(Comm. Ct. and CA) were able to avoid their cross-border payment obligations by reason of exchange controls in their country of origin.

Marcus Smith J. held that the English law of frustration should not take into account the *lex incorporationis*. However, rather than invoke the reasoning from the *Ralli Bros* line of authorities (save for oblique reference at paras. [187]–[188]), the judge instead based his decision on *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2012] Q.B. 549. In *Haugesund*, the Court of Appeal held that while questions of capacity were governed by the *lex incorporationis*, questions of the consequences of incapacity were determined by the law governing the contract. The judge was plainly right to conclude that this choice of law rule precluded looking beyond English law for the purposes of frustration.

In any event, the foreign illegality point was academic for two reasons. First, Marcus Smith J. held that, since that the European Commission had capacity to act outside of the EU (Case C-131/03 P, *Reynolds v Commission* [2006] E.C.R. I-7795; *Council v Commission* C73/14, ECLI:EU:C:2015:663), so too the EMA had capacity to hold and deal with property outside the territory of the EU. There was, therefore, no supervening illegality. Second, any frustration would be self-induced and therefore could not discharge the lease. The specific legal requirement on the EMA to move its headquarters from London to Amsterdam came not from Brexit per se but rather from Regulation (EU) No 2018/1718 (OJ 2016 L 291/3). However, with respect, the elision of the EU and the EMA is questionable given each has separate legal personality. It is difficult to see how and why a regulation passed by the European Parliament and Council should be treated as an act of the EMA itself.

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(NET) CURTAINS FOR MODERN ARCHITECTURE? PRIVACY, NUISANCE AND HUMAN RIGHTS

A nuisance case, with engaging facts, attracted unusual popular attention: *Fearn v Trustees of the Tate Gallery* [2019] EWHC 246 (Ch). The claims were brought by owners of four thirteenth- to twenty-first-floor flats in central London. The flats' living areas were glazed from floor to ceiling with "rather splendid" panoramic views. "Unfortunately" as Mann J. said at [8], "if occupants can see out then outsiders can see in (absent some protective measure), which is the problem in this case". Specifically, the owner-occupants complained that an exterior viewing platform on the tenth floor of the adjacent Tate Modern art gallery was an actionable

nuisance and also violated their human right to privacy (under Art. 8, ECHR). The evidence showed hundreds of thousands of visitors to the viewing platform per year. The judge held that a "significant number" of these "demonstrate a visual interest in the interiors of the flats", including peering, waving and photographing (at [85]). He commented (ibid.) that "their numbers and the level of interest is such that a homeowner would reasonably regard to be intrusive".

That finding of fact was necessary but not sufficient for liability. The claimants' "direct" human rights claim alleged that the Tate Gallery was a public authority required by the Human Rights Act 1998 (HRA), s. 6 to comply with the ECHR. The court held not. The Tate's activities (promoting artistic endeavour and educating the public about it) were, no doubt, in the public interest. The gallery received public funding and was subject to public regulation (by ministers, pursuant to the Museums and Galleries Act 1992). But none of this proved that its functions were "public", namely essentially "governmental". After all, *any* charity's activities are (by definition) in the public interest, many charities receive public funding, and all are publicly regulated (like most other activities). Charities can hardly all be "governmental" bodies under the HRA. Nor then the Tate Gallery. Mann J. took a narrow view here of "hybrid public bodies", but one consonant with the leading cases: *Aston Cantlow Parish Council v Wallbank* [2003] UKHL 37, [2004] 1 A.C. 546 and *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 A.C. 95. If the claims were to succeed it would have to be in nuisance.

Mann J. held that, in principle, erecting a viewing platform to overlook a neighbour's land could be actionable in private nuisance. This is novel and significant. Many would previously have assumed that the situation epitomised "non-actionability". Classic examples are: that a landowner has no right to a view and cannot complain if it is blocked (*Aldred's Case* (1610) 9 Co. Rep. 57, 58b: "the law does not give an action for such things of delight"); that a landowner has no right to percolating groundwater and cannot complain if it is extracted or diverted, even when done maliciously (*Bradford Corporation v Pickles* [1895] A.C. 587). A contemporary example is *Hunter v Canary Wharf Ltd.* [1997] A.C. 655: no right to receive television signals. Mann J. was not deterred by Lord Goff's suggestion in *Hunter* (p. 685) that something "emanating" from the defendant's land onto the claimant's land would usually be required: this was obiter and anyway Lord Goff did not say emanation was *always* required. Ample authority established that it is not actionable to open windows in a building overlooking neighbouring land. But Mann J. thought that a platform designed precisely for overlooking one's neighbour fell into a different category. On that the only direct authority was the Australian case *Victoria Park Racing v Taylor* (1937) 58 C.L.R. 497 (platform built to view the plaintiff's racecourse to write commercial reports about the

races). Mann J. preferred the reasoning of the dissenting minority in *Taylor* (who thought this ought to be actionable).

Postulating an "extreme" hypothetical case, Mann J. discussed the erection of a viewing tower to spy on one's neighbour, selling tickets to the general public to come and gawp. This, he said at [169], would be "unreasonable use of the first neighbour's land". Thus it should constitute a nuisance. Counsel for the defendants had accepted that such "overlooking", if *malicious*, would be actionable. As Mann J. said (ibid.), this concession "gave the game away". If *in principle* constructing a viewing platform could be unreasonable user, the real question was whether on the facts of a particular case the "unreasonableness" test for nuisance was satisfied.

The decision breaks new ground. But that does not render it incorrect. Mann J. bolstered his decision by reliance on the ECHR. Even though (as seen) the defendant gallery was not an HRA "public authority", whenever hearing claims of violation of an ECHR right (such as privacy) "the courts can, where appropriate, give effect to the [Convention] Article by developing existing causes of action" (at [172]). This seems a rather vague statement (with respect), but any equivocation accurately reflects the state of the authorities. There has been a vigorous academic debate about what the HRA requires of a court faced with a "horizontal" human rights claim (i.e. against another private party). But the courts have not seen fit to join it. Mummery L.J. seems to have predicted correctly that the horizontal effect debate would never be resolved judicially "at the same high level of abstraction on which the debate has been conducted for the most part in the law books and legal periodicals" – since the "particular cases" before the courts "tend to put very general propositions into a more limited and manageable perspective": *X v Y (Employment: Sex Offender)* [2004] EWCA Civ 662, [2004] I.C.R. 1634, at [45]. Whatever the true answer to the vexed "horizontality" question, it is well established that the common law has developed under the influence of the HRA to prevent privacy intrusions. Most cases have involved misuse of private information by the media (e.g. *Campbell v Mirror Group Newspapers Ltd.* [2004] UKHL 22, [2004] 2 A.C. 457). Mann J. was surely justified in applying a similar approach to private nuisance.

Yet although being spied on might in principle be actionable, Mann J. held that the claims failed on the facts. Nuisance of course depends on *unreasonable* interference with the claimant's use and enjoyment of land, assessed in the particular locality. Mann J. designated the latter: "an inner city urban environment, with a significant amount of tourist activity" (at [190]). In such a setting neighbours lived "quite cheek by jowl". They would therefore have to put up with a considerable degree of being overlooked. It was (given the judge's factual findings) a very considerable and intrusive degree in this case. But in his view, this was attributable as much to the design of the claimants' flats as to the defendant's erection

of a public viewing platform. Had these flats had normally sized windows, it would not have been possible to see inside to anything like the same degree from the Tate's platform.

As the judge noted at [203], the "glass wall" architecture of the flats tended to draw the gaze of visitors to the platform. In the end, the claimants (by living in such open flats) made themselves unusually vulnerable to this invasion of their privacy. But the courts had long been wary of granting remedies to protect unusually sensitive uses of land (e.g. *Robinson v Kilvert* (1889) 41 Ch. D. 88 – expressly followed notwithstanding Buxton L.J.'s comments in *Network Rail Infrastructure Ltd. v Morris* [2004] EWCA Civ 172, [2004] Env. L.R. 41). If the claimants objected so much to being viewed they could draw their blinds, install "privacy film" on the glass, or hang net curtains. Of course any of those solutions would interrupt the magnificent views from the flats and/or spoil the modernist architectural effect. But the judge thought that the availability of measures by which the claimants could mitigate the "self-induced incentive to gaze" (at [205]) was an important part of the "give and take" approach to a privacy-related nuisance. (The judge further thought that the "almost identical" analysis of "reasonable expectations of privacy" under the ECHR would lead to "the same result" – and did not undertake any separate inquiry (at [220]). Cf. P. Wragg [2019] C.L.J. 409, 412.)

Conclusions (architectural): media commentators were amused by Mann J.'s suggestion that these achingly modern flats could have (irredeemably suburban) net curtains installed. But glass walls afford both impressive vistas and diminished privacy. Owners have to take the rough with the smooth. Hoi polloi can peer in to admire one's magnificent Arne Jacobsen chairs. Perhaps people who live in glass houses shouldn't stow thrones.

Conclusions (legal): Tort can and does protect human rights – even if the HRA is inapplicable (and even if the planning permission system has failed to balance the competing interests). Nuisance may evolve to protect the expectations of modern living. But in doing so, it still relies centrally on compromise, the spirit of "live and let live" between neighbours that Bramwell B. enunciated in *Bamford v Turnley* (1862) 3 B. & S. 66, 84.

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WHAT DELIMITS EQUITABLE RELIEF FROM FORFEITURE?

SHORT steps in a sequence of cases over just 40 years have changed the dominant English understanding of equitable relief from forfeiture almost entirely. Each step has been volitional, yet taken without the judges