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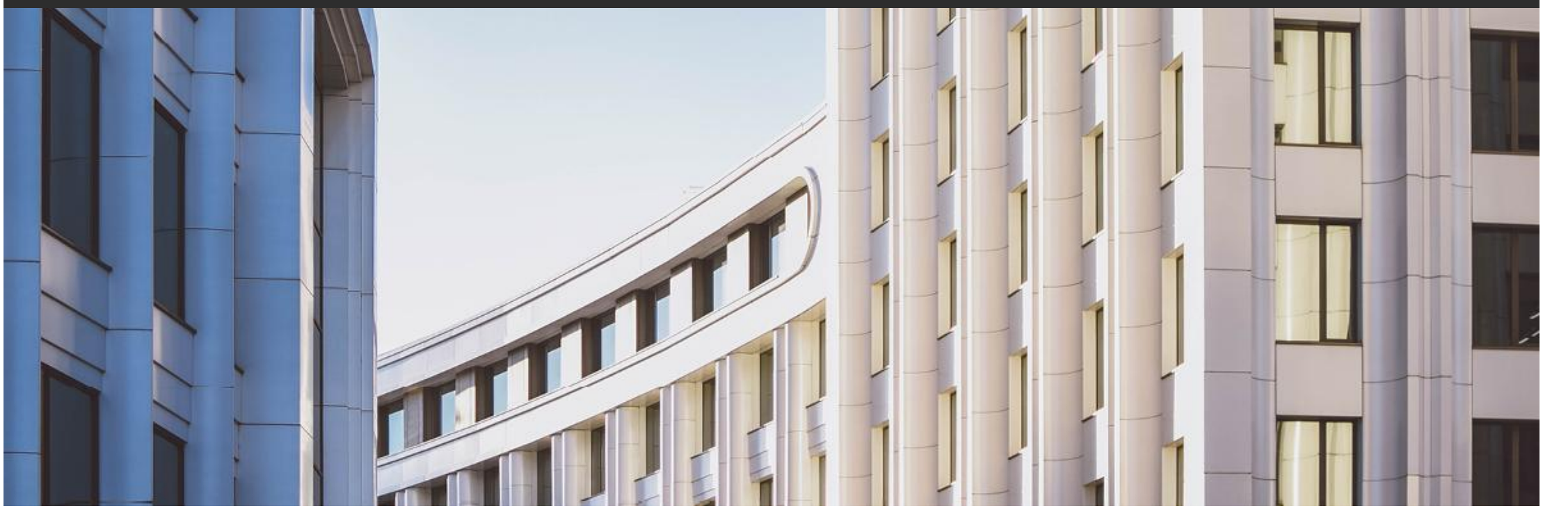

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Nuisance, the Locality Principle, and Real Estate Finance in England and Wales

The tort of private nuisance under English law has direct implications for the value and enforceability of interests in real estate assets that are the subject of financing transactions. Where a borrower's use of a financed asset is disrupted by a neighbouring landowner, or where a borrower's own use of that asset disrupts a neighbour, the availability and scope of a nuisance claim – and in particular the application of the locality principle – may affect asset value, liquidity, and lender security. The Court of Appeal's recent decision in *Thomas v. Nicholas* [2026] EWCA Civ 847 provides a timely opportunity to consider how these principles operate and what they mean for real estate finance practice.

The tort of private nuisance is well known to property lawyers in England and Wales – it is one of a limited number of torts that relate exclusively to land. It may be established where substantial interference with the use and enjoyment of land occurs. It seeks to achieve two objectives, both of which are intuitive and pragmatic.

The first is that a person with an interest in land (the "first landowner") should be permitted to use that land in a way that is normal and ordinary. The second is that a neighbouring landowner (the "second landowner") should not be permitted to do anything on its land that interferes in a substantial manner with the first landowner's normal and ordinary use of its land. Thus, if the first landowner claims that it has suffered an actionable nuisance at the hands of the second landowner, it must establish that the second landowner interfered with the first landowner's normal and ordinary use of its land in a substantial way. If the utility or value of the land belonging to the first landowner is reduced as a result of the interference by the second landowner, the tort of nuisance may provide the first landowner with a remedy in damages, such damages being based on the difference between the value of the first landowner's land before and after the second landowner's interference.

However, if the second landowner's actions on its own land are consistent with that landowner's normal and ordinary use, the second landowner will, in the absence of malice on its part, have a defence to the first landowner's claim of nuisance. Equally, if the first landowner's claim is based on interference with activities that go beyond its normal and ordinary use, the second landowner will also have a defence to the first landowner's claim.

What is "normal and ordinary" in the context of the use of land is, however, an objective question and not always easy to determine. The courts have recognised this difficulty by formulating a variety of factors, including the "locality principle". This provides that in determining the normal and ordinary use of land, account must be taken of the location and, we would suggest, the nature of the land and the activities typically conducted on it. The locality principle is well established: its origin may be traced back to cases such as *Sturges v Bridgeman* (1879), 11 Ch D 852, where Thesiger LJ stated at page 865:

"....whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to **its circumstances**; what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey...."

The use of the word "circumstances" suggests that while location is of central importance in assessing the extent to which the locality principle provides a defence to a claim of nuisance, it is not the only factor.

Thomas v Nicholas: The Court of Appeal Considers the Scope of the Locality Principle

In *Thomas v Martin Nicholas and Scott Nicholas* the Court of Appeal (Moylan, Nugee and Whipple LJJ) considered the tort of nuisance and the ambit of the locality principle.

The claimants (Martin Nicholas and Scott Nicholas, who were the respondents in the appeal and who had been successful at first instance) were engaged in the business of breeding falcons on their land in Cornwall. The defendant (Barnes Thomas, the appellant, who had been unsuccessful at first instance) was a neighbouring landowner, who used his land for his scaffolding business, barn-building works and to park his broken-down digger. The claimants alleged that the various actions taken by the defendant on his land caused noise, vibration and visual disturbance that interfered with the claimants' falcon breeding business. We refer to the parties as the "claimants" and the "defendant" throughout.

The trial judge (HHJ Russen KC, sitting as a judge of the High Court) found that the defendant was liable in nuisance on the basis that the claimants' land was "suitable" for the breeding of falcons – apparently, falcons cannot be bred on any type of land. In the trial judge's opinion, the fact that the land was suitable for this purpose and consistent with the locality meant that the breeding of falcons should be regarded as a normal and ordinary use of that land. This satisfied one of the requirements of the tort of nuisance. The defendant had, by his actions which included undertaking building works during the breeding season when the falcons were particularly sensitive to environmental factors, substantially interfered with the claimants' normal and ordinary use of their land and was liable in nuisance.

On this point, the ground of appeal relied upon by the defendant was that the trial judge, in making his determination, had failed to take into account that the claimants were engaging in a "sensitive trade" and had failed to apply the common law principle derived from the decision of the House of Lords in *Eastern* *and South African Telegraph Co Ltd v Cape Town Tramways Companies Ltd* [1902] AC 381, per Lord Robertson at page 393, and approved in *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1, per Lord Leggatt at page 25, that:

"A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure".

The grounds of appeal also included that the trial judge had erred in "inventing a principle (hitherto unknown to English law)" that:

"…. if a claimant is carrying on a sensitive trade from its land at a "suitable location", the test for whether an interference is sufficiently serious to constitute a nuisance is to be judged, not by whether the activity substantially interferes with the common and ordinary use of land, but, instead, whether the activity substantially interferes with that sensitive trade."

To put this a slightly different way, the defendant contended that just because land was "suitable" for a "sensitive trade" it did not follow that the sensitive trade should be regarded as being a normal and ordinary use of that land.

The Court of Appeal was divided on this point. The majority (Moylan and Nugee LJJ) agreed with the defendant's contention that a location's suitability for a particular activity does not of itself make that activity an ordinary use. Moylan LJ stated in his judgment that the reasoning of the trial judge was that:

"… [the] claimants' land was a suitable location for breeding falcons and therefore this does not qualify as a special or unusual use but as an ordinary use. That was certainly how [leading counsel for the claimants] sought to support the judgment. His submission was that the judge found as a fact that this was a suitable location for breeding falcons, and that it followed that breeding falcons was an ordinary use and not a special use for the purposes of the law of nuisance.

With all respect both to the judge, who evidently gave his judgment a great deal of careful thought, and to [counsel's] argument, I think this is a non-sequitur and fallacious and that it rests on a misunderstanding of the core principles of nuisance as expounded by Lord Leggatt in Fearn and illustrated by the decided cases…."

Whipple LJ, who delivered a lengthy dissenting judgment considering the authorities in detail, reached the same conclusion as the trial judge, HHJ Russen KC: that falcon breeding was an ordinary rural use with sensitive features and could therefore satisfy the "ordinary and normal use" test for the purposes of the tort of nuisance.

For completeness, the claimants also made a separate claim in negligence against the defendant which was successful both at first instance and on appeal. Both courts found that the defendant was aware of the falcon breeding season as a result of a series of messages exchanged between the parties and that, as a result, a duty of care had arisen which was breached by the building works; further, the damage caused was held to be foreseeable. Moylan LJ dissented from the majority on this point and expressed particular concern as to whether the law of negligence should be permitted to achieve indirectly what the law of nuisance does not permit directly. Leave to appeal to the Supreme Court has been granted, and the Supreme Court's decision should resolve this question definitively.

Nuisance and the Locality Principle: Implications for Real Estate Finance Transactions

A commercial real estate asset that has been the subject of a financing transaction may be affected in two ways as a result of a nuisance:

1) If the borrower is undertaking an activity consistent with the ordinary and normal use of the real estate asset but that ordinary and normal use is subject to interference by a neighbouring landowner making use of its land in a way that is not ordinary and normal, the borrower is the innocent party.

2) If the borrower is undertaking an activity inconsistent with the ordinary and normal use of the real estate asset and that use interferes with the ordinary and normal use by a neighbouring landowner of its land, the neighbouring landowner is the innocent party.

Depending on the severity of the interference, the value of the borrower's real estate asset may be adversely affected. If, for example, the borrower's real estate asset is used as a multi-family residential property, but a neighbouring landowner operates some form of entertainment venue with a large clientele, the value of the borrower's real estate asset could be reduced. Conversely, if the borrower were the one operating the entertainment venue, it could be interfering with the ordinary and normal use of the neighbouring land as a multi-family residential asset. This is where the locality principle becomes relevant. There are areas where residential assets co-exist with entertainment assets – Bermondsey, for example, in deference to the example used by Thesiger LJ – and areas where they do not, such as Belgravia, though the distinction is perhaps more nuanced in 2026 than it was in 1879. Where the borrower is the innocent party, it may need to take action to prevent the nuisance or seek damages. Where the neighbouring landowner is the innocent party, the borrower may find itself the defendant in an action in nuisance. In either case, the value of the asset, and indeed its liquidity, may be compromised.

Depending on the location and the use of a real estate asset that is the subject of financing, both borrowers and lenders should be aware of the locality principle, assessing both the current position and circumstances that may arise in the future. As the digital economy continues to develop, actions in nuisance may be brought against owners of digital infrastructure located in areas not specifically designated for that purpose, where such infrastructure interferes with the ordinary and normal use of neighbouring land. Accordingly, the implications of nuisance law – both as potential claimants and potential defendants – ought to be carefully considered by both borrowers and lenders as part of their due diligence in real estate finance transactions.

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