they can take to avoid, or pursue, a claim in areas of law which, despite their deep historical roots, remain vital in the 21st century.

Chapter 1

Nuisance and its limits

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Daniel Petrides

Author

Daniel Petrides

Daniel was called to the Bar in 2018 and joined Wilberforce Chambers in 2019 upon successful completion of his pupillage. Property cases already make up a significant part of Daniel's busy commercial chancery practice. In addition to frequently being instructed to appear as sole counsel in both the High Court and the County Court, Daniel frequently advises on the full range of real property and landlord and tenant matters. Recent property cases in which Daniel has acted include a long-running rent review arbitration involving several multi-week hearings before a former Supreme Court judge, a forthcoming three-week trial in the High Court concerning the existence of an easement in favour of a high-value residential property in Central London, a dispute about the sale of a property in Iraq including allegations of fraud, and a professional negligence claim arising from the drafting of an option agreement. Daniel also retains an interest in and has experience of property cases which intersect with other areas of his practice, particularly insolvency and the law of trusts.

Introduction

"*There is*" the American legal scholar William Prosser once remarked "*perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'*". [1] Nevertheless, nuisance remains the common law's primary mechanism for regulating the use of property. Indeed, its continued relevance on a crowded island is illustrated by the frequency with which nuisance cases raising novel questions of considerable public interest now reach the higher courts: there have been significant decisions of the Court of Appeal in three of the last four years and numerous decisions of the House of Lords and Supreme Court over the last two decades. Unfortunately, these decisions have done little to clear the undergrowth.

The basic paradigm at the heart of every nuisance case can be stated simply. When faced by an alleged infringement of a property right by a given activity, there are three broad responses open to the law: (i) it can enjoin the activity complained of; (ii) it can allow the activity to continue subject to the payment of some form of damages/compensation; or (iii) it can refuse to recognise the right alleged to have been infringed. Which of these approaches is adopted is ultimately based on considerations of public policy – as articulated through precedent – around the balancing of competing interests.

In cases concerning physical nuisances, response (i) will ordinarily follow as a matter of course. In contrast, the recent caselaw on so-called 'loss of amenity' nuisances reveals an increasingly restrictive approach to such claims, tending towards responses (ii) and (iii). While changes in social mores and the use of land have seen claimants seek to push at the boundaries of the tort, the courts have generally, thus far, declined to extend its territory. Indeed, as the law currently stands, it is firmly established that certain acts can never amount to a nuisance. But why these 'non-rights' should not attract protection – especially compared to those which do – is at best under-theorised, and at worst threatens the coherence of the tort. Meanwhile, the remedial potency of the tort has arguably been dulled by the Supreme Court's decision in *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, the practical implications of which remain unclear.

This chapter considers both the conceptual coherence and practical utility of the law of nuisance in light of recent caselaw on these issues, in three parts. First, the elements of nuisance are considered which, while capable of being stated simply, remain highly fact-sensitive and therefore unpredictable in their application. Secondly three acts presently excluded from the ambit of nuisance are considered – overlooking private property, the obstruction of a view, and interference with television signals – before turning to examine some of the ways in which parties might seek to circumvent these limitations. Finally, the question of remedies following *Lawrence* is addressed.

Part I: Nuisance in general

Private nuisance is – along with its cousins, trespass and *Rylands v Fletcher* liability – one of the torts against land. This means that it arises from an act, omission or state of affairs which causes harm to or interferes with the claimant's proprietary interest in the affected land *qua* land; other harms such as personal injuries suffered on the land, even if arising from the same fact-pattern, may only be pursued via different causes of action such as the tort of negligence. The underlying

[1] Prosser, W., *Handbook of the Law of Torts* (4th ed.) (West Publishing Co., 1971), p. 371.

coherence of the tort is, therefore, said to derive from the violation of property rights.[2]

The proprietary nature of nuisance is said to justify some of its limitations, including the exclusion of personal injuries and the controversial rule that only the owner of an interest in the affected property has standing to sue, mere occupiers being excluded from its ambit.[3] It also underpins the rule, put beyond doubt in *Lawrence*, that there is no defence of 'coming to' the nuisance. As Lord Neuberger explained, it would be inconsistent with the analysis that nuisance is a property-based tort if a change in the ownership of the affected property were capable of rendering an act which would have amounted to a nuisance under the former owner no longer a nuisance under the new one.[4]

But as understandings of property and usage of land have changed, so too have the proprietary interests protected. As it initially evolved, nuisance was largely confined to resolving parochial disputes concerning physical (but non-trespassory) encroachments. Lord Westbury's great innovation in the leading case of *St Helen's Smelting Co v Tipping* [1865] 11 HL Cas 642 was to make explicit, for the first time at the highest level, that acts which did not physically interfere with the affected property, but rather occasioned "*sensible personal discomfort*", could nonetheless amount to an actionable nuisance. The explicit recognition of these 'loss of amenity' nuisances constituted an important doctrinal departure by the courts in response to the advent of industrialism, placing the tort at the heart of the law's attempts to balance private interests against activities said to be publicly beneficial.

However, the potentially wide-ranging ambit of loss of amenity nuisances means that they are subjected to additional control factors which either do not apply to physical nuisances or, if they do, are always presumed to be overcome (the latter view seems preferable). These are frequently condensed into an iteratively assessed requirement that there is "*material interference*" with the claimant's enjoyment of their property and that the act complained of is not "*necessary for the common and ordinary use and occupation of the land*" or "*conveniently done*".[5] This was referred to by Lord Goff in *Cambridge Water v Eastern Counties Leather plc* [1994] 1 All ER 53 by the shorthand of "*reasonable user*", which is adopted here for convenience.[6] Each of these elements is dealt with briefly below.

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[2] See for example Nolan, D. "'A Tort Against Land': Private Nuisance as a Property Tort" in Nolan, D. and Robertson, A. (eds.) *Rights and Private Law* (Hart, 2014).

[3] The courts have been willing to construe the concept of ownership broadly so as to include those with transitory or easily defeasible interests, such as an owner of a time share (*Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2015] EWHC 3564 (Ch) at [69]) or a "*tolerated trespasser*" against whom a possession order had not been enforced (*Pemberton v Southwark LBC* [2001] 1 WLR 1672). On the unusual positions of a reversioner and a tenant, see *chapter 2 by Benjamin Faulkner and Francesca Mitchell*

[4] [52]; cf. *Miller v Jackson* [1977] QB 966. On the position of successors in title to the original tortfeasor, see *chapter 4 by Julian Greenhill QC*.

[5] As per Bramwell B in *Bamford v Turnley* (1862) 3 B & S 66 and explained by Sir Terrence Etherton MR in *Fearn v Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 at [40].

[6] It should be noted that the Court of Appeal in *Barr v Biffa Waste Services Ltd* [2013] QB 455 emphasised that the word "*reasonable*" should not be taken to have disturbed the settled principles established in the older caselaw or implied any assimilation with the tort of negligence, as per Carnwath LJ at [71]; cf. Lord Millett's similar remarks in *Southwark LBC v Mills (No. 2)* [2001] 1 A.C. 1 at 20.

Nature of harm

The manifestation of harm in loss of amenity cases is necessarily more amorphous than in those involving physical damage. Although it is sometimes said that there is always a requirement for 'damage' if a claim in nuisance is to be made out, Sir Terence Etherton MR explained in *Williams v Network Rail* that the concept of damage, if it has any role to play, is a "*highly elastic*" one.[7] Instead, nuisance protects rights/privileges which are "*facets*" of the rights of exclusive possession and quiet enjoyment which underpin the law of property.[8]

This begs the question of what rights/benefits *are* inherent facets of the ownership of property. It is here that the law appears liable to slip into incoherence.

On the one hand, the courts have cast the net of harm considerably wider than the classical cases of noises and smells emanating from neighbouring premises. For example, the Court of Appeal in *Thompson-Schwab v Costaki* [1956] 1 WLR 335 held that the sight of "*the perambulations of prostitutes and their customers*" from a nearby brothel would cause sufficient moral offence to residents of a Mayfair street to amount to a nuisance. So too have persistent phonecalls,[9] picketing a factory,[10] provoking a well-founded fear,[11] and scaring animals during breeding season[12] all been held to constitute actionable nuisances. Although attempts are often made to conceptualise these as quasi-emanations from the defendant's land, such metaphysical acrobatics are unnecessary and liable to confuse.

But as discussed below, the distinction between some of these types of interference, and those which the law has hitherto refused to recognise, appears to be vanishingly thin.

Material interference

If the form of harm is one which the law recognises to be actionable, an objective test is applied to the question of whether the given interference is sufficient to attract censure. Again, this flows inexorably from the principle that the tort protects proprietary, rather than personal, rights. The question of materiality is ultimately fact-sensitive, and attempts to define it are liable to slip into meaningless generality.[13]

The most important corollary to the objective test is that no liability will arise due to 'unusual sensitivity' on the part of the claimant.[14] In *Robinson v Kilvert* (1889) 41 Ch D 88 the

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[7] [42] – [43].

[8] *Williams* at [48]; it was held that diminution in market value is therefore not actionable *per se*.

[9] *Khorasandjian v Bush* [1993] QB 727; although cf. Lord Hoffmann's *obiter* doubts about whether this was in fact a true nuisance case in *Hunter v Canary Wharf Ltd* [1997] AC 655 at 707D-G.

[10] *J Lyons & sons v Wilkins* [1899] 1 Ch. 255.

[11] For example, in *Metropolitan Asylum District v Hill* (1881) 6 App. Cas. 193 the establishment of a hospital for housing small-pox patients close to the plaintiffs' property was restrained by an injunction.

[12] *Hollywood Silver Fox Farm v Emmett* [1936] 2 KB 468.

[13] For example, "*the ordinary usages of mankind living in society…*" (*Sedleigh-Denfield v O'Callaghan* [1940] AC 880) and "*plain and sober and simple notions among the English people*" (*Walter v Selfe* (1851) 4 De G & Sm 314 at 322). This latter *dictum* has, unsurprisingly, gained little traction in the rest of the common law world.

[14] Although harm to unduly sensitive objects if an object of normal sensitivity would also have been damaged is actionable: see *McKinnon Industries Ltd v Walker* [1951] 3 DLR 577 where a claim arising from the destruction of delicate orchids by sulphurous fumes succeeded because even hardier plants would have been killed.

Court of Appeal held that the cause of action was not made out by the emanation of hot, dry air from a cellar retained by the defendant landlord, which caused damage to unusually delicate paper stored on the floor above by the plaintiff tenant, but would not have troubled an owner putting the property to a more conventional use. More recently it has been held that interference from railway signalling equipment with electric guitars in a recording studio did not constitute a nuisance.[15]

Whilst defensible both for its consistency with the proprietary nature of the tort and as a matter of pragmatism, the rule does seem apt to create unjust outcomes in some situations. Take the facts of *Grange Wind Farm v North Lincolnshire Council* [2010] PAD 31, where the evidence was that the 'shadow flicker' generated by a proposed windfarm would have an acute and debilitating effect on the severe autism of two children whose family lived in a nearby home which had been specially modified for their needs. Had the case been a claim in nuisance rather than a planning dispute, the court would have been unable to take their condition into account. Or, to take a less extreme example, if the 'sensitive' activity is a longstanding one which has become intimately entwined with the property in question – for example, if the premises in *Kilvert* had been a shop selling antique books from the same location for decades which had built up a loyal customer-base who associated it with the location, or if the studio in *Morris* had been on Abbey Road – it seems harsh that the goodwill value to the affected business, or the cultural heritage of the site, should be so easily defeasible. This is particularly so when, as explained below, a defendant to a nuisance claim is able to rely on the character of the locality (and indeed their presence there is partly constitutive of that character). A similarly holistic test of the reasonableness of the claimant's activity in that specific area might be preferable to a brightline rule about sensitivity.

Reasonableness of user

The concept of reasonableness is similarly protean. It is often stated that the principle at the heart of the law of nuisance is one of reciprocity: for society to function there must be some "*give and take*" between its members.[16] While the precise boundaries of this 'give and take' have fluctuated over time, there are now discernible from the modern caselaw four elements which the courts may take into account in assessing reasonableness.

The first is the 'ordinariness' of the impugned act. This will depend on a range of factors, including the intensity, duration, frequency and purpose of the act in question. While this will generally be a fact-specific question, it is notable that malice on the part of the defendant may render an act which would otherwise be reasonable and ordinary a nuisance.[17] The best explanation for this is probably that the act of actively attempting

[15] *Network Rail Infrastructure Ltd v Morris* [2004] EWCA Civ 172.

[16] See for example *Cambridge Water* [1994] 2 AC 264 as per Lord Goff at 299.

[17] See *Christie v Davey* [1893] 1 Ch 316 (deliberately making noise to prevent a neighbouring music teacher from giving music lessons) and *Hollywood Silver Fox Farm v Emmett* [1936] 2 KB 468 (shooting guns to prevent a neighbouring animal breeder's animals from breeding).

to disturb a neighbour is never 'common or ordinary', but this is hard to reconcile with the objective approach applied to the question of interference, and with the Court of Appeal's robust view in *Fearn* that nuisance should not encroach upon statutory attempts to regulate harassment and invasions of privacy.[18] As with many aspects of the law of nuisance, this appears to be a pragmatic attempt to do justice rather than a matter of doctrinal purity.

The second is the character of the neighbourhood. As Lord Westbury put it in *Tipping*, whether an act is part of the common and ordinary use of land

> *"…must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large."*

Or, as Thesiger LJ famously put it, "*what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey*".[19] Although numerous justifications for the rule have been proffered, as the quote above from Tipping shows, the rule is little more than a thinly-veiled tool for consideration of the public interest at the liability stage. [20]

This analysis will, again, generally be iterative and fact-sensitive, and is where much of the work of the 'give and take' principle is done. The courts may take into account here all lawful activities of the defendant which would not amount to a nuisance.[21] There is, however, an objectively determined 'cap' on what will be considered reasonable. If, for example, the level of noise generated is greater than any reasonable resident could be asked to bear, "*it is no answer to say that the neighbourhood is noisy*".[22]

The third is the existence of planning permission. Following *Lawrence*, it is firmly established that the grant of planning permission – which simply removes one legal bar to the use of land by reference to statutorily-assessed criteria – will not itself authorise a nuisance.[23] This is said to

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[18] [94], discussed further below.

[19] *Sturges v Bridgman* (1879) 11 Ch D 852 at 864.

[20] For a critical analysis of the various explanations, see Steel, S. "The locality principle in private nuisance" *The Cambridge Law Journal, Vol. 76, Issue 1* (2017) pp. 145-167.

[21] *Lawrence* at [74] as per Lord Neuberger; this involves, as Lord Neuberger himself acknowledged at [71], "*an element of circularity*". Lord Carnwath would have gone further to take into account even nuisance-causing activities, but this did not form part of the ratio of the majority: [187 – [189].

[22] *Rushmer v Polsue & Alfieri Ltd* [1906] Ch. D. 234 as per Cozens-Hardy LJ at 251.

[23] [89]-[95]; [156]. cf. the intriguing case of *Forster v The Secretary of State for Communities and Local Government* [2016] EWCA Civ 609 in which the claimant successfully judicially reviewed a grant of planning permission on the basis that the proposed construction of a residential development close to her music venue might render her liable in nuisance arising from late-night events in the future.

be because allowing decisions of planning authorities to oust private law causes of action would be to allow "*the extinction of private rights without compensation as a result of administrative decisions which cannot be appealed and are difficult to challenge*".[24] However, planning permission, if obtained, may have *some* relevance to an assessment of the character of the local neighbourhood as evidence of what types of activity may be considered reasonable in the locale.[25]

The fourth is a more holistic assessment of the public interest. This is the area where statute has affected the position the most: s.158 of the Planning Act 2008 now confers "*a defence in civil or criminal proceedings for nuisance*" where a development is carried out with statutory authority (although s.152 provides statutory compensation in such situations), while in cases involving statutory undertakers the common law defence of statutory authority may also be available.[26]

In cases unaffected by statutory intervention, the orthodox position is that beyond the locality principle (in which established activities are used as a cipher for the interests of the local area), wider questions of public interest have no role to play at the liability stage. To give two examples, in Miller (notwithstanding Lord Denning's colourful dissent to the contrary) the benefits of cricket to the local community were not sufficient to defeat a claim arising from the claimants' garden being bombarded by balls every weekend, while in both Cambridge Water and *Lawrence* the suggestion that the creation of employment would be sufficient to render a particular user natural or ordinary was rejected.[27]

However, the mask has occasionally slipped. In *Hunter v Canary Wharf Ltd* [1997] AC 655, Lord Hoffmann placed reliance on the fact that the Isle of Dogs had been designated as an 'enterprise zone' and subjected to a special planning regime so as to encourage regeneration of the docklands.[28] Several years later in *Marcic v Thames Water plc* [2003] UKHL 66 – which arose from the persistent flooding of the claimant's home by untreated sewage – Lord Hoffmann noted that a consequence of allowing the claim would be that "*capital expenditure on new sewers has to be financed…This expenditure can be met only by charges paid by consumers*". He asked rhetorically "*Is it in the public interest that they should have to pay more?*"[29]

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[24] As per Peter Gibson LJ in *Wheeler v JJ Saunders* [1996] Ch 19 at 35 and approved by Lord Neuberger in *Lawrence* at [93].

[25] [96] – [98].

[26] This is now assessed by reference to the restrictive test laid down by Webster J in *Department of Transport v North West Water Authority* [1983] 3 WLR 105 (and approved by the *House of Lords* [1984] AC 336). For a recent application, see *Pigot v Environment Agency* [2021] EWCA Civ 213. The rationale for the defence is, at least in part, constitutional: as Lord Halsbury noted in *Canadian Pacific Railway Co v Roy* [1902] AC 220 at 231, if "*the legislature is supreme, and if it has enacted that a thing is lawful, such a thing cannot be a fault or an actionable wrong*".

[27] 309A. A similar argument also failed in *Lawrence*.

[28] 700–701.

[29] [62]; Marcic is a difficult decision which should perhaps be confined to its own facts – in Southern Gas Networks Plc v Thames Water Utilities Ltd [2018] EWCA Civ 33, Hickinbottom LJ noted that the speeches of Lord Hoffmann and Lord Nicholls are "not easy" to reconcile (see [80] – [83]).

But as has been frequently noted, the difficulty with allowing public interest considerations to infect the analysis of liability – over and above the established considerations of ordinariness and the locality – is that the courts are ill-placed to balance the public good against the private interests which are infringed, especially when (as the courts have repeatedly stated) there is a strong public interest in protecting private rights. Furthermore, the inevitable consequence of Lord Hoffmann's concern in *Marcic* is that claimants affected by activities deemed beneficial may be asked to shoulder excessive burdens on behalf of the wider community. This seems wrong. As was said in *Bamford v Turnley* itself *"[a] law to my mind is a bad one which, for the public benefit, inflicts loss on an individual without compensation"*.[30]

The approach taken in *Dennis v Ministry of Defence* [2003] EWHC 793 (QB), which concerned the noise of military jets from nearby RAF Wittering carrying out training exercises above the claimant's country estate in Cambridgeshire, seems preferable. There it was held that there was a *prima facie* nuisance[31] (as well as breaches of Article 8 and A1P1) and, importantly, that the considerable public interest in allowing the MoD to train should not alter the analysis on liability:

> "[46] *The problem with putting the public interest into the scales when deciding whether a nuisance exists, is simply that if the answer is no, not because the claimant is being over sensitive, but because his private rights must be subjugated to the public interest, it might well be unjust that he should suffer the damage for the benefit of all…*
> [47] *…selected individuals should not bear the cost of the public benefit".*

Instead, it was held that the question of public benefit should be considered only at the remedial stage, as a result of which the Claimants were awarded damages in lieu of an injunction.[32]

Part II: The limits of nuisance

As has already been noted, the courts have consistently held that there are several rights which the law does not regard as facets of the ownership of land, and which are therefore incapable of founding a claim in nuisance: the questions of materiality and reasonable user simply do arise. These include the right to percolating water,[33] the right to the flow of air,[34] and even the right to light (which is only capable of being protected by way of an easement, whether express or acquired by way of prescription).[35]

This section will focus on three 'rights' which the courts have hitherto declined to protect: the right to a view, the right to receive television signals, and the right not to be overlooked. It is suggested that such

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[30] 33.

[31] But a different result was recently reached on similar facts in Jones v Ministry of Defence [2021] EWHC 2276 (QB).

[32] *Cf. Andrews v Reading BC* [2005] EWHC 256 (QB) in which damages were awarded for a breach of Article 8 arising from an increase in traffic noise outside the claimant's home caused by a local authority's decision to close another road.

[33] *Bradford v Pickles* [1895] A.C. 587.

[34] *Chastey v Ackland* [1895] 2 Ch 389.

[35] *Tapling v Jones* (1865) 11 HLC 290.

brightline rules are difficult to justify, harm the coherence of the tort, and are outdated. Instead, they should be abolished in favour of the flexible application of the principles described in the previous section.

Rights to a view

The origin of the common law's refusal to protect a right to a view is generally traced back to *Aldred's Case* (1610) 77 E.R. 816 in which reference was made to the earlier, unreported case of *Bland v Moseley* (1587) as authority for the proposition that "*[a] prospect, which is a matter only of delight, and not of necessity, no action lies for stopping thereof… the law does not give an action for such things of delight*". As Pontin has shown, it is doubtful that this was in fact the *ratio* of *Bland*, which appears to have been a case concerning rights of light in which the Latin terms *lumen* (light) and *visum* (view) were used interchangeably.[36] Indeed, there were cases going back as far as 1329 in which the law had seemingly afforded protection to views.[37] Nevertheless, this erroneous reading of *Bland* became baked into the early-modern caselaw following *Aldred's Case*, and was more recently reasserted by the House of Lords in *Hunter*.[38]

A further rationale behind the total exclusion of such claims was expounded in *Attorney-General v Doughty* (1752) 2 Ves Sen 453 where it was suggested that the court should not grant a remedy to one person which would necessarily have the effect of imposing a burden on vast swathes of land in the visible vicinity. Lord Hardwicke memorably remarked "*was that the case, there could be no great towns; and I must grant injunctions to all the new buildings in this town*".[39] There are a number of difficulties with the continued justification of such a rule by reference to these ancient cases.

First, the "*thing of delight*" rationale appears outdated. *Aldred* hails from a time – pre-*Tipping* – when nuisance was primarily understood as a remedy for physical interferences with land which were regarded as strictly necessary for its habitation. Indeed, as Lord Blackburn rued in *Dalton v Angus* (1880) 6 App Cas 740 "*the distinction between a right to light and a right to prospect, on the grounds that one is a matter of necessity whereas the other of delight, is to my mind more quaint than satisfactory*". It is hard to see why, as a matter of principle, a magnificent view of, say, a cultural monument or a location of outstanding natural beauty should not be recognised as an inherent part of the ownership of a property lucky enough to possess one.

The categorisation of a view as a frivolity unconnected to the enjoyment of the property in question also seems inconsistent with some of the subsequent developments in the law. For example, the distinction between an offensive sight (such as in *Thompson-Schwab*), and the obstruction of a beautiful view is tenuous at best – each relates to the 'prospect' which the claimant enjoys from

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[36] Pontin, B., 'A room with a view in English nuisance law: exploring modernisation hidden within the "textbook tradition"', *Legal Studies* (2018) pp. 1- 18.

[37] London Assize of Nuisance, 1301–1441: A Calendar (London: London Records Society, 1973), Case No. 305; cf. Case No. 312, cited by Pontin, ibid.

[38] *Hunter* at 699C-G; 709-710.

[39] 453-4; although interestingly, in *Packington v Layton* (1744) 3 Atk 215 and *Aston v Aston* (1749) 1 Ves Sen 264, Lord Hardwicke was prepared to grant injunctions preventing tenants from taking steps which would destroy views of a wooded landscape and a tree-lined vista from the properties concerned.

their property, while the occasional presence of the former is arguably more transitory than the complete extinction of the latter.

The justification that it would stifle development is no more persuasive. The understandable fear of stultifying vast swathes of land could be managed by the careful application of the tests of materiality and reasonable user. It may be that the majority of views would be afforded no protection, either because the materiality of the interference is limited (for example, if the view is an unremarkable one or the building complained of is too far in the distance significantly to distort it) or because in the locale (such as urban areas) the user is not unreasonable. But in the minority of cases where the strictness of the rule would result in an unjust outcome, this flexibility would be welcome. The risk could perhaps be further mitigated by awarding damages in lieu of an injunction.

An illuminating illustration of what such a flexible approach might look like is the decision of the High Court of South Africa in *Waterhouse Properties CC v Hyperception Properties* 572 CC [2004] ZAFSHC 97. The claimants were the owners of a holiday home on the banks of a picturesque river, and the evidence was that the view of the river was a significant part of their decision to purchase the property and their enjoyment of it. Thirteen years later the defendants, who owned a neighbouring property, erected a large structure above a jetty which obscured that view. The claimants applied for an interdict (equivalent to a mandatory injunction) requiring the removal of the new superstructure on the basis that it materially infringed their use and enjoyment of their property. The court granted the interdict, holding that *"what we are here dealing with is not an average residential area"* and that *"it goes without saying that the visual enjoyment of the beautiful river forms an essential part of the intended purpose owning these luxurious properties and the reason for the existence of this specific locality."*[40] The judge continued:

> *"*[34] *If we accept, and I believe we should, that we are here dealing with an extraordinary situation of two neighbouring properties with unique attributes…then we must appreciate and acknowledge that to a reasonable and neutral property owner in that particular society a view of the river in question is much more than a pure aesthetic matter. It is an asset with unquestionable proprietary significance."*

The recognition in *Waterhouse* that a particularly beautiful view in an atypical area may constitute an integral part of a property (and indeed of all properties in that specific area) is significant, both because it provides the necessary connection to the land affected *qua* land for nuisance to be made out, and because it provides a principled basis (consistent with established principles of nuisance) for distinguishing between views which will attract protections, and those which will not.

Rights to receive electronic communications

In *Hunter* the House of Lords referred to the analogy between access to a view and access to television signals as *"compelling"*, and applied the reasoning developed in the context of the former in refusing to afford protection to the latter.[41] For the reasons

[40] [31], [29].

[41] 666E. It was held that such a right could not be acquired by way of prescription either.

given above, this is unpersuasive. Indeed, the outdated distinction between necessities and frivolous forms of enjoyment appears even more outdated in respect of television signals (and other forms of electronic communication which have arisen since *Hunter* but are presumably captured by the same rule, such as mobile telephone reception and broadband internet).

Thirty-one years before *Hunter*, in ***Bridlington Relay Ltd v Yorkshire Electricity Board*** [1965] Ch 436, Buckley J had also held that interference with television signals did not constitute a nuisance because this was merely interference with a recreational facility, but presciently left open the possibility that this analysis would no longer be appropriate if such signals were one day considered more fundamental to daily life than they then were. In 2022, that day seems to have arrived.

Rights not to be overlooked

What about the inverse – a right not to *be* viewed? It might be thought that in an age more conscious than ever of incursions into privacy, the courts would seek to use the law of nuisance as an additional tool for protecting property owners from unwelcome interference in their own homes. Indeed, as noted already, persistent telephone calls have been held to constitute a nuisance. However, the recent decisions of both the High Court and Court of Appeal in the *Fearn v Tate* litigation took a more restrictive view.

The case concerned the Neo Bankside residential development directly adjacent to the Tate Modern. Neo Bankside is distinctive in that it is constructed predominantly of glass. In 2016, the Tate completed the construction of a walkway and viewing gallery with 360-degree views of London, part of which directly overlooked the flats. The evidence at trial was that the interiors of the flats were clearly visible from the southern part of the viewing gallery, that in excess of 500,000 people visited the viewing gallery each year, and that a "*significant number*" of people took a "*visual interest*" in the interiors of the flats, especially when the residents were inside them. Indeed, some members of the public were said to have set up social media pages broadcasting the activities of the residents with the hashtag "#noprivacy". It was therefore clear that the interference with the privacy of the residents as they went about their daily lives was particularly acute.[42]

The question of whether an invasion of privacy could amount to a nuisance was, to an extent, a novel one for the English courts. Although it is well-established that "*besetting*" a property – that is, watching it

[42] Mann J's full factual findings are recorded at [66] – [89] of his judgment.

with the added ingredient of an intention to compel an inhabitant to behave in a particular way – is actionable as a nuisance, this seemed to be the first reported English case to consider the question of pure overlooking.[43] *Obiter* suggestions that there was no right not to be overlooked were made in *Tapling*, *Chandler v Thompson* (1811) 170 ER 1312 and *Turner v Spooner* (1861) 30 LJ Ch 80, and some of the older tort law textbooks referred to an unreported case from 1904 in which a dentist failed to obtain an injunction to prevent a family in Balham from spying on activities in his surgery via a carefully calibrated arrangement of mirrors.[44] In contrast, in *Bernstein v Skyviews & General Ltd* [1977] 1 QB 479, where a claim in trespass against a defendant who had flown over the claimant's country house for the purpose of taking an aerial photograph of it failed, Griffiths J suggested in *obiter* that a "*monstrous invasion of privacy*" may constitute an actionable nuisance.[45]

The question had been considered in the Australian case of *Victoria Park Racing and Recreation Ground Co Ltd v Taylor* (1937) 58 CLR 479, in which the owner of a racecourse sued after the defendant had erected a tower overlooking the racecourse for the purpose of broadcasting coverage of the races and taking bets on the outcomes. A bare majority held that there was no nuisance, but the minority – Evatt J and Rich J – wrote powerful dissents. Of the Balham dental surgery case, Evatt J said that "*no normally sensitive human being could have pursued his profession or business under so intolerable an espionage, and the result would have been to render the business premises practically uninhabitable*" while Rich J described it as "*if correctly decided, discreditable to English law*".[46]

At first instance in *Fearn*, Mann J was prepared to accept that nuisance is capable of protecting rights of privacy, preferring the reasoning of the minority in *Victoria Park*.[47] He went on to add that if there were any doubt that the law should be developed in this way, this was removed by Article 8 of the European Convention on Human Rights.[48]

However, he declined to find that the existence of the walkway constituted a nuisance on the facts of the case.[49] Instead, it was emphasised that an occupier in an inner city environment popular with tourists must have a lesser expectation of privacy than, say, a rural homeowner, that the construction of a viewing platform as an adjunct to an art gallery was not unreasonable within the neighbourhood, and that the problem was "*self-induced*" due to the "*particularly sensitive*" nature of the glass building.[50]

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[43] On besetting see *J Lyons & Sons v Wilkins* [1899] 1 Ch 255 and *Church of Jesus Christ Latter Day Saints v Price* [2004] EWHC 3245.

[44] Kenny, C.S. *A Selection of Cases Illustrative of the English Law of Tort* (4th ed.) (Cambridge, 1926); Winfield, P. H. "Privacy", *Law Quarterly Review vol. 47* (1931) pp. 23- 42.

[45] 489G. The intention was apparently to sell the photograph to Mr Bernstein; the judgment does not record if the effort was successful.

[46] 520-21; 504.

[47] [169].

[48] [170] – [174].

[49] A human rights claim also failed on the basis that the Tate Modern was not acting as a public body.

[50] [190]; [196]; [205]; [211]. At [214] he listed several remedial measures which, in his view, the complainants could easily have taken, such as installing mirror film on the building or lowering their blinds during the day.

The Court of Appeal rejected an appeal by the claimants, but differed from Mann J in its reasoning. It was held that if overlooking were capable of amounting to an actionable nuisance, the case did not concern any undue sensitivity on the part of the claimants and it would do violence to the twofold test of assessing materiality of interference and reasonableness of user to allow the possibility of the claimants taking *"remedial steps"* to creep into the analysis.[51] This is surely correct: an individual using their property in a normal manner should not be obliged to go to additional lengths to protect their quiet enjoyment simply due to the unreasonable acts of a neighbour.

But the Court of Appeal was not prepared to extend the tort of nuisance to protect privacy by preventing overlooking. This was for four broad reasons, none of which are persuasive.

First, it was held that both the absence of a right to a view under English law and the *obiter dicta* on overlooking in *Chandler* and *Tapling* gave effect to the important and longstanding policy of not imposing a burden on a large and indefinite area which would inhibit development.[52] In one passage, the court observed *"familiar images of cheek-by-jowl buildings in cities such as London in the medieval and early modern period show that overlooking was commonplace and indeed inevitable when the great cities were being constructed"*.[53] But such Hogarthian images hail from a time when conceptions of privacy were fundamentally different, so say little about what protections are appropriate in the twenty-first century. In any event, early-modern houses had fewer, and smaller, windows (viz. the window taxes), and the glass in what few windows there were was generally not transparent, so provide no helpful analogy to the type of complete visibility under consideration in *Fearn*. For reasons given above, concerns about imposing burdens on large areas of 'servient' land are better addressed by cautious application of the principles underpinning reasonableness rather than brightline rules derived from simplistic historical analyses.

Secondly, it was held that such cases are arguably not cases of 'damage' to interests in property, and if they were it would be difficult to determine the level of interference on the basis of an objective test.[54] But it is unclear why some minimum level of privacy should not be a facet of property ownership, especially where the property in question is a residential one. Once it is accepted – as it surely must be – that being constantly under the gaze of strangers is an invasive and inhibiting experience, it cannot credibly be denied that some measure of privacy must be an inherent part of quiet enjoyment of a property (particularly a home). And while it may be difficult to give precise guidance on where the line should be drawn, the courts are well accustomed to reaching determinations on difficult questions arising from finely balanced fact-patterns and developing guidance through the incremental accretion of precedent: the prospect of having to undertake such an exercise is not a good reason for refusing to recognise the existence of a cause of action.

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[51] [99]; reference was made to *Miller v Jackson* [1977] QB 966 in which the refusal by the plaintiffs of the defendant's offer to have a protective net erected did not affect their cause of action.

[52] [75]-[78]; this is the same point made by Lord Hardwicke about rights to a view, quoted above.

[53] Ibid.

[54] [81]; [84].

Thirdly, it was emphasised that both planning law and statutory enactments such as the Protection from Harassment Act 1997 and Data Protection Act 2018 provided alternative means of protecting privacy rights.[55] This may be so, but none of them protected the residents in *Fearn*, nor would there be any risk of undermining the statutory schemes by allowing the law of nuisance to provide an additional fallback position. As for planning, the Court of Appeal's fear that "*any recognition that the cause of action in nuisance includes overlooking raises the prospect of claims in nuisance when such a planning objection has been rejected*" is baffling in light of *Lawrence*.[56] Lord Neuberger appears to have been envisaging precisely such a situation when he said "*a planning authority would be entitled to assume that a neighbour whose private rights might be infringed* [by a planning decision]*…could* [still] *enforce those rights in a nuisance action*".[57]

Finally, the Court of Appeal declined to extend nuisance to give better effect to Article 8, holding that this would "*significantly distort the tort*". [58] This is discussed further below.

Circumventing the limits

How might a claimant seeking to protect a 'right' which the courts have hitherto refused to recognise – or a novel right which would seem to be impeded by analogy to the present state of the law – circumvent these restrictions?

Rights of light and other easements

Some such rights may be capable of being protected by easements. The most well-known example is a right to light, which may be acquired either by way of an express grant or under s.3 of the Prescription Act 1832. However, due to their imprecision, it is well-established that rights to a view and rights to privacy are not capable of satisfying the *Re Ellenborough Park* test; whether a right to receive signal from, say, a particular mobile telephone mast may take effect as an easement is untested.

Restrictive covenants

Due to their greater specificity and contractual genesis, restrictive covenants are capable of covering a far wider range of activities than both easements and the law of nuisance, and as such ought to be capable of protecting most (if not all) of the forms of harm which nuisance declines to protect.

A good example of the operation of a restrictive covenant in this context is *Dennis v Davies* [2009] EWCA Civ 1081, the facts of which were very similar to *Waterhouse*. The claimants purchased a property in a development situated on the River Thames. The judge at first instance found that "*a particular feature of the development was its closeness to the river and the views that each house was afforded of the Thames*". The defendant proposed to build an extension to his property, the effect of which would have been significantly to reduce the claimants' view of the river.

Unlike in *Waterhouse*, every transfer of property within the development contained a suite of covenants, including a covenant "*not to do or suffer to be done on the Plot or any part thereof anything of whatsoever nature which may be or become a nuisance or annoyance to the owners or occupiers*

[55] [81] – [83]; [94].
[56] [81].
[57] [95].
[58] [91].

for the time being of the Estate or the neighbourhood". Accordingly, while the claimants could not claim in common law nuisance, they pursued a claim for breach of the covenant.

The main issue was whether, on its true construction, the language of the covenant was apt to protect a right to a view. Both the first instance judge and the Court of Appeal followed the decision of the Court of Appeal in *Tod-Heatly v Benham* (1888) 40 Ch. D. 80 in holding that it was.

In *Tod-Heatly*, which concerned a similarly worded covenant, it was held that even if the word 'nuisance' did have to be given its common law meaning (which Bowen LJ said he was prepared to accept "*as a matter of argument only*")

> "'*Annoyance' is a wider term than nuisance, and if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house—if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance...*"[59]

As Lindley LJ noted "*there is no use in putting in...additions to 'nuisance' except for the very purpose of giving some greater protection than he would have had if the 'nuisance' alone were used and included in the covenant*".[60] The reasoning in *Tod-Heatly* was applied in the later decision of *Wood v Cooper* [1894] 3 Ch 671 where it was held that the construction of a boundary wall some eight feet high and nearly sixty feet in length was capable of amounting to an "*annoyance*" to "*reasonable, sensible people*".

The seeming breadth which may be afforded to the terms "*annoyance*", "*disturbance*", "*grievance*" and "*detriment*"– which are common in covenants of this nature – makes these potentially powerful tools for impugning acts which would not constitute a common law nuisance. Equally, more explicit covenants might be employed to remove any doubt, or more broadly framed ones which could collaterally prevent obstruction of views or overlooking.

Restrictive covenants are, however, subject to discharge under s.84. The grounds prescribed by s.84 – which include that the covenant has been rendered obsolete by "*changes in the character of...the neighbourhood*" (s.84(1)(a)) or is impeding "*some reasonable user of the land for public or private purposes*" (s.84(1)(aa)) – bear some obvious surface-level similarities to the considerations which arise in some nuisance cases. Although s.84 is subject to its own caselaw, which is beyond the scope of this chapter, it is conceivable that defendants faced by an attempt to use such a covenant to go beyond what would be a weak common law nuisance claim due to the reasonable user test could seek to collapse the distinction and apply for a discharge.

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[59] 98.
[60] 95.

Human Rights

The impact of the Human Rights Act 1998 in the sphere of property law has been muted. Nevertheless, nuisance is one area where some effects have been felt, and – given the potential interface with the right to privacy under Article 8 and the frequent involvement of public bodies – the potential exists for it to continue to exert an influence.

In cases involving the defence of statutory authority, it is conceivable that the Human Rights Act could be used to outflank the statutory hierarchy. Two provisions are potentially relevant here: s.3 requires legislation to be construed so as to give effect to Convention Rights, while s.4 permits the courts to issue a declaration of incompatibility where a statute is incompatible with a convention right. However, the courts have hitherto declined to invoke either section in the context of a nuisance claim. Indeed, in *Marcic* a claim for infringements of Article 8 and A1P1 also failed because the scheme of the Water Industry Act 1991 was held to be HRA-compliant.

Cases not involving statutory undertakers may offer a more fruitful avenue for human rights to shape nuisance law. There are two facets to this: the first is the creation of free-standing human rights claims which can operate in parallel to – but distinct from – common law causes of action; the second is the obligation on the courts under s.6 to apply and develop the law in accordance with Convention Rights.

Claims for freestanding breaches of human rights are only available against individuals or entities performing *"functions of a public nature"*, so will not be relevant in many cases.[61] But because such claims are not subject to the same strictures as orthodox nuisance claims, where applicable they present an opportunity to circumvent some of the limitations.

One of the first cases heard by the Strasbourg Court following the passage of the Act, *Khatun v United Kingdom* (1998) 26 EHRR CD 212, was an attempt by the unsuccessful claimants in *Hunter* to argue that the dust generated by the construction taking place at Canary Wharf violated their Convention Rights. Whereas in *Hunter* many of the claimants had been barred on the basis that they did not have an interest in the affected properties, a Convention claim is not subject to the same limitation and so those claimants had the standing which they lacked under domestic law. Similarly, in *Dennis v MOD* [2003] EWHC 793 (QB) the first claimant's wife – who did not own the property and was therefore excluded from bringing a nuisance claim – was able to claim for a breach of her Article 8 rights. This is one significant advantage of human rights claims for potential claimants.

However, *Khatun and Dennis* v MOD also illustrate some of the limits of freestanding human rights claims. On the facts of *Khatun* it was held that the claim failed because Article 8 is one of the derogable Convention Rights, and the interference had been justified by the public benefit in regenerating the docklands

[61] s.6(3)(b). In *Fearn*, it was held that the Tate was not carrying out a 'public function' for the purpose of s.6(3)(b).

area. In *Dennis v MOD*, although both the claimants succeeded in their human rights claims, the damages of £950,000 awarded to the first defendant for the nuisance claim alone were held to constitute "*just satisfaction*" for the human rights claims as well.[62] This suggests that the courts are unlikely to allow human rights claims to 'top up' nuisance claims, where they succeed.

Turning to s.6, the courts have been particularly circumspect about developing the common law, although one notable exception has been the rapid expansion of the tort of breach of confidence to protect Article 8 rights.[63] At first instance in *Fearn* Mann J held that if nuisance did not, as the law presently stood, protect privacy, it should seek to give effect to Article 8 by doing so.[64] However, the Court of Appeal disagreed, holding that aligning the tort with Article 8 would be to "*distort*" it, and suggesting that such rights were already adequately protected by statute.

The difficulty with the Court of Appeal's analysis is that s.6 does not seem to require the complete alignment of the common law with Convention Rights, but merely the development of the common law to give *better* protection to them than it currently affords.[65] That being so, the suggestion at, for example, [91] that it would be necessary to give non-owners a cause of action as well is clearly incorrect (although it is notable in this connection that in *McKenna v British Aluminium* [2002] ENV LR 30 Neuberger J suggested in *obiter* that the limitation of nuisance claims to those with an interest in the affected land may breach the Article 8 rights of other occupiers).[66] The courts could – and arguably, pursuant to s.6, should – at least extend the protection to owners, rather than adopting an all or nothing approach. For similar reasons it cannot be correct that – as suggested at [92] – the inevitable consequence of applying s.6 would be to abolish the 'undue sensitivity' requirement under *Kilvert* (and it would not, in any event, have been necessary to do so on the facts of *Fearn* given the Court of Appeal's finding that there was no undue sensitivity on the part of the claimants).

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[62] [61].

[63] *Thompson & Venables v News Group International* [2001] 2 WLR 1038; *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; *Chief Constable of the Hertfordshire Police v. Van Colle* [2008] UKHL 50 at [55] – [58] as per Lord Bingham.

[64] cf. *Wainwright v Home Office* [2003] UKHL 53 at [18] as per Lord Hoffmann, which appears to envisage that nuisance could develop to protect privacy. The question of whether A1P1 – when enshrines a right to "*peaceful enjoyment*" of "*possessions*" – may also be applicable appears not to have been aired at first instance or in the Court of Appeal in *Fearn*.

[65] The precise breadth of s.6 has long since been a vexed question, and one of which the courts have been reluctant to provide definitive guidance. For an argument in favour of 'full' horizontal effect, see Wade, W., "Horizons of horizontality" *The Law Quarterly Review Vol. 116*, (2000) pp. 217-224, building on remarks made by the Lord Chancellor during the passage of the Act (quoted in Hansard at 583 H.L. Deb. 783 (November 24, 1997)).

[66] Even independently from the Human Rights Act, the ownership requirement has been criticised for its failure to reflect the realities of modern property-ownership; indeed, it has been long since abandoned in Canada: see *Motherwell v Motherwell* (1976) 73 DLR (3d) 62 where the suggestion that a wife with no legal interest in the matrimonial home should be left without remedy in the face of serious interference with her home life was described as "*absurd*".

Other causes of action

Although an exhaustive list is beyond the scope of this chapter, it should be noted that there will not infrequently be other routes of redress open to claimants. Environmental protection law now significantly regulates the use of land, while, as has been noted above, planning law and even the criminal law offer alternative routes via which the most egregious wrongs can be addressed. Other torts such as negligence and trespass may also be relevant.

Part III: Remedies

Most successful claimants in nuisance cases will want an injunction to halt the nuisance (combined possibly with damages for losses up to the date of judgment). In contrast, defendants – and particularly parties who have already sunk resources into commencing the activity in question – may be content to pay for the right to continue to commit the nuisance. The effect of *Lawrence* was seemingly to make the latter possibility more likely.

Prior to *Lawrence*, the jurisdiction to award damages in lieu of an injunction (which has existed since the Chancery Amendment Act 1858) was exercised sparingly in accordance with the principles laid down by the Court of Appeal in *Shelfer v City of London Electrical Lighting Co* (1895) 1 Ch 287 – a case involving vibrations generated by electrical engines run by the defendant – where AL Smith LJ expressed concern at the courts becoming a forum in which a defendant with deep pockets could "*purchase his neighbour's rights*". In *Lawrence*, the Supreme Court followed the approach of the American courts by significantly downgrading the *Shelfer* criteria to hold that the court's discretion to award damages should be unfettered.[67] The (somewhat enigmatic) *ratio* of the case was recently summarised by Lord Burrows in *Alexander Devine Children's Cancer Trust v Millgate Developments Ltd* [2020] UKSC 45 as follows:

> "*while an injunction should prima facie be ordered where a tort of nuisance is continuing, the strong primacy traditionally afforded to the injunction as a remedy for the tort of nuisance should be modified so that the public interest should always be a relevant consideration. In other words, the courts should be more willing than has traditionally been the case to award damages in lieu of an injunction in this context*".[68]

The decision is open to criticism on the grounds that it continues the financialisation of equitable remedies, and that the courts are ill-suited to judge whether the butterfly effect of a particular remedy will result in more or less publicly beneficial outcomes.[69]

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[67] *Boomer v Atlantic Cement* 257 NE2d 870 (1970).

[68] *[64]*.

[69] A stark illustration of the latter point is provided by *Attorney-General v Birmingham Borough Council* (1858) 4 K&J 528, in which an injunction was granted to prevent the defendant local authority discharging sewage into a river despite the alarming submission by counsel that if the local authority were forced to cease doing so, this would transform Birmingham into "*one vast cesspool*" and ultimately lead to "*a plague which will not be confined to the 250,000 inhabitants of Birmingham, but will spread over the entire valley and become a national calamity*". This hyperbolic warning proved to be inaccurate: the local authority's loss of the case in fact triggered a wave of national investment in new sewer systems by other local authorities at risk of similar claims, which revolutionised public health by ending a wave of cholera epidemics. See Pontin, B. "The secret achievements of Nineteenth Century Nuisance Law: *Attorney General v Birmingham Corporation* (1858-95) in Context", *Environmental Law and Managements, vol. 19* (2007) pp. 271-290.

In particular, where the nuisance-causing activity has an environmental dimension, the public interest would arguably militate against allowing a payment to a single, local resident to suffice. These questions are beyond the scope of this chapter, and arguably beyond any court-based process.

The practical application of *Lawrence* by the courts is still in a state of flux, and it seems likely that the Supreme Court will soon have to reconsider the interplay between injunctions and damages, particularly in light of the minority's comments in *Lawrence* supporting, in effect, a presumption in favour of damages (which continue to be extensively cited – without much success – by enterprising parties at first instance).

Meanwhile, the ways in which the public benefit will be assessed when deciding whether to award damages in lieu remains opaque. It is perhaps tempting to see *Lawrence* – and certainly the views of the minority – as an attempt to align the common law with the prevailing position under statutes such as the compulsory purchase legislation, where publicly beneficial activities which override private rights are sanctioned in return for the payment of compensation. If so, the lower courts have consistently refused to take up this invitation.[70] Indeed, there does not yet seem to be any reported post-*Lawrence* case where any injunction restraining a nuisance has been refused because of the publicly beneficial nature of the activity complained of. This may be in part because, to the extent that there is fear that publicly beneficial activities may be inhibited, a carefully framed injunction may go some way towards mitigating any concern.[71]
A further curiosity is the return of planning permission at this stage of the analysis. To the extent that consensus across the majority in *Lawrence* can be discerned, it is that the existence of planning permission may – if there is evidence that the planning authority considered the wider public interest of the development when granting permission – be one factor supporting an award of damages in lieu of an injunction.[72] But if a planning application is successful then – at least in cases involving major developments – it will likely be a self-fulfilling prophecy that the scheme was considered publicly beneficial (especially if coupled with an s.106 agreement). To this extent *Lawrence* appears to re-open the possibility of planning decisions overriding (or at least curtailing) private rights via the back door.

It does appear that where there has been opportunism on the part of the defendant, this may militate strongly against anything other than an injunction being awarded. In *Waterhouse*, in granting the interdict rather than ordering damages in lieu, the court placed some reliance on the fact that the structure had also been erected without obtaining planning permission.[73] A stark warning is provided by the (pre-*Lawrence*) decision of *Regan v Paul Properties Ltd* [2006] EWCA Civ 1319, in which a developer

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[70] See for example *Ottercroft Ltd v Scandia Care Ltd* [2016] EWCA Civ 867 and *Peires v Bickerton's Aerodrome* [2016] EWHC 560 (Ch).

[71] For example, in *Kennaway v Thompson* [1981] QB 88 and *Watson v Croft Promosport Ltd* [2009] 3 All ER 249 the courts did not injunct the activities altogether, but merely confined them to a limited number of days per year.

[72] See Lord Neuberger's remarks at [125] and Lord Carnwath's at [246].

[73] See [54]. Although a case under s.84, the courts similarly frowned upon the opportunism of the developers in *Millgate*.

knowingly built in breach of a right of light. The Court of Appeal granted an injunction despite the fact that the reduction in the value of the claimant's land was around £5,500 while the cost to the defendant of complying with the injunction would be over £200,000.

Finally, while it is now settled that damages will be assessed at the date of the hearing rather than from the date of the breach,[74] another question which was not resolved in *Lawrence* is the method for calculating damages in lieu of an injunction. Although it is well-established that damages for loss of amenity and/or diminution in value may be awarded, damages in lieu will also frequently extend to gain-based damages such as an account for profits and negotiating damages. Given that one of the primary objections to *Lawrence* has been that the substitution of damages for an injunction fails to give adequate protection to the proprietary nature of the rights affected, negotiating damages – which are based on the fiction of purchasing the infringed right from the claimant – seem to be a closer analogue to the property right substituted. On the other hand, if pushed too far remedies such as an account – which would effectively grant the claimant a profit-share in the defendant's business – might render the purpose of not stifling publicly beneficial users which underpins the *Lawrence* approach otiose. In the recent case of *Beaumont Business Centres v Florala Properties Ltd* [2020] EWHC 550 it was held that negotiating damages could be an appropriate measure for violation of a right of light, despite forceful argument to the contrary being advanced.[75] At the other extreme, in *Dobson* it was suggested that where the claimant did not occupy the property during the time of a transitory nuisance, the damages should only be nominal – something which is difficult to square with the proprietary nature of the tort. There is clearly significant scope for arguments on the quantification of any damages awarded, and this may become a central battleground in nuisance claims going forwards.

Conclusion

Lord Cooke observed in *Hunter* that "*what has made the law of nuisance a potent instrument of justice throughout the common law world has been largely its flexibility and versatility*".[76] But decisions of the appellate courts over the past two decades have sought to limit the breach of loss of amenity nuisance, preferring to leave questions about the most publicly beneficial use of land (including the environmental impact) to Parliament and refusing to develop new categories of protection, extend the availability of the tort to those without a proprietary interest in affected land, or lay down clear guidance on the approach to remedies. In the meantime, the variegated patchwork of rules underpinning nuisance remain highly fact-sensitive in their application, making it difficult to advise on the likely outcome in any specific context. This has left nuisance as a tort in need of direction, presently uncertain whether it is an occasional fallback where the planning process or environment legislation fail, or still the primary means of balancing competing interests of property owners in the public interest. The courts have yet to produce a coherent answer; until they do, we will remain lost in Prosser's jungle.

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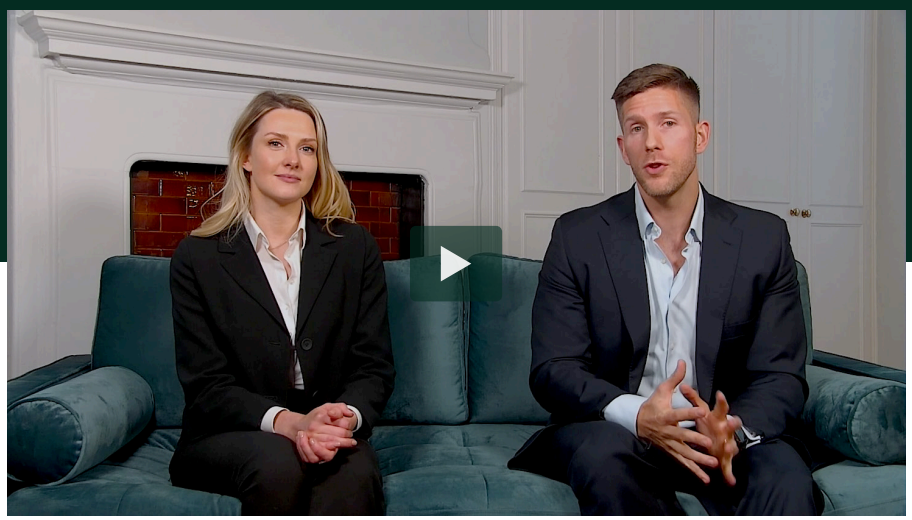
[74] Rahman v Rahman [2020] EWHC 2392 (Ch).

[75] [320]; on recent developments, including the most recent word from the Supreme Court in *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20, see *chapter 5 by Jonathan Chew.*

[76] 711G

Chapter 2

Some problems concerning nuisance and landlord and tenant



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Ben has a commercial Chancery practice with a particular emphasis on property work and related professional negligence. A large part of Ben's practice concerns opposed and unopposed lease renewals. In 2018, led by Joanne Wicks QC, he successfully acted for the tenant in *S Franses Ltd v Cavendish Hotel (London) Ltd* [2018] UKSC 62, a Supreme Court case which has substantially recast the law relating to 'ground (f)' under the Landlord & Tenant Act 1954, and since then has been a go-to juniors on 1954 Act matters. Recent directories describe Ben as "*an excellent junior; he is very personable and strong on the technical detail*". He "*inspires confidence*" and is "*energetic, responsible and user-friendly*", and is "*an excellent communicator and both quick and bright*". "*He works hard and effectively, makes a point of responding quickly and thoroughly, and is a great comfort to have on the team.*" And they note that he is "*definitely a junior to watch over the next few years and a real superstar in the making*"; and recognise him for his "*gravitas and positive and engaging manner*".

Francesca Mitchell

Francesca has a keen interest in property matters and such cases form a key aspect of her broad commercial chancery practice. Francesca regularly appears as sole counsel in the High Court and County Court and she also acts as a junior in larger counsel teams. Francesca is frequently instructed to advise on a wide range of residential and commercial matters and she is routinely instructed for her drafting skills. In addition to litigation, Francesca has acted in a number of domestic and international arbitrations. Recently, Francesca has worked extensively on the various adaptations of the Covid-19 legislation and codes of practice in both commercial and residential disputes. Other notable work includes successfully resisting an emergency injunction in the High Court for a residential landlord whilst recovering the landlord's costs in unlikely circumstances, as well as acting in a long running and highly technical arbitration that concerned hundreds of properties across England.

Nuisance should be easy. It rarely is. Although the general principles can be quite easily stated, quite often nuisance cases throw up some really rather technical issues. In this chapter we explore some of the complications which can arise where either the land affected by a nuisance, or the land from which the nuisance emanates, is leased.

Complications where the affected property is leased

The basics

Nuisance is not a wrong to a particular person, but rather a tort against land: it concerns interference with land (in the case of physical damage or encroachment), or with the use and enjoyment of land (such as by noises, smells, dust, vibrations etc). For example, if a neighbouring trader emits noxious fumes, a claim is not made by the inhabitants of the area because they suffer respiratory problems, but it is made simply because their garden can no longer be sat in and enjoyed as it had been before. That means that the person who can sue for nuisance must be the person who is using and enjoying the affected land i.e. the person with a right to exclusive possession.[77]

Where the affected land is not leased, entitlement to sue is relatively straightforward. There are a few points to note:

(1) Generally the claimant must have a right over the affected land, so that mere licensees of the freeholder (e.g. family members) are not entitled to sue. [78] Again, this reflects the fact that a claim in nuisance is a claim in respect of the land affected, and not the particular people affected.

(2) However, the claimant does not need to be able to prove the best title to the land, provided that it has exclusive possession.[79]

[77] See e.g. *Hunter v Canary Wharf Ltd* [1997] AC 655 at 688E per Lord Goff; the elements of nuisance are discussed more fully in *chapter 1 by Daniel Petrides*.
[78] *ibid* at 689D, 692C, 702H & 724D.

(3) Any damages awarded will not vary depending on the number of people in exclusive possession (or indeed occupation) of the affected land.[80]

Where the affected land is leased, the position is slightly more complex. The general rule is that the reversioner, who does not have the right to exclusive possession, will not be able to sue: the reversioners' use and enjoyment of the land is not being affected. However, the key exception to that rule is where the reversion is damaged by the nuisance, in which case the reversioner will be entitled to damages according to their interest: *Hunter* at 707A.

As to whether the nuisance causes damage to the reversion:

(1) Where the nuisance consists of physical damage to the affected land the answer is usually clear: the reversion will be damaged.

(2) Encroachment on the affected land is usually also straightforward: the reversion will be considered damaged if the encroachment continues, and nothing is done to stop it.

(3) But in the case of nuisance caused by activities on neighbouring land (e.g. noises, smells, dust etc – often called 'loss of amenity' nuisance), the answer is typically that there will be no damage to the reversion, because the nuisance is not of a permanent nature, and may end before the lease expires. The test is generally whether the nuisance will continue indefinitely unless something is done to stop it: *Jones v Llanrwst Urban DC (no. 2)* [1911] 1 CH 393 at 404; *John Smith & Company (Edinburgh) Limited v Richard Hill* [2010] EWHC 1016 (Ch) at [27]. In that latter case the Court assumed that a nuisance caused by the temporary erection of scaffolding on a building was not of a permanent nature such as to entitle the reversioner to sue, even though technically the scaffolding would remain unless taken down.

Issues where the nuisance is of a temporary nature

Scenario 1: Suppose a landowner, **D**, constructs a chemical factory on its land, which then starts to emit noxious fumes onto the neighbouring residential land, amounting to a nuisance. At the time the freehold of the neighbouring land is owned by **L** and a long leasehold of 999 years is owned by **T**. It is clear that the relevant claimant will be T, and T will be able to claim for:

(1) an injunction (coupled with damages for the loss of amenity until the date of judgment); alternatively

(2) damages in lieu of an injunction calculated: (a) by reference to the diminution in the value of its long leasehold; or (at least arguably[81]) (b) on the negotiating damages basis (i.e. the payment that the parties might reasonably be expected to negotiate for T to permit the nuisance to continue).

L will have nothing to do with it.

Scenario 2: Now suppose that T's lease is not a long lease, but an occupational lease, at a rent of £5,000 per month, and no premium, due to expire in 1 year. Conceptually nothing

[80] *ibid* at 696D, 698H & 706H.

[81] See the discussion in *chapter 5 by Jonathan Chew*, and *Beaumont Business Centres Limited v Florala Properties Limited* [2020] EWHC 550 (Ch) at [277], [319] & [320] per Peter Knox QC.

has changed. The proper claimant is still T. T will be able to claim for:

(1) an injunction (coupled with damages for the loss of amenity until the date of judgment); alternatively

(2) damages in lieu of that injunction: (a) by reference to the diminution in the value of its occupational lease over the next year; or (b) on the negotiating damages basis, but only for a licence to commit the nuisance for a year.

T's damages claim will therefore be for a substantially smaller amount.

Meanwhile, L will be waiting in the wings. As soon as T's occupational lease expires, L will be able to make a claim for a much greater sum (if the nuisance is still ongoing).

But might L have a claim whilst T's lease continues? Ordinarily L's reversion is not damaged by the temporary nuisance, so L has no claim for the first year. However, exceptionally, if the terms of the occupational lease permit T to withhold rent from L on account of the nuisance (e.g. because of a particularly expansive quiet enjoyment covenant), then L might have a claim against D for the loss in rent. In such a case it might be said that, because the right to rent is an aspect of the proprietary rights constituted by a landlord's reversion, which has in essence been 'damaged' by the nuisance, L might be able to claim: *John Smith & Company (Edinburgh) Limited* at [24]. However, such a case will be rare, because normally a landlord is not liable for interference with the tenant's rights caused by a third party: T will continue to be liable to pay rent to L in full, and T will have to sue D in nuisance. And if L did have a claim against D, what would happen to T's claim against D

(1) T's claim is, principally, for the diminution in value of its lease, whatever T actually paid for it. That would suggest that T's claim is unaffected by the fact that it is not liable for rent.

(2) L's claim would be of a different nature: it would not be a claim for interference with the use of the land, but for interference with L's right to rent.

(3) It seems to us therefore problematic for T's claim to be reduced either because L has a claim or because T is not having to pay rent. However, D would then be subjected to a larger claim, in respect of the same nuisance caused to the same land. Lord Hoffmann's opinion in *Hunter* that different parties can claim 'according to their interest' is very easy to state, but much harder to give effect to in such a situation.

Scenario 3: Suppose T's occupational lease is due for renewal shortly after the nuisance commences. L agrees to renew T's lease, but T is only prepared to pay £3,000 per month for as long as the nuisance continues, reducing the rent by £2,000 per month as a consequence of the nuisance. L accepts T's offer of £3,000. Who has suffered what loss?

(1) Again, the proper claimant (for now) is T, as T has exclusive possession.

(2) T's damages ought to be exactly the same as in Scenario 2: the diminution in the value of its occupational lease over the next year will be the same, no matter what T is in fact paying in rent – the Courts generally ought not to enquire as to whether T is paying a market rent or not, in the same way that the Courts will not enquire as to whether T originally overpaid for its long leasehold in Scenario 1. Equally, the negotiating damages, for a licence to commit the nuisance for a year, ought to be the same.

That result seems unattractive, however. T is paying less rent by virtue of the nuisance, yet can still bring a claim against D for the same amount, regardless of what rent T is actually paying. That looks like double recovery. Equally, L receives a reduced rent, but cannot make a claim against D for the shortfall. There might be two solutions to this problem.

First, L might argue that it in fact has a claim against D for £2,000 per month, because of its loss in rent. If, in Scenario 2, T had been *entitled* to withhold £2,000 per month in rent, L would have had a claim against D for that amount. So why should it matter that L has *agreed* (in difficult circumstances) to accept a lower rent from T? A difficulty with this solution is that the existing cases[82] suggest that L will not have a claim, *even if* the nuisance causes tenants to give notice to quit, or reduces the letting value of the property, and accordingly reduces the value of the reversion. Those existing cases, however, are old, and the facts are not as clear from the reports as one might hope: there may be scope for their reconsideration by the Courts in future.

Secondly, more practically, L and T might agree that T will assign its cause of action against D to L, in consideration of the reduced rent. Since L will have a genuine commercial interest in the claim against D (it concerning property in respect of which L is the reversioner), the assignment is unlikely to be void for champerty. That solution squares the circle, and consolidates the entire claim in a single claimant: L will be able to sue for not only its own loss, but also T's loss. One might expect the Court ultimately to hold that – whether because T or L has suffered the loss – L's total claim would be the same as if there had been no lease at all.

A landlord's right to sue based upon the acquisition of prescriptive rights to commit a nuisance?

In *Lawrence v Fen Tigers Ltd* [2014] AC 822 at [41] the Supreme Court held that it is possible to obtain by prescription a right to commit acts which would otherwise amount to a nuisance by noise (and, it must follow, other temporary nuisances).

But, where the affected land is leased, the usual position is that no prescriptive rights can be acquired: an easement must be acquired by a freeholder against a freeholder.[83] This is said to be because:

> (1) prescription can only arise where the servient owner has the power to stop the user before 20 years of use crystallise into a prescriptive right, so as to infer acquiescence on that owner's part;
>
> (2) where the servient land is leased, the only person who can stop the user is the person with the right to exclusive possession, namely T (the tenant,) and not L (the landlord); but
>
> (3) prescription by lost modern grant presumes that a permanent right has been duly created at some unspecified time in the past, so an easement for a term of years – which an easement granted by T would necessarily be, since T has no power to grant rights out of the reversion – cannot be acquired by long use; and
>
> (4) since L did not have the power to stop the user, the law will not presume a grant against them.

[82] See *Mumford v The Oxford, Worcester and Wolverhampton Railway Company* (1856) 1 H. & N. 34, and *Simpson v Savage* (1856) 1 C.B. (N.S.) 347.

[83] See for example *Wheaton v Maple & Co* [1893] 3 Ch. 48.

In other words, time can run only against T, but the law cannot presume a grant by T. Although the law can presume a grant by L, time cannot run against L while the property is leased. This rule has been heavily criticised as counter-intuitive and contrary to the policy of the law, but it remains.[84]

However, if L has somehow acquiesced in the user, time can run against them. In such a case, L will be taken to have acquiesced in the user where they have knowledge of the user and could have taken steps to prevent it. So, critically, if the user began before the servient land was leased, time can run against L, notwithstanding the subsequent demise.[85]

So there is a potential trap for L if it demises property in the knowledge of a nuisance being committed:

(1) the traditional analysis set out above is that L is not the proper claimant; but

(2) time will run against L, and after 20 years a prescriptive right to commit the nuisance can arise, which will then bind L.

Perhaps, though, a landlord could turn this potential trap into a valid claim. Time running in such a circumstance looks a lot like damage to the reversion to us. It remains to be seen whether in these circumstances, and in the light of *Lawrence*, the Courts will permit landlords to bring an action for an injunction to protect their reversion from the acquisition of prescriptive rights, and if so, when that action might be brought (at any time, or only as the 20 year prescription period is nearing the end?). However, we consider that this could well be a fruitful line of argument in these kinds of cases, which could open the door to action by landlords where before it was thought impossible.

Complications where the land from which the nuisance emanates is leased

The basics

Ordinarily, it is the person who created the nuisance, the actual wrongdoer, who will be liable for the nuisance, irrespective of whether the wrongdoer is the occupier or the owner of the land.

So far so good. But liability can be extended beyond the actual wrongdoer to anyone who, with knowledge of the acts causing the nuisance, has a sufficient degree of control over the land to be able to stop the nuisance. Therefore the owner of land can be liable for a nuisance emanating from it even if the owner is not in actual occupation of the land and did not cause the nuisance.

In *Page Motors v Epsom & Ewell BC* (1981) 80 LGR 337; (1981) 125 SJ 590 travellers had taken up residence on the defendant council's land and were causing a nuisance to the claimant who operated a business selling and repairing cars on the adjoining land. Eleven allegations of the travellers' misconduct were made and all were found to have been established in evidence by the trial judge, including: obstructing the claimant's right of way over the access road, damaging the vehicles of the claimant's staff

[84] e.g. Lord Millett's critique in *China Field Ltd v Appeal Tribunal (Buildings) [2009] HKCU 1650* at [54] in which it was held that the rule should not form part of the law of Hong Kong. (Given that all land in Hong Kong – save for St John's Cathedral – is leasehold, the rule would have caused particularly serious problems in that jurisdiction).

[85] e.g. *Pugh v Savage* [1970] 2 QB 373.

and customers by stone-throwing, air-gun pellets and catapult missiles and threatening, intimidating and assaulting the claimant's staff and customers. The claimant's business had been severely affected because its customers, employees and suppliers were too afraid to "*run the gauntlet*" to get to and from the claimant's property across the council's land. It was argued that the council were liable for the nuisance caused by the travellers on the basis that the council "*had an immediate right to possession of that land and was in a position in law, and indeed in fact, to control the property. The responsibility, if any, which attaches to it in these circumstances is by virtue of its being the occupier of that land.*" The Court of Appeal held that the council was liable for the nuisance in those circumstances. Fox LJ put the test in the following terms:

> "*the council continued the nuisance if, with knowledge of the existence of the nuisance, it did not take reasonable steps to bring it to an end with ample time to do so.*"

Similarly, in ***Lippiatt v South Gloucestershire Council*** [2000] QB 51 travellers had set up a base on the defendant council's land and then trespassed onto the claimant's land to cause a nuisance.[86] On the council's strike out application the Court of Appeal held that, as a general rule, for the defendant landowner to be liable for the nuisance some form of 'emanation' from their land was required. At [60] Evans LJ held that "*what 'emanated' in the present case was the travellers themselves. I do not find this form of emanation difficult to accept*". Therefore the council could still be liable for the nuisance notwithstanding that the acts causing the nuisance took place primarily outside of its land, on the basis that the council had the power to remove the travellers from their land. It was arguable that by failing to exercise that power, they were in effect permitting the travellers to remain on their land and use it as a base for unlawful activities.

Equally, if a licensee commits a nuisance, the licensor who owns the land can be liable. In ***Cocking v Eacott*** [2016] EWCA Civ 140; [2016] Q.B. 1080 a mother owned a residential property, but did not live there. Instead, she had permitted her daughter to live there. The daughter had created two types of nuisance for her neighbours: one by the excessive barking of her dog and the other by her (largely intentional) abusive shouting.

> (1) As the licensor the mother had a right to immediate possession and was in a position to control the land, even if she had no control over the licensee, her daughter. She was therefore liable for the nuisance caused by the barking dog even though she did not create it, but because she had chosen to do nothing to abate the nuisance, despite having full knowledge of it. This, the judge at first instance determined, she could have easily done by removing the dog or her daughter from the property (which she did have the power to do).
>
> (2) By contrast, the mother was not liable for her daughter's abusive shouting because she was not initially aware of it and it ceased not long after she had knowledge of it (at [1083B]).

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[86] the nuisance complained of included (at [51]): "*obstructing access to an adjacent field, leaving rubbish and excrement on it, tethering their own livestock thereon, stealing timber and fences, damaging a stone wall, permitting their dogs to chase the plaintiffs' sheep, acting belligerently towards the plaintiffs, their families, employees and neighbours and damaging crops so as to render them unfit for sale or consumption.*"

A landlord's liability for a tenant's nuisance

Unlike a licensor, a landlord typically only has limited control over the land, since exclusive possession is granted to the tenant. That makes it more difficult to blame the landlord for a nuisance created on the leased land by the occupying tenant. Usually a landlord will only be liable for a nuisance emanating from the land but caused by another if the landlord: (i) authorised the nuisance by letting the land; or (ii) directly participated in the commission of the nuisance.[87] However, (iii) if the landlord caused the nuisance in the first place and subsequently let the land, the landlord will not cease to be liable simply because they have parted with possession of it.

(i) Authorising the nuisance by letting

A landlord can authorise a nuisance if they let the property for a purpose which will inevitably, or nearly certainly, cause a nuisance.[88] In order to succeed on this basis a claimant would have to show a very high degree of probability that the letting of the property would result in a nuisance. In *Malzy v Eichholz* [1916] 2 KB 308 at [319] Pickford J explained that "*Authority to conduct a business is not an authority to conduct it as to create a nuisance, unless the business cannot be conducted without a nuisance*". The same reasoning was adopted by Lord Neuberger PSC in *Lawrence v Fen Tigers Ltd* (No 2) [2015] AC 106 who at [15] expressed the view that a landlord would not be liable in nuisance just as a result of letting the property even if: (i) the landlord knew of the intended use of the properties (in that instance, for motor sports); and (ii) that use in fact resulted in nuisance, because it was still possible that the use could have been carried on without causing a nuisance.

For a claim to lie against a landlord, the intended use must therefore be unavoidably nuisance-generating, and that will depend to a very large extent on the particular context and character of the surrounding area. For example, if a landlord leases a property to a tenant to use it as a smelting plant in a residential area, that use will nearly certainly constitute a nuisance (thus rendering the landlord liable for authorising the nuisance), whereas it may not do so in an industrial area with a history of similar use. The alleged nuisance will always be assessed within its specific context.[89]

(ii) Participating in the nuisance

If a landlord actively or directly participates in the nuisance-creating activities they may be liable for the nuisance (*Lawrence* (No 2) at [13]-[18]). Whether a landlord has participated in the nuisance will be a highly fact-sensitive enquiry. But the court has been prepared to find that certain conduct will *not* constitute participation in the nuisance on behalf of the landlord:

> (1) Typically a landlord will not be liable for the nuisance merely because they do nothing to stop or discourage their tenant from causing it. That is the case even if the landlord has knowledge of the offending use, yet continues to accept rent from the tenant and takes no steps to bring the nuisance to an end.[90]

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[87] See *Southwark BC v Mills* [2001] 1 AC 1 at [21H]-[22A].

[88] See *Lawrence* (No 2) at [15] and also *Smith v Scott* [1973] Ch 314; *Malzy v Eichholz* [1916] 2 KB 308.

[89] See for example *Thompson-Schwab v Costaki* [1956] 1 WLR 335 and *Laws v Florinplace* [1981] 1 All ER 659.

[90] Lord Cozens-Hardy MR in Malzy at [316] said it was an "*extraordinary proposition*" that landlords could be rendered liable by accepting rent and refraining from taking any proceedings against their tenant, despite being aware that their tenant was creating a nuisance.

(2) Indeed, if a landlord takes some steps to mitigate the nuisance, but does not eradicate it, the landlord will, absent "*very unusual circumstances*", still not be liable: the attempt to mitigate the nuisance does not normally give rise to an inference that the landlord has participated in or authorised the nuisance. In *Lawrence* (No 2) the Supreme Court did not provide any examples of what might constitute "*very unusual circumstances*". Instead Lord Neuberger PSC alighted upon the irony inherent in such a situation: why should a landlord who did nothing at all to stop the nuisance avoid liability, but a landlord who takes some steps to mitigate it be liable for the nuisance?

(iii) Timing

There is one further way a landlord might be liable, and that is where the landlord was responsible for the nuisance in the first place, before letting the land to the tenant. This situation most commonly arises in respect of nuisance by disrepair.

If at the date of the lease the landlord knew or ought to have known that the state of the premises was such as to constitute a nuisance, the landlord will not cease to be liable despite the fact that: (i) they have given up exclusive possession of the property; and (ii) they have taken a full repairing covenant from the tenant.[91]

Questions of the landlord's knowledge will often be key. In *Mistry v Thakor* [2005] EWCA Civ 953 the Court of Appeal held that a landlord is to be imputed with the actual knowledge of their professional agent (in that instance, a chartered surveyor) but would not be imputed with knowledge that their professional agent did not have but ought to have had. However, as Pill LJ found at [33] the landlord will be imputed not only with the agent's knowledge but also with the consequence of that knowledge. He explained: "*it is not necessary for the owner of the building to have knowledge of the entire consequences of the defect and the action that should be taken. It is sufficient if he knows, or is imputed to know, the basic evidence which will inevitably lead in the present case to a failure such as that which occurred.*" Accordingly it was held that the landlord should have appreciated the danger that would result from the defects observed by their agent, and, had they done so, action should and would have been taken to prevent it.

[91] *Brew Bros Ltd v Snax (Ross) Ltd* [1970] 1 QB 612, in which the repair costs of £5,000 (which were substantial relative to the value of the property) were split between the landlord and the tenant.

Extra angles where there is a block of flats with a common landlord

Suppose there is a block of flats demised by a common landlord, in which the tenant of flat 1, **T1**, is causing an annoyance to the tenant of flat 2, **T2**, by allowing their dog to bark day and night. On the principles above, the landlord would have no liability: T1 has exclusive possession; the landlord did not authorise any nuisance merely by letting the flat to them; and the landlord has not participated in the nuisance in any way.

However, there are a few extra angles to consider.

Is there even a nuisance at all?

In all cases the conduct complained of must constitute an actionable nuisance. Sometimes the claimant's enjoyment of its property will be substantially interfered with, but the defendant cannot properly be blamed because the defendant's use of the property is normal and ordinary. The problem might instead just lie in the difficult circumstances of the situation, which can acutely occur in blocks of flats.

That was the case in *Southwark BC v Mills* [2001] 1 AC 1 in which the sound proofing in a block of flats was so poor that the claimants' lives were made unbearable by the ordinary, reasonable and domestic activities carried out by their neighbours. At [21H] Lord Millet held that:"[the neighbours'] *activities are not merely reasonable, they are the necessary and inevitable incidents of the ordinary occupation of residential property. They are unavoidable if those tenants are to continue in occupation of their flats.*" The noise complained of was due to structural defects inherent in the building when the properties were let to the claimants and were caused by activities that were within the claimants' contemplation (i.e. the ordinary occupation of neighbours). Therefore there was no actionable nuisance.

So in our example, it is conceivable that the dog's barking is not the problem, but rather the sound proofing and construction of the building. It will depend on the facts.

However, a claimant in such a case might look beyond the law of nuisance, and instead focus on the covenants in the leases between the neighbour(s) and the common landlord. It is possible that a covenant may have been breached, for example:

(1) There might be a requirement to keep carpets rather than hard wood floors;

(2) Pets (such as barking dogs) might not be permitted;

(3) In related situations there might be controls over when music can be played.

The landlord might be liable for nuisance by virtue of the covenants in the leases

In a block of flats with a common landlord it is very common to have a combination of: (i) a covenant owed by T1 to the landlord not to commit a nuisance or annoyance to anyone else; and (ii) an accompanying express covenant in all the leases (including T2's lease) that the landlord will enforce such a nuisance covenant and providing a mechanism by which the tenant can compel the landlord to do so.[92]

[92] In *Duval* the mechanism was that a tenant could compel the landlord to take enforcement action, at the request and cost of the tenant.

If T1 is committing nuisance, T2 could simply sue T1. However, in those circumstances, T2 could instead require the landlord to sue T1.[93] If the landlord does not do so, T2 can sue the landlord as well on the basis that the landlord has breached its covenant to enforce the nuisance covenant.

But what if T1 had already asked for, and obtained, the landlord's permission to keep the dog in the flat? In those circumstances T1 might consider itself free from any liability to its neighbours. However, such permission is unlikely to relieve T1 from any liability in nuisance to T2. There are two reasons why T1 would still be liable:

(1) Following *Duval v 11–13 Randolph Crescent Ltd* [2020] AC 845 if the covenant in this hypothetical scenario was an absolute covenant not to commit a nuisance then the landlord could not give permission to T1 to breach that covenant. In *Duval* the Supreme Court found that the landlord could not do so because the effect of the permission would deprive T2 of the practical effect of the covenant, thereby rendering it without value. The Supreme Court held that an absolute covenant could only be breached with the unanimous consent of all the other lessees. And plainly if T2 considered that T1 was creating a nuisance, T2's consent would not be forthcoming.

(2) In any case it seems reasonable to assume that the landlord's consent to T1 keeping a dog would not be capable of being construed to suggest that, in doing so, the landlord had provided implicit consent to T1's dog creating a nuisance by excessive barking. In this regard an analogy may be drawn with the line of authority addressing whether or not the landlord has authorised a nuisance by letting the premises for a particular purpose (as outlined above). If the consent was given for a particular course of conduct that was capable of being carried out without causing a nuisance (which keeping a dog is highly likely to be) it seems unlikely that L will be deemed to have authorised or consented to that nuisance, unless of course a claimant was somehow able to demonstrate that the unique character of the building or its surroundings was such that it would not be possible to keep a dog without causing a nuisance.

Accordingly, in addition to T1 the landlord will also continue to be liable if it fails to enforce the covenant against causing a nuisance and annoyance in T1's lease.

Conclusions

Nuisance cases where either the land affected by the nuisance or the land from which the nuisance emanates is leased can be a legal and practical minefield. The problem is that these cases can often be low value, but they can give rise to very difficult legal issues. As is often the case, the solution may be to pause and think carefully about the proper parties before incurring time, effort and costs. Our hope is that this chapter has given a flavour of the sorts of issues that can arise, and a roadmap to resolving some of them.

[93] It might be said that the Supreme Court rejected such a claim in *Lawrence*. However, in *Duval v 11–13 Randolph Crescent Ltd* the Supreme Court made clear that in a scenario such as the one described here, a tenant could compel its landlord to enforce a nuisance covenant, provided that the relevant conditions in the covenant were satisfied.

Chapter 3

The Practical Application of *Timothy Taylor v Mayfair House*

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Jonathan currently stands top of the pile in terms of QCs for heavy and important property litigation and property related professional negligence work. He is presently involved in many of the leading cases in property litigation and property related professional negligence and is widely respected and admired for bringing to every matter, irrespective of how complex, clarity, commitment and care. In its 2021 edition, Chambers & Partners says that "*Jonathan is a god amongst counsel*". "*A brilliant mind, fabulous with clients and a real pleasure to work with*" and "*very user-friendly, a creative strategist and a superb advocate*". "*Always impresses clients.*" The 2020 edition of Chambers & Partners said that "*his analysis is razor sharp*" and "*he is very bright and highly commercial*". Jonathan recently won the Legal 500 Award for Real Estate, Environment and Planning Silk of the Year to add to the Chambers & Partners Real Estate Silk of the Year Award which he won on three separate occasions, in 2007, 2010 and 2015. In 2019 Jonathan was ranked as the top silk for Real Estate Litigation in Who's Who Legal.

Top 10 pieces of advice to give people responsible for building works which interfere with a covenant for quiet enjoyment.

I am in Chambers, early on a Monday morning. I have given myself the whole day to write this piece. It is a pleasant relaxing task, which I shall enjoy. True, it will not be a day that my accountant will appreciate, but it is nevertheless one that I am looking forward to.

Except that I am not. Because although I have set aside the day for peaceful cogitation and composition, I can barely hear myself think. It is like trying to research and ponder subtle legal concepts whilst being in the middle of a building site because next door the tenants are redeveloping their building, including adding another habitable floor (I think). It sounds like steels are going in today. My whole room is shaking.

Now, in a person of any less sunny fortitude, this might be quite annoying, for a number of reasons:

1. I did not ask for this work to be done.
2. It will not benefit me.
3. I am a tenant of Chambers, which has in its lease a right to quiet enjoyment of our premises.
4. Today is not quiet and I am not enjoying anything about being here.
5. Chambers' own landlord must have given permission for these works: let us assume that they did.
6. Nobody told me that I would be unable to work in Chambers today.
7. I have bought some earplugs from Amazon but although they were expensive, they do not block the noise sufficiently to allow me to write this chapter.

I, of course, will bash on and do my best notwithstanding the RACKET going on (I am 'shouting' that word so you can hear me). But how are my legal rights assessed, and more importantly for the purpose of this chapter, what in practice should or could the next-door neighbour tenant and Chambers' landlord have done to make sure that any rights I have do not interfere with their re-development?

The extent of my legal rights, in terms of liabilities and remedies, depends on whether the next-door neighbour tenants have created a nuisance and whether Chambers' landlord is in breach of any covenant in our lease. In very brief summary, whether the adjoining occupier's behaviour and the landlord's behaviour are enough to amount to a nuisance or a breach of covenant is measured against a criterion of reasonableness (as explained more fully in *chapter 1 by Daniel Petrides*.

In *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264 (UKHL), Lord Goff described the basis of the law of private nuisance as '*the principle of reasonable user – the principle of give and take*'.

The law, as summarised in Clerk and Lindsell (23rd ed., 2020) para.19–15, is as follows: "*Noise and dust caused by demolition and rebuilding will not be actionable if the operations are reasonably carried on, and all reasonable and proper steps are taken to ensure that no undue inconvenience is caused to neighbours.*"

This was cited by the Court of Appeal as a summary of the law of nuisance in *Goldmile Properties Ltd v Lechouritis* [2003] EWCA Civ 49, [2003] 2 P. & C.R. 1, a landlord and tenant case. So, whether we are looking at the adjoining occupier or the landlord, it is all about reasonableness. (On the potential

liability of landlords, see *chapter 2 by Benjamin Faulkner and Francesca Mitchell*.

Assuming therefore: 1): that I have legal rights, because the next-door neighbour tenants are creating a nuisance and Chambers' landlord has allowed it in breach of the terms of Chambers' lease; 2): that this means that I am capable, at least in theory, of exploring whether to obtain an injunction or damages as a remedy for any such unlawfulness, what could or should they have done *in practice*, to prevent me from being able to do anything about the noise generated by their re-development works? In other words, *what advice would you give them?*

What does 'acting reasonably' in the context of carrying out a development where a neighbouring tenant has the benefit of a quiet enjoyment covenant, actually entail? What are the top 10 pieces of advice you would give to Chambers' landlord and the next-door neighbour tenant carrying out the works?

Advice 1: consultation

The ***first*** piece of advice you would want to give the landlord and the next-door neighbour tenants is to warn me well in advance of their development plans (or even try to reach agreement with me about times of work and levels of noise). This means that I can relocate or work from home or generally avoid the area until their works are done.

In *Goldmile Properties Ltd v Lechouritis* [2003] EWCA Civ 49, [2003] 2 P. & C.R. 1, the landlord, Goldmile, let restaurant premises to the tenant, Speiro Lechouritis, under a lease which, not unusually, contained both a quiet enjoyment provision in favour of the tenant and a duty upon the landlord to carry out repairs to the property's exterior. Such work took six months, during which time scaffolding and sheeting had to be fixed to the outside of the building which meant that it looked closed, was dark and there was noise and dust ingress. Mr Lechouritis claimed damages, including for loss of profits.

The District Judge at first instance rejected the claim on the basis that all reasonable steps had been taken to minimise the disturbance but on appeal the Circuit Judge allowed the claim, holding that the test was not whether the landlord had taken all *reasonable* steps to mitigate the disturbance but whether it had taken all *possible* steps.

The Circuit Judge thought that the landlord *could have done more*. The Court of Appeal upheld the District Judge's decision, saying that the obligation to keep the building in repair had to co-exist with the tenant's entitlement to quiet enjoyment and that the need for such co-existence pointed towards a threshold, for disturbance by repairs, of all *reasonable* precautions rather than all *possible* precautions.

One of the major factors which led the Court of Appeal to allow the appeal from the Circuit Judge and restore the decision of the District Judge at first instance that the landlord *had* used all reasonable endeavours was

> "[18] ….. *an aspect of the case to which the district judge paid express attention in the passage of his judgment cited above. He found that the work had been arranged to meet the claimant's requirements as far as possible, and that the lessor had been helpful with regard to the reduction and payment of the service charge. It is worth explaining what he was referring to, because it illustrates what may make the difference between the reasonable and unreasonable execution of repairs which are going to disturb a tenant's quiet enjoyment. In brief, before embarking on the works the lessors had sent the lessee a copy of the full estimate which they proposed to accept, prices included. The*

lessee wrote back, strongly querying the price but also pointing out that the proposed start date would interfere with the restaurant's busiest period over Christmas. The lessors, having considered these representations, postponed the start of the works until March 1997 and agreed to spread the first instalment of the consequent service charge over a year. It can readily be seen why the district judge's view that the lessor had taken all reasonable steps to respect the lessee's contractual interests was not contested on appeal. It will always be necessary for reasonableness to be looked at on the facts and in the light of the legal considerations which we have set out above.

[19] *This lease, like many leases, makes limited provision to compensate the tenant for interruption of the enjoyment of the demise. It is perfectly possible, at least in principle, to make provision in a lease to cover the kind of disruption which has occurred here. In its absence, while there is no obligation or necessity to reflect the disturbance of quiet enjoyment by remitting rental service charges, an offer to do so may well help in establishing the overall reasonableness of the lessor's intervention."*

The point is obvious, but it is potent: reasonableness includes being open, transparent, co-operative and communicative and in particular it means telling the person affected as much as possible about what interruption they are going to suffer, when, at what times and to what degree, so that they have the choice of how to accommodate it.

The landlord, in conjunction with the next-door neighbour tenant, therefore, ought to have called Chambers to make an appointment to speak to our Facilities Manager and in the meeting that ought to have been arranged, should have taken the Facilities Manager through every relevant aspect of the proposed re-development.

Although, as the pandemic is still rife, actual arms should not really be put around actual shoulders, metaphorical arms should be.

And the key is in the taking of the tenant through what is going to happen, physically, preferably in person, and with empathy.

It is noteworthy that in *Timothy Taylor Ltd v Mayfair House Corp* [2016] EWHC 1075 (Ch), [2016] 4 WLR 100 the landlord's tender documents *did* make reasonable reference to the tenant and specifically requested that construction method statements were prepared to ensure the works are scheduled to minimise impact on the Tenant's operations. That was not, in the event enough. The landlord has to walk the walk, not just talk the talk.

The Deputy Judge put it like this at [99]:

"What should have happened here is that the Landlord, through its Project Manager and, perhaps, Chorus's Project Manager also, should have sat down with the Tenant, perhaps with Ms Vaughan, maybe with an expert to assist her, to discuss the works right at the start to agree what should be regarded as high levels of noise, and to plan between them how the noisy work could be carried out without causing as much disturbance

> *as has in fact been caused. It is, in my judgment, striking that it does not appear from the evidence that it was until quite a long way into the commencement of the works, and only after complaints from the Gallery, that any attempt was made to limit the hours for noisy work. Even as late as June 2015, when BLP were retained on behalf of the Tenant, there had still not been any meaningful discussions to seek to agree periods of noisy and non-noisy works and the levels at which noise was to be regarded as noisy."*

Two particular aspects of such a meeting are essential.

First, the length of the work will need to be specified. In *Timothy Taylor* the Deputy Judge said at [107] that: "*Another aspect of the failure properly to liaise with the Tenant is the failure to give any real indication to the Tenant as to how long the works are going to last ..... it does seem to me that it is unreasonable when a landlord is carrying out such major works as this around a tenant whose premises have been virtually incorporated into the building site not to give the tenant a more accurate idea as to when it can expect the works to cease*". That knowledge is essential to the tenant's decision making: whether to move away, whether to change operating hours, whether to move online.

Second, it will include those carrying out the works being *responsive* to the tenant's requirements. If, for instance there is less impact on the tenant's business if works are confined to certain hours (as would occur if the tenant was a restaurant or cinema) the landlord, if it is to be regarded as having acted reasonably, will need to accommodate such requests. In *Timothy Taylor* the contractors confined high levels of noise to two hours on and two hours off, but this was not clearly and certainly not formally agreed with the tenant. Those carrying out the works have to be *responsive* as well as being *considerate*.

It should be noted, though that these considerations are relevant only to the situation under consideration - where the right to quiet enjoyment is under a covenant to that effect. In a 'pure' private nuisance case like *Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) the steps which might be taken to mitigate the interference are of no relevance - see paragraph [102] of that case.

Advice 2: discount on rent

The ***second*** piece of advice you would give Chambers' landlord and the next-door neighbour tenant relates to a discount on rent/service charge for the works.

The facts of *Timothy Taylor* are that the tenant, Timothy Taylor, held a lease of ground floor and basement art gallery premises in Mayfair, London. The landlord was carrying out major works to rebuild the interior of the building from the first floor upwards and to create a number of new apartments which meant that the whole building had to be covered in scaffolding. The works were also noisy and created substantial dust ingress to the gallery: staff at the gallery were, like me in Chambers, forced to wear headphones and work offsite and (unlike Chambers) the gallery had to close on a number of occasions when the noise reached intolerable levels. There was also a high level of absenteeism in

the gallery due to headaches, migraines and nausea – tell me about it – which coincided with the noise.

The lease contained both a covenant for quiet enjoyment in favour of Timothy Taylor as well as a reservation in favour of the landlord of

> *"…. Full right and liberty at any time … to alter, raise the height of, or rebuild the Building or any other building, and … to erect any new buildings of any height on any adjoining property of the Landlord in such manner as the Landlord thinks fit even if doing so may obstruct, affect, or interfere with the amenity of or access to the Premises or the passage of light and air to the Premises, and even if they materially affect the Premises or their use and enjoyment …".*

The lease also included an express reservation allowing the landlord "*The right temporarily to erect scaffolding for any purpose connected with or related to the Building and Premises provided it does not materially adversely restrict access to or the use and enjoyment of the Premises.*"

On Timothy Taylor's claim for damages for breach of the covenant for quiet enjoyment and for derogation from grant, and declaratory and injunctive relief to regulate how the works should be carried out in the future, the Deputy Judge, Alan Steinfeld QC, applied *Goldmile*, holding that the covenant for quiet enjoyment and implied covenant not to derogate from the grant have to be balanced against the landlord's rights to carry out its works under the reservations by reference to a standard of reasonableness: the landlord must take all reasonable steps to minimise the disturbance to the tenant. At [80] the Deputy Judge said

> "*The issue is not whether or not high levels of noise are at times being created by the works, but whether the Landlord has been acting reasonably in the exercise of its right to build by taking all reasonable steps to minimise the amount of disturbance being suffered by the Tenant, even if it cannot totally eliminate that disturbance. The question that I have to decide is, therefore, not whether the works that are being carried out and are threatened to continue to be carried out would constitute an actionable nuisance, as they may well do, but whether the Landlord has been exercising its right to build unreasonably.*"

However, as well as recognising the need for the tenant to have good advance notice of what works, causing what noise and dust ingress, and what scaffolding will be in place for what period, the Deputy Judge also noted the importance of any offer by the landlord of financial compensation to the tenant to compensate it for disturbance caused by the works. No such offer had been made (or at least not seriously) and to reflect that omission twenty per cent of the rent under the lease for the duration of the works was the basis of an award of damages for breach of covenant. Such a discount on the rent was treated as particularly apposite when, as in *Timothy Taylor*, the work was being done for the landlord's own purposes, for its own profit and where they would confer no benefit on the tenant.

It is true that legally, this is a curious solution. In which other area does a wrong stop being a wrong just because compensation is offered in respect of it? This, however, is the way the law has developed to this point, in this area.

The second piece of advice you would therefore give Chambers' landlord is to have required, as a condition of consent to the works, to be indemnified by the next door tenant for a sum up to a figure equivalent to 20% of Chambers' rent to be paid to it. That

20% could then be passed down to Chambers, if Chambers were to make a claim against its landlord for a discount of rent.

Section 19(2) of the Landlord and Tenant Act 1927 provides that:

"*(2) In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against the making of improvements without licence or consent, such covenant condition or agreement shall be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that such licence or consent is not to be unreasonably withheld; but this proviso does not preclude the right to require as a condition of such licence or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord .....*".

It would be well arguable that the latter part of this section would permit the landlord to require such an indemnity on the basis that the 20% rent discount that it might have to give to Chambers would be "*damage to or diminution in the value of … neighbouring premises belonging to the landlord*". Nothing says that the damage under this section has to be damage to the capital value, it could just as easily be damage to the income stream.

It is important to point out as regards this second piece of advice that nobody is saying that the landlord is *obliged* to offer the tenant any form of discount for the works. However, not doing so just raises the bar for the landlord on the question of whether it has acted reasonably – a point in issue but not decided (because on the facts it did not need to be decided) by Mr Justice Nugee (as he then was) in *Jafari v Tareem Limited* [2019] EWHC 3119 (Ch).

The closer the landlord can get to a fair recompense for the disturbance it has created – and it was relevant in this context that the premises in *Timothy Taylor* were being let for use as a high class art gallery in the centre of Mayfair at a 'full' rent, all of which pointed to a need either to carry out the redevelopment with a particularly high concern for the tenant to carry on that business, or for the compensation for the disturbance to be at a decent level – the better protected is the landlord ahead of the carrying out of its works.

The landlord's refusal in *Timothy Taylor* to offer any discount on what was otherwise a very full rent just made it look all the more unreasonable. Best practice is therefore for the landlord to get its offer of a rent discount in early: pay early, pay generously.

The position as regards the first two pieces of advice was summarised by Philip Britton (described in 2016 as Senior Fellow, University of Melbourne, also Visiting Professor and former Director, Centre of Construction Law and Dispute Resolution, Dickson Poon School of Law, King's College London) in the Hudson Essay Competition 2016 in an article entitled "*Quiet enjoyment revisited: a landlord's liability to a tenant for disruption caused by construction*" in terms that the landlord should

> "*start a dialogue way ahead of the start of construction, perhaps in parallel with your application for planning permission or call for tenders from main contractors. Start a 'charm offensive', making sure that the tenant-neighbour knows in detail what is planned, what its impact will or could be, over what period; and be willing to offer cash (or the equivalent) to buy the neighbour's acquiescence. In addition, if construction work is a possibility while the lease is running, provide accessible, affordable and speedy ADR machinery*

within it for resolving these questions if they do arise; if not, agree equivalent provisions with all relevant neighbours once the shape of the project starts to emerge …… If this degree of forward planning seems an impractical and unattainable ideal, Timothy Taylor v Mayfair House shows that a court challenge while construction is already underway will almost always prove more expensive, as well as more disruptive to the project itself, than properly integrating neighbours into the design stage. 'Take the neighbour's (or neighbours') position and views, and their potential power to disrupt your project, properly into account – in advance': that is the clear project management message."

Advice 3: fair shares for all

The ***third*** piece of advice you would give to the landlord and the next-door neighbour tenant is to fashion, before the works commence, a comprehensive, fair, equitable and well-thought-out tariff for compensation of neighbouring owners, all calculated on the (realistic) assumption that everyone will find out what everyone else is getting.

The landlord not having done that was a major cause of the bad feeling in *Timothy Taylor* because not long after the scaffolding was erected, which blocked a lot of the tenant's light and made the gallery far less inviting, the tenant discovered that his friend, who owned an art gallery next door, was being paid £50,000 by the landlord to agree to part of the scaffolding being erected over the airspace above his gallery. The effect of the scaffolding on the tenant was much worse (its whole premises were encased in it) and yet nothing was offered to him. This served only to raise temperatures to litigation-like levels.

There is no reason that the landlord cannot compile a 'compensation grid', where different neighbours are offered different amounts based on the differing effect of the works on their premises, done in a way that will cause neither embarrassment nor ill-feeling if and when the figures become widely known.

Advice 4: best practice

The ***fourth*** piece of advice you would give to the landlord (in granting consent to the next door works) and to the next-door neighbour tenant (in carrying out the works), is to make sure that materials and methodologies are used which are up to date and cannot be criticised as sub-optimal. In *Timothy Taylor* the way the scaffolding was designed and erected paid no or little regard to the interests of the tenant. It could, at little or no extra cost, have been designed and structured in way much more understanding of the tenant's needs. There was found to have been no real need to encase the whole building in an unattractive cover which risked giving outsiders the impression that the gallery had closed or had moved away. It will be essential that contractors can show that they have utilised all available modern methods aimed at reducing the amount of noise being generated by the works and that those granting consent to such works have imposed conditions to like effect.

Advice 5: noise monitoring

The ***fifth*** piece of advice you would give the landlord and the next-door neighbour tenant would be to offer at the outset the installation of noise monitoring equipment in Chambers.

There are three expressions which always inflame a tenant who is being subjected to intrusive neighbouring development.

The first is that '*building work is always occurring* [especially in London] *and the quicker we do it the sooner it will be over*'. This is never a good thing to say. I have never seen it do anything other than make matters worse, for a whole host of reasons, not least that it is patronising and entirely devoid of empathy.

The second worst thing for a landlord to say is that nobody else has complained. Even if this is true, it does not make the disturbance any less annoying and usually only serves to enrage the tenant, with the intimation that the tenant is in some sense super-uber-sensitive.

The third worst thing for a building contractor to say is to deny that as much noise is being made as the tenant is suggesting. For a person who is suffering noise intrusion all day, every day, the hint that they may be exaggerating the issue is similarly something that can only have the effect of making matters worse, inflaming passions and ultimately making litigation more likely.

Installing noise meters in the tenant's premises, at the instigation of those allowing or carrying out the work (instead of waiting for it to be demanded) 1) shows that the tenant's position is being considered, from the outset; 2) shows empathy; 3) will enable the building contractor to know which areas of the work being carried out are causing the most disturbance; and 4) will provide hard data that may well serve to provide valuable objective evidence as to the effect on the tenant.

Advice 6: managing expectations

The ***sixth*** piece of advice is that the people carrying out the works should be extremely careful about raising the tenant's expectations and should keep changes to a minimum. This is more than just about walking the walk. It is about making sure that the talk is accurate in the first place. In *Timothy Taylor*, before the erection of the scaffolding, the landlord's project manager showed the tenant a sketch plan demonstrating how the scaffolding would be erected in a sympathetic way, which preserved the open aspect of the gallery (the Deputy Judge was shown photographs of other premises in different parts of London where this technique has been used which showed clearly that the external appearance of the premises, though necessarily altered by the scaffolding, did not give the impression, as occurred in *Timothy Taylor*, that the premises were closed or the tenant had moved away).

However, in the event, that sympathetic configuration was not the arrangement implemented and that was a factor in the Deputy Judge finding against the landlord on the scaffolding issue (the other one was that the hoists could have been altered so that the low-level hoist was swapped with the high level hoist so that deliveries of materials would

be effected further away from the entrance to the Gallery, thereby interfering less with the delivery of art).

Instead of the open aspect of the gallery being preserved by erection of it on pillars or towers, the scaffolding as actually erected caused the Gallery to be enwrapped in what became a building site.

It was not only the change which was unreasonable – mucking about with the tenant's legitimate expectations – but the original design, put forward as it was by the landlord, only served to demonstrate that a better and more sympathetic configuration as that which occurred, was possible. The Deputy Judge said at [93]

> *"One then has to ask whether there were reasonable steps that the Landlord could have taken to minimise the disturbance thus caused by the scaffolding. The answer to this question, in my opinion, is clear. The Landlord could have designed the scaffolding on the lines set out in the drawing which Mr Hill had shown to Ms Vaughan and which incorporated towers instead of a straight line and where the low level hoist was swapped with the high level hoist so as to minimise disturbance from deliveries to and from the building site."*.

The fact that the landlord itself had specified a superior configuration made it impossible for its scaffolding expert to deny that there was such a thing.

Advice 7: locale-suitable measures

The ***seventh*** piece of advice you would give the landlord and the next-door neighbour tenant would be to ensure that when it came to the cost of measures designed to ameliorate the disturbance – and of course the more is spent on noise insulation the less the disturbance will be – the amount that should be spent should reflect the *locale*.

This was the first factor which the Deputy Judge addressed in *Timothy Taylor* which led him to conclude that the landlord in that case has been acting unreasonably in the exercise of its right and was therefore, in breach of its covenant for quiet enjoyment. He expressed it this way at [82]

> *"Firstly, it seems to me that we are dealing here with premises which were let for use as a high class art gallery in the centre of Mayfair for a high rent. In my judgment that requires that the right to build should be exercised with a particular regard, so far as that was reasonably possible, to the need of the Tenant [to] keep the Gallery running and with as little disturbance to it and its customers and staff as possible…."*.

You could say this is a relevant point as regards work in the Inns of Court – and other similarly unique locations – as well.

Advice 8: continual communication

The ***eighth*** piece of advice is to continue the process of open discussion, liaison and communication with the tenant's representatives, right through the works programme.

Ideally, a meeting should be held at the same time every week with the tenant's Facilities Manager.

The purpose of these meetings is to keep the tenant up to date with the progress of the works, to keep up to date with the tenant's requirements and generally to monitor the effect on the tenant of the works.

It also of course, like the installation of the noise monitoring equipment, shows that the

tenant's position is being considered from the outset, and shows empathy.

Advice 9: considerate scheduling

The ***ninth*** piece of advice you would give to the landlord and to the next-door neighbour tenant would be to make sure, as far as they were able, that elements of their works which caused the most disturbance, were scheduled separately, unless the tenant wanted them scheduled together.

The basis for this is the treatment in *Timothy Taylor* of the disturbance caused by noise and the scaffolding, *together*. At [84] the Deputy Judge said: *"In their submissions to me, the parties have tended to deal with the two elements which have been most concerning to the Tenant as though they were two quite separate issues: namely the scaffolding and the noise. Whilst it is understandable for these to have been dealt with in that way, it seems to me that essentially both the scaffolding and the noise are part and parcel of the carrying out of the works and need to be considered together for their cumulative effect."*

That cumulative effect was much worse than the single effect of either.

Advice 10: pre-emptive drafting

The ***tenth and final*** piece of advice you would give to the landlord flows from *Goldmile* but might be for 'next time'. The principle emerges from a sentence in the judgment of Sedley LJ to the effect that *"It is perfectly possible, at least in principle, to make provision in a lease to cover the kind of disruption which has occurred here."*.

When the next lease is being drawn up there is no reason for the parties not to agree that the rent will be reduced by a certain percentage if the premises demised cannot reasonably be used for their stated purpose because of works being carried out, with an expert to determine whether such use is indeed being prevented.

There could even be a sliding scale agreed, whereby varying amounts are reduced from the rent if the demised premises are useable but there is disturbance from noise, dust or interference with light, again with an expert to determine whether such disturbance is indeed occurring to the level described.

Having said all that, Sedley LJ made this suggestion in *Goldmile* in 2003 and I for one, have not seen any such clause in a lease in the 18 years since then.

The inference can only be drawn that this is not a suggestion which is being taken up, probably because it is impossible to predict the level of interference connected with works, the nature and purpose of which might not even be conceived at the time the lease is agreed.

So, although you might well leave out the last piece of advice when Chambers' landlord and the next-door neighbour tenant consulted you as to how to head off any litigation that might be contemplated, the other nine pieces of advice are essential.

Not just to them, but to my ability to finish writing this chapter.

Chapter 4

Continuing nuisance, limitation and "damage"

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Julian is a property, commercial and professional liability specialist. Often his cases straddle these different fields. Julian prides himself on handling often complex cases in an approachable and user-friendly manner. Persuasive advocacy, both oral and written, is central to Julian's approach in every case. The core of Julian's experience lies in commercial property litigation and commercial litigation where the subject or context of the dispute is property. Recent editions of the leading directories have described Julian as *"really outstanding, he is incredibly bright but also extremely user-friendly"*, *"dynamic, forward thinking, progressive and engaged"*, *"an instructing solicitor's dream; he is unafraid to stick to his views, and holds his own against leading silks"*, *"phenomenally efficient and has a very good knowledge of the law"*, and *"a great team player, commercial, hard-working, and clients really trust him"*. He is *"superb value for money"*, *"brilliant at finding and articulating strong arguments"*, and *"provides comprehensive advice and is extremely user-friendly"*. Julian is again listed in the Who's Who Legal: UK Bar 2020 for Real Estate.

The forms which nuisance may take have famously been described as *"protean"*.[94] The modern trend has been to attempt to introduce greater coherence and consistency to the legal principles governing the cause of action in private nuisance. This short paper explores, through the intertwined topics of continuing nuisance, limitation and the concept of "damage", some of the tensions inherent in seeking to bring coherence to such a diverse cause of action.

What is a continuing nuisance?

A continuing nuisance occurs where acts or omissions which constitute an actionable private nuisance are repeated such that the nuisance continues uninterrupted over time. In such a case a fresh cause of action accrues for each day that the nuisance continues.

The paradigm case of a continuing nuisance is the case of tree roots growing from one person's land into the land of another.[95] For each day that the tree roots remain in the neighbouring land they cause a nuisance by extracting water from the earth, dehydrating the neighbour's soil and thereby undermining his house or other structures on his land. The analogous situation of the growth of tree branches across a boundary is another example of a continuing nuisance. Such encroachment is not regarded as a trespass but as a nuisance (because it originates on the defendant's land) continuing for so long as the roots or branches remain in place in or over the neighbour's land and cause damage.[96] So too where a landowner built and maintained an erection on his land and placed his own eaves so as to overhang his neighbour's premises, the resulting nuisance was said to continue from day to day.[97]

A continuing nuisance in the sense just described is to be distinguished from the separate concept of the "continuation" of a nuisance whereby responsibility for a nuisance can be imposed upon a successor in title to the person who created the nuisance.

> *"An occupier of land "continues" a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so. He "adopts" it if he makes any use of the erection, building, bank or artificial contrivance which constitutes the nuisance."*[98]

This latter concept is not confined to "continuing nuisances" in the sense defined above.

Limitation and "damage" in nuisance

Nuisance is a tort. *Section 2 of the Limitation Act 1980* provides:

> *"An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."*[98]

Section 2 is disapplied by *section 14A(2) of the 1980 Act* but only in relation to an "action

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[94] Per Lord Wright in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880.

[95] Per Coulson LJ in *Jalla v Shell International Trading and Shipping* [2021] EWCA Civ 63 at [54].

[96] *Lemmon v Webb* [1894] 3 Ch 1 at pp11-12.

[97] *Battishall v Reed* (1856) 18 CB 696.

[98] Per Lord Maugham in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 894; see too *Cocking v Eacott* [2016] QB 1080.

for damages for negligence". It is generally accepted that this does not include an action in nuisance, even though there is considerable overlap between the two causes of action.[99] So the alternative limitation period provided for by section 14A and measured from three years after the "date of knowledge" is not available to a defendant in an action for nuisance. In those instances in which a claimant can bring an action in both negligence and nuisance arising from the same facts this may provide a reason for pleading the claim in negligence in a given case. However, for those cases not involving fault by the defendant which can only be brought in nuisance we are only concerned with the six-year period under section 2.

The accrual of a cause of action in tort generally requires the claimant to establish (i) a duty owed by the defendant to the claimant, (ii) breach of that duty, and (iii) damage suffered by the claimant as a result of the breach of duty.[100] Thus damage has often been described as a necessary ingredient of a cause of action in nuisance, in common with most other torts (the exceptions being those torts which are actionable *per se*, such as trespass). For example, in the case of a wrongful withdrawal of support a cause of action in nuisance will not accrue until the neighbouring land is damaged by subsidence.[101]

However, the law of nuisance does not always require damage to be proven. In *Network Rail Infrastructure Ltd v Williams* [2019] QB 601 Sir Terence Etherton MR said at [42]:

> *"... the frequently stated proposition that damage is always an essential requirement of the cause of action for nuisance because nuisance is derived from the old form of action on the case must be treated with considerable caution. ... It is clear both that this proposition is not entirely correct and also that the concept of damage in this context is a highly elastic one."*

An example of a nuisance which is actionable without any allegation or proof of damage is interference with an easement.[102] Likewise in the case of an artificial object protruding onto the claimant's property from neighbouring land, the claimant has a cause of action without proof of damage, though there is some uncertainty as to whether damage is not required at all or is merely to be presumed.[103] In cases of nuisance by interference with the amenity of the claimant's land, physical damage to the land is not a necessary element in order to complete the cause of action. Instead damages in such a case will be awarded for the "loss of the land's intangible amenity value".[104]

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[100] Per Teare J in Su v Clarksons Platou Futures [2017] EWHC 337 (Comm) at [11].

[101] Darley Main Colliery Co v Mitchell (1886) 11 App Cas 127, a case of interference with a natural right of support as distinct from an easement of support. The further point in Darley Main that a claimant for interference with a natural right of support can maintain an action for nuisance in relation to fresh subsidence occurring more than six years after the withdrawal of support has been described as "a special and exceptional situation" (Homburg Houtimport BV v Agrosin [2004] 1 AC 715 at [40]) and is likely to be confined to cases of withdrawal of a natural right of support.

[102] Nicholls v Ely Beet Sugar Factory Ltd [1936] Ch 343 at 349.

[103] Fay v Prentice (1845) 1 CB 828. The better view is that proof of damage is a requirement, but one which will be presumed to be made out in such cases. See *chapter 1 by Daniel Petrides*.

In *Network Rail v Williams* (above) the claimants' homes backed onto land owned by the defendant on which there was a large stand of Japanese knotweed. The judge at first instance rejected a claim for nuisance by encroachment of the knotweed onto the claimants' land. He held (among other things) that, although the knotweed or its rhizomes (underground stems similar to roots) had encroached on the claimants' land, that had not caused any physical damage and so the encroachment was not actionable as a nuisance. However, the judge held instead that the presence of the knotweed *on the defendant's land* within seven metres of the boundary was actionable in nuisance because it diminished the market value of the claimants' property. He awarded damages for the diminution in value.

The Court of Appeal upheld the decision of the judge but disagreed with his reasoning. Sir Terence Etherton MR (giving the judgment of the Court) said that the judge's decision to award damages for diminution in value for the presence of knotweed on neighbouring land would be a radical reformulation of the law of nuisance extending it beyond the protection of the use and enjoyment of land to a claim for pure economic loss.[105] However, in the view of Sir Terence the claimants nonetheless had a valid claim for encroachment because:[106]

> *"… the mere presence of [the knotweed] rhizomes, imposes an immediate burden on the owner of the land in terms of an increased difficulty in the ability to develop, and in the cost of developing, the land, should the owner wish to do so. … Japanese knotweed and its rhizomes can fairly be described, in the sense of the decided cases, as a "natural hazard". They affect the owner's ability fully to use and enjoy the land. They are a classic example of an interference with the amenity value of the land."*

He saw the judge's findings of fact as sufficient to give rise to a cause of action in nuisance and said:

> *"If, and in so far as, damage is required to complete that cause of action, it is constituted by the diminished ability of the claimants to use and enjoy the amenity of their properties."*

Limitation and "damage" in continuing nuisance

Continuing nuisance is, of course, a species of a wider genus, namely continuing torts. In the case of a continuing tort, a fresh cause of action accrues to the claimant each day that the tort continues. It follows that the expiry of more than six years from the *commencement* of the tort does not in itself prevent an action being brought in relation to a continuing tort provided the action is commenced within six years of the date on which the tort ceased. This can have obvious attractions to a claimant who wishes to bring a claim more than six years after a cause of action first accrued. That said, in other respects the utility of such a claim must be qualified. In bringing a claim in relation to a continuing tort, in principle the claimant should be limited to recovering such damage as was suffered within the six-year limitation period preceding the commencement of the action. Moreover, damages for a continuing tort can only be awarded in respect of loss accruing before the commencement of the action (or,

[105] Network Rail at [48].
[106] Network Rail at [55].
[107] Network Rail at [56].

possibly, the date of trial). Damages cannot be awarded for prospective loss in respect of a continuing tort.

Continuing nuisance: extended principle allowing recovery of damages for harm suffered by predecessor in title

The "highly elastic" concept of damage in the law of nuisance has manifested itself in a further, somewhat anomalous principle that is specific to continuing nuisance. The principle is that, where there is a continuing nuisance which the defendant knew, or ought to have known, about, reasonable remedial expenditure may be recovered by the owner who has had to incur it, even if the damage in question occurred before the claimant owned or occupied the property, at a time when the claimant's predecessor in title was the owner or occupier.

In *Masters v Brent London Borough Council* [1978] 1 QB 841 the plaintiff's father had a leasehold interest in a house in which he lived with the plaintiff and the plaintiff's wife. The roots of a lime tree planted in the pavement in front of the house encroached on the land and caused subsidence undermining the foundations of the house by extracting moisture from the subsoil. This was an actionable nuisance. The plaintiff and his father took the advice of a building company as to the necessary repair works but at that stage could not afford the cost. The father transferred the leasehold to the plaintiff to enable the plaintiff to raise a mortgage to pay for the remedial work. He did so and sued the local authority for the cost of the work. He was met by the argument that the damage had occurred before he acquired the proprietary interest. However, Talbot J accepted that there was a continuing actionable nuisance affecting the land both during the father's ownership and during the plaintiff's ownership. He said that there was in fact, not in theory, continuing damage:[108]

> "*Where there is a continuing nuisance inflicting damage upon premises those who are in possession of the interest may recover losses which they have borne whether the loss began before the acquisition of the interest, or whether it began after the acquisition of the interest. The test is: what is the loss which the owner of the land has to meet in respect of the continuing nuisance affecting his land?*"

In *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321 the first claimant was incorporated to provide the maintenance and service company for leaseholders in a block of flats, the freeholder being the Church Commissioners. In 1989 cracking appeared following a period of drought. In March 1990 engineers reported that the roots of a plane tree on the adjoining pavement had encroached under the property and that if the tree were not removed underpinning of the property would be necessary. In June 1990 the freeholders sold their freehold reversion to the second claimant, Flecksun, which was a wholly owned subsidiary of the first claimant. There was no assignment to Flecksun of any cause of action against the highway authority in respect of any damage caused by the tree. In August 1990 the highway authority was given the engineer's report and requested to remove the tree, which it declined to do. The first claimant then undertook the necessary underpinning works and the claimants sued the highway authority for the cost of those works, some £570,000. If the tree had been removed, the need to underpin would have been avoided and the cost of repairing cracking to the building would have been £14,000.

[108] At p848

The highway authority ran the same argument as the local authority in *Masters v Brent*. It argued that all the existing damage had occurred before Flecksun acquired the freehold, that only the Church Commissioners could sue for that damage (subject to any limitation defence), and that Flecksun could only sue for fresh damage if and when it occurred.[109] The House of Lords rejected that argument and held that Flecksun was entitled to recover the costs of carrying out the underpinning works. Lord Cooke (giving the only reasoned opinion) said that:[110]

> *"I think that there was a continuing nuisance during Flecksun's ownership until at least the completion of the underpinning and the piling in July 1992. It matters not that further cracking of the superstructure may not have occurred after March 1990. The encroachment of the roots was causing continuing damage to the land by dehydrating the soil and inhibiting rehydration. Damage consisting of impairment of the load-bearing qualities of residential land is, in my view, itself a nuisance. … Cracking in the building was consequential. … It is agreed that if the plane tree had been removed, the need to underpin would have been avoided and the total cost of repair to the building would have been only £14,000. On the other hand the judge has found that, once the council declined to remove the tree, the underpinning and piling costs were reasonably incurred, despite the council's trench."*

Lord Cooke went on to say that:[111]

> *"… in my opinion, the law can be summed up in the proposition that, where there is a continuing nuisance of which the defendant knew or ought to have known,[112] reasonable remedial expenditure may be recovered by the owner who has had to incur it. In the present case this was Flecksun."*

The principle established by *Delaware Mansions* is an exception to the general rule at common law that the purchaser of a damaged building would obtain no right of action against the person responsible for the damage in the absence of an express assignment of the vendor's cause of action.[113] Logically, provided there is a continuing nuisance present, this extended principle should mean that even if all the damage requiring remediation pre-dated the claimant's acquisition of the land, the claimant can still recover it if he or she has had to incur that cost by way of remedial expenditure.

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[109] *Delaware Mansions* at [11].

[110] *Delaware Mansions* at [33].

[111] *Delaware Mansions* at [38].

[112] The point about knowledge refers back to para [34] where Lord Cooke had noted that "it cannot be right to visit the authority or owner responsible for a tree with a large bill for underpinning without giving them notice of the damage and the opportunity of avoiding further damage by removal of the tree." He referred to that matter again in the same paragraph, noting the defendant's entitlement to "a reasonable opportunity of abatement before liability for remedial expenditure can arise. See *Jalla v Shell International Trading and Shipping* [2021] EWCA Civ 63 at [43].

[113] *Section 3 of the Latent Damage Act 1986* establishes a similar exception in the case of negligently-caused latent damage to property.

Jalla v Shell International Trading and Shipping Co **[2021] EWCA Civ 63**

The scope of continuing nuisance and its impact on limitation was the subject of the recent Court of Appeal decision in *Jalla v Shell International Trading and Shipping Co* [2021] EWCA Civ 63.

On 20 December 2011 during loading operations between a floating production platform and a tanker ship, an oil spill occurred in the Bonga oil field 120kms off the coast of Nigeria. The spill lasted for approximately six hours before it was detected and the leaking pipeline was switched off. The claimants were 27,800 individuals and 457 communities who live and work by or in the hinterland of a stretch of the Nigerian coastline. They issued representative proceedings for nuisance and negligence against a number of entities forming part of the Royal Dutch Shell group of companies including among others Shell International Trading and Shipping Co ("STASCO"). The claim against STASCO was introduced by an amendment made on 4 April 2018.

On the facts found by the judge at first instance, the oil from the spill reached the shoreline where the claimants' land was located within a few days of 24 December 2011 and the judge therefore concluded that many of the claimants will have suffered actionable damage before 4 April 2012. The issue was therefore whether the 4 April 2018 claim against STASCO was time-barred by reason of being made more than six years after the cause of action accrued. On behalf of the claimants it was argued that it was not time-barred because the damage caused by the spill was a continuing nuisance thereby giving rise to a fresh cause of action every day the polluting oil remained in place.

The judge at first instance (Stuart Smith J) rejected the allegation of a continuing nuisance. He held that the spill gave rise to a one-off claim for nuisance which crystallised within weeks of the spill occurring in December 2011 and the limitation period should not be extended by reference to the concept of a continuing nuisance.[114] The Court of Appeal dismissed an appeal against the judge's decision. Coulson LJ (with whom Lewison LJ and Newey LJ agreed) gave the reasoned judgment of the Court of Appeal.

Among the reasons given in *Jalla* for why the oil spill in that case was not a continuing nuisance, the following are of general relevance.

First, a one-off event, or an isolated escape, cannot give rise to a continuing nuisance.[115] A continuing cause of action is to be

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[114] *Jalla v Royal Dutch Shell Plc* [2020] EWHC 459 (TCC) at [67] – [68].
[115] At [57].

distinguished from a single, one-off event, which gives rise to a single cause of action. Coulson LJ said that:[116]

> *"A cause of action in tort is usually a single, self-contained package of rights, relating to an act or omission which has caused damage and is actionable in law."*

He went on to say:[117]

> *"A continuing cause of action is more unusual … the underlying notion, [is] that a continuing cause of action will usually involve a repetition of the acts or omission which gave rise to the original cause of action, …".*

The distinction between a one-off event and a continuing nuisance may seem an obvious one. However, as so often in the law of nuisance, the application of the legal principles to the facts can create difficulty.

In *Jalla* the claimants advanced the proposition that failure to remediate the consequences of a single, one-off event can be a continuing nuisance.[118] That proposition was advanced on the basis of the House of Lords decision in *Delaware Mansions v Westminster City Council* discussed above. However, Coulson LJ distinguished *Delaware Mansions* on the basis that it was not a case about the accrual of a cause of action but about whether a successor in title (Flecksun) had suffered any loss, in circumstances where the predecessor in title (the Church Commissioners) had a prior claim for the same loss and had not assigned that claim to the successor.[119]

Coulson LJ's reasoning suggests that the determining factor in identifying a case of continuing nuisance lies in whether or not there is "a continuing event or state of affairs" amounting to a nuisance. Essential to almost every case of nuisance (other than for interfering with a property right) is a hazardous state of affairs which is the source of the nuisance. That hazardous state of affairs must be under the defendant's control by virtue of it taking place on property under their ownership or occupation.[120] In a tree root case like *Delaware Mansions* there is a continuing event or state of affairs for so long as the tree remains present and its roots continue to encroach across the boundary. The requirement for there to be ongoing physical damage is provided in such a case by the ongoing desiccation of the land due to the tree roots. By contrast, in *Jalla* the source of the nuisance was the oil leak from a ruptured pipe forming part of the oil platform belonging to STASCO which was abated by STASCO within a matter of hours by the oil leak being stopped. STASCO's control did not extend beyond the oil platform and associated structures, so the migration of the oil through the sea to the shore was not a continuing state of affairs for which STASCO could be held liable. Coulson LJ reasoned that *"the oil that remained on the appellants' land was the consequence of that single event"* as opposed to being a continuing state of affairs in itself.[121]

Second, nuisance is not to be equated with damage or harm. The claimants in *Jalla* submitted that *"once the oil has arrived [on the claimants' land] that is a continuing state*

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[116] At [52].
[117] At [53].
[118] [2020] EWHC 459 (TCC) at [65].
[119] At [60].
[120] At [74].
[121] At [61] – [62].

of affairs". The Court of Appeal rejected that approach which elevated ongoing harm or damage to being the determining element of continuing nuisance. That ignored the need for a continuing hazardous state of affairs. Coulson LJ said:[122]

> *"It would be a radical departure from the case law to say that a continuing nuisance does not require a continuing event or hazard, but merely continuing harm after the single event has ended, or the hazard has been removed."*

In *Delaware Mansions* there was ongoing harm (desiccation of the soil) caused by an ongoing hazardous state of affairs (the continued presence of the tree on, and growth of tree roots from, the council's land), whereas on the facts of *Jalla* the hazardous state of affairs lasted only so long as the oil leak was underway, a period of a few hours. Given that *Network Rail v Williams* made clear that it is open to debate whether physical damage is even an ingredient to a cause of action in nuisance, Coulson LJ was understandably reluctant to find that continuing nuisance and continuing damage or harm were effectively synonymous.

Third, abatement of a nuisance is not to be confused with remediation of the damage or harm resulting from the nuisance. On the basis that the nuisance was argued by the claimants to be continuing by reason of the presence of the oil on the claimants' land, the logical consequence of the claimants' argument in *Jalla* was that STASCO would continue to be liable for a continuing cause of action until the oil had been cleaned up. Coulson LJ said:[123]

> *"There is no authority for these propositions. As noted above, nuisance continues until it is abated (see, for example, Sedleigh-Denfield and Delaware Mansions). But abatement of the nuisance means dealing with the state of affairs that created the nuisance; it does not involve any obligation to remediate the damage caused by the nuisance. Thus, in Sedleigh-Denfield, the nuisance would have been abated by unblocking the pipe and moving the grating. The requirement to abate did not extend to obliging the defendant to go onto the plaintiff's land, drain it of the floodwater and make good the damage caused. Similarly, in Delaware Mansions, the Council were liable pursuant to a continuing cause of action until they had cut down the tree, but they were not obliged to go on to Flecksun's property and carry out the underpinning works."*

He noted that a key factor in the liability of an occupier for nuisance is the ability or power of the occupier, by virtue of their occupation of the land in question, to exercise control over the prevention or elimination of the nuisance. In *Delaware Mansions* the council had control over whether the tree remained in place or was cut down, but had no control over the underpinning works. Equally, on the facts of *Jalla*, once the oil leak had been identified, STASCO had control over the flow of oil through the leaking pipe and were able to turn it off to stop the leak. But STASCO had no control over what happened to the oil once it had escaped and was at sea. Clean up of the oil along a long stretch of coastline was subject to numerous regulatory approvals and other practical difficulties over which STASCO had no control at all.

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[122] At [65].

[123] At [71].

Continuing nuisance post-*Jalla*

The decision in *Jalla* was clearly correct on its facts. Nonetheless, it is hard to avoid the conclusion that the distinction between, on the one hand, a one-off event which causes continuing harm and, on the other hand, a continuing nuisance is harder to draw in practice than the Court of Appeal is willing to admit. The equation the *Jalla* claimants sought to make between the continued presence of the spilt oil and the continued presence of the tree roots in *Delaware Mansions* is not so far-fetched. After all, both the oil and the roots could be properly described as wrongfully emanating from the property of the defendant in each case and thereby causing continuing interference with the use and enjoyment of land owned or occupied by the claimant. To identify one (the oil) as merely the consequence of a state of affairs, whilst the other (the tree roots) as an ongoing state of affairs in itself can seem like sleight of hand.

The answer would seem to lie in recognising both that genuine cases of continuing nuisance are rare and that the tree root cases are in a category of their own. *Jalla* suggests that cases of continuing nuisance are likely to be unusual. Indeed continuing nuisance may well be confined in practice to the particular category of nuisances by encroachment together with the analogous category of nuisance by interference with an easement. In both the judgments of Stuart Smith J (at first instance in *Jalla*) and Coulson LJ (in the Court of Appeal) the examples given of continuing nuisances were all cases of encroachment and Coulson LJ referred to the case of tree root encroachment as the "paradigm case" of continuing nuisance.

The tree root cases in particular are to an extent *sui generis* within the wider law of nuisance by virtue of the continued incremental natural growth of a tree and its roots with the ongoing effect of drawing water from the surrounding soil which results in desiccation of the soil, thus inhibiting the ability of the land to support buildings and other structures.

In a tree root case it is the continued presence of the tree itself on the defendant's land with the consequent growth of its roots across the boundary that constitutes the "continuous" hazardous state of affairs. For this reason any analogy drawn between the leaked oil in *Jalla* and the tree roots in *Delaware Mansions* is a false one. The key difference between the two cases lies in the nature of the "state of affairs" present on the property of the defendant and the speed with which it was abated. In *Jalla* STASCO had within hours done everything within its control to prevent continuation of the hazard by stopping the oil leak, whilst in *Delaware Mansions* the highway authority left the tree in place for several years after damage started to occur, its roots continuing to grow incrementally over time, an inevitable consequence of which was continued desiccation of the sub-soil on the neighbouring land. It is clear from *Jalla* that the fact that the damage consequent upon the hazardous state of affairs continues to occur after the nuisance has been abated does not in itself render the nuisance continuous, and so time starts to run.

Nuisances by way of escape or emanations (noise, smells, vibrations etc) will perhaps only rarely meet the test of continuity of the sort exhibited in the "paradigm case" of tree root encroachment. It is clearly possible for emanations causing interference with enjoyment of land to be continuous, but more often than not they are intermittent and / or fluctuating to some degree, such as loud noise only at certain times of day or smells associated with a particular activity. The difference between a continuous nuisance and an intermittently repeated nuisance may in many cases make little impact in terms

of limitation, particularly if the primary relief sought is an injunction to prevent repetition of the nuisance. A new cause of action will accrue each occasion that the nuisance is repeated, whether that be daily in the case of a continuous nuisance or at whatever interval the nuisance is repeated in the case of an intermittent nuisance. In other cases the difference will be highly relevant, for example where a hazardous state of affairs results in intermittent, episodic harm, of varying extent and intensity, for example a blocked pipe of the sort encountered in *Sedleigh-Denfield v O'Callaghan*[124] causing periodic flooding only when rainfall exceeds a particular level. Each episode of flooding will give rise to a separate cause of action and, if damages are sought, the quantum of damages available in each claim could vary drastically depending upon the extent of the harm resulting from each individual episode.

Still to be decided is the true scope of the extended principle identified in *Delaware Mansions* which entitles a successor to recover for damage suffered by reason of a continuing nuisance during the ownership of his predecessor. The principle has so far only been applied in cases of encroachment of tree roots. It remains to be seen how, if at all, it would be applied outside of that specific context.

In one respect, though, *Jalla* does appear to point the way towards future refinement of the principle in *Delaware Mansions*. Neither *Masters* nor *Delaware Mansions* related on their facts to damage suffered more than six years prior to the claim being brought by the successor. Nevertheless, the logic of the principle as enunciated in those cases might be said to support the view that, in a case of continuing nuisance the person who in fact incurs the cost of remediating the damage should be able to recover the cost in full even if and to the extent that the damage commenced more than six years prior to the action being brought. However, such an argument would find little to support it in the judgments in *Jalla*. Coulson LJ was clear that *Delaware Mansions* was not a case about accrual of a cause of action but about who could seek to recover a particular loss. There is nothing in *Jalla* to suggest that *Delaware Mansions* should be interpreted as permitting a claimant in continuing nuisance to recover damage caused outside the limitation period.

[124] [1940] AC 880.

Chapter 5

A Practical Guide to Negotiating Damages

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Jonathan has advised on issues around contracts of sale and problems associated with completion during the pandemic, and also on landlord/tenant type relationships where services are no longer being provided. As part of the successful team in *EMA v Canary Wharf* he has specialist expertise on supervening illegality, frustration and the law of unexpected changes in circumstance. On the litigation side, he has been involved in applying (formally and informally) for adjournments, of both trials and interim hearing, and other case management issues arising. Jonathan's practice spans the range of property work: in substance, from City skyscrapers to Cornwall holiday parks; in type from landlord and tenant through registration and mortgage issues to questions of title and easements; and from tribunals from the Court of Appeal to the FTT. He also has experience of obtaining injunctions against squatters and protestors. He has been recognised in Chambers and Partners, Legal 500 and Who's Who Legal for his property work; *"A tenacious advocate." "Very imaginative and very willing to get into the detail and adopt a very user-friendly approach." "An excellent advocate with an engaging way of putting ideas across." "Analytically very strong and as an advocate he is confident, relaxed and assured." "Comprehensive in his approach, an impressive and effective advocate".*

Introduction

It should be a truth universally acknowledged that a legal principle expressed by reference to a case name must be in want of a clear explanation. Latin or French tags are not much better: at best, a convenient shorthand but with the same problem of obscuring the position, at least to the client and often to the lawyer. Finally, approaches based on fictional situations or imaginary persons (the man on the Clapham Omnibus, the reasonable recipient of a notice, the contractual officious bystander) tend to be tools of argument (for the lawyer) and justification for the judge; they do not help us advise clients in advance of the approach beyond illustrating why we have taken the view we have.[125]

Negotiating damages suffer from all three of these problems:

(1) In at least one area they have traditionally been called Wrotham Park damages;
(2) In others, they are mesne profits, and elsewhere damages in lieu; and
(3) The award is explained by reference to a hypothetical negotiation between (the legal fictions of) the "willing buyer" and "willing seller" – even if neither actual party would ever have sold.

Despite that, these awards and their availability are commercially important: recall the debate following *Heaney*[126] over whether developments could be pulled down (where the interplay between an injunction and an award of damages was in issue); the effect of the decision in *Fen Tigers*[127] on when injunctions will be granted to prevent nuisance; the approach in *Tamares*[128] that 33% of a developer's profit may be payable for a rights to light infringement; and the enormous sums spent on licences for oversailing, right to light deeds, relaxation or discharge of restrictive covenants, and other permissions which are predicated on substantial damages being available for legal wrongs to another's property.

This article tries to answer three short questions:

(1) **What** are negotiating damages?
(2) **When** are they available?
(3) **How** are they to be calculated?

The "how" is divided in two: identifying the problems the traditional explanation causes, which makes advising on a figure very difficult, and proposing a modern checklist.

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[125] This last problem is not new. As Lord Radcliffe said in *Davis v Fareham* [1956] AC 696, 728: *"the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is, and must be, the court itself."*

[126] *HKRUK II (CHC) Ltd v Heaney* [2010] EWHC 2245, [2010] 3 EGLR 15, where a mandatory injunction was ordered requiring the demolition of part of a development in large part down to the developer's attitude, in a rights to light case: see [30], [78(2)], [80]. The correctness of the decision (which settled prior to appeal) and the perceived risk to developers of an order requiring demolition of built property caused considerable concern.

[127] *Lawrence v Fen Tigers, also known as Coventry (t/a RDC Promotions) v Lawrence* [2014] UKSC 13, [2014] AC 822 where the Supreme Court carried out a significant review of the law of nuisance and the available injunctive and monetary remedies, in the event holding that the speedway track was a nuisance and re-instating an injunction with liberty for the defendant to apply for damages in lieu.

[128] *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd* [2007] EWHC 212, [2007] 1 WLR 2167, a rights to light case.

A. What are Negotiating Damages?

Negotiating damages are easy to define but hard to explain.

Definitions

They are "*damages which are assessed by reference to the sum that the claimant could hypothetically have received in return for releasing the defendant from the obligation which he failed to perform*" (*One Step v Morris-Garner* [2019] AC 649 at [1]). The term "*negotiating damages*" was expressly approved by the Supreme Court in *One Step* in place of other terms, such as *Wrotham Park* damages.

So much for the definition. The core problem with this definition is it tells you nothing about why such damages are available (which is the basis for answering the next question, when they are available). It focuses on how you quantify the damages, but tells you nothing about the legal basis for that award. The modern source of the label is *Lunn Poly v Liverpool & Lancashire Properties* [2007] L&TR 6 where Neuberger LJ divided negotiating damages at [22] from other remedies in response to damages in lieu of an injunction:

> "*The court is not limited to any specific basis for assessing damages in lieu of an injunction under the Act. However, principle and practice suggest that the normal three bases are (a) traditional compensatory damages—i.e. a sum which compensates the claimant for past present and future losses as a result of the breach but not for the loss of the covenant; (b) negotiating damages—i.e. a sum based on what reasonable people in the position of the parties would negotiate for a release of the right which has been, is being, and will be breached; and (c) an account—i.e. a sum based on an account, that is, on the profit the defendant has made, is making and will make as a result of the breach.*"

Precisely because the definition tells you nothing about the scope, there has been a vibrant debate amongst academics to explain when negotiating damages are available, and equally innovative attempts by counsel to obtain negotiating damages to overcome the limitations of "traditional" damages awards.

Two Classic Problems

The main difficulty with understanding negotiating damages as compensating "loss" is that, in principle, they allow recovery in situations where we think no "loss" in the ordinary sense has been suffered. Examples include the spacious dining room, and the exercised horse.

The spacious dining room

In *The Mediana* [1900] AC 113, 117 the Earl of Halsbury LC gave the following example:

> "*More than one case has been put to illustrate this: for example, the owner of a horse, or of a chair. Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by shewing that I did not usually sit in that chair, or that there were plenty of other chairs in the room? The proposition so nakedly stated appears to me to be absurd; but a jury have very often a very difficult task to perform in ascertaining what should be the amount of damages of that sort.*"

In any tangible sense, the misuse of this dining chair has not caused any loss: the asset is not diminished in value, and the asset's owner is not deprived of any use to which the

chair would otherwise have been put. The defendant here is a "tactful wrongdoer", who did not cause any material loss.

The Exercised Horse

On one view, the tactful wrongdoer problem can be solved: the use of the dining chair will have, even if by a small amount, affected its useful life. Another version of the problem arises from the "improving wrongdoer". This problem was vividly illustrated by Lord Shaw in *Watson, Laidlaw & Co v Pott, Cassels* (1914) SC HL 18, 31:

> *"If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: "Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise."*

If the horse had not been "borrowed" (or, legally, unlawfully converted), then it would be in a worse state (the horse being better for exercise). So, how can a "loss", in the usual sense of the liveryman being worse off but for the wrong, have occurred?

One answer could be that the opportunity to rent the horse to someone else has been lost, and some sort of award should be made for that. But it does not take much of a tweak to the problem to get rid of that response: assume the horse borrower did so at night, when the horse was not being used by anyone else, nor would there be a market for nocturnal equine activity. The "improving wrongdoer" problem, in my view, creates real issues for any suggestion that negotiating damages compensate loss as normally understood.

The Current Explanation

So, while negotiating damages are awarded in this situation, the "loss" being "compensated" is not easy to identify: no opportunity has been foregone, the asset is better, or at least no worse, than if the wrong had not occurred (and would not have been even better had the wrong not occurred). In other areas of law, compensation in these circumstances does not usually arise: if a breach of contract or other duty leaves a party better off, traditionally there is no monetary award, e.g. where an architect in breach of duty to take reasonable care and skill prepared plans on the basis the plot was a different size than its true dimensions, but the client was unable in any event to purchase the plot because of an inability to raise funds, nominal damages were awarded (*Columbus Co v Clowes* [1903] 1 KB 244).

This has led both commentators and judges to consider whether these awards are not really "compensatory" at all (no loss being suffered in the orthodox sense) but rather "restitutionary", in that the claim is in fact a policy response based on the wrongdoer's gain. The wrongdoer cannot say e.g. "there is no market for nocturnal horse rides" or "sitting on that chair was worthless to me" given they did that very thing. An award based on the market value of the temporary wrong would strip out the gain the wrongdoer made without trying to contort the meaning of "loss".

However, in *One Step*, the Supreme Court described the damages as "*compensation for loss, albeit not loss of a conventional kind*" (at [30]). That "loss" was said to be the wrongdoer taking "*something for nothing, for which the owner was entitled to require payment.*" But it is difficult to see how there is anything to compensate if the wronged party is not worse off – and legal fictions

deeming a "loss" just because the right was infringed should be avoided.[129] Prof. Stevens has suggested (to my mind, convincingly) that these damages are "substitutionary" – in that they are an award of money to substitute for the loss of the right itself (whether temporary or permanent) rather than either restitutionary (focussed on the gain) or compensatory (focussed on the actual loss).[130] Be that as it may, the damages are now said to be compensatory at the highest level.

It is not easy to put a label on the "loss" that is "compensated". It appears from *One Step* that the Supreme Court's analysis is that the interference with the right to control an asset is the loss (the "t*aking something for nothing*"). Taken at one level, that appears to confuse the breach (the taking) with the loss to be compensated (i.e. the way in which the party is worse off as a result). At a deeper second layer of analysis, a loss may be identifiable: that for the duration of the breach (e.g. the time of the nocturnal horse ride) the claimant is deprived of the right of control. Even on that level, if the test is "what position would the claimant have been in but for the wrong" it is difficult to see how an ordinary compensatory award can be made – the claimant is better off.

This label of "compensatory" "loss" has led to a misconception that there must be some consequential loss rather than the interference with the right itself being the wrong in respect of which an award is made. In the recent case of *Wigan BC v Scullindale Global* [2021] EWHC 779 (Ch) HHJ Hodge QC refused to award damages for trespass or mesne profits (at [122]-[128]) where, a break notice over a hotel development having been validly exercised, the tenant remained in possession. The judge considered mesne profits on both a restitutionary and compensatory basis, and refused them as follows:

"[126]. I do not accept that mesne profits are payable if the premises are effectively unlettable and the trespasser makes no profit from them because they are incapable of beneficial occupation. In my judgment, mesne profits are awarded on either a compensatory or a restitutionary basis and not as a matter of legal right simply by virtue of legal ownership….

[128]. The reality is that the Council has suffered no financial loss, and Scullindale has derived no financial benefit, from its continued possession of Haigh Hall since 22 November 2019. That is entirely the effect

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[129] While on a slightly different point, Lord Atkin's thundering rejection of legal fictions in *United Australia v Barclays Bank* [1941] AC 1, 29 is too good not to cite: "*in the cases which we have been considering there can be no such intention either actual or imputed. These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights. When these ghosts of the past stand in the path of justice clanking their mediæval chains the proper course for the judge is to pass through them undeterred.*"

[130] See R Stevens, Torts and Rights (OUP, 2007) p60, 67. For those interested in the academic debate, for the restitutionary view, see C Rotherham "Gain-based relief in tort after *AG v Blake*" (2010) LQR 102, 109. Prof. Burrows (as he then was) dealt with the problem in "Are 'Damages on the *Wrotham Park* Basis' Compensatory, Restitutionary or Neither?" Contract Damages: Domestic and International Perspectives, (2008), eds Saidov & Cunnington, pp 165–185, particularly at pp 181–182 – it is tempting to wonder what the reasoning or decision in *One Step* would have been had Lord Burrows been on the panel (not least as his book *Remedies for Torts, Breach of Contract and Equitable Wrongs 4th ed* describes the decision as "disappointing" at p328).

of matters consequent upon the global pandemic which were entirely outside the parties' own control and were extraneous to their continuing, enforced relationship. In these unusual, indeed unprecedented, circumstances, I would award the Council nothing by way of mesne profits."

Unless the truly exceptional event of the Covid pandemic can somehow affect the position, this analysis in my view, falls into two errors specifically warned of above:

1. The "no loss" analysis ignores the loss of the right and focuses on consequential loss alone – the judge found no "*loss of a conventional kind*" and so awarded nothing. This illustrates the problem with "loss" language.

2. That the property was "*effectively unlettable*" and so no award was made falls into the same traps as the tactful wrongdoer sitting on the dining room chair ("I trespassed on an unlettable property" being analogous to "You wouldn't have used that chair"), or the nocturnal equine activity example above ("I trespassed on an unlettable property" being analogous to "no one else would have ridden the horse at night").

Perhaps *Scullindale* can be justified as follows: in the very extreme circumstances of the pandemic, there was no value at all in the property. It was not only that the property was "*effectively unlettable*" but also – in this unusual case – that the wrongdoer did not acquire any benefit either. On that basis, neither gain nor loss being made, there was no award. However, if this analysis is right, it is difficult to square with the "*taking something for nothing*" loss analysis of the Supreme Court: something was still taken for nothing.

The decision in *Scullindale*, while perhaps doing practical justice, is an example of the difficulties caused by the current confused analyses. The "what" question matters because, without it, it is very difficult to identify a principle of "when" damages should be available. The "loss" was said in *One Step* to be the loss of the right to control the use of a valuable asset. However, if this is the test, it is hard to see how it fits with the decision in *One Step* itself, for the reasons set out in the next section.

B. When are Negotiating Damages Available?

The decision in *One Step* radically reduced the scope of negotiating damages, excluding them from the wide range of contractual claims, and limiting them in principle to:

1. Wrongful use of property, and related IP rights (*One Step* [95(1) and (2)]). As such, they are available against the improving and tactful wrongdoers. Breach of confidential information is also actionable under this head.

2. As damages *in lieu* of an injunction or specific performance under section 50 of the *Senior Courts Act 1981*. "*Such damages are a substitution for what is lost by the withholding of such relief*". One measure of such damages in substitution is the "*economic value of the right which the court has declined to enforce*", i.e. negotiating damages. However, there are other methods

to assess damages in lieu, and it is for the court to judge the fair method of quantification to provide an equivalent to the injunction. (*One Step* [95(3)-(5)]).

3. For breach of contract *"where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset. That may be the position where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed. The rationale is that the claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the right in question, considered as an asset. The defendant has taken something for nothing, for which the claimant was entitled to require payment."* (*One Step* [95(10)]).

For other breaches of contract, where the claimant's interest is purely economic, negotiating damages are not available and it is for the claimant to establish that he has suffered loss, albeit it is not necessary to quantify such loss precisely and evidential presumptions are available where there is a paucity of evidence (*One Step* [95(6)-(9)]).

Dealing with ordinary questions of trespass and nuisance, negotiating damages arise squarely in both torts:

1. For trespass, this is both a wrongful use of another's property and damages may be awarded *in lieu* of an injunction. Take, for example *Eaton Mansions v Stinger* [2012] EWHC 3354 (Ch) and [2013] EWCA Civ 1308, where an air conditioning unit was wrongly placed by an undertenant on a roof outside its demise.

2. For nuisance, while it is a wrong to property, the rights to the property itself are not "invaded", and so it is an open question whether such an award falls under the first head in *One Step* (see [95(1)]). In any event, negotiating damages arise on the basis of an award in lieu of an injunction, which is a standard remedy available for nuisance. In *Beaumont v Florala* [2020] EWHC 550 (Ch), a breach of rights to light and so nuisance case, the judge granted an injunction but continued to set out the negotiating damages award he would have made *in lieu*. Notably, the judge's analysis applying *One Step* as building on *Coventry v Lawrence*, was that damages *in lieu* were not based solely on diminution in value.

However, as with any statement of principle, difficulties lie in its application. Three issues (at least) arise for the property litigator when dealing with these points:

1. When is a contract one which creates an "asset" rather than an economic interest, so that negotiating damages can be claimed?

2. Could the restriction of damages in contract claims lead to a framing of claims in tort, most obviously trespass?

3. How will the flexibility of damages in lieu be applied in practice by the court?

Contractual "assets"

For most property contracts, negotiating damages will be available where necessary:

1. For reach of a contract of sale or agreement for lease, specific performance is ordinarily available on the basis any given interest in land is a unique asset. If, for whatever, reason, specific performance is declined, *One Step* route (2) will be available and negotiating damages will be one of the options for damages in lieu of the specific performance order.

2. If it is necessary to identify an "asset", then one will usually be available.

However, once one gets into more complex situations, such as development agreements or joint-venture style arrangements, the decision in *One Step* could well significantly reduce the ease with which negotiating damages can be claimed. On the facts in *One Step* negotiating damages were refused. The agreement in that case contained employment/business restrictive covenants in respect to a care home business (rather than those restrictive of land use), including covenants against competition, solicitation, and misuse of information. If the test is whether or not the contract creates an "asset", then such agreements go a long way along that route: the contract protects the economic goodwill of the business, which could in my view be analysed as an "asset". However, negotiating damages were refused, even though it was accepted that such damages arise in respect of breach of confidence and e.g. intellectual property rights (*One Step* at [93]).

This creates a wafer-thin distinction where such damages are available in respect of intangible rights: if there is confidential information or intellectual property involved, damages are available; if the breach is of "mere" restrictive covenants, then not. It may be this is the right place to draw the line, but for the justification to be that the former are "assets", and the latter not, is far from clear.

This leaves property joint venturers or other development agreement parties in a tricky position:

1. If the deal is cloaked within a conditional contract for sale or agreement for lease, then there is a "property" right and the damages would be available;

2. If the relevant breach can be framed as a breach of confidence, then in principle the damages should be available; but

3. If the relevant breach is simply a breach of a non-competition clause, or other non-performance clauses, then they would not be available.

At least until there are some decisions giving effect to *One Step* in the property context, advising on where the risks and boundaries lie on these more complex issues is far from straightforward.

Possible Trespass claims

Given the asset/non-asset distinction where the claim is framed in contract, it must be tempting to frame the defendant's conduct as tortious wrongdoing as a way of getting to negotiating damages (assuming ordinary breach of contract damages are difficult to prove or limited).

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[122] At [65].
[123] At [71].

Posit some sort of development agreement where C allows D onto C's land for the purposes of building out the development: for example, an oversail licence with daily or time limits. D's agents fail to abide by the terms of the licence. In three easy steps, there is a tortious solution to a contractual problem:

1. On a breach of contract analysis, there is no "actual" loss from D not sticking to the bargain: the airspace would not otherwise be used.

2. But, since the licence only gives D a limited right to use the land, the excess use is a trespass.

3. A trespass being a proprietary wrong, negotiating damages are available.

The Range of Damages in lieu

The statutory jurisdiction to award damages in lieu of an injunction permits damages "*either in addition to or in substitution for*" an injunction. As such, the *One Step* analysis that negotiating damages are not the only available remedy is perfectly orthodox. However, *One Step* does differ from previous House of Lords authority on the scope of the jurisdiction. In *Johnson v Agnew* [1980] A.C. 367 at 400, Lord Wilberforce said he found "*no warrant for the court awarding damages differently from common law damages*". In *One Step* it was said to be necessary "to *treat with care*" that statement. So, to the extent *One Step* purported to give first instance judges an equitable discretion in awarding damages *in lieu* that appears to be a development in the law at the highest level, creating scope for innovative arguments as to the appropriate exercise of judicial discretion. In *Lunn Poly*, Neuberger LJ had indicated "*the normal three bases*" of "*traditional compensatory damages*", negotiating damages and an account of profits were available to the court, in respect of each "*one would expect the normal approach adopted by the courts to be applied*" (at [22]-[23]). That analysis is unobjectionable, since it treated compensatory damages and negotiating damages as different types of damages award. However, once negotiating damages are identified (as in *One Step*) as compensatory, then it is difficult to justify the introduction of any discretion. The discretion may now be between two different types of compensatory damages.

The related question is when negotiating damages are available *in lieu* at all. The decision in *One Step* does not answer this question; there was no application for an injunction and so the issue was whether such damages were available at common law for breach of the relevant contract (see [98]ff of the first instance decision at [2014] EWHC 2213 (QB)). Given the width of the statutory jurisdiction to grant an injunction "*where just and convenient*" and the width of the power to award damages "*in substitution for*" an injunction, the analytical basis for such an award is not easy to identify. The Court declines the injunction because it is not just and convenient, yet proceeds to award damages *in lieu* in any event. The Supreme Court specifically left open in *One Step* the question of whether it was necessary to have applied for an injunction to obtain such damages (at [45] doubting Lord Walker in *Pell Frischmann* quoted at [4(5)] of *One Step*), but approved Millett LJ's statement that it is necessary to "*first establish a case for equitable relief, not only by proving his legal right and an actual or threatened infringement…but also by overcoming all equitable defences*" (from *Jaggard v Sawyer* quoted at *One Step* [46]). The statutory wording is too broad to provide any meaningful jurisdictional gateway. While not clear, the *Jaggard v Sawyer* approach may perhaps be best explained as requiring a claimant for damages *in lieu* to satisfy the technical threshold requirements for injunctive relief even if a Court would always decline to grant an injunction on the facts.

C. How are they Calculated? The Traditional Approach and its Problems

If stating the definition of negotiating damages is easy – the reasonable price payable in the hypothetical bargain – working out what the award will be in any given situation is difficult, because the definition is based on a fiction.

The most obvious fiction is that the damages are awarded on the basis of a sale, even if in real life there would never have been a sale because one party would not sell (see Vos J in *Stadium Capital* [2011] EWHC 2856 at [69]). This has been fundamental to the jurisdiction since *Wrotham Park*: the assumption was that of a seller who felt "reluctantly obliged" (even though the evidence in that case was that there would be no sale).

This fiction then creates three other real life quantification issues.

First, what is the approach or attitude to the "sale"? The difference between a "market value" valuation (assuming a hypothetical willing reasonable buyer and seller) and the *Wrotham Park* "reluctantly obliged" seller could justify a 5% or 10% difference. More recent decisions have tended to proceed on the basis of the "reasonable" buyer and seller (e.g. *Eaton Mansions* at [60]).[131]

Secondly, more widely, given the sale is hypothetical, what factors specific to the deal or the parties should be taken into account? At one end of the spectrum, one needs to take into account the actual infringement and its impact; at the other end of the spectrum you do not take into account the fact that (as is sometimes the case) one or other of the parties' would never have "sold" or "purchased" the right to infringe. The authorities have moved slightly away from the pure "hypothetical" parties (Neuberger LJ in *Lunn Poly* at [35]) to the "*actual parties ignoring their personal characteristics*" but acting reasonably (*Eaton Mansions* at [59]-[60] and *Stadium Capital* at [71]). The test tells you nothing about where to draw this line.

Thirdly, as a result of those issues, there is a substantial range of quantum that is available in any given case. Take e.g. rights of light cases: in *Tamares Square* 33% of the developer's uplift was awarded (at [33]), whereas in *Heaney* c16% was the damages calculation (the judge having awarded an injunction in any event). This creates significant uncertainty.

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[131] Upheld on appeal: *[2014] 1 P&CR 5*.

D. How are they Calculated? A Modern Checklist

Given all the above uncertainty, this section is a tentative attempt to impose a structure on this calculation, with a view to better advising clients and presenting our cases. This works in three phases: the input, the operation, and the output.

Phase 1: The inputs - Identifying Rights and Losses

1. **Identify the right infringed.** Work out what the infringement is. This includes whether the interference is temporary or permanent, and also the extent of the interference. This definition is important, both in time and in space.

    a. While in usual valuation cases, post-valuation events are ignored, that is not done when identifying the very right that you are valuing. Where a trespass is temporary, you cannot obtain damages for a permanent trespass (even if it appeared at the time that the trespass would be permanent): *Eaton Mansions* [2014] 1 P&CR 5 at [20]-[21] and *Sinclair v Gavaghan* [2007] EWHC 2256 (Ch) at [16]-[17]).

    b. Similarly, if the infringement only affected part of the covenant (or land, or development), then an award based on rendering the covenant entirely valueless, will not be appropriate. In *Wrotham Park,* the award took into account the fact that the covenant was substantially in force elsewhere.

2. **Identify any actual losses suffered apart from the interference with the right:** work out what losses e.g. loss of amenity may have been suffered. In *Carr Saunders v Dick McNeill* [1986] 1 WLR 922, 931 Millett J took into account loss of amenity in setting the figure.

3. **Identify gains made:** evidently, in order to calculate a share of profits, it is necessary to take the defendant's profits into account. In *Heaney*, the damages award calculation took into account the "extra" profit made as a result of the infringement of rights of light and not the entirety of the profit, where a development could have occurred without breach. For a defendant, calculating this lower input will be key to any negotiations. This is a very significant stage, and can lead to detailed expert evidence (e.g. in *Beaumont v Florala* [2020] EWHC 550 (Ch), there was extensive expert evidence on the alternative schemes that could have been carried out without infringing, and then valuer's evidence on those schemes).

Phase 2: The Operation - Reasonableness Factors on Assessment

4. **Ignore the parties' approach to negotiations.** The parties' approach to the negotiations does not matter: see e.g. *Lunn Poly and Stadium Capital*. It is suggested that logic requires this to go beyond simply ignoring that one party would not sell, but also disregarding e.g. that one party was a particularly hard-nosed negotiator. That is a subjective characteristic of the party involved, that, by parity of reasoning, should not be taken into account. The modern approach seems to deal on a "reasonable" and "market" value basis, and not the "reluctant" seller of *Wrotham Park* who could drive a higher price.

5. **Possibly, consider what objectively-known characteristics of the parties can be taken into account**. If the current legal position is that the better view is to take the real parties' context into account "*ignoring their personal characteristics*", there is a debate to be had about what of the background factual matrix (to use a term from a different context) in respect of the parties can be taken into account. At first instance in *Eaton Mansions*, the judge ignored the fact that one party was a tenant-owned management company with no interest in making a profit. This point of detail can be doubted: ignoring negotiating positions seems a fair abstraction, ignoring an objectively-known background fact about one party's corporate purpose and structure seems, in my view, to go too far. If it is artificial to value a permanent infringement when it was temporary, it is in my view equally artificial to ignore that one party is of a different nature to the commercial hypothetical negotiator. For example, the wrongdoer's profit is relevant; that profit will usually be affected by its cost of borrowing, which will be affected by its size and status in the market. As such, a party's real characteristics are engaged. The contrary view is, though, that this is no more than a factor going to the parties' stance in negotiations and so should be excluded. Nevertheless, as set out below, some of the parties' inputs to negotiations are taken into account e.g. any deduction the parties had negotiated in the course of the works because of any infringement to rights to light can be used as an input. If these kinds of factors are taken into account, the proposed approach to context matches the approach to contractual interpretation.

6. **How significant is the infringement?** In contrast, the significance of the infringement to both sides is material and can properly be taken into account. It is an objectively ascertainable fact (in that any loss of amenity or loss of value caused can be measured) which would be known to both parties. In Sinclair v Gavaghan, this factor was put as follows:

> *"ii) What were their purpose and effect in relation to the development of the [other land]: and*
>
> *iii) What alternatives did the Defendants have to using the [Claimant's land] in order to carry out those works."*

This assessment of significance cannot though be reduced to zero: it is not open to a party to say it could have achieved the same result by not infringing at all, and so the damages figure should be zero: *Sinclair*. In *LB Enfield v Outdoor Plus* [2012] EWCA Civ 608, a judge awarded nominal damages for the construction of advertising hoardings which trespassed slightly onto the claimant's land for some five years. This was overturned by the Court of Appeal: the hypothetical question is not what would have happened if the parties had identified the possible trespass at the start of the exercise (here, the defendant would have constructed the advertising hoardings without trespassing) but rather what is the value of the trespass to a reasonable person in the negotiations (at [47]). The alternative means are "*a factor*" but must be "*consistent with the trespass and which can co-exist with it. An alternative cannot be taken into account if it would eliminate the trespass itself, because that would negate the very basis of the exercise*".

This would "*subvert the basis of the negotiation*" (at [51]). This is not easy to rationalise: an alternative that helps the defendant a little bit can be taken into account, but an even better alternative that helps the defendant completely cannot. Perhaps it is that the alternatives feed in, strengthening the defendant's hypothetical bargaining position, but only on the basis the bargain would be concluded with the claimant: the defendant cannot walk away on the strength of these alternatives.

7. **What financial steps, if any, were taken regarding the infringement?** In *Heaney*, the Court took into account the budget price set aside to deal with rights to light and a price reduction in respect of the same, and did the same in *Beaumont v Florala* (albeit this is difficult to square with ignoring parties' subjective characteristics). The price the parties put themselves on the infringement can therefore be a guide.

8. **Pick a percentage profits figure from a range.** Assuming the higher profit award will be a percentage of profit (rather than the not-very-large loss of amenity), then considering that input will be the final step to getting a figure. Looking at the cases, a range from c5-33% seems the usual range (see *Beaumont v Florala*: citing *Wrotham Park* at 5% and *Tamares* at 33%), but no doubt there will be extreme cases.

Phase 3: The Outputs – an Overall Assessment

9. **Cross check your figures for "feel"?** There have been repeated judicial statements that you should cross-check your figures against the gain and losses, and overall sense of whether the figure is too high. If it looks too good, it probably is. See, for example, *Carr Saunders* at 932, and *Tamares*: "*does the deal feel right?*" at [38] applied in *Florala* at [318].

10. **Warn clients of the uncertainty.** These calculations are fraught with judgment calls which can lead to a wide range of potential outcomes. Where there are differing expert views and factual evidence, there must be a substantial element of risk in determining the figure from which a percentage is taken. That uncertainty is then compounded when the range of percentages is at least 5-33%.

Chapter 6

Possession claims and injunctive relief:

A reassessment of the core principles and a practical guide

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Daniel has a busy and varied property practice, comprising both advisory and court work. He deals regularly with landlord and tenant disputes (both commercial and residential), real property work and land registration issues. He has particular expertise in dealing with complex possession claims and claims for injunctions against trespassers, where there is often an element of protest involved. Many of these claims involve "persons unknown" defendants. Over the last year, Daniel has also been involved in several pandemic rental arrears cases, which raise difficult and interesting questions over the extent to which the COVID-19 pandemic affects a tenant's obligation to pay its rent. Daniel's property practice complements his other areas of expertise, and he often works on property cases which involve elements of trusts law, commercial law, civil fraud and insolvency. Daniel enjoys working both on his own and as part of a larger team of counsel.

In 2012, Tom Roscoe wrote an extremely well-received chapter in Wilberforce Chambers' Development Disputes book entitled 'The Limits of Possession Claims.' That chapter continues to be of great relevance to property practitioners. The current chapter is an updated version of that chapter which takes account of more recent developments in law and practice.

Introduction

Possession claims are often regarded as being relatively uncomplicated. In a straightforward possession claim, an order for possession, together with an order for the payment of rent arrears and/or mesne profits where appropriate, is likely (subject to enforcement) to provide an adequate remedy for the claimant, such that other forms of relief – including injunctive relief – will not merit detailed consideration.

Typically, the occupier is unlikely to attempt to re-enter the disputed land, or other portions of the claimant's land, or to disrupt the claimant's lawful activities upon the land once evicted. In a straightforward case, the parcel of land to which the dispute relates is likely to be well defined (a house, shop or office block, for example), and the identity of the occupiers known.

There are, however, more complex possession claims which can raise difficult issues of substance and procedure for practitioners. One such example is the case in which wrongful possession is used as a means of protest to draw attention to a particular cause, to target a particular landowner or developer, or to prevent a controversial development from going ahead (this is considered further in *Tiffany Scott QC's chapter* on obtaining injunctions against "persons unknown").

Particular difficulties can be caused in these cases, including the fact that the occupiers or their associates may seek to occupy or interfere with other land owned or controlled by the claimant nearby. This difficulty raises the question of when injunctive relief may be appropriate, either as an alternative to a possession order or as relief complementary to it. The relationship between possession orders and injunctive relief is multifaceted. Whilst it has been considered by the Supreme Court in *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11, the position remains complex in practice, and where exactly the 'limit' lies in respect of possession orders remains unclear.

Practitioners have been reminded of the significance of injunctive relief in this context over the last 18 months: whilst possession proceedings were temporarily stayed under Practice Direction 51Z due to the COVID-19 pandemic, claims for injunctive relief were not. Whilst many of the changes to possession proceedings caused by the pandemic have now been unwound, they have provided a timely reminder of the role that injunctive relief may play in proceedings concerning unlawful occupation of land.

Possession claims: some important points of principle

In order properly to understand the relationship between possession claims and injunctive relief, one first needs to consider the nature of possession claims themselves and their limits.

The nature of a claim for possession

An action for possession is ordinarily based upon title: the claimant, A, can 'eject' the occupant, B, by establishing that A, has a better title to the land than B. Title is a relative concept in English law. It does not matter that a third person, C, who is not a party to

the claim has an even better title than A: provided A has a better title than B, he will succeed against B.

If A is able to demonstrate superior title, the remedy granted to A will be an order that A shall have possession (and that B shall give up possession) of the land. An order for possession is enforced by a writ or warrant of possession, which authorises the enforcement officer (in the High Court) or bailiff (in the County Court) to evict any person found in occupation of the premises. Accordingly, the order for possession will be enforceable against persons in occupation even if they were not named in the order or made parties to the claim: it is good against the whole world: *R v Wandsworth County Court, Ex p Wandsworth London Borough Council* [1975] 1 WLR 1314.[132]

The physical scope of a possession order

A successful claim for possession will give rise to an order of the Court that the claimant recovers from the defendants (named or "persons unknown") possession of the land described in the Particulars of Claim. It is obviously essential that the claim and the order should properly describe the land, possession of which is to be recovered.

In most cases, the requirement to describe 'the relevant land' - the property over which possession is sought - causes no difficulty. The property may be an office block, for example, or a house and its garden. Often it will be registered land with a single title number. Indeed, in most cases the exact physical extent of the possession order will not be controversial, as once it is enforced the occupiers will simply move on.

In a case where trespassers occupy open land, however, the requirement to describe the property over which the possession order is sought can give rise to problems – both conceptual and practical. The temptation for claimants is to seek a possession order over as wide an area as possible, such as the whole of a development site covering many acres. This is not only for simplicity of description, but also to guard against the risk that if the possession order only covers the portion of the site in fact occupied, then the trespassers will simply move elsewhere on the site once that possession order is enforced. Indeed, there may be a risk that the trespassers move to quite separate land owned by the claimant.

In an attempt to address those risks, claimants have sometimes sought possession orders covering these additional portions of land as well. As explained below, however, there are limits to this attractively 'broad brush' approach.

The impossibility of possession orders over unoccupied property

Claimants have often sought what are essentially 'pre-emptive' possession orders in the sense that they require possession of land in anticipation of it being occupied in the future, because – for example – it is adjacent to land currently occupied.

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[132] Although (perhaps unsurprisingly) the Supreme Court made clear in *Meier* at [6] and [36] that persons on the land who in fact have a better right to possession can apply to the Court for leave to defend and ultimately gain or maintain possession on that basis in preference to the Claimant. Further, a possession order is capable of distinguishing on its face between those who are lawfully on the land (e.g. workers) and those who are not (e.g. trespassers) and so in this respect the absolutism of *Wandsworth* may be tempered in reality.

At one time, the Courts appeared to be willing to grant pre-emptive possession orders in appropriate cases. In *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] EWCA 200 the Secretary of State brought possession proceedings against travellers, who were wrongfully occupying woodland known as Fermyn Woods. As well as seeking possession of Fermyn Woods, the Secretary of State sought an order for possession over 30 other areas of woodland separate from Fermyn Woods, within about a 20-mile radius. The wide order for possession was sought because of a concern that the travellers would move on to occupy one or more of the other woods once they had left Fermyn Woods. There was evidence in support of this concern; the other woods had been occupied by travellers in the past.

At first instance, the Judge granted the Secretary of State the wide order for possession sought. On appeal, counsel for the travellers argued that there was no jurisdiction to grant such a wide order for possession; rather the appropriate remedy was a possession order over Fermyn Woods and an injunction restraining entry into the other woods.

The Court of Appeal disagreed. Wilson J, giving the leading judgment, took a pragmatic approach to the difficulties facing those in the Secretary of State's position. Recognising the availability of an injunction as a remedy to protect against the risk of the travellers moving, he said:

> *"But in such circumstances an injunction is a useless remedy. It is enforceable by committal; and it would be wholly impracticable for the claimant to seek the committal to prison of a probably changing group of not easily identifiable travellers, including establishing service of the injunction and of the application. In relation to the second area, as to the first, the only effective remedy is an order for possession, enforceable against the land itself by the claimant's issue… of a writ (or, in the county court, …of a warrant) of possession, which requires the court enforcement officer to clear the land of all wrongful occupants (whether parties to the proceedings for the order or otherwise: R v Wandsworth County Court, Ex p Wandsworth London Borough Council [1975] 1 WLR 1314)."*[133]

So, Wilson J continued (emphasis added):

> *"In my view the key to this case indeed lies in the law's recognition that even an anticipated trespass sometimes gives rise to a right of action. But, where it does so, it should offer an effective remedy: otherwise the right is nugatory. Thus, if a claimant entitled to an order for possession of a certain area of land contends that its occupants are likely to decamp to a separate area of land owned by him, the separate area should in my view be included in the order for possession if, but only if, he would be entitled to an injunction quia timet against the occupants in relation to the separate area."* [134]

The latter requirement was said by Wilson J to have the effect that such extended possession orders would be made only "*exceptionally*".[135] Wilson J said that it would likely require either evidence of an express intention to decamp to the other area, or evidence of a history of movement between the two areas, from which repetition of behaviour could be inferred.

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[133] At [19].

[134] At [20], emphasis added.

[135] At [21].

In seeking an effective remedy to a real problem facing landowners such as the Secretary of State, Wilson J recognised that a "*paradox*" and "*risk of injustice*" arose; but that the law ought to tolerate both in the interests of avoiding a succession of separate possession proceedings in relation to separate parcels of land. The "*paradox*" was that a landowner could not obtain a possession order against someone who had never trespassed on his land, notwithstanding a clear statement of intent to do so. An injunction would have to do. The "*risk of injustice*" was that an individual who trespassed onto the second plot of land covered by the wide possession order, in complete ignorance of the proceedings that had gone before, could be met immediately "*by an enforcement officer flourishing an order for possession*". Such an individual could seemingly be evicted without the protection of the procedures under CPR Part 55, and without having had the opportunity to present a defence.

In the event, the Court of Appeal did allow the appeal in part, overturning the wider pre-emptive order for possession, on the ground that there was insufficient evidence against the defendants to order a *quia timet* injunction over the other woods (which, again, was, in Wilson J's judgment, necessary for the grant of a wider possession order).

Support for the Court of Appeal's decision that the jurisdiction was available was taken in part from *Ministry of Agriculture, Fisheries and Food v Heyman* (1989) 59 P&CR 48 where Saville J made an extended, or pre-emptive, possession order against trespassers on the basis of the landowner's fear that the travellers would move to nearby land when evicted. The travellers were not represented at the hearing, however, and so the point was not fully argued.

The "permissible physical ambit" of possession orders and the interrelation between possession orders and injunctions was re-examined by the Supreme Court in *Meier*, which concluded that pre-emptive possession orders are not available as a matter of principle.

The facts in *Meier* were similar to those in *Drury*. A number of travellers, including the defendants, had occupied woodland at Hethfelton Wood, near Wool in Dorset. The wood was owned by the Secretary of State and managed by the Forestry Commission. Some of the defendants had previously occupied other areas of woodland in the surrounding area and had moved to Hethfelton Wood following earlier possession proceedings brought in relation to those other parcels of land. The Secretary of State and the Commission were concerned that, if and when an order for possession was made over Hethfelton Wood, the defendants would travel on to other woods instead. The Secretary of State therefore sought possession not only of Hethfelton Wood, but also of more than 50 of the Forestry Commission's other woods. Subsequently, the number of woods over which a possession order was sought was reduced to 13; but these woods were still spread over part of Dorset covering an area of 25 by 10 miles. The Secretary of State also sought injunctions restraining the defendants from re-entering Hethfelton Wood, or the other woods.

At first instance, the Recorder made an order for possession over Hethfelton Wood. He considered that he had jurisdiction to make the wider possession order sought but declined to do so as he found that the Forestry Commission had not properly followed 2004 guidance issued by the Deputy Prime Minister on how local authorities should manage unauthorised camping. He also refused to grant an injunction.

The Court of Appeal, following *Drury*, unanimously granted the wider pre-emptive

possession order. Arden LJ and Pill LJ also held that the first instance Judge was wrong to refuse the injunction, but Wilson LJ dissented on this point, on the ground that it would be disproportionate to grant the injunction alongside the possession order.

The travellers appealed the Court of Appeal decision. The question of whether *Drury* had been correctly decided was considered by the Supreme Court. Lord Rodger, Baroness Hale JSC and Lord Neuberger MR all gave substantive judgments.

Lord Neuberger considered the development of the jurisdiction to grant possession orders and the wording of CPR r. 55.1:

> *"(a) 'a possession claim' means a claim for the recovery of possession of land (including buildings or parts of buildings); (b) 'a possession claim against trespassers' means a claim for the recovery of land which the claimant alleges is occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to possession of that land but does not include a claim against a tenant or sub-tenant whether his tenancy has been terminated or not."*[136]

The important point, Lord Neuberger considered, "*is that a possession claim against trespassers involves the person "entitled to possession" seeking "recovery" of the land*". An order that the claimants recover their land was said to be the "mirror image" of an order for possession. Consequently:

> *"The notion that an order for possession may be sought by a claimant and made against defendants in respect of land which is wholly detached and separated, possibly by many miles, from that occupied by the defendants seems to me to be difficult, indeed impossible, to justify. The defendants do not occupy or possess such land in any conceivable way, and the claimant enjoys uninterrupted possession of it. Equally, the defendants have not ejected the claimant from such land. For the same reasons, it does not make sense to talk about the claimant recovering possession of such land, or to order the defendant to deliver up possession of such land."*[137]

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[136] At [62].

[137] At [65].

As Lord Neuberger put it, the difficulty with the extended possession order is that it requires the defendants to do something that they are not able to do, that is, to give up possession of land of which they are not in fact in possession.

Lord Rodger agreed:

> *"Most basically, an action for recovery of land presupposes that the claimant is not in possession of the relevant land: the defendant is in possession without the claimant's permission."*[138]

> *"The real objection is that the Court of Appeal's extended order… is inconsistent with the fundamental nature of an action for recovering land because there is nothing to recover: the Commission were in undisturbed possession of those parcels of land."*[139]

Lord Rodger was not persuaded by the claimed justification for pre-emptive possession orders, namely that they were the only remedy which would be effective, an injunction being much weaker. He considered that a Court should be slow to assume that an injunction was a useless remedy, and if there was such a widespread concern on this point, changing the procedures for the enforcement of injunctions was the solution. In this regard, he placed reliance on the judgment of Lord Bingham in *South Bucks District Council v Porter* [2003] 2 AC 558:[140]

> *"When granting an injunction the court does not contemplate that it will be disobeyed… Apprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate: there is not one law for the law-abiding and another for the lawless and truculent."*

Baroness Hale stated that she too would allow the appeal (to the extent of setting aside the wider possession order made in the Court of Appeal), but only on the narrow ground that the form of the order granted below (the usual order) was not properly tailored to the facts of the specific case, and was *"scatter-gun"* in its approach. While Baroness Hale recognised that the more 'natural' remedy where there were facts similar to those in *Drury* and *Meier* would have been an injunction, she *"could see no reason in principle"* why, following an *"incremental approach"* (as apparently sanctioned in the *Drury* case) a remedy such as granted in *Drury* could not be appropriate – provided that the order was properly tailored against known individuals.[142]

The ease with which possession orders can be enforced, and the fact that warrants for possession must be executed against everyone on the land, was no doubt why they were sought by the Secretary of State in preference to an injunction. They would be an attractive remedy to many landowners. Indeed, in *Drury*, the efficacy of these orders to achieve the landowner's desired effect was apparently a reason in favour of such an order

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[138] At [6]

[139] At [21]

[140] At [17]

[141] See [40] to [41]

[142] Lords Walker and Collins (like Lords Neuberger and Rodger) did not agree with this *"incremental approach"* see [20] where Lord Walker stated that *Drury* went *"too far"* and [96] – [97] where, after some hesitation, Lord Collins agreed that a possession order could not be sought over wholly distinct land over which the defendants were not in possession.

being granted. Notwithstanding Baroness Hale's apparent willingness in *Meier* to see their development in future, it is now clear that such extended, or pre-emptive, possession orders are not available. An injunction is the proper remedy. It will be appreciated, however, that the enforcement options for an injunction are not specifically tailored to eject occupiers from land, but to deter them from entering or remaining upon the land; in that respect, injunctions are a somewhat inelegant remedy for landowners who want to ensure that occupiers are either ejected or barred from entering upon their property.[143]

How wide a possession order is permissible?

Although it is now clear that an order for possession cannot be obtained in relation to a wholly separate parcel of unoccupied land, it is less clear to what extent an order can be obtained against unoccupied parts of a contiguous parcel of land. As Baroness Hale commented in *Meier*, the Courts "*would be disinclined to hold that if trespassers set up camp in a large garden the householder can obtain an order enabling them to be physically removed only from that part of the garden which they have occupied, even if it is clear that they will then simply move their tents to another part of the garden*".[144]

On the other hand, one can well imagine a situation where protestors are occupying a small portion of a large open development site in a way that does not impact at all upon activities elsewhere on the site. In such a situation, it is difficult to see (following *Meier*) how a possession order over the whole of the site could be justified. In respect of the bulk of the site, it does not make sense to talk about 'recovering' possession: possession has not been lost.

This issue arose in *University of Essex v Djemal* [1980] 1 WLR 1301. In *Djemal*, student protestors had previously occupied part of the administrative offices at the University of Essex campus. Possession proceedings were brought, and the University recovered possession of that portion of the campus. The students then moved to another part of the campus and fresh possession proceedings were brought. This time, the University sought a possession order over "*the premises at the University of Essex*".

The first instance Judge refused to grant the wider order sought and made an order only in respect of the property that was actually being occupied. The University successfully appealed that decision. In considering the extent of the Court's jurisdiction, Buckley LJ said:

> "*The jurisdiction in question is a jurisdiction directed to protecting the right of the owner of property to the possession of the whole of his property, uninterfered with by unauthorised adverse possession. In my judgement the jurisdiction to make a possession order extends to the whole of the owner's property in respect of which his right of occupation has been interfered with, but the extent of the field of operation of any order for possession which the court may think fit to make will no doubt depend upon the circumstances of the particular case.*"[145]

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[143] Injunctions are typically enforced by committal for breach of the order in contempt of court, or by sequestration of assets.

[144] At [25].

[145] At 1304.

Agreeing, Shaw LJ said:

> *"The title to the site and building of the University of Essex is vested in the university… Its right of possession seems to me to be indivisible. If it is violated by adverse occupation of any part of the premises, that violation affects the right of possession of the whole of the premises. It follows that those circumstances would in general justify an order… that they do recover possession of the premises at the University of Essex… without any geographic limitation."*[146]

The facts of *Djemal* might therefore be distinguished from those of *Drury* or *Meier* to this extent: in *Djemal* it appears that the 'campus' was considered as an indivisible whole. That concept plainly does not apply in the case of distinct woods that are geographically separated. The test as to what constitutes an 'indivisible whole' might appear to be this: does trespass on one part of the property affect the use and occupation of the whole of the premises? One can see that a 'yes' answer could be given to a test in those terms in the case of possession of a portion of a large garden, or the occupation of one room of a house.

It would appear that that test was considered to have been met in *Djemal*, although not expressly. The correctness of this decision may be doubted. While the precise layout of the campus is not clear from the judgment, one would be surprised if the occupation of one floor of one university building could interfere with the use and occupation of quite separate buildings on the campus.

Indeed, while Lord Neuberger MR in *Meier* did not think it was the occasion to consider the correctness of the decision, he did cast some doubt upon it:

> *"…there is obviously great force in the argument that the fact that areas of the campus in that case [were] lawfully and exclusively occupied by academic staff, employees and students should have precluded a claim and an order for possession in respect of those areas."* [147]

The other Justices of the Supreme Court were more positive about the decision in *Djemal*. Lord Collins JSC summarised the opinions:

> *"…University of Essex v Djemal… represented a sensible and practical solution to the problem faced by the university, and was correctly decided. I agree, in particular, that it can be justified on the basis that the university's right to possession of its campus was indivisible, as Lord Rodger says, or that the remedy is available to a person whose possession or occupation has been interfered with, as Lady Hale puts it. Where the defendant is occupying part of the claimant's premises, the order for possession may extend to the whole of the premises."*[148]

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[146] At 1305.

[147] At [25] to [70].

[148] At [97].

Even so, there remain problems in defining 'premises' for these purposes. In *Djemal*, Shaw LJ placed emphasis on the extent of the University's title. Such an approach is unlikely to be appropriate in many instances, however. One can imagine circumstances in which a whole title would be too wide for an order of possession to be appropriate, for example where there was a small, well-defined area of land which was being occupied by trespassers, with no impact at all on the owner's right to make use of the remainder of the title.

The opposite situation may also arise. As Baroness Hale pointed out in *Meier*:

> *"[T]he usual rule is that possession of part is possession of the whole, thus begging the question of how far the 'whole' may extend. It was suggested during argument that it might extend to all the land in the same title at the Land Registry. … But this is artificial when a single parcel of land may well be a combination of several different registered titles."*[149]

The approach of the claimants in *EDF Energy v Clark & others* (Unreported) 27 February 2012 (ChD) is illustrative. In that case, a group of environmental protestors occupied land at Hinkley Point in Dorset where EDF were proposing to construct a new nuclear power plant. The aim of the protest was to prevent planned groundworks on the site, which was the first phase of the planned construction. All of the protest activities were contained within a relatively small portion of a much larger development site. The claimants had enjoyed undisturbed use and possession of the remainder. In bringing the claim for possession, therefore, the claimants had to decide over what area of land a possession order should be sought. Too wide, and there was a chance the relief sought would not be granted, or there would be a delay in proceedings. Too narrow, and the protestors might simply set up camp in the next field. In addition, and for the possession order to be workable in practice, it was necessary for its extent to be clear on the ground.

The claimants eventually sought, and were granted (by Floyd J, who endorsed the claimants' approach), a possession order over approximately half of the development site. The area over which possession was obtained was drawn widely enough to cover the protestors' other activities on the land. It was extended (where possible) up to identifiable features on the land, such as fences, hedgerows and footpaths. Importantly, it was drawn widely enough to cover a route from an occupied barn where the protestors were based to a lay-by on a public road, from where the protestors could depart. This would enable the bailiffs to ensure that the protestors were evicted from the claimants' property, rather than from just one portion of it.

The claimants also sought, and were granted, an injunction restraining the current protestors from returning to the whole of the development site (i.e. a wider area than was covered by the possession order). This kind of dual-purpose approach is a helpful illustration of the way in which injunctive relief can complement an order for possession.

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[149] At [37].

In *Hackney LBC v Persons Unknown* [2012] EWHC 2828 (QB) the claimant local authority (successfully) took a bolder approach. In that case, a large number of protestors had occupied parts of a park in Hackney. The local authority sought a possession order over the whole of the park, and an order for possession on those terms was granted. *Djemal* was applied. A park, however, is perhaps more readily viewed as an 'indivisible whole' than a large development site, comprising a number of different fields (or, indeed, a university campus).

In practice, therefore, it will be important for a claimant to consider carefully the precise extent of the land of which possession is sought when drafting the claim form and draft order. The temptation is to aim wide, with a possibility of narrowing the area later if needs be. While the risk that a possession claim would be struck out for aiming too wide must be considered low, there is a more real risk that having to seek to redefine the area during a hearing could lead to delay. If an order for possession over a comparably small and well-defined area would suffice, it would be safer to adopt that course.

If a possession order is sought over a large area, it will be important to have at the hearing evidence justifying its extent. Evidence of disruption to works on the whole of the site, for example, is likely to be cogent evidence that the claimant's right to possession is being disturbed. In the event that there is real doubt about whether the Court will be willing to grant an order over the wide area sought, it will be important to have an alternative, narrower, suggestion available at the hearing (with appropriate plans etc.) so as to minimise the risk of an adjournment. Of course – as in *EDF Energy* – an alternative is to seek a narrower possession order with an injunction restraining future trespass over the rest of the site.

Conceivably, the claim could also be put on alternative bases in the first instance, therefore avoiding any delay. The claim could seek possession over a wider area in the first instance, with a more focused area in the alternative, and perhaps an even narrower area limited to where trespassers currently are as a final alternative. A pragmatic tribunal informed of the caselaw may well accede to this approach, but other tribunals may feel more comfortable making a narrower possession order accompanied by an injunction restraining trespass over the wider area.

Post-trespass possession orders?

It is not uncommon for the mere commencement of possession proceedings to prompt occupiers to leave. If this occurs, a claimant may still wish to proceed to the Court hearing in order to guard against the risk of return (and because, by that stage, a significant proportion of the legal costs have already been incurred).

While *Drury* remained good law, there was nothing objectionable in theory about possession orders being granted in such circumstances ('post-trespass possession orders'). If a possession order could be made in respect of land not yet occupied, but potentially under threat, why not in respect of land *previously* occupied, and potentially under threat of re-occupation? The position post-*Meier* is less clear.

In both *Djemal* (which pre-dated *Drury*) and *Hackney* (which post-dated *Meier*) the defendants had ceased occupation between commencement of the possession proceedings and the hearing. Indeed, by the time of both the first instance hearing in *Hackney* and the appeal in *Djemal*, the occupiers had stated that they had no intention of returning.

In neither instance does it appear that the fact occupation had ceased caused real concern as to the propriety of an order for possession. In *Djemal*, considering the situation presented to the first instance Judge, Buckley LJ said:

> *"[T]here was… a threat to take what is described as "further direct action,"… which might be taken in respect of any part of the university property. In those circumstances it would, in my judgment, have been open to the judge to have made an order extending to the whole of the university property…"*[150]

Considering the fact that the occupiers had since stated that they were to cease pursuing a campaign of direct action, Buckley LJ continued:

> *"If that is the position, the order which I would make… namely, a possession order extending to the whole property of the university and enforceable against the defendants or any other person who might be in unauthorised adverse possession of any part of the university property, will not in fact incommode the students in any way because,… they disavow any intention to pursue that policy in future."*

Shaw LJ referred in his judgment to the "*danger of actual violation of many, or a succession of, parts of the premises*" and appeared content to make a possession order in such circumstances.

In reality, such a possession order may be very awkward to enforce effectively: Buckley LJ's comments beg the question of *who* is to decide whether occupiers are in unauthorised adverse possession of the property. Enforcement officers may be reluctant to enforce an order which gives them a judgment call to make, because if they get it wrong they may be liable either in the civil or criminal courts (depending on the actions that they take).

In *Hackney*, it appears that McCombe J was initially attracted by the protestors' submission that a possession order was not required as they had left the park and had no intention of returning. Apparently following *Djemal*, however, the Judge held that these submissions could not be accepted in light of the protestors' history – such that the order sought should be granted.

In both cases, therefore, it appears that the risk of future occupation in respect of the *same parcels* of land as had previously been occupied (even if not exactly the same areas) was sufficient for an order for possession to be granted in respect of those parcels.

That reasoning seems difficult to reconcile with the reasoning in *Meier*. It is difficult to see a principled distinction between a pre-emptive possession order in respect of land which might in future be wrongfully possessed, but has not yet been occupied (which *Meier* makes clear is impermissible), and possession orders in respect of land which has previously been wrongfully possessed, but is not anymore (as *Hackney*, following *Djemal*, seems to permit). It is clear that in both *Hackney* and *Djemal* the Court was basing its decision on the facts as at the date of the hearing and was not simply looking at the facts as at the date of the claim form. In other words, the judgments were given in full knowledge that the trespass had ceased.

If one is looking at *future* threats to land, whether from previous occupiers or

[150] At 130F-G.

otherwise, then, following *Meier*, a *quia timet* injunction is surely the appropriate remedy (the principles relevant to such orders are considered further below). Otherwise, as was held to be objectionable in *Meier*, the defendants will be ordered to give up possession of land of which they are not themselves in possession.

However there may, depending on the particular facts of the case, be some justification for the approach adopted in *Djemal* and *Hackney*. For example, notwithstanding the statements from the occupants, it may not be clear to the claimant whether or not anyone remains on the land. It may be that the occupants have left possessions on the land, and the claimant seeks certainty about its position. In times of such uncertainty, it might be said that the defendants' actions continued to 'interrupt' the claimant's possession of its land. There is no suggestion that any such features, which relate to whether the land did in fact continue to be occupied, were present in *Djemal* or *Hackney*, however. Rather, the Courts seem to have sought to reach a practical solution to a real problem facing the claimant in each case. In the light of *Meier* (which was apparently not cited in *Hackney*) there must be real doubts as to whether *Hackney* was correctly decided.

Notwithstanding the potential risks post-*Meier*, a claimant may wish to press ahead with a possession claim even where occupiers have left after commencement of proceedings in the hope that *Hackney* would be followed. Given that the claim form was good at the time of issue, claimants are likely to still be entitled to their costs (even if such costs are unlikely to be enforceable in practice).

The availability of injunctions

Quia timet injunctions

In the case of threatened trespass, a possession order is not available (unless, perhaps, it is threatened trespass on land previously occupied). Injunctive relief is, instead, the appropriate remedy. The injunction sought, being in respect of a *threatened* wrong is a *quia timet* injunction, which may be sought on an interim or final basis.

The hearing of a claim for a final injunction may be heard alongside a claim for possession. This might typically happen when the relief sought is possession over one portion of land and an injunction restraining trespass to other portions of land once the occupiers leave the occupied land, as was the case in *EDF Energy*. In such a case, the claim should be brought in accordance with CPR Part 55 (which allows for additional remedies to be sought under that procedure).

The Courts approach claims for final injunctions according to the following principles. First, in order to obtain a final injunction, it will be necessary to demonstrate that there is a real danger of trespass to land owned by the claimant. A strong case must be established; *"no one can obtain a quia timet order by merely saying 'Timeo'"*.[151] Thus, it will not be enough simply to say, for example, that there is a risk that trespassers may move to other land owned by the claimant when evicted from the present site. To succeed, evidence of a direct statement of intention or a history of trespass in the past is likely to be required.

Second, unlike in other contexts, it is not a strict requirement for the claimant seeking an

[151] Per Lord Dunedin *Att-Gen for the Dominion of Canada v Ritchie Contracting and Supply Co Ltd* [1919] AC 999 at 1005: 'Timeo' translates from Latin as 'I fear' or 'I am afraid'.

order restraining trespass to show that it will suffer damage, although plainly if damage can be shown that will assist in the claim.[152]

Third, as observed by Lord Neuberger MR in *Meier*, the Court will be slow to make an order which it does not intend, or will be unable, to enforce.[153] In particular, it may be inappropriate to make an order if the Court would not be willing to enforce it by committal if breached. A Court should not refuse to make an order just because it is likely that it will be disobeyed, however, and it may think an order appropriate because of the deterrent effect.

In the same context, Lord Neuberger expressed the view that, "*if the only reason for granting an injunction restraining the defendant from trespassing in other woods was to assist the Commission in obtaining possession… should the defendant camp in them, it seems to me that this could be catered for by declaratory relief*".[154]

Where trespass is threatened by persons not yet occupying any of the claimant's land, and an injunction is sought to prevent that trespass, it is likely that interim relief will be required – potentially on an urgent basis. In such interim situations, however, it is unlikely that the *American Cyanamid* principles will be of much relevance as interim relief would typically dispose of the whole dispute.[155] Essentially, therefore, the question in an application for an interim injunction restraining a threatened trespass is the same as in a claim for a final injunction: is the claimant able to show a real threat and intention on the part of the defendant(s) to trespass upon the claimant's property?

Where the threatened trespass is imminent such that there is real urgency, interim relief may be sought without notice (although, even then, the claimant ought to give the defendants such notice as he is able), and prior to any claim being issued. Where a claim has not been issued, the Court will give directions requiring a claim to be issued, usually as soon as is reasonably practicable or within a set timeframe. Claimants are well advised to do so, otherwise they risk losing the injunction made. There will also usually be provision for the respondents to make an urgent application to discharge the order.

As in the case of final injunctions, while it is not always necessary, in order to obtain an interim injunction, to show that a threatened trespass will cause damage, if the claimant is unable to demonstrate a belief that significant damage is likely to occur to the property the appropriateness of interim injunctive relief (even if technically available) might be doubted. The Court is unlikely to be sympathetic to a claimant who seeks urgent injunctive relief to restrain trespass where, in practice, the trespass will cause no damage and can be easily remedied after the event by the simple summary procedure of a possession claim.

As such, a claimant in that situation might be better advised to see if the threatened trespass actually takes place and, if it does, simply bring possession proceedings to which the trespassers will have no defence. That is likely to be a simpler, less risky and cheaper course of action.

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[152] See, e.g. Harrow LBC v Donohue [1995] I EGLR 257, CA

[153] At [80]-[85]

[154] At [82]

[155] [1975] AC 396

Injunctions as an alternative to possession orders

Most of the time, therefore, one will encounter injunctions as complementary to possession orders; they are sought over adjacent, unoccupied land.

However, the stay on possession claims under Practice Direction 51Z raised the question of whether injunctions could be sought as a straight alternative to possession orders. The Courts answered in the affirmative, but the result in practice is less than satisfactory for landowners.

In *University College London Hospitals Foundation Trust v MB* [2020] EWHC 882 (QB) the claimant hospital brought a possession claim relating to a bedroom in its hospital. Given that the claim was brought in April 2020, the possession element could not proceed under CPR Part 55 because of the stay imposed by Practice Direction 51Z. The claimant, however, also claimed for injunctive relief requiring its patient to vacate the bedroom as she was no longer in need of in-patient care; the room was needed to treat COVID-19 patients.

The Court granted an interim injunction. In so doing it recognised a landowner's right in general to an injunction to enforce its rights against a trespasser, as set out in *Meier*. This is not a surprising result, given that one would expect the Court to do all it could at the height of the pandemic to assist a hospital in freeing beds to treat COVID-19 patients. The reliance on *Meier* is of note however: *Meier* is really concerned with the circumstances in which an injunction will be granted *quia timet* to prevent a threatened trespass, rather than with the scenario where the trespass is currently occurring. Chamberlain J's decision therefore appears – on one reading – to have opened up the possibility of injunctive relief being used, in some contexts, as a substitute for possession orders.

The *Hospitals* case was followed in *Merritt v Thurrock Council* [2021] 1 WLUK 142, in which a management company successfully obtained an injunction to remove former licensees of local authority property. The County Court seemed to recognise, however, that granting an injunction in place of a possession order was tantamount to granting possession, such that similar controls should be placed on the enforcement of the injunction as on the enforcement of possession orders. Accordingly, the Court suspended enforcement of the order until the expiry of the moratorium on the execution of writs or warrants of possession.

It remains to be seen how often – if at all – we will see injunctions granted in the above manner now that the stay on possession claims has lifted. As the stay on enforcement in *Merritt* demonstrates, the Court seems to recognise that an injunction ordered in lieu of possession is in practice simply possession by another name, and so should be controlled accordingly.

Conclusion – Enforcement: the limits of injunctive relief

As explained above, a writ or warrant of possession is a method of enforcement which allows enforcement officers or bailiffs to recover possession of the land for the benefit of the claimant and to remove whoever they find on the land, whether or not they were a named defendant to the possession claim.

Of course, in the case of an injunction restraining trespass, the claimant with the benefit of the injunction is unlikely to be interested in bringing committal or sequestration proceedings in the event the injunction is breached. What the claimant would like is to be able to enforce the injunction by means of a writ of possession.

Lord Neuberger gave this possibility some consideration in *Meier*:

> *"[T]he thinking of the Court of Appeal in the Drury case proceeded on the basis that an injunction restraining trespass to land could only be enforced by sequestration or imprisonment. In light of the terms of CPR Sch 1, RSC Ord 45, r 5(1), this may very well be right… it is hard to see how a warrant of possession in the county court or a writ of possession in the High Court could be sought by a claimant, where such an injunction was breached.*
>
> *However, where, after the grant of such an injunction (or, indeed, a declaration), a defendant entered on to the land in question, it is, I think, conceivable that, at least in the High Court, the claimant could apply for a writ of restitution, ordering the sheriff or bailiffs to recover possession of the land for the benefit of the claimant. Such a writ is often described as one of the "writs in aid of" other writs… Restitution is normally the means of obtaining possession against a defendant who has gone back into possession after having been evicted pursuant to a court order. It appears that it can also be invoked against a claimant who has obtained possession pursuant to a court order which is subsequently set aside… Historically at any rate, a writ of restitution could also be sought against a person who had gone into possession by force… So there may be an argument that such a writ may be sought by a claimant against a defendant who has entered on to the land after an injunction has been granted restraining him from doing so, or even if a declaration has been made that the claimant is, and the defendant is not, entitled to possession. It may also be the case that it is open to the county court to issue a warrant of restitution in such circumstances."*[156]

There does not appear to be any reported case in which this argument has been run. To cater for the possibility that such an argument would succeed, however, it may be advisable to seek to have the injunction record that the claimant shall be at liberty to take out a writ/warrant of restitution for the enforcement of the injunction, or to seek declaratory relief affirming that the claimant is entitled to possession of the land in question. Lord Neuberger suggested that the Civil Procedure Rules Committee may want to consider this question, although they have not yet done so.

For as long as Lord Neuberger's suggested solution is unavailable the attractions of injunctive relief are limited. For this reason, it is difficult to see why claimants would ever wish to take the (admittedly pandemic-induced) course adopted in *UCLH* and *Merritt* of applying for injunctive relief as a direct substitute for a possession order.

Accordingly, injunctions will often be a welcome tool in the armoury of landowners wishing to prevent trespass over adjacent land and they do complement possession orders sought over currently occupied land. Injunctions as a direct alternative to possession orders, however, are unwieldy and may well offer no more than a deterrent effect when it comes to enforcement. The pandemic may have changed (for a time) the availability and utility of possession proceedings, but there is no doubt that possession orders remain the best way of dealing with unlawful occupation of a landowner's property.

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[156] At [93] to [94].

Chapter 7

Injunctions against "Persons Unknown"

Recent developments and practical tips

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Tiffany has a broad chancery/commercial practice with particular expertise in property litigation, trusts and estates disputes and professional liability claims. She is the Vice-Chair of the Property Bar Association and is one of the leading names at the Bar in her fields of practice having appeared before Courts and Tribunals at all levels including the Privy Council and the Supreme Court. The 2022 legal directories comment that she is "*sharper than a scalpel when dissecting witnesses*", "*incredibly thorough, always happy to pick up the phone to chat something through*" and "*presents complicated advice in a simple and client-friendly way*". Previous editions comment that she is "*calm under pressure and able to explain matters in a clear and concise way…very much a team player*", she "*offers comprehensive advice and always handles cases and clients with care and efficiency*", "*excellent on her feet*", "*a tough and tenacious advocate*", who "*provides clients with excellent commercial legal solutions and is quick to get to the heart of a problem*", is "*approachable, very friendly and has a keen eye for detail*", "*a great advocate who is very good at dealing with complex legal issues*", "*technically very sharp and engaging with clients*"; "*bright and considered*"; "*willing to explore issues and find creative solutions*". She is also said to have "*an excellent grasp of complex valuation matters*" and be "*excellent at handling appeals*".

Overview

There have been several recent and important developments in the jurisprudence considering the procedural and other requirements for seeking and obtaining interim and final injunctions against defendants who are unnamed and whom the Claimant seeks to pursue as "Persons Unknown".

Court proceedings in England and Wales may be brought against unnamed defendants and the Court can grant relief against persons who are only described (rather than named) in the Claim Form and in any eventual order.[157] In the sphere of real estate litigation claims against Persons Unknown have most commonly been brought in possession proceedings and against protestors and members of the Gypsy and Traveller community who enter onto or threaten to enter onto the claimant's land (quite often local authority land). A series of cases has laid down guidelines governing the obtaining of *quia timet* injunctions in these types of proceedings, and those guidelines and some practical tips for bringing claims of this nature are explored in this article.

Cases against Persons Unknown have also been pursued in other spheres but not always successfully: for example in a case of a hit and run collision,[159] cases relating to misuse of confidential information[160] and most recently cases relating to cyber-hacking.[161] It is worth consulting cases outside the property litigation sphere to gain a wider understanding of the importance of being able to identify the "Persons Unknown" in a given situation and how the difficulties of identification and of service of proceedings have been tackled by the Courts in other contexts. This article draws on those wider cases when considering below the practical issues which arise in claims of this nature.

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[157] Despite what is said at CPR PD7A para 4.1(1) which provides that a Claim Form "*should state … the full name of each party*" and PD 16 para 2.6 which defines what amounts to a party's full name. See CPR 55.6 for express provision in respect of possession claims against trespassers; and see *Bloomsbury Publishing Group Plc v News Group Newspapers Ltd* [2003] 1 WLR 1633 where Sir Andrew Morritt VC expressed the view that the overriding objective under the CPR and the obligations cast upon the Court were inconsistent with an undue reliance upon form over substance. *Bloomsbury Publishing* has been followed in many subsequent cases exemplifying the application of the principle in the case of claims for other remedies, particularly injunctions.

[158] See *chapter 6 by Daniel Scott* on the interaction between possession orders and injunctions when it comes to interests in real property.

[159] *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471 (SC) – where a final order for monetary relief was refused as the description of the defendant simply as the driver of a particular vehicle was not sufficient to enable him to be served and the Court had no jurisdiction over him/her as a result. It is particularly important to consult the Court of Appeal's explanation of *Cameron* in *Barking and Dagenham, Other Local Authorities v Persons Unknown* [2022] EWCA Civ 13 before launching proceedings against Persons Unknown as *Cameron* has been misinterpreted in subsequent case law, as explained further below.

[160] For example in *Bloomsbury Publishing* – injunction to restrain breach of copyright by an unknown person who had obtained a copy of an unpublished Harry Potter novel.

[161] *4 New Square v Persons Unknown* where an interim order against unknown computer hackers was made final and default judgment was entered on 13 September 2021 restraining publication of confidential information and requiring delivery up of that information – no judgment is available but a copy of the Order with reasons attached is at *4-New-Square-Limited-And-The-Members-Of-4-New-Square-Chambers-Identified-In-The-Schedule-v-Persons-Unknown.pdf (judiciary.uk)*; see also *AA v Persons Unknown* [2020] 4 WLR 35 where a worldwide interim freezing order and a proprietary injunction were granted in a claim by an insurer which had paid a ransom in Bitcoin to secure the reinstatement of the insured's systems which had been hacked and disabled.

Injunctions relating to real property interests

In the field of property law, the grant of *quia timet* injunctions as opposed to orders for possession was explored in *Secretary of State for the Environment v Meier* [2009] 1 WLR 2780:[162]

> "*The underlying principle is ubi ius, ibi remedium: where there is a right, there should be a remedy to fit the right. The fact that 'this has never been done before' is no deterrent to the principled development of the remedy to fit the right, provided that there is proper procedural protection for those against whom the remedy may be granted. So the questions are: what is the right to be protected? And what is the appropriate remedy to fit it?*"

In recent years the practice had sprung up of obtaining an interim and then a final injunction against "Persons Unknown" using a variety of descriptions (and sometimes no description at all) with the injunction lasting for a particular period of time (usually 3 years) and thereafter renewing and maintaining that injunction periodically without much real scrutiny from the Court. This was a practice usually deployed by local authorities in their efforts to prevent anticipated occupation of and/or fly-tipping on council-owned land, principally by the Gypsy and Traveller community.

By proceeding in this way a claim was not formally pursued to a trial or judgment as such. Indeed in some cases a Claim Form was either not issued or if it was issued it was not served, and while some defendants who got wind of the interim application might possibly have attended Court to object to the imposition of an injunction they would in any event have been unlikely to acknowledge service of the proceedings if they had been properly served or sought to defend them in any meaningful way.

Most recently, the Court has come to scrutinise very carefully the procedure and practice in relation to obtaining injunctions against Persons Unknown. The background leading to that scrutiny and the development of the principles that preceded it must be explained before turning to the most recent application of them.

Development of principles in cases against Persons Unknown

In *South Cambridgeshire District Council v Gammell* [2005] EWCA Civ 1429 two injunctions had been granted against persons unknown under section 187B of the Town and Country Planning Act. The first was an interim order granted by the Court of Appeal restraining the occupation of vacant plots of land. The second was an order made until further order restraining the stationing of caravans. In both cases "newcomers" who were unknown and unidentified at the date of the orders who subsequently violated the injunctions were committed for contempt of Court.

The Court of Appeal held at [32]-[33] that the individual appellants had become parties to the proceedings when they did acts which brought them within the definition of defendant in the particular case – so, when they caused caravans to be stationed on or to occupy the land. It was not necessary to make these "newcomers" defendants to the proceedings since they had knowingly

[162] At [25] as per Lord Walker. See also *Hampshire Waste Services Ltd v Intending Trespasser upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch), which is probably the starting point for consideration of injunctions against Persons Unknown in this sphere; and *South Cambridgeshire District Council v Gammell* [2005] EWCA Civ 1429 addressed below. The high water mark came in *Ineos v Boyd* [2017] EWHC 2945 (Ch), also addressed below.

violated the injunctions before seeking to have them set aside and in so doing automatically became parties by reason of their violation. The injunctions applied in full force to newcomers with knowledge of them.

In the more recent case of *Cameron v Liverpool Victoria Insurance Co* [2019] UKSC 6 (the "hit and run" case mentioned above) the Supreme Court addressed the circumstances in which it was permissible to sue an unnamed defendant and held that as a general rule proceedings cannot be brought against someone who cannot be identified as a particular person, except where the circumstances would enable a claim to be properly served or service to be dispensed with.

Lord Sumption in *Cameron* was primarily concerned with questions of service of proceedings, and he distinguished between two kinds of case in which the defendants cannot be named and to which different considerations apply. In the first category are anonymous defendants who are identifiable but whose names are unknown. For example, squatters occupying a property are identifiable by their location, although they cannot be named. The second category comprises defendants who are not only anonymous but cannot even be identified (such as most hit and run drivers). In the first category defendants are described in a way that makes it possible in principle to locate or communicate with them and to know without further inquiry whether they are the same people as those described in the Claim Form. That is not possible in respect of defendants in the second category. Where defendants cannot be identified then service of the Claim Form cannot be properly effected and jurisdiction cannot be established over them.

In *Cameron* a distinction was made between anonymous defendants who are identifiable by reason of past actions and those who are not. There is also a third category of anonymous defendants, against whom a *quia timet* injunction may be sought: those who are highly likely to commit a future civil wrong (described by reference to their future conduct). *Cameron* was not directly dealing with these types of case, and while Lord Sumption did not mention "newcomers" as such in his decision he did refer to *Gammell* and seems to have accepted that where an action was brought against unknown trespassers then newcomers could make themselves parties to the action by doing one of the prohibited acts with knowledge of the prohibition.

After *Cameron* came three Court of Appeal cases – each dealing with protestors – that framed how parties and the Court ought to proceed in property-related cases dealing with persons unknown: ***Boyd v Ineos Upstream Limited*** [2019] EWCA Civ 515; ***Cuadrilla v Persons Unknown*** [2020] EWCA Civ 9; and ***Canada Goose v Persons Unknown*** [2020] EWCA Civ 303 which must however now be treated with considerable caution in light of the Court of Appeal's decision in ***London Borough of Barking and Dagenham, Other Local Authorities v Persons Unknown*** [2022] EWCA Civ 13 as explained further below.

Ineos, Cuadrilla and Canada Goose

In *Ineos*, the Court of Appeal considered appeals against interim injunctions granted to companies involved in fracking in the UK, and to lessees and freeholders of particular sites, to restrain potentially unlawful acts of protest against fracking activity. The orders granted at first instance related to causes of action in trespass, private and public nuisance and causing loss by unlawful means, and they restrained the defendants from trespassing on and from interfering with access to sites and interfering with access to public rights of way. The Court of Appeal stated that while it was difficult to formulate broad principles on which an injunction against Persons Unknown could be properly granted, the necessary requirements, whether in the context of the

common law or the European Convention on Human Rights, could be tentatively framed as follows (known as "*the Ineos guidelines*"). [163]

(1) There had to be a sufficient real and imminent risk of a tort being committed to justify *quia timet* relief.
(2) It must be impossible to name the persons who were likely to commit the tort unless restrained.
(3) It must be possible to give effective notice of the injunction and for the method of such notice to be set out in the order.
(4) The terms of the injunction had to correspond to the threatened tort and not be so wide that they prohibited lawful conduct.
(5) The terms had to be sufficiently clear and precise to enable persons potentially affected to know what they had not to do.
(6) The injunction should have clear geographical and temporal limits.

The Court took the view that an injunction requiring the defendant not to trespass is capable of being framed in clear and precise terms, as there is no difficulty in defining the tort of trespass; but an injunction relating to obstructing public rights of way and conspiracy to cause damage by unlawful means is capable of being too wide and insufficiently clear (and the Court of Appeal discharged those injunctions in *Ineos*). The Court in *Ineos* also stated that it was wrong to build into an injunction the concept of doing something "*without lawful authority or excuse*" since an ordinary person exercising legitimate rights of protest was unlikely to have any clear idea of what that prohibition would constitute.

The requirement that the terms of an injunction be sufficiently clear and certain is particularly important because the way of enforcing an injunction is by seeking to have the defendant committed for contempt of Court. In *Cuadrilla* the Court of Appeal considered the *Ineos* guidelines against the backdrop of an appeal by protestors against their committal to prison for contempt of Court for breach of an injunction to prevent trespass and unlawful interference with the claimant's rights as owners of land on which they engaged in lawful fracking. The causes of action relied upon were trespass and unlawful means conspiracy (by impeding the lawful activities of the claimant's vehicles seeking to access the site). The protestors argued (amongst other things, relying on *Ineos*) that the terms of the injunction were insufficiently clear because they made the question whether conduct was prohibited dependent on the intention of the person concerned.

On the question of the clarity of the terms of the order, the Court of Appeal took the view that it was unreasonable to impose the cost of obtaining legal advice on members of the public in order to find out what the injunction did or did not prohibit them from doing. On the subject of including reference to "intention" in the order, the Court held that there was nothing objectionable in principle about including a requirement of intention in an injunction nor anything inherently unclear in doing so – provided the references to "intention" do not have any special legal meaning and are not difficult for a member of the public to understand. Also, in order to avoid prohibiting lawful conduct, a requirement should be included that the conduct complained of is intended to cause damage.

[163] At [18]-[34].

The *Ineos* guidelines again came to be considered by the Court of Appeal in *Canada Goose* (a claim by a clothing retailer for injunctive relief against protestors outside its store). The Court of Appeal laid down some procedural guidelines applicable to proceedings for interim relief against Persons Unknown (at [82]).

(1) Persons Unknown are by definition people who have not been identified at the time of the commencement of the proceedings. If the persons are in fact known and have been identified, then they must be joined as individual defendants. Defendants who are stated to be "Persons Unknown" should therefore be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service "*such as can reasonably be expected to bring the proceedings to their attention*".

(2) In principle Persons Unknown can include anonymous defendants who are identifiable when proceedings are commenced, but whose names are unknown; and "newcomers" i.e. people who in the future will join the group of defendants and fall within the description of "Persons Unknown".

(3) The Persons Unknown must be defined in the Claim Form by reference to their conduct which is alleged to be unlawful.

(4) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify *quia timet* relief.

(5) The defendants to the interim injunction must likewise be individually named if known and identified, or otherwise described as "Persons Unknown" but they must again be capable of being identified and served with the order.

(6) The prohibited acts must correspond to the threatened tort. They may include lawful conduct only if and to the extent that there is no other proportionate means of protecting the claimant's rights.

(7) The terms of the injunction must be sufficiently clear and precise to enable the persons potentially affected to know what they must not do. Non-technical language should be used which a defendant is capable of understanding. The prohibited acts may be defined by reference to the defendants' intention if that is strictly necessary to correspond to the threatened tort and if the intention is capable of proof without undue complexity. It is better practice to formulate the injunction without reference to intention if the prohibited tortious acts can be described in ordinary language without doing so.

The Court of Appeal in *Barking and Dagenham* (addressed below) did not hear detailed argument about this guidance and declined to revisit it in detail, but commented that the Court's approach to the grant of an interim injunction would obviously be different if it were sought in a case in which a final injunction could not either as a matter of law or settled practice be granted – so the guidance must be viewed with that qualification in mind.

Further the Court of Appeal in *Barking and Dagenham* held that (contrary to a statement in *Canada Goose* that an interim injunction must be time limited because it is an interim and not a final injunction) there is no rule that an interim injunction can only be granted for

any particular period of time. It is however good practice to provide for a periodic review even when a final order is made; as long as the Court is concerned with the enforcement of an order, the action is not at an end.

The *Canada Goose* controversy

The most important aspect of the *Canada Goose* decision which gave rise to heated debate was the apparent determination by way of "further reasons" given at [89]-[92] that a final injunction could not be granted in a protester case against "Persons Unknown" who were not parties at the date of the final order. In reliance on this it was thought that "newcomers", who had not by the time of the final order committed the acts prohibited by the interim injunction, and who had not directly been served with the Claim Form, did not fall within the description of "Persons Unknown" and were not bound by the final order.

This was said to be an expression of the fundamental principle that a person cannot be made subject to the jurisdiction of the Court without having such notice of the proceedings as will enable him to be heard. There are some very limited circumstances in which a final injunction can be granted "*contra mundum*" i.e. against the whole world regardless of whether or not they are a party to the proceedings.[164] These are the rare exception to the general rule[165] that the Court acts *in personam* and that final injunctions bind only the parties to the proceedings. The Court may in appropriate cases of that nature grant an order under CPR 6.16 dispensing with service of the Claim Form altogether.

As observed in *Canterbury City Council v Persons Unknown* [2020] EWHC 3153 (QB), the effect of this interpretation of the reasoning in *Canada Goose* was that a claimant would most likely be required to commence fresh proceedings against each new class of Persons Unknown after an injunction had been made final, because "newcomers" were (so it was said) not bound by any final order. This gave rise to the anomaly that an interim injunction against Persons Unknown probably offered an applicant better protection than a final injunction. The *Canada Goose* approach was also of course in apparent contradiction with the view taken as to the automatic joinder of newcomers who know about the terms of the injunction in *Gammell*, which approach was adopted in *Ineos*.

Falling into error: subsequent consideration of *Canada Goose*

In *Enfield LBC v Persons Unknown* [2020] EWHC 2717 (QB) a spotlight came to be more fully shone on the practice of local authorities in obtaining "rolling" injunctions, sometimes affecting every piece of land owned by the local authority within its borough. As explained below the case gave rise to a very wide review, scrutinising and criticising the practice and exposing various procedural failures in 37 related cases.

In October 2017 Enfield LBC had obtained a wide final injunction affecting 130 sites and lasting 3 years which prevented Persons Unknown from setting up encampments or fly-tipping. Notice of the order had been attached to posts at each site but not copies of the Claim Form which was instead referred to in newspaper adverts as being available on the council's website and at local libraries. On an application in October 2020 to renew that wide injunction by extending it for a further period of time it became clear that the council had in fact never served the Claim Form on any of the defendants to the original proceedings. No order had been

[164] For example *Venables v News Group Newspapers* [2001] Fam 430.

[165] Stated in *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191 at 224.

made for alternative service, and there was no order dispensing with service, so that the only method by which the Persons Unknown could have been validly served with the Claim Form was by personal service in accordance with CPR 6.5, which had not taken place.

The organisation London Gypsies and Travellers intervened in the proceedings as an interested party and was represented at the hearing before Nicklin J. The council had evidence that the Claim Form had been viewed over 2000 times on its website and that there was no record of anyone asking to view the copies held at libraries. Evidence was lodged by the intervener of the level of digital exclusion within the Gypsy and Traveller community which tended to have less access to the internet than the public generally.

Enfield LBC sought retrospective permission to serve the Claim Form by alternative methods but this was refused. The Court concluded that the council had not demonstrated that the alternative methods deployed had in fact brought the Claim Form to the attention of anyone in the category of Persons Unknown nor that those methods were likely to bring it to their attention. As a minimum posting the Claim Form at each of the sites covered by the injunction would be required. Submissions that the Persons Unknown would have learned of the proceedings and the contents of the Claim Form through discussion in their communities were rejected, and the Court took the view that general awareness of Court proceedings was not to be equated with proper service. Therefore the Court concluded that the interim and final orders in the case had been made without any jurisdiction being established over any defendant.

The Court adjourned the council's application for a fresh interim injunction. The Judge made the point that if the Court were to make a final order in due course in the terms sought it would not provide any real protection for the council because it would probably not be able to demonstrate whether any individual person had become a defendant to the claim. If no-one could be identified as a defendant then the final order bound no-one, and a newcomer who turned up at any of the sites would likewise not be bound. Therefore any interim injunction granted would be more effective and more extensive in its terms than any final order that the Court could grant. The Judge himself observed that *"In terms of practical reality, the only way that the London Borough of Enfield could achieve what it seeks out to do, is to have a rolling programme of applications for interim orders."*

The Judge then made an order effectively joining the 37 local authorities which had been granted similar wide injunction orders that were at that time still extant and gave directions requiring the claimants in these "Cohort Claims" to complete a questionnaire and make any applications for withdrawal, discharge or variation of their injunctions in time for a case management hearing in December 2020. Thereafter the injunctions obtained by various local authorities were discharged or discontinued (as was the case in Enfield LBC's claim itself) or else set aside because of failures to serve the proceedings. The claims of 16 local authorities remained by the time of the case management conference and they sought to uphold the grant of injunctions in their individual cases.[166]

The Judge in *Enfield LBC* recognised that cases of this type raised issues of wider importance which required proper thought and consideration by the Court, and that the

[166] A list of the 37 "Cohort Claims" and a history of the claim in each case including procedural failings is in an appendix to the lengthy judgment in *Barking and Dagenham LBC v Persons Unknown* [2021] EWHC 1201 (QB). Two further groups were given permission to intervene (Friends, Families and Travellers and the National Federation of Gypsy Liaison Groups).

cases reported often only saw one side of the argument being advanced. So the Court invited the Attorney General to appoint an Amicus to make submissions at the adjourned hearing for an interim injunction in the public interest on the wider implications of *Canada Goose* and its effect on interim and final injunctions against Persons Unknown.

The Attorney General was duly represented at the final hearing in January 2021 (as were the interveners along with the various local authorities) and there then followed in May 2021 a very lengthy judgment of Nicklin J tackling the issues and giving general guidance about injunctions in cases where local authorities have sought to prevent Gypsies and Travellers from entering land for the purpose of setting up unlawful encampments (under the title *London Borough of Barking and Dagenham, Other Local Authorities v Persons Unknown* [2021] EWHC 1201 (QB)).

The Court concluded that the principles in *Canada Goose* were of universal application to civil litigation, that final injunctions granted against Persons Unknown were subject to the principle that they bind only the parties to the proceedings and cannot bind "newcomers" who were not parties at the time when the order was granted, and that injunctions in the traveller type of case do not fall into the exceptional category of civil injunction that can be granted *contra mundum*.

As was observed in submissions in *Barking*[167] (and by Nicklin J himself in *Enfield*[168]) this gave rise to a most unsatisfactory state of affairs in which the Court has deemed a final injunction to be practically worthless save in what is likely to be a small proportion of unusual cases, and it seemed anomalous and absurd to require claimants to institute a programme of rolling interim injunctions so as to capture "newcomers" whose position could (had the Court so determined) have been safeguarded by their having permission to apply under the terms of a final order.

Criticism of *Canada Goose* and overturning the decision in *Barking*

This anomalous situation has now been resolved by the Court of Appeal in *London Borough of Barking and Dagenham, Other Local Authorities v Persons Unknown* [2022] EWCA Civ 13 in which Sir Geoffrey Vos MR gave the lead judgment with which Lord Justice Lewison and Lady Justice Elizabeth Laing agreed.

The Court of Appeal held that there was no difference in jurisdictional terms between the grant of an interim and a final injunction and that Nicklin J had gone too far in stating that relief could only be granted

[167] At [156ff].

[168] At [44].

against identified persons unknown at trial. The Judge should not have applied the "further reasons" given in *Canada Goose* and he had misunderstood the Supreme Court's decision in *Cameron*. The Court of Appeal held that the statements in *Canada Goose* at [89]-[92] were inconsistent with *Ineos* and *Gammell* and the Court of Appeal preferred to follow *Gammell*. The Judge should have applied *Gammell* and *Ineos* which had decided that injunctions could validly be granted against newcomers in unauthorised encampment cases and in protester cases respectively.

Is there a need to progress claims following interim relief?

Before the decision of the Court of Appeal in *Barking and Dagenham*, the latest word on the subject of failure to progress claims after obtaining interim injunctions was found in *Havering LBC v Persons Unknown* [2021] EWHC 2648 (QB) where Nicklin J held that three local authorities were guilty of abuse of process, although on the facts he decided not to discharge the injunctions.

The injunctions were obtained between February 2018 and September 2019 and they prohibited unauthorised encampments by a number of named defendants as well as Persons Unknown (and contained a power of arrest despite no application for such a power being made in any of the Claim Forms or application notices). Two of the three injunctions also bound newcomers.

A similar injunction had been granted in *Bromley LBC v Persons Unknown* [2019] EWHC 1675 (QB) and the local authorities asserted that it had been sensible to await the Court of Appeal's judgment in that case before progressing their claims. However they delayed even after the Court of Appeal's decision was handed down in January 2020. Nicklin J concluded that the local authorities had been guilty of serious failures to progress their claims and had arrogated to themselves the decision as to when the claims should be progressed while holding and enforcing interim injunctions of significant width. None of the local authorities had sought directions from the Court; but the Judge held that the Court should shoulder some of the responsibility itself for failing to make case management directions to prevent the claims from stalling.

However the delay itself was not sufficient to amount to an abuse of process; what the Judge found most objectionable was the effect of failure to progress the claims on third parties (i.e. the newcomers).

Nicklin J nevertheless held that it would be disproportionate to discharge the interim injunctions because none of the local authorities had intended to abuse the Court's process, none was in breach of any Court orders and there was no clear authority warning claimants that a failure properly to prosecute the claims could be regarded as an abuse of process (no such argument will now of course avail future claimants in a similar position). Instead the Judge gave directions to ensure that each claim was managed as expeditiously as possible to a final hearing.

In *Barking and Dagenham* the Court of Appeal took a more pragmatic view of the way in which claims of this nature tend to progress (see [77]). It was recognised that the Part 8 procedure adopted in unauthorised encampment cases rarely if ever results in a trial and while interim injunctions in other fields often do protect the position pending a trial, in the present types of case trials are infrequent and of course default judgment cannot be obtained in Part 8 proceedings. There is also no meaningful distinction between an interim and a final injunction in this context since the Court needs to keep persons unknown injunctions under review even if they are final in character. So while orders (whether interim or final) should indeed be kept under review, the approach of Nicklin J in Havering needs to be viewed in the light of what is said by the Court of Appeal in *Barking and Dagenham*.

A possible alternative?

Before the decision in *Bloomsbury Publishing Group Plc v News Group Newspapers Ltd* [2003] 1 WLR 1633[169], the procedure that was used for tackling the problem of obtaining injunctive relief against a class of unknown persons was identifying one defendant and seeking an order under CPR 19.6 making him/her a representative defendant for the wider class.

CPR 19.6 can be used against group protests, groups of squatters, or unincorporated associations. In *Huntingdon Life Sciences v Stop Huntingdon Animal Cruelty* [2005] EWHC 2233 (QB) an injunction was made against a class of defendants which included those who qualified as members of it only upon being given notice of the order granting the injunction.

The Court considered in *Barking*[170] whether this procedure might be deployed in the case of traveller injunctions as a way of binding non-parties. CPR 19.6 enables the Court to permit a claim to be maintained against a defendant as a representative of a group of others who have the "*same interest in a claim*". CPR 19.6(4)(b) only permits an order to be enforced against a person who is not a party to the claim with the permission of the Court.

Nicklin J did not consider that a representative claim was a viable option in the case of a traveller injunction since the class of person that the local authorities are seeking to target is so large that it would be impossible to suggest that each member of the class had the same interest in the claim (even applying a liberal approach to what amounts to "the same interest"). The circumstances of different members of the Gypsy and Traveller communities vary significantly and although members of those communities are the principal target of the traveller injunctions they are not the only ones who would be bound by its terms. HHJ Pelling QC also rejected the appointment of a representative defendant in *Cuadrilla v Persons Unknown* (unreported QB 11 July 2018).

In *MBR Acres & Ors v Free the MBR Beagles & Ors* [2021] EWHC 2996 (QB) Nicklin J refused permission to sue particular defendants as representatives of protestor organisations that the claimant alleged were unincorporated associations. The organisations were only identified by reference to Facebook pages bearing their names ("Free the MBR Beagles" and "Camp Beagle"), and the particular defendants were alleged to be individuals who operated and controlled those pages. Nicklin J referred to *Jalla v Shell International Trading and Shipping Co Ltd* [2021] EWCA Civ 1389 in which key authorities and applicable principles in this area are cited, and he concluded that the class of defendants against whom the claimants sought to bring a claim on a representative basis did not have the "same interest"; and even if it were possible to identify the members of "Free the MBR Beagles" or "Camp Beagle" they had not all committed the same wrong.

The alleged acts upon which the claimants in *MBR Acres* sought to establish liability were fact specific and varied protestor by protestor. Further the membership of the "unincorporated associations" (if they were such) would be likely to change with new members joining as time went on. It would be unjust to grant a judgment against a representative defendant when the class included people who had done nothing wrong and was likely to include "newcomers". Nicklin J held that the Court should not grant a judgment or order against a class of person

[169] Which recognised the wider jurisdiction permitting claims against Persons Unknown – Sir Andrew Morritt V-C holding that a person to be sued by a description provided the description was "sufficiently certain as to identify both those who are included and those who are not".
[170] at [160].

which includes or will include those who if their individual circumstances were investigated would not be liable at all. There was no claim that there was any co-ordination of unlawful activities or that the members of the "unincorporated associations" acted otherwise as joint tortfeasors. The Judge concluded (at [66]):

> *"In my judgment, the Claimants are attempting … to corral the protestors into these "unincorporated associations" and to force the Third and Fifth Defendants to "represent" them in these proceedings. That is simply an attempt at self-serving expedience. The claim against the First and Second Defendants is, in reality, an attempt to obtain a "persons unknown" injunction by another route. It seeks to obtain the remedy of injunction against a protean class of largely unknown people whose only connection with each other is their alleged shared support of a political cause through a Facebook group. Based on evidence of alleged wrongdoing by only a small fraction of the protestors, the Claimants seek to obtain a wide-ranging injunction to restrict the activities of all members of the "unincorporated association" as an entire class. For these reasons, even had I been satisfied that the Claimants could meet the "same interest" test in CPR 19.6(1), I would have refused to permit a claim to be brought against the First and Second Defendants on a representative basis."*

Those seeking an order for the appointment of a representative defendant will face an uphill task and will have to distinguish their case from *MBR Acres* to have a hope of succeeding. The potential ability to rely upon the CPR Part 19 procedure is in any event of less importance now in light of the Court of Appeal's decision in *Barking and Dagenham*.

Practical Guidance for those seeking injunctions against Persons Unknown

Defining "Persons Unknown"

The unknown person may be someone who is readily identifiable as a particular person although their name is not known. Persons can be sued by reference to a photograph or identified as the individual living at a particular address. These people are capable of being served with proceedings, albeit by alternative methods. For example, in *London Borough of Hackney v Grant & Ors* [2021] EWHC 2548 (QB) the Court permitted a claim to proceed against "Person identified in the photograph labelled "A" as exhibited to the witness statement of [the deponent]" and "*Person identified in the photograph labelled "E" exhibited to the witness statement … also known as "Aka_trev_kay" on Instagram*". (Note that the Court in *Hackney v Grant* did not have to decide the question whether a defendant whose name was not known could be identified by his or her Instagram account alone.)

Claimants must ensure that the description of the Persons Unknown in their particular case is sufficiently precise to capture members of the class. The description must be "*sufficiently certain as to identify both those who are included and those who are not*" (*Bloomsbury Publishing*) and the Persons Unknown must be described "*by reference to conduct which is alleged to be unlawful*". (Note that CPR Part 8.2A(1) and PD 8A impose further specific requirements in respect of certain categories of claim brought against Persons Unknown and in particular under s187B Town and Country Planning Act 1990).

In *Hampshire Waste* an injunction was granted *"restraining persons from entering or remaining without the claimant's consent"* on land described in the order in connection with an environmental protest which had been threatened.

In *Gammell* the Court of Appeal granted an interim injunction against Persons Unknown *"causing or permitting hardcore to be deposited other than for agricultural purposes on land known as … caravans, mobile homes or other forms of residential accommodation to be stationed other than for agricultural purposes…"*

In *SoS for Transport, HS2 Limited v Cuciurean* [2020] EWHC 2614 (Ch) the defendants were defined as *"Persons Unknown entering or remaining without the consent of the Claimant on Land at … shown coloured green… on Plan B annexed to the Particulars of Claim."*

In *Canada Goose* the defendants were described as *"protesters against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing by [the claimant]"*. Teare J did not object to this formulation, but Nicklin J found it too broad and criticised the claimants for not joining identified protestors as individual defendants.

In *City of London Corp v Persons Unknown* [2021] EWHC 1378 (QB) Nicklin J refused an injunction against seeking to restrain activities by various, extensive categories of Persons Unknown that were very widely drawn (e.g. *"Persons Unknown who are playing loud music and/or urinating and defecating other than when making use of the toilet facilities…"*). He considered that while the claimant's evidence led to the conclusion that someone would probably do one of the acts that was sought to be restrained at some point in the future, that was not enough – the best the claimant could say was that the person was a member of a class of everyone visiting Epping Forest some of whom might breach its Byelaws. He concluded that those persons fell into the second category described in *Cameron* (see above). Note that at the time of writing there is an appeal outstanding against this decision.

In *MBR Acres* the Persons Unknown were defined as those *"who are protesting within the area marked in blue on the Plan … and/or engaging in unlawful activities against the Claimants and/or trespassing on the First Claimant's land …"*. Nicklin J considered that the use of "and/or" in the definition was unacceptable as it meant that every person protesting in the identified area fell into the definition whether or not they were alleged to be guilty of any wrongdoing; and that the phrase *"engaging in unlawful activities"* was too vague and would include criminal offences (there being no attempt to define *"unlawful activities"* in the Claim Form – a definition in the draft order could not affect the meaning of the phrase in the Claim Form).

Service of documents

It is important to separate service of the Claim Form from service of an interim order that is obtained (along with associated documents). Of course, both must be served unless service is dispensed with (which is not likely to be appropriate in the type of case under consideration here)[171] but different considerations may apply to the method of service in each case, and it is vital to remember that without service of the Claim Form, the Court will not have jurisdiction over the defendants and there can be no viable claim against them.

[171] See *Cameron* and Nicklin J in *Barking* at [48]: *"it is difficult to conceive of circumstances in which a Court would be prepared to grant an order dispensing with the requirement to serve the Claim Form upon 'Persons Unknown'"*.

Given that the Persons Unknown are unlikely to be capable of being personally served, an order will be required for alternative service under CPR 6.15 (and under CPR 6.27 in respect of other documents in the claim). Nicklin J stated in *Barking* that there was a need for the Court to adopt a more vigilant approach and more rigorous process when considering applications under CPR 6.15 in the case of service on Persons Unknown.[172]

Under CPR 6.15 the Court may make an order for alternative service where it appears that there is "*a good reason*" to do so. However claimants must also consider carefully what methods of service can be devised that can reasonably be expected to bring the proceedings to the attention of *all* of those who fall within the definition of Persons Unknown.[173] If this requirement cannot be met then permission for alternative service will be refused. Therefore the greater and more ambitious the width of the definition of "Persons Unknown" in the Claim Form, the more difficult it is likely to be to satisfy the requirements for an order for alternative service.

The witness evidence in support of the application for such an order must directly and properly address the question of why an order for alternative service is justified or appropriate and the basis on which the Court can be satisfied that the method proposed is likely to be an effective way of bringing the proceedings to the attention of the defendants. Remember that applications for interim injunctions of a *quia timet* nature will typically be made on an urgent basis and without notice, so that the claimant (and especially advocates presenting such applications) will be under a duty to ensure that the Court is fully aware of the relevant case law and any arguments that could be raised by the absent party.

It is important to get it right first time: the Court is unlikely to be sympathetic to applications after the event attempting to cure defects in service (for example under Rule 40.12 to correct an accidental slip or omission in an order; seeking a retrospective order for alternative service; making a further application for interim relief if a final order improperly obtained is discharged). In *Canada Goose* the Court of Appeal upheld the refusal of Nicklin J to exercise his case management powers to cure defects in service of the Claim Form.

Note that the Court has power to order unnamed defendants to identify themselves and to provide an address for service and a defendant who fails to comply with such an order but is subsequently identified by other means would be at risk of being punished for contempt of Court.[174]

The order for alternative service of the Claim Form must state the date on which the Claim Form is deemed to be served and the period for filing an acknowledgement of service (CPR 6.15(4)(b) and (c)). Without including a date of deemed service it is impossible to identify the date for acknowledging service.

Possible methods of alternative service

In an appropriate case the Court may be persuaded to order alternative service by one or more of the following methods (usually the more methods that can legitimately be cited in the order, the better):

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[172] How far this message is endorsed in other types of case coming before the High Court remains to be seen. As noted below the approach taken in cases coming before the Commercial Court in relation to, for example, computer hacking and fraud relating to cryptoassets would appear to be somewhat less vigilant than that advocated in Barking.

[173] See *Cameron*.

[174] See in particular *PML v Person(s) Unknown* [2018] EWHC 838 (QB) per Nicklin J.

- placing the documents in a prominent position on the land that is to be caught by the injunction;

- placing of advertisements in local papers and libraries or displaying notices prominently in the vicinity of the land as well as on the land;

- emailing the documents to an email address that can be shown to be associated with the class of unknown persons, or to a WhatsApp message group;

- handing or attempting to hand a copy of the document to any person demonstrating in the vicinity of the affected land, with the order being deemed served whether or not such person accepted a copy (as was ordered by Teare J in *Canada Goose*);

- posting the documents on social media accounts related to or associated with individuals or with the class of unknown persons or else making reference to the documents there with a link enabling them to be downloaded (preferably by some method which enables the claimant to identify when and where the documents have been downloaded if not also by whom);

- posting the documents / reference to them on the social media accounts of the claimant itself; note that in *Hackney v Grant* the Court did not consider that posting a copy of the order on Hackney's website and Facebook and Twitter accounts was of itself an acceptable substitute for personal service of the Claim Form, although it directed the council to take that step nonetheless.

There are other alternative methods that have been found acceptable in commercial contexts such as filing the Claim Form at Court. It remains to be seen whether the Courts in trespasser and protestor cases will find these acceptable in an appropriate case. In *LJY v Persons Unknown* [2017] EWHC 3230 (QB) Warby J authorised service by filing the Claim Form at Court in the context of a blackmail case where the claimant sought an interim non-disclosure order restraining Persons Unknown from publishing allegations of serious criminal misconduct. The Court ordered the defendants to identify themselves and to provide an address for service, and in the event of their non-compliance authorised the claimant to serve the Claim Form by filing it at Court. Note however that a temporary "*unregistered and untraceable*" mobile telephone number that would be in existence only for 4 days had been provided by the defendant in a letter to the claimant for the purpose of furthering the blackmail; and the Court permitted service of the order itself by text message and directed that notice be given to the defendant via a further text message stating that the Court had ordered service of the Claim Form by filing it at Court and that there would be an application for default judgment on the return date if no response was received.

In *AA v Persons Unknown* [2020] 4 WLR 35, a computer hacking case where an insurer had paid a ransom demanded in Bitcoin, the Commercial Court citing *LJY* made a similar order requiring the unknown defendants to identify themselves and provide an address for service, and was prepared to permit alternative service by filing the Claim Form at Court as well as by emailing "*any address provided by [the defendants] relating to*" the Bitcoin account controlled by the Persons Unknown and by delivering or leaving it at "*any physical address provided by [the*

defendants] that relates to the Bitcoin account". It appears, although it is not absolutely clear from the judgment, that no email address or physical address had ever actually been given by the Persons Unknown (communications appear to have taken place by means of notes left by each party on the encrypted system that had been hacked) so that filing the Claim Form at Court seems to have been the only method by which it was thought that it could possibly be brought to their attention (although it is not at all obvious that it would do so).

Form of Order

The order for an injunction should state clearly how to challenge the injunction by containing an express provision giving the challenger permission to apply.[175]

As noted above, the terms of the injunction sought should be sufficiently clear and certain, tied to the cause of action to which they relate, and expressed in language that a member of the public would be able to understand easily without having to obtain legal advice.

If there is a material change of circumstances after the obtaining of interim relief without notice against Persons Unknown which gives rise to a real prospect that the Court will amend or discharge the injunction then it is the applicant's duty to go back to Court within a reasonable time to have it considered.[176] This particularly applies to but is not limited to public authorities.

There should be provision for a periodic review of the order, if not a temporal limit on the injunction, whether it is interim or final; the cases suggest that in appropriate circumstances the Courts are willing to grant injunctions of relatively long duration. In *Mace Ltd v Persons Unknown* [2021] Stacey J granted an interim *quia timet* injunction to prevent Persons Unknown from trespassing on a Central London construction site for the purposes of "*urban exploration*". The injunction was granted for a 7-month period as this was deemed to be a reasonable and proportionate temporal limitation. In *Hackney v Grant* the Court was persuaded to continue prohibitions in a final order lasting for a year.

When it comes to seeking a final order the draft order proposed must contain an order for judgment against the defendants. The final order is part of the remedy to which the Court considers the claimant has demonstrated an entitlement in respect of those defendants against whom judgment is granted, based upon a cause of action or other entitlement following a trial on the merits or other judgment in the claimant's favour (for example upon default or summary judgment).

Practitioners should consider including other provisions in the order that might persuade the Court to grant what is sought – for example, an order that the Claimant should at least every 28 days confirm that copies of the order and accompanying signs directed to be placed on the land remain in place and are legible and if not to replace them as soon as reasonably practicable.[177]

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[175] See *Gammell* [25] endorsed in *Barking* at [152].

[176] *Enfield LBC v Persons Unknown* [2020] EWHC 2717 (QB) at [32].

[177] See *Cuciurean*.

Committal for contempt of Court

Where Persons Unknown cannot be served personally, this presents problems when it comes to enforcement since CPR Part 81 requires an order with a penal notice to be served personally if it is to give rise to committal proceedings. The Court must therefore be persuaded in such cases to dispense with personal service. Note that if the claimant has already obtained an order for alternative service in respect of the Claim Form and other documents in relation to the proceedings, that order does not give prospective permission for service of the committal application itself by an alternative method. A further order for alternative service will have to be sought at that stage.[178]

In *Hackney v Grant* the Judge refused to make an order providing that the claimant could not seek committal against any defendants who had not been served personally or by post, email or social media until 24 hours after service of the sealed order and other documents had been effected by various methods that were deemed to constitute adequate steps pursuant to CPR 6.27 and CPR 81.5. He considered that such an order would have "*amounted, in effect, to an order permitting service by unspecified electronic means on unspecified defendants, made without any evidence to support it*".

If the CPR 19.6 procedure is used then the order should clearly state on its face that it is addressed to the representative defendant and to the members of the class otherwise contempt proceedings against a member of the class may fail as the order is not clear on its face as to whether it applies to that member.

Dispensation should be expressly recorded on the face of the order to avoid arguments of the type that arose in *SoS for Transport, HS2 Limited v Cuciurean* [2020] EWHC 2614 (Ch). There, Marcus Smith J tackled some of the issues that arise in the context of a hearing to determine whether the defendant was in contempt of court for breaches of an injunction against Persons Unknown in the context of trespass over land. The Judge held that the Court granting the injunction had in effect dispensed with the personal service requirement (albeit not in express terms) and rejected the defendant's argument that even if there had been proper (alternative) service of the order there was an additional requirement of knowledge of the order or that the penal notice should have been specifically drawn to his attention in order for the contempt application to succeed.[179]

For a further example of successful contempt proceedings see *Gammell* at first instance. In that case as explained above individuals who had moved on to the claimant's land with caravans and to whom the terms of the interim injunction were communicated were found guilty of contempt of Court. The Court of Appeal dismissed the appeals against that finding.[180]

[178] See *ICBC Standard Bank Plc v Erdenet Mining Corp LLC* [2017] EWHC 3135 (QB) at [37].

[179] This was upheld by the Court of Appeal in *Cuciurean v SoS for Transport* [2021] EWCA Civ 357.

[180] [2006] 1 WLR 658.

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