A NEW CONSIDERATION FOR DEVELOPERS: THE TATE MODERNISES THE LAW OF PRIVATE NUISANCE

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Real Estate Alert

INTRODUCTION

Two neighbouring iconic developments in central London have come under much scrutiny in recent years in respect of the relationship between their uses and whether the use of one constitutes a private nuisance to the other. NEO Bankside is a development of 217 high-end apartments which was designed by Rogers Stirk Harbour + Partners and completed in September 2012. The Blavatnik Building is the extension to the Tate Modern (Tate) art gallery which opened in June 2016 with an open viewing gallery that is free to the public. The viewing gallery looks directly into some of the NEO Bankside apartments.

In February 2023, the Supreme Court held that visual intrusion by members of the public using the Tate Modern's viewing gallery from the Blavatnik Building was a private nuisance against the owners of neighbouring apartments in the NEO Bankside development.

The dispute has been in the courts since 2017 and the Supreme Court judgment is important as the result was not the anticipated verdict.

PRIVATE NUISANCE - THE LAW

Private nuisance at common law is the use of land which unduly interferes with another person's right to enjoyment of their land. The interference must be objectively substantial and exhibit a use of land which is not common or ordinary when judged in the context of the locality.

The Supreme Court's judgment against the owners of the Tate Modern is significant as it has extended the scope of what will constitute private nuisance.

FACTS OF THE CASE

The Tate Modern opened a 10-storey extension in 2016, the Blavatnik Building, which included a viewing gallery providing panoramic views of London. However, 34 metres from the viewing gallery is the NEO Bankside development. This development contains a series of high-end and distinctive sheer glass walled apartments. It has won many awards for its appearance with curtain glass walls. However, it has been estimated that the approximately 500,000 annual visitors to the Tate's viewing gallery have a direct view into the living areas of these expensive apartments.

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The owners of four of the NEO Bankside apartments launched a claim of private nuisance against the Tate's owners for interference with the enjoyment of their properties caused by visual intrusion of the visitors to the Tate Modern. The claimants especially noted the significant numbers of visitors and that their apartments had been observed through binoculars and photographed with some images being posted on social media.

DECISIONS OF THE COURTS

Whilst the High Court and the Court of Appeal rejected the private nuisance claim of the apartment owners, the Supreme Court held the Tate's owners had committed a private nuisance.

Crucially, whilst the Court of Appeal held that “mere overlooking” could never amount to private nuisance, the Supreme Court judgment considered that “visual intrusion” could amount to private nuisance in certain circumstances.

The decision was not unanimous, however, as only three of the five judges held the majority.

THE MAJORITY JUDGMENT

The majority view as stated by Lord Leggatt considered that there is no limit to what can constitute private nuisance. Whilst the law of private nuisance seeks to strike a balance between the conflicting rights of neighbouring landowners, anything that materially interferes with the enjoyment of rights in land could qualify.

In principle, it is not hard to envisage how being subjected to constant observation by the public whilst in your apartment would be an intolerable interference with your right to enjoy your property.

Applying this legal principle to the facts, the majority held that the Tate's use of its land was a substantial interference with the apartment owners' use of their land. In particular, the majority explained how the advent of modern technology precipitating in the use of camera phones and dissemination of photographs on social media added a further dimension of interference. Being filmed and photographed was materially more significant interference and intrusion than mere observation with the naked eye.

That being said, the majority declared a substantial interference will not necessarily lead to liability in private nuisance where the defendant is doing no more than making a common and ordinary use of its own land.

Applying the “ordinary use” principle to the facts, the majority held that inviting members of the public to look out from a viewing gallery was not ordinary but an exceptional use of the Tate's land, as opposed to the common and ordinary use of visitors to an art gallery.

The Tate's owners had sought to rely on the principle of give-and-take established in the 1862 case of Bamford v Turnley which professes that: “*Those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action.. a rule of give and take and live and let live*.”

However, the judges rejected the arguments pleaded by the Tate's owners in reliance on this principle, deciding:

- It was incorrect to suggest the apartment owners induced the nuisance by purchasing distinctive sheer glass residences near the Tate Modern; and

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- It was incorrect to suggest that the ability of those apartment owners to install blinds and curtains was capable of nullifying the substantial interference.

Therefore, the majority concluded that the Tate's owners were liable to the apartment owners in private nuisance.

REMEDY - INJUNCTION OR DAMAGES OR BOTH?

As a consequence of the ruling, the case has been sent back to the High Court where one or both of the following remedies may be imposed:

- An injunction against the Tate's owners to stop the use of its land in a way which is causing nuisance. For example, an order to close the south side of the viewing gallery; and
- An order for the Tate's owners to pay damages to the apartment owners to compensate for the nuisance.

The remedy most commonly imposed by courts for private nuisance is an injunction.

The legal burden is on the defendant to show why damages should be awarded instead of an injunction. It is anticipated that the loss to the public and waste of resources that would result in the ruling of an injunction will probably encourage the High Court to award damages.

Lord Neuburger anticipated that it was possible that significant sums might be awarded to the apartment owners, it is highly likely that a private settlement will now be reached out of court and the sums paid to the apartment owners may remain unknown.

THE MINORITY JUDGMENT

The minority judgment is relevant as the commentators generally did not expect the Supreme Court to rule in favour of the apartment owners.

The minority judgment agreed with the majority that in principle overlooking amounting to visual intrusion could constitute a private nuisance. But the minority judgment disagreed with the majority's approach to deciding whether there was a private nuisance in the immediate case.

Whilst the majority focused on whether the Tate's use of its land is ordinary, the minority believed that instead the courts should consider principles of reciprocity and compromise between neighbours and apply a standard of objective reasonableness informed by the character of the relevant locality.

The minority determined that applying such approach in the Tate case would result in a ruling that there had been no nuisance.

POTENTIAL IMPACTS OF THE CASE ON FUTURE DEVELOPMENTS AND CURRENT BUILDINGS

The case is unlikely to result in an opening of the floodgates to private nuisance claims from aggravated neighbours complaining of visual intrusion. However, the Supreme Court gave its own indication of the wider impact of its judgment:

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> "The circumstances in which land is used in an unusual way which gives rise to visual intrusion on a neighbouring property of sufficient duration and intensity to be actionable as a nuisance are likely to be rare. The potential for such claims has, however, been markedly increased by developments in technology."

The facts of the Tate case are unique, there are few city centre art galleries which feature a viewing platform in the United Kingdom, nonetheless, roof terraces are becoming more popular and buildings are being built in increasing proximity to each other in many cities as land prices increase. The principles endorsed and the analysis of intrusion made capable by new technology (smart phones and social media) in the Tate case are likely to be applied in future private nuisance disputes.

Therefore, developers, building owners, town planners, architects, and policy makers will need to be mindful of the decision in the Tate case in order to mitigate the risk of causing an actionable nuisance.

Arguments to stave off the risk of a private nuisance action by saying that the neighbours should just use curtains or blinds to protect their privacy, or that the neighbours induced the nuisance by purchasing apartments which are vulnerable to overlooking, are less likely to be persuasive in the future.

Developers should also consider the overlapping planning history of the two developments at issue in the Tate case. Initial planning applications were submitted in 2006 and construction started in 2011 for both projects. Further, the developers of the Tate Modern's extension and the NEO Bankside apartments were in discussions throughout planning and were aware of the possible overlooking issue from the viewing gallery. Indeed, the Tate originally planned for its extension to be an all-glass structure akin to the NEO Bankside apartments.

Despite the productive dialogue between developers, the overlooking issue was not definitively resolved. This left the Tate's owners more vulnerable to the risk of future tenants at the NEO Bankside development complaining of visual intrusion and bringing a claim in private nuisance.

It is also of note that the relevant planning authority did not consider the overlooking issue at the planning stage of either development. Therefore, following the Tate case, it is more likely that planning authorities will consider the possibility of nuisance from overlooking in its decisions.

SUMMARY

Following the Tate case, it is now established law that visual intrusion can constitute a private nuisance.

Whilst the facts of the Tate case are unique, the judgment poses new considerations for developers and other groups. Principally, how to mitigate the risk of facing private nuisance claims concerning developments and buildings which include features conducive to visual intrusion. It should be assessed whether such an intrusive feature is part of the common and ordinary use of the building. If the use is exceptional, there is a risk aggravated neighbours may use the Tate case as grounds for a private nuisance action.

Please contact the authors if you have any questions about the Tate case or its implications.

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