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WHITHER PRIVACY PROTECTION IN THE LAW OF NUISANCE

Privacy-related concerns often feature in disputes involving the tort of private nuisance. Despite the growing importance ascribed to the protection of an individual's privacy in the modern world, English law has tended to shy away from allowing such concerns to influence the thinking behind the more traditional areas of law (like nuisance). This article examines and questions the various notions that underpin this English approach. Using the recent decisions of *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) and *Giles Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 as relevant case studies, the authors posit that the tort of private nuisance can and should be used to accommodate privacy-related claims in appropriate circumstances.

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I. Introduction

1 Privacy is a big, but often misunderstood, word. Unsurprisingly, broadly worded and at times lofty notions of privacy abound in the case law. Lord Nicholls has said that a "proper degree of privacy is essential for the well-being and development of an individual".[2] As a concept, privacy essentially gives effect to "the fundamental value of personal autonomy"[3]

1 The authors are grateful to the anonymous reviewer for the kind and helpful comments.
2 *Campbell v MGN Ltd* [2004] 2 AC 457 at [12].
3 *Douglas v Hello Ltd!* [2001] QB 967 at [126], *per* Sedley LJ.

or to "human autonomy and dignity".[4] Such a concept naturally has the advantage of a broad applicability to a plethora of legal situations, with the concept itself embodying a range of possible meanings.[5] As a corollary, the doctrine is inherently and sufficiently flexible in fashioning the appropriate rights, remedies and protections in most, if not all, cases of privacy invasion.

2 Yet, it is perhaps this doctrinal malleability that, ironically, has led to the long-standing struggle in the legal community to accurately identify what privacy *is*, and the areas of law to which it might extend. In an illuminating piece, Megan Richardson outlined the "world of legal disunity",[6] noting that there appears to be "little by way of consensus"[7] amongst nations as to the concept of privacy. This is in stark contrast to the High Court of Australia's fairly recent observation, that an individual's privacy has been "recognised in all modern bills of rights" and "has achieved a status in international human rights law".[8] That that vaunted "status" poignantly includes recognition and placement in the Universal Declaration of Human Rights[9] and the European Convention on Human Rights[10] ("ECHR"), amongst others,[11] is a realism that is surely not to be scoffed at.[12] But to illustrate her point, Richardson made specific reference to the differing treatment that jurisdictions accord to the potential overlaps between the protection of privacy and property torts.[13]

3 It is this specific tussle in English law that is the focus of analysis in this article, namely whether the concept of privacy can be accommodated and given effect to within the realms traditionally governed by property torts. And it is to the highly apposite twin decisions of *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery*[14] and *Giles Fearn v The*

4 *Campbell v MGN Ltd* [2004] 2 AC 457 at [51], *per* Lord Hoffmann.
5 See Bert-Jaap Koops *et al*, "A Typology of Privacy" (2017) 38(2) U Pa J Int'l L 483.
6 Megan Richardson, "A Common Law of Privacy?" [2021] Sing JLS 6 at 7.
7 Megan Richardson, "A Common Law of Privacy?" [2021] Sing JLS 6 at 7.
8 *Smethurst v Commissioner of Police* [2020] HCA 14; (2020) 376 ALR 575 at [24].
9 A/RES/3/217 A, adopted by the United Nations General Assembly, 183rd Plenary Meeting (10 December 1948) Art 12.
10 (4 November 1950), 213 UNTS 221, Art 8 (entry into force 3 September 1953) (hereinafter "ECHR").
11 The list also includes the American Convention on Human Rights (22 November 1969), 1114 UNTS 123, Art 11 (entry into force 18 July 1978); the African Charter on Human and Peoples' Rights (27 June 1981), 1520 UNTS 217, Art 6 (entry into force 21 October 1986) and the International Covenant on Civil and Political Rights (19 December 1966), 999 UNTS 171, Art 17 (entry into force 23 March 1976) (hereinafter "ICCPR").
12 Megan Richardson, "A Common Law of Privacy?" [2021] Sing JLS 6 at 7.
13 Megan Richardson, "A Common Law of Privacy?" [2021] Sing JLS 6 at 12.
14 [2019] EWHC 246 (Ch).

Board of Trustees of the Tate Gallery[15] (collectively "*Fearn*") that the authors will make convenient reference for purposes of discourse. *Fearn* of course involved the interplay between the scope of rights protected by the tort of private nuisance and the plausible (concomitant) accommodation of legal protection for an individual's *spatial* privacy. It will be argued that the tort of private nuisance *can*, and indeed *should*, be employed in appropriate circumstances to help address and resolve an individual's privacy-related concerns.

II. The *Fearn* decisions

4 The claimants in *Fearn* were the owners of four flats in a development known as Neo Bankside, situated on the south bank of the River Thames in London.[16] Neo Bankside was designed, planned for and constructed between 2006 and September 2012. At the same time, between 2006 and 2016, the building adjacent to Neo Bankside – the Tate Modern ("Tate") – built an extension known as the Blavatnik Building.[17]

5 The Tate is a popular tourist attraction, and it was therefore unsurprising that the Blavatnik Building featured a viewing gallery that provided a "striking view" of the north, east and west of London, albeit with a "less interesting view" to the south.[18] It was largely this south-facing view that led to the legal dispute in *Fearn*. As it turns out, the Blavatnik Building is built roughly parallel to the winter gardens of Block C of Neo Bankside, in which the claimants reside. This allowed visitors to the viewing gallery to see straight into the living accommodation of the claimants' flats, with some even taking photographs and peering into these homes with binoculars. Numerous photographs of the claimants' flat interiors were subsequently posted on social media, reaching an estimated audience of 38,600 between June 2016 and April 2018.[19]

6 To its credit, the Tate made two attempts to address the problem – by first requesting its visitors to respect the residents' privacy and then instructing the security guards to stop all photography.[20] These measures, however, failed to remedy the situation, whereupon the claimants commenced proceedings against the Tate in the law of nuisance and

15 [2020] EWCA Civ 104.
16 *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [1].
17 *Giles Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 at [6].
18 *Giles Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 at [6].
19 *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [83].
20 *Giles Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 at [8].

under the UK Human Rights Act 1998[21] ("HRA"). As observed by the High Court judge (Mann J), these actions were initiated to "protect what are said to be rights of privacy (putting it loosely)".[22]

7 The direct privacy action founded upon the statute failed before Mann J (with no further appeal). So far as the nuisance claim was concerned, Mann J considered that had it been necessary to do so, he would have been minded to conclude that the tort of nuisance would have been "capable, as a matter of principle, of protecting privacy rights, at least in a domestic home" (though it was ultimately decided that there was no actionable nuisance on the facts).[23] The Court of Appeal, however, disagreed with Mann J on the point of principle and held that the common law cause of action for private nuisance could not be extended to protect against inappropriate overlooking and what were essentially invasions of (spatial) privacy, preferring instead to leave any further development in laws which bear on privacy to Parliament. With respect, the authors prefer and agree with Mann J's reasoning and will demonstrate in this article why the law of nuisance (despite its juridical foundations as a species of property torts) can yet accommodate privacy-related claims of the present nature.

III. Overlooking and the invasion of spatial privacy

8 From its widespread acceptance, one can discern and therefore "accept that privacy is a 'good thing' and that humans are entitled to it as autonomous beings, pursuing their own conception of the good life".[24] Put simply, privacy is a fundamental and universal human value that all can relate to and must therefore respect.

9 If so, it logically follows that the law *ought* to respond, in appropriate circumstances, to protect an individual's privacy from unjustified intrusion, and states can legitimately do so.[25] Legal protection

21 c 42.

22 *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [1].

23 *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [169]–[178].

24 Paul Wragg, "Recognising a Privacy-invasion Tort: The Conceptual Unity of Informational and Intrusion Claims" (2019) 78 Camb LJ 409 at 413.

25 ICCPR Arts 17(1) and 19(3)(a); *Mosley v UK* 48009/08 [2011] ECHR 774 at [111] and [114]; United Nations Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (A/HRC/14/23, 20 April 2010) at para 74; United Nations Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (A/66/290, 10 August 2011) at para 15; United

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should therefore be available to those "who simply find themselves subjected to an unwanted intrusion into their personal lives"[26] or, in deference to Art 8(1) of the ECHR, where the defendant's conduct has "[interfered] with the personal autonomy of the individual".[27] But what precisely is it about an individual's autonomy or personal life that the law should endeavour to protect?

10 Fundamentally, it boils down to an individual's right "to be let alone", a theory "immortalised"[28] by Samuel Warren and Louis Brandeis in their celebrated article of 1890.[29] A helpful framework for discerning the contours of this right was offered years later by William Prosser, who conceived of four separate privacy torts:[30]

> (a) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
>
> (b) public disclosure of embarrassing private facts about the plaintiff;
>
> (c) publicity which places the plaintiff in a false light in the public eye; and
>
> (d) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Prosser explained this taxonomy as comprising "four distinct kinds of invasion of four different interests of the plaintiff" which "have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be let alone'".[31] Of direct relevance to this article – in understanding the sort of interference with an individual's privacy that

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Nations Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (A/HRC/20/17, 4 June 2012) at para 81; United Nations Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (A/HRC/32/38, 11 May 2016) at para 7; United Nations Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (A/71/373, 6 September 2016) at para 7; Sarah Joseph & Melissa Castan, *The International Covenant on Civil and Political Rights* (Oxford University Press, 3rd Ed, 2013) at para 18.44.

26 *Douglas v Hello Ltd!* [2001] QB 967 at [126], *per* Sedley LJ.

27 *ZXC v Bloomberg LP* [2020] EWCA Civ 611 at [46], *per* Simon LJ. See also *Douglas v Hello! Ltd* [2001] QB 967 at [126]; *Campbell v MGN Ltd* [2004] 2 AC 457 at [50]–[51] and *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) at [7].

28 *C v Holland* [2012] 3 NZLR 672 at [11], *per* Whata J.

29 Samuel Warren & Louis Brandeis, "The Right to Privacy" (1890) 4(5) Harv L Rev 193 (especially at 195).

30 William Prosser, "Privacy" (1960) 48(3) Cal L Rev 383 at 389. See also *Restatement of the Law Second, Torts* (The American Law Institute, 1977) § 652.

31 William Prosser, *The Law of Torts* (West Publishing Co, 4th Ed, 1971) at p 804.

the law in general should endeavour to protect – is the invasion of the first kind: unreasonable and unjustified intrusions upon an individual's *seclusion* or *solitude*. Given the exposition above and particularly so in the modern context, it may sensibly be argued that individuals *must* have a right to lead, to some reasonable extent, a secluded and private life – free from the public gaze and prying eyes of others. The law must accordingly respond in appropriate ways to protect the individual's private or personal space, or what the authors shall term "spatial privacy".

11 Relevantly, in elucidating the parameters of the tort of intrusion upon an individual's seclusion or solitude, Prosser observed that the privacy action had already extended beyond cases of "physical intrusion" (such as intruding into the plaintiff's home or hotel room)[32] to include "*peering into the windows of a home*"[33] [emphasis added]. What is particularly significant about the latter extension of the law is an American decision cited by Prosser in his article on "Privacy"[34] – namely, *Pritchett v Board of Commissioners of Knox County*[35] – in which the court in Indiana had granted relief on the basis of *nuisance* liability.[36]

12 Furthermore, the following matters were also considered by Prosser to be salient in this branch of the privacy tort:

(a) "there must be something in the nature of prying or intrusion";[37]

(b) "the intrusion must be something which would be offensive or objectionable to a reasonable man";[38]

32 William Prosser, "Privacy" (1960) 48(3) Cal L Rev 383 at 389.

33 William Prosser, "Privacy" (1960) 48(3) Cal L Rev 383 at 390. See, in particular, fn 67, which cites a list of US cases in support of this proposition.

34 William Prosser, "Privacy" (1960) 48(3) Cal L Rev 383 at 390, fn 67.

35 42 Ind App 3; 85 NE 32 (1908).

36 See *Pritchett v Board of Commissioners of Knox County* 42 Ind App 3; 85 NE 32 (1908) ("*Pritchett*"). It should be noted, however, that while the plaintiff's cause of action in *Pritchett* was specifically rooted in the tort of *nuisance* (one of the grounds of complaint raised by the plaintiff, being the owner of a residence that was located adjacent to a county jail, pertained to the overlooking by the inmates from the jail windows into the plaintiff's home), the Appellate Court of Indiana, in reversing the trial judge's decision, observed parenthetically that the overall circumstances of this case (as borne out by the evidence) "show, too, that [the plaintiff's] right of privacy has been invaded" – which "right is well recognized" and "derived from natural law" (42 Ind App 3 at 13; 85 NE 32 at 35). In granting relief, the court ordered that the prison windows on the side next to the plaintiff's residence be closed.

37 William Prosser, "Privacy" (1960) 48(3) Cal L Rev 383 at 390.

38 William Prosser, "Privacy" (1960) 48(3) Cal L Rev 383 at 390–391.

(c) "the thing into which there is prying or intrusion must be, and be entitled to be, private";[39] and

(d) "when [an individual] is confined to a hospital bed, and in all probability when he is merely in the *seclusion of his home*, the making of a *photograph* without his consent is an *invasion of a private right*, of which he is entitled to complain"[40] [emphasis added].

In summary, what is evident from Prosser's thesis is that the unreasonable and unjustified invasion of one's spatial privacy is clearly the sort of interference – impinging on the privacy interests of individuals – for which the law must provide adequate redress. The argument can also be made that certain cases of unauthorised overlooking and peering into the windows of homes ought, in theory, to be actionable under the privacy tort of intrusion upon seclusion and, in one early American case at least, on the basis of *nuisance* liability. Pertinently, it should be borne in mind that the taking of a photograph of someone in the seclusion of his home without consent can form the basis of a legitimate complaint and that the law of nuisance is not always irrelevant in the context of the present discussion.

IV. Relevance of Article 8 of the European Convention on Human Rights and the UK Human Rights Act 1998 to the law of nuisance

13 In *Douglas v Hello Ltd!*,[41] Sedley LJ felt that the common law at that time was "in a position to respond to an increasingly invasive social environment by affirming that everybody has a right to some private space".[42] The problem, however, resided in "the common law's perennial need (for the best of reasons, that of legal certainty) to appear not to be doing anything for the first time".[43] These sentiments, in the authors' view, aptly sum up the current state of the English law of nuisance and the relationship it has with any complaint of privacy invasion.

14 Much has been said before about Art 8 of the ECHR ("Art 8") and the HRA. The authors merely wish to reiterate two points. First, the broad scope of the Art 8 right – to respect one's private and family life, home and correspondence – articulated in the Strasbourg case law has reinforced

39 William Prosser, "Privacy" (1960) 48(3) Cal L Rev 383 at 391.
40 William Prosser, "Privacy" (1960) 48(3) Cal L Rev 383 at 392.
41 [2001] QB 967.
42 *Douglas v Hello Ltd!* [2001] QB 967 at [111].
43 *Douglas v Hello Ltd!* [2001] QB 967 at [111].

the view that the umbrella concept of privacy entails the law's protection of an individual's *informational* as well as *physical* or *spatial* privacy interests.[44] As Nicole Moreham has explained in reference to this "two-part – physical and informational – conception of the privacy interest", "the disclosure of private material is not a prerequisite for an Article 8 claim: physical intrusion effected by filming, photographing or recording is in some circumstances actionable *per se*".[45] Second, it has been asserted yet again that the HRA "obliges the [English courts as public authorities] to interpret, apply and develop English law in conformity with the [ECHR]".[46] In other words, there is now an institutional obligation on the part of the English judiciary to (incrementally) develop the common law in such a manner that makes it compatible with, and gives appropriate effect to, Art 8 (as well as other Convention rights).[47]

15 In so far as the *informational* conception of the Art 8 privacy interest is concerned, the English courts have, most admirably, adapted the action for breach of confidence in recent years to provide a legal remedy for the unauthorised disclosure of private or personal information.[48] This movement in English law has also been referred to as the "rechristening" of the tort as "misuse of private information".[49]

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44 See *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 (QB) at [23], *per* Eady J: "It is important always to remember that the modern law of privacy is not concerned solely with information or 'secrets': it is also concerned importantly with *intrusion*." [emphasis in original]. See also *Goodwin v News Group Newspapers Ltd* [2011] EWHC 1437 (QB) at [85], *per* Tugendhat J: "The right to respect for private life [in Art 8(1) of the ECHR] embraces more than one concept. … I shall refer to the two components of the right as 'confidentiality' and 'intrusion'". Notably, Tugendhat J's *dicta* was subsequently endorsed by Lord Neuberger in *PJS v News Group Newspapers Ltd* [2016] AC 1081 at [58]. See further Nicole Moreham, "Beyond Information: Physical Privacy in English Law" (2014) 73(2) Camb LJ 350 (especially at 355–356).

45 Nicole Moreham, "Beyond Information: Physical Privacy in English Law" (2014) 73(2) Camb LJ 350 at 357.

46 *HRH The Duchess of Sussex v Associated Newspapers Ltd* [2021] EWHC 273 (Ch) at [28], *per* Warby J.

47 See *Douglas v Hello Ltd!* [2001] QB 967 at [111], *per* Sedley LJ. See also Gavin Phillipson & Alexander Williams, "Horizontal Effect and the Constitutional Constraint" (2011) 74 MLR 878 at 878–879. *Cf*, further, *Jones v Tsige* (2012) ONCA 32; 333 DLR (4th) 566 at [45]–[46].

48 Beginning, arguably, with the landmark decision of the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457 ("*Campbell*"). As Lord Hoffmann pointed out in *Campbell* (at [43]), "the equitable action for breach of confidence … has long been recognised as capable of being used to protect privacy".

49 See *McKennitt v Ash* [2008] QB 73 at [8]; *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103 at [21]; *OBG Ltd v Allan* [2008] AC 1 at [255] and [272] and, generally, *Google Inc v Vidal-Hall* [2015] EWCA Civ 311; [2016] QB 1003.

16 On the other hand, *absent* an express recognition by the English courts of a stand-alone tort of intrusion upon seclusion, there is no reason in principle why the tort of private nuisance – *within* the present framework and ambit of the action – cannot provide a more robust response in cases involving the unreasonable and unjustified invasion of an individual's *spatial* privacy. This would be particularly relevant *in light of* Art 8 or HRA developments.

17 The question, then, is this: Are there any compelling reasons why the English courts should carefully re-examine whether, in light of relevant legal developments elsewhere and only in deserving cases (such as *Fearn*), the common law action in nuisance is indeed in a position *today* "to respond to an increasingly invasive social environment"?[50]

18 Looking further afield, it has, for instance, been recognised in New Zealand[51] that a tort of intrusion upon seclusion (that protects an individual's spatial privacy) is "entirely compatible" with, and a "logical extension or adjunct" to, the *Hosking*[52] tort of wrongful publication of private facts or the English tort of misuse of private information (both of which protect an individual's informational privacy).[53] The Ontario Court of Appeal has likewise observed that "[t]he right to informational privacy closely tracks the same interest that would be protected by a cause of action for intrusion upon seclusion".[54] Curiously, why is the English judiciary (just like the Court of Appeal in *Fearn*) so reluctant to develop the law of nuisance along these lines (even if incrementally)?

19 The authors are therefore in complete agreement with Mann J who, at first instance in *Fearn*, duly recognised that the English courts *could* "give effect to [Art 8] by developing existing causes of action" where appropriate, and this was indeed the case in so far as private information was concerned.[55] Emphasising that Lord Hoffmann himself had "regarded a claim in nuisance as being potentially one which protects

50 See para 13 above.
51 See *C v Holland* [2012] 3 NZLR 672 at [75] and [86].
52 *Hosking v Runting* [2005] 1 NZLR 1.
53 According to Whata J in *C v Holland* [2012] 3 NZLR 672 at [75], "[t]hey logically attack the same underlying wrong, namely unwanted intrusion into a reasonable expectation of privacy". Commentators also generally agree that informational and physical or spatial privacy protect the same values of autonomy and human dignity, with one of them further asserting that these two forms of privacy are indeed "conceptually inseparable": see Paul Wragg, "Recognising a Privacy-invasion Tort: The Conceptual Unity of Informational and Intrusion Claims" (2019) 78 Camb LJ 409 at 420.
54 *Jones v Tsige* (2012) ONCA 32; 333 DLR (4th) 566 at [66].
55 *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [172].

privacy",[56] Mann J felt fortified in holding the view that since the coming into force of the HRA, "the law of nuisance ought to be, and is, capable of protecting privacy rights from overlooking in an appropriate case".[57] It was also acknowledged that there would otherwise be a lacuna in the legal protection of privacy in the home. As one commentator has observed (and the authors agree), it is true that Mann J's decision on this point "breaks new ground", "[b]ut that does not render it incorrect".[58]

20 It also cannot be denied, as Gavin Phillipson has observed, that one effect of the HRA is to "level up" all rights, and the right to privacy "may indeed gain from the Act".[59] Accordingly, it stands to reason that privacy-related causes of action – *including* the tort of nuisance – must surely stand to "gain from the Act" as well, as will (broadly speaking) cases in which the claimant is seeking a remedy for the unjustified intrusion of his privacy interests. Finally, in addressing the controversial issue of "horizontal effect", it was suggested that the HRA "be taken as a signal that the judiciary should henceforth treat the Convention rights as fundamental principles *even in private adjudication*"[60] [emphasis added].

21 To now suggest – contrary to the Court of Appeal's ruling in *Fearn* – that the law of nuisance is indeed in a position "to respond to an increasingly invasive social environment"[61] and is, in principle, "capable of protecting privacy rights from overlooking in an appropriate case"[62] is not at all an attempt at seeking a radical expansion of the tort by any measure. Indeed, given the authors' arguments elsewhere on the rightful scope of nuisance liability,[63] this might not even be regarded as an "incremental" development of the common law, but simply a judicious application of established principles to what is arguably a novel set of facts.

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56 *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [173]. See Lord Hoffmann's *dicta* in *Wainwright v Home Office* [2004] 2 AC 406 at [18]. To similar effect, see *Hosking v Runting* [2005] 1 NZLR 1 at [118].

57 *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [174].

58 Jonathan Morgan, "(Net) Curtains for Modern Architecture? Privacy, Nuisance and Human Rights" (2019) 78(2) Camb LJ 273 at 275.

59 Gavin Phillipson, "The Human Rights Act, 'Horizontal Effect' and the Common Law: A Bang or a Whimper?" (1999) 62(6) MLR 824 at 848.

60 Gavin Phillipson, "The Human Rights Act, 'Horizontal Effect' and the Common Law: A Bang or a Whimper?" (1999) 62(6) MLR 824 at 848. See also *Campbell v MGN Ltd* [2004] 2 AC 457 at [17]–[18], *per* Lord Nicholls, and [49]–[50], *per* Lord Hoffmann.

61 See para 13 above.

62 See para 19 above.

63 See generally Saw Cheng Lim & Aaron Yoong, "Throwing Stones in Glass Houses: Protecting Privacy under the Law of Nuisance" *Tort Law Review* (forthcoming).

A. Purported overlay of nuisance and Article 8?

22 Separately, the interplay between nuisance, privacy and Art 8 was also brought under scrutiny in the Court of Appeal's judgment in *Fearn*. The court curiously laid down four reasons[64] why "*overlaying* the common law tort of private nuisance with Article 8 would significantly distort the tort in some important respects"[65] [emphasis added]. In the authors' view, however, there is no question at all of "overlaying" the nuisance action with all the principles and teachings of Art 8. It does not appear that this was the approach adopted by Mann J in his analysis at trial;[66] neither are the authors in support of such an approach when considering the viability of "extending" the tort of nuisance to overlooking in light of Art 8. Indeed, any attempt at conflating the law of nuisance with the law of privacy pursuant to Art 8 (with its concomitant balancing exercise) must be rejected outright for being doctrinally incoherent and untenable. It bears repeating that to judicially interpret and apply the tort of nuisance – for instance, to combat egregious cases of overlooking – in a manner that is compatible with, and gives appropriate effect to, Art 8 or HRA developments is in no way suggestive of "overlaying the common law tort of private nuisance with Article 8".

23 With these cautionary remarks in mind, the authors proceed to examine why the Court of Appeal said that there were "a number of errors of principle in the way [Mann J] approached the issue of the relevance of Article 8".[67] Taking into account Art 8, the appellate court proffered the following analytical framework:[68]

> In principle, the analysis should have been to ask whether, if the tort of nuisance does not otherwise extend at common law to overlooking: (1) *there was nevertheless an infringement of Article 8*; and (2) if so, whether it is appropriate to extend the common law in order to provide a remedy for the claimants and so avoid a breach of HRA 1998 s.6 on the part of the courts as a public authority. [emphasis added]

In other words, it would have been necessary for a claimant to show that Art 8 had been engaged on the facts and because of this, it would have

64 See *Giles Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 at [91]–[94].

65 *Giles Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 at [91].

66 Indeed, Mann J provided this clarification in his judgment: "The assessment that I have carried out is the usual one applicable to nuisance, even if privacy protection now arises via the application of Article 8": see *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [220].

67 *Giles Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 at [87].

68 *Giles Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 at [88].

been appropriate to extend the common law tort of nuisance to provide a remedy. Neither requirement was satisfied on the facts of *Fearn*.

24 With respect, the authors are unable to see why it is necessary to first establish that there has been an infringement of the Art 8 right *before* one is permitted to consider what is essentially an abstract question of principle in a very different branch of the law, namely whether the tort of nuisance is capable of protecting the privacy rights of individuals (at least in a domestic home). The answer to this latter question primarily involves a court's consideration – *within* that body of law – of arguments from first principles as well as a survey of judicial precedents that have considered comparable issues on privacy intrusions,[69] particularly in the context of overlooking into homes. Whether or not the tort of nuisance can be effectively invoked to protect against inappropriate overlooking (and thereby safeguard an individual's spatial privacy) must, of course, depend on the specific facts and circumstances of each case. As Mann J rightly observed, "[t]hat does not mean … that *all* overlooking becomes a nuisance"[70] [emphasis added].

25 It is true that a determination of an Art 8 infringement will necessarily have to take account of the relevant Art 8 jurisprudence, including the case law of the European Court of Human Rights. This is obviously not essential – if at all relevant – for a finding of nuisance, with its own (long-established, albeit antiquated) body of case law. However, this is not to say that the tort of nuisance cannot, by drawing on and, if necessary, developing its *own* jurisprudence, be applied in appropriate fact situations to *also* give effect to the privacy rights of individuals now protected by Art 8.[71] Crucially, while these are *distinct* bodies of law (the provenance and evolution of each being vastly different from the other), there is no reason why they cannot share a common objective – on the basis that at least one of the underlying *values* that the Art 8 right and common law action in nuisance protects is the "right to privacy" – and be used to achieve a fair outcome in a given case. This much is clear to the authors, as the following observations by Mann J also serve to illustrate:[72]

69 *McKennitt v Ash* [2008] QB 73 being a relevant example.

70 *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [175].

71 After all, Mann J rightly observed that "Lord Hoffmann [in *Wainwright v Home Office* [2004] 2 AC 406 at [18] regarded a claim in nuisance as being potentially one which protects privacy": see *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [173]. To similar effect, see *Hosking v Runting* [2005] 1 NZLR 1 at [118].

72 *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [175].

> Whether anything is an invasion of privacy [under Art 8] depends on whether, and to what extent, there is a legitimate expectation of privacy. That [separate] inquiry is likely to be *closely related to the sort of inquiry that has to take place in a nuisance case* into whether a landowner's use of land is, in all the circumstances and having regard to the locality, unreasonable to the extent of being a nuisance … [emphasis added]

Thus reasoned, the authors are of the view that there would be *no* need for the trial judge to first determine if there has been an infringement of Art 8 on the facts *before* considering whether, in principle, the tort of private nuisance can provide legal redress in cases where an individual's spatial privacy has been intruded upon due to inappropriate overlooking. To insist otherwise would be to wrongly conflate the two distinct bodies of law[73] – one that is rooted in human rights considerations or legislation and the other in the vindication of a claimant's interests and rights over his land at common law. Ultimately, this can only result in doctrinal confusion and uncertainty, an outcome that is most undesirable.

V. Relevance of Article 8 to the facts in *Fearn*

26 Beyond the doctrinal tussle, the facts of *Fearn* further demonstrate why Art 8 may be of especial relevance in disputes involving property torts, in particular the tort of nuisance. The authors agree with the Court of Appeal that at its heart, the dispute in *Fearn* was all to do with overlooking and the "invasion of privacy"[74] – namely, the unreasonable and unjustified intrusion upon the claimants' seclusion or solitude, and hence their spatial privacy.[75]

27 First, as Mann J at trial had also found,[76] it is apparent that "the alleged threat or assault to the [claimants'] personal autonomy" – in order for Art 8 to be engaged – had attained "a certain level of *seriousness*" [emphasis added] on the facts.[77] Mann J, for instance, observed that the intrusion caused by overlooking from the viewing gallery was

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73 Or would unnecessarily "overlay" the tort of nuisance with Art 8 of the ECHR: see *Giles Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 at [91].

74 *Giles Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 at [84].

75 "*Fearn v Tate* … concerned a traditional and exclusively spatial sense of seclusion – that of the right to privacy in the home": Paul Wragg, "Recognising a Privacy-invasion Tort: The Conceptual Unity of Informational and Intrusion Claims" (2019) 78 Camb LJ 409 at 436.

76 See, in particular, *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [85] and [87]–[88].

77 *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414; [2010] 1 WLR 123 at [22], *per* Laws LJ. See also *M v Secretary of State for Work and Pensions* [2006] 2 AC 91 at [83], *per* Lord Walker and *R (Gillan) v Commissioner of Police for the Metropolis* [2006] 2 AC 307 at [28], *per* Lord Bingham ("But it is clear Convention

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a "*material* intrusion into the privacy of the living accommodation"[78] [emphasis added].

28 Second, if an unjustified invasion of informational privacy was actionable – for breach of confidence and/or misuse of private information – notwithstanding that the claimant had been photographed or filmed in a *public* place,[79] it is difficult to envision why the claimants in *Fearn* would not have been entitled to a "reasonable expectation of privacy" within their homes. For this reason, it is likewise difficult to appreciate why there can be no reasonable expectation of privacy unless the claimants had adopted the requisite "protective measures" in their homes.[80] If that be the case, then it must follow that it is incumbent on the claimants (or any affected homeowner in Neo Bankside, for that matter) to keep their blinds lowered and curtains drawn throughout the opening hours of the viewing gallery so as to ensure maximum privacy – for otherwise, there is *always* a risk of an unanticipated overlooking. Is this, however, a sensible and fair outcome?

29 In the authors' view, provided there is *ordinary* use of property for the purposes of residence, *all* homeowners – including those who live in "glass houses" – must be entitled to a reasonable expectation of privacy (or a "legitimate expectation" of protection)[81] regardless of the architecture and design of their homes, the availability of "protective measures" notwithstanding. Practically all dwelling houses everywhere (in urban areas in particular), to a greater or lesser extent, make use of glass today. But it makes no sense whatsoever for the law to distinguish between houses or buildings that utilise plenty of glass (and hence provide no privacy) and those with a less-glassed design (the converse). It will therefore be difficult "to envisage any clear legal guidance as to where the line would be drawn"[82] between when a reasonable expectation

jurisprudence that intrusions must reach a certain level of seriousness to engage the operation of the Convention").

78 *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [88(c)].

79 Because the publication of such photos or videos could cause distress, psychological discomfort, annoyance or even humiliation – see, *eg*, *Campbell v MGN Ltd* [2004] 2 AC 457; *Von Hannover v Germany* [2004] EMLR 21; (2005) 40 EHRR 1 and *Murray v Express Newspapers plc* [2008] EWCA Civ 446. *Cf* also Laws J's *dicta* in *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804 at 807.

80 See *Giles Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 at [89] and *cf* also *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [220]. For "protective measures", see *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [214].

81 *Von Hannover v Germany* [2004] EMLR 21; (2005) 40 EHRR 1 at [51] and [69].

82 Borrowing the language in *Giles Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 at [81].

of privacy ought to arise and when the opposite is true, if the answer were to rest on such factors as the amount of glass used in the building design and the viability of adopting "protective measures". The authors posit that a more rational test to apply to ascertain whether there is a reasonable expectation of privacy on facts such as *Fearn* is to ask the following question, inspired by Gleeson CJ's *dicta* in the High Court of Australia:[83]

> Is the domestic home a place 'which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be *unobserved*'? [emphasis added]

The authors submit that the answer must be a resounding "yes" – always!

30 On the other hand, whether or not there is a legitimate basis for complaint in so far as the invasion of one's spatial privacy is concerned, that in itself is a *separate* question altogether. Much depends on the nature and degree of the intrusion concerned – in other words, was there an unreasonable and unjustified intrusion upon the complainant's seclusion or solitude that had attained "a certain level of *seriousness*"[84] [emphasis added]? On the authors' analysis, while those who live in "glass houses" are indeed entitled to a reasonable (though perhaps "lesser") expectation of privacy, there may well be no legitimate basis for complaint as against curious onlookers or passers-by who do no more than peer through the windows of such extensively glassed premises (or what is otherwise the equivalent of "mere" overlooking).[85] Crucially, however, less protection does not mean none at all.[86]

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83 *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1 at [42], *per* Gleeson CJ. *Cf* Paul Wragg, "Recognising a Privacy-invasion Tort: The Conceptual Unity of Informational and Intrusion Claims" (2019) 78 Camb LJ 409 at 436:

> The question, then, was not whether it was reasonable for the owners [of the viewing gallery] to use their building in this way, but whether it was reasonable for the residents [the claimants] to expect that others would not view them as objects of curiosity and public spectacle, to be spied upon, using binoculars if necessary, without discernible justification for the intrusion.

84 *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414; [2010] 1 WLR 123 at [22], *per* Laws LJ. *Cf* also *C v Holland* [2012] 3 NZLR 672 at [92]: "[S]urveillance or intrusion *per se* is not actionable. Rather there must be a combination of features, including a lack of authorisation, intimacy, a reasonable expectation of privacy and offensiveness."

85 *Contra* the facts in *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) and *Giles Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 and see *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [171]: "external prying into a home would contravene the privacy protected by Article 8"; "prying" could also, apart from photography, be done by "particular acts of directed and intentional overlooking".

86 See *R v Williams* [2007] 3 NZLR 207 at [114]: "'Lesser expectation of privacy', in the context of this gradation, is a relative term. It is not intended to suggest that an

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31 Granted, the reader might ask what exactly it is about a domestic home that justifies the homeowner's *entitlement* to a reasonable expectation of privacy. First, the plain language of Art 8(1) clearly mandates, *inter alia*, that everyone has the right to respect for "his private and family life" and "his home". One possible interference with the right to respect for one's home is where there is "disturbance to the peaceful enjoyment of [the] home" – due, for instance, to "noise and other nuisances".[87] In the authors' view, the right to the "peaceful enjoyment" of one's home as enshrined in the Art 8 jurisprudence (including the case law of the European Court of Human Rights) is in fact *compatible* with the authors' earlier understanding of Prosser's privacy notion of an individual's right to "seclusion or solitude".[88]

32 Second, the authors agree entirely with the claimants' argument before the High Court that "the law has traditionally regarded the home as a zone of privacy meriting special protection".[89] Very many years ago, Knight Bruce VC in *Prince Albert v Strange*[90] gave a vivid illustration of how an individual's (spatial) privacy within the home may be compromised in these terms:[91]

> [A]n intrusion – an unbecoming and unseemly intrusion … offensive to that inbred sense of propriety natural to every man – if, intrusion, indeed, fitly describes a *sordid spying into the privacy of domestic life* – into the home … [emphasis added]

Because a dwelling house is meant to be a *private* and *intimate* space for its occupants and their activities, the authors further argue that the assurance of privacy within the home ought to be a *natural right* inherent in – and not merely incidental to – the occupation of residential land.[92] As dissenting judge Thomas J so elegantly put it in *Brooker v Police*,[93] "the home is not just a dwelling house, it is a haven and sanctuary from the

unlawful intrusion into a garden is not serious. It is just less serious than an unlawful intrusion into a person's bedroom."

87 See the European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life, Home and Correspondence* (updated 31 August 2021) at paras 393 and 470.

88 As discussed in paras 10–12 above.

89 See *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [128].

90 (1849) 2 De G & SM 293.

91 *Prince Albert v Strange* (1849) 2 De G & SM 293 at 313.

92 See, in particular, the observations of Thomas J (dissenting) in *Brooker v Police* [2007] 3 NZLR 91 at [256]–[258].

93 [2007] 3 NZLR 91.

outside world".[94] But it is to *Fearn* that we return for the final word, with Mann J himself saying: "[i]t can hardly be disputed that a person has a reasonable expectation of privacy in relation to much of what occurs in the home and in relation to the home itself"[95] and "it is not a nonsense to suggest that the home is a private environment".[96]

33 With all these considerations in mind, the authors remain of the view that Art 8 has clearly been engaged on the facts of *Fearn*.

VI. Inadequacies in parliamentary intervention in the field of privacy

34 A commonly raised objection is that where there is potential overlap between privacy-related claims and those involving property torts in general, it might perhaps be better to leave the privacy "problem" to Parliament. Indeed, rather than "extend" the law of private nuisance, the Court of Appeal felt that legislative intervention was preferable – namely, it was for Parliament to formulate any further laws that were perceived to be necessary to deal with the privacy implications of overlooking. It was observed that this is an area in which the Legislature has already intervened because there are other laws available which bear on privacy.[97]

35 The authors agree that privacy protection is now principally the domain of the Legislature and affected individuals can always have recourse to other avenues in the law. These alternatives, however, are of cold comfort to the claimants in *Fearn*.[98] Notably, it is their spatial (and, to a lesser extent, informational) privacy which has been compromised considerably, having regard to the extent of inappropriate overlooking from the Tate's viewing gallery. As such, the laws relating to confidentiality and data protection – the latter merely regulating the collection, use and dissemination of personal information – are largely irrelevant on the facts (the tort of misuse of private information excepted, but this cause of action is only marginally more relevant).

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94 *Brooker v Police* [2007] 3 NZLR 91 at [258]. See also *R v Williams* [2007] 3 NZLR 207 at [113]–[114], where the New Zealand Court of Appeal displayed its sensitivity to the "gradation of privacy interests in respect of particular types of property".

95 *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [170]. See also *McKennitt v Ash* [2008] QB 73 (especially at [21]–[22]).

96 *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [137].

97 For instance, the law relating to confidentiality, misuse of private information, data protection (Data Protection Act 2018 (c 12)), and harassment and stalking (Protection from Harassment Act 1997 (c 40)): see *Giles Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 at [84].

98 See also *C v Holland* [2012] 3 NZLR 672 at [89] *ff*.

36 The protection afforded under the UK Protection from Harassment Act 1997[99] does not take the claimants very far either. Unfortunately, the Act falls short for their purposes because there must be proof of "a course of conduct" (which is deemed unreasonable in the circumstances) in order for statutory liability to arise;[100] therefore, a *single* act by disparate individuals, even if intended to cause the victim distress or alarm, does *not* attract any harassment liability at all.[101] In the absence of harassing behaviour on at least *two* occasions, it is difficult to sustain the argument that all the claimants in *Fearn* qualify as victims of harassment under the statute, this notwithstanding the reality that they might well feel distressed by the sheer number of single or one-off acts – which "a homeowner would reasonably regard to be intrusive"[102] – of an endless stream of visitors to the viewing gallery.[103] Particularly when such conduct (some of it to satisfy the visitors' own degraded curiosity) is viewed *in totality*,[104] should the claimants in *Fearn* not be entitled to be free from the public gaze? Indeed, even Mann J himself conceded that the Protection from Harassment Act 1997 does not "necessarily give all the protection that is required because not all unjustifiable invasions of privacy would necessarily qualify as harassment under the Act".[105]

99 c 40.

100 See ss 1(1) and 1(3) of the UK Protection from Harassment Act 1997 (c 40).

101 See ss 1 and 7(3) of the UK Protection from Harassment Act 1997 (c 40). *Cf* also *Majrowski v Guy and St Thomas's NHS Trust* [2007] 1 AC 224 at [66] and *Wainwright v Home Office* [2004] 2 AC 406 at [46].

102 *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [85].

103 Apart from using cameras and mobile phones to take photographs of the flats and flat interiors (some of which were subsequently posted on social media), visitors were also found by Mann J to have peered into the interiors of the flats (some with binoculars), waved and (rather more rarely) made obscene gestures: see *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [77]–[85].

104 Notwithstanding that the instances of overlooking or intrusion complained of in *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) and in *Giles Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 would have largely arisen from "single or one-off acts" of "an endless stream of visitors", the authors have argued elsewhere that when the defendant's conduct is viewed *in totality*, such interferences emanating from a viewing gallery (such as the one located at the Tate) with a homeowner's use and enjoyment of land can be nothing short of *substantial and unreasonable*, and hence actionable under the tort of private nuisance: see, generally, Saw Cheng Lim & Aaron Yoong, "Throwing Stones in Glass Houses: Protecting Privacy under the Law of Nuisance" *Tort Law Review* (forthcoming).

105 *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [174]. See also Nicole Moreham, "Beyond Information: Physical Privacy in English Law" (2014) 73(2) Camb LJ 350 at 366.

37 Brief mention has already been made of the utility of the tort of misuse of private information, whose genesis is to be found in the common law (having itself evolved from the equitable action for breach of confidence). In line with conventional wisdom, however, this specific tort only goes so far as to protect an individual's *informational* privacy. This again leaves open the position under English law in so far as safeguarding the *spatial* or *physical* conception of an individual's privacy interest is concerned.

38 Parliament's inaction to wade into the realm of civil claims for the invasion of one's spatial privacy is a matter of conjecture, but what is palpable is that no statutory tort of intrusion upon seclusion is at all forthcoming. Is *Fearn* therefore a case crying out for a remedy in the claimants' favour? Certainly not pursuant to the law of nuisance, so affirmed the Court of Appeal. Given the high value attached to privacy in the modern world, the authors now respectfully urge their Lordships in the Supreme Court of the United Kingdom – as "bold spirits" and not "timorous souls"[106] – to pave the way for the tort of private nuisance to provide a more robust response in protecting the spatial privacy rights of the claimants in this case.[107]

VII. Misreading by the Court of Appeal of a trilogy of early precedents?

39 If one final objection to allowing privacy interests to be protected under the tort of private nuisance is that past cases have rejected such an extension of the law, an argument to this effect can, in the authors' view, be easily disposed of. In this regard, the Court of Appeal in *Fearn* specifically referred to a trilogy of cases in which judges have "decided and expressed the view that no such cause of action [for overlooking] exists",[108] namely: *Chandler v Thompson*[109] ("*Chandler*"), *Turner v Spooner*[110] ("*Turner*") and *Tapling v Jones*[111] ("*Tapling*"). With respect, however, the authors submit that none of these cases is authority for the (erroneous) interpretation adopted by the Court of Appeal.

106 *Candler v Crane, Christmas & Co* [1951] 2 KB 164 at 178, *per* Denning LJ (dissenting).
107 *Cf C v Holland* [2012] 3 NZLR 672 at [88] and *Hosking v Runting* [2005] 1 NZLR 1 at [228]. See also *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 522, *per* Evatt J (dissenting).
108 *Giles Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 at [53].
109 (1811) 3 Camp 80.
110 (1861) 62 ER 457.
111 (1865) 11 ER 1344; 11 HLC 290; 20 CBNS 166.

40 In *Chandler*, the plaintiff "considerably enlarged" a small window that had been there for many years, putting in a sash frame instead of a leaded casement. The defendant-owner of the adjoining ground then erected a building that completely covered several inches of the space occupied by the *old* window. It bears mentioning that even with these developments, the plaintiff still enjoyed more light through the new window when compared to the old. Judgment was granted in favour of the plaintiff, as the space occupied by the old window was deemed privileged, unlike the enlargement which "might be lawfully obstructed".[112] Counsel for the defendant was also reported as arguing, *inter alia*, that the larger window was "inconvenient … disturbing [the defendant's] privacy, and enabling people to come through to trespass upon his property".[113] In response, Le Blanc J observed that "although an action for opening a window to disturb the plaintiff's privacy was to be read of in the books, he had never known such an action maintained", and he had also heard that "such an action did not lie, and that the only remedy was to build on the adjoining land, opposite to the offensive window".[114]

41 In *Turner*, the plaintiff owned a property with "ancient lights" that came with it the benefit of an easement of light. He then proceeded to repair and rebuild his premises, putting in new French windows that had large plates of glass with no obstructing bars and which opened more fully inwards. As a result, although the apertures in the wall were of the same size and position, the new windows admitted more light and air; crucially, the plaintiff's property was now able to overlook the defendant's yard to a greater extent. The defendants objected and erected a wooden framework in their yard within a few inches of the plaintiff's ancient lights. The plaintiff brought proceedings, seeking an injunction and, *inter alia*, the removal of the wooden framework. The primary argument of the defendant's counsel was that the increase in the amount of light was a new easement to which the plaintiff was not entitled. Additionally, the defendant was recorded as arguing as follows:[115]

> Hitherto the easement was no nuisance; it has become so by the alterations. The mode in which the easement is dealt with gives increased powers of overlooking our premises …
>
> … The increased power of overlooking us is an injury to privacy, and privacy is a legal right …

112 *Chandler v Thompson* (1811) 3 Camp 80 at [81].
113 *Chandler v Thompson* (1811) 3 Camp 80 at [81].
114 *Chandler v Thompson* (1811) 3 Camp 80 at [82].
115 *Turner v Spooner* (1861) 62 ER 457 at 458–459.

42 Kindersley VC *granted* a perpetual injunction,[116] holding that the alteration of the windows did not *per se* equate to an acquisition of a new easement. In response to the privacy argument as picked up in *Fearn*, Kindersley VC stated:[117]

> With regard to the question of privacy, no doubt the owner of a house would prefer that a neighbour should not have the right of looking into his windows or yard, but neither this Court nor a Court of law will interfere on the mere ground of invasion of privacy; and a party has a right even to open new windows, although he is thereby enabled to overlook his neighbour's premises, and so interfering, perhaps with his comfort.

43 In *Tapling*, the plaintiff-respondent came into possession of a building that possessed ancient windows, and as a result was entitled to access of light and air from an adjoining open space that belonged to the defendant-appellant. On obtaining possession of the place, the plaintiff began altering the windows and installing new ones. In the same year, however, the defendant proceeded to erect a warehouse with the eastern wall to such a height that obstructed the whole of the windows and lights of the plaintiff's property. The House of Lords, agreeing with the lower courts, awarded damages to the plaintiff for interference with his ancient lights. The reasoning of the court, put simply, was that while the defendant was entitled to obstruct the new windows or the enlargement of the old, in doing so, he had also obstructed the plaintiff's ancient lights.[118] In the course of their decision, various observations were made by their Lordships in relation to overlooking and privacy invasions – most notably, with these sentiments pithily expressed by Lord Westbury LC:[119]

> Again, there is another form of words which is often found in the cases on this subject, *viz.* the phrase 'invasion of privacy by opening windows'. That is not treated by the law as a wrong for which any remedy is given. If A is the owner of beautiful gardens and pleasure grounds, and B is the owner of an adjoining piece of land, B may build on it a manufactory with a hundred windows overlooking the pleasure grounds, and A has neither more nor less than the right, which he previously had, of erecting on his land a building of such height and extent as will shut out the windows of the newly-erected manufactory.

116 *Turner v Spooner* (1861) 62 ER 457 at 460.

117 See *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [159] and *Giles Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 at [55].

118 *Tapling v Jones* (1865) 11 ER 1344 at 1351; (1865) 11 HLC 290 at 307; (1865) 20 CBNS 166 at 181.

119 *Tapling v Jones* (1865) 11 ER 1344 at 1350; (1865) 11 HLC 290 at 304; (1865) 20 CBNS 166 at 178. See also the observations made by Lord Carnworth (at 1353) and Lord Chelmsford (at 1355).

44 An observant reader will immediately recognise that these three cases, with similar factual matrices, dealt primarily with the issue of ancient lights passing through existing windows. The attendant privacy concerns were therefore also in relation to *new windows being opened and which happen to overlook the neighbours' yard or garden*. These are situations quite unlike the facts in *Fearn*, where the degree of intrusion *from a viewing gallery* was to such an extent that a "very significant number of visitors display an interest in the interiors of the flats which is more than a fleeting or passing interest",[120] and a "large number" of unauthorised photographs and videos (of Block C flat interiors) were uploaded on social media platforms.[121] In the authors' view, there is an obvious and critical difference between casually overlooking the *exterior* of one's premises (such as a garden or yard), and when the intrusion complained of is persistent and targeted at the living spaces *within* the home. In the latter scenario, the extent of intrusion is far more substantial, to the level of unacceptability. The authors therefore respectfully agree with Mann J's view in the High Court that the "whole purpose" of the Tate's opening of a viewing gallery at the Blavatnik extension is precisely to allow interested visitors to view and overlook.[122] It is quite difficult to see why the Court of Appeal did not agree with Mann J's observations in this regard – because such a dramatic change in the *use* of the Tate's premises fundamentally transforms the nature and character of the overlooking complaints which must now be examined *in that light*.

45 Far from having "decided and expressed [a] view"[123] on these matters, the observations made in *Chandler*, *Turner* and *Tapling* in relation to questions concerning privacy were *purely* by way of *obiter*, after the respective courts had decided the main issues as to the opening of new windows and the obstruction of ancient lights. This trilogy of cases may not even be regarded as "true" nuisance cases, one might argue. Granted that this was a point which the Court of Appeal had also acknowledged (having stated that "those statements were not, strictly, part of the *ratio*, or necessary reasoning of the decision"),[124] but the extent to which such observations were unnecessary in the circumstances – and yet so heavily relied upon as "authority" by the Court of Appeal – cannot be overemphasised or overlooked.

120 *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [88(a)].

121 See *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [81]–[83] and *Giles Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 at [27].

122 *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [161].

123 *Giles Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 at [53].

124 *Giles Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 at [61].

46 It should further be noted that Le Blanc J in *Chandler* did not even appear to be making a positive assertion that such a cause of action to combat inappropriate overlooking could not definitively be founded. Instead, the judge had opted for a vaguer description that "he had heard it laid down" and that "he had never known" the action to be maintained (albeit acknowledging that it was "to be read of in the books").[125] And in *Turner*, the Law Reports even go as far as to record Kindersley VC as having decided the matter in relation to ancient lights, whereupon "His Honour then *commented* upon some *minor points* raised by the Defendants in argument"[126] [emphasis added].

47 In light of the foregoing discourse, it cannot be seriously argued or asserted that there is "[high] authority"[127] – particularly in the context of property tort disputes – against the making of a (privacy-related) finding in favour of the claimants in *Fearn*. In the authors' respectful view, the three cases examined above do not seek to lay down any general principle in relation to privacy; and in any event, they do not stand as "authorities" for the proposition that all manner of overlooking and spatial intrusion are non-actionable in nuisance. This is hardly surprising, given that at the time those cases were decided (in 1811 or the early 1860s), the principles surrounding privacy protection were not at all well developed. With the passing of the HRA, however, the tide has clearly turned, such that these principles ought to be accorded their due weight by the courts of today.

VIII. Conclusion

48 This article has sought to answer the question whether privacy-related claims can, in principle, be accommodated within traditional areas of the law like nuisance.

49 As the authors have emphasised above, what is significant about *Fearn* is that it has presented a *novel* set of facts – beyond "mere overlooking" scenarios[128] such as those contemplated in a trilogy of early English precedents[129] – upon which a careful re-evaluation by the courts of the ambit of the tort of private nuisance is clearly warranted. It has also been argued that the evolution and "modernisation" of this common law action is long overdue in light of parallel developments elsewhere

125 *Chandler v Thompson* (1811) 3 Camp 80 at [82].
126 *Turner v Spooner* (1861) 62 ER 457 at 460.
127 *Giles Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 at [61].
128 See, in particular, *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [88(c)] and [88(d)].
129 Namely, *Chandler v Thompson* (1811) 3 Camp 80, *Turner v Spooner* (1861) 62 ER 457 and *Tapling v Jones* (1865) 11 ER 1344; (1865) 11 HLC 290; (1865) 20 CBNS 166.

(for example, in the jurisprudence of Art 8 and the HRA). Finally, the apparent inadequacies in parliamentary intervention in the field of privacy (as highlighted in this article), coupled with the English judiciary's steadfast inaction at present in developing the tort of private nuisance, can only result in a conspicuous and regrettable "gap in the protection of privacy in the home".[130] The authors are therefore in complete agreement with Mann J's observation that "the cases [on the whole] do not go so far as to say that nuisance can *never* protect privacy"[131] [emphasis in original] and "the tort of nuisance, absent statute, would probably have been capable, as a matter of principle, of protecting privacy rights, at least in a domestic home".[132]

50 Richardson recently bemoaned, in specific reference to *Fearn*, the "rather patchy protection of privacy" accorded by the English courts – on the one hand observing that "the property torts are especially treated as offering little against overlooking",[133] but on the other, asking whether "the assumed British inflexibility will eventually be revisited in a century of endemic looking".[134] With privacy being a fundamental and universal human value, and given the heightened attention that the protection of privacy interests attracts in the modern world, there might just be a glimmer of hope lying ahead.[135]

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130 *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [174].

131 *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [164].

132 *Giles Duncan Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch) at [169].

133 Megan Richardson, "A Common Law of Privacy?" [2021] Sing JLS 6 at 11.

134 Megan Richardson, "A Common Law of Privacy?" [2021] Sing JLS 6 at 12.

135 The Supreme Court of the United Kingdom heard the *Fearn* appeal on 7 and 8 December 2021. A decision is therefore expected in the coming weeks or months.