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# ARTICLES

## IMPROVING PROTECTION AGAINST INDIRECT INTERFERENCE WITH THE USE AND ENJOYMENT OF HOME: CHALLENGING THE LEGACY OF *HUNTER* v. *CANARY WHARF* USING THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND HUMAN RIGHTS ACT 1998.

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### INTRODUCTION

In the spirit of give and take one may expect to be tolerant of some interference with the use and enjoyment of one's home by neighbouring occupiers of land. However, it is when that interference is unreasonable and substantial that one might expect to be able to take legal recourse, including civil action. However, which form or forms of civil action might be suitable for the task? Negligence is not suitable if the harm suffered is purely to one's use and enjoyment of the home: such as loss of sleep through noise, or loss of enjoyment as a result of a noxious smell.[1] Intentional torts such as trespass to the person or harassment will obviously only be effective where the interference is direct. One may obtain the protection of an injunction if the Attorney General successfully brings a criminal case in public nuisance. However, this will require that a class of people is affected[2] and furthermore it is only possible to obtain the tortious protection necessary to claim damages if one has suffered damage greater than ordinary sufferers have.[3] This leaves private nuisance.

In *Malone* v. *Laskey*,[4] private nuisance was seen as merely protecting rights over land. This view was supported in Professor Newark's seminal article, *The Boundaries of Nuisance*.[5] However, in *Khorasandijan* v. *Bush*,[6] the Court of Appeal by a two to one majority (Dillon and Rose L.J.J.; Peter Gibson J. dissenting) concluded that anyone

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[1] A finding of negligence does not confer a remedy in respect of distress, annoyance, inconvenience and physical symptoms short of personal injury – *Hicks* v. *Chief Constable of Yorkshire* [1992] 2 All E.R. 65 as applied more recently in the Court of Appeal in *Riley* v. *Merseyside Regional Health Authority* [1995] 6 Med L.R. 246.

[2] *A.G.* v. *PYA Quarries* Ltd. (No. 1) [1957] 2 Q.B. 169, C.A.

[3] For this requirement in public nuisance and the fact that outside the commercial context damage would probably have to be physical harm see G. Kodlinye, "Public Nuisance and Particular Damage in the Modern Law" (1986) 6 L.S. 182.

[4] [1907] 2 K.B. 141.

[5] (1949) 65 L.Q.R 480.

[6] [1993] Q.B. 727.

who occupied a property as a home could sue in nuisance for loss of use or enjoyment of that home. Dillon L.J. stated that to his mind it was:

> ridiculous if in this present age the law is that the making of deliberately harassing and pestering telephone calls to a person is only actionable in the civil courts if the recipient of the calls happens to have the freehold or leasehold proprietary interest in the premises in which he or she has received the calls.[7]

The issue was raised again in *Hunter* v. *Canary Wharf* and *Hunter* v. *Docklands Development Corporation*[8]. A differently constituted Court of Appeal[9] unanimously favoured *Khorasandijan* over *Malone*. Giving the sole opinion, Pill L.J. stated that:

> [a] substantial link between the person enjoying the use and the land on which he or she is enjoying it is essential but, in my judgment, occupation of property, as a home, does confer upon the occupant a capacity to sue in private nuisance.
>
> There has been a trend in the law to give additional protection to occupiers in some circumstances. Given that trend and the basis of the law of nuisance in this context, it is no longer tenable to limit the sufficiency of that link by reference to proprietary or possessory interests in land. I regard satisfying the test of occupation of property as a home provides a sufficient link with the property to enable the occupier to sue in private nuisance. It is an application in present-day conditions of the essential character of the test as contemplated by Lord Wright. It appears to me, as it did to Dillon L.J. to be right in principle and to avoid inconsistencies, for example between members of a family, which in this context cannot now be justified.[10]

However, when the case came to the House of Lords, by way of appeal by the plaintiffs with a cross appeal by the defendants, a four to one majority (Lords Goff, Lloyd, Hoffman, Cooke and Hope with Lord Cooke dissenting on this point) favoured the orthodox approach in *Malone*.

There are three important points to make about this approach to nuisance. First, it will probably also apply to the rule in *Rylands* v. *Fletcher*[11] since this rule has been shown by the House of Lords in *Cambridge Water Co* v. *Eastern Counties Leather Plc.*[12] to be a branch of the law of nuisance dealing with instances of isolated escape.[13] Second, it means one must have rights over land – such as exclusive possession of the land,[14] ownership without exclusive possession or a reversionary interest – in order to sue. Third, it follows that the objective of the court in providing remedies is purely to protect rights over the land. The only benefit for people who merely occupy the land as a home, whether as a lodger, *au pair*, live in carer or family member is if the person with rights over the land is be successful in obtaining abatement of the nuisance.

Although *Hunter* has been widely criticised, little academic attention has been directed towards challenging its legacy of inadequate legal protection of home life, particularly in the context of those without proprietary interests in land. Human rights law holds the key. "Victims" of the *Hunter* approach could claim before the European Court of Human Rights (ECtHR) that, by failing to provide adequate domestic law, the UK had violated one of their substantive convention rights (the Article 8 right to

[7] *Ibid*, at 734.

[8] [1997] A.C. 655.

[9] Pill L.J., Waite L.J. and Neill L.J.

[10] *Ibid.*, at 675.

[11] [1868] L.R. 3 H.L. 330, H.L.

[12] [1994] 2 A.C. 264.

[13] *Clerk and Lindsell on Torts* (Sweet & Maxwell, 2000, 18th edition para 20-14) suggest this point is "at least arguable".

[14] A tolerated trespasser with exclusive possession can sue – see *Pemberton* v. *Southwark London Borough Council* [2000] 3 All E.R. 924, C.A.

private life being the most obvious) and denied them an effective remedy under Article 13. Success would "force" the UK Parliament to take remedial legislative action. Alternatively, following the coming into force of the Human Rights Act 1998 (HRA) claimants could argue before the domestic courts in a suitable case that domestic law must be expanded in the light of Convention rights.

Of course one would expect the human rights law arguments to involve a different kind of reasoning to that used by the House of Lords in *Hunter*. Nonetheless, it is important to revisit the justifications put forward by the House for adopting the narrower approach in *Malone* since these arguments are likely to be relied on by the defendant to such a human rights law claim.

## THE JUSTIFICATIONS PUT FORWARD IN *HUNTER*

The defendants in *Hunter* argued[15] that *Khorasandijan* should be seen as wrongly decided because it was based on the Canadian decision in *Motherwell* v. *Motherwell*[16] which had in turn wrongly supported the proposition, derived from *Foster* v. *Warblington Urban Council*,[17] that occupancy of a substantial nature was necessary to establish standing to sue in private nuisance. Alternatively they suggested that *Khorasandijan* should be seen as opening up a new tort of harassment, leaving the *Malone* orthodoxy intact.[18] Lord Goff,[19] supported by Lords Lloyd,[20] Hoffman[21] and Hope[22] all accepted the first of these arguments as a ground to deny the existence of a right of action. They took the view that the plaintiff in *Foster* had succeeded because he had exclusive possession and that the court had not established that occupant-licensees without exclusive possession could sue. Lord Goff added that he thought that what the Court of Appeal in *Khorsandijan* had been doing was to attempt to exploit the law of private nuisance in order to create a separate tort of harassment "that was artificially limited to harassment" which took place in the plaintiff's home.[23] He noted that he did not personally think:

> that this is a satisfactory manner in which to develop the law, especially when, as in the case in question, the step so taken was inconsistent with another decision in the Court of Appeal, *viz.*, *Malone* v. *Laskey* [1907] 2 K.B. 141 by which the court was bound. In any event, a tort of harassment has now received statutory recognition . . . We are therefore no longer troubled with the question whether the common law should be developed to provide such a remedy. For these reasons, I do not consider that any assistance can be derived from *Khorasandijan* v. *Bush* by the plaintiff in the present appeals.[24]

The statutory recognition of harassment may remove the problem of seeking to develop the common law to provide a remedy for harassment in the home context. However, the comment by Dillon L. J. in *Khorasandijan* that it would be "ridiculous"

[15] [1997] A.C. 655 at 677.

[16] (1976) 73 D.L.R. (3d) 62.

[17] [1906] 1 K.B. 648.

[18] [1997] A.C. 655 at 678.

[19] *Ibid.* at 691. The plaintiff had exclusive possession of the foreshore (owned by a third party) which the defendant council had polluted causing damage to the plaintiff's oyster business.

[20] *Ibid.* at 697.

[21] *Ibid.* at 702–3.

[22] *Ibid.* at 724.

[23] *Ibid.* at 692.

[24] *Ibid.* For positive reception of the idea of a tort of harassment stemming from *Khorasandijan* see Conaghan, "Harassment and the Law of Torts" (1993) 1 Feminist Legal Studies 189.

if today's law would only protect freeholders and leaseholders from deliberate harassment at home[25] when it could equally apply to many non-harassing interferences bears further consideration. Hence, even putting human rights law aside, there is a need to consider whether the majority had adequate justification to take the approach they did.

Lord Goff found two substantive arguments in favour of retaining the rights over land approach. The first was that it enabled, where appropriate, those creating a nuisance to make an informal arrangement with the "rightholder(s)":

> either that it may continue for a certain period of time, possibly on the payment of a sum of money, or that it shall cease, again perhaps on certain terms including the time within which the cessation shall take place. The former may well occur when an agreement is reached between neighbours about the circumstances in which one of them may carry out major repairs to his house which may affect the other's enjoyment of his property . . .[26]

His Lordship suggested that:

> . . . the efficacy of arrangements such as these depends on the existence of an identifiable person with whom the creator of the nuisance can deal for this purpose. If anybody who lived in the relevant property as a home had the right to sue, sensible arrangements such as these might in some cases no longer be practicable.[27]

It is suggested that this problem is unlikely to be serious as households of any size could always nominate one or more of their number to negotiate an arrangement on their behalf.

The second basis on which Lord Goff supported the orthodox position was that the alternative:

> faces the problem of defining the category of persons who have the right to sue. The Court of Appeal adopted the not easily identifiable category of those who have a "substantial link" with the land, regarding a person who occupied the premises "as a home" as having a sufficient link for this purpose. But who is to be included in this category? It was plainly intended to include husbands and wives, or partners, and their children, and even other relatives living with them. But is the category also to include the lodger upstairs, or the *au pair* girl or resident nurse caring for an invalid who makes her home in the house while she works there? If the latter, it seems strange that the category should not extend to include places where people work as well as well as places where they live, where nuisances such as noise can be just as unpleasant or distracting. In any event, the extension of the tort in this way would transform it from a tort to land into a tort to the person, in which damages could be recovered in respect of something less serious than personal injury and the criteria for liability were founded not upon negligence but upon striking a balance between the interests of neighbours in the use of their land. This is, in my opinion, not an acceptable way in which to develop the law.[28]

With respect to Lord Goff, changing the law to allow residents in general a right of action would not have a significant impact on certainty. This class of persons is fairly clear. It would include not just family members but also lodgers and those who work and live in the home (such as the *au pair* and live-in carer) but exclude people who are temporary visitors, such as hotel guests or visiting friends and relatives. His Lordship's concern about where it would all end if we went down this route was, it is submitted,

[25] [1993] Q.B. 727 at 734.
[26] [1997] A.C. 655–727 at 692.
[27] *Ibid.*
[28] *Ibid.*

a rather crude attempt to justify the orthodox position by reference to worries about a slippery slope when that slippery slope does not exist. In academic commentary, Wightman has perhaps gone the furthest by suggesting that rights of action should extend to protecting those who have an important "activity connection" with the land without having rights over it: such as people engaged in recreational activities or enjoying a right of way.[29] However, it would be equally be logical to stop short of this and simply protect occupation of the home, an approach that Lord Cooke in his dissenting speech thought was, "... an acceptable criterion, consistent with the traditional concern for the sanctity of family life and the Englishman's home."[30] Even one of the majority, Lord Lloyd, had some sympathy with this view[31] though he rejected the suggested change on the basis that it would fundamentally change the scope of private nuisance as a cause of action:

> Like, I imagine, all your Lordships, I would be in favour of modernising the law wherever this can be done. But it is one thing to modernise the law by ridding it of unnecessary technicalities; it is another thing to bring about a fundamental change in the nature and scope of a cause of action.[32]

Both Lord Lloyd and Lord Hoffman took the view that the three kinds of private nuisance (nuisance by encroachment on a neighbour's land; nuisance by direct physical injury to a neighbour's land; and nuisance by interference with a neighbour's quiet enjoyment of his or her land) should be subject to an award of damages in the same measure, that is, diminution in the value of the land. As Lord Lloyd put it:

> there is no difference of principle. The effect of smoke from a neighbouring factory is to reduce the value of the land. There may be no diminution in the market value. But there will certainly be loss of amenity value so long as the nuisance lasts.[33]

The significance of using this approach is that adding family members would make no difference to the value of the claim. As Lord Lloyd again put it, "[i]f that be the right approach, then the reduction in amenity value is the same whether the land is occupied by the family man or the bachelor."[34]

In effect one is compensated not for the number of people affected or the degree to which they are affected but the degree to which the value of the land or one's ability to use the land is reduced. As Lord Hoffman states, inconvenience, annoyance and illness could not be compensated as consequential losses in a private nuisance claim: "[i]t is rather the other way about: the injury to the amenity of the land consists in the fact that the persons upon it are liable to suffer inconvenience, annoyance or illness."[35] It follows therefore, in the words of Lord Lloyd, "that the only persons entitled to sue for loss in amenity value of the land are the owner or the occupier with the right of exclusive possession".[36]

One may concede this point. However, Lord Hoffman states that having done so "there seems no logic in compromise limitations, such as that proposed by the Court

[29] J. Wightman, "Nuisance – the Environmental Tort? *Hunter* v. *Canary Wharf* in the House of Lords" (1998) 61 M.L.R. 871–885 at 881.

[30] [1997] A.C. 665–727 at 718.

[31] *Ibid,* at 695.

[32] *Ibid,* at 696.

[33] *Ibid,* at 696.

[34] *Ibid.*

[35] *Ibid,* at 706.

[36] *Ibid,* at 696.

of Appeal in this case, requiring the plaintiff to have been residing on land as his or her home."[37] The problem with this view is that:

> [t]he traditional division of the law into 'torts' is, at most, of expository value. To allow the preservation of the supposed conceptual integrity of this structure to influence the law's approach to social problems is to allow the tail to wag the dog.[38]

The change that Lord Hoffman found illogical had in fact the logic of doing justice; a logic that the House of Lords had readily used in the past as a basis for abandoning established rules and principles.[39] What is more, their Lordships could have satisfied both forms of logic by creating a new tort. Counsel[40] for the defendants had unwittingly hinted at this by suggesting that the plaintiff in *Khorasandijan* "would have been provided with a suitable remedy if English law recognised a tort of invasion of privacy".[41] So, too, had Lord Lloyd in suggesting that *Motherwell* could be supported on the ground that in Canadian law there was already a recognised cause of action for invasion of privacy.[42]

## INTRODUCING A HUMAN RIGHTS LAW ANALYSIS

Lord Cooke's dissenting speech drew persuasive support from human rights arguments. These included the rights of the child, under Article 16 of the Convention on the Rights of the Child, to protection from interference in his or her home life and also the right, under Article 12 of the Universal Declaration of Human Rights and Article 8 of the European Convention on Human Rights (ECHR), of protection of the home life of people in general. The latter is of particular importance because the claimants in *Hunter* could have gone on to rely on it, along with Articles 13 and 14, had they applied to the ECtHR.

*Article 8*

Article 8(1) states

> everyone has the right to respect for his private and family life, his home and his correspondence.

Article 8(2) defines the limits of protection of this right, stating

> there shall be no interference by a public authority with this right except such as in accordance with the law and as necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of crime and disorder, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Showing a violation of Article 8 is a two-part process. First, the claimant must show that the Article 8(1) right has been interfered with. Second, the claimant must

[37] *Ibid,* at 707.

[38] P. Cane, "What a Nuisance!" (1997) 113 L.Q.R. 515, at p. 520.

[39] For example, in *Miliangos* v. *George Frank (Textiles) Ltd* (No. 1) [1976] A.C. 443, [1975] 3 All E.R. H.L. it removed the rule that a plaintiff was not in law entitled to judgment for a sum of money expressed in a foreign currency. In *R* v. *R(Rape: Marital Exemption)* [1991] 4 All E.R. 481, H.L. it even allowed retrospective criminalisation by abandoning the principle that a husband could not be guilty of the offence of rape against his wife.

[40] Counsel included Lord Irvine of Lairg Q.C. (now L.C.).

[41] [1997] A.C. 655–727 at 678.

[42] *Ibid,* at 697–698.

show that the restriction on him or her caused by the interference cannot be justified as necessary in a democratic society to protect one of the interests laid down in Article 8(2).

*The scope of the term "home"*

The private and family life, home and correspondence aspects of Article 8(1) are often interwoven but have independent meanings and give rise to different lines of case law. The notion of "home" under Article 8 does not provide a constraint on the overall scope of the Article. In other words, though an interference may not take place in the home context it may nonetheless raise issues of private life. The point is made particularly effectively in *Niemietz* v. *Germany (A/215B)*[43] where the ECtHR held that a lawyer's private life had been interfered with when his office was searched by police.[44] However, by the same token, there are cases where the state's conduct only constitutes an interference with private life because it related to events that took place within the home rather than outside it.[45]

To attract protection, one's home life does not need to revolve around a conventional house. One could, for example, dwell in a caravan, as did the applicants in *Buckley* v. *United Kingdom*[46]. However, this does not go as far as saying one would succeed in arguing that the whole of a vast area of land on which one lived a nomadic lifestyle would necessarily be a home for Article 8(1) purposes.[47] Nor, rather restrictively, would a structure the claimant was building but had not yet lived in be classified as his or her home. Hence in *Loizidou* v. *Turkey*,[48] where the applicant had begun building a block of flats on her plot of land in Northern Cyprus, one of which was intended to be a home for her and her family, but was prevented from completing by the invasion of Turkish forces, the ECtHR held that there was no interference with Article 8(1) because:

> . . . the applicant did not have her home on the land in question. In [the court's] opinion it would strain the meaning of the notion "home" in Article 8 to extend it to comprise property on which it is planned to build a house for residential purposes. Nor can that term be interpreted to cover an area of a State where one has grown up and where the family has its roots but where one no longer lives.[49]

All of the cases in which applicants have been successful have involved their living for some time in the home concerned. However, this does not necessarily mean that one has to be living in it at the time of the application. In *Gillow* v. *UK*,[50] the applicant had a house but had not lived in it for many years at the time of the application,

[43] (1993) 16 E.H.R.R. 97, ECtHR.

[44] The word "home" itself is given a broad meaning in some jurisdictions as paragraph 30 of the judgment itself emphasises: "[a]s regards the word 'home,' appearing in the English text of Article 8, the Court observes that in certain Contracting States, notably Germany . . ., it has been accepted as extending to business premises. Such an interpretation is, moreover, fully consonant with the French text, since the word 'domicile' has a broader connotation that the word 'home' and may extend, for example, to a professional person's office."

[45] This is particularly the case where the events are of a sexual nature – see, for example, *ADT* v. *UK* [2000] 2 F.L.R. 697, (2001) 32 E.H.R.R. 33 and contrast it with *Laskey, Jaggard and Brown* v. *UK* (1997) 24 E.H.R.R. 39.

[46] (1997) 23 E.H.R.R. 101, ECtHR

[47] The Commission in *G and E* v. *Norway*, unreported, Nos. 9278/81 and 9415/81. 35 D and R 30 (October 1983) found that there was no interference with home life when a Lapp population was displaced from its indigenous lands (which were then submerged for the building of a hydro-electric plant). The plant went ahead despite extensive protests, which were encapsulated within Norway's widely aired 1983 *Eurovision Song Contest* entry.

[48] (1996) 23 E.H.R.R. 513

[49] Para 66. Fortunately the applicant's claim under Article 1 of Protocol 1 succeeded.

[50] (1986) 11 E.H.R.R. 335.

having let it. However, the ECtHR found a violation of Article 8(1) with emphasis being placed on the fact that the applicant had maintained strong links with the house, had always intended to return to it and had left furnishings in it.

As *Loizidou* shows, having legal rights over the land is no guarantee of success. However, equally, there are a number of reasons why one would expect to succeed in some cases without having such rights. First, the ECtHR has not made a point of stressing that rights over land are necessary. On occasion, judgments in favour of applicants do not even make it clear whether all the applicants have had rights over land.[51] Second, when the applicant has rights over land the ECtHR does not restrict itself to awarding compensation for infringement of these rights.[52] Third, it would be inconsistent with the common sense meaning of a "human right" to "home life" to say that a place is only a person's home if he or she has legal rights over it.

*Does the applicant have to suffer a certain level of adverse impact in order to establish an interference with Article 8(1)?*

Establishing an interference with Article 8(1) appears only to require that the complaint is sufficiently connected with the rights to home, privacy, family or correspondence and that *an* adverse impact on one of these rights has been experienced. There is no suggestion that it requires the applicant to show a *particular degree* of adverse effect. The ECtHR would be unlikely to impose such a requirement, as to do so would result in the approach to Article 8 failing to be consistent with that taken to the similarly structured Article 10.[53]

However, there is a possibility that some claims involving very limited adverse impact may not reach the court in the first place. More than half of the applications to the ECtHR are declared inadmissible. Most of them are rejected under Article 35(3) as manifestly ill-founded. A declaration of inadmissibility on this ground would be made if the complaint disclosed gave no grounds to suggest that a violation were possible.[54] This would be the case, for example, where it was inconsistent with a constant line of reasoning in the case law. In our scenario (that of a potential claimant with limited or no proprietary rights in the land relied on as his or her "home") an application involving an interference with Article 8(1) might be dismissed if, given a consistent line of reasoning in the case law, it was clear that the state involved could provide a justification under Article 8(2). All other things being equal, this is more likely to be so where the applicant had suffered only a minor adverse impact.

[51] See, for example, *Hatton and Others* v. *United Kingdom* (2002) 34 E.H.R.R. 1 and also *Guerra* v. *Italy* (1998) 26 E.H.R.R. 357 where it is merely stated that the applicants lived in the area affected.

[52] For example, the applicant in *Lopez Ostra* v. *Spain* (1994) 20 E.H.R.R. 277 was compensated not just for the harm fumes and smells from a factory had caused to the market and amenity value of her land but also for the anxiety she had suffered as a result of her daughter's being caused a serious illness by the interference (para 298). Although the ECtHR deemed the grand total of her claim to be excessive it did not question any of the heads of her claim (para 299–300).

[53] Under Article 10(1) there is no requirement of a level of adverse effect on freedom of expression for an interference to be founded. The rationale for this is that control on the type of applications that are successful can be exercised under Article 10(2) where the right of expression can be subject to such "formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society" to protect one (or more) of the interests laid down in Article 10(2). Article 8(2) fulfils the same function of control in relation to Article 8(1)(*per* T. Lewis, Department of Academic Legal Studies, Nottingham Law School, Nottingham Trent University, 18 April 2002, e-mail communication).

[54] *De Becker* v. *Belgium*, Yearbook II (1958–9) p.214 (254). Since Article 35(3) is often the make or break issue in determining whether a case comes before the ECtHR the scope it is given is crucial yet the case law relating to it does not reveal an entirely consistent approach (see further P. van Dijk, and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 2nd ed. (Kluwer 1990), p104–107.

*How far does the state have a duty to take positive measures to protect people from interferences by other people?*

The Article 8(1) right has a negative aspect in as much as it is designed to protect individuals from invasion of their rights by the state itself. It also has a positive aspect whereby the state is required to take appropriate positive measures to protect people from interference by other people. As the ECtHR put it in *Powell and Rayner* v. *UK*:[55]

> Article 8(1) cannot be interpreted so as to apply only with regard to direct measures taken by the authorities against the privacy and/or home of an individual. It may also cover indirect intrusions which are unavoidable consequences of measures not at all directed against private individuals. In this context it has to be noted that a State has not only to respect but also to protect the rights guaranteed by Article 8(1).

The state may be held responsible for interferences it does not actively perpetrate where the interference was facilitated by failure of the state authorities to provide adequate assistance or protection. More relevantly, in the context of the scenario outlined above, it may be held responsible for an interference that stems from a failure to have adequate law. Hence, in *Marckx* v. *Belguim*[56] and *Johnston* v. *Ireland*,[57] the ECtHR held that the state was in violation of Article 8 by failing to provide a law allowing for inheritance by children born outside marriage. Cases where inadequacies in law resulted in the state failing to meet a positive obligation to avoid indirect interference with the use and enjoyment of the home include the factory pollution case of *Lopez Ostra* v. *Spain*[58] and the Heathrow airport flight noise cases of *Powell and Rayner* v. *UK*[59] and *Hatton and Others* v. *United Kingdom*.[60]

*Is the UK satisfying its positive obligation under Article 8(1) in this context?*

It was stressed in *Stubbings and Others v. United Kingdom*[61] that

> Article 8 does not necessarily require that States fulfil their positive obligations to secure respect for private life by the provision of unlimited civil remedies in circumstances where criminal law sanctions are in operation.[62]

However, this judgment was given in the context of UK law *providing* a civil remedy but subjecting it to a time bar[63] whereas in the scenario outlined above those without rights over land *do not have* a civil remedy that adequately protects their use and enjoyment of home life from indirect interference in the first place. This would almost certainly to be considered a failure by the UK to satisfy its positive obligation to secure respect for Article 8.

*The nature of Article 8(2)*

A violation of Article 8 is avoided if under Article 8(2) the restriction on the applicant's Article 8(1) rights can, in the circumstances, be justified as necessary in a democratic society. To satisfy this requirement the interference must be in accordance with law;

[55] (1989) 9 E.H.R.R. 375 at 376.

[56] (1979–1980) 2 E.H.R.R. 330.

[57] (1986) 9 E.H.R.R. 203.

[58] (1995) 20 E.H.R.R. 277.

[59] *Op. cit.*

[60] (2002) 34 E.H.R.R. 1.

[61] (1996) 23 E.H.R.R. 213.

[62] *Ibid,* at para 64.

[63] Alleged sexual abusers could not be sued where the claim was brought more than six years after the 18th birthdays of the claimants.

pursue one of the legitimate aims laid down in Article 8(2) and meet a "'pressing social need".[64] Furthermore its restrictive effects must be proportionate to the objective(s) that it seeks to achieve.[65]

The state successfully justified indirect interference with the use and enjoyment of the home in the Heathrow Airport noise interference case of *Powell and Rayner* v. *UK*.[66] Here, the ECtHR afforded the UK a wide margin of appreciation to decide how best to address the problems of aircraft noise, holding that the taking of noise limitation measures and the public utility of the airport meant that the interference was justified under Article 8(2).[67] However, in *Hatton and Others* v. *United Kingdom*[68] a five to two majority of the ECtHR found the UK to have violated Article 8 in the context of sleep disturbance arising from Heathrow Airport night flights. The UK could show night flights pursued a legitimate economic objective but could not discharge its burden to show proportionality between its legitimate economic objective and the effect pursuit of this objective had on the Article 8(1) right and hence could not show that the restrictions were necessary in a democratic society. The reason for this was that it could not quantify either the economic benefit of the night flights or the adverse effect such flights had by preventing some of the population from getting a full night of sleep.[69] *Hatton* may not contradict the reasoning used in *Powell* but certainly represents an evolution in Article 8 protection through placement of "the onus on the State to justify a situation where certain individuals are bearing a heavy burden on behalf of the rest of the community".[70]

*Is the interference in this context justifiable as necessary under Article 8(2)?*

In the scenario outlined above, interference with Article 8(1) would, it is suggested, be in accordance with the law. However, would such interference amount to the pursuit of a legitimate aim or the meeting of a pressing social need? Further, would the interference satisfy the requirement of proportionality? The answer can be found by analysing the justifications used by the court to support its position in *Hunter*. These can be summarised as follows:

(1) the need to follow precedent;

(2) the linked need for private nuisance not to be distorted so as to become a remedy it was not originally designed to be;

(3) the benefits of simplifying (and consequently encouraging) informal arrangements between neighbours by limiting title to sue (combined with the argument that this often suffices to provide a solution to the situation for everyone in the home);

(4) the problem that the category of persons occupying land as their home is uncertain in scope;

(5) the "where will it all end" argument.

[64] *Handyside* v. *UK*, (1979–1980) 1 E.H.R.R. 737, 753–754.

[65] J. Coppell, *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts* (Chichester: John Wiley, 1999), at p. 288.

[66] *Op. cit.*

[67] *Op. cit.* at paras. 40–5.

[68] (2002) 34 E.H.R.R. 1.

[69] See also *Lopez Ostra* v. *Spain* (1994) 20 E.H.R.R. 277 where the ECtHR concluded that certain interference with the home life of the applicant could not be justified under Article 8(2) because a fair balance had not been struck between the interest in the town's economic well-being and the effective enjoyment of the Article 8 right.

[70] K. Cook, "Environmental Rights as Human Rights" [2002] E.H.R.L.R. 196–215 at 204. *Hatton* has been referred to a Grand Chamber.

The first two justifications can be quickly rejected: the ECHR is designed to give practical protection of rights. It would fail in this if it allowed precedent or an historic definition of a tort to intrude. In any event there is nothing to prevent the creation of a new tort. Finally neither justification involves pursuit of a legitimate aim.

The third argument does have a legitimate aim (of protecting economic well being) given that economic benefit can flow from keeping the law as it is because it assists the making of informal arrangements. However, it hardly seems that it meets a pressing social need or is proportionate, if the law were changed arrangements would probably be made almost as often and could be further encouraged by the court imposing cost sanctions for unreasonable failure properly to attempt to make such an agreement before resorting to legal action.[71]

The fourth justification, that a change in the law would create conceptual uncertainty is also, it is suggested, without foundation, given that the category of "persons who occupy land as their (rightful) home" is not particularly uncertain and could soon be demarcated by case law. In any case, a degree of uncertainty of scope is inherent in the human rights field and is hardly a justification for not protecting such individuals either in general or in the context of Article 8(2).

The fifth justification, concerning the dangers of expanding the law too far is also, it is suggested, without foundation. Home life has a special significance under Article 8 and there is nothing in Article 8 that would require private nuisance to expand to interests outside the home: even those of a special kind of which John Wightman has written.[72]

*Article 14 (In Conjunction With Article 8).*

If the ECtHR were to hold that Article 8 had been violated, it would not proceed to consider Article 14. Nonetheless Article 14 is worth considering, by way of subsidiary argument and as an issue of some academic interest.

Article 14 prohibits discrimination, stating:

> [t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

In the context of Article 8, this means that "once a state has taken a positive step to promote or protect private or family life, it must, in principle extend the benefits to all without discrimination."[73] Although Article 14 does mention discrimination on any ground it must be admitted that the only direct discrimination likely to arise in the scenario under discussion would be on the basis of whether or not one has rights over land. However, discrimination on this basis in turn indirectly disadvantages certain groups of people, particularly children (who cannot acquire rights over land) and women (who may be less likely to have them).

The question of violation of Article 14 was considered in *Spadea and Scalabrino* v. *Italy* where it was stated:

> Article 14 will be breached where, without objective and reasonable justification persons in "relevantly" similar situations are treated differently. For a claim of violation of this

[71] To some extent the court already has such powers, see CPR r. 44·5(3): "the court must . . . have regard to . . . the efforts made, if any, before and during the proceedings in order to try to resolve the dispute".

[72] J. Wightman, "Nuisance – the Environmental Tort? *Hunter* v. *Canary Wharf* in the House of Lords" *op. cit.* Article 10 might protect the freedom to carry out recreational activities and the like without unjustifiable interference.

[73] J. Coppell, *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts* (Chichester: John Wiley, 1999), at p. 288.

> Article to succeed, it has therefore to be established, *inter alia*, that the situation of the alleged victim can be considered similar to that of persons who have been better treated.[74]

For the purposes of compensation for diminution of market value the person who lives in a home with rights over the land is not in a "relevantly" similar position to the person who lives in a home without such rights. However, he or she is in a relevantly similar position for the purposes of enjoying his or her home life in other respects. As such the discriminatory state of English law will breach Article 14 unless an objective and reasonable justification can be found for it.

As set out above, a justification would be objective and reasonable if it involved the pursuit of a legitimate aim with the value of achieving this aim being in proportion to the restriction on the rights in question. On a few occasions a state has been able to find a sufficient justification for discrimination. For example, in *Petrovic* v. *Austria*[75] the complaint was that paternity leave payments were not provided when maternity leave payments were. However, it is difficult to see any of the five justifications put forward in *Hunter* constituting an objective and reasonable justification for the purposes of Article 14. Even where they pursue a legitimate aim that aim is not sufficiently important to be proportionate to the restriction on rights that they involve. Indeed, one might almost go as far as Professor Fleming who describes the discrimination at the heart of the orthodox position as "senseless."[76]

*Article 1 Of Protocol 1*

Article 1 of Protocol 1, which guarantees the right to peaceful enjoyment of possessions, is not relevant here as "it is mainly concerned with the arbitrary confiscation of property and does not, in principle, guarantee a right to peaceful enjoyment of possessions in a pleasant environment."[77]

*Article 6*

In spite of *Osman* v. *UK*,[78] it seems unlikely after the ECtHR decision in *Z and Others* v. *UK* [79] that striking out an action because it does not amount to an established cause of action will be treated as denying the right to a fair trial.[80]

*Article 13 In Conjunction With Article 8 (Or 14).*

Article 13 reads

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

In *Hatton and Others* v. *UK*, it was stated that Article 13 had been consistently interpreted by the ECtHR as requiring a remedy in domestic law only in respect of grievances which could be regarded as "arguable" in terms of the Convention. In the case itself since a violation of Article 8 was found, Article 13 had to be considered.[81]

[74] Judgment of 28 September 1995, A.315-B, p. 28.

[75] [1998] E.H.R.L.R. 487.

[76] Fleming, *The Law of Torts* 8th edition (Law Book Company Limited, 1992). For a review of the various opinions see Lunney and Oliphant, *Tort Law: Text and Materials* (Oxford, 2000), at p. 553.

[77] *Powell and Rayner* v. *UK* (1986) 9 E.H.R.R. 375 at 378.

[78] [1999] 1 F.L.R. 193, ECtHR.

[79] *The Times*, 31 May 2001.

[80] For an analysis of the two decisions in this context see R. Baghaw, "Human rights – no duty of care" (2001) 34 *Student Law Review* 62.

[81] (2002) 34 E.H.R.R. 1, para 113.

The applicant had not been able to take a private nuisance action under domestic law because this had been barred by the Civil Aviation Act 1982, section 76(1) which provides, so far as is relevant, that:

> No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground which, having regard to wind, weather and all the circumstances of the case, is reasonable, or the ordinary incidents of such flight, so long as the provisions of any Air Navigation Order . . . have been duly complied with. . . .

The only means of legal challenge that remained to the applicants was judicial review of the government's 1993 scheme for restrictions on noise from night flights. However, the ECtHR stated that it was clear that the scope of review by the domestic courts was limited to the classic English public law concepts, such as irrationality, unlawfulness and patent unreasonableness. This did not allow consideration whether the increase in night flights under the 1993 scheme represented a justifiable limitation on the right to respect for the private and family life and home of those living in the vicinity of Heathrow airport.[82] As a consequence the scope of action available to the applicants was not enough to enable the UK state to comply with Article 13.

It is worth noting that *Hatton* was heard in the ECtHR after the introduction of the HRA – illustrating that its implementation was no guarantee against continued violations of Article 13.

*Violations of Article 13 after the coming into force of the HRA*

The first basis on which the ECtHR might still find a violation of Article 13 is that a domestic court or tribunal might, in a particular case, have failed to provide a remedy simply because it had wrongly concluded that there was no violation of a substantive ECHR right. This is bound to happen on occasion despite the fact that under the HRA, section 2, the judiciary "must" take into account Strasbourg jurisprudence in "determining a question which has arisen in connection with a Convention right."[83]

The second basis on which it is still possible for a violation of Article 13 to be found is that, where legislation is at issue, the domestic courts and tribunals are not always empowered to take any action in respect of the violation of an applicant's ECHR right except to notify Parliament of the violation, *i.e.* issue a declaration of incompatibility.[84] This is of some relevance to the scenario under discussion because, as *Hatton* illustrates, the availability of a private nuisance action is not always governed purely by the common law.

The circumstances in which the domestic courts and tribunals can *only* issue a declaration of incompatibility are governed by the scope of the HRA, section 3. Section 3(1) contains the "interpretative obligation" that in "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." This applies to all legislation passed

[82] *Ibid* at para. 115.

[83] According to Lord Hope of Craighead in the House of Lords in *R* v. *DPP ex p. Kebeline and Others* [1999] 3 W.L.R. 972 at 993–4 the margin of appreciation "is not available to the national courts when they are considering Convention issues arising within their own countries." This enables them to take a more radical approach that the ECtHR would in their place (except in areas like national security, public order and economic well-being where there is a domestic equivalent of the margin of appreciation whereby the judiciary will afford an area of discretionary judgment on democratic grounds).

[84] The circumstances in which such declarations "may" be made are made are considered in section 4. The first is where the court is satisfied that a provision of primary legislation is incompatible with a Convention right (Sections 4(1) and 4(2)). The second is where subordinate legislation, made in the exercise of a power conferred by primary legislation, is incompatible with a Convention right and (disregarding any possibility of revocation) the primary legislation concerned prevents the removal of the incompatibility (Sections 4(3) and 4(4)).

before or after the HRA came into force. Most incompatible legislative provisions will remain because section 3(1) clearly does not allow judges to challenge incompatible legislation unless the legislation is subordinate and then only if primary legislation does not prevent removal of the incompatibility.[85] Nonetheless, in the recent House of Lords decision *R* v. *A (Complainant's Sexual History)*[86] Lord Steyn, using the White Paper that had introduced the Human Rights Bill as support,[87] suggested that section 3 even applied if there were no ambiguity in the language of a legislative provision in the sense of its being capable of two different meanings.[88] In explaining exactly how far the courts should go his Lordship indicated:

> In accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so. If a *clear* limitation on Convention rights is stated *in terms,* such an impossibility will arise: *R* v. *Secretary of State for the Home Department, Ex p Simms* [2000] 2 A.C. 115, 132A-B *per* Lord Hoffmann.[89]

The other judge to comment on the scope of section 3 in *R* v. *A (Complainant's Sexual History)* was Lord Hope who also saw it as giving judges the selective power to modify, alter or supplement legislative provisions. However, whilst Lord Steyn felt that this power merely did not extend to interpreting legislative provisions in a manner that conflicted with the *express* will of Parliament, Lord Hope felt that it also did not extend to interpreting legislative provisions in a manner that conflicted with the *implied* will of Parliament.[90] Lord Hope's view may be preferable but until the difference of opinion is settled by a future House of Lords' decision, we are in something of a "constitutional void".[91] The relevance of the problem to the context of our scenario can be gauged by imagining *Hatton* had been heard by a domestic court. The court would only have been able to circumvent the fact that Civil Aviation Act 1982, section 76(1) expressly denied the applicants the opportunity to gain redress for noise

[85] Sections 3(2)b and 3(2)c.

[86] [2001] U.K.H.L. 25; [2002] 1 A.C. 45 (Lord Slynn of Hadley; Lord Steyn; Lord Hope of Craighead; Lord Clyde and Lord Hutton).

[87] "*Rights Brought Home: The Human Rights Bill*" (1997)(Cm 3782), para 2·7.

[88] *R* v. *A* (Complainant's Sexual History), *op. cit.*, at para 44. He noted that
[u]nder ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: section 3 goes much further. Undoubtedly, a court must always look for a contextual and purposive interpretation: section 3 is more radical in its effect. It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation: other sources are subordinate to it: compare, for example, articles 31 to 33 of the Vienna Convention on the Law of Treaties (1980) (Cmnd 7964). Section 3 qualifies this general principle because it requires a court to find an interpretation compatible with Convention rights if it is possible to do so. In the progress of the Bill through Parliament the Lord Chancellor observed that 'in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility' and the Home Secretary said 'We expect that, in almost all cases, the courts will be able to interpret the legislation compatibility with the Convention': Hansard (HL Debates), 5 February 1998, col 840 (3rd Reading) and Hansard (HC Debates), 16 February 1998, col 778 (2nd Reading). Ibid.

[89] *Ibid* at para 46.

[90] *Ibid* at 108. He stated that the rule of interpretation in section 3 is "only a rule" that
. . . does not entitle the judges to act as legislators. As Lord Woolf C.J. said in *Poplar Housing and Regeneration Community Association Ltd* v. *Donogue* [2001] E.W.C.A. Civ 595, section 3 does not entitle the court to legislate; its task is still one of interpretation. The compatibility is to be achieved only so far as this is possible. Plainly this will not be possible if the legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible. It seems to me that the same result must follow if they do so by necessary implication, as this too is a means of identifying the plain intention of Parliament: see Lord Hoffmann's observations in *R* v. *Secretary of State for the Home Department, Ex p Simms* [2000] 2 A.C. 115, 131F-G.
*ibid. Poplar Housing and Regeneration Community Association Ltd v. Donogue* is reported at [2002] Q.B. 48.

[91] J. Grant, Department of Academic Legal Studies, Nottingham Law School, NTU, e-mail communication, 15th April 2002.

disturbance in a nuisance action by creating a new tort. However, doing so would have subverted the implied purpose of the section, which was to provide a level of immunity for airports from civil action for noise disturbance.

Another point to make about section 3 is that by virtue of section 6(2) it will act as a qualification on the section 6(1) legal duty on public authorities not "to act in a way which is incompatible with a Convention right." Accordingly a public authority will only be acting unlawfully if it does not act in a manner which is compatible with Convention rights *when it was possible for it to do so.* When legislation, even when filtered through section 3, prevents a public authority from acting compatibly with a Convention right, the only domestic recourse a claimant would have would be to seek a declaration of incompatibility. Again, an effective remedy for Article 13 purposes would have been denied.

The third basis on which the domestic courts and tribunals may not provide an effective remedy for breach of a ECHR right is that the HRA confers on domestic courts a power, but not an obligation, to provide a remedy, let alone to provide an effective one for Article 13 purposes.[92]

## USING THE HRA: AN ILLUSTRATION

Obviously if the defendant is *not* a public authority the claimant must make his or her case on the basis of pre-existing law. However, if the defendant is a public authority the claimant has standing under the HRA, section 7 to argue his or her case on the basis of section 6. *Peter Marcic* v. *Thames Water Utilities Limited*[93] is a highly relevant illustration. Mr Marcic had, on several occasions over a number of years, suffered the discharge into his front garden (and from there into his back garden) of surface and foul water discharged from sewers operated by Thames Water. He had taken successful steps to prevent its getting into his home but it had damaged the fabric of his house. Judge Havery Q.C.in the Technology and Construction Court dismissed the claims founded on *Rylands* v. *Fletcher*; nuisance; negligence and breach of statutory duty. However, the judge allowed the claim of Mr Marcic under the HRA, section 7 that he had been the victim of an unlawful act by a public authority. Specifically, his claim was that Thames Water had acted unlawfully under section 6 of the HRA as a public authority which had acted in a manner incompatible with Mr Marcic's right to respect for his home under Article 8 of the ECHR and of his entitlement to peaceful enjoyment of his possessions under Article 1 of the First Protocol, by failing to carry out works to bring the repeated flooding of Mr Marcic's property to an end. Using *Guerra* v. *Italy*[94] as authority, it was emphasised that although the interference under Article 8(1) resulted not from active interference but from a failure to act, Thames Water could nonetheless be liable in principle, and was ultimately so in fact because it could not

[92] Obviously if the claimant is arguing a breach of an existing area of law, seen in the light of a Convention right, the provision of a remedy will be governed by the pre-existing rules as to the granting of remedies in that area of law. The scope of these rules may not be such as to ensure the claimant gets what the ECtHR would view as an effective remedy. When the claimant is using section 7 of the HRA, i.e. where the defendant is a public authority, there is still no guarantee of an effective remedy being provided because Article 13 was omitted from the HRA in favour of a more limited approach to the provision for remedies: namely section 8. Section 8(1) states that "(i)n relation to any act (or proposed act) of a public authority which the Court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate." There is no guarantee that a court will grant a remedy under this section and if it does there is no guarantee that what it considers a "just and appropriate" remedy will be consistent with what the ECtHR would view as an effective remedy.

[93] [2002] EWCA Civ 64, [2002] 2 W.L.R. 932, C.A.

[94] (1998) 26 E.H.R.R. 357 (at p. 382–3).

justify its interference under Article 8(2).[95] Damages were awarded under the power in section 8. Both parties appealed. Thames Water challenged the finding under section 7. Mr Marcic challenged the remainder of the decision. He was not satisfied by merely having succeeded under the ECHR as this left him without damages for that portion of the harm he had suffered prior to the implementation of the HRA. The Court of Appeal agreed with the decision of the Technology and Construction Court that Thames Water had acted in a manner incompatible with Mr Marcic's ECHR rights. However, in the view of the Court of Appeal, reliance on section 7 and the HRA as a whole was superfluous in Mr Marcic's case in as much as he could clearly bring his case within the pre-existing scope of private nuisance. This in turn enabled him to obtain damages for all the harm he had suffered, not just that suffered after the HRA came into force.

## METHODS FOR EXPANDING DOMESTIC PROTECTION OF HOME LIFE

Assuming that in our scenario, where the applicant does not have proprietary rights in land, judges would have to expand domestic law to make it compatible with Article 8 and possibly with Article 14 (in conjunction with Article 8) what approach should they take? In *Douglas* v. *Hello Ltd.,* Keene L.J. said that

> since the coming into force of the Human Rights Act 1998, the courts as a public authority cannot act in a way which is incompatible with a Convention right: section 6(1). That arguably includes their activity in interpreting and developing the common law, even where no public authority is a party to the litigation. Whether this extends to creating a new cause of action between private persons and bodies is more controversial, since to do so would circumvent the restrictions contained on proceedings contained in section 7(1) of the Act and on remedies in section 8(1).[96]

This quotation provides a summary of the debate concerning any direct horizontal effects of the HRA *i.e.* whether it provides new causes of action between private parties. This was an issue that Keene L.J. said was unnecessary to determine in the proceedings with which he was faced since reliance was being placed on "breach of confidence, an established cause of action, the scope of which may now need to be approached in the light of an obligation on this court under section 6(1) of the Act."[97]

Since *Douglas,* the courts have continued to see the breach of confidence action as a suitable method of ensuring that legal protection from disclosure of private matters is compatible with Article 8 in cases like *Theakston* v. *MGN Limited*[98] and most recently *A* v. *B & Anor, sub nom Garry Flitcroft* v. *Mirror Group Newspapers Ltd.*[99] Rightly or wrongly, the judges have viewed the development of the tort of breach of confidence as merely an evolution. How they would address those areas where the only way an existing cause of action can be rendered compatible with an ECHR right is if its fundamental nature is changed remains moot. In the home life context, this dilemma may affect trespass to land as well as private nuisance (and probably by extension, the

[95] As the Court of Appeal itself puts it "on the facts of the present case, it was necessary to decide whether Thames' scheme of priorities had struck a fair balance between the competing interests of Mr Marcic and of their other customers. It was common ground that the onus was on Thames to establish this. Thames had failed to do so. It followed that Mr Marcic's claim under the Human Rights Act succeeded." *op. cit.*, para 108).

[96] [2001] Q.B. 967 at para 166.

[97] *Ibid.*

[98] [2002] EWHC 137, [2002] E.M.L.R. 22, Q.B.D.

[99] [2002] EWCA Civ 337, [2002] 2 All E.R. 545, C.A

rule in *Rylands* v. *Fletcher*). Currently trespass to land protects *possession* of land from physical invasion.[100] However, it could be extended by the courts in the light of Article 8 additionally to protect the private physical space of legitimate *users of land who do not have possession* such as the lodger or hotel guest.[101]

In essence the question is whether a property-based claim should become something more. This recently arose as a matter for consideration in the High Court in *Nora McKenna and Others* v. *British Aluminium Limited.*[102] This case involved the defendant bringing an action to strike out claims in private nuisance and strict liability as having no prospect of success under the Civil Procedure Rules 1998.[103] The defendant was relying on the House of Lords' decision in *Hunter* in support of an argument that the claims of those claimants who had no rights over the land "affected" should be struck out. Giving judgment, Neuberger J. stated that these claims could not be struck out because it was at least questionable whether the *Hunter* approach was compatible with Article 8. If, or when, the case goes to trial we will be enlightened by a definitive answer to this question. However, in the meantime it is worth pointing out that Neuberger J. clearly saw the question of appropriate action to be taken should the approach in *Hunter* be incompatible with Article 8 as less than straightforward. The defendant had argued that the section 6 duty owed by courts and tribunals should not extend to changing the common law in such a fashion that a property-based claim was altered into something else.[104] Neuberger J. did not need to decide whether this argument was correct but admitted it was a "powerful" one that "may very well turn out to be right."[105]

However, the problem is that if this argument does turn out to be correct then, unless the defendant is a public authority, the courts and tribunals will arguably be "forced" to find another way of complying with their section 6 duty. This will necessitate evolving a new cause of action out of existing law; something they will have to do in any event *in situ*ations where there is a breach of a claimant's ECHR right(s) but no relevant existing cause of action. On the question of creating a new cause of action the Lord Chancellor stated in the House of Lords debates on the Human Rights Bill that in his opinion:

> . . . the court is not obliged to remedy the failure by legislating via the common law either where a convention right is infringed by incompatible legislation or where, because of the absence of legislation – say, privacy legislation – a convention right is unprotected. In my view, the courts may not act as legislators and grant new remedies for infringement of convention rights *unless the common law itself enables them to develop new rights or remedies.*[106] [italics added]

The italicized sections of this statement indicate that the Lord Chancellor clearly thought that the evolution of new causes of action was a normal part of the function of the common law. This would suggest that in the scenario under discussion the courts could quite easily develop a new tort. The statement of case in *Nora McKenna and*

[100] See *White* v. *Bayley* (1861) 10 C.B. (NS) 227.

[101] As examples of interest that trespass to land does not protect these are courtesy of Lunney and Oliphant, *Tort Law: Text and Materials* (Oxford, 2000), at p. 663. Of course if the person legitimately using the land were to be protected there would then need to be further change so as to balance their rights with those of others such as the rights of entry of the hotel owner and staff in the case of the hotel guest.

[102] *The Times*, 25 April 2002, Ch. D.

[103] S.I. 1998/3132.

[104] (2002) (Case No: BMO9697, 16th January) at page 16, para. d.

[105] *Ibid* at para e.

[106] H.L. Deb, 24 November 1997, col. 785.

*Others* suggested "a common law tort analogous to nuisance"[107] which might be taken as a rather vague plea for a tort protecting the use and enjoyment of home life from indirect interference. The alternative would be to evolve an all-embracing tort of privacy. On the question of the latter choice the Lord Chancellor rather equivocally commented:

> I believe that the true view is that the courts will be able to adapt and develop the common law by relying on existing domestic principles in the laws of trespass, nuisance, copyright, confidence and the like, to fashion a common law right of privacy.[108] [italics added]

Did he mean that a right of privacy would in effect exist because a patchwork of expanded existing causes of action would cover the whole area of privacy? Or did he mean that the courts would soon put these separate causes of action under an umbrella cause of action called privacy? It seems that he thought the latter was at least possible. Indeed, in an earlier statement he went as far as suggesting that irrespective of whether the Human Rights Bill was passed the judiciary were "pen poised" to "develop a right of privacy".[109] This comment of His Lordship is particularly surprising as for a over a century and a half the legal world has been waiting for an action in privacy to arise from the foundations built in cases such as *Prince Albert* v. *Strange*.[110] In the meantime we have witnessed the failure of cases such as *Kaye* v. *Robertson*[111] (which involved the *Allo! Allo!* star Gorden Kaye), because of the inadequate coverage of piecemeal causes of action.[112] We have also experienced the irony of English authorities being instrumental in development in the US courts of a right of privacy.[113] The intellectual pioneers of the US approach, Warren and Brandeis, commented:

> [t]he principle which protects personal writings and any other productions of the intellect or of the emotions, is the right of privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts and to personal relations, domestic or otherwise.[114]

Of course a problem with an all-embracing tort of privacy is that it would be like a vast ocean with uncertain boundaries. One can understand this having been a disincentive to its creation in English law. However, following implementation of the HRA it is difficult to see the force of this argument: the ability to argue "the right to privacy" has created uncertainty as to the nature and scope of the law in certain areas in any event. Furthermore, turning this "right" into a tort in the common law sense of the word would be the best way of diminishing any such uncertainty because instead of simply making decisions on the privacy issue at hand judges would be making broader pronouncements on the scope of a privacy law as a whole. It would also make drafting particulars of claim much easier: avoiding the danger of claims failing because lawyers have not identified the right cause of action from the existing piecemeal

[107] *Op. cit.*, at page 17, para. a-b.

[108] *Op. cit.*

[109] *Ibid.*

[110] (1849) 1 McN & G 23.

[111] [1991] F.S.R. 62.

[112] Kaye's representatives sought to get an interlocutory injunction preventing publication of an article in the *Sunday Sport* that claimed he had agreed to give the paper an exclusive interview. In fact he had been in his private hospital room recovering from extensive injuries to his head and brain and there were notices saying the media should not be there. In spite of this a newspaper reporter and photographer had invaded his private hospital room, trying to get an interview with him when he was in no fit condition and had taken a photograph of him. His representatives argued libel, malicious falsehood, trespass to the person and passing off before the Court of Appeal (Glidewell, Bingham and Leggat LJJ.) but only malicious falsehood succeeded and this was only to the limited extent that it prevented publication of the falsehood that he had agreed to give an exclusive interview.

[113] See Lunney and Oliphant, *Tort Law: Text and Materials* (Oxford, 2000) 664.

[114] "The Right to Privacy" (1890) 4 *Harvard Law Review* 193.

multitude.[115] Doubtless there would be teething problems but this could be to the benefit of all in identifying the precise nature of applicants' rights and obligations in the privacy context. Of course it must be admitted that it is more likely that domestic judges will continue with a piecemeal approach of expanding existing causes of action wherever required and creating new piecemeal causes of action wherever unavoidably necessary. However, after a period of such development we would probably have what was the equivalent of a tort of privacy in any case, at which point the judges might be prepared to concede that there was indeed a tort of privacy, both to avoid a charade and to make it easier to set out one's particulars of claim.

[115] This could have been the problem in Kaye in as much as the actor's representatives might well have had better luck if they had argued breach of confidence. If the situation arose today and the tort of privacy could not be argued they might make the argument identified earlier that their "space privacy" and legitimate users of private space should be protected by trespass to land as seen in the light of Article 8 or alternatively a new tort analogous to trespass to land.