Neutral Citation Number: [2019] EWHC 246 (Ch)

Case No: HC-2017-000486

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY
COURTS OF ENGLAND AND WALES

PROPERTY, TRUSTS AND PROBATE
LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12/02/2019

Before :

MR JUSTICE MANN

- -

Between :

(1) GILES DUNCAN FEARN
(2) GERALD KRAFTMAN
(3) IAN MCFADYEN
(4) HELEN CLAIRE MCFADYEN
(5) LINDSAY URQUHART — **Claimants**

- and -

THE BOARD OF TRUSTEES OF THE TATE GALLERY — **Defendant**

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Mr Tom Weekes QC and **Richard Moules** (instructed by **Forsters LLP**) for the **Claimants**
Mr Guy Fetherstonhaugh QC, Ms Aileen McColgan and **Ms Elizabeth Fitzgerald** (instructed by **Herbert Smith Freehills LLP**) for the **Defendant**

Hearing dates: 2nd, 5th, 6th, 7th and 12th November 2019

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MANN

Mr Justice Mann :

Introduction

1. This is a case bought in nuisance and under the Human Rights Act 1998 to protect what are said to be rights of privacy (putting it loosely) in flats in central London. The flats in question are in a development called Neo Bankside on the south side of the River Thames adjacent to the Tate Modern museum, which is housed in the old Bankside power station. Their living areas are extensively glassed and they look directly on to a new extension of the Tate Modern (the Blavatnik Building). Around the 10th floor of that extension there is a walkway around which visitors to the Tate Modern can enjoy a 360 degree panoramic view of London. Unfortunately for the residents of the relevant flats in Neo Bankside (certain of the residents of Block C) that panoramic view includes the living areas of their flat interiors (to varying degrees, depending on their height within the block). The claimants own four flats in the block and say that this amounts to an actionable invasion of their privacy rights. The flats are numbered 1301, 1801, 1901 and 2101, the first two digits connoting the floors on which they are situated. They bring this action for an injunction requiring Tate Modern to close part of the gallery which gives the views into their respective flats, though screening is proposed as an alternative. Their privacy rights are said to arise via the law of nuisance (as it needs to be developed taking into account the Human Rights Act 1998) and/or under section 6 of that Act on the footing that the Tate Gallery is a "hybrid" public authority against who the Act can be directly enforced.

2. Mr Tom Weekes QC led for the claimants; Mr Guy Fetherstonhaugh QC led for the defendant.

The nature and physical layout of the two properties

3. The Tate Modern is part of the Tate Gallery. It is housed in a former power station (with its retained chimney) and itself houses much of the nation's modern artworks and has permanent and temporary exhibitions. Its position appears edged in red on plan A annexed to this judgment. The plan is for purposes of general indication of position only.

4. There are four blocks of flats in the Neo Bankside development. They are shown edged in green on plan A. The closest to the Blavatnik Building is Block C, in which the present claimants reside. The Blavatnik Building is shown edged in blue. Between the two is a public highway, Holland Street. The Blavatnik Building is a sort of twisted pyramid, so it tapers upwards, and is truncated at the top so it does not quite rise to a

peak. The distance between the allegedly offending viewing gallery at the top of the building and the 18th floor flat in Block C (which is one of the closest) was agreed to be just over 34m. The distance will be about the same for flat 1901, a little more for flat 2101 (because it is a little higher) and a little greater again in respect of flat 1301 (which is farther down). Those differences are not particularly material to this case, though the angles may be.

5. Construction of the Blavatnik Building was completed by 2016, in which year the Building and the viewing gallery was also opened. The Building is part of the Tate Modern museum (a section below deals with the nature and status of the museum), and access to the viewing gallery is free. The viewing gallery runs right round the outside of the Blavatnik Building at the 10th (top) floor level. Access is gained via lifts to the 10th floor, which give on to a glassed area facing north, west and east, and one passes from the glassed area on to the outside gallery which is several feet wide. There are safety railings at about chest-height round the gallery, and the only thing that obstructs the view is periodic support pillars for the structure above. To the north the view is interrupted only by the Tate Modern's old chimney; to the east it is largely uninterrupted; to the west it is interrupted (at some distance) by some taller buildings and in part by a lower Neo Bankside building and to the south by Block C. To each side of Block C there is a view of part of south London, and parts of Westminster. Such a panoramic view of London is rather splendid (particularly over the Thames) and members of the public will find it very attractive, though differing views were expressed in the case about the merits of the view of south London.

6. A sample floor plan of the flats in Block C is shown on Plan B annexed to this judgment. Details vary from flat to flat, but the general layout as between the winter gardens and daytime living accommodation on the one hand and bedrooms/studies/bathrooms on the other is the same throughout. There are 21 flats plus a penthouse, with two flats on each of the floors with which this action is concerned, each with a triangular end piece. The flats which are the subject of this action are those whose triangular parts are nearer the Blavatnik Building; there are four of them - on the 13th, 18th, 19th and 21st floors respectively. The flats can be considered to have two elements - the triangular parts to which I have referred, known as the winter gardens, and the rest of the living accommodation. The winter gardens have wall to ceiling windows bounding their sides and on one side they are roughly parallel to the Blavatnik Building. Those windows are single-glazed, with one opening pane, and each winter garden is separated from the rest of the flat by double-glazed glass doors. The rest of the flat windows are also double-glazed. The single glazing in the winter gardens apparently derives from the fact that they were conceived as sort of indoor balconies, providing something of a quasi-outdoor amenity for the flats. They were not conceived by the developers as part of the living accommodation. However, in the case of all the flats with which this action is concerned (and all the other flats on the same side of the building) the winter gardens have been incorporated so as to become part of the living accommodation. The flooring is heated in the same way as the rest of the flat, and the flooring itself is apparently of the same construction too, though there is a lip between the winter gardens and the rest of the accommodation.

7. The other "sides" of the flats, giving on to the living accommodation (kitchen, dining and sitting areas), are made up of floor to ceiling glass panels with some alternating wooden fascias, positioned at different horizontal points in the various flats so they are not lined up throughout the building. Those fascias prevent a complete view into the dining and sitting areas within the flat, but do not provide much obstruction. The adjacent bedrooms do not have wall to ceiling glass; they have more conventional window-type apertures, and this action is not concerned with them. The building itself has an exo-skeleton of steel, and is of a striking (Rogers Stirk Harbour + Partners) design.

8. The same design obtains on both sides of the flats - that is to say, both on the side giving on to the Blavatnik Building and on the other side. The overall effect is of a largely glass-walled flat with impressive views from inside, which views are why most of the claimants bought them in the first place. Unfortunately, if occupants can see out then outsiders can see in (absent some protective measure), which is the problem in this case. Unless a barrier to sight is put in place, visitors can see straight into the living accommodation of the flats (or some of it - most of it in the 18th and 19th floor flats, less so in the 21st floor and less again in the case of the 13th). That is what gives rise to this action. The claimants say that they are the subject of close scrutiny by many of the viewers in the viewing gallery (in some cases by binoculars), and of photography, which they find completely oppressive. The flats all have solar blinds which would obscure views of the interior (though not very effectively at night when lights are on inside the flats) but to keep those down would obscure the views which the occupants consider to be one of the key advantages to the flats, and would involve their living without the benefits of windows along one complete side of their living accommodation.

9. After the case had been partially opened I had the opportunity to have a view of the site, both from the Tate Modern side and from (and in) each of the claimants' four flats.

Claimants' Witnesses

10. I heard evidence from the following claimants, and in one case a claimant's son. In order to avoid my saying it separately in relation to each of the claimants, I can say now that they were all honest witnesses who gave evidence of their subjective experiences in a sincere manner and without intended exaggeration. They all speak of their subjective discomfort and they are not making it up. The only parts of their evidence which require particular care in my consideration are those parts in which they give evidence of the extent to which they consider gallery viewers are actually looking at (viewing), or taking photographs of, them as occupants. I make findings about that below. At this point I merely record the thrust of their evidence.

11. **Mr Ian McFadyen.** Mr McFadyen owns flat 1901 of Block C (on the 19th floor). It is on roughly the same level as the viewing gallery (the experts agreed it was elevated by just 2 degs). He viewed the flat in 2013 and bought it in 2014, at which point the Blavatnik Building was not finished. He lives in the flat part of the time, having a home elsewhere as well. His son Alexander lived in the building for some period when working in London. He gave evidence to the effect that he and his family were "more or less constantly watched" from the viewing gallery. They could not leave washing out, and had to be "properly dressed" at all times. People on the viewing gallery watched, photographed, filmed and on occasion even used binoculars to look into the flat. The intrusion was relentless and they felt as if they were in a zoo. They keep the blind down during the day in the northern (Tate) side, and when they have to put the blinds down on the southern/western side in the afternoon (against the sun) the result is that there is no view outside. He rarely used the winter garden because he was uncomfortable about being photographed. His wife finds the situation so intolerable she seldom stays in the flat.

12. He relied on a home finder to identify the property when they bought it, and he did his own research. He admitted he purchased the property in the knowledge there would be a viewing gallery, but he thought that visitors would apply the same standards of decency as would be applied if there were residential or office windows opposite.

13. **Alexander McFadyen.** He is Mr McFadyen's son and lived in flat 1901 for some 9 months from September 2016. He would work on the dining room table which gave him a good impression of the intrusiveness of visitors to the gallery. He felt he was constantly watched. He claimed to have counted 84 people taking photographs into the apartment over one 90 minute period. He himself took pictures of viewers and took one of someone said to be training binoculars on the flat. He accepted that to a degree he would have attracted interest to himself by his own photographing activities, but said (and I accept) that that does not explain all the activity he saw. He only sought to photograph the gallery once someone there had photographed the flats first.

14. **Mrs Claire Fearn.** Mrs Fearn and her husband acquired flat 1801 in August 2014. This flat, like 1901, is roughly on the same level as the gallery - just 5 degs down. It was intended as a second home for them. Her first experience of people in the gallery made her feel "sick to her stomach" - people waved, made obscene gestures and photographed and filmed the family in the apartment. She decided that her young children should not visit there any more, and so she herself hardly ever goes there. The older children are advised to keep the blinds down when the gallery is open. She is so upset by the attention that she has only been in the flat 5 or 6 times since the gallery opened, but friends of hers had the same experience when they stayed there.

15. **Mr Giles Fearn** gave evidence to the same effect as his wife. He noticed people filming "for long periods of time". He was shocked when he was shown a file of internet postings showing his flat. As a result he spends less time at the apartment than he had intended. He now stays only on Sunday nights, and occasionally Monday nights, and in the last 6 months even less than that. He keeps the blinds down when the gallery is open, and tries to keep lights off after dark because the blinds are partially transparent. He (like his wife) said that the interior of the Winter Garden could be seen through both faces of the Garden. (I find that while that could just be true, a view from just the south-

western face would not be intrusive because it is so oblique.) He was asked what he knew of the proposed gallery when he purchased. He said he was aware of the "Tate Modern Environment", and the main shell of the Blavatnik Building was completed at the time. He was aware that there was a "walkway" on the 10th floor because he could see it through the scaffolding. He did not make any inquiries about it and did not realise it was a viewing gallery until the time when it was opened. He had relied on his solicitors' searches which did not reveal anything about it.

16. **Mr Gerald Kraftman.** Mr Kraftman purchased flat 2101 in 2013. He liked the "spectacular" views from the flat, particularly from the Winter Garden, where he used to sit. Being higher than the Tate Modern, he had a better view than lower flats. (His flat is elevated by 16 degs from the viewing gallery). He can no longer sit there, or sit at his breakfast bar, because of people on the viewing gallery staring at him, photographing him and filming him. He has noticed people using binoculars to view his flat. When he invited a Mail on Sunday reporter to his flat (doubtless in an attempt to gain some publicity for his plight) the reporter published a story saying that as soon as the two of them went into the winter gardens in Mr Kraftman's flat people in the gallery starting photographing and waving at them. As a result he feels he has to keep the blinds down on that side of his flat. If he does not he feels under surveillance. He is concerned about people taking photographs of his grandchildren so he keeps the blinds down when they are there. His partner does not allow her grandchildren to visit the flat because they would be the subject of high levels of scrutiny. If the problem is not solved he feels (as do the Fearns) that he will have to try to sell the flat.

17. **Mrs Lindsay Urquhart.** Mrs Urquhart lives at flat 1301, which is below the level of the gallery (34 degs down). The flat combines what was originally two different flats (essentially two halves of the upper flats) to produce a flat which is now the same as the three others I have referred to. Nothing turns on that. The two flats were purchased in 2013 and 2014 and then combined. When she purchased her flat she knew that the Blavatnik Building was being built but did not know there was to be a public viewing gallery. She then became aware that there would be a gallery, as the building was built, but assumed it would point towards the best views which were north, west and east. Even when it was complete she assumed the south section would be used only for emergency access - she never contemplated the degree of intrusion into the flats which this section gave. Since then she has experienced visual intrusion and photography, people waving and obscene gestures. The coverage in social media was upsetting to her and when she visited the gallery she overheard one visitor to the gallery say that the "rich bastards" who lived in the flats deserved the intrusion that the gallery afforded. Without the blinds being closed she feels completely exposed in her kitchen and she will not let her young daughter into the exposed areas. She keeps the blinds closed when the numbers are at their worst, particularly during the day at weekends. She feels she can no longer host children's parties in the Winter Garden, which she used to do.

18. I also heard from **Mr Robert May**, a planning expert who opined on various planning-related issues and who carried out measurements and calculations relevant to this matter. He was a clear and conscientious witness.

Defendants' witnesses

19. I heard evidence from the following witnesses for Tate Modern. Their respective credibilities were not really much at stake in this action, though their sensitivity to their neighbours was. Those witnesses were as follows.

20. **Mr Piers Warner**. He is the Tate's Head of Audience Experience. He gave evidence of the capacity and management of the viewing platform. The maximum capacity is 300, but they get concerned about management when the numbers reach 250. He also gave evidence about the views available from the platform and what local visitors enjoy spotting from it. His observation was that people spent about 15 minutes on the platform and he has observed people taking pictures of the Neo Bankside flats (though not with people in them), which he attributed to their interesting architectural design, though more people were interested in landmarks. He described some of the steps taken by Tate Modern to stop obtrusive interest in the flats, and gave his views on the screening of gallery closures which the claimants propose as a possible remedy (he was not in favour).

21. **Miss Carmen Lee** is the Tate Gallery's Head of Business, Corporate Membership and Events. She described the use of the space on the 10th floor for corporate and other events, both in terms of scale and nature. Her evidence was not materially challenged.

22. **Mr Donald Hyslop** is Head of Regeneration and Community Partnerships for the Tate Gallery. His evidence related to the part that the opening of the Tate Modern (in 2000) played in the regeneration of the surrounding Bankside area. One of his functions was to make sure his team remained "embedded" in and part of the local community and his evidence described that process and how it was that local businesses and communities were kept informed of development plans. Just as significantly, he was one of two points of contact with the planning authorities and held regular meetings with, inter alia, the developers of Neo Bankside. The developers were said to have been "always supportive" of the extension plans. The developers and Tate Modern worked closely together at the planning stage. More detail of this appears below. He went on to give evidence about the Tate's perception of the "vision" for the platform as part of the Tate Modern visitor experience. He passed some comments on what social media revealed about scrutiny of Block C and some of the negotiations with the claimants.

23. **Ms Frances Morris**. She has been the Director of the Tate Modern since 2016. Before then (since 2006) she was the Director of Collections, International Art. She gave some general evidence about the opening of the Tate Modern and its funding, and of its general artistic and educational activities. She described how the Blavatnik Building was intended to "open up" the Bankside area and to contribute to the "architectural vista" of the area as well. She emphasised the importance of the viewing gallery as part of the "whole architectural narrative" of the building. At the same time she acknowledged that the Tate had to be a responsible neighbour. Her evidence seemed

to give the gallery a degree of artistic and social importance that some might think was over-stated, but little turns on whether that is right or not. She, too, clearly acknowledged that the Tate should be a good neighbour, but doubted if the bad behaviour complained of was perpetrated by anything more than a small minority of visitors.

24. **John O'Mara** was and is employed by the architects' firm which designed the Blavatnik Building, and he was engaged in that exercise. He gave some evidence of the planning and development history and the design concepts involved. He also expressed views about the modifications to the platform proposed by the claimants in order to provide some screening, which were firmly negative.

25. **Mr John Rhodes** was the Tate's expert who gave evidence in relation to planning and associated matters.

26. A short further statement was provided during the trial from **Paul Higgins**, the control room manager at Tate Modern. It dealt with problems that had arisen on the gallery on the day after the trial started, as a result of which it was felt necessary to close the southern and western walkways for a time. His statement was not challenged.

The remedies sought in this action

27. The only remedy claimed in the Particulars of Claim is injunctive relief. The claimants seek an injunction requiring the defendant to prevent members of the public and others "observing" the claimants' flats from an area shown cross-hatched on a plan, whether by cordoning off, screening or otherwise. There is no damages claim, but Mr Weekes said that if an injunction was not available he would seek damages in lieu. That would need an inquiry, which was not conducted at the trial.

28. The cross-hatched area on the relevant plan (by the time an amended plan was produced at the trial) showed cross-hatching covering the whole of the southern walkway, which fronts directly on the flats, and also half the western walkway (the southern half of it), from which it is said that the flats can be inappropriately viewed notwithstanding it is roughly at right angles to, rather than running in any way approximately parallel to, the flats, and therefore does not give on to the flats in the same way as the southern section does.

The building and planning history of the two properties - detail

29. The building and planning history of the two properties is relied on by the defendant because, amongst other things, it is said to be capable of going to certain aspects of nuisance, and it may be relevant to the question of remedy if one gets that far.

30. In 2005 the Neo Bankside site was purchased by GC Bankside LLP, a joint venture company in which one of the participants was Native Land Ltd. It is that latter company which features in the story of the dealings which follows. For present purposes it can be taken to represent the Neo Bankside interest in the development and planning process.

31. In 2001 the Tate Gallery started to think about developing the land behind the main Tate Modern building on which the Blavatnik Building now resides. By January 2006 the scheme had advanced sufficiently far that a paper was submitted to the defendant seeking approval of designs so that they could be submitted to the local authority for planning purposes. The building at this stage was very different from the brick construction that was eventually built. The design then proposed was one based on what can be described as a twisted pyramid made up of a number of differently orientated glass-faced cubes or cuboids. Two aspects of this design are or may be relevant. The first is the presence of so much glass. Part of the purpose of that glass was to provide views out as well as allowing light in. Some of it would probably be glass which would, from within, give a view of some of the flats in Block C, but the extent of that was not apparent from the evidence. Nor was it apparent to what extent the building would have been arranged so as to make the view an intended and necessary feature, as in a viewing gallery, as opposed to a more incidental passing thing, as in "normal" large windows. The second is that the briefing document made it clear that there would be "terraces with superb views, not just for Tate Members but for all visitors."

32. So a viewing terrace of some form was always intended. Plans show the then intended terrace. They are not wholly clear as to their extent, but on any footing the terrace for this building was not like the present one. It was not a walkway round four sides of the building. It seemed to be more of an open space at the top of the building giving views to the north and west, but not to the south (where Neo Bankside would ultimately be). It is not clear whether the terrace extended to the east, but the important point so far as the claimants are concerned is that there was no south-facing terrace. If this plan had been implemented it would appear that Block C might have been visible but would not have been overlooked, or certainly not as directly as is now the case.

33. City Corporation were aware of the plan for a terrace at a fairly early stage and welcomed it. That much is recorded in the minutes of a meeting on 10th May 2006 between the Tate and its representatives (including the architects) and City planners.

34. Native Land Ltd, who were by now in effect the developers of Neo Bankside, met with Tate representatives (including Mr Hyslop) on 17th May 2006 and it was agreed that the Tate side (including the architects) would consider "off line … whether the position of our [viz Native Land's] tallest block will impact on the key views from your top floor; if it does, we have a problem." There is no subsequent suggestion that it did, but it shows an awareness on the part of the developers of a viewing gallery. It was not in evidence what the outcome of that offline consideration was other than a request for a 3D model and site plan of Neo Bankside, but presumably it was perceived that the view would not be obstructed. That would not be surprising because the gallery at the time did not face south, it would seem.

35. In June 2006 Richard Rogers Partnership, for Native Land, prepared some revised proposals for planning purposes which reflected a number of things, "particularly the proposed extension to the Tate Modern". Within that document one page shows a sequence of development designs for the flats, from rectangular to the double-pointed shape which was ultimately built. The drawing showing the final shape is headed "Diagram illustrating primary views and orientation, solar shading, privacy and self-screening". Solar screening is shown by hatching which seems to describe some form of louvres on the prominent glass portion comprising the living accommodation and the winter gardens. The word "Privacy" appears in such a way as to suggest the same practical solution to protect privacy as between the blocks, but there is no marking which acknowledges a need to protect privacy as against those outside the blocks (and in particular the Tate Modern extension).

36. On 28th July 2006 Native Land submitted a planning application for Neo Bankside. It was accompanied by an Environmental Statement which said, amongst other things:

(i) There would be winter gardens in most units which would be "enclosed balconies similar to conservatories and … located outside apartments, providing amenity space for residents, suitable for use in both summer and winter … the inner partition would be formed by double glazed doors." (para 5.24).

(ii) There was "careful design" of the location and shape of the buildings "in order to maximise the privacy of existing and future residential occupiers" (para 7.118).

(iii) Louvres within the façade of the building would "help to prevent overlooking between the proposed buildings and between the buildings and existing residential uses that surround the [Neo Bankside] Site". (para 7.118).

(iv) The design of the flats "would not result in unacceptable impact on surrounding uses, in line with planning policies" (para 7.120).

37. Accompanying plans showed designs for elevations which would seem to show some form of louvres over some of the living accommodation windows, but not on the winter garden windows. The design features the extensive glass areas which exist in the as-built version.

38. A section entitled "Description of Cumulative Developments" sets out nearby developments including that proposed at Tate Modern. It acknowledges that:

> "Outside, the extension would be clad in cast glass. A public roof terrace and a tenth floor restaurant would provide panoramic views both north and south."

It is not clear where the developers can have got the idea of a southern view, but if they thought there was one they were presumably not unduly concerned by views south towards their own glass-based building.

39. On 2nd October 2006 the Tate submitted its own planning application to the London Borough of Southwark (the planning authority) for its glass pyramid building. It provides for a roof terrace with a "panoramic" view over London. The plan of the top layer shows the terrace referred to above, one with a northerly and westerly view, query an easterly view, but no real southerly view, or at least not from the south side closest to Neo Bankside. There was certainly no south-side viewing gallery or equivalent in the form of an area running along the whole of the south side in the manner of the present gallery.

40. A Development Control Report document, prepared in respect of the Neo Bankside development for the members of the Southwark Planning Committee, and dated 14th November 2006, refers to the Tate Modern's then outstanding application for planning permission for its glass building, but makes no comment on the impact of the one development on the other. It refers to the facade as being "a combination of solid, glazed and timber louvered panels", and to "'winter garden' balconies … to provide year round amenity spaces for future residents". One of the objections is listed as "Residents will look into existing flats". It would appear that to that extent, and only to that extent, there were express privacy concerns arising out of the construction of Neo Bankside.

41. In the same document some express concerns of Tate Modern are referred to, in the form of a quotation from a document which was not itself in evidence before me:

> "Tate Modern
>
> Tate wishes to offer its in principle support for the Holland Street Buildings application, due to the appropriate uses proposed on site and the considerably preferred approach to the 44 Holland Street site, which would otherwise be used for a 20 storey residential tower. This support is subject to the condition that Tate would wish to be involved in discussion with the Council and the Applicant on the agreement of appropriate conditions, mitigation measures and S.106 requirements that may be necessary to protect the amenity and operation of the Tate Modern Site and the visitor experience. In particular, this would involve agreement of an appropriate construction management plan."

42. The grant of planning permission for Neo Bankside. followed on 19th June 2007. The preceding officer's report referred to the "'winter garden' balconies". It was subject to conditions, which included the provision and approval of drawings of various principal elements, including:

> "(b) Typical sections … window/curtain-wall and glazing details including framing, louvre-system and opening vents".

The given Reason for that seems to have been:

> "In order that the local Planning Authority may be satisfied as to the details of external finish in the interest of the appearance of the building …"

43. What ultimately happened was that drawings were submitted and approved which did not contain the louvres apparently appearing on glassed elements in the preceding application. There is some louvring apparent but it is decorative - wooden panels over solid structural panes. Thus any proposals which might have involved creating privacy from form of structure disappeared without comment. It is also right to observe that the concerns of the council in this respect, as is apparent from the condition and Reason, were more to do with external appearance than with privacy.

44. On 12th November 2008 a representative of Southwark Council wrote to Drivers Jonas LLP, the Tate's planning agents. By now the defendant had changed its mind about the

form of its new building and had decided to go for a primarily brick construction rather than a glass one, apparently to distinguish it from surrounding glass buildings. The council later resolved to grant planning permission for the glass building (on 23rd December 2008) but the change in appearance and construction required a different planning permission and this letter seems to be part of the pre-application process between the Tate and the council. The letter records the council's concerns about massing and bulk, and about plans for a "viewing platform". Paragraph 13 reads:

> "13. … Setting aside the bunker-like aspects of this design, the panoramic view that will be available from this elevated platform will be disappointing by being contained. It is also disappointing from the point of view that this is the final place of arrival for this important public building. It is considered that the amount of structure required to achieve what is proposed would be to the detriment of the space. The viewing platform should take in the sky (or as much of it is possible). Glimpses of the sky through 3 – 6m high girders would not achieve this."

45. That letter does not make it clear what the viewing gallery proposal was, but it does demonstrate that the council was quite aware there was going to be one. However, a Design Control report prepared by the architects on 15th December 2008, and which was reproduced in support of the planning application refers to a gallery giving a 360° panoramic view. This did not, however, go to the local authority. What went to the local authority, as part of a planning application made on 9th January 2009, seeking permission for the new brick design, was a Supporting Statement which said (at paragraph 7.3.13) that there was a public viewing terrace on the top level (then level 11) "which wraps around the building". The supporting plan, however, was not clear as to whether it extended to the east of the building. But nonetheless it is clear from this point that the walkway did go round the south of the building (with the effect, whether appreciated or not, that it would give views into half the Block C flats).

46. On 31st March 2009 a planning officer prepared a report for the Southwark Planning Committee recommending that they grant the Tate's planning application (subject to a s106 agreement and to referral to the Mayor of London and the Secretary of State). The developer of the Neo Bankside site (described there as GC Bankside) is recorded as a supporting neighbour ("strongly supports"), but is also recorded as wishing to put in place restrictions to protect the amenity of "the significant number of new and existing adjacent residential properties". There is no clear indication of what that meant, though it occurs in the context of references to landscaping. There is no reason to suppose it is intended to refer to privacy for the flats in the development, whether in the context of the viewing gallery or otherwise.

47. At paragraph 64 part of the Environmental Impact Assessment there is recorded as follows:

> "Detailed studies have been undertaken, and included in the Environmental impact Assessment (EIA), of the potential impact of Tate Modern 2 on daylight, sunlight, overshadowing, overlooking, the local micro--climate (wind) and light pollution. These have demonstrated that in all these cases the impact would be negligible. In particular, any impact on the nearest residential occupiers would not be noticeable."

48. Mr May said that the statement about overlooking was inaccurate so far as the viewing gallery was concerned. The preceding Environmental Impact Assessments did not consider overlooking <u>from the viewing gallery</u>. The 2006 statement did not do so because the gallery was not planned then, and the glazing of the previous design did not raise the same issues. It was not apparent from the terms of the 2009 statement that it did anything other than repeat what was said before. He said there was no evidence that a planner would recognise that the overlooking of the interior of the flats by the gallery was considered. He was not challenged on that analysis of the documents, and I accept it. Whether the officers would be likely to have considered it, as a matter of probability, is a matter I consider below.

49. Other relevant parts of this document are:

> "73. There has been a thorough assessment of the potential impact of this development on the amenity of nearby residents and other occupiers in the surrounding area."

50. The section of the report then goes on to consider such things as TV and radio reception, additional vehicle movements from building operations, light pollution and the increase in visitor numbers in the area. It does not give any ground for thinking that any particular, or particularly close, consideration was given to the overlooking of the Neo Bankside flats by the viewing gallery.

51. Paragraph 97 refers to the "dramatic horizontal panorama" of London from the viewing gallery. It is apparent from that that the panoramic aspects of the gallery were considered.

52. On 31st March 2009 planning consultants engaged by the developers of Neo Bankside wrote to the council about service vehicles for the Tate Modern site, and for site operations there. It expressed the developers' intentions to work with Tate Modern on site operations, and concluded:

> "In conclusion, overall our client continues to strongly support the proposed development and therefore continues to support the recommendation that proposals [sic] should be approved."

53. On 30th April 2009 the developers of Neo Bankside prepared plans showing the facade of the building incorporating the details still to be agreed. As appears above, they had removed what appeared to be louvres capable of protecting privacy for the flats (to a degree) and these plans were approved by the council on 7th August 2009. Meanwhile planning permission for the Tate Modern's new building was granted on 14th May 2009.

54. Construction of the Blavatnik Building and Neo Bankside started in 2011. Various amendments to the Blavatnik Building design took place at this time, the significant ones for present purposes being those to the viewing gallery. On 12th September 2011 planning permission was given to changes in the original design which added support columns to the gallery and, according to the experts, and to opening up the gallery on the east side. The planning documents which I have seen do not in terms refer to opening up the east side of the gallery, but the experts are agreed that this is a proper view of the planning documents (not all of which I saw - I did not see the plans) and I shall treat it as an agreed fact. It may be that the previous references to a 360° view assumed a view through glass sides of the lift lobby at that level, but nothing turns on that.

55. The developers produced marketing material for the development. Mr Fearn saw a brochure, but could not remember more about what he saw. Mr Fetherstonhaugh put to him a document downloaded from the internet which would appear to be some sort of marketing material from neobankside.com. The pages he produced all had photographs (some of them partially mocked up) with a label "Neighbourhood Tate Modern" and extolled the virtues of the Tate Modern as a neighbour. One page, with a representation of what the building would look like lit up at night, refers to "A new spectacular pyramid-like structure" which was being built and which referred to "a top floor terrace for the public to relax and breathe in the inspiring atmosphere". Mr Fearn denied having seen that document, and I accept that evidence. It was put to Mrs Urquhart, who could not remember seeing any marketing material. She did not think she had seen that particular piece. I accept that evidence too. I also find that, even if Mr Fearn and Mrs Urquhart (or anyone else) had seen it, it would not of itself have given any real indication of the nature of the gallery, or of the nature and usage that was to come. If notice were relevant to this case, this document would not have given it.

56. Neo Bankside was completed before the Blavatnik Building. Three of the claimants viewed their flats in 2013 and they all bought their flats in 2013 or 2014 under 999 year leases. They were all original purchasers of their leases.

Building and planning history - conclusions on awareness

57. From the basic history set out above, and from a consideration of the evidence of the experts, who have experience of the practice of planning applications, I make the following findings of fact in relation to the knowledge of the various parties involved in this case as to the viewing gallery from time to time and as to what the viewing gallery would involve when built and opened.

58. There is no planning document which in terms says that the overlooking by the present viewing gallery, in the direction of Block C (or other blocks) was actively considered by the local planning authority at any stage. There are general references to overlooking, but that is as far as the documents go. No witness was called to deal with the point, so (to the extent that it is relevant) it is a matter of inference as to whether and to what extent it was considered.

59. No witness who was involved in the process at the time could give any instance of a conversation or dealing in which the question of overlooking of the flats by the gallery was referred to either internally within the Tate or otherwise.

60. The propensity for the Blavatnik Building to overlook will have been apparent to the local authority planners, but in different ways at different times. The original glass building did not present a prospect of overlooking the Neo Bankside development from the viewing gallery because the gallery did not present views to the south. There was a prospect of overlooking from at least some of the windows of the glass cuboid constructions, but it is not apparent that detailed consideration was given to this in any way which is relevant to the present matter because the concept was different. Little was demonstrated in these proceedings as to how the design concept would work in practice in this respect, but the sort of viewing that would be done from windows which are part of an art gallery is likely to be different from the viewing done from a dedicated viewing platform, both in terms of its nature and quality and probably in terms of its numbers (there would be more deliberately viewing viewers on a viewing gallery). There was nothing in these plans which foreshadowed the sort of viewing experience which the claimants claim to have suffered. The local authority will not have been thinking in those terms. Furthermore, the overlooking concept would not have been particularly significant in the minds of planners because the distance between the flats and the gallery (27m at ground floor level widening as the buildings rise) was greater

than the standard normally applied to distances between residential buildings (12m to 21m depending on the standard applied - it is unnecessary to consider them in detail). That makes it less likely that the point will have been dwelt on in relation to the glass body of the building. The viewing terrace in this proposal did not have a south-facing aspect, so there was nothing there to call to mind the possibility of overlooking of the present nature.

61. The original apparently intended privacy measures will not have encouraged a consideration of the extent of the actual overlooking from any gallery. Furthermore, it is the case that the winter gardens were originally intended as quasi-balconies (see below). As such they would attract less privacy in terms of overlooking than living accommodation, on normal planning considerations (again, see below). It may well be that that deflected the attention of the planners, developers and Tate representatives from a more detailed consideration of privacy matters.

62. When a gallery along the south side of the building was then proposed a fresh application was prepared, with its supporting documentation, but the supporting documentation did not draw attention to, or in any way refer to, the fact of overlooking from the gallery. This would have been a new factor, since it was a viewing gallery, not a window. There is no evidence that the council particularly considered overlooking at this stage. Mr Rhodes thought it likely if not inevitable that an experienced planning officer would have done so and must have been satisfied that, in planning terms, the degree of overlooking was acceptable. He defended this position in cross-examination. Mr May's evidence was to the contrary. He considered that the absence of any meaningful reference to it in the planning documents demonstrated that it was not properly considered. The problem did not exist under the original Tate Modern scheme (the glass building) and when the design was changed there was pressure to get the matter dealt with quickly. He considered it more likely that it was not appreciated that the gallery plans had altered, and that the effect of that was not considered.

63. I am not sure that that question is really one amenable to expert opinion, but in any event I consider that Mr May's analysis is the more likely. While an experienced officer <u>might</u> have considered the point, in this case I consider it less likely because of the pattern of development and the factors referred to above. On the balance of probabilities it is not likely that the planning authority did consider the extent of overlooking. It is more than plausible in all the circumstances that it did not, and I find that it was not given any focused attention by the planning authority.

64. So far as the developers of Neo Bankside are concerned, there is very little material on which to make a finding as to their awareness of the consequences of the viewing gallery. The developers were plainly aware of the nature of the Blavatnik development from time to time, and I accept Mr Hyslop's evidence that there was consultation

between the two sides. It is plain that the developers were aware of a viewing gallery because concerns were expressed as to the effect the flats would have on the viewing gallery (not the other way round). It is very likely that the developer was aware of the plans for the gallery during the concurrent planning process. However, I do not think that the developer foresaw the level of intrusion alleged by the claimants, and therefore to that extent did not foresee the consequences of its co-operation or its knowledge.

65. The end result of this analysis is that, so far as relevant, I find that all relevant parties were eventually aware of the viewing gallery in its present form, and aware of its function, but (so far as relevant) they did not think through the consequences of overlooking, and looking into, the flats in Block C.

The usage of the gallery - numbers, opening hours and controls

66. Tate Modern has about 5.5m visitors per year. Not all of them go up to the viewing gallery. Mr Hyslop's estimate in the witness box was that there were 500,000 to 600,000 visitors to the gallery each year. Mr Weekes thought that that might be over-stated, but that does not matter. The important point is that the number of people visiting the viewing gallery is in the hundreds of thousands. The opening of the gallery attracted a lot of interest at the time, some of which has subsided, though it appears that this case has temporarily created a little surge of further interest.

67. The maximum number of visitors to the gallery at any one time is 300, and that number is said to be monitored to make sure it is not exceeded. People tend to spend on average 15 minutes there, but that is an average, so some will spend more time there. Originally the gallery was open when the museum was open, which was 10am to 6pm on Sunday to Thursday and 10am to 10pm on Friday and Saturday. However, on 26th April 2018 the claimants were notified that the opening hours were to change. As a result of disclosure shortly before the trial it turned out that that had probably been because of negotiations with an occupant of another block. It would seem (rather surprisingly) that the Tate was somewhat coy about revealing the reasons for the change, or acknowledging those facts, but in the end nothing turns on that. The most significant part of that change is that the viewing platform as a whole would be, and now is, closed to public access at 5.30pm on Sunday to Thursday. On Friday and Saturday the south and west sides are closed from 7pm, and the north and east sides from 10pm. Monthly events called Tate Late are an exception - on these days (currently the last Friday of each month) the whole gallery remains open until 10pm, with clearance starting at 9.30 pm.

68. As well as affording access to the public, the 10th floor area, including the gallery, is used by the Tate Modern for hosting commercial and internal events. The external events are very important to Tate Modern in financial terms, because they bring in

significant income. Miss Lee gave evidence of that. In the first 17 months of the Blavatnik Building's life 52 external events were hosted there. They are held only between Sunday and Thursday. Guests are allowed to use the gallery. Until the change of hours referred to in the preceding paragraph there was no restriction on the use of the gallery by guests at these events, but since April 2018 the same restrictions on user apply to these events as apply to public access.

69. Immediately the gallery opened there were complaints from the claimants about the activities of visitors (see below). Tate Modern has said that it wishes to act in a neighbourly manner, and it took two steps to try to address the problem. The first was to post notices on the southern gallery asking visitors, in terms, to respect the privacy of the gallery's neighbours. The second was to instruct security guards to stop people taking photographs of the flats and occupants. Insofar as the effectiveness of those steps to address the concerns of the claimants is concerned, and insofar as those concerns need to be addressed, I have to say that I do not regard them as likely to achieve much. The proper meaning of the notice will be lost on non-English speakers, and its real significance lost to most others. So far as the instructions to security guards are concerned, that might operate to prevent persistent photographs and long filming, but will not operate to prevent the first photograph (and probably others) in a sequence. If implemented properly it will prevent a sustained intrusion on privacy involving a camera, but not much else. There was some evidence from Mr Higgins to the effect that on the occasion of which he gave evidence some members of the public were hostile when asked not to take photographs. That may not be typical (he was asking in a situation in which some publicity had just been given to the start of this case) but it does show the difficulties of policing with security guards.

70. The claimants take the view that the Tate's steps to ameliorate the situation (the notice, the instruction to guards and the altered opening hours) are not sufficient to meet their respective claims and they seek closure of parts of the gallery or screening off, as referred to above.

The activities of visitors to the gallery

71. I have already set out in general terms what it is that the claimants complain about in terms of their being viewed and inspected from the viewing gallery. The defendant does not seek to say that none of that behaviour happened, but it did seek to say that it was not as bad as the claimants say, and that the claimants have bought it on themselves as a result of their publicising their own complaint, so I will have to make some findings about it, both in terms of its quality and, so far as possible, its quantity.

72. The claimants rely on evidence of their own experience, on films that have been taken of activity on the gallery, and on what has appeared in social media.

73. So far as films are concerned, there are two. The first is a short one taken by Mrs Urquhart. It was taken from her kitchen, looking up at the gallery and lasts 39 seconds. It shows a significant number of people on the south side of the gallery - they line most of the railing. Some people can plainly be seen looking elsewhere other than the flats. Some can be seen plainly looking in the flats. A significant number of them wave. It can be safely be assumed that some will be waving because they are being filmed - they know they are of interest and wave back. But Mrs Urquhart's evidence was to the effect that waving was a typical activity, and I accept that evidence. I consider it unlikely that the interest shown in the flat was simply because someone was filming gallery visitors and that no interest would be shown if no filming was happening.

74. The other film is much longer - 2 days. Mr May set up a small camera in flat 1801 to film the gallery to try to capture the footfall there and to try to capture occasions on which there was photography. The filming took place on Sunday 6th and Monday 7th May 2018, which was a Bank Holiday weekend. The resultant footage was presented to me on a hard disk at the trial. I was not invited to view the whole of it, but I was invited to sample it at my discretion and to view particular identified parts of it which are said to show people taking photographs.

75. Mr May told me that he had sat down and viewed the whole footage. Some of it he speeded up; some of it he slowed down in order to check on activity in which he might be interested. He calculated that, extrapolating from the number of people that he saw on the gallery, that there would be 608,000 visitors to the gallery per year. I have already indicated that even if figures of that order are too great, there is still a very large number. In viewing it he counted the number of people who seemed to be taking photographs from the 3 left-hand bays (looking them from the flats) and counted them as taking a photograph of the flats unless it was obvious to him that they were photographing something else, though he said that there was nothing to photograph from those three bays except the flats and the view over Westminster to the photographer's right (the flat viewer's left). His original assessment of the film was that it showed 10.4% of the people on the gallery took photographs, but in oral evidence in chief he volunteered that that was too high. A conservative estimate was 2%, and it could be 4%. That still meant a lot of photographs. I am invited to find that this evidence supports the case of the claimants that they suffer intrusion from photographs.

76. I do not regard this evidence as adding much in the circumstances, mainly because of the quality of the film. The definition of the camera's sensors, coupled with the width of the angle of the lens and the distance from the gallery, means that the figures on the gallery are not distinct enough to be able to sure whether they are taking photographs (very often) and, if they are, what they taking photographs of. It is clearer that photographs are being taken in some instances than in others, but even for those where it is plain that photos are being taken it is often not possible to identify the target. I was given a list of 21 time markings at which it was said that one could see people taking

photographs. They were said to be examples; it was not said they were the best examples. I will not deal with each of those examples separately. I will simply say that I could not see the evidence of any apparent photography in 2 or 3, and that in several others it was not clear what was being photographed because in none of them can one see an actual camera, let alone a lens. In some of them, where there is apparent photographic activity, one can see that any photography of the flats is incidental to a pan by the photographer as the camera sweeps past. It is not possible to identify deliberate photography of the flat interiors in any of them.

77. I therefore do not find that particular piece of evidence helpful. In addition to it there are some photographs taken from inside the flats by an occupant or occupants of the flats, and in particular Mr Alexander McFadyen. They all show gallery visitors with a phone held as a camera, or a camera itself, and in most, but not quite all, of which the camera is pointed in the direction of the taker of the photograph in the flats. In one or two it is not apparent that a photograph is being taken from the gallery, but in a very significant number it would appear that a photograph is taken of the flats, either that of the photographer or flats above or below that. They clearly corroborate the evidence of the claimants about photograph taking. There was an attempt by Mr Fetherstonhaugh to suggest to Mr McFadyen that he instigated the photography from the gallery by photographing the gallery visitor first. Mr McFadyen did not accept that suggestion and neither do I. I accept that Mr McFadyen photographed only those who photographed first, even if, on occasion, his act then triggered a further reaction such as a wave. I accept, to a degree, Mr Fetherstonhaugh's submission that it is not always apparent whether a photographer (particularly with a phone) is photographing the flats, or something else, but I consider it is likely that a number of those photographed from the claimants' side were photographing the flats, including the interiors.

78. In this context I refer to a particular piece of evidence from Mr May. He described standing in the viewing gallery behind a lady who was plainly photographing the flats in Block B, and she did so by lowering the camera so that she could capture them between the railings of the gallery. I accept his evidence about that. It does, of course, concern Block B, which is a different block, but it corroborates the level of interest in the flats generally and their interiors.

79. Mr McFadyen claimed to have caught in a photograph at least one person with binoculars, looking into his home. I accept that that is probably what he caught. This corroborates the more general evidence of the claimants about that activity. Another photograph which he took demonstrates the use of binoculars, but not pointed at the flats. Based principally on the evidence of the claimants, I accept that on occasions they and their flats are studied by those with binoculars, but think it likely that those events are very much rarer than photography.

80. The peering into the flat without cameras, and the waving and obscene gestures, are not corroborated by photographic evidence though Mrs Urquhart's film is to some degree corroboration of the claimant's case to this effect, though limited by the fact that the gallery visitors were aware they were being filmed, but again I accept the evidence of the claimants that it occurs and (in case of peering and waving) on a much more than de minimis scale. It may sometimes be difficult to ascertain if people are really looking intently into the flats, but, particularly having visited the flats myself, I am satisfied that one can get a reliable perception of that from the flats and that the evidence of the claimants that that happens to a disturbing extent is correct.

81. The claimants also rely on reports on social media as demonstrating a photographic and "peering" interest in the flats. They, and Mr May, produced in evidence a large number of photographs from social media, some accompanied by comments, which indicate that people have been to the gallery, noted that one can see into the flats, and commented in such a way as to acknowledge that there was a surprising intrusion into privacy arising as a result of that.

82. The first batch of postings were all dated in a period shortly after the Mail on Sunday wrote a piece about the issue in 2016. They are 14 Instagram posts which feature various photographs of the interiors of the Block C flats with some reflections on the lack of privacy in the flats. Some juxtapose the sign asking for respect for privacy with the view into the flats themselves; another has the rubric "Invading me some privacy"; another refers to the "Birds eye view directly into the neighbouring apartments. No wandering around in pj's" with the hashtag (among others) "#noprivacy". The general impression from that collection of posts, which caused upset to some of the occupants, was that those visitors were interested in peering into the flats when that view was on display.

83. This was supplemented by investigations into social media carried out by Mr May as part of his expert functions. A member of his firm carried out a check on Instagram and found 124 posts with photographs of Neo Bankside, apparently taken from the viewing gallery, in the period between June 2016 and April 2018. It was estimated by that member that they reached an estimated audience of 38,600, but there is a certain element of intelligent guesswork in that figure. Many of photographs show the interiors of the flats. Judging by their attached comments and hashtags, many of the photographs are taken because of the architectural interest of Block C, or because of the photogenic interest of the subject matter (not always the block by itself), and some comment on the fact that you can see right into the flats. Various conclusions can be drawn from this study, depending on one's point of interest, but I consider that they support the case of the claimants that part of the interest on the part of at least some posters was in the view of Block C flat interiors from the gallery. For others the interiors are irrelevant, and for yet others it is noted and incidental, but there is a significant discrete interest in what one can see by looking into the flats.

84. Mr Fetherstonhaugh sought to play down the significance of the social media postings as evidence of interest on the footing that much of it was in periods when interest was stimulated by publicity given to the dispute and would not have been demonstrated without that stimulation. He also sought to demonstrate that many of the photographic postings were for purposes other than peering into the interiors - perhaps general views, or architectural studies. I agree with his timing points but I consider that they do not negate the fact that a significant number of people peer photographically into the interiors of the flats and find them interesting. One cannot dismiss all the Instagram postings on the basis of Mr Fetherstonhaugh's analysis, and what is left supports a case that people are interested in what goes on in the flats.

85. Drawing these strands together, and taking into account the evidence given for the claimants, I find that there is a significant number of people who demonstrate a visual interest in the interiors of the flats in the manner complained of by the claimants. Some look, some peer, some photograph, some wave. The occasions of obscene gestures are probably very rare. I do not have to put numbers on the people thus interested. There is a significant, perhaps large, number of them, and I accept that their numbers and the level of interest is such that a homeowner would reasonably regard to be intrusive. In saying that I am not pre-judging privacy questions which arise in this case in relation to this building, and which I have to consider below. I am merely trying to give an indication of the level and effect of intrusion.

86. There is one aspect of the view that it will be convenient to deal with at this point in the judgment. Practically all of the debate at the trial was the view into the flats through the northern face of the winter gardens and the northern windows giving on to the living accommodation. It was suggested by Mr Fearn that the gallery visitors could also see into his Winter Garden through the other face (south-western face). Since he had never been into the gallery he must have been basing this opinion on the fact that he could see the gallery through that face. It is only a small point, but I find that any view through that face is very limited indeed. The line of the glass is a very oblique angle to the face of the gallery, and it may be that reflections would prevent any view at all. I did not notice that aspect myself on my view. I consider that this face is irrelevant to this dispute in terms of overlooking.

My own view of the flats and gallery

87. I have referred above to the view that I have had of the site of the dispute. I saw the flats from the gallery, and the gallery from all the flats, and the general views from both of them, on a sunny afternoon when the sun was moving past the south into the west. From my visit, combined with the rest of the evidence I heard and read, I have come to the following views.

(a) The view from the gallery is indeed striking, particularly to the north, west and east. It is quite understandable why the Tate's representatives should consider that view a cultural, if not artistic, asset.

(b) The view from the southern stretch of the gallery is of less general interest, despite what the Tate witnesses said about its interest to those from south London. I confess that some of their attempts to stress the "links" with south London that the view afforded seemed to me to be rather over-stated, but this judgment does not turn on such value judgments. The view is nonetheless not without interest, and one of the interesting things is the appearance of the Neo Bankside buildings themselves (including, of course, Block C).

(c) The available views overall are great contributors to the inhabitants of, and visitors to, London. Whether experiencing them is an integral part of the artistic experience of a visit to the Tate Modern (as suggested by some of the Tate's witnesses) is not something on which I need to form or express a view.

(d) The view from the viewing gallery into the living accommodation of the two flats at the same level (1801 and 1901) is clear. One can indeed see all sorts of aspects of the daily living of the occupants of those flats, both in the winter gardens and in the kitchen/dining/sitting area of the flat itself. That is almost as true of flat 2101, but not so true of flat 1301. So far as the latter flat is concerned, one has a view into large parts of the kitchen area, the winter garden, and a limited part of the rest of the living area, but not to the extent of the other three flats.

(e) The angle of the view changes as one walks along the southern part of the viewing gallery. At its western end one looks into the winter gardens and then through the glass dividing doors into much of the living accommodation (dining, sitting and kitchen areas). As one walks along the gallery the angle of view changes so that one sees less of the living accommodation through the winter gardens and more of it directly through the living accommodation's windows. Through one or other of those views, for the subject flats (and obviously the others on that side of Block C) there is a very clear view into most of the living accommodation from one point or other on the southern walkway (subject to what I have said about flat 1301).

(f) It is quite understandable that the occupants of the flats, and particularly the top three flats, would be as aware of the viewing gallery and the people in it as the claimants all maintain. While the sensitivity to the point may vary from person to person, it is not unreasonable to feel as the claimants do about the presence of the visitors. Again, this is less true of the lowest flat in the claim (flat 1301), but to a degree it is still the case.

(g) I think it likely that the view of many visitors will be drawn to the interior of the flats as well as the rest of the available view. It is human nature that the interest will be greater if there are people in the flats. Many will not dwell on the interiors and anyone within them. But many will do so.

(h) It is a not unreasonable subjective perception on the part of a flat dweller that his or her personal privacy is invaded by that degree of overseeing. Again, the subjective perception will vary from person to person, but it is not unduly sensitive

for the occupants to feel as they do about it. On the other hand, not all occupiers would feel so oppressed.

(i) Under some conditions the view into the flats is obscured, in whole or in part, by reflections of the surroundings from the face of the glass. I observed this for myself, and it is apparent from some of the Instagram postings as well. However, that will not be the case under all conditions, and it is not a substitute for screening.

(j) When lowered, the blinds that I saw in one of the flats (which I assume was typical) reduced the light somewhat, but not oppressively. The nature of the blinds was such as to allow a fuzzy view of the outside world through them. They were not (and were not intended to be) totally opaque.

(k) It is possible to have a view of the interior of flats in the block from street level, diminishing as the building rises and as the angle of view increases. The interiors of the lower flats (but not the upper flats) are therefore visible from public areas other than the gallery. On the other hand, the street is not somewhere where people pause for extended periods in order to view.

(l) There are windows on the southern face of the Blavatnik Building below gallery level. Those windows are in the entertaining and kitchen areas. A view of the interior of the flats is available from those windows. The claimants make no complaint about that. I find that the windows are not frequented by people who are visiting for the purposes of seeking a view, and that the level of people with access to those windows, and who choose to look out of them, is far less than the tens or hundreds of thousands of visitors to the gallery.

Conclusion on the facts of the level of intrusion

88. Gathering my findings above into one place, I find:

(a) A very significant number of visitors display an interest in the interiors of the flats which is more than a fleeting or passing interest. That is displayed either by a degree of peering or study, with or without photography, and very occasionally with binoculars.

(b) Occupants of the flats would be aware of their exposure to that degree of intrusion.

(c) The intrusion is a material intrusion into the privacy of the living accommodation, using the word “privacy” in its everyday meaning and not pre-judging any legal privacy questions that arise.

(d) The intrusion is greater, and of a different order, from what would be the case if the flats were overlooked by windows, either residential or commercial. Windows in residential or commercial premises obviously afford a view (as do the windows lower down in the Blavatnik Building) but the normal use of those windows

would not give rise to the same level of study of, or interest in, the interiors of the flats. Unlike a viewing gallery, their primary (or sole) purpose is not to view.

(e) What I have said above applies to the upper three flats in this case. It applies to a much lesser extent to flat 1301, because that is rather lower down the building and the views into the living accommodation are significantly less, and to that extent the gallery is significantly less oppressive in relation to that flat.

The direct claim in privacy

89. The direct claim in privacy is said to arise under section 6 of the Human Rights Act 1998, and Article 8 of the European Convention on Human Rights, by virtue of the fact that the Tate Gallery is a public authority of a "hybrid" nature (to borrow an expression from the authorities). Whether it is such a public authority is the first question that arises under this head. It is only if that question is answered in the affirmative that it is necessary to consider whether there is a direct claim under Article 8 on the facts.

90. Section 6 of the Act provides:

> "6(1) It shall be unlawful for a public authority to act in a way which is incompatible with a Convention right."

91. Subsections (3) and (5) provide important definitions and elaborations:

> "(3) In this section 'public authority' includes: - "
>
> … (b) any person certain of whose functions are functions of a public nature …"
>
> (5) In relation to a particular act, a person is not a public authority by virtue only of subsection 3(b) if the nature of the act is private."

92. The Convention right relied on is that protecting what can loosely be called privacy, in Article 8 of the Convention:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or…for the prevention or disorder or crime…or for the protection of the rights and freedoms of others."

93. The claimants do not now allege that The Tate Gallery is a public authority in the full sense of the word (a "core" public authority). That claim seems to have been made in the Particulars of Claim, but by the time of the opening skeleton arguments in this case this point seems to have been put on the basis that the Tate fell within section 6(3)(b), and that position was repeated in final submissions.

94. The particular functions relied on were not clearly articulated in the case documentation, but they would seem to have been the operation of art galleries for the benefit of the public (putting it shortly). In a longer form, I understood Mr Weekes' case to be that the functions described in section 2(2) of the Museums and Galleries Act 1992 (see below) were functions of a public nature for the purposes of section 6. This has to be teased out of Mr Weekes' opening and final submissions, but ends up being clear enough. It emerges most clearly from para 110(iii) of his written closing submissions when he refers to the Tate's holding of the State's collection of art. He does not seem to have sought to make a case that the operation of the viewing gallery was itself a discrete public function; his written final submissions seek to make the case that it was not severable from wider public functions that the Tate Gallery has.

95. The defendant denied that it was a "core" public authority. The main thrust of its submissions was that it was not particularly relevant to consider whether some of its functions were exercised in the public interest. The main question was said to be whether the operation of the viewing gallery itself was the exercise of a public function, and it submitted that it was not. However, its list of issues made it clear that it was an issue in the case as to whether it was a "hybrid" authority, even though Mr Fetherstonhaugh's submissions were often targeted differently.

96. To an extent, therefore, there was a mis-match of submissions. Mr Weekes based himself on the wider proposition that the Tate Gallery was exercising wider public functions of which the viewing gallery was an integral part. Mr Fetherstonhaugh majored on the fact that running the viewing gallery per se was not the exercise of a public function, and did not address his submissions much to the wider point. Nonetheless, the wider point has to be addressed because it is a necessary part of Mr Weekes' case and a logical starting point. Insofar as he succeeds on that, it becomes necessary to consider what I can call the severance point about the operation of the

gallery itself. If he fails, he does not really have a stand-alone point on the viewing gallery by itself.

Public authority issues - the facts

97. There is obviously an important factual background to this issue, and it will be useful to summarise it here before turning to the legal issues that arise.

98. It will be well known that the Tate Gallery has a long history, though that history was not investigated or expounded at the trial before me. In its present incarnation the Gallery, of which the Tate Modern is part, was founded by the Museums and Galleries Act 1992:

> "1(1) There shall be bodies corporate known as—
>
> …
>
> (b) the Board of Trustees of the Tate Gallery (in this Act referred to as "the Tate Gallery Board");"

99. Other provisions provide for the transfer of assets, rights and liabilities. Section 2(2) deals with the functions of the Gallery:

> "2(2) So far as practicable and subject to the provisions of this Act, the Tate Gallery Board shall maintain a collection of British works of art and of documents relating to those works, and a collection of Twentieth Century and contemporary works of art and of documents relating to those works, and shall—
>
> (a) care for, preserve and add to the works of art and the documents in their collections;
>
> (b) secure that the works of art are exhibited to the public;
>
> (c) secure that the works of art and the documents are available to persons seeking to inspect them in connection with study or research; and
>
> (d) generally promote the public's enjoyment and understanding of British art, and of Twentieth Century and contemporary art, both by means of the Board's collections and by such other means as they consider appropriate; …"

100. Sections 2(5) and 2(6) are said by the claimants to be relevant to the question of whether the Tate is exercising a function of a public nature. I set them out here without comment:

> "(5) Subject to the provisions of this Act, a new Board may, for the purposes of whichever of subsections (1) to (4) above confers functions upon them—
>
> (a) provide education, instruction and advice and carry out research;
>
> (b) enter into contracts and other agreements (including agreements for the new Board's occupation or management of its principal building or of other premises); and
>
> (c) acquire and dispose of land and other property.
>
> (6) Subject to the provisions of this Act, a new Board may do such things (including requiring payment for admission or for other services or for goods provided by them) as they think necessary or expedient—
>
> (a) for preserving, and increasing the utility of, their collection;
>
> (b) for securing the due administration of anything vested in or acquired by them, and any premises occupied or managed by them, under or by virtue of this Act; and
>
> (c) otherwise for the purposes of their functions."

101. Section 2(7) enables a Minister to delegate functions to the Board:

> "2(7) If a Minister of the Crown directs a new Board to exercise functions—
>
> (a) which are exercisable by him (whether by virtue of an enactment or otherwise),
>
> (b) which in his opinion can appropriately be exercised by that new Board, having regard to their functions and resources, and
>
> (c) which are specified in the direction,
>
> the new Board shall exercise them on his behalf in such manner as he may from time to time direct; but nothing in this subsection authorises the new Board to exercise a function of making regulations or other instruments of a legislative character."

That provision does not apply to any particular act relevant to this litigation.

102. Schedule 2 provides that the Gallery is not an emanation of the Crown, and that its staff are not civil servants:

> "2(1) Subject to sub-paragraph (3) below, the Board shall not be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown.
>
> (2) The trustees and their staff shall not be regarded as civil servants and the Board's property shall not be regarded as property of, or held on behalf of, the Crown.
>
> (3) In relation to any matter as respects which the Board act by virtue of a direction under section 2(7) of this Act, the Board shall enjoy the same privileges, immunities and exemptions as those enjoyed in relation to that matter by the Minister giving the direction."

103. Nothing in those provisions suggests that the Tate is a "core" public authority, and Schedule 2 para 2 points clearly the other way. No-one in the case contended otherwise.

104. Section 9 provides that the Secretary of State may provide public funding to the Gallery, and that financial statements shall contain information which complies with any directions of the Secretary of State as to their content. The financial statement is to be provided to the Secretary of State. Pursuant to that provision (presumably) the Tate Gallery does indeed receive significant public funding - it received £35.8m in the year 2016-17. It should, however, be noted that that is nothing like all the funding it requires - see below as to that.

105. Pursuant to other provisions of the 1992 Act, the Tate is subject to other controls by state officials. The consent of the Lord President of the Council is required for the acquisition and disposition of land and the formation of certain bodies corporate; The Lord President may impose conditions on the pay and conditions of the Tate's employees; the Lord President receives three yearly reports (which are laid before Parliament); the Secretary of State can attach conditions to the provision of public funds; and the Comptroller and Auditor General examine and certify its accounts, which are laid before Parliament.

106. Under the Parliamentary Commissioner Act 1976 the Tate is one of the "departments etc" that are subject to investigation by the Parliamentary Ombudsman. (Perhaps significantly, the Gallery was so subject before its present constitution under the 1992 Act.)

107. Those are all factors relied on by the claimants as reflecting the public interest in the Tate, which is said to go to the question of whether it is a hybrid public authority under the 1998 Act. Other more minor factors are relied on, but in my view they do not add materially to the picture. These factors are said by the claimants to show that the Tate is "tasked by statute to perform a public service to the nation".

The law on "hybrid" public authorities

108. In *Aston Cantlow and Wilmcote with Billesley Parish Council v Wallbank and another* [2004] 1 AC 546 the House of Lords had to consider whether a parochial church council should be treated as a public authority generally, or in relation to its activities in maintaining the fabric of its church. Various remarks in the speeches of their Lordships assist in providing guidance in approaching that question in the present case. Thus Lord Nicholls said:

> "7. Conformably with this purpose, the phrase "a public authority" in section 6(1) is essentially a reference to a body whose nature is governmental in a broad sense of that expression ... The most obvious examples are government departments, local authorities, the police and the armed forces. Behind the instinctive classification of these organisations as bodies whose nature is governmental lie factors such as the possession of special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest, and a statutory constitution: see the valuable article by Professor Dawn Oliver, "The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act": [2000] PL 476."

109. Although Lord Nicholls is there considering the question of whether a body was a core public authority, that encapsulation is of assistance in considering whether a "function" is one of a "public nature". The concept of being "governmental" is of significance. In that context it has, of course to be recognised that in a modern age functions of government are wide-ranging, and some can be discharged by non-governmental bodies - see Lord Nicholls at para 9.

110. So far as particular functions are concerned Lord Nicholls returned to the essence of a function of a governmental nature:

> "10. Again, the statute does not amplify what the expression "public" and its counterpart "private" mean in this context. But, here also, given the statutory context already mentioned and the repetition of the description "public", essentially the contrast being drawn is between functions of a governmental nature and functions, or acts, which are not of that nature. I stress, however, that this is no more than a useful guide. The phrase used in the Act is public function, not governmental function."

111. There is no single test, and various factors are or may be relevant:

> "12. What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service."

112. Lord Hope used a similar overall guide of governmental functions:

> "49. The phrase "public functions" in this context is thus clearly linked to the functions and powers, whether centralised or distributed, of government."

113. Having expressed the view that the PCC was not a "core" public authority (ie it was not, of its nature, a public authority) he went on to express the view that the functions being exercised in that case were not public functions either. He acknowledged that there was a public interest in having the repairs carried out (para 64) but concluded that the act in question was not a public function:

> "64. …The nature of the act is to be found in the nature of the obligation which the PCC is seeking to enforce. It is seeking to enforce a civil debt. The function which it is performing has nothing to do with the responsibilities which are owed to the public by the State. …"

114. Lord Hobhouse also considered the extent to which the functions of the PCC, and the particular function in question, were governmental (amongst other things). Lord Hope also referred to that factor, acknowledging that a public interest in an activity did not mean it was a governmental function (para 170). He ended his speech by saying:

> "171 … There is nothing in the nature of the obligation itself, or in the means or purpose of its enforcement, that would lead to the conclusion that the PCC of Aston Cantlow is exercising a governmental function, however broadly defined, when it enforces the lay rectors' obligation to pay for chancel repairs. Therefore, even when it is enforcing that obligation, the PCC is not to be regarded as a public authority for the purposes of section 6 of the 1998 Act."

115. In *YL v Birmingham City Council* [2008] AC 95 the Supreme Court had to consider whether a private company, which contracted with a local council to provide residential accommodation for individuals, was or was not fulfilling a public function within section 6(3)(b) in relation to that provision. It held that it was not. Lord Mance, one of the majority, drew heavily on *Aston Cantlow* in his judgment and developed or elaborated it in certain respects which are helpful to a determination of the present case. Thus he said:

> "103. Typical state or governmental functions include powers conferred and duties imposed or undertaken in the general public interest. I shall not attempt to identify the full scope of the concept of "functions of a public nature", any more than Lord Nicholls did in *Aston Cantlow*. But some further consideration is appropriate of his suggested hallmarks of a public authority. As stated, these were, in the case of a core public authority and in addition to special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest and a statutory constitution. All these factors can readily be understood to throw light on the nature of a person's functions. When considering section 6(3)(b), Lord Nicholls suggested as factors, again in addition to statutory powers, the extent that a body is publicly funded or is "taking the place" of central government or local authorities or is providing a public service: [2004] 1 AC 546, para 12. These are more generally expressed factors, to which I address some further comments."

116. He then went on to consider the particular element of public funding which was said to exist in that case, though in a form which does not assist the present debate. Statutory regulation, if anything, pointed against a body being governmental, or a function being of a public nature:

> "116. In providing care and accommodation, Southern Cross acts as a private, profit-earning company. It is subject to close statutory regulation in the public interest. But so are many private occupations and businesses, with operations which may impact on members of the public in matters as diverse for example as life, health, privacy or financial well-being. Regulation by the state is no real pointer towards the person regulated being a state or governmental body or a person with a function of a public nature, if anything perhaps even the contrary."

117. Lord Neuberger agreed with Lord Mance, but conducted his own closely reasoned analysis of some of the issues in his case. It is sufficient to note the following matters arising from his judgment:

(i) The fact that a service is for the public benefit does not render its provision a function of a public nature. Were it otherwise all charities, or indeed all bodies offering the same services as charities, would be caught by section 6(3)(b), or even section 6(1). That cannot be right (para 135).

(ii) The presence or absence of public funding is not a determinative factor (para 142).

(iii) He seemed to draw very material assistance from the concept a function being "governmental" or not.

118. For the sake of completeness on this case, I should observe that the present claimants relied on a contrast between what is "public" and what is "private", as referred to by the judgment of Baroness Hale:

> "61. The contrast is drawn in the Act between "public" functions and "private" acts. This cannot refer to whether or not the acts are performed in public or in private. There are many acts performed in public (such as singing in the street) which have nothing to do with public functions. And there are many acts performed in private which are nevertheless in the exercise of public functions (such as the care of prisoners or compulsory psychiatric patients). The contrast is between what is "public" in the sense of being done for or by or on behalf of the people as a whole and what is "private" in the sense of being done for one's own purposes."

119. Baroness Hale was part of the dissenting minority in that case, and this part of her reasoning (which is reflected in her final decision in paragraph 73) is therefore not part of the ratio of the case. I respectfully do not find it as helpful as the remarks of the other Justices as set out or referred to above.

120. Short reference was made to *R (Weaver) v London & Quadrant Housing Trust* [2010] 1 WLR 363. In that case it was accepted that a housing association was a hybrid public authority, and the question was whether one particular act was a private act or not. Mr Weekes relied on it as assisting on the question of whether the use of the viewing gallery was itself part of the Tate Gallery's wider public functions in order to resist the submission by Mr Fetherstonhaugh that even if the Tate were a hybrid public authority the operation of the viewing gallery was a private function. I do not think that that case helps me much. It is a decision on the particular facts of that case. If the point arises in this case then it will be dealt with on the facts of this case.

Is the Tate Gallery a public authority?

121. I shall deal first with whether wider functions of the Tate, pursuant to which it provides the viewing gallery, make it a public authority in relation to that provision, before turning to the narrower question of whether the provision of the gallery by itself makes it a public authority.

122. I shall deal individually with the various factors relied on by Mr Weekes, or which are otherwise relevant, as they appear from the preceding citation of authority, but it will also be important at the end to step back and consider the position in the round.

(i) **The foundation by statute**. This might be thought to be a promising start for Mr Weekes, as indeed it is. It may, however, be right to look at the background. The foundation of the present Tate body by statute was not an act of creation out of the blue. The Gallery was formed to be the successor to an activity previously carried on by trustees or some other body of people (it was not made clear which), and the Act is apparently, in part, a convenient way of re-casting the museum and gallery activities of a number of concerns, including the Wallace Collection. If, as is entirely possible, those concerns would not have been treated as public authorities before the 1992 Act, I consider it unlikely that the Act had a transformative effect in this respect. Without a full analysis of the history of the Tate Gallery it is not possible to give this factor much weight.

(ii) **Public funding**. There is some public funding for the Tate Gallery, but it is not a completely, or even substantially, publicly funded body. The statute does not require any funding at all. Funding is at the discretion of the Secretary of State who "may" provide funding. As already stated, in 2016-17 the Tate received public funding of £35.8m, but its total operating costs in that year were almost £104m. That gives a clear idea of the extent to which the Tate Gallery is not publicly funded. It makes up the shortfall from private philanthropy, corporate sponsorship, some trading activities and (in the case of Tate Modern and Tate Britain) hosting events in gallery spaces outside operating hours. A comparison of the amounts of the public and private funding very much weakens the force of the public funding point. The more a body is publicly funded, the greater the force which can be given to this element, and the converse is true.

(iii) **The Tate Gallery is required to act in the public interest, and only in the public interest, in the conduct of its activities**. It is said to be providing a public service of the nation. I accept this is true in respect of its activities. It would be a feature of public authorities, but it is not determinative as the speeches in the preceding authorities make clear. If it were determinative, or if great weight were given to it, it would render it likely that all charities, which by definition have to provide public benefit (and of which the Tate Gallery is

one), would be (or be at risk of becoming) public authorities for the purposes of the 1998 Act. I do not give this factor a lot of weight in the circumstances.

(iv) **The Tate is subject to a "high degree of control" by, and accountability to, the State**. The degree of control is set out above. It is true that there is a significant degree of control, but it tends to be in the negative sense (restrictions on activities) rather than positive control which directs the activities. The reporting function is probably not much more than an aspect of the provision of public funds, which, as already pointed out, cover only a proportion of the Gallery's costs. Supervision of activities is less significant in this respect than a power positively to direct. Mr Weekes' formulation seriously overstates the position.

(v) **A "Tate Management Agreement" between the Department for Culture, Media and Sport and the Tate, covering the period 2016-2020.** This extensive document (not referred to above) lays down the Secretary of State's priorities in terms of some broadly stated cultural objectives, and goes on to set out a number of extensive control and reporting mechanisms over many pages. No time was devoted to this document at the trial other than a short reference to it in Mr Weekes' written submissions so I have not had the benefit of counsel's assistance in analysing it. It certainly demonstrates a number of requirements on the part of the DCMS, and to that degree control, but it does not contain significant elements of positive direction which one would expect if the Tate were to be actively forwarding a governmental agenda. The provisions of the document are rather more consistent with one in which a government department is concerned to see that its money is properly and wisely spent.

(vi) **The Tate is subject to the jurisdiction of the Parliamentary Ombudsman**. I regard this as of no real significance in this debate.

123. The upshot of this is that the Tate displays, to some degree, some of the factors which are said in the authorities to be relevant to the question of whether it is exercising public functions. None of them are (or are said by the parties to be) determinative. At the end of the day a global assessment has to be made, and the key question is whether the activities of the Tate are governmental in their nature. I have come to the clear conclusion that they are not. The Tate is running a number of museums. Opinions may differ as to whether that activity could ever be viewed as governmental, but on the facts of this case it is not. The Tate, like many other museums up and down the country, is offering displays and education to the public and advancing the cause of art to the UK citizens and overseas visitors. That is not an essentially governmental activity, and it is not rendered so by the fact that the Tate was formed by statute, has public funds and, as a publicly funded body, is subject to constraints on some its activities. It is not generally fulfilling a delegated function of the state (even though there is a power to delegate), and it is not acting on the direction of, or in place of, a government department. Those are not all synonyms for carrying on "public functions", but they are useful cross-checks.

124. It follows, therefore, that the Tate Gallery does not have, or in this case is not exercising, "functions of a public nature" (which I acknowledge to be the real question) within the Act in relation to its general activities at the Tate Modern.

125. That leaves the question of whether the operation of the viewing gallery by itself is a "function of a public nature". I do not consider that it is. Applying all the guidance given by the authorities, there seems to me to be no case for singling it out as a discrete activity of a public nature.

126. That means that the direct privacy claim under the Human Rights Act fails at that first stage in the analysis. The consequence is that I do not have to consider how Article 8 would have operated were the Tate a public authority, and I shall not lengthen this judgment by doing so.

The claim in nuisance - an outline of the parties' respective cases

127. The conclusion just expressed means that Mr Weekes' clients are thrown back on the nuisance claim. In outline, that claim is as follows (doing my best to do justice to the elaborate arguments in the case).

128. The claimants start by accepting that historically speaking there are cases which held that it is not unlawful to "open windows" (ie create window openings) in a wall even though it might be said to invade the privacy of a neighbour's property. Notwithstanding that, the law has traditionally regarded the home as a zone of privacy meriting special protection. There is support for the view that privacy is an aspect of the amenity of land. Furthermore Article 8 of the Convention on Human Rights, as enforced via the Human Rights Act 1998, reinforces claims to privacy, and the Courts are now obliged to develop the law so as give effect to that right to privacy by extending (if it needs extending) the law of nuisance to protect it. A parallel is drawn with the extension of the law of confidence to protect private information. It is said that the viewing gallery is unreasonably interfering with the use of the flats in Block C by reason of the acts found above in this judgment. The nuisance is said to be the operation of the gallery as a viewing gallery from which there is afforded a view into their flats which is inevitable and which visitors take advantage of, to an extent which affects the use and enjoyment of the flats because it encroaches on, and invades, their privacy.

129. The defendant disputes that analysis. It is denied that privacy is capable of being viewed as part of the amenity of land for the purposes of the law of nuisance and the law should not be extended via the Convention (or otherwise) to introduce it. The law of nuisance does not protect privacy; other laws, (such as the anti-harassment laws)

deal with that. Planning permission is also relevant. Furthermore, on the facts what the claimants complain of is not an unreasonable interference bearing in mind all the circumstances of the case. What the claimants are really trying to do is to protect their view, and that is not a right known to law either.

The nature of nuisance

130. It is as well to start with the foundations of a nuisance claim. Certain basic propositions relating to this were not in dispute.

(i) "Private nuisances are of three kinds. They are (1) nuisance by encroachment on a neighbour's land; (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land." (per Lord Lloyd in *Hunter v Canary Wharf Ltd* [1997] AC 665 at p695C).

(ii) "Nuisance is a tort against land, including interests in land such as easements and profits. A plaintiff must therefore have an interest in the land affected by the nuisance." (per Lord Hoffmann in *Hunter* at p702H).

(iii) That does not mean that nuisances resulting in personal discomfort to owners/occupiers are not actionable.

> "In the case of nuisances "productive of sensible personal discomfort," the action is not for causing discomfort to the person but, as in the case of the first category, for causing injury to the land. True it is that the land has not suffered "sensible" injury, but its utility has been diminished by the existence of the nuisance. It is for an unlawful threat to the utility of his land that the possessor or occupier is entitled to an injunction and it is for the diminution in such utility that he is entitled to compensation." (per Lord Hoffmann in *Hunter* at p706B-C).

(iv) As to the nature of nuisance, it is convenient to take the summary of Lord Neuberger in *Lawrence v Fen Tigers Ltd* [2014] AC 822:

> "3. A nuisance can be defined, albeit in general terms, as an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant's reasonable enjoyment of his land, or to use a slightly different formulation, which unduly interferes with the claimant's enjoyment of his land. As Lord Wright said in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 903, "a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society".
>
> 4. In *Sturges v Bridgman* (1879) 11 ChD 852, 865, Thesiger LJ, giving the judgment of the Court of Appeal, famously observed that whether something is a nuisance "is a question to be determined, not merely by an abstract consideration of the thing

> itself, but in reference to its circumstances", and "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey". Accordingly, whether a particular activity causes a nuisance often depends on an assessment of the locality in which the activity concerned is carried out. 831
>
> 5. As Lord Goff said in *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, 299, liability for nuisance is
>
> "kept under control by the principle of reasonable user—the principle of give and take as between neighbouring occupiers of land, under which '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': see *Bamford v Turnley* (1862) 3 B & S 66, 83, per Bramwell B."

131. The nuisance in this case, if there is one, would have to be of the third kind. The invasion of privacy is said to result in the sort of things referred to in (iii) above because the "utility" of the land (as a dwelling house), or its amenity, has been interfered with by the frequent invasive inspection of the interiors and the people within, to the detriment of the land itself, and the claimants should not have to put up with this even on a "give and take" basis. Although there is no English authority directly in point, it is said that the law of nuisance can and should accommodate such a claim, and if necessary should be developed to do so by reason of the Human Rights Act.

132. I shall first consider whether the law of nuisance is capable of applying to the kind of wrong claimed in this case (nuisance by invasion of privacy), and if it is then I will consider separately whether it has been established on the facts.

The claimants' case on invasion of privacy as a nuisance

133. The claimants' case involves drawing together a number of strands and reaching a conclusion with which they are all consistent rather than seeking to demonstrate a historical development of the law of nuisance which gets them home.

134. They start by acknowledging, rightly, that there is no general legal right to privacy. However, they point to various statements which are said to acknowledge the concept of privacy in the home. In *Semayne's Case* (1604) 5 Co Rep 91 (concerning entry into a home by the Sheriff of London to execute a writ) it was said (at p.195) that "the house of every one is to him as his…castle and fortress, as well for his defence against injury and violence, as for his repose". Mr Weekes also relied, perhaps a little more realistically, on what Lord Scarman said in *Morris v Beardmore* [1981] AC 446 at 465:

> "The appeal turns on the respect Parliament must be understood, even in its desire to stamp out drunken driving, to pay to the fundamental right of privacy in one's own home, which has for centuries been recognized by the common law."

135. These generalised statements are not terribly helpful. They may be true but they do not assist in determining what aspects of life are protected and, crucially, by what legal means.

136. Mr Weekes also deployed the summary description of a home, and its associated privacy, set out in *Booker v Police* [2007] 3 NZLR 91. In that case an individual demonstrated his antipathy to a police constable by positioning himself outside the constable's house, singing and playing a guitar and displaying a placard. He was tried on a statutory charge of disorderly behaviour, and acquitted on appeal. Thomas J dissented, and in the course of his dissent said:

> "The right or interest to be let alone in one's home is a vital aspect of privacy. One frequently hears the phrase "the privacy of one's home". The law reflects, or should reflect, the value underlying the use of that phrase and respect the sanctity of the home. I acknowledge at once that, in entering upon a discussion of the interest to be let alone, much of my language is freely borrowed from American jurisprudence where the values underlying the interest have been more fully explored.
>
> The home is a place where the wellbeing of the occupants can be nurtured and protected and the peace and quiet provided within the four outer walls (or fences) enjoyed by the occupants without unwanted intrusions. It provides its occupants with a sanctuary, a place to retreat or repair to in order to escape from the tensions and tribulations of the daily world. As the Courts in the United States have often observed in remarking on the unique nature of the home, it is "the last citadel of the tired, the weary, and the sick.
>
> Observations of this kind are not just rhetoric. Those resorting to the home can include persons from all walks of life: office workers turning their backs on a busy and frustrating day; manual workers whose energies have been spent by arduous labour; school teachers with a bag of work to prepare for the following day; pilots wishing to rest and conserve their resources for the long flight the next morning; doctors who turn from the close concentration of a long day's surgery and wish to read; shopkeepers who, having endured the conversations and complaints of their customers, seek quiet in the comfort of their home; taxi drivers who, having driven patrons all day or all night, simply want to relax untroubled by those passengers; houseparents who, having toiled all day, wish to enjoy time with

> their children in the seclusion of their home; children who are uncomfortable in the school playground and find security in the space of their parents' home; and so on. Everyone from all walks of life seeks and expects to enjoy the privacy of their home. Their quest and expectations do not differ from the interest of [the police constable] to be left alone after she had retired from her night shift on police duty to the seclusion of her home. The need for privacy in all such cases is met by acknowledging that the home is not just a dwelling house, it is a haven and sanctuary from the outside world."

137. Again, one can accept that that may well be a correct description, but it does not really begin to answer the difficult questions that arise in this case. What it can be said to demonstrate is that it is not a nonsense to suggest that the home is a private environment, but Mr Fetherstonhaugh did not gainsay that anyway.

138. Mr Weekes then sought to explain away various 19th century cases in which the courts refused to restrain the creation of window openings which overlooked adjoining land. I shall deal with those in the context of considering Mr Fetherstonhaugh's submissions.

139. Reliance was then placed on textbook and academic commentary which was said to support the thesis that torts could protect privacy. He cited Clerk and Lindsell on Torts 21st Edition at para 1-35 in which it was said:

> "A number of torts indirectly protect privacy. Trespass to land and <u>nuisance</u> protect those with an interest in land from direct invasion and indirect interference as by taking photographs of activities on the land from outside the boundary." (Mr Weekes' emphasis)

140. That is not the current edition, but the wording of para 1-36 in the current edition is the same. And he cited an article on Privacy by Winfield in (1931) 47 LQR 23:

> "A curious invasion of privacy, recorded by the late Professor Kenny, was a case of 1904 in which a family in Balham, by placing in their garden an arrangement of large mirrors, were enabled to observe all that passed in the study and operating-room of a neighbouring dentist, who sought in vain for legal protection against "the annoyance and indignity" to which he was thus subjected [a footnote refers to: "*Cases on Tort* (4th ed. 1926), 367]. This is all that is given of the case, and, as there is no further reference, it is worthless as an authority. Why should it not have been actionable as a nuisance? It was something very like watching and besetting the dentist's house so as to compel him to do or not to do something which he was lawfully entitled not to do or to do; and this was held to be a common law nuisance in *Lyons and Sons v Wilkins*…".

141. That article was cited by the dissenting judges in *Victoria Park Racing v Taylor* (1937) 58 CLR 497 (Rich and Evatt JJ). In that case a landowner erected a tower on his own land, overlooking a racecourse and broadcasted commentaries on the races. The racecourse owner sought to prevent that conduct, relying on the law of nuisance. The majority held that there was no cause of action in nuisance, but the minority would have held otherwise. Evatt J (in the minority) said:

> "It should be appreciated that the plaintiff does not question the general principle that it is a legitimate use of property to erect and extend homes for the purpose of obtaining or improving favourable prospects or "views". A number of cases bearing upon such question have been collated and discussed by Professor *Winfield* in a learned article on "Privacy,"…The Balham case there discussed illustrates not only what *Paley* called the "competition of opposite analogies," but also, in my opinion, how the competition might fairly be resolved. It appeared that, by an arrangement or large mirrors, "neighbours" succeed in observing all that went on in the surgery of a near-by dentist. Professor *Winfield* rightly asks: "Why should it not have been actionable in as a nuisance?" In my opinion, such conduct certainly amounted to a private nuisance and should have been restrained by injunction, although the sole object of the "peeping Toms" of Balham was to satisfy their own degraded curiosity and not to interfere with the dentist's liberty of action. In truth, 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 practicably uninhabitable. The motive of the wrongdoers at Balham was to satisfy their curiously perverted instincts. But let us suppose that, by such devices as broadcasting and television, the operating theatre of a private hospital was made inspectable, so that a room outside the hospital could be hired in order that the public might view the operations on payment of a fee. It would not be any less a nuisance because in such a case the interference with the normal rights of using and enjoying property was accentuated and aggravated by the wrongdoers making a profit out of their exhibition."

142. Rich J was of a similar mind. However, the majority were not. They were firmly of the view that this sort of overlooking could not constitute a tort in the circumstances. Dixon J said (at p 507):

> "But English law is, rightly or wrongly, clear that the natural rights of an occupier do not include freedom from the view and inspection of neighbouring occupiers or of other persons who enable themselves to overlook the premises. An occupier of land

> is at liberty to exclude his neighbour's view by any physical means he can adopt. But while it is no wrongful act on his part to block the prospect from adjacent land, it is no wrongful act on the part of any person on such land to avail himself of what prospect exists or can be obtained. Not only is it lawful on the part of those occupying premises in the vicinity to overlook the land from any natural vantage point, but artificial erections may be made which destroyed the previously existing under natural conditions."

143. Latham CJ said (at p494):

> "Any person is entitled to look over the plaintiff's fences and to see what goes on in the plaintiff's land. If the plaintiff desires to prevent this, the plaintiff can erect a higher fence. Further, if the plaintiff desires to prevent its notice boards being seen by people from outside the enclosure, it can place them in such a position that they are not visible to such people. At sports grounds and other places of entertainment it is the lawful, natural and common practice to put up fences and other structures to prevent people who are not prepared to pay for admission from getting the benefit of the entertainment. In my opinion, the law cannot by an injunction in effect erect fences which the plaintiff is not prepared to provide. The defendant does no wrong to the plaintiff by looking at what takes place on the plaintiff's land. Further, he does no wrong to the plaintiff by describing to other persons, to as wide an audience as he can obtain, what takes place on the plaintiff's ground. The court has not been referred to any principle of law which prevents any man from describing anything which he sees anywhere if he does not make defamatory statements, infringe the law as to offensive language, &c., break a contract, or wrongfully reveal confidential information. The defendants did not infringe the law in any of these respects."

144. In the circumstances Mr Weekes can draw no comfort from this as an authority in his favour. The most he can say is that judicial minds are not of the same view on the point. He did draw attention to the view of Callinan J in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1 to the effect that "the conservative views of the three judges in the majority in Victoria Park have the appearance of an anachronism, even by the standards of 1937 …". However, a proper study of that remark shows that it was not designed to give effect to broader privacy rights, but to prevent what he saw as the unfair exploitation of broadcasting opportunities.

145. Nor does Mr Weekes get much positive support from his next authority, which is *Bernstein of Leigh (Baron) v Skyviews & General Ltd* [1978] 1 QB 479, in which Griffiths J refused a claim for trespass by an overflying aircraft taking aerial photographs, while acknowledging that might be arguable that "the harassment of constant surveillance of his house from the air, accompanied by the photographing of his every activity" was an actionable nuisance, though that question did not arise in that case. It can be seen from the narrative of the argument in that case that the judge was doing little more than reflecting the equivalent suggestion advanced by counsel for the defendants when dealing with the trespass case (see p481D). The judge's remark is, of itself, of little material support to Mr Weekes.

146. Of a little more assistance to Mr Weekes was the Australian case of *Raciti v Hughes* [1995] 7 BPR 14,837. In that case one neighbour set up security lights and cameras which illuminated and filmed the backyard of the other. The hearing was for an interlocutory injunction and for that purpose the judge (Young J) assumed the claimants' version of the facts to be true (including an inference that the purpose of the filming was to record what happened in the plaintiffs' back yard), so that he could deal with the question of whether the claim disclosed a cause of action for interlocutory injunction purposes. Young J said:

> "On the evidence before me at the moment there is a deliberate attempt to snoop on the privacy of a neighbour and to record that on video tape. It seems to me that this is an actionable nuisance."

Although his conclusions were expressed positively, this should probably not be treated as a final determination because, as he himself said, the argument was in the nature of a demurrer. It should probably be treated as being a decision that the point is arguable (perhaps strongly arguable). Nonetheless it gives Mr Weekes more support than his other authorities. That is so even though Young J proceeded by analogy with what he called telephone nuisances, which have been held here not to be actionable as a nuisance (see the overruling of *Khorasandjian v Bush* [1993] QB 727 in *Hunter*).

147. In *Southwark v Mills* [2001] 1 AC 1 Lord Millett said (at p23):

> "On this ground the courts have dismissed complaints of the making of noise or the emanation of fumes, <u>of interference with privacy or amenity</u>, and other complaints of a kind commonly forming the subject matter of actions for nuisance." (Mr Weekes' emphasis).

That was, however, not the subject matter of the action, and it is not clear to what cases Lord Millett was referring.

148. Thus far on the authorities, therefore, Mr Weekes has not much to go on in trying to establish that the tort of nuisance is capable of covering the acts of which he complains. However, he seeks to bridge the gap by relying on the Human Rights Act, and in particular Article 8 of the Convention, cited above. I shall not set out his arguments here. They are reflected in my reasoning and conclusions below. He submits that when one balances all the factors which have to be balanced in a nuisance and privacy claim, there has been an actionable nuisance in this case.

The defendant's case on invasion of privacy as a nuisance

149. The defendant's case is that the law of nuisance has no applicability to the kind of conduct relied on in this case.

150. Mr Fetherstonhaugh started by submitting that there were certain rights which the law did not regard as a facet of ownership. The right to a view is one example of this; the right to a radio and TV signal is another (as in *Hunter*). The right not to be overlooked is a further example, and is at the heart of this case. He relied on *Browne v Flower* [1911] 1 Ch 219.

151. In that case a tenant erected a staircase which ran past the property of Mr Browne, enabling users to see directly into Mr Browne's rooms and thereby seriously affecting his privacy. Mr Fetherstonhaugh submits that Parker J held it was not a breach of the covenant for quiet enjoyment to erect a building which enabled an invasion of privacy by looking through windows on another's land. The detail of the case has to be considered carefully if it is to bear the weight put on it by Mr Fetherstonhaugh.

152. The action was one based on a covenant for quiet enjoyment, including a provision that nothing be done which would cause a nuisance, together, apparently, with a claim based in non-derogation from grant. It was said that that covenant bound all the tenants, and it was alleged that there was a breach of the covenant for quiet enjoyment. The lessor (actually a mortgagee), who was the defendant, was said to be permitting an interference with the rooms as bedrooms, which was known to be their intended use. That lessor submitted that there was no case which had held that interference with privacy gave any right of action at law or in equity and it was therefore not liable on the covenant for quiet enjoyment. She also denied the existence of an easement of privacy or a covenant against interference with privacy in that case. The tenant who erected the staircase submitted that she had done nothing which could be a nuisance, and could not in any event be liable on the covenant for quiet enjoyment in the absence of a building scheme.

153. Parker J held that the tenant could not be liable under the covenant because she had done nothing "on the demised premises" for the purposes of the covenant, and in any

event was not bound by the covenant. Then he turned to deal with a claim based on non-derogation from grant and considered implied grants of easements of light. He observed:

> "Inasmuch as our law does not recognize any easement of prospect or privacy, and (as I have already held) the plaintiffs' lights are not interfered with, it is difficult to find any easement which can have been interfered with by the erection of the staircase in question."

154. He then goes on to consider the application of the doctrine of non-derogation from grant, and while conceding its effect in various respects, including rights to light, he said that he had not found any case in which a lessor was found liable for anything other than something which would make the benefited premises unfit or materially less fit to be used for the contemplated purpose. He did not consider that privacy was a material factor in that respect:

> "A landowner may sell a piece of land for the purpose of building a house which when built may derive a great part of its value from advantages of prospect or privacy. It would, I think, be impossible to hold that because of this the vendor was precluded from laying out the land retained by him as a building estate, though in so doing he might destroy the views from the purchaser's house, interfere with his privacy, render the premises noisy, and to a great extent interfere with the comfortable enjoyment and diminish the value of the property sold by him."

155. He concluded, on his facts, that nothing had occurred which made the plaintiff's flat less fit for its demised purpose.

> "It is only the comfort of the persons so using the rooms that is interfered with by what has been done. Either they have less privacy, or if they secure their privacy by curtains they have less light. Much as I sympathise with the plaintiffs, it would, in my opinion, be extending the implications based on the maxim that no one can derogate from his own grant to an unreasonable extent if it were held that what has been done in this case was a breach of an implied obligation."

156. Dealing then with (or reverting to) the claim for breach of the covenant for quiet enjoyment in the plaintiff's agreement, he found:

> "It appears to me that to constitute a breach of such a covenant there must be some physical interference with the enjoyment of the demised premises, and that a mere interference with the comfort of persons using the demised premises by the creation of a personal annoyance such as might arise from noise, invasion of privacy, or otherwise is not enough."

That last finding was disapproved, in relation to covenants for quiet enjoyment by Lord Hoffmann in *Southwark LBC v Mills* [2001] AC 1 at p11A-C.

157. I have dwelt on this case because Mr Fetherstonhaugh vests it with some significance. When one has penetrated the identity of the parties, the facts and the claims being made (principally based in covenant), I do not think it gives him the support he claims in relation to nuisance claims. It is about covenants, and although privacy is referred to it does not really raise the same issues as arise in the present case. Mr Weekes would probably wish me to note that during the course of argument Parker J is observed as saying "Residential rooms involve privacy" (p222), but that does not go very far either.

158. Mr Fetherstonhaugh's next authority is the *Victoria Park Racing* authority referred to above and in particular the extract from Latham CJ's judgment. This provides stronger support for Mr Fetherstonhaugh, though it is to be noted that it does not deal with the arguably different situation of looking into someone's home. It is not clear to me that the result would have been the same if what was being overlooked was the interior of someone's house. Nonetheless it is a (non-binding) authority which would support him.

159. In *Turner v Spooner* (1861) 30 LJ Ch 801 the owner of ancient lights to windows replaced obscured glass with clear glass, and reduced the size of the frames. When his neighbour erected obscure glass close to the clear glass the claimant sought an injunction requiring its removal on the basis that his light was wrongfully obscured. The case was mainly about the amount of light to which the claimant was entitled, but one of the arguments run by the defendants was that there was interference with their privacy. There does not seem to have been substantial argument on that point, but Kindersley V-C said (at p 803):

> "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. Upon the whole, the injunction must be made perpetual."

In part this statement is repeating the established law which does not prevent the opening of windows per se, but it goes further in its express reference to privacy. However, I consider that it should not be taken further than as applying to acts such as opening windows which happen to overlook. It does not assist in the present problem which relates to a structure whose whole purpose is to overlook by providing a view to those who visit for that actual purpose.

160. The same remarks can be made about Mr Fetherstonhaugh's next case, namely *Tapling v Jones* (1981) 20 CB (NS) 174. The context of that case again involved ancient lights, and this time new windows were opened in the same wall and in newly constructed upper storeys, so as to overlook the defendant's land. The defendant obstructed all the lights, and the question was (putting it broadly) whether the defendant's right to erect structures obscuring the new windows could justify his interference with the ancient lights. In the context of that case the following pronouncements were made, and are relied on by Mr Fetherstonhaugh:

> "Again, there is another form of words which is often found in the cases on this subject, namely 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." (per Lord Westbury at p179)

> "Every man may open any number of windows looking over his neighbour's land; and, on the other hand, the neighbour may, by building on his own land within 20 years after the opening of the window, obstruct the light which would otherwise reach it. Some confusion seems to have arisen from speaking of the right of the neighbour in such a case, as a right to obstruct the new lights. His right is a right to use his own land by building on it as he thinks most to his interest; and if by so doing he obstructs the access of light to the new windows, he is doing that which affords no ground of complaint." (per Lord Cranworth at p185)

> "It is not correct to say that the plaintiff, by putting new windows into his house, or altering the dimensions of the old ones, "exceeded the limits of his right;" because the owner of a house has a right at all times (apart, of course. from any agreement to the contrary) to open as many windows in his own house as he pleases. By the exercise of the right he may materially interfere with the comfort and enjoyment of his neighbour; but of this species of injury the law takes no cognizance. It leaves everyone to his self-defence against an annoyance of this description; and the only remedy in the power of the adjoining owner is to build on his own ground, and so to shut out the offensive windows." (per Lord Chelmsford at p 191-2).

161. Again, these statements make clear the proposition that opening windows in such a way as to overlook land is not actionable, and would support the proposition that overlooking per se does not amount to a nuisance. Once again, however, they do not necessarily deal with the case of a structure whose whole purpose is overlooking.

162. Mr Fetherstonhaugh went on to demonstrate that there was no general law which protects privacy, a proposition which is not controversial in this case. So far as nuisance was concerned, the tort generally prevented things which were emanations from land. Non-emanation claims were rare and were usually accompanied by an element of malicious intent. That was said to explain *Raciti v Hughes*. Cases involving a presence outside premises, or watching, were explicable on the footing that the activity was accompanied by other activities which would themselves amount to a nuisance - *J Lyons & Sons v Wilkins* [1899] 1 Ch; *Ward Lock v Operative Printer's Assistant Society* (1906) 22 TLR 327; *Thomas v National Union of Mineworkers* [1986] Ch 20; *Church of Jesus Christ of Latter Day Saints v Price* [2004] EWHC 3245 (QB). He seemed to accept that overlooking with the intention of annoying a neighbour would be a nuisance, but absent that it would not.

163. Mr Fetherstonhaugh sought to justify or support his submissions that nuisance did not protect privacy by relying on the fact that nuisance is a tort which protects property interests. It would not be right to develop the law of privacy to change the facets of property ownership which nuisance protects. It would enable tort to "escape the bounds of being a tort against land", using words used in *Hunter*. I do not find that a compelling argument. One can imagine types of invasion of privacy which affect land as badly as, say, noise in the sense that they make the land much less useful for its intended purpose. I deal with his point about non-emanation cases in the next section of this judgment.

Conclusions as to whether privacy from overlooking can be protected by nuisance

164. The survey of the authorities referred to above reveals the following. As appears, a number of the cases address the question of whether an overlooking window is actionable in nuisance, and in that context reference is made to privacy. However, I think that most of the cases do not go so far as to say that nuisance can never protect privacy. The only exception is probably *Victoria Park Racing*, though the dissents in that case are in my view somewhat compelling. On the other side of the fence is the decision in *Raciti*, which presupposes that an action in nuisance is capable of being deployed to protect privacy, albeit that that was a case in which the acts complained of were actually targeted at privacy.

165. I return to Mr Fetherstonhaugh's submission that it was only in exceptional circumstances that a non-emanation case could be upheld in nuisance. He relied on what was said by Lord Goff in *Hunter* at p685-6:

> "…for an action in private nuisance to lie in respect of interference with the plaintiff's enjoyment of his land, it will generally arise from something emanating from the defendant's land. Such an emanation may take many forms - noise, dirt, fumes, a noxious smell, vibrations, and suchlike. Occasionally activities on the defendant's land are in themselves so offensive to neighbours as to constitute an actionable nuisance, as in Thompson-Schwab v Costaki [1956] 1 WLR 335, where the sight of prostitutes and their clients entering and leaving neighbouring premises were held to fall into that category. Such cases must however be relatively rare."

166. In Anglia Water Services v Crawshaw Robbins & Co [2001] BLR 173, Burnton J said:

> "I read the reference to "occasionally" [in *Hunter*] as meaning "exceptionally"."

167. I do not think that these authorities bear the weight that Mr Fetherstonhaugh put on them. The dictum in *Hunter* is not apparently part of the ratio of the case, and in any event Lord Goff did not say that there always had to be an emanation. His own statement acknowledges that there could be non-emanation cases. So that is an end of non-emanation as a complete bar.

168. Further points can be made about it:

(i) It has been criticised, as a mechanistic bar, in *Clerk & Lindsell on Torts,* 22nd Edition at para 20-09.
(ii) If the sight of something on the defendant's land can give rise to a nuisance claim as in *Thompson-Schwab*, then it should be noted that part of the privacy claim could be founded on the fact that the claimants find it oppressive to see the watchers watch them.
(iii) If it were necessary to find an emanation, I would be prepared to find that the gaze of the watchers on the viewing gallery is analogous to an emanation for these purposes. It may be metaphorical to say that a gaze emanates in the same way as noise or a smell, but in my view the metaphor is compelling in these circumstances and (if the facts justified it) would require the gaze (with or without cameras and binoculars) to be treated in the same way.

169. Following from all that, had it been necessary to do so I would have been minded to conclude that 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. Mr Fetherstonhaugh accepted that that deliberate overlooking, if accompanied by malice, could give rise to a nuisance. I consider that concession to be correct, but it gives the game away at the level of principle. It implicitly accepts that, given the right circumstances, a deliberate act of overlooking could amount to an actionable nuisance. Nothing in the established cases, except *Victoria Park Racing*, is really inconsistent with that. Given the right circumstances, such an act could be made to fall within the factors that give rise to a nuisance of the third kind as described in the section above which deals with the matters which go to make up nuisance. To take an extreme case, imagine the case of one neighbour who erects a viewing tower whose only purpose is to enable views into the gardens and houses of other neighbours, and who then charges an entry fee to allow members of the public to come in and do just that. I would consider that that would be likely to fall within the constituent parts of the law of nuisance as set out above. It would be an unreasonable use of the first neighbour's land, and it would materially detract from the utility of the suffering neighbours' land as that concept was used by Lord Hoffmann in *Hunter*. Being free to do so, I would prefer the reasoning of the minority in *Victoria Park Racing*. If the motive was merely mercenary, I doubt if it would amount to "malice" for the purposes of Mr Fetherstonhaugh's accepted extension of nuisance, but it would in my view nonetheless be capable of being a nuisance.

170. If there were any doubt about that then in my view that doubt has been removed by the Human Rights Act and Article 8. Article 8 contains a right to respect for an individual's "private and family life [and] his home". For present purposes it is noteworthy that the "home" is expressly referred to. It 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. Apart from common sense and the dicta identified above, authority for that can be found in *McKennitt v Ash* [2008] QB 73. In that case it was alleged that the publication of a book involved various acts of invasion of privacy, contrary to Article 8, and the publications complained of included various physical details of a home of the claimant. Buxton LJ approved the findings of the court below (Eady J) in relation to that sort of publication in the following terms:

> " 21. Item 9 was addressed by the judge at paras 135–136:
>
> > "135. Item 9 concerns Ms McKennitt's Irish cottage. It is not her only house, but it is nevertheless a home. That is one of the matters expressly addressed in article 8(1) of the Convention as entitled to 'respect'. Correspondingly, there would be an obligation of confidence. Even relatively trivial details would fall within this protection simply because of the traditional sanctity accorded to hearth and home. To describe a person's home, the décor, the layout, the state of cleanliness, or how the occupiers behave inside it, is generally regarded as unacceptable. To convey such details, without permission, to the general public is almost as objectionable as spying into the

> home with a long distance lens and publishing the resulting photographs.
>
> "136. True it is that over five or six years Mr Fowkes was engaged, from time to time, in renovation works at the cottage. Ms Ash, too, did a lot of hard work to make it habitable after Ms McKennitt acquired it in 1992. Some of the work was remunerated and some was not. That seems to me to make no significant difference. Whether one is allowed into a person's home professionally, to quote for or to carry out work, or one is welcomed socially, it would clearly be understood that the details are not to be published to the world at large."
>
> 22. Criticism was made of the introduction to this passage, in that article 8 cases have tended to be concerned with the security or stability of residence, rather than with privacy within the home. But the judge clearly spoke only by analogy, pointing out that it should have been and was obvious that events in a person's home cannot be lightly intruded upon; and in the event, as he said, at para 138, "it is intrusive and distressing for Ms McKennitt's household minutiae to be exposed to curious eyes". And I would also respectfully agree with his comparison with long distance photography, an exercise generally considered to raise privacy issues."

171. This justifies the notion (if it needs justifying) that external prying into a home would contravene the privacy protected by Article 8. In order for it to be a contravention it would not necessarily have to be done by photography. That is merely one example of prying. It could also, it seems to me, be done by particular acts of directed and intentional overlooking, if the circumstances justified it, as in my example given above. I do not see why that is not as capable of being as invasive as a long-range (or indeed a short-range) photograph.

172. That contravention, if done otherwise than by a non-public authority, would not of itself give rise to a right of action under the Article, but the courts can, where appropriate, give effect to the Article by developing existing causes of action. That has been done in relation to private information, by extending the action for breach of confidence. This is reflected in the judgment of Lord Hoffmann in *Wainwright v Home Office* [2004] 2 AC 406:

> "18 The need in the United States to break down the concept of "invasion of privacy" into a number of loosely-linked torts must cast doubt upon the value of any high-level generalisation which can perform a useful function in enabling one to deduce the rule to be applied in a concrete case. English law has so far been unwilling, perhaps unable, to formulate any such high-level principle. There are a number of common law and statutory remedies of which it may be said that one at least of the

> underlying values they protect is a right of privacy. Sir Brian Neill's well known article "Privacy: a challenge for the next century" in *Protecting Privacy* (ed B Markesinis, 1999) contains a survey. Common law torts include trespass, nuisance, defamation and malicious falsehood; there is the equitable action for breach of confidence and statutory remedies under the Protection from Harassment Act 1997 and the Data Protection Act 1998 . There are also extra-legal remedies under Codes of Practice applicable to broadcasters and newspapers. But there are gaps; cases in which the courts have considered that an invasion of privacy deserves a remedy which the existing law does not offer. Sometimes the perceived gap can be filled by judicious development of an existing principle. The law of breach of confidence has in recent years undergone such a process: see in particular the judgment of Lord Phillips of Worth Matravers MR in *Campbell v MGN Ltd* [2003] QB 633. On the other hand, an attempt to create a tort of telephone harassment by a radical change in the basis of the action for private nuisance in *Khorasandjian v Bush* [1993] QB 727 was held by the House of Lords in *Hunter v Canary Wharf Ltd* [1997] AC 655 to be a step too far. The gap was filled by the 1997 Act."

173. It is to be noted that Lord Hoffmann regarded a claim in nuisance as being potentially one which protects privacy.

174. It therefore seems to me that, if it did not do so before the Human Rights Act, since that Act the law of nuisance ought to be, and is, capable of protecting privacy rights from overlooking in an appropriate case. It if did not do so there would be a gap in the protection of privacy in the home where, for example, a landowner used his or her land to spy on a neighbour in an unreasonable way. Mr Fetherstonhaugh suggested that the Protection from Harassment Act 1997 was available if an invasion was bad enough, but I do not consider that that Act would necessarily give all the protection that is required because not all unjustifiable invasions of privacy would necessarily qualify as harassment under the Act.

175. That does not mean, of course, that all overlooking becomes a nuisance. Whether anything is an invasion of privacy depends on whether, and to what extent, there is a legitimate expectation of privacy. That 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, which is the subject of the next section of this judgment.

176. Mr Fetherstonhaugh submitted that damage to privacy by overlooking was something which, as a matter of policy, was properly left to the planning process, and not the law of nuisance. In so doing he relied on what Lord Hoffmann said in *Hunter* at p 710:

> "In a case such as this, where the development is likely to have an impact upon many people over a large area, the planning system is, I think, a far more appropriate form of control, from

> the point of view of both the developer and the public, than enlarging the right to bring actions for nuisance at common law.
>
> In saying this, I am not suggesting that a grant of planning permission should be a defence to anything which is an actionable nuisance under the existing law. It would, I think, be wrong to allow the private rights of third parties to be taken away by a permission granted by the planning authority to the developer. The Court of Appeal rejected such an argument in this case and the point has not been pursued in your Lordships' House. But when your Lordships are invited to develop the common law by creating a new right of action against an owner who erects a building upon his land, it is relevant to take into account the existence of other methods by which the interests of the locality can be protected." (Mr Fetherstonhaugh's emphasis)"

177. I do not regard my conclusions under this head as creating a new cause of action in the sense referred to by Lord Hoffmann. In that case the court was being asked to extend the law of nuisance to protect something not previously thought to have been within its protection, namely the right to receive a clean TV and radio signal. In the present case the court is being asked to give effect to rights arising under the Convention and under statute, which is a different process. It is developing the common law under the direction of statute. Furthermore, I would not consider that the planning process by itself is a sufficient mechanism for protecting against infringement of all privacy rights, so Lord Hoffmann's caveat does not, in my view, apply so as to stand in the way of the conclusion that I have reached. While privacy and overlooking are plainly matters to be taken into account for planning purposes, a landowner should still have his or her own rights under nuisance.

178. I therefore conclude that the law of nuisance is capable, in an appropriate case, of operating to as to protect the privacy of a home as against another landowner.

179. Having thus concluded, I need to turn to whether there is an actionable nuisance in this case.

Is the viewing gallery a nuisance – general

180. I shall determine this point taking the outline of the law usefully encapsulated in the speech of Lord Neuberger in *Lawrence v Fen Tigers*, as set out above, as my starting point. The question is whether the Tate Modern, in operating the viewing gallery as it does, is making an unreasonable use of its land, bearing in mind the nature of that use, the locality in which it takes place, and bearing in mind that the victim is expected to have to put up with some give and take appropriate to modern society and the locale. Although there is an overall assessment to be made in order to comply with the tests

referred to above, I shall approach the question by first breaking the consideration down into three elements – location, the use of the defendant's property and the nature and use of the claimants' properties. Before doing that it will be useful to dispose of one particular planning-related point which Mr Fethersonhaugh relied on as applying to the first two of those elements.

The relevance of the planning permission for the Blavatnik Building to the locale and the defendant's user

181. Mr Fetherstonhaugh relied on what he said was the careful consideration given to overlooking aspects by the planning authorities, and the fact that they allowed the two developments (and particularly the Blavatnik Building) to go ahead. He submitted that that had a "limited relevance" to the question of whether the operation of the viewing gallery could on the facts be viewed as a nuisance. He submitted that the permission went to both the nature of the locality and to the reasonableness of the defendant's use. These are different points from the planning-related point that I have just dealt with in the preceding section. The earlier point goes to whether privacy can be the subject matter of a nuisance action at all. This point goes to the interaction between planning matters and nuisance factors, assuming that privacy can be protected by nuisance in an appropriate case.

182. In relation to these matters Mr Fetherstonhaugh sought to make much of the planning permissions (and particularly the Tate Modern's permission) which permitted the two developments to take place side by side. In doing so Mr Fetherstonhaugh relied on statements about the significance of planning permission in the judgment of Lord Carnwath in *Lawrence v Fen Tigers.* On the basis of a review of the authorities Lord Carnwath said:

> "218. They suggest that a planning permission may be relevant in two distinct ways: (i) It may provide evidence of the relative importance, in so far as it is relevant, of the permitted activity as part of the pattern of uses in the area; (ii) Where a relevant planning permission (or a related section 106 agreement) includes a detailed, and carefully considered, framework of conditions governing the acceptable limits of a noise use, they may provide a useful starting point or benchmark for the court's consideration of the same issues."

183. Mr Fetherstonhaugh also pointed to Lord Carnwath at paragraph 183:

> "183. After more than 60 years of modern planning and environmental controls, it is not unreasonable to start from the presumption that the established pattern of uses generally represents society's view of the appropriate balance of uses in a

> particular area, taking account both of the social needs of the area and of the maintenance of an acceptable environment for its occupants. The common law of nuisance is there to provide a residual control to ensure that new or intensified activities do not need lead to conditions which, within that pattern, go beyond what a normal person should be expected to put up with."

184. Lord Neuberger (with whom the rest of their Lordships agreed) expressed his agreement with the second of Lord Carnwath's propositions (albeit perhaps a little more cautiously) in paragraph 96:

> "96. However, there will be occasions when the terms of a planning permission could be of some relevance in a nuisance case. Thus, the fact that the planning authority takes the view that noisy activity is acceptable after 8.30 am, or if it is limited to a certain decibel level, in a particular locality, may be of real value, at least as a starting point as Lord Carnwath JSC says in para 218 below, in a case where the claimant is contending that the activity gives rise to a nuisance if it starts before 9.30 am, or is at or below the permitted decibel level. While the decision whether the activity causes a nuisance to the claimant is not for the planning authority but for the court, the existence and terms of the permission are not irrelevant as a matter of law, but in many cases they will be of little, or even no, evidential value, and in other cases rather more."

185. Armed with those statements, Mr Fetherstonhaugh submitted that the owners of the adjacent properties and the planning authorities (London Borough of Southwark and the Greater London Assembly) gave full and careful consideration to how these developments would work together. He emphasised how it was that the viewing platform would have complied with policies applicable to the area and more general policies. From this he seemed to be submitting that the planning approval of the viewing gallery, in the context of the largely parallel application for Neo Bankside, was evidence capable of supporting the submission that there was no nuisance.

186. In my view the planning permission in this case provides little or no assistance in deciding what I have to decide. In his point (ii) Lord Carnwath referred to a planning permission which "includes a detailed, and carefully considered, framework of conditions governing the acceptable limits of a noise use". He was therefore referring to a situation where it can be seen that the planning authority can be seen to have considered the sort of issues that go to the nuisance. In the present case, for the reasons given above, that cannot be seen in this case. The level of consideration given to the overlooking, if there was any at all, is not apparent from the evidence that was placed

before me. Assistance on that point is therefore not available to Mr Fetherstonhaugh from the planning permission, either as a starting point or anything else.

187. Mr Fetherstonhaugh also relied on the planning permission as being consistent with, if not demonstrating the application of, the established policies for the area. The London Plan Draft for Public Consultation 2017 identified the area as an "Opportunity Area", as being part of the Central Activities Zone ["CAZ"] which was a centre of "excellence and specialist clusters … which should be supported and promoted"; policy SD5 stated that new residential development should not compromise the strategic functions of the CAZ; the policy stated that development proposals should deliver "appropriate outlook, privacy and amenity"; and it endorsed Policy 7.7 of the London Plan 2016 which provided that "tall and large buildings should incorporate publicly accessible areas on the upper floors, where appropriate". All this may be true, but it does not go to the question of nuisance not least it does not really engage with the important factors which have to be considered in considering a nuisance claim for the reasons appearing in the following sections of this judgment.

188. The other way in which Lord Carnwath suggested that the planning permission might be relevant is in providing evidence of the relative importance of the activity to the area. Since the planning permission in this case did not really address the viewing gallery, as opposed to the building as a whole, it is not possible to draw any conclusions from it as to the views of the planning authority on this point, so the permission is of no evidential use here either.

The character of the locality

189. With those planning points out of the way I turn to the question of the nature or character of the locality, which (as appears above) is the first significant relevant factor.

190. The locality is, as appears above, a part of urban south London used for a mixture of residential, cultural, tourist and commercial purposes. That usage, thus described, does not say much about the privacy of high-rise glass-walled residential buildings. However, the significant factor is that is an inner city urban environment, with a significant amount of tourist activity. An occupier in that environment can expect rather less privacy than perhaps a rural occupier might. Anyone who lives in an inner city can expect to live quite cheek by jowl with neighbours. That is implicitly acknowledged by the claimants when they say they do not object to the fact that they are overlooked from the windows of the Blavatnik Building.

191. In this context Mr Fetherstonhaugh again turned to planning matters and pointed out various planning policies which acknowledged the need to regenerate this part of London, including the London Plan policy that gave priority to strategic uses rather than residential development, which should not compromise the strategic functions of the CAZ. Cultural uses were said to be given a high degree of priority in the Plan. I do not think this is capable of assisting him in terms of identifying the nature of the locality for at least three reasons.

192. First, the plans of the planners, in general terms, for this area are of little or no assistance in determining what the current nature of the locality is. If they reflect the current usage, then they are irrelevant and add nothing. If they reflect a desire to move the area along to a different usage then they reflect the aspirations of the planners, but they do not affect what the nature of the locality should be treated as being for the purposes of the law of nuisance. In *Fen Tigers* the Supreme Court considered the question of whether the grant of planning permission could be taken to affect the character of a neighbourhood, and rejected the suggestion that that could be the case. The Justices considered the proposition that it might affect the character of the neighbourhood if it covered a large area but not a small area, and rejected that too (see eg Lord Neuberger at paras 86-88). If an actual planning decision cannot affect the character of the locality for the purposes of the law of nuisance, then the aspirations of a local authority for an area, as expounded in a local plan, should not be able to do it either. It therefore seems to me that the plans for the area do not bear on the character of the locality in this case.

193. Second, if I am wrong about that, then even if (as seems to be the case) there is an emphasis on cultural matters, and the benefits of a vibrant Tate Modern, it does not seem to me that that leads to the conclusion that this is an area in which a viewing platform should necessarily be actually expected in that context.

194. Third, while such generalised planning matters might be capable of resolving a conflict between a residential use and a cultural use (at least so far as planning is concerned), they do not assist in resolving the question of a conflict between a viewing platform (which is a particular subset of the cultural activities of the Tate Modern) and some residential accommodation.

195. One is therefore left with the character of the locality as I have described it in general terms.

The reasonableness of the use of the defendant's land

196. There is nothing unreasonable about the use of the defendant's land per se, in its context. The operation of an art gallery is obviously not unreasonable in the neighbourhood. Neither, in my view, is the operation of a viewing gallery an inherently objectionable activity in the neighbourhood. It is not inconsistent with the character of the locality, and the claimants did not contend otherwise. Nor is it inherently unreasonable to have a 360 degree viewing capability from such a platform. I do not accept some of the higher-flown statements of the Tate Modern's witnesses as to the importance of the southern view (Ms Morris said that to close the southern section would be to "turn their backs" on south London - that seems to me to be rather over-stating it), but there is nothing wrong with seeking to complete a view with views to the south. In other words, creating and operating the viewing gallery was nothing like akin to introducing a noisy, smoke-emitting foundry into the middle of this non-industrial locale (to take an example of something that would be strikingly inconsistent with the area and be likely to cause a nuisance).

197. At this stage it is necessary to remind oneself that the defendant did not open its southern limb of the gallery in order specifically to allow viewers to gaze upon the Neo Bankside flats. That would probably have been an unreasonable use. The operation of the gallery allows people to view the interior of the flats, but that is not its purpose. Nor does absolutely every visitor vest the flats with the visual significance that they would vest in, say, the view of St Paul's; though a significant number are interested, as appears above.

198. The defendant also now restricts the use of the viewing gallery to the times identified above, and has taken the other (less effective) steps that I have also identified. I am obviously invited to approach this case on the footing that those measures will remain in place, and I shall do so. It is part of the defendant's user which has to be assessed for the purposes of this action.

199. What is said to render the use of southern gallery, and part of the western, unreasonable is the fact that it enables and (de facto) encourages a view of the claimants' properties which is more than a passing glance; it provides an opportunity or prolonged study by many people which is not of the same nature as a walk-by view. The viewing gallery's purpose is to provide a view, and part of that view happens to be the interiors of the flats. So it is necessary to consider the nature of those properties and their user.

The claimants' properties and my conclusions on nuisance

200. At one level the claimants are using their properties in accordance with the characteristics of the neighbourhood. They are used as dwellings, and the fact that they rise to some height does not remove that characterisation.

201. However, it is necessary to consider more precisely what it is that the claimants complain about. They complain that their everyday life in the flats is on view because of the nature of the view. The nature of the view is the complete (or largely complete) view that one has of the living accommodation from the viewing gallery. It is that that is commented in one or two the Instagram postings. That arises (obviously) because of the complete glass walls of the living accommodation. I have considered whether the claimants would have had had a complaint if they had lived in flats designed with more wall and less window. If the owner/occupier/developer of such a flat would still have a complaint in nuisance, then so must the claimants. If he/she would not then I have to consider whether the claimants in this case would nonetheless have a cause of action themselves, arising out of the glass construction.

202. I approach this exercise with care for a couple of reasons. First, the assessment depends on what the hypothetical alternative design is, and I do not propose to provide architectural details of my hypothesis. Second, it is not a matter which was dealt with evidentially in the case. However, I still propose to do it. So far as the hypothesis is concerned, my imaginary building has significant vertical and perhaps horizontal breaks to interrupt the inward view. So far as the absence of evidence is concerned, I am not sure that there would be any evidence that could be adduced to assist on the point. But in any event the analysis seems to me to be important so I shall carry it out. In reaching my conclusions about it I do, of course, consider the notional flat owner's usage in the context of the defendant's usage and the locality, as set out above.

203. In my view the owners/occupiers/developers would not have a nuisance claim in those circumstances, for various reasons. First, a building constructed in that way would not be likely to attract the external viewer in the way in which the Neo Bankside flats do. A major part of what catches the eye is the apparently clear and uninterrupted view of how the claimants seek to conduct their lives in the flats. One can see them from practically every angle on the southern walkway. That attracts the gaze which intrudes on privacy. If there are breaks in the view then the visual interest is less continuous, and less striking, and viewers would be less interested. Furthermore, some parts of the interior may well not be fully in view anyway, and the occupiers of the flats would be less likely to consider themselves to be in a goldfish bowl. So the attraction of the external gaze, which gives rise to the high level of intrusion into privacy, would be seriously reduced, as would the intrusion into privacy. There would still be a risk of intrusion into their privacy, from the viewing gallery – the purpose of a viewing gallery is to <u>view</u>, after all, and some people will view what is in front of them - but at a level which is within what the modern flat dweller in this locale ought to have to put up with on the "give and take" principle. There is no measure which establishes that; it is my view on how the balancing considerations of the proper use of the defendant's land and the legitimate interests of the putative flat owners/occupiers/developers work out in a modern urban, cultural tourist-attracting environment. Such a flat owner could choose to leave his or her view open, with the concomitant ability for outsiders to look in, or the owner could adopt remedial measures such as those that I discuss below. Either way, I do not consider that the vulnerability to the view from the gallery would be

sufficient to amount to a nuisance. In coming to this conclusion I take into account the limitations on use, and other control measures, which the defendant has taken (for what two of them are worth). I do not need to make a finding as to whether the use of the gallery without those controls would have been a nuisance on this hypothesis, and do not do so.

204. That being the case, what is the position of the flat owners of the actual Neo Bankside development, with all the attractions to which I have referred? In my view there are parallels with nuisance cases about sensitive users. In *Robinson v Kilvert* [1899] 1 Ch 255 the Court of Appeal had to consider the case of heat which affected particularly sensitive paper of the plaintiff but which would not have affected "normally" sensitive paper (that is my terminology). Cotton LJ said (at p94):

> "But no case has been cited where the doing something not in itself noxious has been held a nuisance, unless it interferes with the ordinary enjoyment of life, or the ordinary use of property for the purposes of residence or business. It would, in my opinion, be wrong to say that the doing something not in itself noxious is a nuisance because it does harm to some particular trade in the adjoining property, although it would not prejudicially affect any ordinary trade carried on there, and does not interfere with the ordinary enjoyment of life."

The other members of the court expressed similar views.

205. There is a clear analogy here. The developers in building the flats, and the claimants as successors in title who chose to buy the flats, have created or submitted themselves to a sensitivity to privacy which is greater than would the case of a less-glassed design. It would be wrong to allow this self-induced incentive to gaze, and to infringe privacy, and self-induced exposure to the outside world, to create a liability in nuisance. Other architectural designs would have reduced the invasion of privacy to levels which should be tolerated; that is the appropriate measure in my view. If the claimants have a design which raises the privacy invasion then they have created their own sensitivity and will have to tolerate what the design has created. I remind myself that the first designs for these flats did have some privacy protection built in.

206. In making that determination I am not indulging in any criticism of the claimants or the developers; nor am I criticising the architectural design. I am aware that is no part of the law of nuisance to discourage architectural adventure. However, the architectural style in this case (including the more striking design of the block as a whole) has the consequence of an increased exposure to the outside world for all the reasons contained in this judgment. That should not be allowed to alter the balance which would otherwise exist.

207. In making his submissions in this area Mr Fetherstonhaugh did not quite put the matter in the way I have just done, but he did refer to self-induced sensitivity arising out of the physical construction of the building, and relied on *Southwark London Borough Council v Tanner* [2001] 1 AC 1 in support of his proposition that construction factors could be seen to be dealt with in the same way as sensitive manufacturing operations. I do not think that that case demonstrates the same parallel, but I do not need it in order to reach my conclusions on the point.

208. The winter gardens also have to be considered. A very material part of the perceived intrusion into privacy comes from the fact that the occupiers can be viewed in the winter gardens, which they treat as an extension of their living accommodation. Furthermore, the glass of the winter gardens allows a view to the glass of the internal double-glazed door, which in turn allows a further view into the living accommodation.

209. Those areas were not originally intended as part of the living accommodation. The planning documents make clear that they were conceived as a form of internal balconies, which the occupiers could enjoy as an additional amenity to their living accommodation. The experts both agreed on that. That is why the areas were single glazed, and not double glazed. The flooring was also intended to be different, to reflect that. They were not intended to be heated, though the developers did actually extend the under-floor heating into them. Had the occupiers operated their flats in that way then in my view they could have expected less privacy in respect of that part of their flats - one does not expect so much privacy in a balcony, even one as high as these. I agree with Mr Rhodes' evidence to that effect.

210. In that respect, too, the owners and occupiers of the flat have created their own additional sensitivity to the inward gaze. They have moved more of their living activities into a quasi-balcony area and provided more to look at. Had they not done that, there would have been less worth looking at - less to attract the eye – and fewer living activities to be intruded upon. It is true that to a degree there would still have been a view through the winter gardens and through the double-glazed doors, and to that extent the privacy of the living accommodation would still have been compromised by something more usual (extensive glass doors giving on to a balcony-equivalent) but the whole package would have been a less sensitive one.

211. I therefore consider this to be a case in which the claimants are occupying a particularly sensitive property which they are operating in way which has increased the sensitivity. A differently built, but perfectly acceptable, property would have had more privacy built in, or rather would not have had the same degree of exposure. These properties are impressive, and no doubt there are great advantages to be enjoyed in such extensive glassed views, but that in effect comes at a price in terms of privacy.

212. I record that in relation to this part of the debate there was disagreement between the experts as to whether the winter gardens fell to be treated as a “habitable space” for planning purposes. Interesting though that debate might be in another context, I did not in the end think that it helps me to decide the nuisance questions which arise in this case.

213. So far as user by the owner-occupants of the flat is concerned, it is also necessary to consider whether they could take protective measures, and if so whether it would be reasonable to expect them to do so or whether they are entitled to the full extent of their privacy from the viewing gallery without having to take steps themselves. This goes to the “give and take” that is expected of owners in this context.

214. It is plain that some remedial steps could be taken. There are several.

(a) The owners could lower their solar blinds. That would give them a good degree of privacy in daylight hours, at the cost of their clear view of the outside world and a certain amount of light. It would not be successful in the hours of darkness if they have lights on inside, because they allow a reasonable (if a bit fuzzy) view of the interiors. I did not see this last factor for myself but some of the owners gave evidence to that effect, and they are supported by photographs. In the hours of darkness, with the lights on, the occupiers of the flats would have had to draw curtains to produce complete privacy.

(b) The owners could install privacy film. This film is now a standard technique for barring views from the outside in daylight hours. It is applied to windows and reflects the external light outwards, providing a mirror-like effect from the outside while allowing a good degree of light in. It does, however, have drawbacks. It does not work in the hours of darkness if the lights are on inside. And it affects the external appearance of the building because during daylight hours it generates a mirror effect rather than clear glass. There may be planning implications in installing that film now; that was not clear.

(c) They could install net curtains. This has the same effect and drawbacks as the blinds. Furthermore, there is said to be a covenant in the lease which prevents installing curtains in the winter gardens. There was some suggestion that the landlord would not object to its being done, but there was no definitive answer to that.

(d) At least one occupant has put some medium height plants in the winter gardens. As a matter of screening they are not hugely effective, and taller plants could restore some privacy. However, the other three measures are the significant ones which fall for consideration.

215. It is unusual for a nuisance claim to be met by the defendant saying that the claimant could take remedial steps to avoid the consequences of the act, but this is an unusual case. I refer again to whether the consequences of the use of the defendant's land is something that the claimant might be expected to put up with in the relevant environment/locale. The victim of excessive dust would not be expected to put up additional sealing of doors and windows; the victim of excessive noise would not be expected to buy earplugs. However, privacy is a bit different. Susceptibilities and tastes differ, and in recognition of the fact that privacy might sometimes require to be enhanced it has become acceptable to expect those wishing to enhance it to protect their own interests. I refer, for example, to net curtains. In the present case, if the occupiers find matters too intrusive they can take at least one of the measures referred to above. It will, of course, detract from their living conditions, but not to an unacceptable degree. Looking at the overall balance which has to be achieved, the availability and reasonableness of such measures is another reason why I consider there to be no nuisance in this case.

216. Mr Fetherstonhaugh sought to meet the claimants' objections to having to take these steps by saying that what they were really seeking was a right to a view, which is a right unknown to the law. I do not consider that to be a relevant point. There are authorities which indicate that a right to a view, as an easement and absent agreement, is not a right known to the law, but that is not what the claimants are seeking. It is true that they want to be able to maintain an unrestricted view from their windows (without compromising their privacy) but they do not rely on a legal right to a view. They are saying they should not have to obstruct their view to protect themselves from an inwards intrusion by others. That is a different point, to which Mr Fetherstonhaugh's point does not go.

217. I should mention one further factor relied on by at least two of the claimants, and that is the effect of there being children in the flats. As appears above, some of the occupants will not allow their children or grandchildren to be exposed in the flats. Mr Weekes sought to pray in aid the particular need to protect children. He relied on *Weller v Associated Newspapers* [2016] 1 WLR 1541. While I do not ignore that factor, I do not think that it has much weight in the calculation I have to make or the balance I have to strike. The children do not have their own privacy claim under nuisance because they are not the owners of the land. Their privacy interests are part of the greater privacy interests of the parent owners, but do not add anything substantial to the latter's significant interests. The viewing gallery has not been constructed, and is not used, deliberately so as to give a view of children, and children would not necessarily be on view in the flats all the time though it is, of course, a perfectly "normal" activity to bring up children in a residential area. I am far from sure that every parent would feel quite the same level of sensitivity (though I respect the views of those who do), and if there is felt to be a danger then the remedial steps which are open to the parents and grandparents (identified above) are steps which they could reasonably be expected to take.

218. I have considered whether there is an additional factor to be brought in at this stage in the argument, namely the history of the planning and construction process relating to the flats. I have set out the relevant events above. The effect is that the Neo Bankside flats and the Blavatnik Building were conceived and developed at largely the same time, and with a significant degree of cooperation between those responsible for the construction. Although it would appear that the developers must have known of a viewing gallery and did not object to it (indeed they virtually consented to it by expressing their support for the Blavatnik project) it is not clear whether they realised its full impact. Nonetheless there is a heavy element of acquiescence. At first sight it would seem to be odd that if there was a form of consent, relied on by all concerned at the time, later owner/occupants of the flats could complain about the nuisance. On the other hand, there is the principle that it is no defence that a claimant came to the nuisance.

219. I have not considered this point further because it is unnecessary to do so for the purposes of my decision, and probably inappropriate to base my decision on it in the circumstances of this litigation. The legal position arising out of this state of affairs was not relied on or analysed by Mr Fetherstonhaugh (though he did refer to the facts in his final argument); no relevant matters were pleaded; and the facts (as to the developers' knowledge) are not wholly clear anyway. Accordingly it is not a factor that I take into account.

220. 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. That Article generally requires an assessment (among other things) of whether the claimant has a reasonable expectation of privacy. As stated elsewhere in this judgment, in my view an assessment of that nature would be almost identical to the balancing exercise between the defendant's use of the land in the locale in question and the sort of give and take that would be reasonable for the claimant. It would arrive at the same result. The sort of factors which mean that the claimants cannot claim that the use of the viewing gallery is a nuisance mean that they do not have a reasonable expectation of privacy, if that is relevant. I need say no more about it than that.

221. As has appeared, my conclusion is dependent on the restrictions on the times of user identified in this judgment being maintained. It would be appropriate for that restriction to be enshrined in an undertaking to the court. Nothing I have heard suggests that that would not be forthcoming, and indeed the defendant's case was advanced on the footing that the package that they presented was part of their case for saying there was no nuisance, so I assume it will be forthcoming. The same applies to the less significant (but not quite wholly useless) other measures put in place by the defendant.

Remedies

222. That conclusion means that I do not have to consider remedies in detail, and I shall therefore not do so. I will not indicate whether an injunction, as opposed to damages,

would have been an appropriate remedy. I will, however, make one observation. Had I been minded to grant an injunction to restrain use of the gallery it would not have extended beyond the southern section of the gallery. I can see no case for granting an injunction to restrain use of any part of the western section. The use of that section does not give rise to any, or much, incursion into the privacy of the flats, or not enough to merit an injunction.

223. It is also unnecessary for me to say anything about alternative remedial measures that the Tate Modern might have had to put in place as an alternative to closing the south side because it is unlikely that I would have ordered any specific remedies. Had I found that there was a nuisance which needed to be addressed it would have been for the Tate to have proposed something as an alternative to closing the gallery or paying damages. The Tate (and particularly its architect) manifested an understandable lack of enthusiasm for anything which affected the architectural integrity of the building (such as louvres), but had I decided that there was a nuisance some such thing might have had to have been done in order to avoid the injunction or damages. However, the point does not arise and I say no more about it.

Conclusion

224. Since I have found that there is no direct cause of action under the Human Rights Act, and since I have found there to be no actionable nuisance in the present circumstances, it follows that this claim should be dismissed (provided that the defendant gives the undertaking about the restrictions, and controls on user, and the encouragement by signs, referred to above).

Postscript

225. My judgment in essentially the above form was provided to the parties in draft, before handing down, in the normal way. As well as sending in proposed typographical corrections, Mr Weekes also sent in submissions based on his side's perception that they had not had a proper opportunity to make submissions about the reasoning on which my final determination is based, contained in paragraphs 200 following, and in particular the "sensitivity" point. He pointed out, to a degree correctly, that while the defendant's closing written submissions had referred to *Robinson v Kilvert*, they had not developed the point in quite the manner which my judgment does. In written submissions to me Mr Weekes said that they had not really understood the point being made in the written submissions, so they had not made their own submissions on *Robinson v Kilvert*, being under pressure of time and preferring to make their submissions elsewhere. In particular, he frankly admits that he did not subject *Robinson v Kilvert* to scrutiny. In those circumstances he sought the opportunity to make further submissions, relying on *ZM v JM* [2008] EWCA Civ 1261 and what he submitted was a "deficiency" in my reasoning process. He drew my attention to the notes at paragraph 4.2.1.1 of the White Book.

226. I was not totally convinced that Mr Weekes really had proper cause to make further submissions. While it is true that Mr Fetherstonhaugh did not fully expressly articulate what his "sensitivity" point was, and he certainly did not express it in the way in which I expressed it above, it seemed to me to lie within what he was submitting, and to follow on from two other passages in his skeleton (in the context of submissions about reasonable expectations of privacy) when he said:

> "123. The reasonable expectation of privacy that a person has in his or her home depends on the nature of that home and on the measures taken by the resident to screen his or her home from view. A person who chooses to live in a glass box in a crowded, urban sky has a different reasonable expectation that one who chooses a secluded spot."

And at para 140:

> " 140 … What can reasonably be expected by way of protection from view in an isolated cottage in rural Dorset will be very different from that which can reasonably be expected in a curtainless window by a bus stop, or an uncurtained glass box in a congested sky."

227. I am therefore reluctant to accept that the point taken by me, and probably taken by Mr Fetherstonhaugh, is a new point which justifies further arguments being made. Be that as it may, and despite the fact that entertaining further argument after distribution of a draft judgment and before hand-down is not to be encouraged (that is not what circulating a draft is for) I allowed Mr Weekes' application and have entertained further argument today.

228. His main if not only point was that the reasoning on the "sensitivity" point was based on *Robinson v Kilvert* (which it was) and that the "abnormal sensitivity" point arising out of that case has been held to be no longer apt since the case of *Network Rail Infrastructure Ltd v Morris* [2004] Env Lr 41. That case concerned interference from railway signalling equipment on electric guitar music some 80 metres away. In that context Buxton LJ pointed out that the concepts of reasonableness and foreseeability lay at the heart of nuisance and said:

> "32. This very broad approach is thus firmly established as the essential content of liability in the modern law of nuisance, at least where the existence of a "nuisance" is established. It takes the place of some detailed and particular rules that are to be

found in earlier authority. A number of consequences flow from that fact.

…

35. Third, relevantly to our case, it is difficult to see any further life in some particular rules of the law of nuisance, such as for instance the concept of "abnormal sensitiveness" drawn from *Robinson v Kilvert* (1889) 41 Ch D 88. That rule was developed at a time when liability in nuisance, for damaging a neighbour by use of one's own land, was thought to be strict: for that view of the nineteenth century law see Lord Goff in *Cambridgeshire Water* at p 299D, and in that century itself the judgment of Blackburn J in *Fletcher v Rylands* (1866) LR 1 Ex 265 in particular at p 285, quoted in this sense by Professor Newark 65 LQR at p 487, a passage cited with approval by Lord Goff in *Cambridgeshire Water* at p 298D. The unreasonable results that could flow from that approach were mitigated by a number of rules of thumb; for instance, as shown by the passages from *Robinson v Kilvert* cited by my Lord at § 14 above, that an activity that could only injure an exceptionally delicate trade could not be a nuisance at all; or that the occupier could not be responsible for a "nuisance" on his premises that was not created by him (e.g. *Barker v Herbert* [1911] 2 KB 633, a case that specifically disclaimed analysis in terms of negligence). It is very difficult not to think that such particular rules are now subsumed under the general view of the law of nuisance expressed in *Delaware Mansions*: not dissimilarly to the way in which the generalisation of the law of negligence initiated by *Donoghue v Stevenson* has rendered obsolete the previous categories of dangerous chattels; duties of occupiers of land; duties attaching to specific trades; and the like.

36. This all affects our present case in the following ways. First, if it were any longer appropriate to address as a separate question whether Mr Morris's studio was a special or abnormal sensitive use of his premises, I would be minded to answer that question as did the Recorder, as set out by my Lord in §16 above. It seems to me that it is difficult to say that, in the modern era, the type of studio involved is so unusual as *necessarily* to disqualify Mr Morris from the protection of the law of nuisance. But the problem about that reply is that it is in wholly generalised terms, that do not address the relationship between this claimant and this defendant. And that demonstrates that the question is no longer apt. As my Lord says, what is required is an analysis of the demands of reasonableness in this particular case: which the court can now assess, as the court in *Robinson v Kilvert* could not, in terms of foreseeability."

Mr Weekes submitted that this disapproved the "sensitivity principle" in *Robinson v Kilvert*, and that Lord Phillips MR supported that in his paragraph 19.

229. While it is plain that Buxton LJ did not think that *Robinson v Kilvert* had so big a role to play in the modern law of nuisance, I do not read his dicta as completely over-ruling the case as being inapplicable in all circumstances. He did not regard the principle as useful ("apt") in his case. As textbook writers have since commented, it is not easy to see why particular sensitivity should not logically play a role in assessments of foreseeability and reasonable user. Thus Winfield & Jolowicz on Tort 19th Edition says at 15-019:

> "It has been suggested that it is difficult to see any further life in the principal about abnormal sensitivity because of the current general approach. With respect, that does not seem correct: to say that C cannot restrict the freedom of action of his neighbour by putting his property to a very sensitive use is part and parcel of the idea of reasonableness. Of course, that is not to say that the law's response to what were once regarded as abnormally sensitive activities may not change over time: for example, the use of sensitive electronic equipment is now part of everyday life and there are detailed regulatory controls designed to minimise interference."

And Clerk & Lindsell on Torts (22nd edition) at para 20-11:

> "20-11. Standard of comfort.
>
> A nuisance of this kind, to be actionable, must be such as to be a real interference with the comfort or convenience of living according to the standards of the average man. An interference which alone causes harm to something of abnormal sensitiveness does not of itself constitute a nuisance. A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or for pleasure. In practice the general application of the concept of foreseeability and reasonable user may have rendered the notion of abnormal sensitivity less significant in modern law [a footnote refers to the *Network Rail* case], although it is submitted that it remains useful as a guideline when applying those broad concepts in particular cases."

230. I agree. I also observe that the concept of foreseeability, stressed by Buxton LJ, was not really the subject of debate and argument before me. At one level foreseeability in the present case is obvious, but Mr Weekes did not suggest it presented an answer to the case. The answer lies in an overall assessment involving reasonableness (again as Mr Weekes accepted) and I cannot see why the sensitivity point should not play a part in that exercise.

231. Returning to *Network Rail*, it is not plain to me that Lord Phillips MR was quite as firm as Buxton LJ. He said:

> " 19. This evidence reflects the fact that it may be more satisfactory that the potential problem of one neighbour causing electronic interference to another should be addressed by regulation than that it should be left to be resolved by the law of private nuisance. We express no concluded view on this. If the authorities to which we have referred in paragraphs 13 to 15 above remain good law, they would lead us to the conclusion that the amplified guitars which were affected by the magnetic field created by Railtrack's installations fell into the category of extraordinarily sensitive equipment which did not attract the protection of the law of nuisance. The evidence to which we are about to turn indicates that the interference suffered by Mr Morris as a result of the use of the TI 21 track circuits was a very rare occurrence indeed. As Buxton LJ's judgment demonstrates, however, the law of nuisance has moved on. If resort must be had to it in order to resolve the competing claims of users of electrical or electronic equipment, the balance may fall to be struck by considering what is reasonable. One thing seems clear, however. Foreseeability is a vital ingredient in the tort of negligence – see *Cambridge Water Co. v Eastern Counties Leather PLC* [1994] 2 AC 264. It was, in this case, common ground that Railtrack could only be liable in nuisance if they should reasonably have foreseen that, by installing the TI 21 track circuits they would cause damage to someone in the position of Mr Morris."

232. I do not read that as clearly adopting a suggestion that sensitivity has no role to play. He says "the balance may fall to be struck …". Laws LJ agreed with the reasons of Lord Phillips, not with Buxton LJ.

233. For those reasons, therefore, I do not regard *Robinson v Kilvert* (itself Court of Appeal authority) as having somehow been overruled by *Network Rail*, and the considerations which arose in that case still have a role to play. I have indicated above what role I think they play in the present case. Nothing that I heard in the further argument has

caused me to change my conclusions or reasoning in the main body of this judgment. Mr Weekes did not seek to raise any further arguments, whether on the law or on the facts, beyond his point on *Network Rail*, other than to say that it was wrong to base my judgment on "hypothetical facts". Since I do not accept that point either my judgment above still stands.

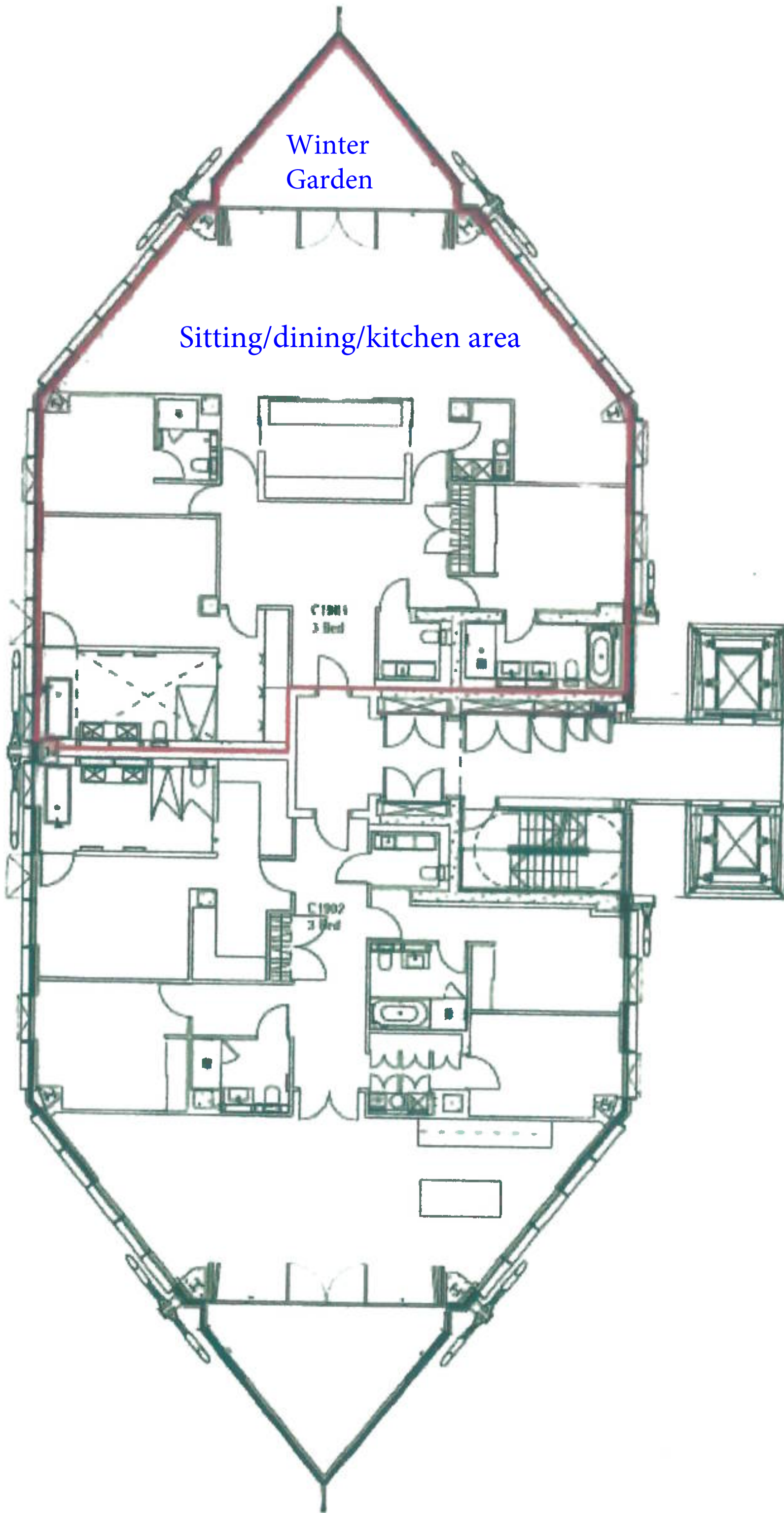
A

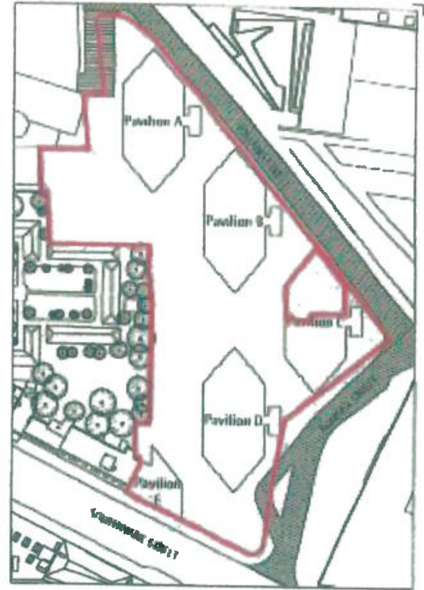
B

C

D

PLAN B





2 Location Plan