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# Update Summary

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**S Jacobs**

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## UPDATED COMMENTARY

Author Sydney Jacobs has reviewed a number of chapters of his work, with significant amendments referred to below.

### **Restraining a Nuisance**

The decision of *Fearn v Board of Trustees of the Tate Gallery* [2023] 2 WLR 339; [2023] UKSC 4 has been discussed extensively. The constant watching of the claimants in their inner city, glass clad units by innumerable visitors to the Tate gallery's viewing platform, to the extent they were in a sense akin to animals on display in a zoo, was said by Lord Leggatt for the majority to be an actionable nuisance. See [29.100].

It is noted that the scope, elements and defences to a tort of private nuisance have long been seen as uncertain and remain so, referring to *Woodhouse v Fitzgerald* (2021) 104 NSWLR 475; [2021] NSWCA 54 and *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1; [2023] NSWSC 840. See [29.150].

Considerable new commentary is added to the conflicting control mechanisms where priority is accorded to the general and ordinary use of land – see [29.156] – [29.160] compared to the competing control mechanism regarding the reasonable user – see [29.162].

### **Noise and odours / smells: both private and public nuisance**

An occupier of premises has an action at common law for nuisance in the form of unreasonable noise, for example early morning stamping of the hooves of a milk vendor's horse; circular saws; ringing of church bells. See [29.515].

Further, the grant of planning permission is not necessarily a defence. See [29.518].

Odours/smells emanating from a residential locality and resulting from industrial activity are dealt with at [29.524] and [29.527] respectively.

Interestingly, in *Southwark London Borough Council v Tanner* [2001] 1 AC 1, adjoining flats lacked sound insulation, the consequence of which was the noise from the neighbours' activities caused a substantial interference with the ordinary use and enjoyment of the claimants' flats. However, the House of Lords held that this interference was not actionable in nuisance. See [29.536].

The author also notes that there is no conceptual limitation on what might constitute a nuisance, by again referring to *Fearn v Board of Trustees of the Tate Gallery* [2023] 2 WLR 339; [2023] UKSC 4. Here, the UKSC held that constant peering and photographing by hundreds of thousands of visitors from the Tate Modern's viewing platform in the Blavatnik Building, into the glass walls of the plaintiff's inner-city flat in the Neo Bankside complex, manifested such an interference with their ordinary use of their property as to constitute a nuisance.

Subsequently, *Fearn* has been referred to without demur by Cavanagh J in a private nuisance claim by business owners for interruption to the businesses by noise from the light rail project: *Hunt Leather Pty Ltd v Transport for NSW* (2023) 257 LGERA 1; [2023] NSWSC 840 [627] – [650]. See [29.560].

The author has also tracked the development of the law regarding Obstruction of view and visual pollution. See [29.580].

### **Specific performance**

#### **What if specific performance is declined?**

If specific performance is declined, there is “strong authority” for the proposition that the contract “is lost”: per Young J (as his Honour then was) in *Rosser v Maritime Services Board* [1996] NSWSC 434. See [33.270].

#### **Where specific performance granted: can the defendant terminate?**

Where specific performance has been granted, the defendant cannot terminate without the leave of court: *Rosser v Maritime Services Board* [1996] NSWSC 434, citing the decision of the NSWCA in *JAG Investments Pty Ltd v Strati* [1981] 2 NSWLR 600 and referring to observations of Mason CJ in *Sunbird Plaza Pty Ltd v Maloney* (1998) 166 CLR 245; 62 ALJR 195; [1988] HCA 11 at 260 (CLR). See [33.280].

### **Building and construction contracts**

Specific performance might sometimes be granted in respect of building and construction cases. However, “generally speaking, neither specific performance nor interlocutory injunctions having the effect of specific performance will be granted in respect of building contracts in other than exceptional circumstances”. See [33.1780].

The circumstances in which courts will specifically enforce building and construction contracts, takes place against a wide juristic canvass, including:

- (i) whether a person doing work that improves the land of another has an implied equitable lien to secure payment;
- (ii) whether the builder (whether a head contractor or sub-contractor) might have a claim under the *Building & Construction Industry Security of Payments Act 1999* (NSW) (SOPA) (see Ch 12) or other state legislation such as the *Contractors Debts Act 1997*(NSW);
- (iii) whether there is state legislation applicable in specialist building Tribunals mandating rectification as the remedy which is preferable to damages. See [33.1782].

The author goes on to provide a chronological development of the case law in the UK, US, New Zealand and Australia. See [33.1790] – [33.1810].

