Neutral Citation Number: [2026] EWCA Civ 847

Case No: CA-2025-001473

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
His Honour Judge Russen KC (Sitting as a Judge of the High Court)
[2025] EWHC 752 (Ch)

Date: 3 July 2026

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE NUGEE
and
LADY JUSTICE WHIPPLE

- -

Between :

(1) Barnes Davison Thomas **(2) Upper Cot Estate Limited**	**Appellants**
- and -	
(1) Martin Craig Nicholas **(2) Scott Nicholas** **(3) Raptors of Penwith Limited**	**Respondents**

- -

Tom Weekes KC and Camilla Lamont (instructed by **Nalders LLP**) for the Appellants
Jonathan Seitler KC, David Mitchell and Lemuel Lucan-Wilson (instructed by **Arch Law**) for the Respondents

Hearing dates: 24 and 25 February 2026

- -

Approved Judgment

This judgment was handed down remotely at 2pm on Friday 3rd July 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Whipple:

Introduction

1. Barnes Davison Thomas ("Mr Thomas") is the first appellant and the director of Upper Cot Estates Ltd ("UCE"), the second appellant. Mr Thomas and UCE own land at Bosavern, near St Just in Cornwall. Mr Thomas lives in a house on that land called Pengelly. UCE operates its business on adjacent land. Mr Thomas and UCE were the defendants below and I shall refer to them as the defendants in this judgment.

2. Martin and Scott Nicholas ("Martin" and "Scott" respectively) are the first and second respondents, they are brothers and co-directors of Raptors of Penwith Ltd ("ROP"), the third respondent. They were the claimants below, which is how I shall continue to refer to them. Martin and Scott live with their families on land at St Just which is very close to Mr Thomas' land. ROP runs a business raising falcons in an aviary which is situated close to the boundary of the Nicholas' land with land owned by UCE and under the day to day control of Mr Thomas.

3. The claim was brought in private nuisance (by ROP, third claimant, against both defendants), negligence (by ROP, against both defendants) and harassment (by Martin and Scott against Mr Thomas). It was met by a defence denying nuisance and negligence and a counterclaim by Mr Thomas against all three claimants in harassment. In his judgment dated 8 April 2025 (the "judgment"), HHJ Russen KC found for ROP in nuisance and negligence but dismissed the harassment claim and counterclaim. The judge awarded damages of £258,500 against Mr Thomas and UCE. He refused the claimants' application for an injunction. He awarded the claimants 75% of their costs of the action.

4. There is an extensive background to this appeal. A separate claim about a septic tank on adjacent property was commenced in November 2022 by Mr Thomas against Martin and Scott; that claim was compromised before coming to trial (see para 6 of the judgment). The claim about the septic tank was itself part of a wider dispute which sprang from Mr Thomas' interest in having a more convenient vehicular access to Pengelly (see para 27 of the judgment). In the course of that wider dispute, the parties had also fallen out over a drain which ran along a lane to Pengelly belonging to UCE (see para 36 of the judgment). In sum, this has been a long running neighbour dispute.

5. The judge was faced with a raft of allegations and counter-allegations at trial. In advance of trial, on 17 January 2025, the judge conducted a site visit to the claimants' and defendants' land at Bosavern. The trial started on 23 January and concluded on 5 February 2025, comprising nine full court days. Seventeen lay witnesses and two experts were called. The trial bundle ran to around 3,600 pages and the evidence included 35 videos. This trial was a significant undertaking for all involved.

6. With impressive speed, the judge produced a thorough and detailed judgment, running to over 500 paragraphs. On the key issues of disputed fact, the judge preferred Martin and Scott's versions of events. Specifically, and despite Mr Thomas' evidence to the contrary, the judge found that at all material times Mr Thomas was aware of the risk to ROP's business of creating a visual disturbance or making loud noise close to the aviary when the falcons were breeding, which Mr Thomas knew to be from March to May of any given year (at least). He found that Mr Thomas, through UCE, conducted activities

close to the aviary which created individual instances of visual disturbance or loud noise in the period between March and May of 2022. The individual instances complained of occurred in the course of three activities conducted or permitted by the defendants: (i) a scaffolding business; (ii) building a barn; and (iii) parking a broken down digger. He found that these individual instances caused the death of three of ROP's falcons and damage to eggs. He quantified the financial loss to ROP at £258,000. None of this is now disputed on appeal.

7. What is disputed is the judge's conclusion that these individual instances of visual disturbance and loud noise amounted to a nuisance and were negligent. Mr Thomas and UCE argue that they were entitled to act as they did on UCE's land, and that they are not responsible, either in nuisance or negligence, for any consequential damage to ROP's business. More precisely, Mr Thomas and UCE advance three grounds of challenge to the judge's findings in nuisance (the "Nuisance Grounds"), arguing that ROP's falcon business is a sensitive trade and that the judge has wrongly increased their own liabilities by reference to that sensitive trade (ground 1), that the judge has wrongly measured the defendants' interference with the claimants' use of their land by reference to that sensitive trade rather than by reference to what might be common and ordinary use, and in so doing has invented a novel principle of "suitable location" (grounds 2 and 3), and that the judge has impermissibly and unjustifiably restrained the defendants' use of UCE's land (ground 3). The defendants' fourth ground of appeal is a challenge to the judge's finding that the appellants were liable in negligence (the "Negligence Ground"), arguing that there is no room for negligence once the claim in nuisance has failed, and that anyway the defendants owed no duty of care to the claimants.

8. There is no Respondent's Notice. The claimants seek to uphold the judgment below for the reasons given in it. They say that the judge found the facts and correctly applied the law to those facts. They dispute the basic predicate of the Nuisance Grounds because they say that the judge decided that ROP's falcon business was common and ordinary for that location, a finding which was open to him on the evidence and which is not (and could not now be) challenged. Further, the judge found that the defendants had used their land in ways which were inconsiderate and careless as to the damage caused to the claimants, a further finding of fact which is not (and could not now be) challenged. In light of those findings, Mr Thomas and UCE cannot escape liability for their actions.

9. Mr Weekes KC and Ms Lamont act for the defendants. Neither was instructed at trial. Mr Seitler KC has come in to lead for the claimants, assisted by Mr Mitchell who was trial counsel and Mr Lucan-Wilson who was not instructed at trial. I am grateful to all counsel and their respective legal teams for the efficient preparation and expert presentation of this appeal.

Outline of this Judgment

10. In this judgment I shall set out the facts in a little more detail, consider the parties' pleaded cases with an eye to identifying the issues before the judge, and then look at the judgment in some detail to establish what the judge decided in response to those issues. I shall then set out the grounds of appeal (which are detailed) and turn to the parties' submissions. Finally, with the ground laid, I shall consider these four headline questions:

(1) On the issue of use of the claimants' land, what did the judge decide? More specifically, did the judge decide that ROP was carrying on a sensitive trade, as the Nuisance Grounds assert; or did the judge decide ROP was carrying on an ordinary and common business, as the claimants contend?

(2) Did the judge err in law in his approach to the law of nuisance?

(3) Depending on the answer to the first and second questions, what is the answer to the Nuisance Grounds?

(4) Does the law of negligence provide an alternative basis for liability, in answer to the Negligence Ground?

The Facts

11. The judge set out the background facts in the judgment at paragraphs 9-36 and 192. The following is a summary.

12. The Nicholas family (of which Martin and Scott are members) moved to Bosavern in 1995. Martin and Scott's parents still live there in a house on that land. Martin and Scott and their families also live there, in separate houses on that land. Martin has been involved in breeding falcons since 1995 when he took up falcon breeding as a hobby. The brothers became involved in commercial falcon breeding on that site some years ago, long before Mr Thomas or UCE became neighbours. Construction of the aviary commenced in October 2018. The aviary contains a number of pens, some of which are intended for use as breeding pens, others of which are for exercising the birds and are larger spaces covered by netting. The pens in issue in this case are the "Western Pens", which are closest to UCE's land, and which were designated as breeding pens. The breeding pens are insulated in order to reduce the noise within (judgment, para 380). Although the judge suggested that the claimants had modified the Western Pens by closing off windows (judgment, para 25), Mr Seitler told us that the Western Pens have never had windows and have not been modified; that point is not in dispute and is not material to this appeal and I simply record it here.

13. ROP is owned and managed by Martin and Scott. ROP focusses on breeding gyr falcons, peregrine falcons and gyr/peregrine crosses. The birds are owned by Hussain Lootah with whom ROP is in business. Mr Lootah sends ROP falcons for breeding and young birds are sent back to him in Dubai for training, racing and onward sale. Mr Lootah and ROP share the profits of these activities.

14. Mr Thomas's grandmother had lived in Bosavern since 1988 in a house on the site where Pengelly now stands. Mr Thomas moved in with his grandmother in 2018 and inherited her house from her when she died. He built Pengelly, a modern and substantial bungalow, in its place. In 2020, UCE purchased land which had previously been farmed which was close to Pengelly and adjacent to the aviary on the Nicholas' land.

The Pleaded Cases – Nuisance and Negligence

15. The amended particulars of claim ("APOC") asserted that the "normal and ordinary use" of the claimants' land was for the breeding of falcons (APOC paragraph 9).

Particulars of nuisance against the defendants included reference to the three activities I have already described (APOC paragraph 20). It was asserted that these activities did not constitute "general and ordinary use" of UCE's land; alternatively that Mr Thomas had acted maliciously in order to damage the claimants' business interests (APOC paragraph 21). It was asserted that Mr Thomas and UCE owed the claimants a duty of care which they had breached in the same ways as were particularised as part of the nuisance claim, such as to amount to negligence (APOC paragraph 22). By the time of trial, the duty of care had been articulated by the claimants as "a duty of care not to cause or permit the falcons to suffer excessive noise or visual threats, in particular during the Breeding Season", see judgment para 129.

16. The amended defence and counterclaim ("ADCC") countered with an assertion that the activities on UCE's land were "normal use" (ADCC, paragraph 25). Malice and nuisance were denied. It was asserted that falcons were not a species native to the UK, that their breeding was "an exceptionally delicate operation" and the claimants could not effectively impose on the defendants a restrictive covenant as to the operations being carried on by the defendants on UCE's land ry (ADCC, paragraph 26). It was denied that a duty of care existed or that, if it did, it had been breached (ADCC, paragraph 27).

17. The claimants filed a reply and defence to counterclaim, as well as responses to the defendants' part 18 requests. At the heart of the pleaded cases, so far as nuisance was concerned, was whether the claimants' use of their land to breed falcons amounted to "normal and ordinary use" (as they asserted) or "an exceptionally delicate operation", which was not normal and ordinary, as the defendants asserted. The case in negligence hinged on the same facts as pleaded in nuisance, and centred on whether a duty of care existed at all and if it did, whether it had been breached by Mr Thomas and / or UCE.

The judgment

Background

18. The judge set out the background (judgment, paras 9-36) and the litigation history (judgment, paras 37-46).

Legal Principles

19. Looking first at the law of nuisance, the judge noted that the core principles were set out in *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4, [2024] AC 1 (per Lord Leggatt at paras 8-47), drawing on *Bamford v Turnley* (1862) 3 B&S 66 (per Bramwell B at p 83). The judge distilled Lord Leggatt's judgment into the following propositions:

> "53. For the purposes of this judgment, I distil the following propositions from Lord Leggatt's comprehensive analysis of the relevant principles (references are to paragraphs in his judgment in *Fearn*).
>
> (1) The law of nuisance is concerned with the wrongful interference with the claimant's enjoyment of rights over his land. This extends to any buildings upon it and to rights

appurtenant to his ownership interest. The focus is upon the diminution in the utility and amenity value of the land as opposed to harm to the person. Nuisance is therefore a property-based tort. The claimant must have a legal interest in the land in order to have standing to sue. ([9]-[11]).

(2) There is in principle no limit upon the types of activity which may constitute an actionable nuisance. Nuisance can be caused by any means, distinct from acts of trespass, which materially interfere with the claimant's enjoyment of such rights. The cause of the interference may be something physical and/or tangible (such as invasive plants spreading from the defendant's property) or intangible (such as noise, fumes, vibration or excessive light emanating from it). In principle, the sight offered to the claimant by the use to which the defendant's property is put may be so offensive as to constitute a nuisance. ([12]-[17]).

(3) Not all causes of significant annoyance to the claimant in his enjoyment of his land will be actionable as a nuisance. The need to balance the (sometimes) conflicting rights of neighbouring landowners, or the principle of reciprocity often described in terms of "give and take", means that the court must have grounds for concluding that the defendant's activity is unlawful. Only if it is unlawful will it then be appropriate to label it, in what otherwise would be question-begging and legally vague terms, as an "undue" or "unreasonable" interference with the claimant's enjoyment. ([18]-[20]).

(4) Any decision that the defendant's activity is unlawful (and, therefore, constitutes an undue or unreasonable interference with the claimant's enjoyment of his land) must at the first stage rest upon the twin-limbed conclusion that there has been a s*ubstantial* interference with the *ordinary* use of the claimant's land. The test of whether or not the interference is *substantial* is an objective one and is applied by reference to the standards of an ordinary or average person in the claimant's position. It is aimed at eliminating small or trifling inconveniences to leave those which may sensibly be categorised as actionable interferences. That the defendant's activities must interfere with the ordinary use of the land is aimed at eliminating unjustified claims which are instead founded upon interferences with land use that is out of the ordinary. Lord Leggatt endorsed the observation in a decision of the Privy Council in 1902: "*A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure*." This limb of the test therefore requires the court to consider the type of property in question within its surrounding neighbourhood: 'the locality principle'. It is contrary to the notion of "give and take" that a claimant should, by using his land for purposes beyond the ordinary and which carry with them

particular sensitivity to neighbouring activity, increase the potential liability of his neighbour under the law of nuisance. ([21]-[26]; [35]-[36] and [38]).

(5) The same notion of the common and ordinary use of land applies to the next stage of any determination of liability which is to consider the nature of the defendant's activities upon his land. In the absence of malicious behaviour (see below), if they constitute no more than the common and ordinary use of his own land *and* are done with proper consideration for his neighbours – i.e. "*conveniently done*" in the words of Bramwell B - then he will not be liable. ([27]-[28]).

(6) Save perhaps in a case where the design or construction of a building is "*so far from anything that could actually be expected*", that will be so even if the design attributes of the claimant's property means that the claimant is abnormally sensitive to such activities. However, if the defendant's activities fall outside the common and ordinary use of his land then it is no defence to say that the design of the building occupied by the claimant means the claimant is particularly sensitive to their consequences. Neither is it a defence to say that the claimant's building might have been differently constructed or designed so as to avoid the nuisance. It is the utility of the actual land, including the buildings actually constructed on it, for which the law of private nuisance provides protection, not for some hypothetical building of "average" or "ordinary" construction and design. ([62]-[75] and [83]). It is possible that there could be an "extreme case" where the design or construction of a building is so unusual and far from anything that could actually be foreseen that its physical attributes might give rise either to a claim or to a defence to a claim in nuisance. ([76]-[79]).

(7) The application of the second limb of the test of lawfulness – extended to consideration of the ordinary use of the defendant's land - will therefore enable the court to reach a decision by reference to what, again, would otherwise be an insufficiently principled observation about the defendant's "reasonable" or "unreasonable" use of his land. ([29]-[33]). It follows that the locality principle comes into play again when considering the nature of the defendant's activities on his land.

(8) Subject to any agreement not to do so or impermissible interference with a neighbour's property right, there is a fundamental right to build (and demolish) structures on one's own land. It follows from this (and the fifth proposition above) that interference with neighbouring land which results from construction or demolition work will "*not be actionable provided it is, in Bramwell B's phrase, "conveniently done", that is to say, in so far as all reasonable and proper steps are taken*

> *to ensure that no undue inconvenience is caused to neighbours*." ([36]-[37]).
>
> (9) There is a qualification to this potentially exculpatory second limb of the test, based on the defendant's ordinary use and occupation of his land, where he is shown to have acted maliciously. Lord Leggatt cited the judgment of Bramwell B in *Bamford v Turnley*, in explaining that activities to be categorised as the ordinary use of the defendant's land will not be treated as nuisances "*unless done maliciously and without cause*". ([27]. Lord Sales, at [162], cited another passage in the same judgment, at 82, where Bramwell B observed "*The defendant has done that which, if done wantonly or maliciously, would be actionable as being a nuisance to the [claimant's] habitation by causing a sensible diminution of the comfortable enjoyment of it.*""

20. The judge qualified his fourth point (judgment, para 53(4), see above) in this way:

> "54. In addressing the point summarised in the fourth sub-paragraph above Lord Leggatt referred (at [25]) to two cases in saying the law of nuisance will not protect against injury to particularly delicate or sensitive operations: *Robinson v Kilvert* (1889) 41 Ch D 88 and *Eastern and South African Telegraph Co Ltd v Cape Town Tramways Ltd* [1902] AC 381. Mr Auld [counsel for the defendants at trial] placed particular reliance upon that passage in Lord Leggatt's judgment. In both of those cases the claim in nuisance failed. In *Robinson v Kilvert* the plaintiff's brown paper (sold by weight) was affected, through drying out and becoming brittle, by a level of heat from the defendant's basement premises which would not have affected paper generally. In *Eastern and South African Telegraph Co* the plaintiff's submarine telegraph cable and receiving instruments were vulnerable to interference to even minute currents of electricity escaping from the conductor used in the defendant's operations. The plaintiff's later construction of a twin-core cable to overcome the problem showed that the defendant's operations only affected instruments made in a certain way."

21. The judge qualified his eighth point (judgment, para 53(8), see above) in this way:

> "55. The eighth point above illustrates that a nuisance [can] be actionable even if it is temporary, provided the interference with the claimant's use of his land is substantial: compare *Barr v Biffa Waste Services Limited* [2012] EWCA Civ 312; [2013] QB 455, at [36(iv)] per Carnwath LJ. As a matter of principle, therefore, a neighbour's building work in the otherwise unobjectionable development of his land is capable of creating a nuisance."

22. The judge turned to the "locality principle" (a principle referred to in his fourth point at judgment, para 53(4)). The judge noted that the locality principle formed a central part of the present case in which the falcons were "sensitive animals" (judgment para 56):

> "56. … As I read the decision in *Fearn*, a "special use" – which involves a claimant placing the principles of reciprocity and give and take under excessive strain – falls to be identified by reference to what is *not* the common or ordinary use of his land having regard to the locality. Whether land is being put by the claimant to special or unusual use, so that he has no actionable complaint about interference with that use if the neighbour is only using his land for ordinary purposes, cannot be answered in isolation from the locality.
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> 57. Considering the position in relation to the defendant's use of his land, in *Sturges v Bridgman* (1879) 11 Ch D 852, at 865, Thesiger LJ reasoned: "*what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey*."
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> 58. In my judgment, it is not open to the court simply to categorise the claimant's use of the land as a special or sensitive one (interference with which will not support a claim in nuisance) without considering whether it is too sensitive for the surroundings where it is taking place. Only an assessment of the surrounding locality will determine whether the claimant is impermissibly seeking to "*increase the liabilities of his neighbour*" or, instead, claiming no more than an immunity from interference of a kind that might be reasonably expected in the locality. This is especially so when the potential liability of that neighbour arises out of *temporary* activity, such as particularly noisy building work carried out on otherwise generally peaceful agricultural land, which might be "*conveniently done*" at certain times to accommodate the sensitivity of the claimant's use; as opposed to an exposure to liability which would fetter the defendant's use of his land more permanently.
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> 59. Otherwise, there would be certain uses of land, including business or trade use, which, regardless of the character of the surrounding neighbourhood in which that use took place, would be unprotected by the law of nuisance (save possibly in the case of malicious interference with that use). To take an extreme example, if the operation of two separately owned aviaries on adjoining land in the middle of nowhere each constitutes a special use, even if (as the presence of both indicates) the locality is an ideal place to breed falcons, the owner of each aviary would not benefit from *any* protection by the law of nuisance against other non-avian activity by his neighbour (however intrusive and heedless they might be) which substantially interferes with his breeding business.

> 60. Although I understood part of Mr Auld's argument to be that ROP cannot maintain a claim in nuisance because its falcons are particularly sensitive, in my judgment, therefore, *Fearn* does not support that unqualified submission. It is important to bear in mind that, whereas most of the earlier authorities address this question in the context of a regular or continuing use of the defendant's neighbouring land, ROP's allegations of nuisance are based upon isolated acts of interference. They involve claims arising out of "temporary" activity on UCE's land (in the sense addressed above) rather than its long-term use for growing grass or crops or grazing livestock. They also concern a particular sensitivity in ROP's operations during the breeding season rather than all year round.
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> 61. Further, in my judgment, it is important to note that the locality principle is just that. It requires the court to assess the immediate neighbourhood. I say this because Mr Auld made points about how the Aviary might have been built some metres further away from UCE's land. The locality principle does not descend to that type of detail and that line of argument appears to run up against the sixth proposition in paragraph 53 above."

23. The judge said that the focus needed to be on the parties' respective uses of their properties. He said that one of the issues in the case was whether the claimants' aviary was to be categorised as a "special and unusual use" of their land (judgment, para 65).

24. The judge dealt with various issues which are not relevant to this appeal (malice, director's liability, damages for nuisance) before coming to negligence. He considered whether there was a duty of care, noting the defendants' case that the claim was novel, but also noting that many of the cases cited on nuisance had also been advanced in negligence, some involving alleged acts of carelessness (judgment, paras 135 and 137). He recorded the claimants' submission that there was a parallel duty of care, in reliance on *Grandel v Mason* [1953] 1 SCR 459, a decision of the Supreme Court of Canada, noting the defendants' submission that *Grandel* was of no assistance to the claimants (judgment, para 141). The judge held:

> "150. The reasoning in *Grandel* supports the conclusion that the facts of a particular case may mean that the principle – "*so use your own property as not to injure your neighbour's*" – applies to the *timing and manner* of what otherwise would be the defendant's unobjectionable common and ordinary use of his land. Also, and significantly for present purposes, a duty of care arising out of such facts may overcome a defence to a nuisance claim that (per Estey J at p. 465) "*recovery should be denied because of the delicate and sensitive nature of the respondent's business*." In other words, *Grandel* indicates that a claim in negligence could qualify the impact of the fourth proposition (in the law of nuisance) in paragraph 53 above. The law of negligence *may* operate to protect even sensitive uses of land during periods of heightened susceptibility."

25. So far as negligence was concerned, the judge concluded:

> "155. The duty in negligence is a duty not to inflict damage carelessly: see *Clerk & Lindsell* op. cit. at para. 7-08. In my judgment, the decision in *Grandel* is persuasive in the sense that it highlights that (in a situation broadly similar to those alleged by ROP in its negligence claim) there is potential for a liability in negligence where positive acts on a neighbour's property have caused physical damage to the claimant's property through the defendant acting carelessly.
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> …
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> 158. If ROP can establish by reference to proven facts both that Mr Thomas was made aware that the activity on UCE's land during the breeding season was likely to harm the falcons on the Western Pens and that the harm might reasonably have been avoided then it would be open to the court to conclude that it is fair, just and reasonable that the person responsible for that activity (be that Mr Thomas, UCE or possibly both) should be held liable in negligence.
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> …
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> 161. … I consider my conclusion, for the purposes of this case, that a negligence claim may be triggered not just by a failure to undertake competently what is otherwise lawful activity on the land but also by the *timing* of such activity to be an incremental development of the law of negligence (if it is that) which does not fall foul of principles of land law. "

Factual Evidence

26. In the next section of the judgment, the judge dealt with the evidence of fact. There were conflicting accounts of certain key events, meaning that one or more of the witnesses was not telling the truth (judgment, para 186). He held that Mr Thomas and his father Adrian Thomas had sought to downplay their knowledge of the concerns expressed by Martin and Scott about the impact of UCE's barn building work on the wellbeing of the falcons; that there were numerous difficulties with the evidence of Mr Thomas and his father; that there was some support for the suggestion that Mr Thomas "has an angry side if things do not go his way"; and that Mr Thomas had proved to be a "controversial neighbour" (judgment, para 189). Turning to the claimants' evidence, he held that Martin's evidence was reliable on issues of fact (judgment, para 191); that Scott's evidence corroborated Martin's evidence on key issues (judgment, para 212); that Karen Nicholas, Martin's wife, gave clear and convincing evidence which was truthful; that allegations against Karen by Mr Thomas were "completely false" (judgment, paras 215 and 216); and that the evidence of Mr Brady, brought in by Martin to attempt a compromise in early May 2022, that he had not threatened Mr Thomas with violence, was true (judgment, para 227). The judge found that Mr Thomas "would not be the easiest of neighbours" (judgment, para 228) and was someone who was "prone to overreacting to events" (judgment, para 231); that there were questions about the

reliability of Mr Thomas' evidence (judgment, para 232); and that Adrian Thomas, Mr Thomas' father, was an "unsatisfactory witness" whose evidence on some key points was unreliable (judgment, para 238).

Expert Evidence

27. Next the judge turned to the expert evidence. Mr Garland had been called to give evidence for ROP on breeding issues and quantum. The judge recorded that he is a very experienced breeder of birds of prey (judgment, para 251). Mr Garland said the claimants' aviary was similar in design to his own (judgment, para 254). He said that falcons will acclimatise to the regular noise of their surroundings but that "shock noise" will alarm them and that it was important to avoid those sorts of noises in the months of March, April and May (judgment, para 255).

28. Mr Forbes gave evidence for the appellants on breeding issues and cause of death. The judge said that he was a very experienced and well-respected avian vet although he had left his full-time veterinary practice in 2017 (judgment, para 260). The judge held that Mr Forbes had at times perhaps lost sight of the need to remain objective in assisting the court with matters within his expertise (judgment, para 266); he also said that at times Mr Forbes had assumed the role of an investigator or advocate for Mr Thomas (judgment, para 269).

29. Mr Forty gave evidence for the defendants on quantum issues. He and Mr Garland (for the claimants) reached agreement on most matters of valuation (judgment, para 288).

Factual Findings

30. The judge made his findings of fact under various headings. The first was "causation of death". The judge preferred the evidence of the claimants' expert, Mr Garland, that the death of Gyr 03 (one of the lost falcons) was attributable to stress following its introduction to a pen on the western side of the claimants' land, abutting the land owned by UCE; this was to reject Mr Forbes' explanation that stress was not the cause of death but rather that Gyr 03 was already suffering from disease when imported into the UK (judgment, paras 304-5, 315 and 316).

31. The second heading was "The Locale". The judge found that the location of ROP's business was suitable for the purpose to which it was put, that is, breeding falcons. This is an important part of the judgment which I set out in full:

> "327. Any finding that Mr Thomas and/or UCE is liable in nuisance must begin with consideration of the potential impact of the locality principle. Consideration of the neighbourhood in which ROP carries on its business is also likely to feed into an assessment of whether it is fair just and reasonable that the defendants should owe the duty of care alleged by the claimants.
>
> 328. The Aviary is built on land acquired by Martin and Scott in 2017. It has been [built] very close to the location of Martin's earlier aviaries (the structure of one of which still stands).

329. My visit to the site on 17 January 2025 confirmed the rural setting of the Aviary. The Atlantic (Celtic Sea) can be seen from site where the coast dips at the mouth of the Cot Valley approximately a couple of miles distant.

330. Although there are buildings nearby (including the parties' respective homes, other neighbours' properties and a community farm on the other side of the B3306) the Aviary is surrounded by agricultural land. A public footpath runs between the Aviary and UCE's land. UCE's barn on the other side of the footpath is of course an agricultural building and work on it commenced after the Aviary was substantially completed. Building the barn (not yet completed) has not changed the agricultural character of the neighbouring land.

331. The Aviary is flanked to the north and west by substantial soil bunds which Martin explained was an aspect of the planning requirement that the Aviary should to some extent be screened from view, rather than created for the purpose of shielding the birds from noise or visual intrusion. Nevertheless, the bunds (created using soil from the levelling of the site for the Aviary) do shield them to some extent. The Aviary (which is closer to UCE's land than the road partly for the reason explained by Martin) is shielded from the road by a roadside hedge.

332. A business operation such as ROP's could of course be built in the middle of nowhere, such as the top of an isolated moor, but it does not follow that the Aviary is not suited to its own location. On my understanding, its location is no less rural and possibly more so than that of Mr Garland's successful aviary (the defence of which from disturbances on neighbouring land Dr Forbes has himself supported).

333. There seemed to be no dispute between the parties that, given its proximity to Land's End, the B3306 is busy with traffic during the summer months, and I think it can probably be assumed that the hum of traffic would be heard at least within the pens on the eastern side of the Aviary. During the site visit several small and quite noisy propeller-driven passenger planes were also coming in to land at Land's End Airport a short distance away; and conversation had to pause briefly to await their passing overhead. These would be heard and seen overhead by the falcons through the netting of the hack pens and other openings in breeding pens giving a view above. However, the factual and expert evidence in this case demonstrates that regular noises and sights, to which the birds become accustomed, do not present a threat to their welfare.

334. The evidence about the location of Mr Garland's own aviary, Mr Bryn Close's aviary, the history of Martin's breeding of falcons at the site (before the Aviary was built) and the overall

> success of ROP's business in breeding birds all point to this being a suitable location for the sensitive operation of breeding falcons."

32. Three points within that passage require a little more explanation by reference to other parts of the judgment:

    a. The reference to Martin's "earlier aviaries" in para 328 is to Martin's evidence that breeding falcons in the approximate location of the aviary was not a new venture but one that predated UCE's purchase of the land by some years although the aviary now on site was of more modern construction (see judgment, para 24).

    b. The references to Mr Garland's aviary in paras 332 and 334 are to evidence, summarised at para 254 of the judgment, of Mr Garland's own aviary which was near a road, a clay pigeon shooting ground and an industrial site, noting that the shoot was accessed via a bridlepath next to the aviary with shooting 6 ½ days a week, involving up to 500 vehicles passing.

    c. The reference to Mr Close's aviary in para 334 relates to a report Mr Forbes had prepared for a successful falcon breeder in Doncaster called Mr Close, summarised at para 306 of the judgment, in which Mr Forbes accepted the susceptibility of falcons to stress.

33. The third heading was "The Defendants' Awareness". The judge examined the extent to which the defendants were aware of the sensitivity of the birds during their breeding season. He noted that the claimants' allegations of nuisance and negligence related to particular one-off activities on UCE's land during the breeding season, rather than being complaints of continuing nuisance (judgment, para 335). He accepted the evidence of Martin and Scott about a conversation with Mr Thomas in December 2020 when relations were still good, which conversation was prompted by a discussion of Mr Thomas' plans to build a barn. The discussion centred on the danger to the falcons of construction noise and visual disturbance. The judge set out extracts from various messages between Martin (and his wife, Karen Nicholas) and Mr Thomas between 19 December 2020 and 30 March 2021. Within those extracts there were references to the breeding season and the birds' sensitivity at that time. The exchanges included this on 19 December 2020:

    > "Mr Thomas: I won't make any noise in March then
    >
    > Martin: You will be fine noise is fine its just stuff they can see that put them off. Unless there is a crane next to them then you are all good."

34. The judge found that Mr Thomas knew that excessive noise and visual disturbances were to be avoided during the period from March to May (inclusive) of 2022 (judgment, para 359).

<u>Findings in Nuisance</u>

35. The claimants had advanced eight pleaded allegations of nuisance. Of these, the judge found six of them, allegations (1), (4), (5), (6), (7) and (8), established on the evidence.

36. By allegation (1), the claimants asserted that from January to April 2022, a scaffolding business operated by a third party with the permission of Mr Thomas and UCE from UCE's land close to the aviary generated excessive noise in the aviary and included the operation of a truck-mounted crane of approximately 10 metres in height which broke the sight-line of the falcons constituting a visual threat. The judge found that the scaffolding business was not a common or ordinary use of UCE's land (judgment, para 364); further, the place where Mr Thomas permitted the scaffolding business to exist could hardly have been closer to the aviary (judgment, para 365). The judge found this allegation proved for the months of March and April 2022 only:

> "368. My finding in relation to March and April is instead based on Martin's evidence about the impact of the sound of scaffolding poles being dropped at the site. I have referred to his and Scott's evidence about them seeing birds in distress via CCTV on 27 March 2022. Martin also referred to an egg being smashed and another damaged in the Western Pens in April 2022 following the loud noise of scaffolding poles being dropped. They referred to the loud clanging noise made by dropping metal on metal and I consider that judicial notice can be taken of the significant level of metal-on-metal noise which often accompanies scaffolders re-stacking poles. Mr James accepted that, if the poles were not dropped on mud but on one another or a hard surface, they would make a noise."

37. The judge noted a corroborating email sent by Martin to the Trading Standards Officer at Cornwall Council on 29 March 2022, complaining of noise and access issues associated with the scaffolding business on neighbouring land. In that email, Martin said that there was noise from banging and cutting of steel which was causing issues with the falcons; that people were working for the scaffolding business in the early hours and late at night including weekends, and were in and out with deliveries.

38. By allegations (4), (6), (7) and (8), the claimants asserted that on various dates between 31 March and 2 May 2022 Mr Thomas and UCE caused excessive noise in the aviary by the work on the barn being built in close proximity to the aviary. The individual actions involved operating diggers and dumper trucks, and loading and offloading lorries and trailers. Included in these allegations was a complaint about the use of a JCB excavator on one occasion to peck out granite from the ground which caused the aviary to vibrate. The judge took these allegations together and found them proved (judgment, para 378). The reasons for that finding were:

> "380. Those videos record a significant amount of noise from within the incubation room of the Aviary which he said is fully lined and insulated. The video recorded Mr McFadden [employed by the defendants] operating either a digger or a tractor (on one occasion with a steel trailer for loading and offloading blocks of granite). Martin said he took the videos because he knew the noise was excessive and could harm the birds. The video from 2 May 2022 showed the noise upsetting the birds. Martin was cross-examined about the video from 29 April and said that day Mr McFadden was pecking out granite for the barn area. He said that as the Aviary stood on the same

bedrock the whole building was vibrating. He said on that occasion the noise from approximately 6 metres away was "*100 and something decibels*" (referring to his own position on scaffolding industry technical committee) but accepted that, before the 2025 breeding season, no decibel meters were installed in the Aviary.

381. I accept the evidence of Karen Nicholas about Mr McFadden's work on 2 May 2022. I prefer her evidence over his as to the reason why she asked him to stop work that day. She said it was not only because it was a bank holiday but because he was causing noise and vibration next to the Aviary and the birds were showing signs of distress. Karen Nicholas says she also referred to the stress it was causing Martin and the family but I do not accept Mr McFadden's evidence that she only referred to her own mental wellbeing. I also accept her evidence that, although Mr McFadden said he would stop work, he carried on the work for another hour.

382. These activities, related to the building of the barn, cannot be said to be outside the ordinary and common use of agricultural land but they were carried out without proper consideration of ROP's breeding season. Mr Thomas was aware this was the breeding season. Contrary to what he had said in his WhatsApp message of 19 December 2020, about not making noise in March 2021, he was responsible for Mr McFadden creating significant noise close to the Aviary on those days in March, April and May 2022.

383. The evidence does not support a case for saying the work had to be undertaken on those days to meet a defined schedule of building work. Mr McFadden explained that he was doing the groundworks for the barn around other jobs and I note 18 April (Easter Monday) and 2 May (early May Bank Holiday) were holidays. However convenient it may have been for Mr Thomas and UCE for some progress to be made on those days, they appear to have paid no thought to the interests of ROP. Those interests had been well in mind, for the previous breeding season, when relations between Mr Thomas and Martin and Scott were good. Despite their recent dialogue, before the 2021 breeding season, Mr Thomas did not think to first check with them whether this kind of activity during the period in question would result in a substantial interference with the 2022 breeding season."

39. By allegation (5), the claimants complained that a digger was positioned with its bucket raised on 7 April 2022, which constituted a visual threat to the falcons. The judge found this allegation proved (judgment, para 384). The reasons for that finding were particular and warrant close attention (emphasis added):

"385. The use of a JCB digger on agricultural land is part and parcel of the ordinary and common use of the land and it must follow that when such a machine breaks down during such use that is an incident of such use. However the JCB did not break down in the place to which it was then moved adjacent to the Aviary on 7 April 2022, the day after its breakdown some distance away on UCE's land, with its bucket raised. The evidence of Mr Geoffrey Hoad, who had been operating the digger to clear out ditches on "*the far side of the farm land*", is that it stayed there, with the bucket raised, until the digger was taken away on a low loader trailer (the bucket lowered after loading) because it could not be repaired on site. For the purpose of on-site inspection by an engineer the bucket was raised. With the bucket raised next to the Aviary for those 3 days the machine broke the line of sight of at least some birds in the Western Pens. Scott's evidence was that the birds were "*going mental*" at the sight of this alien object.

386. Mr Hoad was a patently honest witness and I am persuaded that he acted entirely innocently in this matter. The JCB was moved to the position adjacent to the Aviary on the instructions of Adrian Thomas. Adrian Thomas is a farmer himself and explained that he helps out on his son's farm.

387. My finding in relation to allegations (4), (5), (6), (7) and (8) – particularly allegation (8) relating [to] the noise and vibration caused by a functioning digger near the Aviary some 3 weeks later – is consistent with this conclusion on the present allegation based on the creation of a visual threat by a non-functioning one. **The WhatsApp exchanges in December 2021 show that he knew not to create visual threat from the month of March ("*A crane would put me off*"). Placing the digger on the birds' line of sight on 7 April 2022 was entirely at odds with ensuring that no undue inconvenience was caused to ROP (to adopt Lord Legatt's reformulation of the language of Bramwell B).**

388. The evidence of Mr Hoad and Adrian Thomas was that the bucket was raised in order to provide access to the JCB's engine and that, the vehicle having broken down and lost its hydraulics, this was not an easy operation to reverse and then repeat as necessary. They explained that an engineer had not been able to fix the problem after it had been moved to the access track near the Aviary and it had been moved there because the track provided a length of land sufficient for the two tractors required to put the JCB on a trailer to be put on a trailer and towed away. I was shown a photograph of the 3 vehicles in a line (the JCB on a trailer with its bucket down) before it was towed away.

389. However, having visited the Site, **I am not persuaded that this was the only place where the JCB could have been towed**

> **(if necessary) for the purposes of an engineer's visit and, if that was not successful, then being taken away on a trailer.** Even if it had been the only place where the engineer could inspect it, it should not have been left there with its bucket raised once it was apparent he could not fix it on site. The evidence indicates that Adrian Thomas had no difficulty in towing the JCB from its place of breakdown a significant distance away so it could have been moved a shorter distance away from the Aviary.
>
> 390. In my judgment, therefore, there is no difference, in terms of either principle or relative ease of discontinuance, in avoiding a nuisance caused by the noisy operation of machinery near the Aviary and the breakdown of a machine which ends up in the same place and creates a visual disturbance."

40. The judge noted that he had reached his findings of nuisance without ROP having needed to prove malice (judgment para 391). Malicious conduct by the defendants would have enabled the claimants to recover *even if* they were involved in a sensitive trade: see the judge's summary at paragraph 83(5) and (9), above. The judge was not persuaded that Mr Thomas had acted maliciously although he had acted with carelessness (judgment, para 394). However, ROP could recover in nuisance because the defendants' acts were not "done conveniently":

> "395. Even though malice has not been established, the proven acts of nuisance are in my judgment actionable because they were undertaken without proper consideration of the sensitivity of ROP's birds during the breeding season. Mr Thomas was previously aware of the need to avoid disturbances during the breeding season, and appears to have accepted that could be done, and yet the activities were undertaken regardless.
>
> 396. The conclusion that they are actionable is consistent with the fifth and eighth propositions I have taken from *Fearn*, the decision in *Barr v Biffa Waste*, and with my assessment that ROP'[s] breeding of falcons (which includes their heightened sensitivity during the breeding season) does not fall foul of the locality principle."

<u>Findings in Negligence</u>

41. The judge considered the position in negligence and found that the same tortious acts under the law of nuisance supported a finding of negligence (judgment, para 397). His reasons were as follows (emphasis added):

> "397. […] By parallel reasoning from the established facts, the exchanges between Martin (primarily) and Mr Thomas in December 2020 establish the requisite proximity between the parties, the foreseeability of harm and that it was not unduly onerous (but instead fair, just and reasonable) that the building works on UCE's land should not be carried out near the Aviary during the breeding season. Adopting the incremental, analogy-

> based approach under *Robinson v Chief Constable of West Yorkshire*, a duty of care not to create disturbances that would harm the falcons during their breeding season should be recognised. The otherwise tortious acts of nuisance also breached that duty.
>
> 398. **A key element of this finding is Mr Thomas's awareness, as explained above, that such activity on UCE's land during the breeding season was likely to harm the falcons on the Western Pens and could reasonably have been avoided by working around that season.** I have explained why, on ROP's pleaded case, the focus is upon whether it is fair, just and reasonable that the defendants should be held to [a] duty of care covering the months of March, April and early May 2022 (and therefore before Mr Brady arrived to make representations on behalf of the claimants) rather than a later part of the breeding season. The uncertainty, which has emerged from the evidence, as to whether Mr Thomas (or Mr Brady for that matter) understood the breeding season to extend into June or beyond June, or was as long as the 6 month period suggested by Martin, would raise obvious questions about the foreseeability of harm and the fairness, justice and reasonableness of holding the defendants to a more enduring duty of care. Those questions do not apply to the activity undertaken between the beginning of March and the beginning of May."

<u>Causation and Damage</u>

42. The judge had already found the death of Gyr 03 was stress-induced. The judge went on to find that death was caused by the established acts of nuisance (judgment, para 405). He found that Gyr 05 and 06 had also died as a result of the established acts of nuisance (judgment, para 411). Martin and Scott had given evidence about the effect on the birds of the acts of nuisance, and those acts had caused the birds to become stressed (judgment, para 412). The judge went on to consider loss of the opportunity to breed the dead birds; the eggs lost because they were infertile, smashed or damaged; and the chicks that had died (judgment, paras 414-433). He rejected arguments about ongoing breeding losses (judgment, paras 434-449). He held that the identified losses were reasonably foreseeable (judgment, paras 451-462). He held that Mr Thomas was personally liable alongside UCE (judgment para 464-6). He quantified the losses identified (judgment paras 467-485 and 546). He rejected the claim for an injunction (judgment, paras 486-488, paras 534-537)) and dismissed the claim and counterclaim in harassment (judgment, paras 489-533 and 538-545).

The Grounds of Appeal

43. It is convenient at this point to set the Grounds of Appeal out in full. The Nuisance Grounds are these:

> "1. By holding that [the defendants] are liable to [ROP] in nuisance/negligence due to an interference with [ROP's]

sensitive trade, the learned judge failed to apply the common law principle that:

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

(*Eastern and South African Telegraph Co Ltd v Cape Town Tramways Companies Ltd* [1902] AC 381, Lord Robertson, 393 - approved in *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1, Lord Leggatt, [25]).

2. The learned judge was wrong to invent 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.

3. The learned judge was wrong to hold that, for the purposes of the immunity from nuisance for the "common and ordinary use of land" if all reasonable steps are taken to ensure that interference to neighbours is kept to a minimum, such reasonable steps can be affected by the fact that a neighbour is carrying on a sensitive trade - rather than being determined by the objective impact of the activity on the common and ordinary use of the neighbour's land. Alternatively, if such reasonable steps can be affected by the fact that a neighbour is carrying on a sensitive trade, the learned judge was wrong to hold that [the defendants] were required to desist from carrying out building works, and permitting the scaffolding business to operate from the land, for a 5-month period lasting for most of the spring and summer. "

44. The Negligence Ground is in the following terms:

"4. In circumstances in which [ROP's] claim in nuisance should have been dismissed, the learned judge should have held that there could be no claim in negligence. Alternatively, the learned judge was wrong to hold, pursuant to a duty of care, that [the defendants] were required to desist from carrying out building works, and permitting the scaffolding business to operate from the land, for a 5-month period lasting for most of the spring and summer."

Parties' Submissions in Outline

45. On nuisance, Mr Weekes does not seriously challenge the judge's summary of the law at paragraph 53 of the judgment, based as it was on Lord Leggatt's judgment in *Fearn*, although he questions the judge's reference to and understanding of the locality

principle in paragraphs 56, 58 and 60, arguing that the judge's references to a use being "too sensitive for the surroundings" reveal a misunderstanding of the law. The focus of Mr Weekes' challenge is on the judge's conclusions at paragraphs 327 to 334. At paragraph 334 the judge held that the aviary site was a "suitable location for the sensitive operation of breeding falcons" which Mr Weekes submits is wrong because the judge adopted a test of suitable location for that particular business rather than considering, as the law required him to do, the impact of the defendants' acts (done in the course of ordinary and common use of UCE's land) on the utility or amenity of the claimants' land, an objective matter; and because the evidence disclosed only an interference with the sensitive operation of breeding birds, and not with any ordinary amenity and utility of the claimants' land. The consequence of the judgment, he argues, is to impose on the defendants a duty to take steps to protect ROP's sensitive business; but the tort of nuisance does not extend that far; the protection extends only to owners' rights to use their land for ordinary and common purposes, an objective standard which does not depend on particular use. The resulting position is asymmetrical because UCE is prevented from using its land for normal purposes because of the obligation imposed by the judge to protect its neighbours' sensitive business. The judge misunderstood the meaning of "conveniently done" which imposes a single duty on all neighbours to act with consideration; it does not impose a different and variable duty owed to different neighbours depending on the sensitivity of their businesses. The conclusion that the scaffolding business on UCE's land was not ordinary and common use should be revisited because it was wrong.

46. On negligence, Mr Weekes submits that there is no space for negligence in a case involving adjacent landowners where the law of nuisance already defines the parties' respective obligations. In those cases where landowners have been held liable in negligence for damage to neighbours' property or chattels, ownership of the land is incidental and the cases turn on the fact of harm through lack of skill and care. By contrast, in this case the defendants have not acted carelessly or demonstrated any lack of skill and care; they have simply prioritised their own land use over their neighbours' competing and sensitive land use. To suggest that a landowner owes a duty not to damage a neighbour's sensitive business would lead to incoherence in the law between the strict liability property tort of nuisance and the culpability based tort of negligence. It would lead to an ever-changing kaleidoscope of liability depending on what one landowner knows about his neighbour's business. To impose liability on the defendants in negligence would in practice greatly interfere with and restrict the defendants' use of their own land. Following Mr Weekes, Ms Lamont argued that the judge was wrong to place such weight on the Canadian case, *Grandel v Mason,* which was not a case about landowners' rights at all.

47. Mr Seitler reminded the court that the issue of whether ROP's business was sensitive or not was at the heart of the case in nuisance before the judge. The judge addressed that issue by reference to the principle of locality and was right to do so. The judge closely analysed *Fearn* and applied the test which emerges from that case, which could be expressed in two stages. The first stage was to focus on the claimant's land and ask whether (i) there had been a substantial interference with (ii) the ordinary use of that land. There is case law to assist on each aspect. If that first stage is met on the facts the second stage involved looking at the defendant's land and asking (i) whether that interference was the consequence of an ordinary use of the defendant's land and, if so, (ii) whether it was conveniently done. Here too, there is case law to assist. Mr Seitler

acknowledged that the test is different where the defendant has acted with malice, which was not an issue on this appeal given the judge's findings of fact (and had not been in issue in *Fearn*), because if malice was shown the nature of the claimant's use does not matter. The judge understood the two stages of the test and applied them correctly. The test is straightforward and easy to apply, involving issues of fact and degree which courts of first instance are practised in determining on the evidence.

48. The claimants were entitled to equal treatment under the law, by receiving from the defendants a level of neighbourliness and consideration similar and equivalent to what they would offer in return. They met the first stage of the test because they had been subject to a very substantial interference with their common and ordinary use. They also met the second stage of the test because, to the extent that the defendants' use was ordinary and common, the defendants had not acted with proper consideration for their neighbours (so as to meet the "conveniently done" limb); in one respect, the scaffolding business, the defendants' use was not ordinary and common but had created substantial interference, for which the defendants were liable regardless of any lack of consideration. These matters were all the subject of factual findings and evaluative decisions based on those facts by the judge, which findings were not under appeal but could not, in any event, be reviewed on appeal in light of the long line of cases including *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48 and *Cook v Thomas* [2010] EWCA Civ 227 at [48], which warn appeal courts away from interfering with findings of fact and evaluative judgments by lower courts.

49. On negligence, Mr Mitchell reminded the court of the judge's finding that Mr Thomas was well aware of the risk to the falcons of his actions, that he had sought to downplay that risk, that he had been untruthful in some of his evidence, and that the court had been unimpressed with him as a witness. The judge made no error of law in finding a duty of care existed and in his conclusion that Mr Thomas had breached that duty of care. It was well established that negligence and nuisance were independent torts with different components and scope. Mr Thomas knew of the risk to the falcons during breeding season, but had taken certain actions on his land which could reasonably have been avoided (at that time and that intensity) which caused the risk to eventuate in damage. This was extreme conduct and the case was stark on its facts.

The Headline Questions

(1): On the issue of use of the claimants' land, what did the judge decide?

50. The key passage is at para 334 of the judgment where the judge held that this was "a suitable location for the sensitive operation of breeding falcons". That paragraph must be read in context. The judge had summarised the applicable principles of law (based on *Fearn*) earlier in the judgment at para 53 (cited in full at para 19 above) including his self-direction at para 53(4) that the test was whether there had been "a substantial interference with the ordinary use of the claimant's land", noting that a "man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure", and reminding himself to consider the type of property by reference to its neighbourhood or locality, applying "the locality principle".

51. It is clear that the judge did not intend to depart from these principles when he came to make his findings about the claimants' use of their land. To the contrary, at paragraphs 227-334 he discussed the application of these principles to determine whether the

claimants' use (specifically, ROP's use in running the falcon breeding business) was ordinary and common (as the claimants argued) or special and uncommon (as the defendants argued). That was the issue raised on the pleadings (see paras 15-17 above); it was also the issue to which para 53(4) was addressed in terms.

52. Read on its own, the judge's reference to a "sensitive operation" might seem to lend support to the defendants' appeal grounds. But read in context, I am satisfied that at para 334, the judge decided that, taking account of locality, the claimants' use of their land was common and ordinary, not sensitive or special. That finding was based on extensive evidence and was a finding of fact, or possibly an evaluative judgment based on the primary facts. The court would not usually interfere with such a finding. I have already referred to it, but it is worth setting out the relevant passage from *Cook v Thomas* [2010] EWCA Civ 227 (unreported) on which the claimants rely, (per Lloyd LJ with whom Sullivan and Laws LJJ agreed),

> "48. In a case in which the judge has had the benefit of oral evidence from the witnesses, has made findings of fact which are rationally explained, has described in detail his assessment of the respective witnesses as regards their reliability, and where his findings of fact differentiate with care as to what evidence from which witness is accepted in relation to which part of the history, no one witness being accepted as wholly reliable or rejected as wholly unreliable, an appellant who seeks to show that the judge's findings of fact, or some of them, are unsustainable faces a seriously difficult task. The judge's findings as to what was said between the Claimant and the Defendants are primary findings of fact, and his findings as to how the Defendants reacted to what was said to them are at least partly findings of fact, even if there may be elements of inference in that process. It has been said many times, *Benmax v Austin Motor Co* [1955] AC 370*, Biogen Inc v Medeva Inc* [1997] RPC 1 and *Assicurazioni Generali SA v Arab Insurance Group* [2003] 1 WLR 577 being only three of the examples of high authority, that an appellate court can hardly ever overturn primary findings of fact by a trial judge who has seen the witnesses give evidence in a case in which credibility was in issue."

53. Credibility was in issue here as part of the wider dispute. The judge settled that dispute and found that the claimants' use (by ROP) was common and ordinary. The issue is whether the judge erred in law in reaching that conclusion. It is to that issue that I now turn.

(2): Did the judge err in law in his approach to nuisance?

54. The question at its most basic is whether the judge's summary of the law (judgment, paragraphs 53-67 and see above at paragraphs 19-23) contains any material error of law. Those paragraphs themselves reflect extensive case law, much of which was considered and summarised in *Fearn.* The review cannot be limited to the judge's summary of the law, because it is Mr Weekes' argument that, whatever the judge said about the law, he got the law wrong. I will examine the law, and the judge's approach in this case under a number of sub-headings, reflecting the key parts of the judge's

analysis which are challenged on appeal: (i) ordinary and common use; (ii) the locality principle; (iii) substantial interference; and (iv) "done conveniently".

(i) Ordinary and Common Use

55. The starting point is *Fearn.* That case involved a viewing gallery at the Tate Modern which was said to create a nuisance for neighbouring flat-owners. By a majority (Lord Leggatt JSC, with whom Lords Reed PSC and Lloyd-Jones JSC agreed), the Supreme Court held that nuisance was established. The reasoning behind that conclusion, in short summary, was that the Tate's use of the viewing gallery was not common and ordinary but special, and that the Tate's special use materially interfered with the ordinary use and enjoyment of the adjacent flats.

56. Lord Leggatt described "ordinary use" in the following terms:

> "*(5) The ordinary use of land*
>
> 24. Fundamental to the common law of private nuisance is the priority accorded to the general and ordinary use of land over more particular and uncommon uses. In *Fleming v Hislop* (1886) 11 App Cas 686, 691, the Earl of Selborne encapsulated this well when he defined a nuisance as "what causes material discomfort and annoyance *for the ordinary purposes of life* to a man's house or to his property" (emphasis added). In the earlier case of *Ball v Ray* (1873) LR 8 Ch App 467, 470, the same judge, when Lord Chancellor, had expressed the converse proposition that:
>
> > "if either party turns his house, or any portion of it, to *unusual purposes* in such a manner as to produce a substantial injury to his neighbour, it appears to me that that is not according to principle or authority a reasonable use of his own property; and his neighbour, shewing substantial injury, is entitled to protection. " (Emphasis added.)
>
> The "unusual purpose" for which the defendant in *Ball v Ray* was using his house (in a residential street) was as a stable for keeping horses. Mellish LJ (at p 471) agreed with the Lord Chancellor that:
>
> > "when in a street like Green Street the ground floor of a neighbouring house is turned into a stable, we are not to consider the noise of horses from that stable like the noise of a pianoforte from a neighbour's house, or the noise of a neighbour's children in their nursery, which are noises we must reasonably expect, and must to a considerable extent put up with."
>
> See also *Broader v Saillard* (1876) 2 Ch D 692, another case concerning a stable in a residential street, where this passage was quoted with approval and the principle applied.

25. One aspect of this core principle is that an occupier cannot complain if the use interfered with is not an ordinary use. In *Robinson v Kilvert* (1889) 41 Ch D 88 the claimant rented a warehouse in which he stored a particularly delicate and sensitive type of paper. Heat rising from the defendant's cellar underneath the warehouse floor damaged the paper although it would not have affected ordinary paper and was not sufficient to interfere with the ordinary use of property for the purposes of residence or business (p 94). The Court of Appeal held that the defendant was not liable in nuisance. Cotton LJ, at p 94, rejected the notion that something can be a nuisance "because it does harm to some particular trade in the adjoining property, although it would not prejudicially affect any ordinary trade carried on there, and does not interfere with the ordinary enjoyment of life". As Lord Robertson said, giving the judgment of the Privy Council in *Eastern and South African Telegraph Co Ltd v Cape Town Tramways Co Ltd* [1902] AC 381, 393: "A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure."

…

27. The other aspect of this core principle is that, even where the defendant's activity substantially interferes with the ordinary use and enjoyment of the claimant's land, it will not usually give rise to liability if the activity itself is no more than an ordinary use of the defendant's own land. In the leading case of *Bamford v Turnley* (1862) 3 B&S 66, 83, Bramwell B formulated a test which has since been regularly cited, approved and applied, including at the highest level. He gave what were then contemporary examples of acts such as "burning weeds, emptying cess-pools" and "making noises during repairs" which (unless done maliciously and without cause) would not be treated as nuisances, even when they caused material inconvenience or discomfort to neighbouring owners. He then said at pp 83-84.

> "There must be, then, some principle on which such cases must be excepted. It seems to me that that principle may be deduced from the character of these cases, and is this, viz, that *those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action.*" (Emphasis added.)

Bramwell B justified this principle in the following way:

> "There is an obvious necessity for such a principle as I have mentioned. It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbour's land, he himself

> will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live."

28. Subsequent cases have shown that this justification is not limited, as Bramwell B suggested, to situations where the reciprocal nuisances "are of a comparatively trifling character". The rule of "give and take, live and let live" applies wherever a nuisance results from the ordinary use of land. In *Southwark London Borough Council v Tanner* [2001] 1 AC 1 adjoining flats had been built without insulation, with the result that, as described by Lord Hoffmann at p7:

> "The tenants can hear not only the neighbours' televisions and their babies crying but their coming and going, their cooking and cleaning, their quarrels and their love-making. The lack of privacy causes tension and distress."

The noise from the neighbours' activities thus caused a substantial interference with the ordinary use and enjoyment of the claimants' flats. But the House of Lords held that this interference was not an actionable nuisance because the neighbours were doing no more than making normal use of their flats. The two conditions of Bramwell B's test were satisfied, as the acts complained of were (i) necessary for the common and ordinary use and occupation of land, and (ii) "conveniently done" – that is to say, done with proper consideration for interests of neighbouring occupiers: see pp 16C-D (Lord Hoffmann) and 21A-B (Lord Millett). Lord Hoffmann stated, at p 15F-G:

> "… I do not think that the normal use of a residential flat can possibly be a nuisance to the neighbours. If it were, we would have the absurd position that each, behaving normally and reasonably, was a nuisance to the other.""

57. For present purposes, I would extract three specific propositions from those paragraphs, none of which I believe to be in dispute: (1) there is a distinction to be drawn between the general and ordinary use of land (sometimes called the common and ordinary use), on the one hand, and a particular and uncommon use (sometimes called a special or sensitive use), on the other hand: para 24 of *Fearn*. (2) A claimant cannot complain of nuisance by a neighbour if his use is not common and ordinary but is instead particular and uncommon: para 25 of *Fearn*. I would add that an exception to this is where malice is proved – not in issue in this case or in *Fearn*. (3) A defendant will not be liable, even where his use substantially interferes with that of his neighbour, if his use is common and ordinary *and* is done conveniently: para 27 of *Fearn*. Conveniently means "done with proper consideration for the interests of neighbouring occupiers": para 28 of *Fearn*.

58. In my view, the judge had those three propositions well in mind. They are reflected in the judge's summary of the law (judgment, para 53) and they are present throughout his reasoning.

59. In this case, however, the issue was not whether there was a sensitive aspect to ROP's business, because it was always part of ROP's case that the falcons were sensitive to noise and visual disturbances during the breeding season. The issue in this case was more nuanced; it was whether the degree of sensitivity of these birds meant that the claimants' use of their land was special or uncommon, or whether that use could still be categorised as common and ordinary, notwithstanding the aspect of sensitivity. That was the issue raised on the pleadings.

60. That leads to a question whether the law of nuisance permits or envisages the possibility of a common and ordinary use of land which has some special or sensitive feature attached to it, or whether the existence of that element of sensitivity means that the use is not common and ordinary at all.

61. In my judgment, the authorities show that it is possible to have a common and ordinary use of land which has sensitive aspects. The case which is closest on its facts to this case, and which demonstrates that possibility, is a Scottish case, *Western Silver Fox Ranch Ltd v Ross and Cromarty Council* [1940] SC 601, where the council's contractors had blasted a road bridge in order to excavate its foundation causing damage to female silver foxes in breeding pens on neighbouring land. The vixens had been terrified by the noise and had aborted or destroyed their cubs leading the silver fox farm to bring an action for damages in nuisance and negligence against the council. The case report records that silver fox vixens during the breeding season are "highly nervous animals" and if unduly disturbed during that time as by excessive noise many of them may abort or destroy their cubs, which was what had happened in response to the noise caused by the blasting operations (p 602). In their defence on nuisance, the council argued that the pursuers, in rearing silver foxes, had put their land to a special or non-natural use (p 603). Lord Patrick rejected the council's case and ordered damages in nuisance (and negligence). On the issue of use, he concluded that breeding foxes was a type of stock breeding which was in turn an ordinary and common use of land, despite the particular sensitivity of the foxes during the breeding season. He said this (p 606, emphasis added):

> "… I do not regard the use of land for the breeding of silver foxes as a non-natural use of land. The use of the land for the breeding of stock is one of the most natural uses. It is true that the silver fox is not indigenous to this country, but that, in my opinion, cannot make the use of land for breeding it an unnatural use. Neither Frisian cattle nor Jersey cattle are indigenous to this country, yet I do not think it would occur to anyone that the use of land in Scotland for the breeding of these animals is a non-natural use of property. **It is also true that silver foxes in the breeding season are more nervous than our domestic animals, and may more readily abort or eat their young when subjected to unusual disturbance, such as blasting in the neighbourhood.** This, however, does not alter the quality of the risk to which he who blasts subjects their neighbour, but only the quantity of the damage the neighbour may suffer. Thus, upon

> the uncontradicted evidence of the witness Dallas, who has been connected with the breeding of animals all his life, some of the sows in a pig-breeding farm would have been affected by the blasting in this case, just as the silver fox vixens were, and with similar results. In my opinion the damage which occurred in this case was the natural consequence of the defenders' acts, as defined in *Rylands v. Fletcher*, and was not occasioned by a non-natural use of their land by the pursuers."

62. Another case to similar effect is *Emms v Polya* [1973] EGC 906, where a playwright complained of nuisance from the defendant's noisy building work next door. The judge (Plowman J) identified two issues: whether the noise was such as materially to interfere with the ordinary comfort and use of the property or whether it affected the playwright only because he was "hypersensitive"; and secondly, if there was interference, whether the defendant had used proper care and skill to avoid causing a nuisance. On the first point, the judge found that the playwright "expected and felt entitled to a higher degree of quiet than an ordinary man who had a flat in a residential part of Hampstead would expect" – in other words, as I read it, was particularly sensitive to noise. Nevertheless, the judge held that the noise amounted to a nuisance. On the second point, the defendant had taken "no precautions whatsoever" to mitigate the effect of his operation. The playwright recovered damages. That conclusion is consistent only with a finding that the playwright was using his flat in an ordinary and common way, even if he was particularly sensitive to noise. The defendant substantially interfered with that ordinary and common use and did so without proper consideration so was liable for damages, quantified by reference to the playwright's sensitivity and the loss of his ability to write due to the nuisance.

63. There are a number of other authorities which lend support to that central proposition, although they are more distant on their facts. In *Cooke v Forbes* (1867-68) LR 5 Eq 166, the claimant manufactured cocoa matting using a particular bleaching agent, chloride of tin, on land adjacent to the defendant's manufacturing premises which emitted sulphuretted hydrogen which caused the chloride of tin to discolour. The defendant argued that the plaintiff was using an unusual process and that because they were carrying on their business in an extraordinary way (by the use of chloride of tin which was apt to discolour), the court should not interfere (p 170). The Court held that the question whether any damage had been done and the extent of that damage was one of fact (p 171) and that the plaintiff was entitled to carry on a business using chloride of tin (p172) even if that was a trade of "great delicacy" (p 173). Because the nuisance had only arisen three times in four years, an injunction was refused and the plaintiff was left to pursue his case "if he thinks he can get damages"; but the case was not dismissed *in limine* on the basis that the claimant's trade was sensitive.

64. In *Hoare and Co v McAlpine* [1923] 1 Ch 167 (a case referred to in *Fearn* at para 66) the judge (Astbury J) rejected the defendant's case that the claimant's building was a "delicate and fastidious erection" whilst accepting that, as an old building, it was less robust than modern buildings (p 175). The defendant was found liable for the damage caused by the vibration from pile driving during construction works, notwithstanding the fragility of the building. Part of the judge's reasoning was that: "If the defendants' contentions of law were really apposite, I should find it difficult to answer the query: 'When does an old building lose its ordinary right of protection against destruction?' "

65. Lord Leggatt discussed *Hoare v McAlpine,* and in particular, Astbury J's question, in *Fearn.* He said this:

> "67. I think this question [from *Hoare v McAlpine*] is apt because it highlights the hopeless uncertainty and endless scope for argument that would arise if the sensitivity of the claimant's property were in general regarded as itself giving rise to a defence to a claim for nuisance. The law of nuisance would be unworkable, and the protection which it provides to homeowners seriously enfeebled, if it were treated as an answer to a claim for nuisance – as the judge treated it in this case – that the claimant would not have had a complaint in nuisance if, instead of her actual property, she had lived in a "differently built, but perfectly acceptable, property" (see para 211)"

66. Rejecting Tate's submission that there was no nuisance because the claimants' flats were by their design particularly sensitive to being overlooked, Lord Leggatt said this (emphasis added):

> "72. … the general relevance of sensitivity in the design and construction of buildings is that it makes neighbouring owners **more vulnerable to interference from one another's activities. But such sensitivity does not alter the principles by which their reciprocal rights and obligations are determined.** If an occupier is merely using her premises in a common and ordinary way and acting with as much consideration for neighbouring occupiers as can reasonably be expected, then she will not be liable in nuisance. The design of the building may in that way result in an occupier having to put up with greater interference with the ordinary use and enjoyment of her property than she would otherwise have to put up with – but only to the extent required to enable her neighbour to use his own property for the ordinary purposes of life."

This passage suggests that the existence of some sensitive aspect (of design, or by parity of reasoning, of use) does not alter the way the principles are to be applied, and does not necessarily mean that the use is itself sensitive (as opposed to common and ordinary).

67. Finally, I note *McKinnon Industries Ltd v Walker* [1951] 3 DLR 577 in which the Privy Council dismissed an appeal from the Court of Appeal for Ontario which had upheld the trial judge's grant of an injunction to stop the appellant company from discharging smoke, vapours and noxious matter onto the respondent's land causing damage to the respondent's business as a commercial florist and grower. The appellant argued that the injunction should be modified to exclude damage to orchids from its scope, on the basis that the growing of orchids was a "particularly difficult and delicate operation". The Privy Council rejected that argument, holding that "there is no reason to treat damage to orchids differently from damage to any other flower plant or shrub …". This too is an illustration of the principle that a sensitive aspect can be accommodated as part of ordinary use within the law of nuisance.

68. Plainly there comes a point where a person's use of land is *so sensitive* that it ceases to be common or ordinary and becomes special or uncommon. Where that point lies is a matter of fact and degree and is heavily dependent on the evidence. Two cases referred to in *Fearn* (and relied on by Mr Weekes, in particular) are illustrative. In those cases, the use of land was held not to be common and ordinary but to be special or unusual or uncommon, because of the sensitivity of the business operation taking place on that land. The first case is *Robinson v Kilvert* (1889) 41 Ch D 88, where the landlord's use of a cellar for manufacturing purposes created heat which interfered with his upstairs tenant's paper business by discolouring one particular sort of paper which was sensitive to heat. The landlord was unaware when the upstairs floor was let that the tenant would store any kind of paper which was liable to deteriorate with heat. Cotton LJ held that:

> "Here it is shewn that ordinary paper would not be damaged by what the Defendants are doing, but only a particular kind of paper, and it is not shewn that there is heat such as to incommode the workpeople on the Plaintiff's premises. I am of opinion, therefore, that the Plaintiff is not entitled to relief on the ground that what the Defendants are doing is a nuisance." (p 94)

The other members of the court (Lindley and Lopes LJJ) gave concurring judgments, including this from Lopes LJ (emphasis added to pinpoint the origin of the phrase "exceptionally delicate" which is used in the ADCC, para 26):

> "I am of the same opinion. I think the Plaintiff cannot complain of what is being done as a nuisance. A man who carries on an **exceptionally delicate** trade cannot complain because it is injured by his neighbour doing something lawful on his property, if it is something which would not injure anything but an exceptionally delicate trade. … In the present case the Defendants are not shewn to have done anything which would injure an ordinary trade, and cannot, in my opinion, be held liable on the ground of nuisance."

69. The second case is *Eastern and South African Telegraph Co Ltd v Cape Town Tramways Companies Ltd* [1902] AC 381, determined by the Privy Council on appeal from the Supreme Court of the Cape of Good Hope. Electricity from the respondent's tramway interfered with the appellants' underground and underwater cable system. Lord Robinson held that that the appellants could not recover damages for nuisance because of the special and sensitive nature of their use of land:

> "… the appellants, as licensees to lay their cable in the sea and as owners of the premises in Cape Town where the signals are received, cannot claim higher privileges than other owners of land, and cannot create for themselves, by reason of the peculiarity of their trade apparatus, a higher right to limit the operations of their neighbours than belongs to ordinary owners of land who do not trade with telegraphic cables. If the apparatus of such concerns requires special protection against the operations of their neighbours, that must be found in legislation; the remedy at present invoked is an appeal to a common law principle which applies to much more usual and less special

> conditions. A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure. The principle of *Rylands v. Fletcher* (1), which subjects to a high liability the owner who uses his property for purposes other than those which are natural, would become doubly penal if it implied a liability created and measured by the non-natural uses of his neighbour's property. Nor need the law be regarded as shewing any want of adaptability to modern circumstances if this be the true view, for the liability thus limited is of insurance and not for negligence, and all the remedies for negligence remain." (p 392-393).

70. Interestingly, to me at least, both of these cases (*Robinson v Kilvert* and *Eastern and South African Telegraph Co*) involve defendants who were conducting their businesses in perfectly ordinary ways without any knowledge of the possibility of damage to the claimants' business. The damage to the claimants' business was unanticipated and unforeseen, and by means which would not normally cause any problem at all – mild heat in the first case and electricity currents in the second. That may go some way to explaining why the court held, in both cases, that the defendants were not liable. That is to be contrasted with cases like *Western Silver Fox, Emms v Polya* and *Cooke v Forbes* where the defendant's actions were much more egregious: blasting foundations, demolition works all day and at evenings and weekends and projecting noxious substances onto a neighbour's land. That may go some way to explaining why the defendants in those cases were liable.

71. I mention one more case, *Hollywood Silver Fox Farm Ltd v Emmett* (1936) All ER 826, cited by Mr Weekes. I am not persuaded that case is helpful to him or indeed of any real assistance in this appeal. In that case the court granted an injunction and damages in favour of the owner of a fox farm in Kent who had suffered loss as a result of his neighbour's discharging of cartridges on his own neighbouring land. The defence mounted was that the fox farm was not an ordinary use of land given that the foxes were highly nervous and not native to Kent, unlike cattle or sheep which the defendant accepted would be ordinary use (p 828). That defence was not adjudicated by the court, because the shooting was held to have taken place intentionally (ie, with malice) and the claim succeeded on that basis (per Macnaghten J at p 829). As I read the case, the finding of malice meant that the issue of use (whether ordinary or sensitive) became irrelevant and fell away. It is not possible to take from this case that the use must have been sensitive and that, but for malice, the claimants would have failed: they might or might not have done depending on the court's conclusion on the character of the claimants' use, which was the very point which was left undetermined.

72. There is no bright line which separates ordinary and common use from special and sensitive use. That should not come as any surprise: these cases are all evidence- and fact-dependent; indeed, on their facts there may very well be cases which could go either way. But the issue on this appeal, at this point, is whether it was *open* to the judge as a matter of law to find that the claimants' use was common and ordinary even though it had sensitive features. In my view it was open to the judge so to find, on the basis of previous authority.

73. I would be surprised were that not to be the case. It seems obvious to me that there are ordinary and common uses of land which have sensitive aspects attached to them. Stock

breeding is an example. The breeding of pigs, cattle or sheep is an ordinary activity in rural areas, as seems to have been accepted in some of these cases even though each type of stock may be sensitive at particular times of year and in particular ways - typically, that sensitivity will occur around the breeding season.

74. The issue seems to me not to centre on whether an ordinary business can be sensitive in some way or ways but as to the degree of sensitivity of that business, and whether that degree of sensitivity, judged by reference to locality (as to which see below), takes the use out of the category of ordinary and common and makes it special or uncommon.

75. In summary, it was open to the judge to conclude that the claimants' use of their land for breeding falcons and other birds was common and ordinary, even if the birds were sensitive at some times of the year. I turn then to the locality principle (or "locale" as the judge called it) which underpinned the judge's ultimate conclusion that the claimants' use was indeed ordinary or common.

(ii) The Locality Principle

76. The locality principle finds its origins in cases like *Sturges v Bridgman* (1879) 11 Ch D 852 where the question was whether the defendant's industrial machinery used for his confectionery business was a nuisance to his neighbour, a physician, who had built his consulting room along the party wall. Thesiger LJ gave the judgment of the Court, finding that the nuisance was established. He held that locality was relevant to whether the defendant's acts amounted to a nuisance:

> "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" (p 865).

77. The principle is applicable both ways, to questions of claimant's and defendant's use, as *Fearn* demonstrates: in the course of examining the defendant's use, Lord Leggatt referred to two cases about stables in residential streets (*Ball v Ray* (1873) LR 8 Ch App 467, 470 and *Broder v Saillard* (1876) 2 Ch D 692), to make the point that *where* the land is situated is relevant to the classification of *how* it is used (para 24); Lord Leggatt emphasised the reciprocal nature of the duties owed by neighbours, applying the same set of rules to claimant and defendant (para 35); and he explained the locality principle drawing on *Sturges v Bridgman,* in terms that confirmed the universality of its application to questions of use (paras 38-41).

78. The proposition that locality is relevant to questions of use, whether by claimant or defendant, is supported by a recent decision of the High Court of Australia *Hunt Leather Pty Ltd v Transport for New South Wales* [2025] HCA 53, in this passage in the judgment of Gordon and Edelman JJ (with Beech-Jones J, who also agreed on this point, in the majority, emphasis added):

> "From the perspective of a plaintiff, it has been established since *Walter v Selfe* that a claim for interference with the plaintiff's right to land can only be brought for private nuisance if there is "material discomfort and annoyance for the ordinary purposes of life to a [person's] house or… property". That principle, also

> well recognised in Australia, requires for a claim for private nuisance that a plaintiff establish a substantial interference with the plaintiff's enjoyment of land for purposes that are **ordinary, in the sense that the purposes are consistent with the reasonable expectations of the locality as to the use of that land**."

79. The question of use, judged according to locality, is one of fact: see *Lawrence v Fen Tigers* [2014] AC 822 (per Lord Neuberger with whom the other members of the Court agreed):

> "59. The assessment of the character of the locality for the purpose of assessing whether a defendant's activities constitute a nuisance is a classic issue of fact and judgment for the judge trying the case. Sometimes, it may be difficult to identify the precise extent of the locality for the purpose of the assessment, or the precise words to describe the character or the locality, but any attempt to give general guidance on such issues risks being unhelpful or worse."

80. In this case, the judge examined and applied the locality principle at paras 327 to 334 of the judgment (set out at paragraph 31 above). The question for him was whether ROP's business, with its sensitivity during the breeding season, was common or ordinary *for its location*. He was in my judgment correct to consider the issue of sensitivity alongside the issue of locale (as he said in terms: see judgment, para 58). The judge's conclusion that this was a "suitable location" (judgment, para 334) was a finding that, taking location into account, this was an ordinary use. That conclusion was based on the evidence about other falcon breeding businesses in the locality and about Martin's own long history of breeding falcons in that precise place, and it took account of the rural location. It also took account of the degree of sensitivity of the falcons, as to which the judge had heard expert evidence (rejecting Mr Forbes' evidence that the birds were "stress monsters" in favour of Mr Garland's evidence that they could withstand noise without stress except for sudden and excessive noise or disturbances during the breeding season). Drawing on all that had gone before, this was to conclude that the breeding of falcons (and other birds) was common and ordinary use in that place; just as industrial use would be common and ordinary in Bermondsey but not in Belgravia (cf *Sturges v Bridgman*). I see no error of law in the judge's approach or conclusion.

81. I have seen the judgments of Nugee and Moylan LJJ in draft and I note with regret that we disagree on nuisance. This is one key point of disagreement. Nugee LJ understands the judge to have concluded that the claimants' land was suitable for breeding falcons and *therefore* this does not qualify as special or unusual use but as ordinary use (see eg paras 112, 132 and 134 below). That is not how I read the judgment. I understand the judge to use the words "suitable location" at para 334 (and elsewhere) as a shorthand for his conclusion about the claimants' use of the land, taking locality into account. Moylan LJ suggests that the judge wrongly relied on the locality principle to convert what was special use into ordinary use (see eg para 172 below). But *Sturges v Bridgman* expressly envisages that a use which is special in one place may be ordinary in another place – so that the character of the locality is, and should be, part of the evaluation of use. For reasons I have already given (see above paras 50-53), I think the judge had the

right question in view and made a finding about the claimants' use of their land in answer to that question, taking locality into account. I do not consider the judge to have fallen into error.

(iii) Substantial Interference

82. Lord Leggatt addressed the issue of substantial interference in *Fearn* in the following way:

> "Courts have adopted varying phraseology to express the point that the interference with the use of the claimant's land must exceed a minimum level of seriousness to justify the law's intervention. The terms "real", "substantial", "material" and "significant" have all been used. Put the other way round, the courts will not entertain claims for minor annoyances. As Lord Wensleydale said in *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642, 653-654: "the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected." "

83. The judge acknowledged the objective nature of the test and the threshold of seriousness (not small or trifling inconveniences) at paragraph 53(4) of his judgment.

84. Mr Weekes submits that the judge misapplied the test by examining only the extent of interference with the sensitive falcon breeding business. But once it was established that the claimants were using their land for common or ordinary use, the question was whether there was substantial interference with *that use*, not whether there was interference with an aspect of that use which happened to be sensitive. Mr Weekes is in error, in my judgment, in seeking to split out different aspects of the claimants' land use in order to argue that the interference was only with the sensitive part of that use so that it can be disregarded. This was in effect what Lord Leggatt warned against in *Fearn* at paragraph 67 (the "hopeless uncertainty and endless scope for argument").

85. In any event, the facts are not with Mr Weekes on this point. The judge found there was nuisance by noise, vibration and visual disturbance. The last was unusual (and I shall consider it below) but the notion that noise and vibration may interfere with a neighbour's use and amenity of land is well-established. The judge found that there was excessive noise from the scaffolding business, a finding based on Martin's evidence about the noise of the poles being dropped making a loud clanging noise of metal on metal; the judge took judicial notice of the "significant" level of noise that would cause (judgment, paras 363-369). The judge found that there was excessive noise and one instance of vibration by the carrying on of building work by UCE using a mechanical digger or tractor; the particular activities included loading blocks of granite on and off a steel trailer and pecking out granite for the barn area. Those findings were based on four videos (which this court has not seen) taken from inside the incubation room which is lined and insulated (judgment, para 380) and the oral evidence of Karen Nicholas (judgment, paras 378-383). The judge recorded that the noise went on for long hours and was at antisocial times. One of the reasons Karen Nicholas complained was that it was a bank holiday. She said that the noise was stressing Martin and the family too (judgment, paragraph 381). True it is that ROP

relied on the adverse effect of that noise on the birds. But, in context, that is hardly surprising: the whole point of this claim was to recover damages for lost business profits in the falcon breeding business, and it was that business and the damage to it which was central. In response to the mass of evidence before the judge, he found that the defendants had created "excessive" noise. He did not say that the noise was excessive by the standards of breeding falcons only; nor did he suggest that the noise would not have caused difficulty to other birds or animals. He just said the noise was excessive. I take that to be a general finding about the nature and severity of the noise interference.

86. Here too, with regret, I depart from Nugee LJ in my understanding of the judge's findings. Nugee LJ suggests that the judge's findings were limited to noise which was excessive for falcons in the breeding season, see paras 142-143 below. But on a fair reading of the judgment as a whole (which answered the pleadings and the points put by the advocates, experts and witnesses) I understand the judge's findings to be more general in character. After all, clanging scaffolding poles and drilling out bedrock for long periods are very ordinary types of nuisance, likely to create a serious interference with any neighbour's enjoyment of their land, measured on any objective standard.

87. To the extent that this case is about excessive noise or vibration, it is much more like the cases where the court found nuisance to be established: for example, *Western Silver Fox, Emms v Polya* or *Selfridge v Andreae.* In these cases, the noise was excessive *and* done without due consideration for the neighbour; indeed, it might be said that the use of the word "excessive" itself suggests a lack of care in controlling the amount of noise generated. This is not a case like *Robinson v Kilvert* or *South African Telegraph v Cape Town Tramways* where the actions complained of were harmless (mild heat undetectable by employees and electricity from tramlines) *except for* the effect they had on the neighbour's sensitive business.

88. A separate strand of the judge's findings relates to the visual disturbance caused by the elevated bucket on the digger, a kind of nuisance very different from the noise disturbance. The judge's reasons for finding this to constitute nuisance are that Mr Thomas knew full well that leaving his digger in that position would harm the birds; if not deliberate, it was at least careless of him to act in this way. The digger could easily have been parked elsewhere and the problem avoided. This, then, was an instance of the defendants' operations – as part of their common and ordinary use - substantially interfering with the claimants' use by not being "conveniently done". That was, I think, a conclusion open to the judge on the evidence. But even if that finding went too far, because a raised digger bucket should not have been characterised as a nuisance (noting Nugee LJ's points at paras 137-139 below), I do not think it undermines the judge's reasoning elsewhere, where he dealt with more conventional types of nuisance.

89. Mr Weekes also suggested that the judge wrongly conflated the claimants' use of land, a land law concept which was objective in its content, with ROP's business on that land which was subjective; and that the judge wrongly measured substantial interference by reference to the latter. In many of the authorities referred to above, the court has looked at the way the claimant uses the land in question in order to identify whether that use has been the subject of substantial interference, assimilating the claimant's business (or a business which the claimant permits to be operated from the claimant's land) with the use of the land. I am not persuaded that the judge went wrong in the manner suggested. I would respect his finding that the defendants' actions caused serious interference to the claimants' use of their land.

(iv) Done Conveniently

90. In a passage I have already cited from paragraph 27 of *Fearn,* Lord Leggatt referred to *Bamford v Turnley* (1862) 3 B&S 66 at 83 where Bramwell B formulated the test (which has since been regularly cited, approved and applied) that "acts necessary for the common and ordinary use and occupation of land and houses may be done, *if conveniently done*, without subjecting those who do them to an action" (emphasis added). Lord Leggatt said at paragraph 28 that this meant "with proper consideration for the interests of neighbouring occupiers".

91. The principle is illustrated by *Southwark London Borough Council v Tanner* [2001] 1 AC 1 where adjoining flats had been built without insulation with the result that tenants could hear precisely what their neighbours were doing. Despite the substantial interference with the ordinary use and enjoyment of the claimants' flats caused by this noise pollution, the claimants' action failed because the neighbours were doing no more than making normal use of their own flats in a way that was conveniently done. Lord Hoffmann put it this way:

> "… it may be reasonable to have appliances such as a television or washing machine in one's flat but unreasonable to put them hard up against a party wall so that noise and vibrations are unnecessarily transmitted to the neighbour's premises. But I do not understand how the fact that the appellants' neighbours are living in their flats can in itself be said to be unreasonable." (p 16)

92. A further illustration of the principle is found in *Andreae v Selfridge & Co Ltd* [1938] 1 Ch 1, where excessive noise and dust from Selfridge's building works (a common and ordinary use) was held to be a nuisance because it interfered substantially with Ms Andreae's hotel (a common and ordinary use). The court accepted that *if* Selfridge had carried on the building works with reasonable and proper precautions to save annoyance to neighbours, then Ms Andreae would not have had any recourse, even if the building works had lost her custom (per Sir Wilfred Greene MR at p 7); but the evidence showed that the amount of grit and dust produced by Selfridge's building operation was "quite insufferable" and that Selfridge had not taken all reasonable and proper precautions to avoid annoyance to neighbours (p 8). Sir Wilfred Greene described the duty in these terms (p 9-10, emphasis added):

> "Those who say that their interference with the comfort of their neighbours is justified because their operations are normal and usual and conducted with proper care and skill are under a specific duty, if they wish to make good that defence, to use that reasonable and proper care and skill. It is not a correct attitude to say: "We will go on and do what we like until somebody complains." That is not their duty to their neighbours. **Their duty is to take proper precautions, and to see that the nuisance is reduced to a minimum. It is no answer for them to say: "But this would mean that we should have to do "the work more slowly than we would like to do it, or it would involve putting us to some extra expense."** All those questions are matters of common sense and degree, and quite clearly it would be unreasonable to expect people to conduct their work so

> slowly or so expensively, for the purpose of preventing a transient inconvenience, that the cost and trouble would be prohibitive. **It is all a question of fact and degree, and must necessarily be so.** In this case the defendant company's attitude seems to have been to go on until somebody complained, and, further, that its desire to hurry its work and conduct it according to its own ideas and its own convenience was to prevail if there was a real conflict between it and the comfort of its neighbours. That, to my mind, is not carrying out the obligation of using reasonable care and skill."

93. The judge was right to have regard to the *way* in which the defendants acted on their own land, to the extent they were involved in ordinary and common use of that land (for building work and use of the mechanical digger, at least). This was in line with authority. The judge's conclusion was a matter of assessing the fact and degree of the defendants' efforts to reduce the nuisance to a minimum; that conclusion was based on the evidence; there is no appeal against his conclusion that in the various ways identified the defendants did not act "conveniently".

Summary on judge's approach to nuisance

94. I have not detected any error of law in the judge's approach. His summary of the core legal principles in the judgment at para 53, noting paragraph 53(4) in particular, was materially correct. His directions of law in immediately subsequent paragraphs (noting paragraphs 54-67, but excluding paragraph 59 where it is agreed that he made a non-material error) are also materially correct. At paragraph 58 of his judgment, the judge referred to use, judged by locality, being "too sensitive for the surroundings". "Too sensitive" is not the language of *Fearn* but the judge explained what he meant in the next sentence, in terms which are unobjectionable: the court must consider what might reasonably be expected in that locality when determining the character of a claimant's use. That is to restate *Fearn,* paras 24, 38-41. In this case, it was reasonable to frame the issue in those terms, because it was agreed on all sides that the falcons were sensitive during the breeding season and the question for the judge was *how sensitive*. At paragraph 60 of the judgment, the judge rejected the defendants' case that ROP's use could not be common and ordinary because the falcons were sensitive during the breeding season; sensitivity was an issue to be considered on the evidence, and was not necessarily incompatible with common or ordinary use.

95. The judge applied the legal principles he had summarised in these paragraphs to the facts as he found them. His finding at paragraph 334, as it should fairly be understood (as to which, see above), was open to him and was based on a correct understanding of the law. He was right to consider ROP's use taking account of the location of that land and the degree of sensitivity that use involved. These concepts are connected and an overall evaluation, based on the evidence, was required. It was open to him to conclude that the defendants' actions constituted a serious interference with ROP's use of that land. In reaching his final conclusion on liability, he was right to take account of the defendants' own failure to use UCE's land "conveniently", to the extent the use was common and ordinary.

(3): What is the answer to the Nuisance Grounds?

96. Grounds 1, 2 and 3 all refer to "sensitive trade". As discussed above, the judge rejected the defendants' case that the ROP was carrying on a sensitive trade, holding instead that ROP's use was ordinary or common, albeit one with some sensitivity around the breeding season. Mr Seitler is right to say that the factual predicate underpinning the Nuisance Grounds is simply not made out.

97. The issue of the *degree of sensitivity* was squarely before the judge. Mr Garland gave evidence that the falcons were not all that sensitive, they could live around noise and would get used even to quite loud noise, but in the breeding season unexpected "shock noise" and visual disturbances would cause them stress so care had to be taken. In contrast, Mr Forbes gave evidence that the falcons were "stress monsters". The judge accepted Mr Garland's evidence and by necessary implication rejected Mr Forbes' differing view. That water has flowed under the bridge and the findings of fact based on tested expert evidence stand. This was not an extremely sensitive business but a business with some sensitivity around breeding time. (Here too I depart from the view of Nugee LJ at paras 110 and 133 below, and Moylan LJ at paras 168, 172 and 174 below. I do not believe it is open to this Court to characterise ROP's business as sensitive because the nature of the use was for the judge at first instance to determine on the evidence: see *Cook v Thomas* and *Lawrence v Fen Tigers,* amongst other cases.)

98. I am not persuaded that the judge wrongly increased the defendants' liability by reference to a special use or sensitive trade, as is pleaded in ground 1. My reasons have already been set out, but in summary: the judge decided that the claimants' use (by ROP) was common and ordinary and that the defendants had caused a substantial interference with that use by their actions, which, to the extent they were part of the UCE's ordinary and common use, were not done conveniently (ie, with sufficient neighbourly consideration or give and take). Those findings were open to the judge.

99. I am not persuaded that the judge invented a new principle as pleaded in ground 2. My reasons have already been set out (and are the same, essentially, as in the previous paragraph). The judge did not measure the interference with ROP's use by reference to any sensitive trade but by reference to the ordinary and common use which he had found to exist.

100. Ground 3 raises the same point as ground 2, which I have already addressed (see preceding paragraph). It is suggested as part of this ground that the defendants took all reasonable steps to ensure that interference with ROP's use was kept to a minimum. But that suggestion is not open to the defendants in light of the judge's findings that the defendants' actions were unreasonable and careless.

101. In the alternative, ground 3 suggests that the defendants' use is, in consequence of the judgment, unduly inhibited. I am not persuaded of that. The reasonableness of what the defendants should have done and might in future do is to be assessed according to the established standard set out in *Bamford v Turnley* (1862) 3 B&S 66, a case cited in *Fearn*. I think the defendants greatly exaggerate the impact on the use of UCE's land of the duty to act with reasonable regard for their neighbour's land use. After all, the problem only arose in 2022 even though the claimants and the defendants had been adjacent landowners for some years before that and in previous years problems had been avoided through good communication and the ordinary give and take expected

between neighbours. Some guidance as to what might be reasonable was given in *Andreae v Selfridges* at p10:

> "The use of reasonable care and skill in connection with matters of this kind may take various forms. It may take the form of restricting the hours during which work is to be done ; it may take the form of limiting the amount of a particular type of work which is being done simultaneously within a particular area; it may take the form of using proper scientific means of avoiding inconvenience. Whatever form it takes, it has to be done, and those who do not do it must not be surprised if they have to pay the penalty for disregarding their neighbours' rights."

102. This duty applies to all neighbours; it will not restrict unduly a neighbour's use; but what precisely is required in any given situation must, I think, depend on the facts of the particular case, including the location and the parties' state of knowledge.

103. There is one further element of ground 3 that I must deal with, and that is Mr Weekes' attempt to persuade the court to overturn the judge's conclusion that the scaffolding business conducted on UCE's land was not common and ordinary use, contrary to the findings of the judge (judgment, paragraph 364). Mr Weekes recognised the difficulty of this submission. I would not interfere with the judge's findings in relation to the scaffolding business. They were findings on the evidence and I think the conclusion that the scaffolding business was not common and ordinary use, taking account of locality, was open to the judge on the evidence. It follows that any substantial interference by the defendants with ROP's use as a result of the *scaffolding business* was and would in future be a nuisance, without more. The barn building and use of the mechanical digger are ordinary uses of UCE's land and those activities must be "conveniently done" if the defendants are to avoid liability in the event of substantial interference.

(4): Does the law of negligence provide an alternative basis for liability, in answer to the Negligence Ground?

104. The judge held in ROP's favour on the alternative basis that the defendants had been negligent. On this issue too, I have been greatly assisted by reading in draft the judgments of Nugee and Moylan LJJ. In the alternative, I would agree with Nugee LJ that ROP should succeed in negligence. The required proximity and foreseeability of damage was established on the evidence and it was, on these rather stark facts, fair and reasonable to impose a duty of care on the defendants. A key element in the judge's analysis of negligence was Mr Thomas' awareness that the activities on UCE's land during the breeding season were likely to harm the falcons held in the Western pens, which harm could reasonably have been avoided by working around the breeding season (judgment, para 398). I agree with Nugee LJ's view (para 161 below) that the defendants should not be able to act with complete disregard for the interests of their neighbours in the way they have done. I am struck by the injustice of the outcome, in the context of the judge's findings, if Moylan LJ's view on (nuisance and) negligence were to prevail.

Conclusion

105. This appeal is another chapter in this long-running saga which has consumed a great deal of time and money for both sets of litigants. In my view, this dispute was settled by the judge on 8 April 2024. He rejected the defendants' evidence of fact and expert opinion. He found that the claimants were using their land, through the business of ROP, in a way that was common and ordinary, that the defendants had acted in a way which had substantially interfered with that use through lack of care and that ROP had suffered loss and damage as a result. I would dismiss this appeal.

Lord Justice Nugee:

106. I am very grateful to Whipple LJ for setting out the facts and issues so clearly, and I will adopt the same abbreviations as her. This enables me to pass straight to a discussion of the relevant legal principles. Here however I have the misfortune to take a different view from her of the law of nuisance, and I shall try and explain why.

Nuisance

107. The most recent authoritative statement of the law of (private) nuisance is the majority judgment in *Fearn* given by Lord Leggatt. This covers many different aspects of the law, but the starting point is the passage headed "Core principles of private nuisance" at [9ff]. Here Lord Leggatt identifies the scope of private nuisance as being a material interference by the defendant with the claimant's enjoyment of rights in land: see [9] where he refers to Professor Newark's classic article on "The Boundaries of Nuisance" (1949) 65 LQR 480 and his statement that "The term "nuisance" is properly applied only to such actionable user of land as interferes with the enjoyment by the plaintiff of rights in land"; [10] where he refers to the emphatic endorsement of this thesis by the House of Lords in *Hunter v Canary Wharf Ltd* [1997] AC 655; [11] where he says that it follows that "the harm from which the law protects a claimant is diminution in the utility and amenity value of the claimant's land"; and [12] where he says that anything short of direct trespass on the claimant's land "which materially interferes with the claimant's enjoyment of rights in the land" is capable of being a nuisance.

108. The subsequent discussion shows that there are two aspects to the question of liability. The first requires one to look at the impact on the claimant's land. Not every interference with a person's use and enjoyment of their land can be actionable as a nuisance (at [18]). So an interference is only unlawful if it crosses a minimum threshold. This is sometimes referred to as "unreasonable" interference; but this is not a legal standard or a test. It is simply a conclusion that the interference has crossed the requisite threshold so as to be unlawful (at [18]-[20]). The actual test consists of two limbs: the interference must be *substantial* and it must interfere with the *ordinary* use of the claimant's land (at [21]). Lord Leggatt then expands on both these concepts, on what it is to be a *substantial* interference at [22]-[23], and on the *ordinary use of land* at [24]-[26]. The latter is to my mind the key passage for the resolution of the present case, and I will come back to it below.

109. The second aspect of the question of liability looks not at the impact on the claimant's land but on the nature of the defendant's activity. Even if the defendant's activity does substantially interfere with the ordinary use and enjoyment of the

claimant's land (so as to satisfy the first aspect), the defendant is nevertheless not liable if his activity is itself no more than the ordinary use of the defendant's own land and is "conveniently done", that is to say, done with proper consideration for the interests of neighbouring occupiers (at [27]-[28]).

110. Lord Leggatt deals with a number of other principles, but these seem to me the critical ones for the purposes of this appeal. Since a defendant's activities are only actionable in nuisance if they substantially interfere with the ordinary use of the claimant's land, it is an obvious question whether the use here by ROP of the claimants' land to raise falcons qualifies as an "ordinary use" of the land. At first blush it would seem surprising if it did. Raising falcons does not strike one as an ordinary way to use land, but as a very specialised and unusual use. How then did the judge conclude that the defendants' actions were actionable as a nuisance?

111. The answer is to be found in the following passages in the judge's judgment. At paragraph 56 (set out by Whipple LJ at paragraph 22 above), the judge said:

> "As I read the judgment in *Fearn*, a "special use" … falls to be identified by reference to what is *not* the common or ordinary use of his land having regard to the locality. Whether land is being put by the claimant to special or unusual use … cannot be answered in isolation from the locality."

Then at paragraphs 327 to 334 (set out by Whipple LJ at paragraph 31 above), under the heading "The Locale", the judge considered the site where the aviaries stood, concluding with the finding at paragraph 334 that various matters:

> "all point to this being a suitable location for the sensitive operation of breeding falcons."

Finally at paragraphs 395 to 396 (set out by Whipple LJ at paragraph 40 above), the judge concluded that the defendants' acts were actionable:

> "because they were undertaken without proper consideration of the sensitivity of ROP's birds during the breeding season"

and said that that was consistent with:

> "my assessment that ROP'[s] breeding of falcons (which includes their heightened sensitivity during the breeding season) does not fall foul of the locality principle."

112. When one reads these passages together, I think it is a fair summary of the judge's reasoning 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 Mr Seitler 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.

113. With all respect both to the judge, who evidently gave his judgment a great deal of careful thought, and to Mr Seitler'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.

114. This can be seen by the passage in Lord Leggatt's judgment where he considers the twin requirements that in order to be actionable the interference with the claimant's land must be (i) substantial and (ii) such as to interfere with the ordinary use of land. So far as the requirement that the interference is substantial is concerned, Lord Leggatt at [22] cites the statement of Lord Wensleydale in *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642 at 653f that:

> "the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected."

He continues at [23]:

> "The test is objective. What amounts to a material or substantial interference is not judged by what the claimant finds annoying or inconvenient but by the standards of an ordinary or average person in the claimant's position. As famously expressed by Knight Bruce V-C in *Walter v Selfe* (1851) 4 De G & Sm 315, 322, the question is whether the interference ought to be considered a material inconvenience "not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people"; see also *Barr v Biffa Waste Services Ltd* [2013] QB 455, para 36(ii). The objective nature of the test reflects the fact that the interest protected by the law of private nuisance is the utility of land, and not the bodily security or comfort of the particular individuals occupying it: see para 11 above."

115. Pausing there, this discussion of the "substantial" element of the test for actionability is to my mind revealing. It shows that the test for what crosses the threshold of actionability is not concerned with the particular claimant and their particular attributes and sensitivities, but with an objective standard, that of the ordinary or average person. So if the particular claimant is more than ordinarily sensitive, they cannot make a claim for things that would not materially inconvenience the ordinary person. This, as Lord Leggatt explains, is consistent with the fact that nuisance is a tort to *land*. The interest protected is not the individual claimant's comfort; it is the utility and amenity of the land itself, measured by the impact on ordinary and average occupiers.

116. A good illustration of how these principles work in practice can be found in the decision of Plowman J in *Emms v Polya* [1973] EGD 906. The plaintiff lived in a terraced house in Hampstead. The defendant carried out conversion works to the next-door house (which belonged to his wife). The plaintiff's case was that the work had been carried out in such a way as to constitute a nuisance by noise. He said that the noise was intolerable. The defendant's case was two-fold: (i) that the plaintiff was hypersensitive to noise and that no reasonable person would complain of it as a nuisance; and (ii) that even if there would otherwise be a *prima facie* case of nuisance, the defendant could bring himself within the exception in *Andreae v Selfridge & Co* [1938] Ch 1 by proving that he had carried out the works with all proper care and skill

so as to prevent a nuisance so far as possible. As can be seen, these two points reflect what I have called the first and second aspects of the question of liability, the first concerning the impact on the claimant's land and the second the nature of the defendant's activity.

117. For present purposes the relevant question is how Plowman J dealt with the first aspect. Having said that the law was not in issue, he identified the relevant question on this part of the case as follows:

> "First there was the question whether the noise was such as materially to interfere with the ordinary comfort, physically, of human existence in the plaintiff's premises according to plain, simple and sober notions among English people, or whether it affected the plaintiff only because he was hypersensitive to noise, if indeed he was."

118. He then considered that question. He concluded that the plaintiff, a playwright, was more than usually sensitive, as follows:

> "Although he said he was not unduly sensitive to noise, he (Plowman J.) took rather a different view about that. He thought that the plaintiff expected and felt entitled to a higher degree of quiet tha[n] an ordinary man who had a flat in a residential part of Hampstead would expect."

Nevertheless, he went on to conclude that a nuisance had been established, as follows:

> "But making every allowance for that, he (the judge) was nevertheless satisfied on the evidence as a whole that the degree of noise occasioned by the defendant's operations was such as to constitute a nuisance within the definition. … The cumulative effect of all the evidence was to convince him (his Lordship) that a nuisance was created."

Plowman J went on to dismiss the defendant's case on the second aspect (the *Andreae v Selfridge & Co* point) and awarded the plaintiff damages in the sum of £350.

119. This illustrates two points. First, that if the claimant is unduly sensitive in some respect, he does not establish liability by showing that his own enjoyment of his land has been affected by what the defendant has done if it would not be such as to affect the ordinary person in his position ("according to plain and simple and sober notions among the English people"). In such a case the interference caused by the defendant has not crossed the requisite threshold of seriousness, and the claimant has no claim – however much he personally has been affected by it. But second, if the defendant's interference does cross the requisite threshold, then the claimant can recover despite the fact that he is more than usually sensitive.

120. As I read Lord Leggatt's judgment in *Fearn*, similar principles apply to the other limb of the first aspect, namely that the defendant's actions must be such as to interfere with the *ordinary* use of the claimant's land. As I have said above, this is I think the key passage for resolution of the current appeal, and although Whipple LJ has largely set it out above, I repeat it here for convenience:

> "*(5) The ordinary use of land*

24 Fundamental to the common law of private nuisance is the priority accorded to the general and ordinary use of land over more particular and uncommon uses. In *Fleming v Hislop* (1886) 11App Cas 686, 691, the Earl of Selborne encapsulated this well when he defined a nuisance as "what causes material discomfort and annoyance *for the ordinary purposes of life* to a man's house or to his property" (emphasis added). In the earlier case of *Ball v Ray* (1873) LR 8 Ch App 467, 470, the same judge, when Lord Chancellor, had expressed the converse proposition that:

> "if either party turns his house, or any portion of it, to *unusual purposes* in such a manner as to produce a substantial injury to his neighbour, it appears to me that that is not according to principle or authority a reasonable use of his own property; and his neighbour, shewing substantial injury, is entitled to protection." (Emphasis added.)

The "unusual purpose" for which the defendant in *Ball v Ray* was using his house (in a residential street) was as a stable for keeping horses. Mellish LJ (at p 471) agreed with the Lord Chancellor that:

> "when in a street like Green Street the ground floor of a neighbouring house is turned into a stable, we are not to consider the noise of horses from that stable like the noise of a pianoforte from a neighbour's house, or the noise of a neighbour's children in their nursery, which are noises we must reasonably expect, and must to a considerable extent put up with."

See also *Broder v Saillard* (1876) 2 Ch D 692, another case concerning a stable in a residential street, where this passage was quoted with approval and the principle applied.

25 One aspect of this core principle is that an occupier cannot complain if the use interfered with is not an ordinary use. In *Robinson v Kilvert* (1889) 41 Ch D 88 the claimant rented a warehouse in which he stored a particularly delicate and sensitive type of paper. Heat rising from the defendant's cellar underneath the warehouse floor damaged the paper although it would not have affected ordinary paper and was not sufficient to interfere with "the ordinary use of property for the purposes of residence or business" (p 94). The Court of Appeal held that the defendant was not liable in nuisance. Cotton LJ, at p 94, rejected the notion that something can be a nuisance "because it does harm to some particular trade in the adjoining property, although it would not prejudicially affect any ordinary trade carried on there, and does not interfere with the ordinary enjoyment of life". As Lord Robertson said, giving the judgment of the Privy Council in *Eastern and South African Telegraph Co Ltd v Cape Town Tramways Co Ltd* [1902] AC 381, 393: "A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure."

> 26 The trial judge in the present case in an appendix to his judgment (at paras 228—233) was in my view quite right to recognise the continuing validity of this principle and to reject contrary dicta of Buxton LJ in *Network Rail Infrastructure Ltd (formerly Railtrack plc) v Morris (trading as Soundstar Studio)* [2004] Env LR 41, paras 32 and 35—36, suggesting that it is no longer apt.
>
> 27 The other aspect of this core principle is that, even where the defendant's activity substantially interferes with the ordinary use and enjoyment of the claimant's land, it will not give rise to liability if the activity is itself no more than an ordinary use of the defendant's own land…"

121. As this passage shows, the question of whether something is an ordinary use of land is relevant to both aspects of the question of liability. Thus at [24] and [27ff] what Lord Leggatt says concerns the defendant's activity, and in particular whether this is an ordinary use of his land, this being relevant to the second aspect. But in [25] and [26] the focus is on the claimant's use of his land and in particular whether the use that has been interfered with is an ordinary use or not. To my mind this is the counterpart of the principle applicable to the question whether an interference is substantial enough to be actionable. As we have seen, a claimant who is more than usually sensitive cannot complain of an interference with his enjoyment of land as an actionable nuisance unless the interference would substantially affect the utility or amenity value of the land judged by an objective test, that is according to plain and simple notions of the ordinary or average person. In precisely the same way a claimant whose use of the land is more than usually sensitive cannot complain of an interference with that use as an actionable nuisance unless the interference would substantially affect the utility or amenity value of the land judged by the ordinary use of the land.

122. That is confirmed by the two cases referred to by Lord Leggatt in [25]. The first is a decision of this Court, *Robinson v Kilvert* (1889) 41 Ch D 88. The facts, and the decision, are well summarised by Lord Leggatt and have been given by Whipple LJ above but it is I think worth referring in more detail to the judgments. At 93 the following exchange is recorded between Cotton LJ and counsel for the plaintiff:

> "Cotton LJ: Is injury to a very delicate trade a nuisance if it would not injure an ordinary one?
>
> [Counsel]: Yes, if the delicate trade is a reasonable use of the property: *Cooke v Forbes*."

Cooke v Forbes (1867) LR 5 Eq 166 was a case where the plaintiffs, who carried on business as manufacturers of coconut matting, complained that noxious fumes from the defendant's gas works turned their matting black.

123. But it is clear from the judgments that this submission of counsel was rejected. Cotton LJ said at 94:

> "Now the heat itself is not excessive, it does not rise above 80^{o} at the floor, and in the room itself it is not nearly so great. If a person does what is in itself noxious, or which interferes with the ordinary use and

> enjoyment of a neighbour's property, it is a nuisance. But no case has been cited where the doing something not in itself noxious has been held a nuisance, unless it interferes with the ordinary enjoyment of life, or the ordinary use of property for the purposes of residence or business. It would in my opinion be wrong to say that the doing something not in itself noxious is a nuisance because it does harm to some particular trade in the adjoining property, although it would not prejudicially affect any ordinary trade carried on there, and does not interfere with the ordinary enjoyment of life. Here it is shewn that ordinary paper would not be damaged by what the Defendants are doing, but only a particular kind of paper, and it is not shewn that there is such heat as to incommode the workpeople on the Plaintiff's premises. I am of opinion therefore that the Plaintiff is not entitled to relief on the ground that what the Plaintiffs are doing is a nuisance."

124. Lindley LJ said at 96:

> "As regards the question of nuisance, the lessors heat the air of their cellar so as to raise the temperature of the Plaintiff's room. There is no evidence to shew that the heat is such as to interfere with the comfort of the Plaintiff's workpeople, but there is evidence to shew that it damages one sort of paper sold by the Plaintiff, and so to some extent interferes with his use of the demised property. The Plaintiff contends that this establishes a case of nuisance, and he relies upon *Cooke* v. *Forbes*, in the head-note to which it is laid down that "It is no answer to a complaint by a manufacturer of a nuisance to his trade, to say that the nuisance is felt only by reason of the delicate nature of the manufacture." But that head-note goes too far, further than is warranted by the case. The defendants there were pouring into the air sulpheretted hydrogen, a gas of an offensive and noxious character. Now, if a man pours gas of that description into the atmosphere he does it at his own risk, and it may well be that he is liable for any damage done by it to a neighbour, although such damage would not accrue if the neighbour's manufacture were not of a delicate description. But there is a very broad difference between poisoning the atmosphere with sulphuretted hydrogen and doing something not in itself noxious, and which makes the neighbouring property no worse for any of the ordinary purposes of trade."

125. Lopes LJ said at 97:

> "I think the Plaintiff cannot complain of what is being done as a nuisance. A man who carries on an exceptionally delicate trade cannot complain because it is injured by his neighbour doing something lawful on his property if it is something which would not injure anything but an exceptionally delicate trade. *Cooke* v. *Forbes* has been disposed of by Lord Justice *Lindley*. In the present case the Defendants are not shewn to have done anything which would injure an ordinary trade, and cannot, in my opinion, be held liable on the ground of nuisance."

126. This decision of this Court, cited with approval by Lord Leggatt in *Fearn*, is of course binding on us for what it decides, and is, as explained below, in my judgement

dispositive of this appeal so far as concerns nuisance. It is consistent with the other case cited by Lord Leggatt, that of the Privy Council in *Eastern and South African Telegraph Co Ltd v Cape Town Tramways Co Ltd* [1902] AC 381 (**"the *Cape Town* case"**). Here the plaintiff company transmitted telegraphic messages by under-sea cables between Europe and Cape Town. One of their cables came ashore at a cable hut on the Central Jetty in Cape Town. The defendant companies ran trams in Cape Town which were powered by electricity. The effect was to disturb the signals in the plaintiff's cables such as to make the working of the cable impossible while the trams were running.

127. Lord Robertson, giving the judgment of the Board, said at 392:

> "To describe this as a delicate instrument might be inaccurate, if the term were used in relation to other electrical instruments of extreme sensibility. But in the present discussion this is not the true comparison at all.
>
> The true comparison is with things used in the ordinary enjoyment of property, and this instrument differs from such things in its peculiar liability to be affected by even minute currents of electricity. Now, having regard to the assumptions of the appellants' argument, it seems necessary to point out that the appellants, as licensees to lay their cable in the sea and as owners of the premises in Cape Town where the signals are received, cannot claim higher privileges than other owners of land, and cannot create for themselves, by reason of the peculiarity of their trade apparatus, a higher right to limit the operations of their neighbours than belongs to ordinary owners of land who do not trade with telegraphic cables. If the apparatus of such concerns requires special protection against the operations of their neighbours, that must be found in legislation; the remedy at present invoked is an appeal to a common law principle which applies to much more usual and less special conditions. A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure… Nor need the law be regarded as shewing any want of adaptability to modern circumstances if this be the true view, for the liability thus limited is of insurance and not for negligence, and all the remedies for negligence remain."

128. I do not find in either of these cases, or in what Lord Leggatt says in *Fearn*, any support for the proposition that so long as a trade is being carried on in a suitable location, that means it is to be regarded as an "ordinary" trade for the purposes of the law of nuisance, even if it is a particularly sensitive one. On the contrary, both cases seem to me to be directly contrary to such a proposition. In *Robertson v Kilvert* each of the judgments proceeds on the basis that there was a difference between the "particular trade" carried on by the plaintiff – an "exceptionally delicate trade" in the words of Lopes LJ – and an "ordinary trade". In none of them is there any suggestion that this is affected by the question whether the plaintiff's trade was being carried on in a suitable location. As a matter of fact the ground floor of a warehouse in Manchester would seem an entirely suitable location for the plaintiff's business of storing paper and twine, and it would have been difficult for the defendants to contend otherwise as they had let it to him knowing that he was taking it for that very purpose (see at 89). Not

only was it not suggested that this meant that the plaintiff's trade was to be regarded as an ordinary one; but, as we have seen, counsel's submission that one could recover for injury to a delicate trade so long as it was a reasonable one was rejected.

129. A similar point can be made on the *Cape Town* case. An under-sea cable to Cape Town obviously has to come ashore somewhere in the city, and a cable hut on the Central Jetty would seem an eminently suitable location for it to do so. But there is no suggestion that the question whether the cable was in a suitable place had any bearing at all on the question whether it was an ordinary use of land. On the contrary, the contrast was between the "peculiarity" of the appellants' trade apparatus and the "ordinary owners of land that do not trade with telegraphic cables."

130. In summary, the requirement that the defendant's activities substantially interfere with the *ordinary* use of land is to my mind an important limiting factor in the law of private nuisance, and again reflects the nature of nuisance as a tort to land. The interests which the tort protects are the interests that any owner or occupier of land has in not having the ordinary utility and amenity of their land substantially interfered with; they are not "the bodily security or comfort of the particular individuals occupying it" (*Fearn* at [23]). Equally they are not the interests of the particular business which the claimant uses the land for. If the defendant's activities are such as to substantially interfere with ordinary uses of the claimant's land, then the claimant can recover if their particular business is affected (as in *Cooke v Forbes*, as explained by Lindley LJ in *Roberston v Kilvert*); but if they are not such as to substantially interfere with ordinary uses, then there is no nuisance: *Robertson v Kilvert*, the *Cape Town* case. So just as the question whether the interference is substantial is to be judged by an objective standard based on the ordinary or average person in the claimant's position, not by the particular sensitivities of the actual claimant, so too the question whether the interference is such as to affect the utility or amenity of the land is to be judged by an objective standard referable to ordinary or average uses of the claimant's land, not by the particular sensitivities of the actual use made by the claimant. To put it another way, whether the defendant has committed an actionable nuisance is not determined by what the claimant does with their land, but by the impact on the ordinary or average occupier of the land.

131. This does not mean that a person carrying on a delicate trade can never recover in nuisance. If the interference they complain of is such as would substantially affect the utility of the land for ordinary purposes, then it can qualify as an actionable nuisance and the claimant can (subject to the second aspect of liability) recover for damage even to his sensitive trade. This is directly comparable to the position in *Emms v Polya* where the plaintiff, even though more than usually sensitive, could recover because the noise was a nuisance judged by the standards of the ordinary and average occupier (above, paragraph 116). The principle is exemplified by *Cooke v Forbes*; and see also *The McKinnon Industries Ltd v Walker* [1951] 3 DLR 577, a decision of the Privy Council on appeal from Canada, where the respondent, a commercial florist and grower who specialised in particular in the growing of orchids, successfully established that the appellant company, a manufacturer of iron and steel products, had committed a nuisance by emitting noxious substances that caused his plants to die, and was able to complain of damage to his orchids, despite the fact that the growing of orchids was said to be "from the horticultural point of view a particularly difficult and delicate operation". But unless the defendant's actions cross the threshold of a serious

interference with the utility and amenity of the claimant's land for ordinary uses, the claimant has no claim.

132. For the reasons I have sought to give I do not accept Mr Seitler's submission that a finding by the judge that the claimant's land was a suitable place for the breeding of falcons meant that that became an ordinary use of the land for these purposes. That seems to me to be contrary to the cases, contrary to the explanation given by Lord Leggatt in *Fearn*, and contrary to the core principle of the law of nuisance that it is concerned with activities by the defendant that cross a threshold of sufficiently serious interference with the utility and amenity of the claimant's land, measured by objective standards not by the particular nature of the claimant and the particular use to which they put the land.

133. If this is right, then the remaining question for the purposes of the present appeal is how these principles apply in the present case. First, there was no real dispute that the breeding of falcons is a sensitive operation, at any rate during the breeding season. The entire basis of ROP's case was that during the breeding season excessive noise and perceived visual threats were apt to induce fear and stress in the falcons. The judge's findings are replete with reference to the falcons being peculiarly sensitive during the breeding season, as follows. At paragraph 56, he referred to the falcons as "sensitive animals"; at paragraph 60 he referred to "a particular sensitivity in ROP's operations during the breeding season"; at paragraph 334 to the claimants' land being a suitable location "for the sensitive operation of breeding falcons"; at paragraph 395 to "the sensitivity of ROP's birds during the breeding season"; and at 396 to "their heightened sensitivity during the breeding season" (see Whipple LJ's judgment at paragraphs 22, 31 and 40 above).

134. Whipple LJ has concluded that nevertheless the judge was entitled to conclude that ROP's business was not a sensitive trade, but a common or ordinary one, albeit one with some sensitivity around the breeding season. The difficulty I have with that is two-fold. First, the only reason that the judge gives for concluding that use of the land for breeding falcons was a common or ordinary use is the one that I have already referred to, namely his conclusion at paragraph 334 that the claimants' land was a suitable location for breeding falcons, read with paragraph 396 that ROP's breeding of falcons did not fall foul of the locality principle. By that I understand him to mean that what is a common or ordinary use has to be judged by the locality. That by itself I have no difficulty with; what is a common and ordinary use in a residential area is unsurprisingly different from what is a common or ordinary use in an industrial area, or in an agricultural area: see per Lord Leggatt in *Fearn* at [38]. But, to repeat myself, I simply do not think it follows that because this particular part of Cornwall is a suitable location for breeding falcons, that makes it a common or ordinary use for the purposes of the law of nuisance. The warehouse used in *Robinson v Kilvert* was as I have said no doubt a suitable location to store things, and the Central Jetty in the *Cape Town* case was no doubt a suitable location to bring a cable ashore, but in neither case did this make the use of that location a common and ordinary use for these purposes; in each case the trade or business, however commonplace in other respects, had a particular sensitivity (to heat, to electric current) over and above ordinary trades, which meant that for the purposes of the law of nuisance, it was to be regarded as special. The same seems to me to be true of the particular sensitivity that the breeding of falcons has (to

sudden noise and visual threats during the breeding season), however suitable the location was.

135. This leads into my second reason for not accepting that the judge was entitled to find as he did. It seems to me to misunderstand what the purpose and effect is of the requirement that the defendant's actions must be such as to interfere with the common and ordinary use of the land before they can be held to give rise to an actionable nuisance. The purpose of this seems to me, as I have said, to ensure that the defendant's actions meet a minimum objective threshold which can apply as a standard across the board. I accept that this objective standard will vary with the locality. This is well-established. As long ago as 1862 Pollock CB said in *Bamford v Turnley* (1862) 3 B&S 66, 79 (admittedly in a dissenting judgment, but not on this point) that: "That may be a nuisance in Grosvenor Square which may be none in Smithfield Market". A very similar statement was made by Thesiger LJ giving the judgment of the Court in *Sturges v Bridgman* (1878) 11 Ch D 852 at 865 in a well-known passage as follows:

> "It is said that if this principle is applied in cases like the present, and were carried out to its logical consequences, it would result in the most serious practical inconveniences, for a man might go—say into the midst of the tanneries of Bermondsey, or into any other locality devoted to a particular trade or manufacture of a noisy or unsavoury character, and, by building a private residence upon a vacant piece of land, put a stop to such trade or manufacture altogether. … We do not think that either of these hypothetical cases presents any real difficulty. As regards the first, it may be answered that 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; and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance, Judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong."

This example focuses on the common and ordinary use of the defendant's land rather than the claimant's (see per Lord Leggatt in *Fearn* at [38ff]), but I accept that the same applies to the question of common and ordinary uses of the claimant's land.

136. Nevertheless I do not think the requirement that the defendant's actions interfere with the common and ordinary use of the claimant's land requires an investigation into how common or ordinary (in the sense of frequent or expected) the claimant's actual use is, with the result that if his use can be characterised as common he can complain of any interference with it, even with its more sensitive aspects. The test of interference with common or ordinary uses, like the test of substantial interference according to plain and simple and sober notions, is I think rather an appeal to an objective test, a standard that is not dependent on the actual claimant and his actual use of it.

137. I can illustrate this point by reference to one of the acts found by the judge to have been an actionable nuisance, namely allegation (5), that a digger was positioned next to the aviaries with its bucket raised on 7 April 2022, which constituted a visual threat to

the falcons: see his judgment at paragraph 385, cited by Whipple LJ at paragraph 39 above. The evidence was that this caused a significant interference with the falcons and hence with ROP's business: see the reference in the judgment to Mr Scott Nicholas's evidence that the birds were "going mental" at the sight of this alien object. That is a finding of fact which is not, and could not realistically be, appealed.

138. But I do not think it can be said to be something that would cause any interference at all, let alone a substantial one, with ordinary uses of the land. Leaving a digger with its bucket in the air cannot be supposed to be likely to have any effect on the general range of uses to which agricultural land may be put. There is no reason to think – nor is it suggested that any evidence was adduced – that it would cause any disturbance to most types of livestock, let alone have any effect on the utility of land for ordinary agricultural purposes, or the amenity of the land for those living or working on it. It would be entirely irrelevant to the vast majority of owners and occupiers of land of this type. It is only a business such as ROP's which has a particular sensitivity to visual threats that might be affected. That to my mind shows that the act of leaving a digger with its bucket raised cannot be said to have crossed the threshold of constituting a substantial interference with the *ordinary* use of the claimant's land, but only with the particular (and in this respect very sensitive) use that ROP made of it. I consider that it is precisely analogous to the heat from the basement in *Robertson v Kilvert* which would not have interfered with any ordinary use of the ground floor but only with the particular use of it for storing unusually sensitive brown paper.

139. In my judgement therefore the judge was wrong to find that leaving the digger with its bucket raised was an actionable nuisance.

140. What then of the other matters that the judge found constituted a nuisance? These are allegations (1), (4), (6), (7) and (8). All of these related to excessive noise, either from a scaffolding business (allegation (1)) or from various building operations on specific days (allegations (4) and (6)-(8)): see generally the account of his findings given by Whipple LJ at paragraphs 35 to 38 above. (Allegation (7) – pecking out granite – also comprised causing the aviaries to vibrate). Noise is of course a recognised type of nuisance that can substantially interfere with the utility and amenity value of land for ordinary purposes. So the question is whether the noise that the judge found crossed the requisite threshold.

141. The difficulty however for the claimants is that they never alleged, and never set out to prove, that the noise would have interfered with other uses of the land, or the utility or amenity value of the land generally. The Amended Particulars of Claim include the following. At paragraph 11 it was alleged that in approximately December 2020, Mr Martin Nicholas told Mr Thomas (among other things) that "excessive noise and visual disturbances (being a perceived visual threat) induced fear and stress in the falcons"; at paragraph 12 that it was explained that a barn should not be constructed during the breeding season, "owing to the risk to the falcons caused by the excessive noise and visual disturbances associated with its construction"; and at paragraph 18 that:

> "Accordingly, from at least December 2020 the Defendants were on actual notice of the risk posed to the falcons by excessive noise and visual disturbances during the Breeding Season."

That was followed at paragraph 20 by the particulars of nuisance, each of which alleged that particular matters either "generated excessive noise in the aviaries" or constituted or caused a visual threat to the falcons. Thus for example allegation (4) was pleaded as follows:

> "On 31st March 2022 operating diggers and dumper trucks and loading and off-loading lorries which generated excessive noise in the aviaries."

Similar wording is found in the other allegations. Each of the allegations which the judge found proved was therefore either of a visual threat (allegation (5)) or of excessive noise to the aviaries (allegations (1), (4) and (6) to (8)), combined in one case (allegation (7)) with causing the aviaries to vibrate.

142. Reading that pleading as a whole, it seems to me plain that the allegation of noise nuisance was specifically tied to the noise (and/or vibration) being excessive because it constituted a risk to the falcons in the aviaries. Since that was what was alleged, I think the judge's findings that the allegations of excessive noise were proved have to be understood in the same way. In other words when the judge finds that various instances of excessive noise established, what he means by excessive noise is excessive for the falcons in the breeding season.

143. That to my mind falls short of any finding that the noise was such as to constitute a nuisance judged by the standard of the ordinary or average occupier. I do not find that surprising: the judge naturally considered the allegations that had been pursued before him. But I think it does follow that ROP has neither set out to establish, nor in fact established, that the particular acts which the judge found to have generated excessive noise crossed the threshold so as to be a nuisance in accordance with the correct principles as I understand them to be, and which I have attempted to explain above.

144. I would therefore allow the appeal against the judge's finding that there was a nuisance.

Negligence

145. The judge found the defendants liable in negligence to ROP on the basis of the same allegations that he had found proved for the nuisance claim: see his judgment at paragraphs 397 and 398. This is set out by Whipple LJ at paragraph 41 above, but I repeat it here for convenience:

> "397. I also find that those same tortious acts under the law of nuisance support a finding of negligence. By parallel reasoning from the established facts, the exchanges between Martin (primarily) and Mr Thomas in December 2020 establish the requisite proximity between the parties, the foreseeability of harm and that it was not unduly onerous (but instead fair, just and reasonable) that the building works on UCE's land should not be carried out near the Aviary during the breeding season. Adopting the incremental, analogy-based approach under *Robinson v Chief Constable of West Yorkshire*, a duty of care not to create disturbances that would harm the falcons during their

> breeding season should be recognised. The otherwise tortious acts of nuisance also breached that duty.
>
> 398. A key element of this finding is Mr Thomas's awareness, as explained above, that such activity on UCE's land during the breeding season was likely to harm the falcons on the Western Pens and could reasonably have been avoided by working around that season. I have explained why, on ROP's pleaded case, the focus is upon whether it is fair, just and reasonable that the defendants should be held to [a] duty of care covering the months of March, April and early May 2022 (and therefore before Mr Brady arrived to make representations on behalf of the claimants) rather than a later part of the breeding season. The uncertainty, which has emerged from the evidence, as to whether Mr Thomas (or Mr Brady for that matter) understood the breeding season to extend into June or beyond June, or was as long as the 6 month period suggested by Martin, would raise obvious questions about the foreseeability of harm and the fairness, justice and reasonableness of holding the defendants to a more enduring duty of care. Those questions do not apply to the activity undertaken between the beginning of March and the beginning of May."

By reference to other parts of his judgment (paragraphs 223 and 224) the date when Mr Brady arrived to make representations can be identified as 5 May 2022, so the effect of this is to confine the duty of care to the period from 1 March to 5 May.

146. By Ground 4 of the Grounds of Appeal Mr Weekes contends that the judge was wrong to hold the defendants liable in negligence. His primary argument is that if (as I have concluded) ROP's claims in nuisance should be dismissed, the judge should have held that there could be no claim in negligence: if an act was not tortious for the purposes of the law of nuisance, then the same act could not be tortious for the purposes of the law of negligence.

147. The judge discussed the principles in an earlier part of his judgment at paragraphs 130 to 161. This passage is too long to set out in full, but relevant parts are found in Whipple LJ's judgment at paragraphs 24 and 25 above. In essence he concluded there that the question whether a duty of care should be held to exist depended on a conventional analysis of foreseeability, proximity and whether it was "fair, just and reasonable" in accordance with the Supreme Court's decision in *Robinson v Chief Constable of Yorkshire* [2018] UKSC 4, [2018] AC 736 (***"Robinson"***). He then applied that test at paragraphs 397 and 398, holding that it was, as set out above.

Duty of care

148. The question is whether the judge was right to hold that the defendants owed ROP "a duty of care not to create disturbances that would harm the falcons during their breeding season" (judgment, paragraph 398).

149. The Supreme Court gave guidance in *Robinson* on the correct approach when a Court is required to consider whether a duty of care is owed. The principles are set out

in the judgment of Lord Reed JSC (with whom Baroness Hale PSC and Lord Hodge JSC agreed), at [21]-[30]. Much of the discussion is taken up with the decision of the House of Lords in *Caparo Industries plc v Dickman* [1990] 2 AC 605 (***"Caparo"***) and in particular in rejecting as mistaken the proposition that *Caparo* laid down a test which applies to all claims in negligence, the supposed tripartite test being one which required (i) foreseeability of damage; (ii) a relationship of proximity; and (iii) that the situation was one in which the Court considered it fair, just and reasonable to impose a duty of a given scope upon the one party for the benefit of the other. Instead the correct approach is that summarised by Lord Reed at [29] as follows:

> "29 Properly understood, the *Caparo* case thus achieves a balance between legal certainty and justice. In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable."

150. The starting point therefore is to ask whether the decided cases have recognised a duty of care owed by the occupier of land to his neighbour. The answer I think that emerges is that they have. In *Donoghue v Stevenson* [1932] AC 562, 580 Lord Atkin famously posed the question "Who, then, in law is my neighbour?" and it would seem surprising if an actual neighbour could not qualify as a neighbour for these purposes. Lord Atkin answered his question by reference to the statement of Brett MR in *Heaven v Pender* (1883) 11 QBD 503, 509 that "If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property."; and a similar statement by A L Smith LJ in *Le Lievre v Gould* [1893] 1 QB 491, 504 that "The decision of *Heaven v Pender* was founded upon the principle, that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other." Lord Atkin continues (at 581):

> "I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act."

As this shows (and as the decision in the case illustrates), Lord Atkin was here concerned to establish that proximity was not confined to "mere physical proximity"; but the passage as a whole certainly suggests that physical proximity to another's property could suffice, and hence that an actual physical neighbour could be a neighbour for the purposes of the law of negligence.

151. To this can be added the statement of Lord Robertson in the *Cape Town* case that "all the remedies for negligence remain" (cited above, paragraph 127); the decision of the majority of this Court in *Miller v Jackson* [1977] QB 966 that a cricket club was

liable in negligence (as well as nuisance) where the risk of injury to the property of neighbours from cricket balls was both foreseeable and foreseen; and the statement of Lord Hope in *Hunter v Canary Wharf Ltd* [1997] AC 625, 723G-H that:

> "A duty of care is owed to all those who are so closely and directly affected by my act that I ought reasonably to have them in contemplation. These persons may include the owners or occupiers of property which lies beside the property of which I am the owner or occupier."

152. It seems to me therefore that there is no difficulty in principle with the proposition that the owner or occupier of land may owe a duty to the owner or occupier of neighbouring land to take reasonable care to avoid foreseeable damage to his neighbour's property. Indeed Mr Weekes at one point in his argument accepted as much, saying that a landowner could be liable to his neighbour for carrying out an activity carelessly: see for example *Northumbrian Water v Sir Robert McAlpine Ltd* [2014] EWCA Civ 685 where the claim (which in fact failed) was based on an allegation that a contractor had negligently allowed concrete to escape into the claimant's sewer. He said that his clients would similarly be liable if, when building the barn, they had carelessly allowed a fire to start which had spread to the aviary and burnt it down; or if in felling a tree they had carelessly allowed it to fall onto the aviary causing damage.

153. But once this is accepted, then I do not see any difficulty in principle with the judge's conclusion that the defendants owed a duty to take reasonable care to avoid damaging the falcons by subjecting them to the stress caused by excessive noise and visual threats. There is no doubt that such harm was foreseeable: the whole question of what the defendants knew and when was a contentious issue at trial which the judge considered at some length, but his conclusion was clear. Mr Thomas knew, and had known for over a year before the spring of 2022, that:

> "…both excessive noise and visual disturbances on UCE's land were to be avoided during the period March to May (inclusive) of 2022."

(judgment, paragraphs 359 and 360).

154. Given that it is accepted that occupiers of land can owe a duty to care to avoid foreseeable harm to their neighbours, and that on the facts here it was foreseeable that excessive noise or visual threats might indeed cause such harm to the falcons, it is not immediately apparent why the judge is said to have been wrong to conclude that the defendants did owe a duty to avoid creating disturbances that would harm them. In the event, I think Mr Weekes' argument came down to two points.

155. The first is the need for coherence in the law. Mr Weekes said that the law already provided rules for regulating competing priorities as between uses of neighbouring land, but it did so through the law of nuisance. Imposing a duty of care which drew the line in a different place would distort the principle derived from *Robinson v Kilvert* that an occupier of land cannot increase the liabilities of his neighbour by conducting a sensitive trade on it.

156. I accept that there is a principle that the law should be coherent: see for example, *Charlesworth & Percy on Negligence* (16th ed, 2025) at §2-52:

> "A duty of care should fit coherently into an overall scheme of rights and responsibilities or, in other words, it should be consistent with other legal rules and principles."

157. But this raises quite difficult issues and I do not think the position is as simple and stark as Mr Weekes suggested. To take an example by analogy, consider the case of a bank providing a reference for a customer, or an employer providing a reference for a former employee. An inaccurate reference might be very damaging to the reputation of the customer or former employee. The law provides rules for damage to reputation in the shape of the law of defamation, but the bank or employer would normally have a defence of qualified privilege and hence be immune from liability in defamation unless shown to have acted maliciously. But this has not prevented the law of negligence from being applied, and the person giving the reference from being held to owe a duty of care and to be potentially liable for giving a carelessly inaccurate reference even in the absence of malice: see *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, and *Spring v Guardian Assurance plc* [1995] 2 AC 296, where the argument that imposing a duty of care was inconsistent with the law of defamation was rejected.

158. We received very limited submissions on this aspect of the case (and were not for example referred to the *Hedley Byrne* principle) but it seems to me that the desire for coherence in the law can only be one factor in the question whether a duty of care arises, and not, as Mr Weekes would have it, a determining criterion. I do not myself think there is anything incoherent about the law providing that the occupier of land is not in general liable in nuisance (which is usually a tort of strict liability) for activities unless they substantially interfere with the ordinary or average user of land, but may, because of particular circumstances, come under a duty to take reasonable care to avoid causing specific foreseeable harm to a particular neighbour.

159. Mr Weekes' second point was that imposing a duty of care on the defendants in the present case would prevent them from carrying out perfectly lawful activities on their own land, and that was wrong in principle. He cited by way of example the Scottish case of *Armistead v Bowerman* (1888) 15 R 814 where the purchaser of a quantity of fallen timber in a plantation dragged it across a stream which adversely affected a salmon-hatchery belonging to the pursuer. The Lord Ordinary found that the defendant was negligent. But this was reversed on appeal, the Lord Justice-Clerk saying that he thought the defendant "acted simply as he was entitled to act in the exercise of his ordinary rights" (at 820). But it is also instructive to look at what Lord Young said in his concurring judgment (at 822):

> "I do not dissent from the general proposition, as a general proposition, that anyone executing lawful operations—of course I am only dealing with such— upon his own property is bound to have a reasonable regard to the interests of his neighbour. He is not entitled to perform the operations in a particular way when he has ascertained that that will be hurtful to his neighbour, if there be another way equally available for his purposes which would not be injurious to his neighbour. He is not entitled to do his neighbour harm and then defend himself from liability by saying that his purpose was effected by carrying on his business in a particular way, when that particular way was not necessary for carrying on his business."

160. That to my mind chimes with the principle in the law of nuisance that a defendant is not liable for what would otherwise be a nuisance if the activity he is carrying out is itself no more than the ordinary use of the defendant's own land and is "conveniently done", in the sense that it is done "with proper consideration for the interests of neighbouring occupiers", or "in so far as all reasonable and proper steps are taken to ensure that no undue inconvenience is caused to neighbours": see *Fearn* per Lord Leggatt at [27]-[28], [37].

161. The principle that I take from this is that it would be wrong (and cause a lack of coherence in the law) for a duty of care to be imposed on the occupier of land if the practical effect would be to prevent him from carrying out some ordinary activity on the land at all. But that does not mean he is entitled to immunity for some activity if he is carrying it out in a particular way that is foreseeably harmful to his neighbour where there is another way of carrying it out that would be equally available for his purposes and less injurious to his neighbour. In other words I do not think it is the law that just because the defendants are (on the view I take) not liable for nuisance, it follows that they can act with complete disregard for the interests of their neighbours and cause as much disturbance to the falcons as they like, despite the fact that harm is both foreseeable and avoidable.

162. To take a specific example, I have accepted (above) that leaving a digger with its bucket raised next to the aviary did not constitute a nuisance because it would have no discernible effect on the ordinary user of the defendant's land. And parking a digger on one's own land is a perfectly ordinary thing to do. But the judge found that it did not need to be left next to the aviary: this was not the only place that it could have been towed for the purposes of an engineer's visit; and even if it had been, it should not have been left there with its bucket raised (judgment, paragraph 389). In other words leaving it in that place with the bucket raised was not necessary for the defendants' purposes and was not "conveniently" done, in the sense that all reasonable steps had been taken to ensure that no undue inconvenience was caused to their neighbours. It was in the judge's words "entirely at odds with ensuring that no undue inconvenience was caused to ROP" (judgment, paragraph 387). I think the judge was entitled to make that finding and conclude that so acting was in breach of a duty of care.

163. That leaves the allegations of excessive noise. The judge found that the scaffolding business was not an ordinary use of the defendant's land (judgment, paragraph 364). Mr Weekes sought to challenge that but recognised the difficulty of overturning the judge's factual assessment. I do not think we can disturb the judge's finding to that effect.

164. So far as the building activities are concerned, the judge accepted that they could not be said to be outside the ordinary and common use of agricultural land (judgment, paragraph 382). But he found that they were carried out without proper consideration of ROP's breeding season (ibid). The evidence did not support a case for saying that the work had to be undertaken on those days to meet a defined schedule (judgment, paragraph 383).

165. These factual assessments were open to the judge and are not challenged on this appeal. But on the basis of them I think he was also entitled to find that the defendants were in breach of a duty of care to ROP. To adapt the words of Lord Young in *Armistead v Bowerman*, the defendants were not entitled to perform their operations in

a particular way when they had ascertained that that would be hurtful to ROP, if there were another way equally available for their purposes which would not be injurious to ROP.

166. I would therefore uphold the judge's conclusions on negligence and hence dismiss the appeal.

Lord Justice Moylan:

167. I am grateful to Whipple LJ and Nugee LJ for their respective judgments.

168. On the issue of nuisance, I agree with Nugee LJ for the reasons he gives. In my view, the judge misapplied the locality principle at paragraphs 56 to 61 of his judgment. As Nugee LJ states, at paragraph 128, this principle cannot be used to turn what is in fact a sensitive trade into an "ordinary" use of the land. As Lord Robertson said in *Eastern and South African Telegraph Co Ltd v Cape Town Tramways Co Ltd* [1902] AC 381 ("the *Cape Town* case"), at 392, "A man cannot increase the liabilities of his neighbour by applying his own property to special uses". If it were otherwise, a person could, through the use he makes of his land, impose significant limitations on his neighbour's ability to make ordinary use of his land. This would also be inconsistent with what Cotton LJ said in *Robinson v Kilvert* (1889) 41 Ch D 88, at 94 (as quoted by Nugee LJ at paragraph 123 above), namely that "doing something not in itself noxious" is *not* a nuisance if "it would not prejudicially affect any ordinary trade … and does not interfere with the ordinary enjoyment of life".

169. As described by Lord Leggatt in *Fearn and others v Board of Trustees of the Tate Gallery* [2023] UKSC 4, [2024] AC 1 ("*Fearn*"), at [18]:

> "At a general level, the law of private nuisance is concerned with *maintaining a balance* between the conflicting rights of neighbouring landowners – "between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with": *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 903 (Lord Wright). It is evident that, *if such a balance is to be maintained*, not every interference with a person's use and enjoyment of their land can be actionable as a nuisance." (emphasis added)

170. Significantly, in addition, the observations in the cases referred to above were cited and expressly approved by the Supreme Court in *Fearn*, at [25]. As Lord Leggatt explained, at [24], "Fundamental to the common law of private nuisance is the priority accorded to the general and ordinary use of land over more particular and uncommon uses". He then set out, at [25], by reference to the decisions in *Robinson v Kilvert* and the *Cape Town* case, that "One aspect of this core principle is that an occupier cannot complain if the use interfered with is not an ordinary use" as shown, for example, by Cotton LJ's rejection of "the notion that something can be a nuisance "because it does harm to some *particular* trade in the adjoining property, although it would not prejudicially affect any *ordinary* trade carried on there, and does not interfere with the ordinary enjoyment of life"". (emphasis added)

171. These observations also reflect another element of the law of nuisance, namely that it is based on the "principle of reciprocity". To quote what Lord Leggatt said in *Fearn*, at [35]:

> "This principle of reciprocity explains the priority given by the law of nuisance to the common and ordinary use of land over special and unusual uses. A person who puts his land to a special use cannot justify substantial interference which this causes with the ordinary use of neighbouring land by saying that he is asking no more consideration or forbearance from his neighbour than they (or an average person in their position) can expect from him. *Nor can such a person complain on that basis about substantial interference with his special use of his land caused by the ordinary use of neighbouring land. By contrast, a person who is using her land in a common and ordinary way is not seeking any unequal treatment or asking of her neighbours more than they ask of her*." (emphasis added)

A person cannot "increase the liabilities of" their neighbour as a result of a "special" use because, if he could, he *would* be seeking "unequal treatment".

172. There is no suggestion in any of the authorities that the locality principle can be used to convert what is a special use into an ordinary and common use simply because of the character of the locality. Indeed, the authorities are to the opposite effect. This can be seen, for example, from Lord Leggatt's reliance in *Fearn*, at [27], on *Bamford v Turnley* (1862) 3 B & S 66:

> "The other aspect of this core principle is that, even where the defendant's activity substantially interferes with the ordinary use and enjoyment of the claimant's land, it will not give rise to liability if the activity is itself no more than an ordinary use of the defendant's own land. In the leading case of *Bamford v Turnley* (1862) 3 B & S 66, 83, Bramwell B formulated a test which has since been regularly cited, approved and applied, including at the highest level. He gave what were then contemporary examples of acts such as "burning weeds, emptying cess-pools" and "making noises during repairs" which (unless done maliciously and without cause) would not be treated as nuisances, even when they caused material inconvenience or discomfort to neighbouring owners. He then said at pp 83—84:"
>
> > "There must be, then, some principle on which such cases must be excepted. It seems to me that that principle may be deduced from the character of these cases, and is this, viz, that *those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action.* (Emphasis added.)"

The words emphasised by Lord Leggatt are important because they emphasise the meaning of "common and ordinary use". In my view, there is no basis on which it could be said that the very sensitive business of breeding falcons is "necessary for the common and ordinary use of [the claimants'] land".

173. I also consider that, rather than supporting the judge's decision and approach to the locality principle, there are observations in *Sturges v Bridgman* (1879) 11 Ch D 852 which are to the opposite effect including that coming to a nuisance is no defence. This was noted in *Fearn*, at [43]:

> "A further rule, also illustrated by *Sturges v Bridgman*, is that "coming to a nuisance" is not a defence. In other words, it is not in itself a defence to a claim for nuisance that the defendant was already using his land in the way now complained of before the claimant acquired or began to occupy the neighbouring land. Nor is it a defence that the defendant's activity did not amount to a nuisance until the claimant's land was built on or its use was changed."

This was relevant because Mr Bridgman and his father had been using pestle and mortars for their confectionary business for many years (up to 60) before Dr Sturges built his consulting room. Lord Leggatt explained why this longstanding use of a pestle and mortar did not avail Mr Bridgman:

> "[44] A second theoretical possibility would be to allow a person to acquire a right to continue a use of land through long uninterrupted use during a period when the neighbouring landowner has no right to prevent such use because the neighbour is not at that time using her own land in such a way that the activity is a nuisance. However, such a regime would be equally objectionable. It is wrong in principle that a person should be able to acquire rights over neighbouring land and diminish his neighbour's rights over her own land without the neighbour's consent or acquiescence, simply by his unilateral action in carrying on an activity at a time when the owner or occupier of the neighbouring land has no power to prevent it."

174. Accordingly, rather than *Sturges v Bridgman* supporting the application of the locality principle, in my view it supports the reasoning of Nugee LJ. Based on the reciprocal effect of the law of nuisance, Lord Leggatt's observations can equally be taken to mean that it would be wrong in principle that "a person should be able to acquire rights over neighbouring land and diminish his neighbour's rights over her own land … simply by his unilateral act in carrying on an activity" which is sensitive. As Lord Leggatt noted, at [45],

> "Thesiger LJ pointed out that, if the blacksmith wished to protect himself from the risk of future claims for nuisance, he might do so "by taking a sufficient curtilage to ensure what he does from being at any time an annoyance to his neighbour"."

This could equally be the response to someone who undertakes a sensitive activity or "particular trade" on their land. Rather than place their sensitive business, as in this case, immediately adjacent to their neighbour's land and then seek to diminish their neighbour's rights over their own land, they might, for example, take "a sufficient curtilage" or take any other measures as may be available to protect their business. Any other approach would be contrary to the balance between respective landowners which the law of nuisance is intended to maintain.

175. On the issue of negligence, I respectfully disagree with Nugee LJ and Whipple LJ. In my view, for the reasons set out below, the appeal should be allowed and the claim under negligence dismissed.

Introduction

176. I would phrase the overarching issue, based on the decision that the claim in nuisance fails, as being whether a duty of care in negligence can be imposed on the owner of land the effect of which is inconsistent with the core principles of the law of private nuisance as summarised above. Indeed, one which would fundamentally undermine the "balance between the conflicting rights of neighbouring landowners" which the law of nuisance "is concerned with maintaining", *Fearn* at [18]. In respectful disagreement with Nugee LJ, I do not consider that the issue is whether, as a matter of general principle the owner or occupier of land *can* owe a duty of care to the owner or occupier of neighbouring land. I do not, therefore, consider that the authorities Nugee LJ refers to in paragraphs 150-152 assist as they were not considering the issue which arises in this case. This includes the bald comment in the *Cape Town* case, that "all the remedies for negligence remain", which does not suggest that the claim in that case, while failing in nuisance (*Rylands v Fletcher*) , could have succeeded in negligence.

177. It is whether, as the judge noted, at [130], a duty of care can be imposed which could be summarised as a duty "not to commit a nuisance". More particularly, it is whether, to repeat, a duty of care can be imposed the nature and scope of which would be inconsistent with the law of nuisance and, indeed, would be contrary to a fundamental aspect of that law.

178. It will be clear from the judgments above that the claimants relied on precisely the same acts in support of their claims in nuisance and negligence. There is no distinction or difference. The scope of the specific duty of care as found by the judge, namely "not to create disturbances that would harm the falcons during their breeding season", has the same foundation as the claim in nuisance. In my view, simply expressed, the existence of such a duty is inconsistent with, and would negate, a core aspect of the law of nuisance, recently affirmed by the Supreme Court in *Fearn*, as referred to above, namely that "A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure", Lord Robertson in the *Cape Town* case.

179. The duty of care imposed by the judge in the present case has exactly that effect. The liabilities of the defendants, "not to create disturbances", is based on, and solely on, the particularly sensitive nature of the falcons during the breeding season ("the sensitive operation of breeding falcons", paragraph 334 of the judgment). Accordingly, the duty of care as found by the judge *does* increase the defendants' liabilities as a result of the claimants "applying [their] own property to special uses".

180. I start with a number of other preliminary observations.

181. First, ROP's pleaded case in negligence was that the defendants owed "a duty of care not to cause or permit the falcons to suffer excessive noise or visual threats, in particular during the Breeding Season" and that they had "acted in breach of their duty of care and were negligent". It is clear that the acts relied on as causing "*excessive* noise" or creating "visual *threats*" (emphasis added) were only such because of the particularly sensitive nature of the falcons during the breeding season. This can be seen, for example, from the fact that excessive noise was pleaded as being "70dB within the Aviary" (paragraph 129 of the judgment), which is not a substantial level of noise, and that "visual disturbances" (as the judge described them in paragraph 359) comprised simply "breaking the falcons' line of sight" (paragraph 367 of the judgment). As to the latter, it was said by the first claimant that "the sight of a crane or even a kite on a string that appears above the sightline of their pens would scare the birds and cause them to become stressed". Accordingly, the duty of care as found by the judge arises from, and *only* from, the particular sensitivities of the falcons.

182. Secondly, the judge understandably focused on the particular acts relied on by the claimants. As referred to by Whipple LJ, the actions complained of occurred in the course of three activities: (i) a scaffolding business undertaken by a third party on a temporary basis; (ii) building a barn; and (iii) parking a broken-down digger with its bucket raised. However, the duty of care does not relate to any particular activity but to the effect of that activity. In other words, the judge's decision means that the defendants are under a duty of care not to undertake any activity during the relevant period which might be perceived by the falcons as constituting a visual threat or which might cause sound in excess of 70dB within the aviary. This is a very broad duty of care which would undoubtedly have a significant impact on the ordinary use which the defendants could make of UCE's land, of which Mr Weekes gave a number of examples during the course of his submissions. In this respect, I disagree with Nugee LJ's analysis as to the limited effect on the defendants' use of UCE's land of the judge's decision.

183. To put it another way, it would result in a significant "diminution in the utility and amenity value of" UCE's land which, as identified by Lord Leggatt in *Fearn*, at [11], is the *very* harm from which the tort of private nuisance protects a claimant ("It follows from the nature of the tort of private nuisance that the harm from which the law protects a claimant is diminution in the utility and amenity value of the claimant's land"). Bluntly, therefore, the claimants would achieve through an action for negligence the obverse of what the tort of private nuisance protects. Their sensitive business would be protected while the defendants would be prevented from undertaking activities on their land merely because they would "create disturbances" which would or might affect the falcons.

184. I would further agree with Mr Weekes' submission that the nature and boundaries of this duty are extremely broad and are far from clear. As he observed during the hearing, the effect of the judge's decision is to leave the defendants uncertain as to what activities will or might result in them breaching their duty of care. The judge decided, to repeat, that it was a duty of care "not to create disturbances that would harm the falcons during their breeding season" (paragraph 397). Although it is not clear from the judgment what is meant by disturbances, I would assume that, as referred to above, this was intended to be confined to the pleaded case, namely to sound exceeding 70dB

in the aviary and visual threats. However, even this limitation leaves scope for considerable uncertainty because what might cause this sound threshold to be exceeded *in* the aviary and what might constitute a visual threat are not clear. As Mr Weekes submitted, the asserted duty of care covers any and every activity such that the defendants would risk liability by undertaking all kinds of ordinary activities on UCE's land which created a noise or which the falcons perceived as a visual threat.

185. Mr Weekes made some general submissions about the practical effect of imposing a duty of care of the sort determined by the judge in this case. It would, he submitted, be hard to explain the scope of a landowner's duties. How would it address or include the steps which the sensitive business could itself take to avoid harm to its business? Instead of the same duty being owed to all the neighbouring properties, as in nuisance, there would, he submitted, be an ever-changing kaleidoscope of duties depending on what the landowner knew about the sensitivities of the occupiers and their businesses.

186. He also repeated a submission he had made in respect of the claim in nuisance, namely that this might well require a landowner to obtain specialist expert evidence in order to understand the impact of his activities on the sensitive trade being conducted on the neighbouring property. This could be seen in the present case because, in addition to the breadth of the potential activities which would be prevented, the evidence from the claimants' expert was that falcons "will acclimatise to the regular noise of their surroundings" which could include the noise from a clay pigeon shooting ground. This was reflected in the judgment, at paragraph 333:

> "During the site visit several small and quite noisy propeller-driven passenger planes were also coming into land at Land's End Airport a short distance away; and conversation had to pause briefly to await their passing overhead. These would be heard and seen overhead by the falcons through the netting of the hack pens and other openings in breeding pens giving a view above. However, the factual and expert evidence in this case demonstrates that regular noises and sights, to which the birds become accustomed, do not present a threat to their welfare. "

Accordingly, what had to be avoided were noises "to which the birds have not become accustomed" (paragraphs 254 and 255 of the judgment). How this was to be determined is not addressed in the judgment at all. I understand why Mr Weekes suggested that what was included within the duty would be uncertain even to an expert in falcons.

187. It is necessary, therefore, to analyse how the judge came to the conclusion that the defendants were liable in negligence.

Judgment

188. In reaching this conclusion, the judge relied on *Grandel v Mason* [1953] 1 SCR 459, a decision of the Supreme Court of Canada which concerned heavy duty construction and maintenance works on a public road near a mink farm, and *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4, [2018] AC 736 ("*Robinson*").

189. He considered that the former supported the existence of a claim in negligence, which was broader than a claim in nuisance, in that, at paragraph 150, it "could qualify

the impact of the fourth proposition (in the law in nuisance)" which he had set out in paragraph 53(4), namely that a claimant cannot "increase the potential liability of his neighbour under the law of nuisance" by "using his land for purposes beyond the ordinary and which carry with them particular sensitivity to neighbouring activity". This meant, the judge decided at paragraph 150, that the "law of negligence *may* operate to protect even sensitive uses of land during periods of heightened sensitivity" and that, at paragraph 154, "[a]ny such liability in negligence, including to a claimant whose operations are particularly sensitive to [activity on a neighbour's land], would exist alongside and (resting upon carelessness) *would obviously be wider* than the liability of the neighbour … in nuisance" (emphasis added).

190. The judge relied on what Lord Reed had said in *Robinson*, at [26]-[29], for the proposition, at paragraph 136, that:

> "what is fair, just and reasonable informs the court's judgment as to whether a duty of care should be recognised in a situation where established principles do not provide the answer. It is part of the incremental, analogy-based approach required in a decision as to whether or not a duty of care should apply in a situation where one has not previously been recognised."

Accordingly, at paragraph 157:

> "in novel situations lying outside established categories of liability, the law proceeds incrementally and all three factors identified in *Caparo* [*Caparo Industries Plc v Dickman* [1990] AC 605] remain relevant. *It is the facts of any novel case, particularly so far as an assessment of the parties' relationship for the purpose of deciding whether it is fair, just and reasonable, that will determine whether the law of negligence does extend to cover their consequences.*" (emphasis added)

191. The judge then set the approach he proposed to take:

> "[158] If [the claimants] can establish by reference to proven facts both that [the first defendant] was made aware that the activity on UCE's land during the breeding season was likely to harm the falcons on the Western Pens and that the harm might reasonably have been avoided then it would be open to the court to conclude that it is fair, just and reasonable that the person responsible for that activity (be that [the first defendant], UCE or possibly both) should be held liable in negligence.
>
> [159] However, such a finding of liability would rest upon conventional analysis of foreseeability, proximity and fairness, justice and reasonableness. That finding would be in accordance with the approach in *Robinson v Chief Constable of West Yorkshire* and not simply because the outcome in a Canadian case decided 65 years before the Supreme Court's decision is consistent with it."

192. The judge determined that the first defendant was "made aware that March to the beginning of June was the time to avoid excessive noise and visual disturbances near the Aviary" (paragraph 343).

193. The judge summarised his conclusions in paragraphs 397 and 398 as quoted above (paragraph 145 above). To repeat, the judge decided that:

> "*those same tortious acts* under the law of nuisance support a finding of negligence. By *parallel reasoning* from the established facts, the exchanges between [the first claimant] (primarily) and [the first defendant] in December 2020 establish the requisite proximity between the parties, the foreseeability of harm and that it was not unduly onerous (but instead fair, just and reasonable) that the building works on UCE's land should not be carried out near the Aviary during the breeding season. *Adopting the incremental analogy-based approach* under *Robinson v Chief Constable of West Yorkshire*, a duty of care not to create disturbances that would harm falcons during their breeding season should be recognised. The otherwise tortious acts of nuisance also breached that duty." (emphasis added).

Parties' Submissions

194. The primary focus of the parties' submissions was on the issue of nuisance reflecting, no doubt, their respective perspectives of the significance of that issue for the case as a whole. I propose to deal with their submissions briefly in this part of the judgment and by reference only to some of those submissions.

195. Mr Weekes made some general submissions about the relationship between nuisance and negligence. He submitted that the courts have repeatedly cautioned against recognising a duty of care in relation to matters dealt with by the bespoke law dealing with the exercise and protection of the rights of neighbouring landowners. He referred to a number of authorities starting with *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 a case decided at a time when, he submitted, the courts' view of the law of negligence was at its most expansive. Nevertheless, Lord Reid identified, at 1027 B/C, as a reason not to apply the law of negligence, that "there is a long chapter of the law determining in what circumstances owners of land can and in what circumstances they may not use their proprietary rights so as to injure their neighbours".

196. This passage was considered by Pennycuick V-C in *Smith v Scott* [1973] 1 Ch 314, at 322 F, as "strongly to support the view that the law cannot in this respect [the rights and liabilities of neighbouring landowners] now be reshaped by a reference to the duty of care. I should add that the relationship of landowner, tenant and neighbour is, in its nature, of the most widespread possible occurrence, and the introduction of the duty of care in this connection would have far reaching implications in relation to business as well as to residential premises".

197. These observations, Mr Weekes submitted, resonate with the need for the law to be coherent. As Lord Hoffmann said in *Hunter v Canary Wharf Ltd* [1997] AC 625, at 707 E, "the development of the common law should be rational and coherent. It should not distort its principles and create anomalies merely as an expedient to fill a gap". I

would add, in passing, that I do not consider that there is a "gap" in the present case because it *is* covered by the law of nuisance. To similar effect, Lord Reed said in *Robinson*, at [29], that "where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, *with a view to maintaining the coherence of the law* and the avoidance of inappropriate distinctions" (emphasis added). Further, in *Charlesworth & Percy on Negligence*, 2025, 16th Ed at 2-52:

> "*A duty of care should fit coherently into an overall scheme of rights and responsibilities or, in other words, it should be consistent with other legal rules and principles*. Imposing liability for negligence has the potential to undermine other principles of law imposing conflicting or inconsistent responsibilities on persons said to be under a duty to take care. Liability in negligence should not be imposed without a clear understanding of the implications. By admitting or excluding it in areas already governed by some legal regime the court seeks to strike an appropriate policy balance in the particular social context." (emphasis added)

198. A core part of Mr Weekes' submissions was that to impose a duty of care as in this case, in respect of a sensitive business carried out on a neighbour's land, would not maintain the coherence of the law because it would be inconsistent with and would "completely undermine the bespoke tort of nuisance" as described above. This tort, he submitted, expressly governs the rights and obligations of neighbouring landowners in respect of the use of their land and, thereby, governs potentially competing land uses.

199. Mr Mitchell, who made submissions on negligence on behalf of the claimants, submitted that the law of nuisance and negligence *can* both apply "depending on the facts". As set out by the judge at paragraph 111, "It is the facts of any novel case, particularly so far as an assessment of the parties' relationship for the purpose of deciding whether it is fair, just and reasonable, that will determine whether the law of negligence does extend to cover their consequences". He submitted that it was plainly open to the judge to decide that a duty of care was established in this case, based on his findings, by application of the incremental, analogy-based approach referred to in *Robinson*. He also submitted that the obligations placed on the defendants were not "onerous".

200. In a point, which I deal with further below, Mr Mitchell also relied on the "tendency of the law … more and more to assimilate nuisance and negligence", Lord Parker CJ in *British Road Services v Slater* [1964] 1 WLR 498, at 504.

201. In response to a question during the hearing from Nugee LJ as to how, if the sensitive nature of the falcons meant that the defendants were not liable in nuisance, they could recover in negligence for the same acts, Mr Mitchell replied that this simply reflected the different scope of the two torts.

Determination

202. In my view, as submitted by Ms Lamont, the judge was wrong to rely on *Grandel v Mason*. It is clear that the reasoning in that case does not conform with the principles

applicable in nuisance under English law which have recently been affirmed in *Fearn*. As referred to above, Lord Leggatt expressly approved what had been said in *Robinson v Kilvert* and in the *Cape Town* case such that an "occupier cannot complain if the use interfered with is not an ordinary use". The majority in the Supreme Court in *Grandel v Mason* did not apply those cases or that principle but decided, instead, that the defendants were liable in *nuisance* because, at 466, they "were negligent in creating the noise within the gap and in such proximity to the mink and *therefore cannot avail themselves of the defence based upon the delicate and sensitive nature* of respondent's business of raising mink" (emphasis added). The "gap" referred to a part of the road in which the construction workers had been instructed not to work in order to prevent disturbing the mink but in which, contrary to the instructions, they did carry out works.

203. It can be seen, therefore, that the majority considered that *negligence* formed part of the law of nuisance and, if present, prevented a defendant from relying on the principle applicable under English law as referred to above. There is no suggestion in *Fearn* or in any other case to which we have been referred that this approach is part of the law of nuisance in England and Wales.

204. Further, I agree with Ms Lamont that *Grandel v Mason* is not authority for the proposition, as determined by the judge, that the duty in negligence is *wider* than the duty in nuisance. The court decided that the claimant could succeed in both nuisance and negligence because of the defendant's negligence in the manner in which the work was undertaken. The same negligent acts were the foundation of both claims. This can be seen from the following passages in the judgment of Estey J at 463/464, 466 (repeating the passage quoted above to put it in context) and 467:

> "The grade foremen Neilson and Appenheimer and the operators of the machines were not only acting contrary to instructions given to avoid damage to the mink but were in a place where, as hereinafter described, reasonable men would have foreseen damage would probably result and taken those precautions which, under the circumstances were possible to avoid it. It was their failure to take this reasonable care that created the noise from which the damage resulted.
>
> A defendant who seeks to avoid liability for nuisance on the basis that he has pursued but the ordinary and normal course of conduct incident to that locality must establish that he acted with reasonable care." (463/464);
>
> "It would therefore appear that *the appellants were negligent in creating the noise within the gap and in such proximity to the mink and therefore cannot avail themselves of the defence based upon the delicate and sensitive nature of respondent's business of raising mink*. (emphasis added)
>
> Moreover quite apart from any question of nuisance it would appear that the appellants are liable on the basis of their own negligence. The maxim *sic utere tuo ut alienum non laedas* is applicable to both nuisance and negligence. Brooms Legal Maxims 10th Ed 238, 248, 252." (466); and

> "A reasonable man in the position of the grade foremen and the operators of these large machines would have known of the presence of the respondent's mink, foreseen the possibility of damage and taken reasonable care to avoid it. Their failure to do so constituted a breach of duty owing by them to the respondent" (467).

It can be seen from these passages that, as referred to above, the elements which founded the claim in nuisance and in negligence were the same. This case does not, therefore, support the judge's conclusion, at paragraph 154, that "liability in negligence, including to a claimant whose operations are particularly sensitive to such activity, would exist alongside and (resting on carelessness) would obviously be wider than the liability of the neighbour whose liability in nuisance is dependent upon him having acted maliciously and so as to cause harm". It was the failure to take reasonable care which entitled the claimant to succeed in nuisance and negligence.

205. I also consider that the judge was wrong when he relied on the "incremental, analogy-based approach" referred to in *Robinson* as justifying developing the law by imposing a duty of care on the defendants "not to create disturbances that would harm the falcons during their breeding season". In my view this is "a novel type of case", to quote from *Robinson* at [27], either because it does involve a development of the law of negligence or because it is being applied in novel circumstances.

206. In *Robinson*, the court made a number of observations about the approach which should be taken when considering whether to impose a duty of care although, in fact in that case, at [29], "the court is not required to consider an extension of the law of negligence. All that is required is the application to particular circumstances of established principles governing liability for personal injuries". It is also relevant that the judgment in *Robinson* was not dealing with the situation, as in the present case, where the relationship between the parties in respect of the matters of which the claimants complained is governed by existing legal principles, namely the law of private nuisance, but where the application of those principles does not establish liability. I recognise that this was not how the judge was considering it because he decided that the defendants *were* liable in nuisance and decided, at paragraph 397, that the "same tortious acts under the law of nuisance support a finding of negligence".

207. There are, of course, circumstances in which a duty of care can be owed by the occupier or owner of land to his neighbour. However, as referred to above, I consider that the issue should be phrased as being whether a duty of care in negligence can be imposed on the owner of land the effect of which is inconsistent with the core principles of the law of private nuisance. In my view, as the judge appeared to consider, this is, at least, a novel application of the law of negligence. However, because the judge decided that the claims in nuisance and negligence overlapped, he did not undertake the broader assessment referred to in *Robinson*, and relied on by Mr Weekes, including, in particular at [29], namely:

> "In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, *with a view to maintaining the coherence of the law* and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against

> imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable." (emphasis added)

Because the judge did not undertake this exercise, I consider it necessary for this court to do so.

208. I start by acknowledging, as noted in Mr Seitler and Mr Mitchell's Skeleton Argument, the "tendency of the law … more and more to assimilate nuisance and negligence": *British Road Services Ltd v Slater*, at 504. Indeed, they could also have referred to what Lord Cooke (with whom Lord Steyn, Lord Browne-Wilkinson, Lord Clyde and Lord Hutton agreed) said in *Delaware Mansions Ltd v Westminster City Council* [2001] UKHL 55, [2002] 1 AC 321. After referring to *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty* [1967] 1 AC 617 and *Goldman v Hargrave* [1967] 1 AC 645, he said, at [31]:

> "The label nuisance or negligence is treated as of no real significance. In this field, I think, the concern of the common law lies in working out the fair and just content and incidents of a neighbour's duty rather than affixing a label and inferring the extent of the duty from it."

This is also reflected in the passage Mr Seitler quoted from *Clerk & Lindsell on Torts* (24^{th} Ed), at [19-38]:

> "If the defendant knew or ought to have known that in consequence of his conduct harm to his neighbour was reasonably foreseeable, he is under a duty of care to prevent such consequences as are reasonably foreseeable. In such case the defendant is liable because he is considered negligent in relation to his neighbour, and here nuisance and negligence coincide. Whether his liability is described as falling under one legal rubric or the other would seem to be only a difference of words."

However, what I draw from these references is rather different to that drawn by Mr Seitler. In my view, they emphasise the need for the law of nuisance and negligence to apply coherently rather than in a manner in which they conflict.

209. The effect of the judge's decision is, as it happens, identical to that in *Grandel v Mason*, namely that, where a landowner has been negligent he "cannot avail [himself] of the defence [in nuisance] based upon the delicate and sensitive nature of respondent's business". In my view, as submitted by Mr Weekes this creates a duty of care which is inconsistent with the law of nuisance and would not maintain the coherence of the law. It would impose a duty of care based solely on the sensitive nature of ROP's business. It would not maintain the coherence of the law because it would be inconsistent with and, as Mr Weekes submitted, would "completely undermine the bespoke tort of nuisance". It would, as referred to above, enable the claimants to achieve through an action for negligence the obverse of what the tort of private nuisance protects. It would not maintain but would wholly change the balance between neighbouring landowners which the law of nuisance is concerned with maintaining and would enable the claimants to increase the liabilities of the defendants by applying their property to a special use.

210. If it was necessary to do so, I would also decide that the judge was wrong to find that the scaffolding business was not an ordinary and common use of the land. It was the storage of materials and was no different to the storage of farm machinery or other such items. Further, as referred to above, what was relevant for the purposes of the judge's determination was "the impact of the sound of scaffolding poles being dropped" (paragraph 368).

211. In conclusion, therefore, for the reasons summarised above, I consider that the judge was wrong to find that the defendants owed a duty of care as described above. As referred to in *Robinson*, established principles do provide the answer. There is no basis for imposing a duty of care which is inconsistent with and directly contrary to the law of nuisance. Self-evidently, it would not maintain the coherence of the law. I would, therefore, allow the defendants' appeal on this issue as well.