

2023 in the Law of Nuisance: Key Cases for Property Lawyers

21 September 2023



An extraordinary crop

- *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4
- *Jalla v Shell International Trading and Shipping Co Ltd* [2023] UKSC 16
- *Davies v Bridgend BC* [2023] EWCA Civ 80
- *The Manchester Ship Canal Company Ltd v United Utilities Water Ltd*
No 2 [2022] EWCA Civ 852
- *National Highways Ltd v Persons Unknown and others* [2023] EWCA
Civ 182 (among others)

Fearn v Tate



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Fearn v Tate: The Majority judgment

8 Core Principles of Private Nuisance

- Private nuisance is concerned with wrongful interference with a claimant's enjoyment to rights over land
- No conceptual limit to what can constitute a nuisance
- Not a question of "reasonable user" (without more): rather has the interference caused a substantial interference with the ordinary use of the claimant's land?
- Substantial interference is objective
- Priority to the general and ordinary use of land over more particular and uncommon uses
- What is a common and ordinary use of land is to be judged by reference to the character of the locality
- Coming to a nuisance is not a defence
- No defence to an action in nuisance that the activity is of public benefit

Fearn v Tate: The Minority judgment

The nature of the reasonable user principle

- Private nuisance is concerned to maximise the freedom of neighbouring landowners in a symmetrical way: does so with a principle of give and take
- Not just a question whether the defendant's use is common and ordinary
- Appropriate to consider the reasonable self-help measures which might be available to protect oneself against visual intrusion by neighbours in an urban environment

Jalla v Shell



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Jalla v Shell

- Continuing nuisance or one-off event?
 - One-off event: no continuing nuisance without repeated activity by the defendants or an ongoing state of affairs for which the defendants were responsible that was causing continuing undue interference with the claimants' use and enjoyment of their land
- Can a nuisance ever be a one-off event?
 - Assumed for the purposes of the appeal that it could be, heard argument, but left the question open

Davies v Bridgend BC



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Davies v Bridgend LB

- Are damages recoverable in nuisance for residual diminution in property value following encroachment by knotweed, but absent any physical damage?
 - Yes, if damage can be proved and the knotweed encroached on the claimant's land.
- Had the defendant caused the diminution in value if the encroachment (and therefore the damage) preceded the breach of duty?
 - Yes, because any attempt to clear the knotweed on his own land would have been futile unless and until the respondent cooperated.

Key points

- *Fearn* is fundamental, and may represent a significant expansion of the scope of private nuisance:
 - Key question is whether there was a substantial interference with the ordinary use of the claimant's land
 - No conceptual limit to what can constitute a nuisance, although does that include a one-off event?
- But it may not be the last word, and there are significant other nuisance cases currently before the UKSC

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Protecting Property: Injunctions

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Overview

- What is an injunction
- When to seek injunctive relief
- Brief procedural overview
- 10 top tips when seeking an injunction

What is an injunction?

- Remedy
- Interim vs. final
- With notice vs. without notice
- Prohibitory vs. mandatory
- Reactionary vs. precautionary

When to seek injunctive relief

- Unlawful interference with property or proprietary rights
- Injunctive relief vs. action for possession (see ***SS for Environment and Rural Affairs v Meier* [2009] UKSC 11**)

Brief procedural overview

- Decisions to be made at the outset:
 - Is interim relief required; if so
 - Is that application to be made with or without notice; and
 - Is there time to issue the claim prior to the application?
- Claim Form (Part 7 or Part 8) and PoC or Details of Claim (as applicable)
- Interim application (if applicable): N244 (High Court) or N16A (County Court)
- Injunction order: standard forms (eg. N16, CH11 or Annexes to PD 25A) or idiosyncratic drafting
- Service of the injunction order

Top tip 1: where to issue?

- High Court or County Court
- If High Court – KB or ChD?
- Practical considerations

Top tip 2: which Claim Form?

- Part 7 or Part 8
- Is there a Rule that requires the Part 8 procedure to be used?

Top tip 3: defendants

- Named defendants
- Persons Unknown
 - Must define the category of Persons Unknown by reference to their conduct which is alleged to be unlawful without express reference to legal concepts – eg. “trespass” – or the subjective intention of the defendants, where possible (***Hampshire Waste Services Ltd* [2003] EWHC 1738 (Ch)**)
 - At present, the law permits both interim and final injunction orders against Persons Unknown (***London Borough of Barking & Dagenham* [2022] EWCA Civ 13**). The UKSC heard the appeal in this litigation in February 2023, judgment is awaited

Top tip 4: the interim hearing

- With or without notice (or something in between?)
- If without notice:
 - Remember full and frank disclosure
 - Make a full note of the hearing and expect to have to give an undertaking to serve that note with the Claim Form, application and any order made
- Most injunctions seeking to protect property will engage the ***American Cyanamid*** principles. However, if the relief sought might affect the Convention right to freedom of expression, the **Human Rights Act 1998, s12** must be considered. If injunctive relief is being sought against trespassing protestors, for example, consider whether s12 (and especially s12(3) applies)

Top tip 5: the substantive Order

- ***Ineos* [2019] EWCA Civ 515 at [34]** sets out the requirements of an injunction order in relation to Persons Unknown, but the relevant requirements should also be considered when crafting prohibitions against named defendants
- ***Cuadrilla* [2020] EWCA Civ 9 at [50]** caveats the *Ineos* requirements in that conduct that is not tortious or otherwise unlawful can be restrained if such a restriction is necessary in order to afford effective protection of the rights to the claimant in the particular case
- Where mandatory relief is sought, the actions that the defendant must complete, and the deadline for doing so, must be clearly stated in the injunction order

Top tip 6: alternative service

- Do you need the assistance of an alternative service order to serve the Claim, application and any injunction order made?
- CPR 6.15 and CPR 6.27
- Remember – absent an order for alternative service, or an order dispensing with service, the default position is that an injunction order must be personally served to engage the contempt jurisdiction
- A Claimant must comply strictly with the terms of an alternative service order for service to be effective
- ***Cameron [2019] UKSC 6 at [21]*** "the mode of service should be one which can reasonably be expected to bring the proceedings to the attention of the defendant"

Top tip 7: Other essentials for the Order

- Penal notice
- Liberty to apply (include whenever the injunction is against Persons Unknown, sought without notice, or in circumstances where a Defendant did not attend)
- Consider review clauses, or time-limited orders, especially in Persons Unknown injunctions

Top tip 8: undertakings

- Cross-undertaking – where the claimant is a local authority and the action involves duties of law enforcement, the Court should consider exercising its discretion to not require an undertaking in damages from the claimant (***Kirklees Metropolitan BC* [1993] AC 227**)
- Claimants should consider seeking undertakings from the defendants, where practicable. Key points to remember:
 - The undertaking is given to the Court
 - If the undertaking is not given in the context of a wider settlement or compromise between the claimant and defendant, the wider issues remain at large (eg. costs)
 - The giving of an undertaking and disposal of the injunction proceedings against the relevant defendant (if applicable) should be recorded in an order

Top tip 9: progress the proceedings

- Once an interim order has been sought and obtained, ensure that the proceedings continue to progress to avoid allegations of abuse of process (***London Borough of Havering* [2021] EWHC 2448 (QB)**)
- Active case management

Top tip 10: enforcement

- Injunctions (and undertakings) may be enforced by way of committal proceedings for contempt of court. When serving and monitoring compliance with an injunction order, it is useful to have the requirements of a contempt application in mind
- CPR 81
- Burden of proof is 'beyond reasonable doubt'
- The claimant will have to prove service or actual knowledge of the relevant injunction order, as well as the substantive elements of the alleged contempt
- Maximum penalty is 2 years imprisonment and/or an unlimited fine

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