Private nuisance → The essence is private nuisance is an activity or condition that unduly interferes with use and enjoyment of land

- ✓ Lord Goff in *Hunter*: the term nuisance is properly applied only to such actionable user of land as interfers with the enjoyment by the plaintiff of rights in land (Newark)
- ✓ Nuisance: an action on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant's reasonable enjoyment of his land (*Fen Tigers*)

Limb 1: An unreasonable interference with the ordinary use and enjoyment of land

TYPE A NUISANCE → Non-trivial physical damage

- ✓ Injury or damage to the plaintiff's land
- ✓ Actionable nuisance *prima facie*, once physical damage can be shown (*Halsey v Esso*)
- ✓ Strict liability, actionable in itself and no negligence test
- ✓ Emanation required (*Wu*)

TYPE B NUISANCE → Material interference with comfort and convenience

- ✓ Requires an evaluation of the reasonableness of the activity
- ✓ *St Helens*, *Halsey*: the circumstances of the neighbourhood should be assessed
- ✓ *Fen Tigers*:
- ✓ Character of surrounding area is relevant

Note: ***Antrim*** is a shift away from the ordinary use and enjoyment division between type A and type B. Instead suggests a reasonable person test is required for all types of nuisance ("something a reasonable person in this location should have to endure?")

St Helen's Smelting Co v Tipping → **Type A and Type B of reasonable enjoyment**

Plaintiff bought a manor and land, defendants owned a smelting operation 1.5 miles away. The smelting operation produced noxious fumes that damaged plants/cattle due to the pollution.

TYPE A NUISANCE

- ✓ Material damage
- ✓ Strict liability
- ✓ Cannot be trivial
- ✓ Must be causation
- ✓ Locality irrelevant for type A

TYPE B NUISANCE

- ✓ Personal discomfort
- ✓ Dependant on circumstances

Halsey v Esso Petroleum Co Ltd → **Type B nuisance criterion**

"Case of little man asking for the protection of the law against the activities of a large and powerful neighbour."

Type A

- ✓ Material and tangible harm → Oil deposits (noxious oil smuts)
- ✓ Cannot be trivial: damages given for oil smuts on linen, this was held to be non-trivial material damage
- ✓ Causal link: boiler room of Esso produced oil smuts

Type B → Noise, smells

Standard to be applied is that of the ordinary, reasonable and responsible person living in a particular area

- ✓ Was there reasonable use of the property?
- ✓ Reasonable person: must be "more than fanciful, more than one of mere delicacy or fastidious" i.e. not super-senstivie, objective test
- ✓ Locality of the area to be considered: i.e. if industrial area, to be expected
- ✓ Nature of the nuisance

- Here, smell was "burning, pungent and nauseating" and noise occurred at night-time when people tried to sleep

✓ Intensity of the nuisance
✓ Frequency of the nuisance

Lawrence and another v Fen Tigers Ltd → **Type B locality**
Defendants were owners of a motor sport stadium, that had planning permission. The claimants bought a house situated close to the stadium and the track.

✓ *Sedleigh-Denfield v O'Callaghan*: a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society
✓ *Sturges*: nuisance is "a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances", and "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey"
✓ Lord Goff described reasonableness as requiring a give and take between neighbours

Concept of the "character" of the locality can be too monolithic → can be better to use **"established pattern of uses"**

Defendant's activities in assessing locality
St Helens Smelting: suggests we should take defendant's activities into account ("it is necessary that he should subject himself to the consequences of those operations of trade carried out in his immediate locality")
Neuberger disagrees: the activities that are a nuisance to the claimant should be left out when assessing the character of the locality.

✗ Otherwise leads to circularity: if the activity which causes the alleged nuisance is taken into account, there would be no successful claims for nuisance

Defendant can rely on activities as constituting part of the character of the locality, but only to the extent that these activities do not constitute a nuisance

➢ If activities couldn't be carried out without creating a nuisance, then they would have to be entirely discounted when assessing the character of the neighbourhood

Planning permissions in assessing reasonableness: If an activity is given planning permission after an inquiry, it might not be an unreasonable use of land by the defendant.

➢ *NB:* planning permission is not a full defence, different judges give it different weights.

Social benefit: orthodox position is that public interest is not relevant to reasonableness inquiry

Limb 2: Substantial interference with a right in respect of land

Nuisance can brought for interference with:

- ✓ Easement: legal right to use the land of another but not extending to possession
- ✓ Profit à prendre: right to take things/use land in a particular way (e.g. cutting and removing timber)
- ✓ Natural rights attached to land: including rights of support, obligation of lower properties to accept run off of higher ones, natural right access to a highway as legal incident of their ownership of adjacent land, frontage rights
- ✓ While unlawful interference will not always amount to unreasonable interference, but complete abrogation of access and the unlawfulness of the acts leading to denial of access would indicate that the respondent's conduct was unreasonable (*Wu*)
- ✓ Must be **substantial and unreasonable**, threshold set is complete abrogation
- ✓ Requires **no** emanation

Wu v Body Corporate → **Natural rights of ownership**

Plaintiff owned a unit in a large block of flats, which was managed by a company that went into liquidation. Body Corporate wanted to take over the managerial position, but Wu wanted to lease directly to students. Body Corporate then refused to give Wu new security cards to access the lifts and hallways of the building unless he entered into a new security agreement and paid a bond. Claim for nuisance being the electronic reprogramming of the electronic locks for the entry into the common areas, the lifts, and Mr Wu's unit.

Limb 1: use and enjoyment of land

- ✗ Emanation is usually required
  - *NB:* **Exception** "where the activities on the defendant's land are in themselves offensive to neighbours as to constitute an actionable nuisance." (Rare)
- ✗ Here, hard to see how the reprogramming of the e-cards was emanated from the common property.

Limb 2: Rights over and in connection with a plaintiff's land

Action in private nuisance can also be brought for interference with a

- ✓ Easement
- ✓ Profit à pendre
- ✓ Natural rights attached to land

Natural rights to land examples

- ➢ Owner's right of support for land in its natural state e.g. if neighbouring land owner excavates soil on their land so as to remove the support of the neighbouring land, causing the land to slide or subside
- ➢ Common law right that a property owner has to gain access to or from a public highway as a legal incident of his or her ownership of the adjacent land
- ✓ Implied right to access one's unit under the Unit Titles Act: akin to public highway right (public highway being the means by which a land owner adjacent to that highway accesses their land).
  - Common property is thoroughfare for unit title holders
  - Unreasonable interference with this access right gives unit owner a claim in private nuisance

Emanation

Emanation: the connecting act between the activities done on a defendant's land and the alleged interference with the use and enjoyment of the plaintiff's land.

- ✓ Requires a transposition of the alleged nuisance (noise, dirt, noxious substances, vibrations) from the defendant's property to the plaintiff's property
- ✓ Stems **from *sic utere tuo ut alienum non laedas* (enjoy your own property in such a manner as not to injure that of another person)**

Hunter v Canary Wharf Ltd → **Emanation**

Plaintiffs were residents next to a building erected in Canary Wharf. After the tower was built, the plaintiffs suffered loss of interference with television reception. Plaintiffs then sued for damaged in nuisance. (Second nuisance action regarding dust created when the defendants were building a link road).

Emanation

- ➢ More is required than mere presence of a neighbouring building to give rise to an actionable private nuisance.
- ➢ For an action in private nuisance to lie in respect of interference with the plaintiff's enjoyment of his land, **it will generally arise from something emanating from the defendant's land**

NB: occasionally, activities on the defendant's land are in themselves so offensive to neighbours as to constitute an actionable nuisance

Very high standard → Lord Cooke – nuisance should develop in accordance with human rights

- *Thompson-Schwab v Costaki*: where the sight of prostitutes and their clients entering and leaving neighbouring premises were held to fall into that category
- *Greenwood*: the glass roof of a veranda which deflected the sun's rays so that a dazzling glare was thrown on to a neighbouring buildings (at such an angle that was too bright for the human eye to bear)

Wu v Body Corporate

As we know, limb 1 was not met as the nuisance did not emanate from the land → SC reiterates the **traditional view** that nuisance involves some kind of 'emanation' from the defendant's land to the plaintiff's land.

Where does the emanation need to arise from?

Clearlite Holdings Ltd v Auckland City Corporation: the injury to the plaintiff's land resulted from an act on the plaintiff's own land, the nuisance being a shaft dug by the defendant under the plaintiff's land. **Held that emanation from neighbouring land is not required for nuisance. i.e. it did not matter that the nuisance arose on the plaintiff's own land.**

- ➢ Does not explicitly overrule *Clearlite*
- ➢ *Clearlite* rationalised in lower courts: no exclusive possession of land

Alternative nuisance theory → Obiter

Unreasonable interference with *rights* in respect of land

On these facts → **total** restriction of access was an unreasonable interference with the natural right of access

BEMA Property Investments v Body Corporate (2017) → **Emanation not required for type B**

Facts mirrored those in Wu, and related to same building.

CA said that there should be liability, but considered that the case fell within **type B nuisance** (as opposed to **limb 2 in *Wu***) as **emanation was not a prescribed element of type B nuisance.**

Alternative approach → ***Antrim Truck Centre v Ontario Transportation***

Plaintiff owed a truck centre, and the Ontario Transportation authorities built a new highway that bypassed the truck centre. Could Antrim sue in nuisance for the economic loss caused by new highway?

- ✓ **Limb 2 nuisance only requires partial restriction of access to land rather than total to be unreasonable.**
  - *Antrim* could still access their land, just not as easily to access from the new main highway (comparison to *Wu* where it had become impossible rather than inconvenient)
- ✓ This level of inconvenience was sufficient to be found unreasonable, and thus a nuisance
- ✓ Discards distinction between **type A** and **type B** nuisance: instead **focused on a reasonableness inquiry across all categories**
  - **Type A** inquiry will often be short: physically damaging someone's property will almost always be unreasonable
- ✓ Allowed recovery for dimunation in market value (economic loss)
  - *NB:* ***Shogunn Investments Pty Ltd v Public Transport Authority of WA*** → similar to *Antrim*, but held that nuisance related solely to **possessory interests rather than economic or business interests** = thus no liability nor cause of action

Malice

Malicious intent can make an otherwise reasonable action, unreasonable.
Presence of malice may override argument that:

- ✓ Plaintiff is not engaging in ordinary use
- ✓ Defendant is engaging in a reasonable use of land

Christie v Davey → **Malicious intent**

Plaintiffs were musicians who take music lessons in their house, and occasionally host musical parties. Defendants have a newborn baby, were annoyed at the musical noise and so wrote a letter to plaintiffs to stop them from playing so much music. Plaintiff's sent another and the defendant was so annoyed that they started to make many unusual sounds from their flat to irk plaintiffs.

Defendant must be engaged in a reasonable use of land

Defendant asserted that he had perfect right to make the noises complained of: but these noises are not legitimate.

- ➢ "Excessive and unreasonable": made for purposes deliberately and maliciously to annoy plaintiffs

Plaintiff not engaging in ordinary use

Plaintiffs were reasonably using house: didn't create nuisance as theirs was a perfectly legitimate and proper use

- ➢ Legitimate use of house, nothing malicious

Result: noises are not of a "legitimate kind" when done for the vexation and annoyance of a neighbour and are "bound to interfere".

Hollywood Silver Fox Farms Ltd v Emmett → **Malicious intent**

Plaintiffs bred silver foxes on their land, defendant was worried that potential buyers of his property by a sign that sign "Hollywood Silver Fox Farm". He maliciously caused his son to fire his gun near the mating grounds of the foxes during mating season, meaning that a lower number of foxes were born.

Christie v Davey: considered intent malicious

- ✓ "If what had taken place had occurred between two sets of persons both perfectly innocent, I would have taken an entirely different view of the case. But I am persuaded that what was done by the defendant was done only for the purpose of annoyance"
- ✓ Not a legitimate use if to vex/annoy neighbours

Ibbotson v Peat: defendant set off fireworks to frighten away plaintiff's grouse from corn = **unjustified**
Allen v Flood: if intentional, then malicious wrong

Result: injunction granted to stop the defendant making any loud noises during mating season.

PLAINTIFF – STANDING TO SUE

Hunter v Canary Wharf Ltd

Plaintiffs were residents next to a building erected in Canary Wharf. After the tower was built, the plaintiffs suffered loss of interference with television reception. Plaintiffs then sued for damaged in nuisance. 690 plaintiffs sued (included tenants, owners, spouses, boarders, children etc.)

Lord Goff → Orthodox approach

An action in private nuisance will only lie at the suit of a person who has a right to the land affected.

- ✓ Must have the right to **exclusive possession** of the land
- ✓ *E.g.* freeholder, tenant in possession, licensee with exclusive possession
- ✓ May include a person in actual possession with no right to be there (e.g. oyster merchant in exclusive occupation of oyster beds for many years, successful in suit despite having no title)
- × **Mere licensee of the land has no right to sue**

TORT TO LAND

Essence of nuisance is that it is a **tort to land** rather than personal injury (otherwise could sue under negligence)
Concerned with the categories of people being able to claim → nuisance about protecting the utility value of land

- ➢ CA adopted view that should include anyone with a 'substantial link': but this is not easily identifiable
- ➢ Could also open floodgates to lodgers, au pair, resident nurse etc (employees)
  - Absurd to broaden it this far
- ➢ Transforms tort to land into tort to person

Need to protect the systematic integrity of tort law

- ✓ Don't want to make boundaries so blurry that it becomes effectively a negligence claim without proving the different elements of negligence
- ✓ Nuisance easier to prove than negligence (*actionable per se*)

CERTAINTY

Primary remedy for private nuisance is injunctions:

- ✓ Right-holder can reach agreements with the person creating nuisance (*Malone v Laskey*)
  - Neighbours need to know who to deal with in order to make deals, easier to identify home-owner
- ✓ Efficacy of arrangements depends upon the existence of an identifiable person with whom the creator of nuisance can deal with for this purpose
- ✓ If broadened, sensible arrangements might no longer be practicable
  - Easier to resolve dispute between a few people than 619

OILING WHEELS OF COMMERCE

Not wanting to impede necessary progress

- ➢ Needed at the time at Canary Wharf
- ➢ Widening of the nuisance action would impinge on economic development

Lord Cooke → DISSENT

Should include anyone living there **who has been exercising a continuing right to enjoyment of that amenity**

- ✓ Would not include temporary visitors or anyone 'merely present' in the house
- ✓ Some borderline situations: e.g. lodgers, au pair

Rights of the child: consistency with international law

Children should be entitled to relief for substantial and unlawful interference with the amenities of their home

- ➢ United Nations Convetion on the Rights of the Child: acknowledges children as fully fledged beneficiaries of human rights, and Art 16 – no child shall be subjected to unlawful interference with his/her home
- ➢ Need to develop domestic law in line with ratified agreements (presumption of consistency)
- ➢ To exclude would be "senseless discrimination" (Professor Flemming)

It does not matter that the 'floodgates' may open

- ✓ The purpose of the law is to remedy harms: "If there is a wrong the law should provide a remedy"
- ✓ Cooke's approach more modern and consistent with modern conceptions of who we might find in a household

Development of the law

The law has moved on from the approach that limits land rights into land and the impact it has on people → i.e. nuisance is not just about land, but about people's use and enjoyment of land

- *Type B nuisance: ordinary use and enjoyment*: everyone that lives in the home has the right to enjoyment
- Use and enjoyment of land can be impacted regardless of whether you have possessory rights
- ✓ Partners and children are part of the family home and suffer the nuisance equal to the rights-holder
- ✓ Merely a matter of policy of how to interpret 'occupier'

'Drawing the line': too hard to deal with 619 claimants

Cooke suggests that we should not refrain just because it is difficult to do so: "don't let margins define the middle"

- Law needs to develop with the times and changing social environment
- Common law about flexibility rather than tidiness or ease
- *Wu* suggests that the lack of formalism can be good: should not be too rigid or formalistic
- Also Cooke suggests it wouldn't be as big a deal as is made out → could impliedly authorise one person to act on behalf of others

How would either approach impact remedies for nuisance?

Type A → damages quantified based on how much physical damage is done to land

Type B → damaged quantified based on the infringement of the right to enjoy property

- But with five people with equal claims, how would we adjust remedies to reflect this? (Def pay x 5, or same amount spread 5 ways?)
- Lord Goff's approach is simpler to determine than Cooke's
- May be easier to grant injunctions if we were to adopt Cooke's approach, but unlikely post *Fen Tigers*

Categories

Owner, tenants → meets Goff's test

Friend → neither test, "temporary visitor"

Spouse/child → Cooke but not Goff

Lodgers, peers, family butler → "Borderline categories" (Cooke)

NZ Courts would have to adopt a liberal meaning of 'occupier' to accept a lodger as having the standing to sue

DEFENDANT → THE PERSON THAT CREATED THE NUISANCE

The person that created the nuisance is the principle defendant.

Sedleigh-Denfield v O'Callaghan → **Causing or continuing nuisance**

Defendant owned a property above the plaintiffs. Council put a pipe in but failed to properly install it so that it would get clogged, and flooded the plaintiff's land.

Matheson: don't need an ongoing, continuous problem

Sedleigh: the flooding was a one-off issue, but nevertheless found to be a nuisance due to being a "**state of affairs**"

- State of affairs: issue was underlying (improperly installed grate) exacerbated by the storm

Owners of the land → did not install the grate, or trespass onto the land to install it

Can still be liable for **causing or continuing** the nuisance **if you had knowledge that you could have reasonably abated the nuisance**

- ✓ Defendants had knowledge of the nuisance and ability to stop it = therefore liable for nuisance as they did not

Delaware Mansions Ltd v Lord Mayor and Citizens of the City of Westminster → **Reasonable foreseeability of damage**

Building developed into a block of flats. Tree roots growing in a way that were damaging the plaintiff's property.

Reasonable abatement

- ✓ Knowledge or "notice given" → defendants need knowledge or notice of the issue
- ✓ Need to give the defendant a reasonable amount of time to abate the issue
- ✓ Plaintiffs attempted to abate themselves through a DIY remedy: may impact damages

Reasonable foreseeability of damage

If damage seems unforeseeable → apply *Wagon Mound No 1* test of foreseeability

- i.e. remoteness issue, such as in negligence

Matheson v Northcote → **Allowing state of affairs to exist on land**

School was sued for actions of pupils (but argued that they could not be held liable due to no vicarious liability as students were not employees and there was no agency relationship). Students throwing firecrackers onto the plaintiff's property, and the plaintiff sought an injunction for the annoyance of this.

Nub of the complaint is the failure of the school to control and supervise pupils

- If school had done this properly, the problem would not have arisen = whole swag of pupils who get up to mischief
- Deterrence: trying to encourage school to do something about the state of affairs

Nuisance typically an ongoing wrong or problem → but this is not a way of denying liability

- Nuisance can be intermittent

Test for liability of actions of third party

Whether the trespassing was a natural and probable consequence of leaving students unsupervised

Remedies

Traditional approach

- ✓ Damages for damage caused (and past interference)
- ✓ Injunction: flexibility in *how* the injunction might be framed
  - *Halsey v Esso*: time limits for quietness so that residents would be uninterrupted for sleep
  - *Kennaway*: elaborate injunction
- ✓ Normal remedy for continuing harm that cannot be monetarily compensated is an injunction
  - *Shelfer*
  - Defendant should not be able to 'buy' their way out of liability (*Kennaway*)
- ✓ Lord Cairns Act 1858 gives courts the power to award damages in lieu of an injunction, but only in exceptional circumstances

Lord Cairns Act (*Shelfer* approach) → discourages defendants from buying their way out of nuisance claims
Four elements for damages awarded in lieu of an injunction:

- ✓ If injury to plaintiff's rights is small
- ✓ Capable of being estimated in money
- ✓ Can be adequately compensated in money
- ✓ Oppressive to defendant to grant injunction

Kennaway v Thompson → **Traditional approach**

Woman seeking injunction for the nuisance by Cotswold Motor Boat Racing Club. Judge awarded 1000 pounds for the damage already suffered, and 15,000 pounds for the damage not yet suffered under the Lord Cairns Act 1858, refusing an injunction.

Defendant cannot buy the right to cause substantial/intolerable nuisance

- ➢ Not a justification to say public interest for a section of the public interested in the public

Shelfer: Lord Cairns Act was not altered settled principles of injunction, and in cases of continuing actionable nuisance. Act should only be exercised in exceptional circumstances.

- ➢ Lord Cairns Act **not** to turn the court into a tribunal for legalising wrongful acts
- ➢ Should not allow a wrong to continue simply because the wrongdoer is able to pay for nuisance
- ➢ Also irrelevant if they are a public benefactor (e.g. power or gas company)

BNZ v Greenwood → **Traditional approach**
BNZ sought an injunction to prevent the reflection of sunlight into their south-facing windows from glass roofing panels forming the verandah of the defendant's building across the road. Reflection of sunlight causes considerable discomfort and inconvenience to those within. "On a sunny day the veranda throws off a dazzling glare that is too intense for the naked eye to bear; and that those subjected to it cannot reasonably be expected to tolerate."

Type B nuisance → Test is simply whether a reasonable person, living or working in the particular area, would regard the interference as unacceptable.

Remedies

- ➢ **Paid no heed to the cost: If one creates an actionable nuisance, he must eliminate it, whatever the cost**

Defendants tried to argue that this would impact the use of glass architecture across the country (**public interest**)

- ➢ Despite *Miller v Jackson*, *Kennaway* clarified that the *Shelfer* rule still stands
- ➢ "The circumstances that the wrong-doer is in some sense a public benefactor has not ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights and being persistently infringed."

Injunction preferred form of remedy

- ➢ If an actionable nuisance of a continuing nature is established, the plaintiff is entitled to have the nuisance stopped and not be paid off in damages as this would result in the Court licensing his wrongdoing
- ➢ Here, flexible remedy of the defendant's paying for venetian blinds
- ➢ "Allowing the defendants to choose the means by which they will eliminate the nuisance"

Current approach

- ✓ *Shelfer* approach no longer considered 'good law' as it is outdated and too narrow
- ✓ Need to take into account the wider circumstances of the case: e.g. whether activity of the defendant is in the public interest
    - Similar to Denning LJ in *Miller v Jackson* (did not want to grant injunction due to cricket being in public interest)
    - *Criticism*: the plaintiff in *Miller* got damages in lieu of an injunction. Cricket club said they were happy to pay for broken windows, developing a large fence/net over garden, and the suggestion that players could hit fours instead of sixes → seems absurd

Lawrence and another v Fen Tigers Ltd → **Shelfer approach outdated**

Defendants were owners of a motor sport stadium, that had planning permission. The claimants bought a house situated close to the stadium and the track.

Remedies

Court's power to award damages in lieu of an injunction involves a classic exercise of discretion, which should not be fettered (i.e. *Shelfer* tests)

- ✓ Depends on facts of case

Injunction necessary if:

- ✓ Injury cannot be fairly compensated by money
- ✓ If defendant has acted in high-handed manner
- ✓ If has endeavoured to steal a march upon the plaintiff or evade jurisidiction of the court

"Really a question of whether obstruction is legal, and if the defendant has acted fairly and not in an unneighbourly spirit"

Position of *Shelfer*

"Decision in *Shelfer* is out of date, and it is unfortunate that it has been followed so recently and so slavishly."

- ✗ Much less crowed England
- ✗ Comparatively few people owned property
- ✗ Conversation not a public issue
- ✗ Too narrow

Damages are ordinary an adequate remedy for nuisance, and an injunction should not be granted where it is likely that competing interests are engaged other than parties' interest.

Remedies need to take into account a wider set of circumstances:

- ➢ If a council inquiry has been done and planning permission granted, the court is less likely to grant a full injunction (different judges = different weights)
    - Makes sense for parliamentary supremacy
- ➢ Public interest/social utility may be relevant at remedies stage (*Kennaway*)

	Cause of action	Injunction	Terms	Damages in lieu
Denning **Dissent** ***Miller v Jackson***	✗ Denning considers both social utility and coming to the nuisance at the liability stage: considers it relevant to determining whether there is nuisance **at all** *nb: only Judge ever to do this*	✗ No injunction: if it were only Denning, he would not have even ordered damages. But as no cause of action, he did not need to deal with this.	✗	✗ (No cause of action)
Geoffrey Lane ***Miller v Jackson***	✓ Danger of injury is obvious, bound by *Sturges v Bridgman* (coming to the nuisance is no defence)	✓ *Nb: most orthodox position – coming to nuisance/public interest irrelevant for both liability and remedies*	*Delay operation of injunction to allow cricket club a reasonable time to find other grounds*	
Cumming-Bruce ***Miller v Jackson***	✓ Bound by precedent	✗ Suggests that granting an injunction requires a consideration of wider factors (e.g. weighing up of public interest, other remedies available, whether the plaintiff was obsessive and unreasonably hostile, coming to the nuisance) *Most similar position to modern courts – Kennaway, Fen Tigers*	*If he had to grant one, would allow delay*	"Risk of damage to house can be dealt with in other ways"
Kennaway	✓	✓ Bound by *Shelfer* precedent	*Should consider public interest/social interest in the terms of the injunction. Allowed the injunction, but in a flexible manner that still allowed the watersports in a regulated fashion.*	✗
BNZ	✓	Considers bound by precedent despite *Miller*: but suggestion of some flexibility with remedy (here, was the defendant paying for new venetian blinds rather than altering the building)		
Fen Tigers	✓	✗ *Shelfer/Kennaway* approach outdated		✓

Coming to the nuisance

No defence that a person comes to the nuisance → BUT coming to the nuisance may be a defence:

- ✓ Where the defendant's pre-existing activity is claimed to have become a nuisance, because the plaintiff has changed the use of their land (current position – *Fen Tigers*)

Sturges v Bridgman → **No defence**

Plaintiff was a doctor that built a consulting room that shared a wall without defendant's confectionery kitchen. The noise and vibration from the defendant's kitchen materially interfered without the plaintiff's ability to work in a consulting room. NB: defendant's business had been there 26-60+ years, if the plaintiff had built a separate wall then would not been exposed to noise or vibration.

- ✓ No defence that the Doctor came to the nuisance
- ✓ Unjust that the use of adjacent land should be for all time be diminished by reason of the continuance of interrupting acts which the law gives no power to prevent (Thesiger LJ)
- ✓ Getting there first no defence

Miller v Jackson → **No defence, *Denning's dissent***

Plaintiffs complain about the activities of the cricket club adjacent to their new housing development.

- ✓ Cricket club wins on remedy, as they only have to pay damages (rather than injunction).
- ✓ Still nuisance, despite neighbours **coming to nuisance** (*Sturges*)
- ✓ Getting there first **no defence** (Geoffrey Lane and Cumming-Bruce, majority)
- ✓ Lord Denning's dissent weighs up public policy arguments: public interest of a cricket club vs. sensitives of the plaintiffs
    - *Re Fen Tigers*: the building of a new house suggests a change in the established use of the area – could suggest that Denning was right?
    - *NB*: *Miller* concerned **type A** nuisance (actual damage) whereas *Fen Tigers* concerned **type B** nuisance

Kennaway → **Consistent with Fen Tigers**

- ✓ **Suggests that getting there first can be considered during the remedies stage rather than liability stage**
- ✓ Incumbent was allowed to continue their activities to the point of the plaintiff's comfort.
- ✓ Elaborate injunction – inconsistent with *Sturges* and *Miller* re coming to the nuisance.

Clarified in ***Fen Tigers* as applying new exception**: the original nuisance that the plaintiff "came too" was a reasonable use reasonably carried out (i.e. untouched by defence).

- ➢ **Subsequent increase in noise** (larger boats, closer proximity to plaintiff) and **frequency did constitute nuisance (as pre-existing activity changed)**

NEW EXCEPTION

Lawrence and another v Fen Tigers Ltd → **Can be a defence is plaintiff has changed use of land**

Defendants were owners of a motor sport stadium, that had planning permission. The claimants bought a house situated close to the stadium and the track.

Coming to the nuisance

Not a defence to a claim in nuisance to show that the claimant came to the property after the nuisance started.

Has been law for 180 years.

- *Sturges*, *Miller v Jackson* – Geoffrey Lane LJ/Cumming-Bruce LJ (majority) thought not to alter a rule that had stood for so long
- *NB:* Denning LJ dissent in *Miller v Jackson* considered the proper approach to balance the right of the cricket club (established as such for 70 years) and the right of the householder ("selfish act of an estate developer")

Consistent with nuisance being a **property tort:** the right to allege a nuisance runs with the land.

- Absurd if a defendant was no longer liable for nuisance if his neighbour changed, but nuisance-causing acts remaining the same

BUT:

A claimant who changes the use of property after the defendant started the activity alleged to cause a nuisance does not have the same rights to complain about the nuisance as before changing use of property.

NB: CONSIDER THIS AT THE LIABILITY STAGE RATHER THAN REMEDIES STAGE

- ✗ *Sturges* and *Miller* both concern the defendant's activities predated the plaintiff's contruction work, only as a result of that work and use of new building that activities became nuisance

Where claimant changes use of land: wrong to hold defendant's pre-existing activity as a nuisance provided that

- ✓ Affects the senses of those on the plaintiff's land (**type B**)
- ✓ Not a nuisance before the change of usage
- ✓ Has been a reasonable and lawful use of defendant's land
- ✓ Carried out reasonably
- ✓ Causes no greater nuisance than before the change

"Neither the claimant nor the defendant can be allowed, through their actions, to **ossify the use to which land can be put**. Similarly, neither party should be able to demand a change in their neighbours existing use simply because they have a new scheme that they themselves would like to put in place. **Just as the defendant cannot unilaterally 'force' the claimant to change his use of land, nor can the claimant force the defendant to change his use of the land by becoming unusually sensitive to noise through altering the activities he carries out on his own land**."

- Suggests broader social/economic implications that society needs to grow and progress and expand
- If coming to the nuisance is a defence: land-owners can use it to take advantage of the latent value of surrounding land for all time

Rylands v Fletcher

Concerned with damage caused by a single occurrence due to the escape of a dangerous thing from the defendant's land, where the storage of the dangerous thing is a non-natural (extraordinary and unusual) use of land.

- ✓ Storage of things that would foreseeably cause harm if escaped
- ✓ Liability strict in that it can be held in the absence of negligence

EXTENSION OF NUISANCE → Single occurrence of escaped hazardous thing
Hamilton v Papakura District Council

Without Rylands v Fletcher

- ✓ Damage caused by the escape of an inherently dangerous thing where the escape is due to the negligence of the party storing the thing
  - Burden of risk is imposed on the party storing the thing
- ✓ Damage caused by the escape of inherently dangerous thing where the defendant is not negligent (i.e. nuisance)
  - Burden of risk imposed on neighbours

With Rylands v Fletcher

- ✓ Burden of risk of damage imposed on the party storing the thing where it is foreseeable that damage would occur if it escaped
- ✓ About the distribution of risks, more of the burden of the risk is shifted to the party storing the inherently dangerous thing