Ringing off the hook: when do domestic security devices become unlawful?

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Abstract: Comments on *Fairhurst v Woodard*, an Oxford County Court decision which considered whether the defendant's usage of security devices on and around his property breached harassment or data protection legislation or amounted to the tort of private nuisance.

Home security technology is becoming increasingly sophisticated and affordable. Among other features, smart doorbells and security cameras can now send motion-activated video alerts to a user's phone or smart-watch, as well as providing high-quality video and audio feeds on demand. In *Fairhurst v Woodard*, the Oxford County Court held that the defendant's use of multiple such devices around his property breached data protection and harassment legislation, but did not amount to the common law tort of private nuisance.[1] Although a relatively small case, the decision is a fascinating one, illustrating how English law deals with the serious privacy interferences which can be facilitated through this technology.

Factual background

The claimant Dr Fairhurst and the defendant Mr Woodard are neighbours. The two do not live directly next to each other but own properties in close proximity, both of which back onto a large private car park used by them and other local residents. In the past the claimant and defendant had a perfectly civilised relationship, until the defendant ramped up the use of security devices on and around his property.

In total, the defendant made five installations, mostly with products sold by Ring (a company owned by Amazon). Mounted on his shed and pointing at the carpark he installed: (1) a floodlight and sensor; and (2) a video and audio surveillance camera with an integrated motion sensitive spotlight, known as a Ring spotlight camera. At his front door, the defendant installed a combination video and audio Ring doorbell.

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1 *Fairhurst v Woodard* [2021] 10 WLUK 151.

The fourth device was another Ring spotlight camera which he placed (apparently with permission) on a neighbour's windowsill pointing towards the carpark. And finally, there was a Nest camera installed inside his own front windowsill.

The claimant first expressed concern when the defendant was giving her a tour of building works at the property (at which point only some of the devices had been installed). She reported being "alarmed and appalled" at the surveillance camera mounted on his shed and expressed that this may be a privacy concern for other people [37]. The defendant's position throughout the proceedings was that the cameras were installed for security purposes, and that he was asked by police to step up security following an incident one night when strangers attempted to steal his car. But the defendant's account of that incident was found by HHJ Melissa Clarke to be exaggerated and untruthful [50]. This was the case with much of the defendant's other evidence as well. The defendant said at various times that some of the cameras were merely "dummy" devices and not fully operational, which the judge found to be false (e.g. [64]-[69]). On one occasion, the defendant sent the claimant photographs of her taken using the shed camera. He said the photos were of a suspicious stranger by his car and that he had reported it to the police, but knew full well it was the claimant and had made no such report [70]-[73].

The claimant tried to discuss matters with the defendant, but the situation deteriorated. It got to the stage where the claimant said she felt unsafe in her own home because of the extent of surveillance, and had to leave home to go live elsewhere.

In the County Court, the claimant's case was that the defendant failed to be open and honest about the cameras, that he interfered unjustifiably with her privacy and intimidated her when she challenged him about use of the cameras. She argued that this behaviour: (i) constituted the tort of nuisance; (ii) breached the Data Protection Act 1998 (DPA); and (iii) was a course of conduct contrary to the Protection from Harassment Act 1997 (PHA). She sought damages and an injunction for the removal of the shed cameras and Ring doorbell.

Harassment

HHJ Melissa Clarke dealt first with the PHA claim. Her Honour held that the defendant's lies about the cameras and communications with the claimant, including intimidating her by falsely telling her he had sent her image to the police as an unknown suspicious person, was clearly a course of conduct amounting to harassment

[126](i)-(ii). Moreover, a reasonable person in possession of the same information as the defendant would have considered the escalation in his behaviour from relative civility to threats and belligerence to be behaviour amounting to harassment, as required under section 1 of the Act [126](iii).

The judge looked particularly unfavourably on the defendant's counterargument that his conduct was pursued for the purposes of crime detection and was in the circumstances reasonable. Here, the defendant had submitted that the claimant showed no understanding of how the incident with thieves affected him. HHJ Melissa Clarke strongly rejected this, commenting that it was effectively victim-blaming and that "[t]he Court is unimpressed by arguments that women who are being bulldozed and intimidated by men should show them empathy and understanding for the circumstances which 'made them' do it" [126](iv).

Nuisance

The claimant's nuisance case was pleaded in two ways: first; that subjecting people to visual surveillance by the various cameras amounted to nuisance caused by loss of privacy; and second, that there was a nuisance caused by the light from the Ring spotlight camera pointing towards the carpark. The judge was not persuaded by either of these points, so the nuisance claim was unsuccessful.

On the privacy argument, the judge said that she was bound by *Fearn v Tate Gallery*, where the Court of Appeal held that mere overlooking from one property to another is not capable of giving rise to an action in private nuisance.[2] The claimant submitted that *Fearn* was wrongly decided but ultimately accepted that the Court was bound to follow it [129].

As to the light caused by the spotlight camera, it was accepted that this could in principle constitute a nuisance. On the facts, the judge considered that the light triggering on and off probably did cause some irritation for the claimant. It did not, however, rise to the level of an undue interference with her use and enjoyment of her property, particularly given that she lived in a town rather than the countryside, where "night-time lights are a feature" [130].

[2] *Fearn v Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104; [2020] Ch. 621.

Data Protection

There was no dispute between the parties that the images and audio files were "personal data" under the DPA and UK GDPR (which is the name given to the EU General Data Protection Regulation as it forms part of UK law following Brexit). It was also not contested that the collection and transmission of this personal data *via* the defendant's devices constituted "processing" of the data or that he was the "data controller" at all material times for the purposes of the legislation. Accordingly, the defendant was bound to comply with the core principles relating to processing set out in Article 5 of the GDPR [131]-[132].

Given Her Honour's findings that the defendant had actively misled the claimant about the operation of the camera, HHJ Melissa Clarke was amply satisfied that the defendant had not complied with the first principle requiring fair and transparent processing nor the second principle requiring collection for a specified or explicit purpose [133]. The main issue was whether the defendant could satisfy the court that the processing of personal data was necessary for his legitimate interests when balanced against the interests and fundamental rights of the claimant. The defendant submitted that the balance favoured him with regard to *all* his data collection and processing because it was necessary for the purpose of crime prevention. The claimant said that her right to privacy around her home should take preference over that purpose [134].

Undertaking this balancing exercise, the judge came to a nuanced conclusion. With respect to the processing of video from the Ring doorbell, Her Honour found that the balance favoured the defendant because "any video personal data of the Claimant is likely to be collected only incidentally as she walks past" [134]. But this was not the case for the audio from the same device, nor the audio collected by the camera mounted on the shed or the camera pointing at the driveway. Here, the important point was that the devices could capture audio clearly at long range (probably 40 feet on the best evidence available) which was well beyond their video capturing range. In the judge's view, collecting audio this far was unreasonable, particularly when taking into account the GDPR's third principle of data minimisation. Her Honour said that the legitimate aim of crime prevention could have been served without audio, or a microphone that only captured sound within a small diameter [137].

For one of the devices, the Ring camera mounted on a neighbour's windowsill which pointed down the driveway and was trained on the claimant's property, the judge

found that neither video nor audio surveillance was necessary for the defendant's legitimate interests [135].

The overall result was that the defendant had breached the DPA and UK GDPR, and was therefore entitled to compensation and orders preventing the defendant from continuing to breach her rights. The judge invited further submissions to determine the appropriate remedy for these breaches and for the successful harassment claim [140].

Comment

While *Fairhurst* is not binding on other courts, it is an important illustration of how issues surrounding the usage of domestic security devices are currently dealt with under English law. Three points in particular are worth noting.

The first point is that use of domestic security devices can contribute to a course of conduct which gives rise to a successful harassment claim, but perhaps only where the defendant's conduct is egregious. In this case, the defendant's behaviour was particularly objectionable, involving repeatedly being dishonest about his use of the security cameras, threatening the claimant and distressing her to the point where she no longer felt safe in her home. Given the situation, it is entirely understandable that the judge focussed on these factors when determining the harassment claim. But it is worth considering whether conduct falling short of what the defendant did, such as merely setting up all the devices, would have been enough to cross "the boundary between that which is unattractive and even unreasonable and that which is oppressive and unacceptable" [126(ii)].[3] If, as suggested, the answer to that question is no, then it is indicative of the narrow compass in which the PHA operates in these types of situations.

The second point relates to data protection, which is perhaps the most interesting aspect of the decision. Here, it was not surprising that the judge found the defendant's use of security devices capturing images of people outside his property boundary to be processing personal data. That is consistent with various previous cases including *Rynes v Urad*, where the CJEU held that a householder's use of a surveillance camera at his property which partially monitored a public space involved processing personal

[3] The judge quoted here from *Iqbal v Dean Manson Solicitors* [2011] EWCA Civ 123; [2011] I.R.L.R. 428 at [35] (which was in turn quoting *Majrowski v. Guy's and St Thomas' NHS Trust* [2006] UKHL 34; [2007] 1 A.C. 224 at [30]).

data, and that the exemption for "purely personal or household activity" (now in Article 2(c) of the GDPR) did not apply.[4] There is also guidance from the Information Commissioner's Office (ICO) to the same effect.[5]

The striking finding with regard to data protection was the judge's holding that the audio collected by all three Ring devices was unlawful, taking into account the long range at which these devices pick up sound [137]. If a more authoritative court were to come to the same conclusion, it is difficult to see how the audio functionality on these devices could ever be lawful in a domestic setting if the only justification offered is security. In the days following *Fairhurst*, Amazon released a statement reminding users that there is an "audio toggle" to switch sound recording on and off on their devices.[6] But this of course does not answer the question of whether it is ever acceptable for the audio setting to be switched on when such devices are potentially recording voices at long range. The judgment suggests not.

The third and final point, stepping back from the decision, is to note that it was only the statutory harassment and data protection claims which were successful. The case thus serves as a reminder of the difficulties the English common law has long-confronted when it comes to protecting individual privacy. Although private nuisance is not necessarily the ideal cause of action in privacy cases (it chiefly being concerned with the enjoyment of property rather than directly protecting privacy) one does wonder whether more could have been made of the nuisance claim in this case. The judge was quick to apply *Fearn v Tate Gallery*, and it seems from the judgment that the claimant conceded that case was binding, even if incorrectly decided [129].

Fearn, however, was a case about overlooking from the viewing gallery of one property into residential apartments, largely using the naked eye (given that photography on the viewing gallery had been banned).[7] Indeed, the Court of Appeal's judgment repeatedly uses the phrase "mere overlooking" to describe the conduct at

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4 *Rynes v Urad pro ochranu osobnich udaju* (C-212/13) EU:C:2014:2428; [2015] 1 W.L.R. 2607.

5 Information Commissioner's Office, "Domestic CCTV systems - guidance for people using CCTV", https://ico.org.uk/your-data-matters/domestic-cctv-systems-guidance-for-people-using-cctv/ [Accessed 24 October 2021].

6 Dan Milmo, "Amazon asks Ring owners to respect privacy after court rules usage broke law", *The Guardian*, 14 October 2021, https://www.theguardian.com/uk-news/2021/oct/14/amazon-asks-ring-owners-to-respect-privacy-after-court-rules-usage-broke-law [Accessed 24 October 2021].

7 See *Fearn v Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104; [2020] Ch. 621 at [8].

issue.[8] Given the continual use of multiple and sophisticated recording devices, it was surely at least arguable that *Fearn* could be distinguished. As it happens, *Fearn* is currently pending an appeal to the Supreme Court so we may well receive guidance soon on what "mere overlooking" constitutes, and about the important interaction between privacy and property rights more generally.

[8] E.g. *Fearn v Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104; [2020] Ch. 621 at [74], [90].