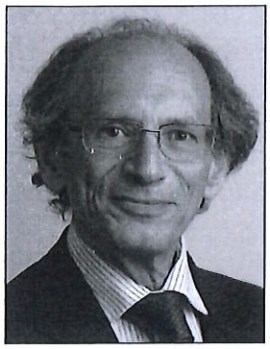
Neighbourhood watch

David Schmitz considers how the principles in Coventry v Lawrence *on nuisance and the character of the area might best be applied*



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'The confusion in this case is also the result of Lord Neuberger's unelaborated suggestion that an iterative process be used.'

Among the many questions tackled by the Supreme Court in *Coventry v Lawrence (No. 1)* [2014] is the question: in a nuisance claim, where the court is considering the character of the area in order to decide whether an activity there amounts to a nuisance or not, what difference does it make if that character has been altered by activities on the defendant's own land, and what further difference, if any, does it make if planning permission was given for those activities?

The actual decision in *Coventry* can be expressed easily enough: what has occurred on the defendant's land, and any planning permission which may have been obtained for it, can affect the character of a locality and therefore the standards which are to be applied in determining whether a nuisance has or has not been committed. However, anything done on the defendant's land, whether carried on with planning permission or not, must be left out of account to the extent that it has amounted to a nuisance.

As Lord Neuberger observes at para 68:

> ... insofar as those activities were being carried on unlawfully, for instance, because they give rise to a nuisance to the claimants making the nuisance claim, they should not be taken into account when assessing the character of the locality, whether they have been going on for a few days or many years.

There is a problem, though, in that Lord Neuberger's judgment contains further dicta which make it difficult to apply these principles when giving practical advice to clients. The aim of this paper is to clear up the resulting confusion and therefore to make it easier to advise on the application of that principle. It is not the aim, however, to question the principle itself.

Confusing dicta

These arise out of attempts by Lord Neuberger to address an apparent problem that is raised by the point of principle stated above, or rather by the qualification that a defendant's activities cannot be taken into account in the assessment of the character of an area, to the extent that those activities constitute a nuisance. The problem is that the qualification on its own appears to lead to circularity:

Q *Is what I'm doing a nuisance?*

A It is, if what you are doing is something that a reasonable person in your neighbourhood cannot be expected to put up with.

Q *My activities have made changes to the neighbourhood. Will that have a bearing on what a reasonable person can be expected to put up with there?*

A It will have a bearing, but only to the extent that what you have been doing does not amount to a nuisance.

In the words of Lord Neuberger himself at para 71 (emphases supplied):

> It must be acknowledged, however, that *there appears to be an element of circularity in the notion that, when assessing the character of the locality, one has to ignore the defendant's activities if, or to the extent that, they constitute a nuisance, given that the point one is ultimately seeking to decide is whether the defendant's activities*

> *amount to a nuisance.* However, it seems to me that there should be no real problem in this connection. In many cases, it is fairly clear whether or not a defendant's activities constitute a nuisance once one has established the facts, and nice questions as to the precise identification of the locality or its character do not have to be addressed...
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> *However, in some cases, there will be an element of circularity. In such cases, the court may have to go through an iterative process when considering what noise levels are acceptable when assessing the character of the locality and assessing what constitutes a nuisance...* None the less, the circularity involved in my conclusion does give cause for concern.

Unfortunately, Lord Neuberger does not give an example of the form which such an 'iterative process' might take and he does not give an indication of the kind of case where such circularity might actually intrude.

Where planning permission has been obtained and implemented, the position is as follows. Before the *Coventry* case, it was thought that (in the words of Lord Neuberger at para 86 summarising the effect of *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1993]):

> ... where [a] planning permission is granted for a use of the defendant's property which inevitably results in, or specifically permits, what would otherwise be a nuisance to the claimant, that use is to be treated as part of the character of the locality.

That view has now been rejected by the Supreme Court (Lord Carnwarth dissenting on this point). The implementation of a planning permission will serve to change the character of a neighbourhood, but once again, only if the change does not amount to a nuisance. (Here, it must be emphasised that we are talking only about the *character* of the area and its status as one of the facts to be taken into account in determining whether there is a nuisance or not. It has never been suggested that a planning permission can ever *in itself* authorise the commission of a nuisance. The effect of a grant of planning permission removes a bar to a use which is imposed by planning law, but it goes no further than that – para 89.)

Where the question of circularity might arise

As Lord Neuberger observes, the problem of circularity, if it exists, will never arise in some circumstances. Thus, there will be times where the nuisance is so great that the character of the area does not matter (see *Rushmer v Polsue & Alfieri Ltd* [1906]; *Halsey v Esso Petroleum* [1961]). In other cases, as in *Coventry* itself, the activities of the defendant will be unreasonable and not in accordance with good industry practice. This will render the defendant's activities a nuisance, even though activities of the type in question would be unobjectionable if carried out reasonably. Then again, the change that the defendant brings about may be gradual and imperceptible, so that the character of the neighbourhood is changed over time without the defendant ever having committed an actionable

Some basic principles of nuisance

The following principles are relevant here:

- Nuisances fall broadly into two categories, those which cause or threaten physical damage to property and those which are not as serious as that, but which nonetheless detract from the comfort or enjoyment of the property in question through noise, other vibrations, smells, smoke or anything which affects the senses.
- Nuisances which cause physical damage to property are actionable, whatever the character of the area (see *St Helen's Smelting Company v Tipping* [1865]).
- Whether matters, which do not cause physical damage but which detract from the enjoyment of the property, will amount to nuisances often depends upon the character of the area (*Sturges v Bridgman* [1879]):

  > What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey.

- As the character of an area changes, so will the standards against which an activity is judged. (See *Attorney-General v Cole & Son* [1901] where an injunction was granted to restrain emissions of noxious gases from fat-smelting works which had operated for 30 years in an area that had previously been open country but which had subsequently been built upon.)
- If changes are introduced gradually, the result may be that these will eventually mean that activities that would once have been unacceptable nuisances can eventually become acceptable (per Lord Mance in *Coventry* at para 164).
- The erection of a building is lawful, so long as the building works are carried out reasonably, provided that the presence of the building does not contravene planning laws and that it does not interfere with an established easement. No nuisance is therefore created by the mere presence of the building (see *Hunter v Canary Wharf Ltd* [1997]).
- Although matters which do not cause physical damage to property, but which cause personal injury or discomfort, may be actionable as nuisances, they are actionable as nuisances only to the extent that they affect the value or the usefulness of property. The injury or discomfort itself is not actionable as nuisance but only in negligence or breach of statutory duty, if at all (see *Hunter*).
- User of land must be reasonable. If the user is not reasonable, the defendant will be liable in nuisance even though he or she may have exercised reasonable care and skill to avoid it (per Lord Goff, *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1993]).
- It is now established that one can acquire an easement by prescription to commit a nuisance, but to do so, it is necessary to prove not only that the activity in question has been carried on for 20 years, but also that it has been such as to amount to an actionable nuisance for 20 years (see *Coventry*).

nuisance. For this, see per Lord Mance at para 164.

However, the question, if there is one, does have to be faced if the activities are not such as to be objectionable wherever they might occur, if they do not reflect poor practice and if they are not introduced gradually. The issue is particularly acute where the defendant has built a development which itself has radically changed the character of the area. If the defendant has built a football stadium, for example, there will be no crowds or noise before it opens, but substantial crowds and noise thereafter.

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Why the circularity is illusory and why iterative processes are unnecessary

The difficulty with Lord Neuberger's apparent approach arises from an impression he gives that the defendant's activities are all to be lumped together for consideration, rather than being treated historically. He frames the question in these terms in para 6:

> The issues raised on this appeal are... the extent, if any, to which it is open to a defendant to a nuisance claim to invoke the actual use of his premises, complained of by the claimant, when assessing the character of the locality.

And in para 62:

> The issue therefore is whether, and if so to what extent, the use to which the defendant actually puts his property can or should be relied on when assessing the character of the locality for the purpose of assessing whether the claimant has made out her case that those activities constitute a nuisance.

The confusion in the case is also the result of Lord Neuberger's unelaborated suggestion that an iterative process be used. If instead, one forgets iteration and simply uses a simple two-stage process when considering a defendant's activities, their effects on the locality, and their lawfulness or otherwise, all questions of circularity and iteration fall away.

In most cases, where a defendant has been undertaking an activity for a while, the activity will form part of the established pattern of uses of the area. As such, it will be unlikely to be objected to, even though no easement has arisen. Instead, what will be objected to is some new or newly intensified use of the land, and the question which will arise is whether that new or newly intensified use is a nuisance, notwithstanding the pattern of uses which had been established beforehand. A two-stage approach provides for separate consideration of the character of the locality before and after the introduction of the change. This, it is submitted, should be sufficient to satisfy the fundamental *Coventry* principle without any suggestion of circularity or the need for iterative processes.

This approach is hinted at in Lord Carnwarth's judgment at para 190. There, after having cited three cases where the court had had to deal with intensification of previous uses (*Watson v Croft Promo-Sport Ltd* [2009], *Kennaway v Thompson* [1980] and *Rushmer*), and where it had been common ground that it was the intensification which was the problem, rather than the previous user, he noted:

> In none of these cases did the court find it necessary to undertake an 'iterative process' as proposed by Lord Neuberger PSC: para 72. The judges proceeded on the basis that a change in the intensity or character of an existing activity may result in a nuisance, no less than the introduction of a new activity. It was a matter for the judge, as an issue of fact and degree, to establish the limits of the acceptable, and if appropriate to make an order by reference to the limits so defined.

The two-staged approach permits the court in every case to reach conclusions that conform to the relevant authorities. So, where the claimant *does* seek to attack not only the new or intensified use, but also a longer-established user, the court will first address the question of whether that older use ever amounted to a nuisance. If it did amount to a nuisance, then it cannot be taken into account in assessing the nature of the locality when the newer use is under consideration unless in the meantime other changes to the locality resulted in its ceasing to be a nuisance. If the older use has never been a nuisance, then it can and indeed must be taken into account.

Turning now to the situation where an area undergoes change, not because of the activities of any one landowner, but because of the activities of various landowners. Here, unless it is possible to identify specific nuisances and object to them, the area as it is now must set the relevant standard to be applied in the case of new activities. Such changes to the area might result in certain activities ceasing to be nuisances, but might make other activities nuisances where they had not previously been such – eg *Attorney-General* (above) and *Lambton v Mellish* [1894] (the case of the two rival fairground organs). Once again, it is necessary first to assess the character of the locality and to strip out any activities from that assessment which amounted to nuisances before any new activities commenced which are objected to. But this is a simple two-stage process, not a complex iterative one.

Sudden changes brought about by a new building

Although the character of an area may change radically if buildings are put up, it must be remembered that putting up a building is perfectly lawful unless it has been erected without planning permission or interferes with an easement. Where a building has been put up lawfully, no action in nuisance can be maintained arising out of its mere presence. In *Hunter* Lord Hoffman stated as follows:

> As a general rule, a man is entitled to build on his own land, though nowadays this right is inevitably subject to our system of planning controls. Moreover, as a general rule, a man's right to build on his land is not restricted by the fact that the presence of the building may of itself interfere with his neighbour's enjoyment of his land. The building may spoil his

> neighbour's view (see *Attorney-General v. Doughty* (1752) 2 Ves.Sen. 453 and *Fishmongers' Co. v. East India Co.* (1752) 1 Dick. 163); in the absence of an easement, it may restrict the flow of air on to his neighbour's land (*Bland v. Mosely* (1587) 9 Co.Rep. 58a, cited in *Aldred's Case* (1610) 9 Co.Rep. 57b, and *Chastey v. Ackland* [1895] 2 Ch. 389); and, again in the absence of an easement, it may take away light from his neighbour's windows (*Dalton v. Angus* (1881) 6 App.Cas. 740)...
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> From this it follows that, in the absence of an easement, more is required than the mere presence of a neighbouring building to give rise to an actionable private nuisance. Indeed, 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. Such an emanation may take many forms – noise, dirt, fumes, a noxious smell, vibrations, and suchlike.

Because the putting up of a building is generally lawful, it follows that the changes to the neighbourhood brought about by the presence of that building are also lawful and that they must be taken into account in assessing the character of the area, and therefore whether a defendant's activities there amount to a nuisance or not.

To revert, therefore, to the stadium example, no claim in nuisance can be brought for the mere use of the stadium as a stadium. Such a use is in keeping with the patterns of use of an area which has a stadium in it, and no objection can be made to the fact that the area now has a stadium. On the other hand, the use of the stadium must be reasonable and it must be carried out in accordance with good industry practice. Any failure to do this will result in a liability in nuisance.

Even where planning permission is given to put up a building, there may be extreme cases where any use of the building for the permitted purpose may cause nuisance to a neighbour and may lead the court to forbid that use. (See *Wheeler v JJ Saunders Ltd* [1994], where permission had been given for a shed to house pigs only 11m away from the claimant's holiday cottage). The fact that an area is one where it is permissible to keep pigs does not mean that it is permissible to keep them in large numbers within a few feet of a dwelling.

Where planning permission is given for an activity, as opposed to the putting up of a building

Generally, permission to carry on an activity will be accompanied by permission to put up a building or structure, which will itself change the character of the locality. Where there is a permission to carry on an activity but no accompanying permission to build, as for example where the owners of a retail shop are allowed to convert it into a restaurant, the permission is largely irrelevant to the question of whether or not an activity is a nuisance. As noted above, the permission only operates to permit an activity insofar as it is lawful, and if it cannot be carried on without giving a rise to a nuisance, it cannot be carried out at all (see para 82). The role of the planning permission being thus limited, it follows that the answer to the question of whether the permitted uses are a nuisance or not should be answered by the same two-stage process as applies to uses which have been brought in without planning permission.

To this there is one exception, namely that if a planning authority has imposed conditions as to when and how the permission is to be implemented, this is recognised as providing a useful starting point in the analysis of what is and what is not acceptable (see paras 96 and 218).

The court was divided on the question of the degree of reliance that can be placed on planning officers' reports to planning committees. Lord Neuberger said at para 98 that he was very dubious about the notion that the reasons given by planning officers were the reasons which the local authority had in mind when granting it. Lord Carnwarth, however, referred to his 40 years' experience as a planning barrister and as a judge in justifying the view that it provides:

> ... a very good indication of the council's consideration of the matter, particularly on such issues as public interest and the effect on the local environment.

On the basis of my having sat on a planning committee and witnessed the attention sometimes paid to officers' reports and presentations by some of the members of the committee, it is submitted that Lord Neuberger's view is to be preferred.

Conclusion

The purpose of the law of nuisance is to provide property owners with a remedy where their land or the things thereon are damaged by the activities of their neighbours or where the value of their property is reduced by activities on the part of their neighbours which are unreasonable by the standards of the locality. Those standards may become more restrictive or more permissive as an area changes, or as prevailing attitudes change, and changes brought about on the defendant's land in the past are relevant to setting those standards, provided that they have not amounted a nuisance. Whether they have amounted to a nuisance or not is a question of historical fact to be looked at as of the time before the defendant began any intensification of the use, which is now complained of. Once this principle is borne in mind, cases of nuisance can be resolved without the need to resort to iterative processes or circular reasoning. ■

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[1901] 1 Ch 205
Cambridge Water Co Ltd v Eastern Counties Leather plc
[1993] UKHL 12
Coventry & ors v Lawrence & anor
[2014] UKSC 13
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[1993] QB 343
Halsey v Esso Petroleum
[1961] 1 WLR 683
Hunter & ors v Canary Wharf Ltd
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[1980] EWCA Civ 1
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[1894] 3 Ch 163
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[1906] 1 ChD 234
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(1879) LR 11 Ch D 852
Watson & ors v Croft Promo-Sport Ltd
[2009] EWCA Civ 15
Wheeler v JJ Saunders Ltd
[1994] EWCA Civ 8